Item 4(d)

Walsh, Kathryn

From: Walsh, Kathryn
Sent: Friday, May 18, 2012 11:02 AM
To: [redacted]
Cc: Verne, B. Michael
Subject: RE: Item 4(d)

Tracking:

Recipient	Delivery
[redacted]	
Verne, B. Michael	Delivered: 5/18/2012 11:02 AM

You are correct that the scope of 4(c) and 4(d) is meant to be the same. This is a point we made right after the Final Rule came out last summer by speaking on a number of panels and participating in several brown bags.

The intention of 4(d)(i) and 4(d)(ii) is to reach that period during which a transaction is taking shape but nothing definitive has yet been signed. For instance, the company knows it wants to put itself up for sale and creates a CIM but does not yet have a specific buyer or agreement in place. The CIM is responsive to 4(d)(i). Once there's a buyer and something has been signed, you're into 4(c) territory with the bulk of your potentially responsive documents (4(d)(iii) is a notable exception).

That said, let me try to answer your questions.

1a. I think it's highly unlikely that there are going to be two different CIMs created for what is essentially the same underlying pool of assets (whether acquired as assets or through a VS transaction). But, in the case of the two CIMs you describe, it is only the CIM for the second buyer that would be responsive to 4(d)(i).

1b. Only the CIM to the second buyer would be responsive to 4(d)(i). The CIM created for the first buyer might be a 4(c) document in this instance if the second buyer somehow used it to evaluate the current deal.

1c. Agree. The seller should submit this CIM even if it wasn't given to the buyer because it involves the same underlying pool of assets.

2. This would be responsive because it deals with the same underlying pool of assets. If there were two bankers' books, with one focusing on the VS structure and one on the asset structure, we would only want the one dealing with the asset structure with the second buyer.

I don't see the clean break doctrine coming up very frequently on 4(d)(ii) or 4(d)(iii), but we are always happy to consider specific cases as they arise.

From: [redacted]
Sent: Thursday, May 17, 2012 12:26 PM
To: Walsh, Kathryn
Subject: RE: Item 4(d)

One more general question to add – can the "clean break" analysis be applied to 4(d)(ii) and 4(d)(iii)? Thanks.

From: [redacted]
Sent: Thursday, May 17, 2012 11:59 AM
To: 'Walsh, Kathryn (kwalsh@ftc.gov)'
Subject: Item 4(d)

Kate:

I have some general questions about Items 4(d)(i) and 4(d)(ii) that I was hoping you could shed some light on.

The PNO's tip sheet on Item 4(d) states: "Documents responsive to Items 4(d)(i) and 4(d)(ii) must relate to "the acquisition" as in Item 4(c), because the phrase "specifically relate[d] to the sale of the acquired entity(s) or assets" in Items 4(d)(i) and 4(d)(ii) conveys the same concept." Does this mean that to be responsive to Item 4(d), offering memoranda and third-party analyses must be transaction-specific?

I had read the difference between the "for the purpose of evaluating or analyzing the acquisition" language of 4(c) and the "specifically relates to the sale of the acquired entity(s) or assets" language of 4(d) to mean that the scope of 4(d) is broader. The SBP also seems to suggest that "the acquisition" intentionally was not used for 4(d). Now looking at the tip sheet and the SBP together, I am wondering if it's correct that the 4(d)(i) and 4(d)(ii) do have to be transaction-specific but that the "specifically relates" language was used because there technically may not be an "acquisition" at the time they are prepared. Some specific scenarios:

1. *Offering memoranda.* Earlier in the year, Seller and Buyer A attempted to negotiate a deal whereby Buyer A would acquire a 100% of Seller's voting securities. Seller prepared a CIM for Buyer A relating to this transaction, but the transaction later was abandoned. A few months later, Seller and potential Buyer B are negotiating an agreement whereby Buyer B will acquire a portion of Seller's assets.

    a. Assume Seller prepares a CIM for Buyer B in connection with B's proposed asset acquisition, which is a 4(d)(i) document for both Seller and Buyer B. If Seller does not give the CIM for Buyer A to Buyer B, is it correct that the Buyer A CIM is not a 4(d)(i) document for Seller because it does not relate to the proposed asset acquisition?

    b. If Seller does give the Buyer A CIM to Buyer B during the course of negotiations, would that still not be a 4(d)(i) because there is a formal CIM that Seller prepared for "the acquisition" by Buyer B?

    c. If no CIM is prepared for the transaction with Buyer B, the CIM for Buyer A would be a 4(d)(i) if it actually was given to Buyer B to serve the purpose of a CIM.

2. *Materials prepared by third-party advisors.*

    a. An investment bank sends a pitch book to Buyer B above that analyzes several potential transactions, one of which is the acquisition by B of 100% of Seller's voting securities. Would this be a 4(d)(ii) document even though it does not relate to "the acquisition"?

Thanks in advance for your help.

Best regards,
[redacted]

[redacted]