



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 15, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-22

Lyn Utrecht
Manatt, Phelps & Phillips
1200 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036

Dear Ms. Utrecht:

This responds to your letter dated September 17, 1990, requesting an advisory opinion on behalf of the Blue Cross and Blue Shield Association ("BCBSA") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a payroll deduction program to collect contributions for BCBSA's separate, segregated fund from the executive and administrative personnel of licensed Blue Cross and Blue Shield Plans.

You state that BCBSA is a nonprofit, non-stock corporation formed in 1982 under the laws of the State of Illinois upon the merger of the Blue Cross Association and the Blue Shield Association. BCBSA is the national association that licenses Blue Cross and Blue Shield Plans throughout the United States. Plans are organized under and regulated by state insurance commissioners pursuant to special state enabling legislation governing the operations of nonprofit plans for the prepayment of health care services. Each Plan is organized locally. BCBSA licenses Plans to use Blue Cross and Blue Shield names and symbols (the "service marks") in exclusive service areas. The Plans contract with local hospitals, physicians, and other health care providers to provide pre-paid health care services to subscribers.

The Blue Cross and Blue Shield service marks may not be used unless BCBSA grants the right pursuant to a Licensing Agreement with BCBSA or a sublicense with a licensee that has been specifically approved by BCBSA. The license to use the service marks is contingent upon compliance with licensing and membership standards established and monitored by BCBSA.

BCBSA is comprised of three types of Member Plans. These are Regular Members, which are plans inside the United States; Associate Members, which are plans located outside the United States; and Affiliate Members. Currently, there are 74 Regular Members, 9 Associate Members, and 3 Affiliate Members. Your request relates only to Regular Member Plans. These plans have full voting and governance rights. These include the right to vote in the election of Directors, the setting of dues, the approval of BCBSA's annual budget, and the amendment of the By-laws, and the right to have designated representatives sit on the Board. The Associate Member Plans have fewer voting and governance rights than the Regular Members, and the Affiliate Members have no voting rights. Each type of member plan has a dues obligation, and monthly Regular Member dues are based upon a formula approved by the vote of such members. In addition to dues, special assessments may be levied on Member Plans to fund certain projects or activities.

The Board of Directors, which is the governing body of BCBSA, consists of 34 directors. This includes the Association President, who serves ex-officio, and three directors from each of the eleven geographic districts within which the Regular Member Plans operate. Two seats from each district are set aside for Regular Member Plan CEOs with the third seat to be occupied by a Plan CEO or Plan board member. Under the Bylaws going into effect on January 1, 1991, the Board shall consist of the Association President and the CEOs of the Member Plans. Under the new Bylaws, the Executive Committee which has the powers of the Board when the Board is not in session and which is presently made up of nine Directors, will be composed of two Directors from each of twelve districts elected by the Regular Members.

BCBSA has established strict membership standards, thus giving it a certain amount of control over the operations of Member Plans. In order to become a Regular Member and remain as a Full Member, a Plan must be determined to be in substantial compliance with all ten standards. If a Plan is not in compliance with any one of the ten, its membership is conditional and BCBSA requires the Plan to develop a "rehabilitation plan" to be monitored by BCBSA. A Plan will lose its membership and license if it does not meet any one of the first seven standards, or if it fails to meet the terms of its conditional membership within a certain period of time.

These standards presently include the following:

- (1) A Plan shall be organized on a not-for-profit basis.
- (2) A Plan shall maintain a governing board composed of a majority of persons other than providers of health care services, who shall be known as public members.
- (3) A Plan shall be operated in a manner responsive to marketplace demands and shall maintain financial resources adequate to protect its subscribers' interests. BCBSA monitors compliance through the receipt of numerous reports and statements from the Plans (presently fourteen types of reports or statements), entailing strict reporting requirements as to content and timeliness, and containing data as to enrollment, performance of services, and financial situation.
- (4) A Plan shall effectively and efficiently participate in each national program adopted by the Plans. These are inter-plan programs pertaining to such matters as reciprocal benefits, inter-plan transfers, and uniform I.D. cards.

(5) A Plan's activity shall be directed principally to health care financing and delivery.

The revised membership standards to go into effect on January 1, 1991, have been consolidated into seven standards. Most of the 10 former standards have been retained.

Presently, the decisions as to admission of a Plan as a Regular Member and retention of a Plan as a Regular Member reside ultimately with the BCBSA Board, which is BCBSA's governing body. Plans are admitted upon the approval of a majority of the Board. Membership may be revoked or conditioned by a vote of two-thirds of the entire Board for failure to comply with the Bylaws or the membership standards. The new Bylaws to take effect on January 1, 1991, will provide that Regular Membership may be made conditional by a vote of two-thirds of the entire Board but revocation of membership will require the vote of three-fourths of the Regular Members. Each Plan's right to maintain its membership status must be renewed each year. According to the Bylaws, BCBSA "may make special studies of performance, enrollment, finances, utilization experience and other subjects and may audit, on its own initiative, all records of a Regular Member and make recommendations with respect thereto, first to the member's chief executive officer, and then to the governing board of the Member." If a failure to follow such recommendations results in non-compliance with membership standards, the Plan's membership and license may be revoked.

BCBSA also provides centralized support and coordination for the Member Plans. This includes representation of the Blue Cross and Blue Shield system's interests in Congress and the courts. You state that BCBSA provides "centralized liaison" with national organizations or entities that affect Plans such as the Federal government and business, labor, and health organizations, and serves as "Plan liaison" to organizations such as the National Association of State Insurance Commissioners. You state that BCBSA provides research and actuarial services to the Plans and serves "a central informational function" for the Plans, i.e., in coordinating public education and professional relations programs, maintaining computerized telecommunications linking the Plans, providing market assistance and product development services, and transmitting claims between Plans.

You note that BCBSA provides centralized management of various Plan employee benefit programs such as the National Retirement Program, the Long Term Disability Program, and the Group Life Insurance Program. Under power of attorney from the Plans, BCBSA contracts with the Office of Personnel Management on behalf of the Plans to provide the Service Benefit Plan for Federal employees. It is also the prime contractor with the Health Care Finance Administration, providing administrative services and other support with respect to Parts A and B of the Medicare Program. You state that these activities and contractual relationships result in an extensive flow of funds between Plans and BCBSA.

You also state that the Blue Cross and Blue Shield system appears to its subscribers and operates, insofar as they are concerned, "as a single corporate entity." You note that subscribers moving from one Plan area to another may transfer to the new local Plan without interrupting their coverage, and subscribers who incur a medical need outside their Plan area receive

treatment through the local Plan where their needs arise. These claims are processed through BCBSA without additional burden to the subscriber.

BCBSA has a separate segregated fund, known as CarePAC, registered with the Commission.^{1/} Eleven Member Plans have Federal political committees as well. Some Plans also have political committees organized to operate at the state and local levels. You state that, presently, each Plan political committee is considered and treated as affiliated with the other committees.

Based on the information presented, you assert that BCBSA is more than merely a membership organization comprised of Member Plans. You maintain that the Regular Member Plans are more akin to licensees of BCBSA or corporate subsidiaries, affiliates, or local units of BCBSA, thus enabling BCBSA to expand its solicitable class to the executive and administrative personnel of the Regular Member Plans. You wish to know whether the Commission concurs and considers those personnel to be solicitable by BCBSA. In the event that the Commission determines the Plans to be no more than members, you ask whether representatives of the Plans may be designated as collecting agents under 11 CFR 114.5(k) and 102.6(c)(2) and solicit contributions from the Plans' executive and administrative personnel and transfer such funds to CarePAC.

Under Commission regulations, an incorporated membership organization, or cooperative, or any corporation without capital stock, or a separate segregated fund established by such organization, may solicit contributions to the fund from its members and executive or administrative personnel, or their families. 11 CFR 114.7(a). These corporate organizations may not solicit contributions from their incorporated members, and no provision of the Act or regulations permits any such organization, other than a trade association, to solicit contributions from the executive or administrative personnel of its corporate members, merely because their corporate employer holds membership. 11 CFR 114.7(b). See 11 CFR 114.8(c) and Advisory Opinion 1990-18. Nevertheless, Commission regulations provide that a corporation may solicit contributions to its fund from the executive and administrative personnel, and the families thereof, of its subsidiaries, branches, divisions, and affiliates. 11 CFR 114.5(g)(1).

The Act and Commission regulations treat the committees established by the same corporation or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof as a single committee. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1)(ii). See 11 CFR 100.5(g)(2). The regulations clarify the term "local unit," stating that it may include, in appropriate cases, a franchisee, licensee, or state or regional association. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). The regulations also provide that, in the absence of certain automatically affiliated relationships, such as a parent corporation and its subsidiary, the Commission may examine specific factors in the context of the overall relationship between organizations to determine whether such factors are evidence of affiliation between organizations. 11 CFR 100.5(g)(4) and 114.5(g)(1).

Included in these factors are: (1) whether an organization has the authority or ability to direct or participate in the governance of another organization through provisions of constitutions, bylaws, contracts, or other rules, or through practices and procedures; (2) whether an organization has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decisionmaking employees or members of another organization; (3) whether an organization has

common or overlapping officers or employees with another organization which indicates a formal or ongoing relationship between the organizations; and (4) whether an organization had an active or significant role in the formation of another organization. 11 CFR 100.5(g)(4)(ii)(B), (C), (E), and (I). See 11 CFR 110.3(a)(3)(ii).^{2/}

The Regular Member Plans of BCBSA, through their ability to participate in the governance of BCBSA and regular payment of dues, would qualify as members under the criteria set out in case law and Commission advisory opinions. See Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 204 (1982) and Advisory Opinions 1990-18 and 1987-31. The Plans appear, however, to function as more than mere members of BCBSA, and BCBSA functions as more than just a membership organization. The Plans are incorporated organizations that must adhere to strict requirements as to their operations in order to qualify for and retain membership and thereby to retain the license granted by BCBSA to use the name and symbols of Blue Cross and Blue Shield.

In previous advisory opinions involving corporate franchisees and licensees, the Commission has found affiliation to exist on the basis of a corporation's control and direction over the business policies, practices, and procedures of an entity and the nature and extent of the entity's contractual obligations to the corporation. See Advisory Opinions 1988-46, 1985-31, 1979-38, 1978-61, and 1977-70. Compare Advisory Opinion 1985-7. It is difficult to compare directly the operations of a nationwide health insurance system with those considered in the cited opinions; the operations of restaurant franchisees, exclusive agencies of an insurance company, or beer wholesalers with territorial arrangements. Commission regulations cited above, however, provide a framework.

BCBSA exerts substantial control over the operations of the Member Plans by requiring adherence to all its membership standards and by subjecting the Member Plans to close scrutiny. From the materials submitted by you, it appears that the data reviewed by BCBSA in making its membership admittance and renewal decisions involve detailed information as to the performance and financial health of the individual Plans.

Although BCBSA does not select the individuals to run the Plans, BCBSA, through its membership standards, exerts control over the composition of the governing boards of the Plans. In addition, under the Bylaws to go into effect on January 1, 1991, there is an increased level of reciprocal control between BCBSA and the Plans as to the selection of decisionmakers in that the CEOs of all Member Plans will make up the Board of Directors of BCBSA, and the ultimate decision to revoke the membership of any one Plan will be in the hands of the Member Plans. The fact that the BCBSA Board is predominantly composed of Plan CEOs, and in the future will be composed entirely (with the exception of the BCBSA president) of the CEOs from each Plan, also denotes an overlap of officers indicating a formal and ongoing relationship. See Advisory Opinion 1983-46.

BCBSA also seems to have an active or significant role in the formation of the Member Plans. In order for the Member Plans to function as Blue Cross and/or Blue Shield Plans, under those names, the Plans must be admitted for membership and granted the license to operate as such by BCBSA.

You explain that, to its subscribers, the Blue Cross and Blue Shield system appears to operate as a single corporate entity in that subscribers receive uninterrupted coverage regardless of the geographic area of treatment. The centralized operations of the system further indicate that, in several respects, it functions as one entity. Examples of this include BCBSA's representation of the Plans as regards governmental, legal, and business matters, BCBSA's services supporting and providing linkage between Plans, BCBSA's management of national employee benefit programs, and BCBSA's participation in Federal programs.

Based on the information presented by you, the Commission concludes that the Regular Member Plans of BCBSA are affiliates of BCBSA, functioning in effect as local units of BCBSA. BCBSA and CarePAC may, therefore, solicit the executive and administrative personnel of the Regular Member Plans for voluntary contributions to CarePAC. Furthermore, because of the affiliate status of the Plans, BCBSA may establish a payroll deduction system to collect voluntary contributions from the described personnel. 11 CFR 114.5(k).

Your request also poses an alternative question if the Commission were to conclude that CarePAC could not lawfully solicit contributions from the executive and administrative personnel of Regular Member Plans of BCBSA. You ask whether such Plans would nevertheless be permitted to solicit and collect contributions for CarePAC pursuant to the collecting agent rules in Commission regulations at 11 CFR 102.6. The Commission notes for your information that, to qualify as a collecting agent, an entity must either fit within the class of related organizations described in 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii), or be an affiliated committee of the separate segregated fund in question. 11 CFR 102.6(b)(1). Moreover, Commission regulations restrict contribution solicitations made by collecting agents to only those persons who are within the solicitable class of the connected organization, and its separate segregated fund, on whose behalf the collecting agent is engaged in fundraising activity. 11 CFR 102.6(c)(2). Thus, the collecting agent regulations do not extend the ability of CarePAC to solicit and receive contributions beyond that provided for in 11 CFR 114.5.

The Commission also notes from materials included with your request that Regular Member Plans may possibly own or control corporations or other entities, which you have not indicated are specifically part of the Plans. This opinion does not reach any issues as to the ability of CarePAC or BCBSA to solicit any personnel who are employed by or associated with those entities. You have not expressly presented any questions regarding them, and you have not provided a complete description of the relevant facts. 11 CFR 112.1(b) and (c).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott

Chairman for the Federal Election Commission

Enclosures (AOs 1990-18, 1988-46, 1987-31, 1985-31, 1985-7, 1983-46, 1979-38, 1978-61, and 1977-70)

1/ The full name of the committee is CarePAC, the Blue Cross and Blue Shield Association Political Action Committee.

2/ Commission regulations at 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii) list ten such factors but indicate that this list is not exhaustive.