

CORPORATE UPDATE

ANTITRUST ENFORCEMENT

GORDON SCHNELL

4(c) or Not 4(c): That Is the HSR Question

What qualifies as a so-called “4(c) document” under the premerger notification reporting requirements of the Hart-Scott-Rodino Act (HSR Act)?¹ It is a question that for close to a quarter-century has confounded parties submitting HSR filings. However, thanks to its recent and unprecedented enforcement action against Hearst Corporation, the government has made this antitrust puzzle a lot easier to figure out: just empty your files — or else.

4(c) Requirement

Under the HSR Act, the Federal Trade Commission or Department of Justice will review in advance of closing all mergers and acquisitions involving at least \$50 million worth of assets or voting securities (assuming certain thresholds for the size of the parties are reached and no exemptions apply). A transaction that is reportable under the HSR Act may not close until the merging parties have satisfied all of their HSR reporting obligations (and the applicable HSR waiting periods have expired).

One of these reporting obligations is the submission of what are referred to as “4(c) documents.” As defined in the instructions to the HSR Notification and Report Form, these documents consist of:

all studies, surveys, analyses and reports which were 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...²

Unfortunately, the government has offered little else in the way of formal analysis or explanation as to what exactly qualifies as a



4(c) document, and what steps parties must take to find them. So, merging parties and their lawyers are left to their own devices to determine how they will comply with the 4(c) requirement.

For some parties, this can be a recipe for disaster. What recently happened to Hearst Corporation is a case in point.

When through a post-merger investigation the FTC uncovered a number of 4(c) documents that Hearst should have but did not produce with its HSR filing for its Medi-Span acquisition, the agency threw the book at Hearst — and collected. The penalty for Hearst’s 4(c) failure included a \$4 million fine, divestiture of the Medi-Span business, and disgorgement of \$19 million in post-merger profits.

The FTC has proudly trumpeted that the \$4 million penalty is the most ever paid for an HSR violation, and that this is the first time it has sought either divestiture or disgorgement in a federal action challenging a completed merger. The government’s attack on Hearst is all the more notable because it concerned a deal that was valued at only \$38 million — too small to even be covered by the HSR Act since last February’s rule changes.³

Clearly, the government wanted to make a point. And it has. It will not tolerate anything less than strict adherence to the 4(c) rules. Filing parties should therefore follow some basic 4(c) fundamentals to ensure safe passage

through the rocky 4(c) waters that led to Hearst’s 4(c) fiasco. Here’s what to do.

4(c) Fundamentals

Perform a thorough search. Do not limit it to the files of officers and directors, but include the files of every company employee who is involved in or has knowledge of the proposed transaction. If feasible, outside counsel should perform the searches personally. At the very least, they should interview company staff about their files and potentially relevant documents, and explain the boundaries of the 4(c) requirement and the consequences for failing to comply. Those performing their own searches should sign some form of affidavit attesting to their general understanding of the 4(c) requirement and their good faith effort to find all qualifying documents.

Search for broad categories of documents. Cast a wide net in the hunt for 4(c) documents. Do not rely on the 4(c) definition as a guide. The plain language offers only limited assistance and can be particularly cryptic for non-lawyers. Instead, search for the following broad categories which comprise the most commonly found 4(c) documents:

- Documents, prepared internally or by outside consultants, which analyze or evaluate the proposed transaction. These materials will usually touch upon some derivation of 4(c) subject matter such as competition, markets, product integrations, sales projections, post-merger synergies and efficiencies, product development, output expansion, etc. Documents limited to addressing the financials of a proposed transaction are typically not 4(c) worthy.

- Presentations to the board or executive committees about the proposed transaction. High level company presentations about a proposed transaction will also typically contain 4(c) subject matter. These presentations are made to convince the corporate decision makers to approve the deal. Such approval

Gordon Schnell is a partner at Constantine & Partners, specializing in antitrust litigation and counseling.

generally requires a true understanding of the competitive implications of the deal.

- Minutes and notes from any board or executive committee meetings at which the proposed transaction was discussed. The government may be even more interested in these materials than the presentations because they more honestly reflect the corporate deliberations on approving the deal.

- Documents prepared by or for the seller for the purpose of offering the company to prospective purchasers. Investment bankers' books, offering memoranda, and similar documents prepared for the purpose of soliciting interest in the seller should be produced because they typically provide detailed information about the seller's operations and market position which are used by the buyer to evaluate the proposed acquisition. The fact that these documents are prepared before the buyer has been identified does not remove them from the 4(c) ambit.

- Documents prepared by or for the seller that influence the seller's decision to sell. Internal analyses, consultants' reports, and other documents which evaluate potential business combinations, identify potential buyers, or otherwise influence the seller to enter into the ultimate transaction should be produced.

- Documents obtained from the seller through due diligence. These materials might include business reports, strategic plans, competition studies, project development reports, or sales projections prepared by the seller or its consultants. These materials may not be covered by the 4(c) requirement if they were prepared in the ordinary course of the seller's business (and not with the proposed acquisition in mind). Nevertheless, they should be produced because they will provide the agencies with useful information that may speed up the review process.

- Press releases and other corporate relations documents that announce or describe the transaction. These documents should be produced because they typically summarize the benefits, efficiencies, and synergies of the transaction and their impact on the combined entity's market strength, ability to compete, and potential for growth. The fact that they are prepared after the deal is signed has no import in the 4(c) determination.

- Corporate communications to shareholders, members, customers, or employees which announce or describe the transaction. Like corporate relations documents, these communications should be produced because they typically touch upon the competitive impact of the transaction.

- Antitrust analyses prepared by counsel. These documents should be identified as 4(c) documents but withheld on the basis of attorney-client privilege. Antitrust "white

papers" and all backup materials and related analyses are not covered by the 4(c) definition because they are prepared for the government's review, and not for that of the client.

Many of these documents may technically fall outside of the 4(c) definition. Produce them anyway unless there are powerful reasons which justify the risk of excluding them. Antitrust counsel should make the ultimate determination here.

Broad as Possible

When in doubt, don't leave it out. Make the 4(c) production as broad as possible. Err on the side of inclusion. A tie goes to the government.

And don't forget e-mails. Produce qualifying materials regardless of their form (i.e., handwritten notes, memos, slide presentations, electronic files, e-mails, etc.).

Include the entire document and any attachments. Even if only a small portion of a document contains relevant 4(c) subject matter, produce the entire document, including all attachments.

Produce documents even if they are not technically prepared "by or for any officer or director." The government views "officers and directors" very broadly for 4(c) purposes. Assume anyone with a title is covered. The government also views very broadly for whom a document is prepared. The government's position is that if it is in your files, it was prepared for you. The bottom line is that withholding an otherwise relevant document solely because of the "officer or director" requirement will probably not hold up under government scrutiny.

Do not come up empty. It is important to produce some 4(c) documents with the HSR filing. The absence of any 4(c) documents, or the production of only one or two such documents, may be viewed as a red-flag by the agencies that the parties are holding back. This view is likely to be more pronounced under the amended rules which limit filings to transactions valued at \$50 million or more. The rationale is that for transactions of this size, it is unlikely that the parties would not perform some type of substantive premerger analysis or evaluation before committing to the deal.

Outside Counsel

Use outside counsel as a screen. Outside antitrust counsel should get involved as early as possible to educate corporate staff and consultants about the 4(c) requirement, warn them about creating implicating documents, and act as a screen to review all drafts of likely 4(c) documents before they are finalized

and distributed. Since only the most recent version of qualifying 4(c) documents must be produced, outside counsel can be invaluable in guarding against language likely to raise issues or concerns with the government.

Be careful here. Since drafts must be produced with a Second Request or formal investigation into the deal, all likely 4(c) documents should be marked attorney-client privileged and vetted through counsel before wider distribution.

Seek Assistance

Do not be afraid to seek informal government assistance. The staff attorneys and compliance specialists of the FTC Premerger Office can be a very useful source for informal HSR guidance. They can be reached quite easily by phone and will provide the unofficial agency view of how a particular HSR issue should be handled. Relying on the informal opinion of an FTC representative will not insulate a party from HSR wrongdoing. However, such reliance may be viewed as a reasonable justification for engaging in certain conduct ultimately found to violate the HSR Act. Obviously, parties contacting the agency should remain anonymous.

Immediately report any inadvertently withheld documents. Parties should immediately report any inadvertently withheld 4(c) documents to the FTC Premerger Office. Parties should be prepared to disclose when the inadvertently withheld document was discovered, and why it was not originally produced. While the failure may be used by the government to re-start the HSR waiting period, it is unlikely that a more stringent penalty will be imposed if the error was honest and quickly remedied. In addition, the agencies may overlook the violation altogether if the mistakenly withheld document is of little substantive value.

Conclusion

The government's action against Hearst may not resolve the many questions surrounding the 4(c) requirement. But, it does send a message loud and clear that the 4(c) requirement must be taken extremely seriously. So, be careful and teach your clients well: do not fool around with 4(c).

.....●●●.....
 (1) 15 U.S.C. §18a (as amended).

(2) See HSR instructions for Item 4(c), appendix to 16 C.F.R. Part 803.

(3) These amendments, which took effect last February, raised from \$15 million to \$50 million the "size of transaction" threshold for reporting transactions under the HSR Act.