

Item 4(c) Tip Sheet (Nov. 28, 2016)

Item 4(c) Studies, Surveys, Analyses and Reports

Item 4(c) requires parties to include “all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” These documents help the FTC and the Antitrust Division of the DOJ understand the competitive impact of a transaction.

Responding to Item 4(c) can be confusing for filers because the item’s broad language is subject to a range of interpretations. Documents that are not in fact responsive to Item 4(c) are commonly included by filing parties, and occasionally responsive documents are overlooked. This guidance should help parties determine which documents should be submitted.

The documents discussed below should not be considered an exhaustive list of materials potentially responsive to Item 4(c).

Documents capturing internal and shared analyses

When evaluating a potential acquisition, a buyer frequently will create internal documents that discuss the pros and cons of making the acquisition. Typical examples of these kinds of documents are Investment Committee Memoranda and Board Presentations. These documents often discuss the rationale for the transaction, such as how well the target will fit into the buyer’s current business operations. This type of analysis is considered responsive to Item 4(c) and these documents must be produced, assuming the other criteria are met.

Item 4(c) also contemplates receiving presentations made by the parties to the transaction, such as management presentations. These kinds of presentation documents may be responsive if the 4(c) criteria are met.

Ordinary course documents

Two questions frequently arise about ordinary course documents. The first is whether a party’s ordinary course document can become a 4(c) document for that party. The second is whether one party’s ordinary course document can become a 4(c) document for the other party.

The general rule is that a document drafted in the ordinary course remains an ordinary course document regardless of what purpose it may be used for subsequently. For instance, if a company creates an overview of competitors as a part of that company’s quarterly review of the status of its business, that document does not become a 4(c) document even if it is later

consulted by an officer at the company in determining whether to move forward on a potential acquisition opportunity. If, on the other hand, a company creates a list of competitors because it is looking to evaluate potential acquisition targets, that document, assuming the other criteria are met, would be responsive to Item 4(c).

Thus, a company's ordinary course documents, including strategic plans or corporate overviews, are not responsive to Item 4(c) even if they contain an evaluation or analysis of "market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets," that is "4(c) content." The determination depends on the context in which the document was originally drafted and does not change thereafter.

There are three exceptions to this general rule:

The first is when an ordinary course document becomes part of a 4(c) document. For instance, if the company's quarterly review of competitors is circulated to officers of the company along with a cover memo discussing those competitors and market share in the context of a pending transaction, that quarterly review is then part of a responsive 4(c) document. Or, if that quarterly review is put into an officer's "deal notebook" along with other materials responsive to Item 4(c), the entire deal notebook is responsive to Item 4(c).

The second exception to the ordinary course rule relates to Board minutes. Even though Board minutes are arguably created in the ordinary course, they record the decision-making process of the Board and must be supplied in response to Item 4(c), assuming the other criteria are met.

The third exception arises when an ordinary course document created by one party becomes a 4(c) document for another party. In considering whether to pursue a given transaction, a buyer often consults a wide range of material about the seller. One of the most common ways to facilitate this is through a real or virtual Data Room. In this instance, the seller will place materials in the Data Room for the buyer to review and analyze. These materials are often documents created by or for the seller in the ordinary course of its business and as a result are not considered responsive to Item 4(c) on the part of the seller. But, if an officer of the buyer consults these ordinary course materials, they can become 4(c) documents for the buyer if they contain 4(c) content. For example, the seller prepares a market overview in the ordinary course or has a third party prepare such a market overview in the ordinary course and the seller then places this market overview in the Data Room. If an officer at the buyer removes this document from the Data Room, in the case of an actual Data Room, or prints or downloads the document in the case of a virtual Data Room, it is responsive to 4(c) for the buyer. This market overview would also be responsive for the buyer if sent by the seller to the buyer, assuming it is in the files of an officer or director of the buyer. Thus, a document can be responsive to Item 4(c) even if it was created in the ordinary course by or for one of the parties to the transaction.

Email

The following guidance applies to the submission of email:

- If an email contains 4(c) content, assuming the other criteria are met, it is responsive to Item 4(c) along with any attachments to that email regardless of whether the attachments contain 4(c) content.
- If an email contains no 4(c) content, but one of its attachments does, that attachment should be included as a separate 4(c) submission, assuming that it meets the other criteria.
- If an email contains 4(c) content and meets the other criteria, emails replying to the responsive email or the forwarding of the responsive email need not be included unless the reply emails or forwarding emails themselves contain additional 4(c) content and meet the other criteria.
- If an email contains no 4c content, but a reply to or a forwarding of the email does contain 4(c) content, that email chain should be included as one 4(c) document, assuming it meets the other criteria.

For example, assume you have an email containing 4(c) content and a reply that contains 4(c) content. The PNO would consider this responsive email chain to be one document. The reply email would begin the email chain looking down to the original email sent, which does not need to be separately submitted as a 4(c) document. The description of the email chain in a 4(c) log would list the range of dates beginning with the date of the reply email and end with the original email down the chain. The names and titles of all authors and recipients should also be listed in the 4(c) log. If the reply contained 4(c) content but the original down the chain did not, you would include the entire chain as a 4(c) document and describe it in the 4(c) log as discussed above. If the original email contained 4(c) content, but no replies to or forwarding of the original email contained 4(c) content, then only the original email would be responsive to Item 4(c).

Documents that need not be submitted

Because the requirements of this Item are so broad, documents that are not responsive to Item 4(c) are often included by filing parties. Determining whether a document is responsive to Item 4(c) often comes down to a question of content. The first step in reviewing any potential 4(c) document should be determining whether the document contains actual analysis or evaluation of 4(c) content. That is, in order to be responsive to Item 4(c), documents must contain more than just terms such as “competitor” or “market.” For example, a list of requested due diligence items which asks for a list of the seller’s competitors or a snapshot of the seller’s position in the market is not responsive to Item 4(c). If, however, this due diligence request included analysis or discussion of those specific requests, the document would likely be responsive to Item 4(c).

The following documents are not responsive to Item 4(c):

Documents associated with the public announcement of the transaction

When a transaction involves a public company, there is often a package of materials associated with the announcement of the transaction, such as a press release, an investor presentation, a transcript of the investor conference call, a conference call script, and other scripts relating to the announcement to customers, suppliers, competitors, etc. These publicly-available materials are not created in order to evaluate or analyze the transaction, but are instead created much later, when the transaction is set to move forward after public announcement.

Draft documents

It has been the PNO's informal position for many years that if there is no final version of a document responsive to Item 4(c), the latest draft should be submitted. If there is a final version, no drafts need to be additionally supplied unless the draft went to the Board. When a copy of a draft document is sent to the Board, it ceases to be a draft and must be submitted if it meets the other Item 4(c) criteria, even if a final version is also being submitted.