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FROM THE CO-CHAIRS

To All Committee Members:

Welcome to the Summer 2021 edition of The Threshold! We have a transitional, mini-issue with a timely article on the intricacies of HSR Form Item 4.

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Our featured article comes from Mary K. Marks, Greg S. Morrison, and Elena Joffroy of Davis Polk & Wardwell LLP. It provides insights and updates accumulated since Marian R. Bruno, Brian C. Mohr, and Bruce J. Prager's *Locating and Identifying Item 4(c) Documents*—a well-known resource on HSR Item 4—was published in 2002. The article authors outline some of the changes to Item 4 since 2002, including the introduction of Item 4(d), agency guidance on documents discussing only non-U.S. markets, and treatment of public-facing documents such as letters to employees or customers. In addition, Marks, Morrison, and Joffroy provide valuable guidance on ordinary-course documents and redaction of non-privileged but non-responsive portions of otherwise responsive documents. The addendum to the article explores some common scenarios in which clients especially need the sound advice of HSR practitioners. Both new and seasoned antitrust counsel will find the article to be a helpful reference for their next HSR filing.

Our next newsletter will be published in the fall. As always, we welcome our members to send letters to the editors or new articles. Thank you for your continued support of the M&A Committee.

Enjoy the newsletter!

Meghan and Carla

Meghan Rissmiller
Carla A.R. Hine
Committee Co-Chairs

Identifying Item 4(c) and 4(d) Documents: Updates to a Classic

By Mary K. Marks, Gregory S. Morrison, and Elena Joffroy[1]

I. Introduction

Identifying and submitting documents responsive to Items 4(c) and 4(d) of the Hart-Scott-Rodino Antitrust Improvements Act's ("HSR Act") Notification and Report Form ("HSR Form") remains one of the most important—and often the most complex—tasks facing HSR counsel and their clients. These documents often give the Federal Trade Commission and Department of Justice ("DOJ") valuable insight into transaction rationale, market structure, and the competitive pressures faced by the parties. One of the classic practice resources on the topic, *Locating and Identifying Item 4(c) Documents*,[2] is now nearly twenty years old and is in understandable need of certain modernization. Since its publication, the FTC's Premerger Notification Office ("PNO") has reviewed and provided guidance on numerous fact patterns in informal interpretations, many of which are published on the FTC's website, and the PNO has published further guidance in Tip Sheets. Here we set out to capture the major developments over the past two decades by way of an update to and elaboration on the earlier work of Bruno, Mohr, and Prager.[3]

Hypothetical examples highlighting issues in identifying documents that may or may not be responsive to Items 4(c) and 4(d), and current PNO guidance on these questions, are included as an addendum to this article.

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[2] Marian R. Bruno, Brian C. Mohr, & Bruce J. Prager, *Locating and Identifying Item 4(c) Documents*, ANTITRUST, Spring 2002, at 46.

[3] This article discusses the PNO's current interpretations and guidance regarding Items 4(c) and 4(d). It is advisable for parties to a transaction and their counsel to consult with the PNO about particular documents or factual situations if they are not certain whether a particular document is responsive to Item 4(c) or 4(d).

II. Identifying Documents Responsive to Item 4(c)

One of the most substantive and time consuming components of an HSR Act filing is the collection and submission of what are commonly referred to as 4(c) and 4(d) documents.[4] These are documents the FTC views as "essential" to its ability to perform a preliminary antitrust analysis.[5] The initial inclusion of Item 4(c) and its obligation to submit certain "competitively sensitive" documents with the HSR Form was based on the FTC's experience that the viewpoints of the participants in such documents were "extremely valuable in analyzing the antitrust implications of an acquisition" and its determination that "these perceptions are indispensable to the preliminary review envisioned" by the HSR Act.[6]

In addition to formal presentations provided to the board in order to approve a transaction, documents responsive to Item 4(c) include (i) any other memoranda, handwritten notes, information presentations, meeting minutes from board meetings or information presentations, e-mails, documents stored in computer files, or other forms of documents, (ii) documents created by or sent to officers and directors from internal or external sources, (iii) documents that analyze the transaction, and (iv) those in areas relevant to the subject areas delineated above. Documents prepared by outside consultants retained by the buyer *or* the seller (such as investment bankers) may also be responsive if those documents satisfy the 4(c) criteria. If a document goes through various drafts before being used to evaluate the transaction, only the final version must be submitted, not the prior drafts.[7] Likewise, where multiple drafts of a

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[4] The Instructions to Item 4(c) of the HSR Form, which can be accessed at PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS-INSTRUCTIONS at VI (revised June 7, 2019), https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_instructions_9-25-19.pdf, require the submission of "all studies, surveys, analyses and reports … prepared by or for any officer(s) or director(s) … 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.

[5] *See* Premerger Notification; Reporting and Notification Requirements, 43 Fed. Reg. 33,450, 33,525 (July 31, 1978).

[6] *Id*.

[7] PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, ITEM 4(C) TIP SHEET (Nov. 28, 2016), https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf ("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

presentation are attached to a thread of emails, only the final version of the presentation should be filed—the various iterations of emails updating the presentation are considered drafts.

The phrase "officer(s) or director(s)" refers to directors and certain senior officers of the buyer or seller and any of their respective group companies. "Officer" means a person in a position that is either (i) specifically provided for in the bylaws or articles of the company or (ii) appointed by the board of directors.[8] Further, documents "prepared for" an officer or director include documents in their inbox and files accessed from virtual data rooms. A document is deemed to be "prepared for" an officer or director if it is in their inbox, even if it has not been read. Similarly, files are "received" at the time the officer or director downloads them from a virtual data room.

At the end of the day, a review of documents for 4(c) responsiveness is not merely a hunt for "magic words." Not every mention of a word like "competitor" or "market" automatically renders a document responsive to Item 4(c). Instead, the touchstone is whether the document contains actual analysis or evaluation of 4(c) content in the context of the contemplated transaction.[9] Analysis or evaluation requires some description or assessment of 4(c)-responsive content, beyond mere mention of the marketplace or competitive landscape.

III. Adoption of Item 4(d) in 2011

Almost exactly ten years ago, the FTC made a significant change to Item 4 of the HSR Form by adding Item 4(d). In adopting Item 4(d), the Commission noted that certain categories of documents that would aid in the agencies' initial substantive analysis were not being provided by all parties because they did not have consistent interpretations as to whether these documents

draft and must be submitted if it meets the other Item 4(c) criteria, even if a final version is also being submitted.").

[8] *E.g.,* KATE WALSH, PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, INFORMAL INTERPRETATION 1610002 (Oct. 12, 2016), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1610002.

[9] PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, ITEM 4(C) TIP SHEET, *supra* note 7, at 3.

were already required under Item 4(c).[10] Thus, Item 4(d) enumerates discrete categories of documents to explicitly require their submission with the HSR Form, including:[11]

- *Confidential Information Memoranda*.[12] This requirement covers the main document prepared within the past year regarding the sale of the target business that was shared with potential buyers.
- *Bankers' Pitch Books*.[13] This requirement goes beyond Item 4(c) only in that it requires production of these documents received during the year prior to filing, by third parties "during an engagement or for the purposes of seeking an engagement," even if they were not prepared during a time when the parties were contemplating a transaction with each other. Documents responsive to this request should be submitted even if they were prepared by bankers or other third parties not ultimately retained to assist with the transaction (*e.g.*, bake-off decks).[14]

[10] Premerger Notification; Reporting and Notification Requirements, 76 Fed. Reg. 42,471, 42,474 (July 19, 2011).

[11] *Id*. at 42,474–77.

[12] The PNO's guidance on Item 4(d)(i) of the HSR Form, which can be accessed at *PNO Guidance on Item 4(d)*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d, require the submission of all "confidential information memoranda" ("CIM") for the target business prepared within one year prior to filing, prepared by or for, or received by, any officer or director that "specifically relate to the sale of the acquired entity(s) or assets," whether or not specifically prepared to evaluate or analyze this transaction.

[13] The Instructions to Item 4(d)(ii) of the HSR Form require the submission of all "studies, surveys, analyses, and reports" prepared within one year prior to filing by investment bankers, consultants, or other third party advisers prepared for any officer or director for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets," and that "specifically relate to the sale of the acquired entity(s) or assets." PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS, *supra* note 4, at VII.

[14] MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1209003 (Sept. 12, 2012), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1209003.

- *Efficiencies and Synergies Documents*.[15] This requirement covers all transaction-specific efficiencies and synergies documents that are used to evaluate or analyze the proposed acquisition, whether or not they contain an analysis of 4(c) topics.

Other than the one-year limitations contained in Item 4(d)(i) and (ii), any documents prepared at any point up until the time of submission of the form—not just prior to the signing of an agreement—and which fall within the scope of the above definitions, will likely need to be submitted as part of the HSR Form.

IV. Change and Continuity Since 2002

In addition to the promulgation of Item 4(d) in 2011, there have been other areas of change and continuity in guidance from the PNO since the publication of *Locating and Identifying 4(c) Documents*. In general, the guidance appears to reflect a desire on the part of the agencies to strike a balance between receiving the information necessary for their preliminary antitrust review and mitigating the burdens on the parties and the agencies, especially given the significant number of notifiable transactions that do not raise competitive concerns. Additional guidance also reflects the continued pace of technological change and globalization. In this section we briefly cover two areas of change: (i) documents analyzing solely foreign market shares or competitive effect, and (ii) the responsiveness of certain public-facing documents; as well as areas of continuity: the handling of ordinary course documents, redaction of nonresponsive materials, and treatment of texts, instant messages and the like. Underlying these issues is the question of how to best collect and identify potentially responsive documents in the digital age.

Documents that discuss only foreign markets. Documents that are prepared only in a language other than English, and/or those that discuss *only* foreign markets, but are otherwise responsive to Items 4(c) and/or 4(d), must be submitted.[16] This change was made in 2016 in light

[15] PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS-INSTRUCTIONS, *supra* note 4, at VII.

[16] Premerger Notification Office Staff, Bureau of Competition, Fed. Trade Comm'n, *Resetting our views on HSR Items 4(c) and 4(d)* (Nov. 28, 2016),t https://www.ftc.gov/news-events/blogs/competition-matters/2016/11/resetting-our-views-hsr-items-4c-4d.

of the "increasingly interconnected global marketplace" where documents discussing competitive impacts solely in a foreign marketplace might nonetheless prove helpful to making "the correct assessment of competitive impact" in the United States.[17] Thus, otherwise responsive documents may not be excluded on the basis that the content is limited to geographies or operations outside the United States. Translations of documents are not required (unless a translation or summary already exists), but may be provided on a voluntary basis to expedite the HSR review process.

Public-facing documents. The PNO's thinking on public-facing documents such as letters to employees or customers explaining the benefits of the transaction has evolved; those documents are no longer deemed responsive.[18] Likewise, presentations made to lenders for the purpose of securing financing no longer need to be submitted, whether they were prepared before or after the transaction is signed or announced. This treatment is now consistent with the PNO's view on press releases.

Everything has not, however, been all change since 2002. Indeed, there are certain areas of continuity with respect to the identification of 4(c) and 4(d) documents where the common issues encountered relate not to any particular change in guidance but, instead, to the difficulty of applying a consistent rule across myriad covered scenarios. Two common problems in this category relate to ordinary course documents and to the inability of parties to redact (other than for privilege) the non-responsive portions of documents containing responsive 4(c) or 4(d) material.

Ordinary Course Documents. Item 4(c) covers only documents prepared for the purpose of evaluating or analyzing the proposed transaction. Therefore, documents prepared in the ordinary course of business, or for a purpose other than in connection with contemplating the transaction, are not responsive even if they relate to competition, market shares, or the like.[19] For example, a periodic strategy meeting presentation, or business plan, or third-party "off the shelf"

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[17] *Id*.

[18] PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, ITEM 4(C) TIP SHEET, *supra* note 7, at 4; MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1204008 (Apr. 19, 2012), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1204008.

[19] PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, ITEM 4(C) TIP SHEET, *supra* note 7, at 1–2.

study or report containing market share information about the target or its competitors would not be responsive if such document was not prepared to analyze the present transaction.

As the PNO has made clear, however, there are exceptions to this general rule. For example, if an ordinary course document is attached to or included in assembled materials used by an officer or director to evaluate the proposed transaction, it becomes responsive to Item 4(c).[20] Similarly, if a party excerpts ordinary course documents or assembles a collection of excerpts used by an officer or director to evaluate the transaction, the PNO treats these as "new" documents responsive to Item 4(c).[21]

When representing buyers, practitioners should be alert to the situation where a seller's ordinary course document may become a 4(c) document for the buyer if relied upon by officers or directors of the buyer in evaluating the transaction.[22]

Producing Responsive Documents in Full. Where portions of a document satisfy the requirements of Item 4(c) or 4(d), the entire document must be submitted. This can often be a point of concern to parties who worry about "oversharing" highly confidential business information. However, the PNO has consistently applied this rule, even going to far as to require the submission of wholly non-responsive documents embedded in the non-responsive portions of a diligence report which itself contained one section responsive to Item 4(c).[23] The only exception to this rule concerns regularly prepared board *minutes*: material unrelated to a proposed transaction may be redacted from responsive board minutes solely on the basis of non-responsiveness, without a claim of privilege. In notable contrast, *presentations* made to the board

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[20] *Id*. at 3; *see also* MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1301011 (Jan. 14, 2013), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1301011 ("The analysis of attaching an old document to a new one comes into play with ordinary course documents that can become 4(c) by incorporating them as an exhibit to a new 4(c) document.").

[21] ANNE SIX, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 2009007 (Sept. 11, 2020), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/2009007.

[22] PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, ITEM 4(C) TIP SHEET, *supra* note 7, at 2.

[23] NORA WHITEHEAD, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1709011 (Sept. 22, 2017), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1709011.

or *documents* shared with the Board that include responsive material must be submitted in their entirety, including non-responsive material, unless a claim of privilege is asserted.[24]

Texts, instant messages, and chats. In the digital era, the types of documents that parties create exist in ever increasing numbers of technological formats, including a variety of short-form formats designed for quick communications. The PNO has issued informal guidance on certain of these formats.[25] The PNO does not require parties to search for and submit texts.[26] Moreover, instant messages and electronic chat messages may also be excluded from Items 4(c) and 4(d).[27] However, if a party learns about these types of materials with responsive Item 4(c) content, a party may wish to voluntarily produce them or note that they exist in a footnote.[28]

Collecting potentially responsive documents. The foregoing considerations naturally raise the question of when it is necessary to conduct a forensic search and collection of electronic records in order to identify 4(c) and 4(d) documents. There is presently no FTC mandate that such a search *must* be conducted. In many cases, HSR counsel working diligently with their in-house legal partners and relevant client officers will be able to provide sufficient guidance for custodians to self-collect the complete universe of 4(c) and 4(d) documents without resorting to a more formal e-discovery collection and search procedure. Often, particular client departments—such as a corporate secretary's office or a corporate development team—will possess many, if not all, of the responsive documents, especially with respect to documents circulated to the board of directors.

However, if a particular transaction has been under consideration for a long period of time, stretching back several months or even years, if it was the subject of considerable email

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[24] *See, e.g.*, ANNE SIX, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1908006 (Aug. 19, 2019), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1908006 (restating and confirming prior guidance to this effect).

[25] KRISTIN SHAFFER, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1810002 (Oct. 24, 2018), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1810002; *see also* SAM SHEINBERG, PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION, INFORMAL INTERPRETATION 1906008 (June 26, 2019), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1906008.

[26] *See supra* note 25.

[27] ANNE SIX, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 2007004 (July 17, 2020), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/2007004.

[28] *See* SHAFFER, INFORMAL INTERPRETATION 1810002, *supra* note 25.

traffic, or it was discussed and analyzed by more than a handful of employees, then HSR counsel should work with their clients to consider thoughtfully whether a forensic search of electronic records may be appropriate. In certain circumstances, such a forensic search may be warranted because there can be significant risks associated with failure to file responsive documents with the HSR Form; it is to these risks that we now turn in the final section of this article.

V. Enforcement

As noted above, the agencies view the submission of documents responsive to Items 4(c) and 4(d) as "essential," "extremely valuable" and "indispensable."[29] Failure to comply with the requirements of Items 4(c) and 4(d) by locating and submitting all responsive documents can create significant risk for parties. At present, consummating a transaction reportable under the HSR Act without fully complying with the Act—non-compliance of which includes failure to submit all documents required by Item 4 of the HSR Form—may result in fines of up to $43,792 per day.[30] Failure to submit responsive documents may require the HSR Form to be re-submitted and re-certified, thereby re-starting the applicable waiting period and delays the parties' ability to close. The agencies have, indeed, brought enforcement actions based on the failure of parties to appropriately identify and submit Item 4(c) documents.

These enforcement actions include several covered in detail in *Locating and Identifying Item 4(c) Documents*, including:

- *United States v. Hearst Trust and Hearst Corp.* (2001) (resulting in a $4 million fine);
- *United States v. Blackstone Capital Partners II Merchant Banking Fund, LP and Howard Andrew Lipson* (1999) (Blackstone paid a $2.785 million fine and Lipson paid a $50,000 fine); and
- *United States v. Automatic Data Processing, Inc.* (1996) (resulting in a $2.97 million fine).

In the years since that article was published in 2002, enforcement in this area has continued. In 2007, DOJ brought suit against Iconix Brand Group, Inc. for failing to provide

[29] Premerger Notification; Reporting and Notification Requirements, 43 Fed. Reg. 33,450, 33,525 (July 31, 1978).

[30] 15 U.S.C. § 18a(g)(1); Adjustments to Civil Penalty Amounts, 86 Fed. Reg. 2,539, 2,539 (Jan. 13, 2021).

documents responsive to Item 4(c) in connection with the filing of the HSR Form.[31] In that case, Iconix did not identify or submit any 4(c) documents in connection with its HSR Form. In response to a question from FTC staff following the filing, counsel for Iconix represented that the company had duly searched for documents responsive to Item 4(c) and that no such documents existed. The parties were granted early termination and closed the transaction, but then DOJ issued a civil investigative demand specifically "to determine whether Defendant Iconix in fact had undertaken an acquisition requiring more than $200 million in financing without its officers or directors having prepared or reviewed documents that evaluated or analyzed the proposed acquisition with regard to competitive factors that would be responsive to Item 4(c)."[32] In response, the company identified three documents—including two that went to the board of directors—that were, in fact, responsive to Item 4(c). Iconix paid a $550,000 civil penalty, which represented a fine of approximately $6,500 per day that Iconix was out of compliance with the requirements of the HSR Act. Since the *Iconix* case in 2007, we have not identified a civil enforcement action brought by the agencies for failure to provide 4(c) documents, nor have we identified any enforcement action based on failure to provide 4(d) documents.

That said, 2012 saw the first *criminal* prosecution brought in connection with Item 4(c) documents. In *United States v. Pyo*, No. 1:12-cr-00118-RLW (D.D.C. 2012), DOJ criminally charged the Senior Vice President of Corporate Strategy of a buyer in the business manufacturing and selling automatic teller machines. In connection with the required premerger notification filings, the defendant "participated in and directed the identification, review, and collection of documents and information required to be submitted," including Item 4(c) documents.[33] DOJ alleged that the defendant altered or destroyed—and directed others to alter or destroy—documents responsive to Item 4(c) and did so in order to misrepresent "the market shares, competition, competitors, markets, potential for sales growth or expansion into product or

[31] Complaint, ¶¶ 14–24, *United States v. Iconix Brand Grp., Inc.*, 1:07-CV-01852 (D.D.C. Oct. 15, 2007) [hereinafter Iconix Complaint]; *see also U.S. v. Iconix Brand Group, Inc.*, U.S. DEP'T OF JUSTICE (July 22, 2015), https://www.justice.gov/atr/case/us-v-iconix-brand-group-inc.

[32] Iconix Complaint, *supra* note 31, ¶ 19.

[33] Information, ¶ 4, *United States v. Pyo*, No. 1:12-cr-00118-RLW (D.D.C. May 3, 2012), https://www.justice.gov/atr/case-document/file/507871/download; *see also U.S. v. Kyoungwon Pyo*, U.S. DEP'T OF JUSTICE (July 7, 2015), https://www.justice.gov/atr/case/us-v-kyoungwon-pyo).

geographic markets relating to the proposed acquisition in the United States" in order to impede analysis of the proposed acquisition by the FTC and DOJ.[34] The defendant pleaded guilty and was sentenced to five months imprisonment for obstruction of justice.[35]

These examples illustrate the continued seriousness with which the agencies take parties' obligations to provide documents responsive to Items 4(c) and 4(d) and the potentially grave consequences should a party fail to properly locate, identify, and submit the materials required by Items 4(c) and 4(d) of the HSR Form.

VI. Conclusion

Given the weight the agencies place on 4(c) and 4(d) documents in conducting their preliminary investigations of proposed transactions under the HSR Act, and the significant penalties and delays that can result from failure to identify and submit responsive materials, finding and submitting these documents remains one of the most important duties of HSR counsel. We highlighted herein several necessary updates to a previous practical guide on this topic and hope that the foregoing analysis—as well as the addendum of hypothetical issues and resolutions which follows—proves useful to HSR practitioners and their clients in navigating this nuanced aspect of the premerger notification regime.

[34] *Id*. ¶ 7.

[35] Plea Agreement, ¶ 8, *United States v. Pyo*, No. 1:12-cr-00118-RLW (D.D.C. July 2, 2012), https://www.justice.gov/atr/case-document/file/507866/download.

VII. Addendum: Issues in Analyzing Potential Item 4(c) and 4(d) Documents[36]

A. Types of responsive documents and privileged documents

(1) ***Indication of Interest Letter vs. "Selling" Materials****:* In February, the parties signed an indication of interest ("IOI") which contained salesmanship language designed to emphasize the combined companies' business advantages, growth potential, and expansion opportunities. The IOI mentions a non-compete with the founder of the target who has grown the business. Negotiations have moved swiftly and at the beginning of March the parties are planning to execute definitive agreements. *(1) Should the IOI be treated as a deal document, such that disclosure is not required under Item 4(c) or 4(d)? Or, should the IOI be considered a "Selling" document whose salesmanship language requires disclosure under Item 4(c) or 4(d)? (2) Does a lack of typical 4(c)/(d) documents, due to the timing of the deal, have any bearing on the 4(c) analysis or best practices? (3) Separate of the IOI, does the non-compete need to be filed under 4(c) or 4(d)?*

> Generally, letters of intent and offer letters are <u>not</u> responsive to Item 4(c) or 4(d), even if they have 4(c)/(d) content, because they are usually not prepared for the purpose of analyzing or evaluating the transaction, but rather for the purpose of convincing the seller to choose a particular buyer.
>
> Irrespective of deal timing, it is the content and use of the document, rather than the lack of typical 4(c)/(d) documents, that has bearing on the 4(c) analysis and best practices.
>
> The non-compete does not need to be filed under Item 3(b), 4(c) or 4(d), as it is only referenced in the IOI. If the parties wish to file their HSR Notifications before executing definitive agreements, they can file based on the executed IOI, if it meets the other requirements of Item 3(b).[37]

(2) ***Board Documents Prepared in Anticipation of Regulatory Proceedings****:* An acquiring entity is considering whether to purchase Company A. The parties have had preliminary discussions in the past month, but have not yet reached an agreement in principle. If the transaction were to

[36] In reviewing the following hypothetical situations, assume that all of the 4(c) or 4(d) criteria not at issue are satisfied.

[37] *See* PREMERGER NOTIFICATION PRACTICE MANUAL (5th Ed. 2015) ("PNPM") #172.

move forward, it is HSR reportable, and the potential buyer worries it may present some competitive concerns warranting discussion with the regulators. Six months ago, certain officers of the potential buyer (including the vice president of M&A) compiled two "Regulatory Risks" slides to be included in a 15-page M&A Options Deck that was presented at the potential buyer's Board Meeting five months ago. The slides were compiled with the advice of in-house counsel and included 4(c)-responsive material regarding the general market landscape (including a reference to Company A, among others) and competitive factors. *(1) Is disclosure of the M&A Options Deck required under Item 4(c)? (2) Would the answer change if the M&A Options Deck were prepared in connection with the regular monthly board meeting after negotiations had already begun? (3) If incorporated in a presentation expected to be used in discussions with an antitrust agency? (4) If disclosure is required, what material would be privileged?*

> No, disclosure is not required under Item 4(c)—the M&A Options Deck surveyed potential M&A deals and was prepared in the ordinary course of business prior to pursuit of the current potential transaction. However, if the parties had begun negotiations, the slides could be deemed to have been prepared to analyze the transaction, and thus responsive to Item 4(c). In that case, the two Regulatory Risks slides would be privileged, as they were compiled with the advice of in-house counsel.
>
> Documents prepared by officers or directors at the request of counsel for the sole purpose of engaging agency staff on the antitrust implications of the transaction and to collect information that is expected to be the subject of an anticipated request by FTC staff for voluntary submission of additional information is not required to be filed in response to Item 4(c).[38]

(3) *Slack Messages*: Airline A, which is currently in the process of a Chapter 11 restructuring, is being acquired by Airline B. Over the course of the transaction, members of the deal team at Airline B have exchanged messages on Slack (a business communications platform) with the Vice President of Business Development of Airline B, who is an officer of the company. The

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[38] *See* MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1205001 (May 1, 2012), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1205001-0; *see also* MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1205003 (May 9, 2012), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1205003.

messages are generally short, ranging from a few words to a couple of sentences, but the team regularly uses Slack to ask more ad-hoc questions about the deal, as opposed to email. Some of these messages discuss market shares and other 4(c) content. *(1) Would these Slack messages be considered akin to instant messages or chat conversations? (2) Is Airline B required to include these messages in their HSR disclosures to the FTC?*

> Yes, Slack messages would be considered in the same family as instant messages and chat conversations and would be considered non-responsive. Thus, like instant messages and chat conversations, Airline B would be allowed to exclude these messages from their mandatory HSR disclosures to the FTC. However, emails or internal memos summarizing those Slack messages might be required to be submitted under Item 4(c).[39]

(4) ***Board Materials***: Company E is acquiring a subsidiary of Company F, and the acquisition is reportable under the HSR Act. As part of its HSR disclosures, Company E plans to include Board minutes and a presentation that was shared with the Board at the most recent Board meeting. The Board minutes contain 4(c)-responsive materials, as well as official recaps of business that occurred at the Board meeting. The presentation provides an overview of three ongoing deals in Company E's business development pipeline, including the acquisition at issue. The slides relating to the acquisition include market analysis that is 4(c)-responsive. *(1) May Company E redact the slides pertaining to the other two deals that are unrelated to the proposed acquisition, absent a claim of privilege? (2) May Company E redact recaps and Board business unrelated to the proposed acquisition from the Board minutes, absent a claim of privilege?*

> Presentations made to the Board or documents shared with the Board that include responsive material must be submitted in their entirety. Thus, Company E cannot redact the slides pertaining to the other two deals that are unrelated to the proposed acquisition, unless a claim of privilege is asserted. However, Company E may redact material

[39] *See* KATHRYN WALSH, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 2007005 (July 17, 2020), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/2007005 (citing SHAFFER, INFORMAL INTERPRETATION 1810002, *supra* note 25; SHEINBERG, INFORMAL INTERPRETATION 1906008, *supra* note 25).

unrelated to the proposed acquisition from responsive Board minutes without asserting a claim of privilege.[40]

B. Relevant officers and directors.

(1) ***"Draft" Documents****:* The acquiring entity, which was founded by, and is controlled by Entity A, is a special purpose acquisition company ("SPAC"). Entity A has appointed two directors to the 5-person board of directors of the SPAC. The SPAC's senior officers are managing the deal process with oversight from one of Entity A's directors, Mr. X, who serves as an assistant vice president (i.e., not an officer for HSR Act purposes) at Entity A. The transaction is reportable and the SPAC officers have drafted materials to be shared with the SPAC board of directors, including (i) a deck analyzing the potential target's market share and expansion options that was set aside and never provided to any SPAC director; and (ii) a revised deck marked "DRAFT", which was presented to Mr. X in his oversight role on the board, but has not yet been shared with the whole board of the SPAC. The revised deck was also shared by Mr. X with the investment committee of Entity A, however, however, a final version of the deck was never prepared or provided to the investment committee. *(1) Should draft documents containing potentially responsive information be submitted where they have been circulated to Mr. X? (2) Would Entity A's investment committee be considered akin to the board of directors of Entity A or the SPAC for the purposes of determining whether these documents need to be submitted under 4(c) or 4(d)?*

(1) The draft deck containing potentially responsive information is not required to be submitted if it was only circulated to Entity A's director (Mr. X) and not the full board of directors of the SPAC. However, Entity A is the UPE and its investment committee would be considered the equivalent of the board of directors of a company. The draft that Mr. X shared with the entire investment committee of Entity A would need to be filed as a "final" document.

[40] *See* SIX, INFORMAL INTERPRETATION 1908006, *supra* 24.

(2) Generally, drafts shared with the "whole board" or a "full committee of the board" would be deemed final and thus required to be filed.[41] On the other hand, drafts shared with one director are still considered drafts and are not required to be submitted.

(2) ***NewCo without Officers or Directors***: Three entities (A, B, and C) are each investing into an unincorporated NewCo, to be created specifically for the transaction. Entities A and B are each investing 30% into NewCo and Entity C is investing 40% into NewCo. NewCo plans to acquire voting securities of Company X, and none of Entities A, B, or C will be entitled to 50% of NewCo's profits or assets upon dissolution. Ms. M, an officer at Entity C, has been identified as the likely pick for NewCo's Chief Financial Officer; however, there is a chance that might change after filing. Otherwise no individuals from the investing entities are expected to become officers or directors at NewCo. *(1) Is Entity C required to disclose documents that went to Ms. M in connection with NewCo's acquisition of Company X? (2) Are Entities A and/or B required to disclose documents that went to their officers or directors in connection with NewCo's acquisition of Company X?(3) If no officers are slated for NewCo at the time of filing the HSR, then are there no custodians whose files would need to be searched for documents responsive to Item 4(c)?*

Because an officer from Entity C, an investing entity, is expected to become an officer of NewCo, their files should be searched for Item 4(c)/(d)-responsive materials, which should be disclosed to the FTC.[42] If no officers or directors at Entities A and B are slated for or acting as officers/directors at NewCo, these entities are not required to disclose documents that went to their officers or directors in connection with NewCo's acquisition of Company X. If NewCo does not yet have officers/directors and none are slated at the time of filing the HSR Act Notification, then the files of the people *acting* as officers/directors, e.g., a general partner, managing member, or investment committee at the investing entities or sponsors, must be searched.

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[41] *See* KATHRYN WALSH, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1812001 (Dec. 12, 2018), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1812001.

[42] *See* EVAN STORM, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1606003 (June 8, 2016), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1606003.

C. Analysis of the notifiable transaction.

(1) ***Refreshed Documents****:* The parties are currently in discussions for a deal that was initially discussed twelve months prior. After some initial back and forth, the parties broke off discussions, but did not issue a "destroy order" for deal documents. The target then pursued other opportunities, including an IPO via a special purpose acquisition vehicle and a merger with a different company. A month ago, the parties resumed discussions. Some of the banker decks circulated in the current deal are from the initial discussions and are now almost a year old, but essentially involve the same deal. In fact, the bankers simply emailed the decks to the target for reference when the parties resumed discussions. The content of both decks include ABC Bank's standard "discussion materials," which do not change much from deal to deal, aside from project name and deal-specific financials. *(1) Was there a "clean break" in negotiations? (2) If there was a clean break, should the decks be considered "refreshed" and filed in connection with the current deal?*

It is difficult to determine whether there was a "clean break" here. On one hand, the target company pursued two separate opportunities after the parties broke off discussions one year prior. However, the parties did not issue a "destroy order" and when the parties resumed discussions they referenced materials from the previous round of negotiations. It may be useful to understand whether there exists documentation of termination of discussions between the parties to support a clean break (*e.g.*, email traffic between the parties demonstrating no intention to move forward with the transaction).

Even if there was a clean break, the banker decks should be filed as responsive to Item 4(d) in connection with the current deal because they are less than a year old, contain 4(c)-responsive content, and were re-circulated during the course of negotiations that led to the reportable deal.

(2) ***Data Room Documents***: In connection with an upcoming merger, the target (Company A) uploads various documents to a secure data room for due diligence purposes. One of the documents uploaded is a spreadsheet created by Bank XYZ that includes Company A's (a) projected stand-alone sales going forward 5 years, (b) growth projections for Company A under various economic scenarios, and (c) pro forma financials for the combined companies. Bank XYZ compiled the spreadsheet in connection with the deal, but the sales figures in tab (a) were

copied and pasted from business decks prepared in the ordinary course. *(1) Is the spreadsheet created by Company A responsive to Item 4(c) or 4(d)? (2) Would the answer change if the spreadsheet also included a column summarizing the analysis behind each projection?*

> Projections compiled in the ordinary course of business are not 4(c)/(d)-responsive, however, projections prepared in connection with the deal are considered responsive and must be submitted. Here, the sales and growth projections are likely not considered responsive, as the projections themselves were copied and pasted from materials prepared in the ordinary course, with no new or additional commentary.[43]
>
> However, the pro forma financials are metrics that are, by definition, prepared in connection with the transaction and, thus, generally responsive. The growth projections were compiled in connection with the deal and include competitive assumptions that project growth based on the combination of the two companies. Therefore, they would be considered responsive.
>
> If the spreadsheet also included a column summarizing the analysis behind each projection, then the entire spreadsheet would be considered responsive because it includes stated assumptions about the deal, which were prepared in contemplation of the deal. Note, however, that the spreadsheet may in some cases qualify as an input into another, final, document.

(3) ***Comparing Effectiveness:*** A subsidiary of a large pharmaceutical company is being acquired by a multi-national corporation looking to build out their presence in the pharmaceutical sector. A presentation prepared in connection with the deal includes a slide comparing the effectiveness of two competing diabetes drugs, one of which is produced by the subsidiary. The comparison itself was not produced for the deal—instead it was copied and pasted from the Abstract of a research paper on diabetes drugs. None of the other slides in the deck contain material that is 4(c)/(d) responsive. *(1) Is the presentation responsive to Item 4(c) or 4(d)? (2) Would the presentation be considered responsive if the slide included the deal team's analysis in the "notes" section of the slide?*

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[43] *See generally* Premerger Notification Office, Federal Trade Commission, Informal Interpretation 0605014 (May 11, 2006).

Assuming no other 4(c)-responsive material is included in the deck, the inclusion of the comparison slide would not make the presentation responsive to Item 4(c) or 4(d), as the slide deals with pharmaceutical effectiveness and was not prepared for purposes of analyzing the marketplace or competitive advantages of the deal. However, the inclusion of the deal team's analysis of the slide, could make the document responsive if the analysis related to market share, competitive advantage, or other 4(c)/(d)-responsive topics. "Notes" sections of slides are treated as the main content of the slide and, if 4(c)/(d) material is included, the whole document would need to be filed.

(4) ***Options in Connection with a Prior Transaction***: Eighteen months ago, two companies negotiated a transaction, wherein Company X acquired Division D of Company Y. The purchase agreement also gave Company X the option to acquire Subsidiary Z, an entity controlled by Company Y. The companies made filings under the HSR Act regarding the acquisition of the Division D business from Company Y. However, the companies did not submit any of the deal documents prepared in connection with the negotiation of the Subsidiary Z option, which included a deal deck and memorandum analyzing the market environment for Subsidiary Z's business. Two months ago, Company X decided to exercise the option to acquire Subsidiary Z from Company Y, in an acquisition that separately will be subject to the HSR Act. When deciding whether to exercise the option, Company X reviewed the documents analyzing the potential exercise of the option, which were created in conjunction with the original acquisition. *(1) Are the documents created eighteen months ago to analyze the option component of this transaction responsive to Item 4(c) for the Subsidiary Z HSR filing? (2) Is the option clause of the purchase agreement required to be submitted in response to Item 4(c)?*

Only documents evaluating or analyzing the exercise of an option are required to be submitted under Items 4(c) and 4(d). Documents that were utilized solely for the prior negotiation of an option are not responsive.[44] Here, the purchase agreement is tied solely to the negotiation of the option contract, and as such is not required to be submitted under Item 4(c) or 4(d). However, the earlier deal documents, such as the deck and

[44] *See* KRISTIN SHAFFER, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1704005 (Apr. 25, 2017), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1704005.

memorandum, that are now resurrected and being used to analyze the Company X's exercise of the option to purchase Subsidiary Z are potentially responsive. Thus, the documents created eighteen months ago to analyze the option component of this transaction are responsive to Item 4(c), even though they were created in conjunction with the earlier transaction.

D. 4(c)/4(d) Topics

(1) ***Foreign Transactions & Documents That Discuss Non-U.S. Markets (1)****:* Entity A is being acquired by Entity B; both are Mexican companies. The entities are using U.S. counsel on this deal. In connection with the transaction, Entity B also corresponded with their Mexican counsel regarding market share, competitiveness, and opportunities for growth. These discussions involved only Latin American markets, with no mention of U.S. markets. After several emails back and forth, the Mexican counsel's advice was summarized in a memo given to officers on the deal team at Entity B. The memo was eventually shared with the other side as well as Entity A's bankers. *(1) Is the memo required to be disclosed under 4(c)/(d)? (2) Are the emails between Mexican counsel and Entity B required to be disclosed under 4(c)/(d)?*

Documents, such as the memo, which only relate to non-U.S. markets are considered responsive to Item 4(c).[45] Documents containing written legal advice that covers 4(c)-responsive topics, including markets, market shares, competition, competitors, expansion or growth, must still be logged under Item 4(c), even if not ultimately produced under claims of privilege. Note that the document would no longer be privileged if shared with Entity A's bankers.

Here, the emails between Mexican counsel and Entity B would most likely be considered "drafts" of the advice summarized in the formal memo. Thus, the emails themselves would not need to be logged or produced.

(2) ***Foreign Transactions & Documents That Discuss Non-U.S. Markets (2)****:* Company A is acquiring Company B, and the acquisition is reportable. Company A is controlled by Partnership X, based in the Netherlands. One of Company A's managing directors is also an officer at X. The

[45] *See* Premerger Notification Office Staff, *Resetting our views on HSR Items 4(c) and 4(d)*, *supra* note 16 ("[F]ilers may not exclude a document responsive to Items 4(c) or 4(d) based on a determination that the document's evaluation or analysis is limited to geographies or operations outside of the United States.").

deal documents include several presentations created by Partnership X, which are in the possession of Company A. The presentations are created in preparation for potential discussions with European Union regulators. However, because the presentations include financials and market projections, they have also been forwarded to the deal team for reference as they prepare the deal decks for the Board of Directors. *(1) Are the presentations created by Partnership X required to be disclosed under Item 4(c)/(d)? (2) Does forwarding the presentations to the deal team make the documents 4(c)/(d)-responsive?*

> Generally, a filing or presentation made to other US regulators or ex-US regulators is not responsive if the filing or presentation is for the purpose of receiving regulatory clearance and not for the purpose of evaluating whether to pursue the transaction. Thus, the presentations themselves would not be considered responsive.[46]
>
> If the deal team uses information from the presentations when preparing the deal decks for the Board of Directors, then the presentations would most likely be considered earlier "drafts," of the Board decks received by the Directors, and thus not required to be submitted under Item 4(c)/(d). Note also that documents created by officers or directors (or their equivalent) of Partnership X or its Investment Committee could be responsive if Partnership X has a board designee on Company A's board of directors.

(3) ***Non-Transaction Specific Synergies***: An online financial services platform, Company O, is being acquired by a private equity Fund P. Fund P has no controlled entities and there is no product overlap between Company O and Fund P. Fund P plans to make several internal changes following the acquisition, and has prepared, with the help of consulting firm Q, a document analyzing the operational efficiencies Fund P thinks it can achieve. The synergies discussed in the document primarily derive from personnel and organizational changes, including reductions in force, changes to executive compensation, and implementation of new compliance policies. *(1) Does Fund P need to produce this document under 4(d) if it is only related to non-merger specific synergies? (2) What would make this document 4(c)/(d)-responsive?*

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[46] *See* MICHAEL VERNE, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1301012 (Jan. 17, 2013), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1301012.

No, Fund P is not required to produce the document, as it is only related to non-merger specific synergies, such as attempts to collect receivables or reductions in force. The document would be considered 4(c)/(d)-responsive if the operational efficiencies or synergies discussed would result from the combination of the target company and the acquirer.[47]

(4) ***Integration Documents***: Company A is planning to acquire Company B and has produced several integration planning documents in connection with the transaction. These documents generally fall into three buckets: (1) those related to revenue synergies of the combined businesses from cross-selling opportunities; (2) those dealing with operational efficiencies such as reducing employee redundancies; and (3) those relating to material synergies, such as the closing of a manufacturing plant when the combined businesses are expected to have substantial excess capacity. Company A has an integration planning team, with a Company A officer dedicated to reviewing all of the integration documents. *Should these documents be disclosed under Item 4(c) or 4(d)?*

Generally, integration documents that quantifying synergies and/or efficiencies should be disclosed under Item 4(c)/(d), unless the document has no quantified dollar amounts or stated assumptions. However, documents specific to tax synergies are typically not considered 4(c)/(d) responsive.[48]

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[47] *See* NORA WHITEHEAD, PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, INFORMAL INTERPRETATION 1502004 (Feb. 23, 2015), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1502004.

[48] *See* PREMERGER NOTIFICATION OFFICE, FEDERAL TRADE COMMISSION 4, ITEM 4(D) TIP SHEET, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d; *see also* PREMERGER NOTIFICATION PRACTICE MANUAL (5th Ed. 2015) ("PNPM") #185.

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