

Ferkingstad, James H.

802.40

From: [REDACTED]
Sent: Tuesday, June 15, 2010 2:52 PM
To: Ferkingstad, James H.
Cc: [REDACTED]
Subject: Formation of a hospital system: exemption 802.40

Exemption does not apply. As structure - transaction would be reportable
JF 6/16/10
MW concurs

James,

We wanted to discuss with you at the earliest convenient time the applicability of Sec. 802.40 to the following transaction:

Hospital A and Hospital B are contemplating a proposed transaction whereby Hospital A and Hospital B, including their subsidiaries (Hospital C is a subsidiary of Hospital A), would become part of one overall system in which a single non-profit entity would be the sole "other body" in control of both the non-profit corporation for Hospital A and the non-profit corporation for Hospital B. Under Pennsylvania law, an entity designated as the "other body" exercises essentially the same control as a sole member of a non-profit corporation. See Pa Con. Stat. sec. 5103 *et seq.* It is our understanding that if Hospital A and Hospital B joined to form a new non-profit entity to act as the new parent of both Hospital A and Hospital B, no Hart Scott Rodino filing would be required pursuant to the exemption in section 802.40 (see discussion below). In this instance, however, in order to save time and transaction costs, Hospital B's current parent organization ("Parent") (which is a 501(c)(3) non-profit) would change its name, completely replace its articles and bylaws and appoint a new slate of directors and officers in order to convert into a 501(c)(3) non-profit parent organization of Hospital A and Hospital B. Only the Employer Identification Number of Parent would remain the same.

The Parent's initial board of directors would consist of thirteen (13) directors. Seven (7) of the directors would be chosen by Hospital A. Four (4) of the directors would be chosen by Hospital B. One (1) director would be chosen by Hospital C. The final director would be the System CEO, as an ex-officio voting member. This position will initially be held by the current CEO of Hospital A. As part of the Agreement, Hospital A and Hospital B would agree upon the individuals who would serve as the initial directors, officers and committee members of the Parent. After the initial term, the number of Parent board seats allocated to each hospital would remain the same. Each hospital would nominate appointees to the Parent board by first submitting candidates to the Parent's nominating committee for review. The nominating committee will be composed of five (5) members, three (3) from Hospital A and two (2) from Hospital B. Once a candidate is "vetted" and approved by the nominating committee through a majority vote, the candidate will be sent back to each hospital for the hospital's submission of the candidate to the Parent for election. On an ongoing basis, Hospital A and Hospital B will continue to maintain the same percentage of board seats as initially held. At some point in the future, Parent may convert to a self-perpetuating board.

Sec. 802.40 exempts from HSR reporting the "formation of an entity ... if the entity will be not-for-profit within the meaning of sections [501(c)(3) ... of the Internal Revenue Code]." Parent will be a new non-profit entity in all material respects, even though it will be created utilizing the existing non-profit corporate Employer Identification Number of Hospital B Parent. Thus, treating the transformation of Hospital B Parent into the new Parent organization as the creation of a new non-profit entity exempt under 802.40 appears to be consistent with various PNO informal interpretations, in particular Informal Staff Opinion 0907008 (James Ferkingstad, 7/20/2009).

We would like to discuss with you whether you agree with this analysis, and if you disagree, what facts are relevant in this situation to the applicability of the 802.40 exemption. If you are available to talk, just let me know a convenient time by return e-mail. Thank you for your time and consideration.

Sincerely,

6/22/2010

6