

From: [Gillis, Diana L.](#)
To: [REDACTED]
Cc: [Walsh, Kathryn E.](#); [Carson, Timothy](#); [Shaffer, Kristin](#)
Subject: RE: Question about application of 802.40
Date: Thursday, July 21, 2016 1:19:00 PM

[REDACTED]

In your hypothetical, health care systems A and B are affiliating and creating a Newco non-profit. Newco will appoint the directors of A and B subsequent to the formation of Newco. At the time of formation, A will appoint 2/3 of Newco's board, and B will appoint 1/3, therefore, A will control Newco. Because A will control Newco at the time of formation, the transaction is reportable as an acquisition by A of all of the assets of B (801.2(f)(3)). Because Newco's board is self-perpetuating going forward, it will be its own UPE for subsequent transactions.

This is consistent with interpretation 0607026, which you identified, because there the Newco, at the time of formation, would not be controlled by any entity.

Let me know if you have any questions.

-Diana

From: [REDACTED]
Sent: Wednesday, July 20, 2016 3:29 PM
To: Gillis, Diana L.
Subject: RE: Question about application of 802.40

Yes, the Newco Board of Directors will have the power to appoint all the directors of both health systems.

Thanks.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Gillis, Diana L. [<mailto:dgillis@ftc.gov>]

Sent: Wednesday, July 20, 2016 2:26 PM
To: [REDACTED]
Subject: RE: Question about application of 802.40

Thanks for following-up, [REDACTED]. I have been discussing this issue with my colleagues. When you say that Newco will be the sole member of each health system, you do mean that Newco will then have the authority to appoint a majority of the boards of the two health systems, correct?

From: [REDACTED]
Sent: Wednesday, July 20, 2016 2:52 PM
To: Gillis, Diana L.
Subject: Question about application of 802.40

Diana, thanks for talking with me this morning.

You will recall we talked about whether 802.40 applied to exempt a transaction whereby two non-profit health care systems affiliated to create a new "super" non-profit parent (Newco) to be the sole member of each health system. My question was what is the effect on reportability, if any, that *initially* one system would appoint 2/3ds of the Board of Directors of Newco and the other system 1/3d of the Board, but that after the initial terms the Board of Newco would be self-perpetuating and neither original health system would retain any right to appoint future Board members?

You tentatively thought that the fact that the Board would be self-perpetuating with no future rights to appoint in the original health systems would make this transaction non-reportable pursuant to 802.40, but were going to confirm this result and send me an email with your ultimate conclusion.

It occurred to me that it is entirely possible that I misspoke when I gave you my email address; hence this communication. (This email is not an impatient nudge for an answer, rather it is *solely* to make sure you have my correct email address. Obviously, whenever you can get to this is fine.)

Thanks again for your help.

[REDACTED]