

4(c)

Verne, B. Michael

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From: [REDACTED]  
Sent: Tuesday, March 27, 2007 2:43 PM  
To: Verne, B. Michael  
Subject: 4(c) Question

Mike,

I'm trying to reconcile some of the 4(c) advice given in the Latham presentation, in the context of a deal I'm working on. Buyer (my client) has considered for some time whether and how to enter the market in which Target operates -- whether by acquisition or by internally developing a similar business. Buyer and Target previously discussed a transaction, but negotiations fell apart (somewhat angrily) in Fall 2006, at which time Buyer returned/destroyed all due diligence materials. Discussions of the current successful deal started in January 2007.

Since there was a clear break between the parties after unsuccessful negotiations, I think documents dated before January 2007 (i.e., those analyzing the old deal) are not 4(c) for the current deal (see Example 18 of the 4c presentation). But what about Buyer's more general internal analyses of whether to enter the market by acquisition or development? If there are documents going back a year or more that include analysis of possible targets, one of which is Target, could those be 4(c) material under Examples 17 or 19? I am troubled by the language "would have been used in analyzing this transaction" in Example 19, especially in this context where we would otherwise have a firm cut-off date for our 4(c) search. If documents analyzing a specific potential transaction dated prior to January 2007 are not 4(c), how could documents dated months/years before that be 4(c) when they discuss no specific transaction?

Thanks for your help,

[REDACTED]

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I think if there was a clear break, any pre 2007 documents, whether specifically about this target or generally about multiple possibilities (including this target) fall out of the scope of 4(c), unless they are resurrected post-Jan 2007 for the purpose of analyzing the instant transaction.

BN  
3/27/07