



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 30, 2023

ADVISORY OPINION 2023-02

Joseph M. Birkenstock, Esq.
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1090 Vermont Ave. N.W., Suite 750
Washington, DC 20005

Dear Mr. Birkenstock:

We are responding to your advisory opinion request on behalf of Humana Inc. (“Humana”) and its separate segregated fund, Humana, Inc. PAC (“Humana PAC”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the affiliation status of Humana PAC with KAH Hospice Company Inc. (“KAH Hospice”), and its separate segregated fund, KAH Hospice PAC.

The Commission concludes that Humana and KAH Hospice, and their respective separate segregated funds, are no longer affiliated.

Background

The facts presented in this advisory opinion are based on your letter received on February 17, 2023.

In August 2021, Humana acquired Kindred at Home, a combined home health and hospice company. At that time, Gentiva Health Services, Inc. (“Gentiva”), a Humana subsidiary, “was the principal holding company within Humana for both the home health business and the hospice business, operating through a number of subsidiaries and serving as the connected organization” for what was then Gentiva Health Services Inc. PAC (“Gentiva PAC”).¹ Both Humana and Gentiva amended the FEC Form 1, Statement of Organization for their respective separate segregated funds to list each other as affiliated entities.

At the time it acquired Kindred at Home, in 2021, Humana announced that it intended to maintain only a minority interest in Kindred at Home’s hospice business but would retain in full Kindred at Home’s home health business. Humana then reorganized Kindred at Home’s

¹ Advisory Opinion Request (“AOR”) at 001.

business, creating KAH Hospice and transferring to it the entities and assets of Kindred at Home's hospice business. On August 11, 2022, Humana sold a 60% controlling interest in KAH Hospice to a private equity firm Clayton, Dubilier & Rice ("CD&R").² The sale was accomplished via a limited partnership, Falcon Hospice, L.P., the general partner in which is a limited liability company, Falcon Hospice GP, LLC (the "LLC"), owned jointly by CD&R (60%) and Humana (40%). The LLC has "plenary authority over Falcon Hospice, L.P.,"³ which in turn exercises control over its subsidiaries, including, KAH Hospice.⁴ The LLC is governed by a seven-member Board of Directors ("Board"). Four of the Board members are appointed by CD&R, two by Humana and the seventh member is the CEO of KAH Hospice.⁵

Following Humana's acquisition of Kindred at Home and creation of KAH Hospice, certain members of the Kindred at Home management team and personnel aligned with hospice operations were realigned to and employed by KAH Hospice. While the KAH Hospice employees were under the Humana, Inc. umbrella between August 2021 and August 2022, no KAH Hospice personnel have an employment relationship with Kindred at Home or Humana post-spinoff.⁶

Since the spin off, KAH Hospice has become the connected organization for the former Gentiva PAC (now operating under its new name, KAH Hospice PAC).⁷ KAH Hospice PAC is managed and operated by its treasurer in cooperation with key business leaders within the restricted class⁸ of the committee's connected organization (KAH Hospice). Humana PAC is run by a PAC Board elected by Humana's restricted class. "Neither [Humana's nor KAH Hospice's] PAC operations (either overall or on a day-to-day basis) include any involvement by the other corporation or the other PAC."⁹

² CD&R has "no management or significant ownership overlap with Humana Inc." and "engag[es] in the KAH [Hospice] transaction solely as an arm's length investor and business partner." AOR002, n.1.

³ AOR002

⁴ *Id.*

⁵ *Id.*

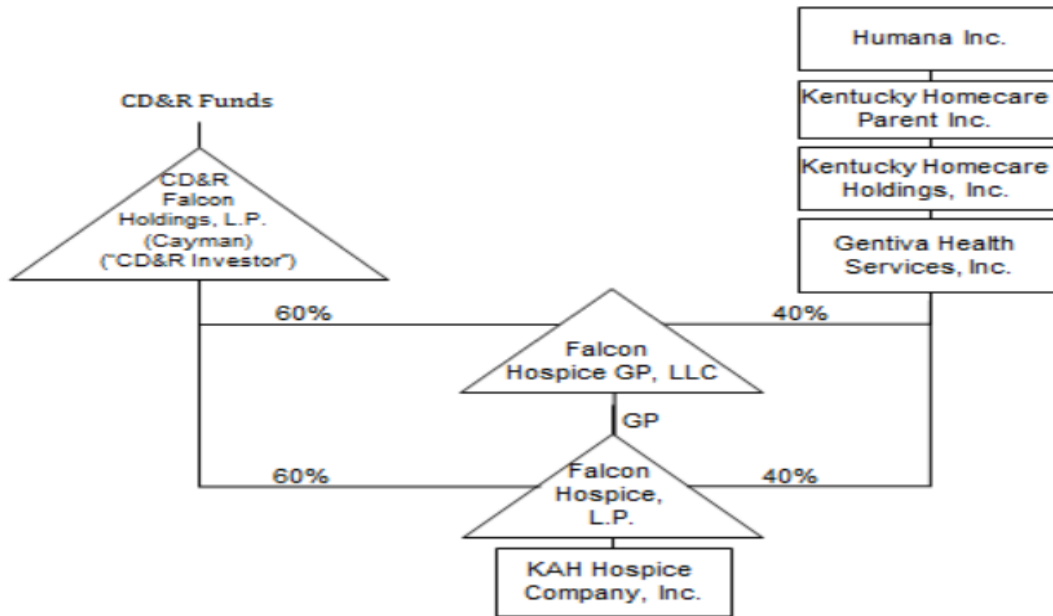
⁶ *See* AOR004.

⁷ *See* KAH Hospice PAC FEC Form 1, Statement of Organization, filed on August 10, 2022. <https://docquery.fec.gov/cgi-bin/forms/C00407080/1622810/>.

⁸ A corporation's restricted class is made up of its stockholders, executive and administrative personnel, and their families. 11 C.F.R. §§ 114.1(j), 114.5(g).

⁹ AOR004.

The following diagram illustrates the business connections between Humana Inc. and KAH Hospice Company, Inc.



The terms of the sale transaction provide that as long as Humana’s equity interest in KAH Hospice remains at least 50% of the amount it owned at closing (*i.e.* half of 40%) and amounts to at least 15% of the then-outstanding stock in KAH Hospice, it will retain a right of approval on certain actions including: 1) Any waiver or amendment to the Stockholders Agreement, charter or by-laws or similar constituent documents that (i) adversely and disproportionately affects Humana relative to CD&R or (ii) amends special rights expressly granted to Humana; 2) non-pro rata distributions, dividends, redemptions, or repurchases (other than ordinary course employee stock repurchases in connection with a termination of employment); 3) transactions with CD&R (or its affiliates) other than (i) ordinary course transactions between portfolio companies of CD&R and KAH Hospice on arm’s-length terms, or (ii) issuances of equity or equity-like securities of KAH Hospice with respect to which Humana has received an opportunity to participate pursuant to its preemptive rights; 4) approval of annual budget, provided that in the absence of approval, the budget will be 107.5% of the annual budget for the immediately preceding year; 5) hiring and firing, or material changes in compensation of the CEO of KAH Hospice; 6) incurrence of indebtedness if such debt would result in KAH Hospice’s debt being greater than 7.5x last twelve months of earnings before interest, taxes, depreciation, and amortization; 7) settling litigation for over \$35 million; or 8) authorizing or entering into these transactions.¹⁰

These rights are imposed by the Falcon Hospice GP LLC agreement, which disallows the general partner from taking these actions without the “Required Consents” of the Humana

¹⁰ See AOR005.

Member of the partnership.^{11,12} While Humana retains the right of approval over these actions, it may not initiate any of them. For example, Humana’s only authority over decision making employees is “the right to approve a change of the CEO, or of the CEO’s compensation, but it has no authority to fire, demote, remove, or otherwise exercise control over the CEO or any other KAH Hospice personnel.”¹³

Neither Humana nor KAH Hospice owns a controlling interest in the voting stock or securities of the other. Humana’s shareholder base will not overlap with that of KAH Hospice other than to the extent that Humana itself is the minority owner of KAH Hospice.

Humana and KAH Hospice will not share any officers or employees other than the two Humana executives who are appointed to the seven-member Board of KAH Hospice.

Further, while there is nothing in the sale agreements that “precludes Humana from providing addition[al] debt funding capital investment, or administrative support to KAH,”¹⁴ and while Humana holds a minority proportion (approximately 15%) of the overall debt syndicate that resulted from the sale, “there are no plans to provide additional debt or other capital funding to KAH Hospice, and no plans to provide direct or indirect administrative, fundraising, or other support to either KAH Hospice itself or to KAH Hospice PAC.”¹⁵

Additionally, the request explains that any continued business between Humana and KAH Hospice will “flow from the two companies conducting their business operations in the normal course.” For example, when the home health business identifies a patient who may be appropriate for transition to hospice, the decision of hospice agency is made by the patient and their independent primary care physician. If neither has a preference, the home health business will assist with identifying a hospice agency (leaving the ultimate decision to the patient and the patient’s independent physician). “The selection of a hospice agency is based on a multitude of factors, including the [] agency’s licensed coverage area and capacity, is made on a case-by-case basis at the patient level and is not tracked by the home health business at the corporate level.”¹⁶

Finally, the request contained a letter from Ronald C. Lazas, Jr., Treasurer of KAH Hospice PAC, stating that both KAH Hospice and KAH Hospice PAC “concur in the facts and analysis presented” in Humana’s request and “ask that the Commission conclude that Humana,

¹¹ AOR005 (emphasis in original).

¹² Section 3.9 of the LLC agreement for the General Partnership also generally allows CD&R to initial an Initial Public Offering of Falcon Hospice regardless of Humana’s consent if certain conditions have been met.

¹³ *Id.*

¹⁴ AOR006, n.7.

¹⁵ AOR006.

¹⁶ *Id.*

Inc. Political Action Committee and KAH Hospice Company Inc. PAC are no longer affiliated in accordance with the applicable law and regulation.”¹⁷

Question Presented

In light of the spinoff of KAH Hospice by Humana, are Humana PAC and KAH Hospice PAC now disaffiliated for purposes of the Act?

Legal Analysis

Yes, Humana and KAH Hospice, and their respective separate segregated funds, are now disaffiliated under the Act and Commission regulations.

Political committees, including separate segregated funds, are “affiliated” if they are established, financed, maintained, or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1)(ii). For purposes of the Act’s contribution limits, contributions made to or by affiliated political committees are considered to have been made to or by a single political committee. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1).

Commission regulations identify certain committees that are *per se* affiliated, such as those established, financed, maintained, or controlled by a single corporation and its subsidiaries. *See* 11 C.F.R. §§ 100.5(g)(3)(i), 110.3(a)(2)(i). The Commission has previously found that a parent-subsidiary relationship, and thus *per se* affiliation, is created when a parent company owns a majority interest in another organization.¹⁸ Consistent with this precedent, KAH Hospice is not *per se* affiliated with Humana because Humana does not own a majority interest in KAH Hospice.

In the absence of *per se* affiliation, the Commission examines “the relationship between organizations that sponsor committees, between the committees themselves, [and] between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated.” *See* 11 C.F.R. § 100.5(g)(4)(i). Commission regulations provide a non-exhaustive list of ten “circumstantial factors” to be considered “in the context of the overall relationship” in order to determine whether the respective entities are appropriately considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii).

¹⁷ AOR009.

¹⁸ *See* Advisory Opinion 2003-28 (Horizon Lines) (finding *per se* affiliation where corporation owned controlling interest in LLC); *see also* Advisory Opinion 2003-21 (Lehman Brothers Holdings) (finding that minority ownership interest in corporation does not create parent-subsidiary relationship).

The Commission considers the ten circumstantial factors in turn.

(A) Controlling Interest

This factor considers whether a sponsoring organization owns a controlling interest in the voting stock or securities of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(A), 110.3(a)(3)(ii)(A). You represent that “[n]either Humana nor KAH Hospice owns a controlling interest in the voting stock or securities of the other entity.”¹⁹

Accordingly, the absence of such ownership weighs in favor of concluding that Humana and KAH Hospice are not affiliated.

(B) Governance

This factor concerns whether a sponsoring organization has the authority or ability to direct or participate in the governance of the other sponsoring organization or its committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures. 11 C.F.R. §§ 100.5(g)(4)(ii)(B), 110.3(a)(3)(ii)(B).

Humana holds fewer than one-third of the seats on the Board of Directors governing KAH Hospice, and has only half the number of seats held by CD&R. Of the seven Members of the Board of Directors, Humana appoints two while CD&R appoints four and the seventh Member is the CEO of KAH Hospice.²⁰ Further, as explained above, Humana has the right of approval on certain governing actions. The request explains that these are “typical ancillary rights” to provide basic protection of Humana’s minority ownership while not allowing Humana to exercise actual control.²¹ While these rights do indicate some influence in the governance of KAH Hospice, “nothing in the [sale] or elsewhere provides Humana with any ability to initiate any of those actions.”²²

Although Humana participates in the governance of KAH Hospice through its two representatives on the seven-member Board of Directors, Humana controls less than one-third of the entire Board membership. The Commission has previously concluded that it will not accord significant weight to such minority representation on the Board of Directors when analyzing affiliation under this factor.²³ Thus, while Humana participates in the governance of KAH Hospice through its Board representatives, Humana lacks the authority to direct the governance KAH Hospice or its separate segregated fund. Accordingly, this factor does not weigh heavily in

¹⁹ AOR004.

²⁰ AOR002.

²¹ See AOR006.

²² AOR005 (emphasis in original).

²³ See, e.g., Advisory Opinion 2016-02 (Enable) at 7 (concluding that representation amounting to one-quarter control of the board of directors does not “weigh heavily” under the governance factor).

the Commission's analysis.

(C) Hiring Authority

This factor concerns whether a sponsoring organization has the authority or ability to hire, appoint, demote, or otherwise control the officers or other decision-making employees of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(C), 110.3(a)(3)(ii)(C). The Commission previously concluded that controlling only a minority interest on the Board of Directors indicated that the sponsoring organization lacked the authority to take hiring actions on its own and thus this factor weighed against affiliation.²⁴ Here, although Humana holds the right of approval over certain hiring actions with respect to the CEO of KAH Hospice, "it has no authority to fire, demote, remove or otherwise exercise control over the CEO or any other KAH Hospice personnel."²⁵ Accordingly, this factor weighs against affiliation.

(D) Common Membership

Humana and KAH Hospice are not labor organizations, membership organizations, cooperatives, or trade associations. Accordingly, this factor does not apply.²⁶

(E) Common Officers or Employees

Factor (E) considers whether sponsoring organizations have common or overlapping officers or employees, indicating a formal or ongoing relationship between the organizations. 11 C.F.R. §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E). Where two organizations have no common officers or employees, this factor weighs against affiliation.²⁷

Aside from the two Humana executives who serve on the Board of Directors governing KAH Hospice, no current KAH Hospice officers or employees have employment relationships with either Kindred at Home or Humana. Accordingly, this factor weighs against affiliation.

(F) Former Officers or Employees

Factor (F) concerns whether a sponsoring organization has any members, officers, or employees who previously were members, officers, or employees of the other sponsoring organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11 C.F.R. §§ 100.5(g)(4)(ii)(F), 110.3(a)(3)(ii)(F).

²⁴ See Advisory Opinion 2016-02 (Enable) at 7; Advisory Opinion 2014-11 (HCSC) at 5.

²⁵ AOR005.

²⁶ See Advisory Opinion 2016-02 (Enable) at 7-8; Advisory Opinion 2014-18 (Rayonier Advanced Materials) ("Rayonier") at 7.

²⁷ See, e.g., Advisory Opinion 2016-02 (Enable) at 6.

Although retaining former employees may in some circumstances indicate an ongoing relationship,²⁸ the Commission has placed less emphasis on this factor when analyzing affiliation of entities that have undergone significant business restructuring. The Commission has determined that a company following a spin-off was not affiliated with its former parent company where more than 90% of the spun-off company's employees were former employees of the parent company.²⁹ The Commission reasoned that this did not indicate a formal or ongoing relationship because such employment was a "necessary consequence of a parent company spinning off a business unit."³⁰

Here, similarly, the former Kindred at Home employees now employed by KAH Hospice were under the Humana umbrella for approximately one year. These employees appear to be "no more than the necessary consequence of"³¹ having restructured Kindred at Home to create KAH Hospice as a new business entity and then spun that entity off. Under these circumstances, this factor does not weigh in favor of affiliation.

(G - H) Providing Funds or Goods and Arranging for the Provision of Funds or Goods

Factor (G) considers whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to the other sponsoring organization or committee. 11 C.F.R. §§ 100.5(g)(4)(ii)(G), 110.3(a)(3)(ii)(G). When evaluating this factor, the Commission has looked at whether the entities "fund or otherwise support" each other's SSF.³² Factor (H) concerns whether a sponsoring organization causes or arranges for funds or goods to be provided to the other sponsoring organization in a significant amount or on an ongoing basis. 11 C.F.R. §§ 100.5(g)(4)(ii)(H), 110.3(a)(3)(ii)(H).

While Humana does hold a minority proportion (15%) of KAH Hospice's overall debt syndicate resulting from the sale (meaning Humana has no ability to control that syndicate), there are no plans for it to provide additional debt or other capital funding to KAH Hospice, and no plans to provide direct or indirect administrative, fundraising, or other support to KAH Hospice itself or to KAH Hospice PAC.

Accordingly, because Humana holds only a small portion of KAH Hospice's debt syndicate and does not plan to fund KAH Hospice or its PAC on an ongoing basis, these factors weigh against finding that the entities are affiliated.

²⁸ See, e.g., Advisory Opinion 2004-23 (U.S. Oncology Good Government Committee) at 7.

²⁹ See Advisory Opinion 2014-18 (Rayonier) at 7; see also, Advisory Opinion 2016-02 (Enable) at 8.

³⁰ Advisory Opinion 2014-18 (Rayonier) at 7.

³¹ Advisory Opinion 2016-02 (Enable) at 8.

³² Advisory Opinion 2012-21 (Primerica) at 9, 11 (noting entity's lack of support for other entity's SSF as indicating disaffiliation under factor (G)).

(I) Formation

This factor involves whether a sponsoring organization or committee or its agent had an active or significant role in the formation of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I).

As described above, Humana played a significant role in the formation of KAH Hospice by separating it from its subsidiary Kindred at Home and spinning it off. However, “when the formation results from a completed business restructuring . . . the Commission has found that this factor does not require” a finding of affiliation between the entities.³³ The spinoff of KAH Hospice resulted in nearly complete separation of corporate leadership (the only overlap being the two Humana executives appointed to the Board of Directors governing KAH Hospice) and complete separation of personnel (“no KAH Hospice personnel have an employment relationship with Kindred at Home (or Humana) post spin off”). Given the complete separation of business operations following the restructuring, Humana’s role in the formation of KAH Hospice does not require a finding that the entities are affiliated.

(J) Contribution Patterns

This factor pertains to whether the sponsoring organizations’ SSFs have similar patterns of contributions or contributors that would indicate a formal or ongoing relationship between the sponsoring organizations or committees. 11 C.F.R. §§ 100.5(g)(4)(ii)(J), 110.3(a)(3)(ii)(J).

After the August 2022 restructuring and through the end of 2022, KAH Hospice PAC has not reported making any contributions to federal candidates or other political committees. Similarly, KAH Hospice PAC has not reported receiving any contributions from KAH Hospice employees over the same period.³⁴

The request addresses this factor by noting that both Humana and KAH Hospice make their own decisions about contributions and expenditures of their separate segregated funds. Neither company participates in the decision-making or day-to-day operations of the other’s SSF and “any similar pattern of contributions between the two would result only from their common participation in the health care industry.”³⁵

Further, the lack of overlap in their executive and administrative personnel (aside from the two Humana executives on the Board governing KAH Hospice), leaves “the vast majority of

³³ Advisory Opinion 2016-02 (Enable) at 9; *see also* Advisory Opinion 2012-21 (Primerica) at 11 (concluding that corporation’s involvement in formation of a spun off company resulting in “nearly complete separation of corporate leadership and personnel” did not require finding affiliation); Advisory Opinion 2007-12 (Tyco International Management Company Employee PAC) at 7 (same).

³⁴ *See* KAH Hospice PAC FEC filings: October Quarterly, Pre-General Election, Post-General Election, and Year-End at <https://www.fec.gov/data/committee/C00407080/?tab=filings>

³⁵ AOR004.

their restricted classes completely separate, all but categorically eliminating the prospect of any similar pattern of contributors” to the two PACs.³⁶

Accordingly, because presently the sponsoring organizations’ SSFs do not appear to have similar patterns of contributions or contributors, this factor indicates a lack of affiliation.

Context of the Overall Relationship Between the Entities

In considering the foregoing circumstantial factors, the Commission examines the “context of the overall relationship” between the entities to determine whether they are properly considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii).

In this instance, the only factors weighing in favor of affiliation are the facts that Humana participates on the Board of Directors governing KAH Hospice through its two Board representatives, and that it holds a right of refusal over certain Board actions in order to protect its minority interest. But given that Humana holds less than one-third of the Board seats and that the right of refusal is mitigated by the inability of Humana to direct or control any of these actions, these facts do not weigh heavily. That neither Humana nor KAH Hospice owns a controlling interest in the other, and do not have common officers or employees, weighs against finding affiliation. Further, the fact that Humana has no plans to fund KAH Hospice or its PAC on an ongoing basis also weighs against finding affiliation between the entities.

Further, it appears that any ongoing business between Humana and KAH Hospice will occur in the normal course of operations between a home health care agency and a hospice agency. The request states that while the home health agency may assist in finding appropriate hospice agencies for a patient, the decision rests entirely with the patient and the patient’s independent physician, not with the home health agency.

Finally, by letter appended to the request, KAH Hospice and KAH Hospice PAC “concur in the facts and analysis presented to the FEC in Humana’s present request, and likewise ask that the Commission conclude that Humana, Inc. Political Action Committee and KAH Hospice Company, Inc. PAC are no longer affiliated in accordance with the applicable law and regulation[s].”³⁷

Accordingly, on balance, after considering the circumstantial factors in the context of the overall relationship between the entities involved, the Commission concludes that Humana and KAH Hospice and their SSF’s are no longer affiliated.

³⁶ AOR004-5.

³⁷ *See* AOR009. Letter from Ronald C. Lazas, Jr., Treasurer, KAH Hospice Company, Inc. PAC.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request.³⁸ The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.³⁹ Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in black ink that reads "Sean J. Cooksey". The signature is written in a cursive, flowing style.

Sean J. Cooksey
Vice Chairman

³⁸ See 52 U.S.C. § 30108.

³⁹ See *id.* § 30108(c)(1)(B).