

4(c)

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, September 06, 2007 11:04 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Scope of Item 4(c) In Connection with Transactions Involving Multiple Parties and Multiple Steps

Mike, we have questions about the scope of Item 4(c) in connection with two separate transactions involving three parties. A summary of the facts and our analysis are below.

Facts: A and B are in discussions regarding a potential acquisition of 100% of A's shares by B. While attempting to induce B to increase the value of its offer for the A shares, A tells B that B could probably sell certain A assets to third parties, including C, after the A-B transaction is consummated. B subsequently agrees to acquire 100% of A's shares. In a separate transaction to which A is not a party, B agrees to sell certain A assets to C after the A-B transaction closes. A did not participate in the negotiations regarding the B-C transaction, A is not a party to the B-C transaction, and closing of the A-B transaction is not contingent on closing of the B-C transaction. Given certain corporate complexities associated with separating the A assets to be sold to C and other issues, it is anticipated that the A-B and B-C transactions will not close simultaneously and B will own 100% of A, including the assets to be subsequently sold to C, for 3-4 months and possibly longer.

A has identified two documents that have content that could be considered 4(c):

1. During the negotiations between A and B, A's officers prepare an analysis that is provided to B's officers ("Document 1"). Document 1 was prepared as part of the A-B negotiations and with the hope of inducing B to increase its offer for A, in part, by trying to convince B that third parties, including C, may place a higher value than B on certain A assets. Document 1 has information that could be considered 4(c) content with respect to the A-B and B-C transactions.

2. In anticipation of discussions between A and B, a document is prepared for an officer of A relating to the possible B-C transaction ("Document 2"). Document 2 was circulated internally to officers of A, but was not provided to B or C. Document 2 does not contain any 4(c) content with respect to the A-B transaction, but has content that could be considered 4(c) for the B-C transaction. As noted, Document 2 was not provided to B or C and thus could not have been relied on by either B or C in connection with their transaction.

Analysis and conclusions: A is not a party to the B-C transaction and A does not have an HSR filing requirement for the B-C transaction. For purposes of Item 4(c) for A's HSR filing for the A-B transaction, Document 1 could be a 4(c) document for A's HSR filing for the A-B transaction because it has information that could be considered 4(c) content for that transaction. Document 2, which does not include information related to the A-B transaction, is not a 4(c) for A's HSR filing because the B-C transaction is not "the acquisition" as to A; A-B is the only "acquisition" for which A has a filing requirement and thus it is under no obligation to provide any documents for the B-C transaction, or any transaction other than A-B. While A must provide information to B for Item 5 of B's HSR for the B-C transaction (assuming B and C decide to file HSR before A-B closes), there is no obligation for A to search for and provide potential 4(c) documents to B for the HSR filing for the B-C transaction (see Informal Staff Opinion 0707007, available at <http://www.ftc.gov/bc/hsr/informal/opinions/0707007.htm>).

In our experience, it is up to the parties to determine the scope of the transaction for which they are filing HSR (which, of course, is based on the underlying transactional documents) and all documents and information provided with the HSR filings, including the 4(c) documents, are limited by this determination. While not directly on point, the "step transaction" analyses in Opinions 48 and 57 also support the position that the A-B and B-C transactions are separate transactions for purposes of the HSR filing analysis and scope of A's 4(c) requirements.

Please let us know if you agree with this analysis and our conclusions regarding Documents 1 and 2.

9/6/2007

If you have any questions or need additional information to evaluate this issue, please let us know.

Best regards,

[Redacted]

[Redacted]

AGREE
BM
9/6/07

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