801.1 (b)
801.2
802.30

Verne, B. Michael

From: [redacted]
Sent: Wednesday, August 31, 2011 8:32 AM
To: Verne, B. Michael
Subject: RE: Interpretation of "other person"; Application of Intraperson Exemption

Different firm represented our client back then; not sure who had represented UPE-B. Fifteen years ago, I likely would have recommended a visit with FTC staff or an HSR filing due to the unique nature of the transaction and the parties' compliance expectations. The parties are a single entity from a *Copperweld* perspective so I assume they viewed the transaction as bi-lateral acquisitions that should be reported even if the governance model did not fit nicely under the regulations. If the answer is that an HSR should not have been filed 15 years ago but needs to be filed for the proposed transaction, can we get a credit for the amount of the filing fee paid back then on this filing? Of course, I jest; we believe the proposed transaction does not involve the acquisition of "another person" under 15 U.S.C. 15a(a) and is therefore not reportable in the first instance, making moot the question of whether an exemption applies.
[redacted]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Wednesday, August 31, 2011 7:57 AM
To: [redacted]
Subject: RE: Interpretation of "other person"; Application of Intraperson Exemption

I guess my next question is – why did they file 15 years ago if neither UPE-A or UPE-B received the unilateral right to designate the board of any of the entities involved?

From: [redacted]
Sent: Tuesday, August 30, 2011 3:40 PM
To: Verne, B. Michael
Subject: RE: Interpretation of "other person"; Application of Intraperson Exemption

Correct, post-transaction A or UPE-A will have the power to designate 100% of B's board. If relevant, a very strong argument can be made that the parties are a single entity for *Copperweld* purposes. No problem with the delay. I had assumed you were drying out home and office possessions. We appreciate your guidance. -cliff

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Tuesday, August 30, 2011 3:30 PM
To: [redacted]
Subject: RE: Interpretation of "other person"; Application of Intraperson Exemption

Sorry not to have gotten back to you sooner – things have been pretty crazy around here. Just to make sure I completely understand what is going on. The right to profits and assets upon dissolution is irrelevant in determining control of a NFP corporation. Currently A and UPE-B appoint all of B's board by consensus, so neither has the right to designate 50% of the board unilaterally. I assume that post-transaction A or UPE-A will have the right to designate 100% of B's board?

From: [redacted]
Sent: Monday, August 29, 2011 6:55 PM
To: Verne, B. Michael
Subject: FW: Interpretation of "other person"; Application of Intraperson Exemption

Mike,

The eighth sentence in the third paragraph should read: "The governing boards of A-Hospital and each of B-Hospitals, although technically appointed by A and UPE-B respectively to comply with certain bond covenants, must mirror B's governing board."

As originally written, my explanation suggested that the mirror boards were required by bond covenants which is not the case. The bond covenants require that A and UPE-B formally appoint the members of the governing boards of A-Hospital and each of B-Hospitals, respectively. The original integration agreement required the boards to mirror the board of B.

My apologies.

[redacted]

From: [redacted]
Sent: Monday, August 29, 2011 1:55 PM
To: 'mverne@ftc.gov'
Subject: Interpretation of "other person"; Application of Intraperson Exemption

Dear Mr. Verne,

We solicit your concurrence that the proposed transaction described below constitutes an intra-person transaction under 15 U.S.C. 18a(a) despite perhaps not technically fitting within the precise confines of 802.30(a). The proposed transaction otherwise exceeds the HSR filing thresholds.

Two health care systems, UPE-A and UPE-B, consolidated the operations of certain hospitals under collective governance and control over 15 years ago (after filing the requisite HSRs) and have operated as a single, integrated system ever since. The attached diagram describes the corporate structure of the resulting system. UPE-B now intends to divest its 50% interest in the system to a subsidiary of UPE-A.

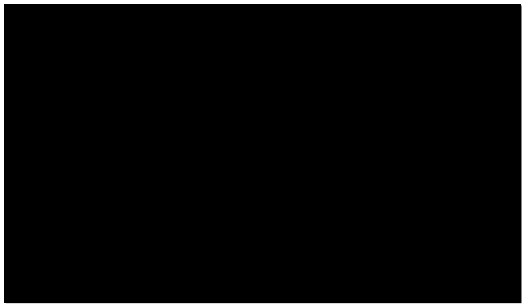
In the origin transaction, A acquired a 50% membership interest in non-profit corporation B and indirectly a 50% control interest in each of the non-profit B-Hospitals. Simultaneously, B acquired control of non-profit A-Hospital. A and UPE-B are each entitled to 50% of the profits of B and indirectly to 50% of the sum of the profits of A-Hospital and B-Hospitals. A and UPE-B are also each entitled to 50% of the assets in the event of dissolution. However, unlike many 50/50 governance models, the governing board of non-profit corporation B is appointed by consensus. Neither A nor UPE-B has the individual right to appoint anyone to B's governing board. Both A and UPE-B must agree to any individual appointed to B's board. The governing boards of A-Hospital and each of B-Hospitals, although technically appointed by A and UPE-B respectively, must mirror B's governing board to comply with certain bond covenants and state law requirements. Each of UPE-A and UPE-B filed their HSR Report Form as both an acquiring person and as an acquired person. The transaction was consummated after expiration of the statutory waiting period.

Now, over 15 years later, UPE-B intends to divest, and A intends to acquire, UPE-B's 50% membership interest in B, and its indirect control in B-Hospitals. The proposed transaction would be exempt pursuant to 802.30(a) if B was an unincorporated entity. A and UPE-B each control B as contemplated in 801.1(b)(1)(ii). However, because B is a non-profit corporation and because neither A nor UPE-B has the contractual power to designate 50% of the directors of B without the consensus of the other party, the transaction does not fit neatly within 801.1(b)(2) as an exact reading of 802.30(a) would seem to require. Nonetheless, we contend that UPE-B is not an "other person" as contemplated in 15 U.S.C. §18a(a) for purposes A's acquisition of UPE-B's 50% membership interest in B, and that the transaction would not therefore be reportable.

We request your concurrence that the proposed transaction as described is not reportable under the HSR Act. Thank you for your consideration. Please contact me if you have any questions or require additional information.

Best regards,

[redacted]



I have looked at everything possible to make this non-reportable and have run into a dead end. The bottom line is that A is going from not being able to unilaterally designate any of B's board members to being able to designate all of them. That clearly falls under §801.2(f)(3). I have also run this by my boss, Marian Bruno, who has come to the same conclusion. We also don't want to interpret §802.30 to exempt this. In fact, when we expanded §802.30 to cover control by means of holdings of non-corporate interests, we specifically excluded control by contractual right to designate directors.

This is a very unusual scenario. In most of the combinations of not-for-profit corporations I have seen, involving two equal members, each gets to designate 50% of the directors. If that had been the case 15 years ago, the current acquisition would still not be exempt under §802.30, but it would be non-reportable because §801.2(f)(3) would not apply since A would not "acquire control of an existing not-for-profit corporation" because it would already control B under §801.1(b)(2).

8/31/11