

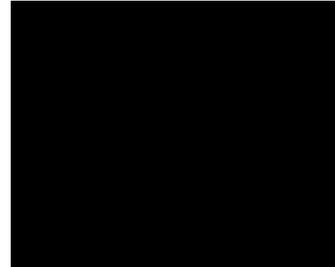
4(c) Review MV, MB
counsel
kw



December 1, 2010

Via Email

Marian Bruno
Michael Verne
Kathryn E. Walsh
Bureau of Competition
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20530



Dear Ms. Bruno, Mr. Verne, and Ms. Walsh:

We are writing for clarification regarding treatment of certain documents prepared for counsel's antitrust analysis of a proposed transaction.

I. Factual Scenario

The situation arises in the following hypothetical scenario. Acquiring entity has reached an agreement in principle to purchase a business. The transaction is reportable, and may present some competitive issues warranting discussion with the Commission Staff in connection with the anticipated HSR filing. The acquiring entity retains antitrust counsel to begin the process of (i) preparing a presentation to the Commission Staff and (ii) collecting information that counsel anticipates may be the subject of a voluntary request for additional information. In doing so, counsel requests that client provide pre-existing documents and other information (including written narratives) to counsel for the sole purpose of assisting counsel in preparing to engage with the Commission Staff. This information discusses competitors and post-acquisition market shares.

Because the transaction has not been made public yet, and few individuals within the company know about it, certain executives (including officers) compile the requested information and forward it to counsel. This information is not used by any officer or director for any business purpose.

II. Analysis

It is our understanding that these documents do not fall within Item 4(c), because they were not prepared by or for an officer or director (acting in that capacity) for any business purpose, but instead were prepared for the purpose of participating in anticipated regulatory proceedings. As such, neither the pre-existing documents nor the written narratives need to be disclosed or logged.

It is our view that such documents do not fall within Formal Interpretation No. 8. Formal Interpretation No. 8 concerned opinions of counsel provided to a company's officers or directors for the express business purpose of deciding whether to enter into the proposed transaction. This



is consistent with the Statement of Basis and Purposes relating to the initial adoption of Item 4(c), noting that documents are “highly relevant” because they “form the basis of a parties decision to proceed with the acquisition;” and that documents prepared “for other purposes” are “excluded” from the scope of Item 4(c). *See* Federal Register, Vol. 43, No. 147 at 33526, 1978.

This distinction is also reflected in Informal Interpretation No. 0509004. At issue in that opinion were certain documents reflecting antitrust legal analysis prepared by the buyer’s counsel and, with one exception, provided to the Seller’s officers or directors. The “purpose of each of these documents was to convince the Seller that the transaction was reasonably capable of consummation,” and therefore, to convince the Seller to proceed with the transaction. Thus, the documents were prepared by and for officers and directors of both companies for the *business purpose* of deciding whether to engage in the transaction.

This is distinct from the situation here, where the documents were prepared at the request of counsel for the purpose of assisting counsel in interacting with the FTC Staff on this matter. The distinction between documents prepared for purposes of analyzing a transaction for business purposes and those prepared for purposes of complying with a regulatory proceeding is well-recognized by the Commission’s Pre-merger Notification Office. For example, in Informal Interpretation No. 0404006, the Staff agreed that documents prepared in connection with a certificate of need proceeding that contained market data (of the subject matter identified in Item 4(c)) did not qualify as a 4(c) document, apparently because it was not prepared for a business purpose. Similarly, in Informal Interpretation No. 0706019, the Staff concluded that “documents that discuss only the likelihood and timing of HSR approval” do not qualify as 4(c) documents, even if they were “found in the files of officers and/or directors.”

We believe that any other interpretation would read the “for the purpose” language out of the statute, making any documents relating to the identified subject matter responsive, regardless of its *purpose*. Such an approach would be contrary to a number of informal interpretations. Informal Interpretation No. 0509001, for example, makes it clear that if a document prepared by the seller was given to the buyer’s officers and directors “after the transaction document has been executed and thus was not used to analyze or evaluate the transaction (*i.e.*, the decision to go ahead with the transaction was clearly not based at all on such documents),” the document is not a 4(c) document for the acquiring person.

Other informal staff opinions appear make it clear that a document only becomes a 4(c) document if the *reason* it was prepared was to further not just some business function, but a business function typically carried out by an officer or director. In that regard, Informal Interpretation No. 0804009 and Informal Interpretation No. 0503019 make it clear that when an officer or director is merely facilitating the flow of information, such as where he acts in his or her capacity as a member of the due diligence team or where he or she co-chairs an integration planning team, such documents are not being prepared for the purpose of an officer or director’s evaluation of the enumerated topics.

As noted, here, the documents requested by counsel are not being prepared by or for an officer or director for purposes of analyzing whether to go ahead with the transaction or for any business purposes. Rather, the documents were seen by officer or directors only in their capacity as members of the team seeking to assist with the regulatory approval process, and not to fulfill any quintessential officer or director function.

* * *

Accordingly, in our view, the documents at issue do not appear to be Item 4(c) documents within the meaning of the applicable rules, SBP, or informal interpretations. Please let us know if you concur with this conclusion.

Sincerely,

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