



# Issues in Identifying 4(c) Documents

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## Item 4(c): The Text

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- 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 ...
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## Item 4(c): The Text (cont')

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- with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets ...
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# Locating 4(c) Documents: The Ideal

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- Go to the client's office
  - Have client identify personnel who knew of the pending transaction
  - Interview those individuals regarding responsive documents.
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# Locating 4(c) Documents: Reality

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- Note that officers and directors include those in subsidiaries
  - Include documents prepared by outside consultants, investment bankers
  - Review the working group list – identify the parties, their responsibilities and their product.
  - Don't forget e-mail and personal computers
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# Studies, Surveys, Analyses and Reports

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- 1. Issue: E-mail message from VP-Marketing to the business development group providing information regarding competition in the target firm's industry to be incorporated into presentation materials
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# Studies, Surveys, Analyses and Reports

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- Resolution: Submit document. 4(c) documents need not be “formal” reports or studies to qualify as a 4(c). Even hand written notes and e-mails can qualify.
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# Studies, Surveys, Analyses and Reports

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- 2. Issue: Information/data request from outside antitrust experts seeking sales and other data and the response thereto.
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# Studies, Surveys, Analyses and Reports

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- Resolution: The information/data request would likely not qualify as a 4(c) document and the response from the client likely is not 4(c) to the extent it contains only raw data about the company. If an officer or director provided the response, and it contains more than mere statistics or numbers, then it could qualify as a 4(c). If it's from or to counsel, it is likely to be privileged.
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# Studies, Surveys, Analyses and Reports

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- 3. Issue: Notes made by VP Business Development for use in providing commentary to accompany her power point the proposed transaction.
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# Studies, Surveys, Analyses and Reports

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- Resolution: Document is a 4(c). Documents prepared by officers or presentation to the Board regarding directors for their own use can qualify as 4(c) documents.
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# Studies, Surveys, Analyses and Reports

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- 4. Issue: During the presentation, two of the directors take notes incorporating both the content of the presentation and their own impressions of the competitive effects of the transaction. One of the directors is the General Counsel of the corporation.
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# Studies, Surveys, Analyses and Reports

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- Resolution: The notes of both directors are 4(c)s; however, the notes of the General Counsel may be privileged.
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# Studies, Surveys, Analyses and Reports

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- 5. Issue: Board minutes summarizing the Board meeting at which the transaction was approved.
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# Studies, Surveys, Analyses and Reports

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- Resolution: The minutes qualify as a 4(c) so long as they contain 4(c) subject matter. Only the relevant portions of the Board minutes need be supplied. This is the only circumstance where the PNO allows a portion of a document containing 4(c) material to be submitted. Note that presentations made to the Board are also required to be submitted if they contain 4(c) subject matter.
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# Studies, Surveys, Analyses and Reports

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- 6. Issue: Press release prepared by VP of Public and Investor Relations for release to media.

# Studies, Surveys, Analyses and Reports

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- Resolution: Press releases do not qualify as 4(c).

# Studies, Surveys, Analyses and Reports

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- 7. Issue: Questions and answers prepared by a public relations firm for use by the acquiring company during an analysts' conference that address how the combined company intends to position itself in its competitive markets
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# Studies, Surveys, Analyses and Reports

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- Resolution: Document is a 4(c).
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# Studies, Surveys, Analyses and Reports

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- 8. Issue: Letters to (1) shareholders, (2) customers and (3) employees from CEO explaining benefits of the transaction resulting from market share increase.
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# Studies, Surveys, Analyses and Reports

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- Resolution: All of the documents qualify as 4(c)s. Remember, the audience for whom a document is prepared is not important so long as the other criteria of 4(c) are met.
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## Prepared by or for Any Officer(s) or Director(s)

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- 9. Issue: An offering circular (banker's book) prepared on behalf of the seller and provided to all potential buyers.
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## Prepared by or for Any Officer(s) or Director(s)

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- Resolution: The document is a 4(c). A document doesn't have to be prepared for a particular buyer. These are deemed to be implicitly prepared at the direction of the Board or an officer of the seller and to be for the officers and directors of all potential buyers who receive copies. Thus, both the buyer and the seller are to supply the book as a 4(c).
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## Prepared by or for Any Officer(s) or Director(s)

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- 10. Issue: An investment bank or business broker prepared an offering circular on its own initiative and sends it unsolicited to a company (which never retains that banker or broker), but ultimately ends up buying the firm that is the subject of the offering memorandum.
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## Prepared by or for Any Officer(s) or Director(s)

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- Resolution: The document is probably a 4(c). If the banker's book was found in the officer's or director's files, it will be deemed to have been used by an officer or director whether or not they accept or agree with its contents.
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## Prepared by or for Any Officer(s) or Director(s)

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- 11. Issue: An otherwise responsive report, prepared by a low-level employee, has an officer or director as the intended recipient. (A) An early draft and a final version of a report both exist at the time of filing. (B) The report is completed, but the officer never receives the report. (C) Same facts, but the officer receives, and never reviews, the report.
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## Prepared by or for Any Officer(s) or Director(s)

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- Resolution: (A) The early draft is not a 4(c). Only the most recent draft or final version of a 4(c) document needs to be submitted. (B) Even though the document is prepared for an officer or director, the PNO now takes the position in this situation that the document is not a 4(c) if it was never received by any officer or director. (C) It is 4(c). That the report was intended for and received by the officer or director is controlling, not that he or she read it.
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## Prepared by or for Any Officer(s) or Director(s)

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- 12. Issue: A report prepared by a low-level employee for his manager is found in the files of a senior office.
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## Prepared by or for Any Officer(s) or Director(s)

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- Resolution: The report would be deemed to have been prepared for the officer if found in the officer's files and therefore would qualify as a 4(c).
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## Prepared by or for Any Officer(s) or Director(s)

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- 13. Issue: An otherwise responsive report prepared by or for a non-elected Vice President of the company.
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## Prepared by or for Any Officer(s) or Director(s)

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- Resolution: This document is not a 4(c). The document must be prepared by or for an officer or director position that is either (1) provided for in the bylaws or articles or (2) appointed by the Board.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 14. Issue: (A) A marketing report, prepared in the ordinary course of business, relied on by an officer in evaluating the transaction. (B) Same facts, but the preexisting document is sent to the officer with a cover letter summarizing the report's contents.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: (A) The document alone is not a 4(c). (B) The combined document is not a 4(c); however, care should be taken with this circumstance. If the cover letter simply transmits the document without more, it is not a 4(c). If the cover memo itself is a 4(c) document, then you need to attach the ordinary course documents which are referenced in the cover memo.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 15. Issue: (A) A European Union Form CO, and (B) a “voluntary” British Office of Fair Trading (OFT) filing, each prepared by the company in connection with the transaction which by definition discuss competitive conditions in various markets where the combined company will operate.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: No to both, even though the British OFT filing is deemed a “voluntary” filing. Note, if an additional voluntary submission is made in connection with a filing, then it is deemed to be part of the filing and not a 4(c). However, in a circumstance where a party voluntarily submits a “white paper” or similar analysis of the acquisition to the agency, that presentation is a 4(c) document.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 16. Issue: A presentation for potential bank syndicate participants analyzing the transaction prepared by the acquiring person **after** the transaction is announced for use in its “road show”.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: The document is a 4(c). The 4(c) requirement does not end when a deal is announced or the agreement is signed.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 17. Issue: Bankers' memorandum prepared **eight months before** deal is announced, analyzing ten possible bidders in an auction, one of whom eventually submits the winning bid.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: Depends on the facts surrounding the transaction. In this situation, the memo may have been created so long before the deal firmed up that its analysis of potential bidders would be deemed too preliminary. You need to look at all the circumstances before making the cut.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 18. Issue: Buyer prepared materials evaluating target **14 months prior** to this transaction. At that time, discussions with target terminated after four months of unsuccessful negotiations. After an eight month hiatus and with retention of a new investment bank, negotiations resumed, leading to the subject transaction.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: The materials are not 4(c)s. When it is clear that earlier transaction negotiations have been terminated and that the buyer has not continued to consider the deal during the hiatus period, the earlier documents are not 4(c) unless the documents at issue were reviewed in connection with the “new” deal.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- 19. Issue: Buyer retains national consulting firm to evaluate corporate alternatives for the company. The consultant's report addresses scenarios including possible re-capitalization of the company, a going private transaction, the sale of the company (including a possible LBO) and various acquisition transactions. The report identifies four possible acquisition candidates and provides market information about each. The instant transaction relates to the acquisition by the company of one of those firms.
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# For the Purpose of Evaluating or Analyzing the Acquisition

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- Resolution: The report is a 4(c). The PNO believes that a document which provides relevant information about the acquired person would have been used in analyzing this transaction.
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# With Respect to: Market Shares

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- 20. Issue: Memorandum prepared by the Vice President of Marketing/Sales that discusses the position of the combined company in certain Pacific Rim countries and provides post merger market shares in those countries.
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# With Respect to: Market Shares

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- Resolution: The document is a 4(c). 4(c) documents are not limited to United States markets.
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# With Respect to: Competitors

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- 21. Issue: Banker's book for merger between Company A and Company B provides charts listing comparable transactions involving the sale of other companies in Company B's industry. The book provides various benchmarks relating to the value of the transactions (e.g., multiples of earnings.) These include a number of transactions involving the direct competitors of Company B.
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# With Respect to: Competitors

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- Resolution: Not 4(c). This document does not contain the analysis that 4(c) seeks.
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# With Respect to: Competitors

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- 22. Issue: A memo discussing the target company provides a detailed description of its product offerings, its production facilities and lists its ten largest customers for each product with its dollar volume of purchases.
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# With Respect to: Competitors

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- Resolution: Not 4(c). This document is merely descriptive of factors other than the requisite 4(c) indicia relating to markets, market share, competition, competitors, etc.
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# With Respect to: Competition

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- 23. Issue: Report from CEO of subsidiary to parent company's Executive Vice President describes the target company's business as being "highly competitive".
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# With Respect to: Competition

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- Resolution: The report is not 4(c). A simple assertion is not sufficient; it must contain some analysis of factual information, such as identification of specific competitors or competitive trends.
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# With Respect to: Markets

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- 24. Issue: Presentation to the Board of Directors describes the target as a meaningful player in the “South Eastern regional retail widget market.”
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# With Respect to: Markets

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- Resolution: Not 4(c). Simply using the word “market” doesn’t make a document a 4(c), although it is possible that the document may qualify as 4(c) under the “potential for sales growth or expansion into product or geographic markets” language.
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# With Respect to: Markets

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- 25. Issue: a lengthy e-mail from the Vice President of Marketing to the CEO describes in detail the relationship between the target as a paints and finishes supplier and the major appliance OEMs, and focuses on the “reemerging market for almond and harvest gold appliances.”
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# With Respect to: Markets

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- Resolution: Not 4(c), but be careful!  
Merely because the market referenced is small doesn't necessarily mean that the document is not 4(c). Also might be 4(c) under "potential for sales growth" criterion.
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# Potential for Sales Growth or Expansion into Product or Geographic Markets

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- 26. Issue: (A) Pro formas of both companies' combined sales through the year 2005, including only a 2% inflationary increase per year, prepared by the acquiring person. (B) Same facts, but acquiring person factors into equation winning new contracts, new product introductions, etc.
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# Potential for Sales Growth or Expansion into Product or Geographic Markets

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- Resolution: (A) Not 4(c). Financials without any underlying substantive assumptions are not 4(c) documents. Also, submission of valuation documents is not necessary (e.g., pages, without analysis, tracking fluctuations in stock prices for the last four years.) (B) The document now qualifies as a 4(c).
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