

Haynes, Lanea

From: Whitehead, Nora
Sent: Tuesday, March 21, 2017 10:45 AM
To: [REDACTED]
Cc: Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Carson, Timothy; Shaffer, Kristin; Storm, Evan
Subject: RE: 801.2(f)(3)

H [REDACTED],

Informal 1010002 describes a system in which Company appoints all twelve of Target's Board of Directors. It does not matter that Company appoints nine of the twelve from a pool recommended by Target's nominating committee, because Company has the final say. Conceivably, Company could force the nominating committee to go back to the drawing board repeatedly until Company gets the directors that it wants. We consider Company's right to appoint all twelve as unilateral, because once Company appoints a director, neither Target nor anyone else can block the appointment.

All this said, we recognize that the line between a consensus process (which does not give rise to a unilateral appointment right) and a process like the one described above can be blurry – these are fact-dependent inquiries. We encourage you to reach out with any questions you have on whether a party has a unilateral appointment right based on specific facts.

Nora Whitehead
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From: [REDACTED]
Sent: Sunday, March 19, 2017 6:20 PM
To: Walsh, Kathryn E.
Subject: 801.2(f)(3)

Kate,

I hope all is well.

I had a question about the change in position reflected in Informal Interpretation [1010002](#). I'm a little confused by the "even though it is only from a limited pool" note appended to the interpretation. The prior position (as recently as the December HSR webinar we did together) was that an acquiring person did not acquire control if it did not have the unilateral right to appoint 50% or more of the directors. In other words, if the bylaws required A to nominate members for its board that B then approved or designated, but B could not independently appoint board members of A without some action by A, B did not acquire control of A.

Is this no longer the position? Is the position now that even if B cannot unilaterally appoint – i.e., B approves A's nominations, but does not actually choose/nominate the director candidates – B controls A? Or is there something else going on here? Like I said, I didn't understand the note updating the interpretation. I'm trying to get a handle on this as it impacts reportability for several pending deals.

Thank you,

[REDACTED]

[REDACTED]