

Haynes, Lanea

From: Shaffer, Kristin
Sent: Thursday, July 27, 2017 11:20 AM
To: [REDACTED] Walsh, Kathryn E.; Gillis, Diana L.; Storm, Evan; Carson, Timothy; Berg, Karen E.; Whitehead, Nora
Subject: RE: Questions about Item 4(c) and 4(d)

[REDACTED]

We consider these to be responsive.

Best regards,
Kristin

Kristin Shaffer

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From: [REDACTED]
Sent: Wednesday, July 26, 2017 10:26 AM
To: Walsh, Kathryn E.; Gillis, Diana L.; Storm, Evan; Shaffer, Kristin; Carson, Timothy; Berg, Karen E.; Whitehead, Nora
Subject: Questions about Item 4(c) and 4(d)

Hi all,

I have some questions about whether certain documents are responsive to Item 4(c) or Item 4(d).

There are two potentially responsive documents I would like to ask about. First, a brief background. Seller (acquired person) holds Target (acquired entity). Seller was contemplating the sale of Target through a bidding process, and to that end commissioned banker to create a CIM and a shorter “teaser” document. The banker delivered drafts to Seller and officers and directors of Seller received and reviewed the drafts. This all happened within the last year, and will have happened within the year preceding filing HSR. After receiving the draft documents, Buyer (acquiring person) approached Seller and made an offer for Target, and an Agreement was ultimately executed, eliminating the need for the bidding process. It is that deal for which we are filing HSR. Seller never provided the CIM or Teaser to Buyer and they were not used for purposes of analyzing or evaluating this transaction. These two documents remained in draft form. I conclude the following, but would like to confirm that you agree:

1. Neither document is responsive to Item 4(c) because they were not used to analyze or evaluate this transaction. Do you agree?
2. The teaser is not responsive to 4(d)(ii) because it does not related to this transaction. This is true even though the 4(d)(ii) instructions state the criteria as documents that “relate to the sale of the acquired entity” because informal guidance and opinions that state that the scope of 4(c) and 4(d) are meant to be the same. See tip sheet (“[4d documents] must relate to ‘the acquisition’ as in Item 4(c), because the phrase ‘specifically related[d] to the sale . . . conveys the same concept”) and:

<https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1205011>

Do you agree?

3. For the draft CIM that was not provided to Buyer, it also is not responsive because it does not relate to this transaction and was set aside in draft form after the need for a bidding process was eliminated. Do you agree? Note, example 1 in Opinion 177 of the PNO Manual could be read to indicate it should be provided in response to 4(d)(i) even if not responsive to 4(c) and not provided to Buyer. However, even there the example refers to a CIM prepared “for the deal” and here the CIM was not prepared for this deal (i.e., this transaction as opposed to a transactions involving a bidding process).

Many thanks,

[Redacted]

[Redacted]

[Redacted]