



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2002-12

Brady C. Williamson
Mike B. Wittenwyler
LaFollette Godfrey & Kahn
One East Main Street
Post Office Box 2719
Madison, WI 53701-2719

Dear Mr. Williamson and Mr. Wittenwyler:

This responds to your letters dated January 31, July 24, September 3, and October 18, 2002, requesting an advisory opinion on behalf of American Medical Security, Inc. ("AMS") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the relationship of American Medical Security, Inc. PAC ("AMS PAC") and the Blue Cross & Blue Shield United of Wisconsin Political Action Committee ("BCBS PAC").

QUESTION PRESENTED

The question posed in your request for an advisory opinion is whether the present relationships between Cobalt Corporation/Blue Cross Blue Shield United of Wisconsin and AMS, and between BCBS PAC and AMS PAC, are such as to permit BCBS PAC and AMS PAC to no longer be deemed affiliated under the Act and Commission regulations. To answer the question of whether, in light of corporate restructuring undertaken over the past six years, AMS PAC and BCBS PAC may be considered disaffiliated, it is necessary: (1) to review the law and Commission regulations regarding affiliation; (2) to examine the history of the corporate entities involved; (3) to analyze, in particular, the relationship of AMS and BCBS as it has evolved since 1996 when BCBS PAC and AMS PAC first reported each other's connected organization as their own connected organizations; and (4) to apply the law and regulations to the present relationships between AMS and BCBS and between their separate segregated funds.

BCBS PAC, the separate segregated fund of Blue Cross Blue Shield United of Wisconsin ("BCBS"), registered with the Commission on September 8, 1980. AMS PAC, the separate

segregated fund of American Medical Security, Inc. registered with the Commission on August 30, 1993. In 1996, following certain corporate restructuring described below, AMS PAC and BCBS PAC filed amended Statements of Organization with the Commission in which each listed the other's connected organization as its own connected organization, thus becoming affiliated committees pursuant to 11 CFR 100.5(g).

Since 1996, a series of additional corporate restructuring plans have been implemented, that, together with related changes in stock ownership, have resulted in significant shifts in the relationships of the subject corporations and their separate segregated funds. Indeed, there have been further changes in stock ownership, and thus in the level of BCBS ownership of AMS's parent corporation, American Medical Security Group, Inc. ("AMSG") since the request for an advisory opinion was submitted on January 31, 2002.

As is discussed more fully below, the Commission concludes that BCBS and AMS and their respective separate segregated funds, BCBS PAC and AMS PAC, are no longer affiliated for purposes of the Act.

BACKGROUND

The factual background to your request encompasses several corporate entities, a number of corporate mergers and restructurings, stock sales resulting in varying levels of ownership of one company by another, and consequent shifts in the levels of financing, maintenance and control that determine whether corporate entities and their respective separate segregated funds are and/or remain affiliated. The following is an outline of these relationships over time, beginning in 1988.

A. Corporate Restructuring - 1988-2001

As of 1988, BCBS, a Wisconsin corporation, was the sole owner of United Wisconsin Service ("UWS"). That year, UWS and American Medical Security, Inc. entered into a joint venture agreement whereby the latter company was to "market and administer the health insurance products underwritten by UWS's insurance company subsidiaries." Pursuant to the joint venture, UWS acquired a 12% equity interest in American Medical Security, Inc. Between 1988 and 1996, BCBS's ownership interest in UWS declined from 100% to 38% as a result of the joint venture agreement and of public stock offerings.

In 1995, American Medical Security, Inc. was re-named American Medical Security Group, Inc. ("AMS-Old"), while its wholly-owned subsidiary, American Medical Security of Green Bay, Inc. became American Medical Security, Inc. ("AMS-New" and hereinafter "AMS"). AMS emerged from this restructuring as the connected organization of AMS PAC. Also as a result of the restructuring, UWS directly owned 12% of AMS-Old and indirectly, through AMS-Old, owned 12% of AMS. In 1996 UWS acquired the remaining 88% of AMS-Old, resulting in the merger of AMS-Old into UWS and UWS's becoming the parent company of AMS. BCBS at this point owned 38% of UWS. As stated above, in 1996, AMS PAC and BCBS PAC filed amended Statements of Organization with the Commission listing each other's connected organization as their own connected organizations.

In 1998 UWS placed all of its managed care and specialty products businesses into a new subsidiary and spun it off by distributing 100% of shares in the subsidiary to UWS stockholders. The subsidiary, "UWS-New," became United Wisconsin Services, Inc., while UWS changed its name to American Medical Security Group ("AMSG"). AMSG retained 100% ownership of AMS through American Medical Security Holdings, Inc., a wholly-owned subsidiary holding company that had been created in 1996 by UWS.

You have stated that, prior to the spinoff of United Wisconsin Service, Inc./UWS-New in 1998, the chairman and CEO of AMSG, Samuel V. Miller, served as the executive vice president of UWS and also as "an officer and director of various AMS entities." However, after the spinoff, Mr. Miller was neither an officer of United Wisconsin Service, Inc./UWS-New (now Cobalt Corporation) nor an officer of any other BCBS entity, nor did he hold any other position with such entities. You have also stated that there were seven other individuals who served both UWS and AMS as employees, officers or directors prior to the spinoff, but that they "resigned their respective positions with the AMS entities on September 25, 1998." Since the spinoff, three other individuals who served as AMSG directors also served as BCBS entity directors, but none were in office later than March 2001.

B. Corporate Restructuring – 2001-2002

In March 2001, BCBS was converted into a stock insurance corporation and became a wholly owned subsidiary of United Wisconsin Services, Inc./UWS-New, the spun-off company, which, in turn, changed its name to Cobalt Corporation ("Cobalt"). As of January, 2002, BCBS was still a wholly-owned subsidiary of Cobalt; Cobalt through BCBS owned 45% of AMSG; and AMSG owned 100% of AMS through American Medical Security Holdings, Inc.

Subsequent to your January 31, 2002 letter, there have been additional changes in corporate ownership. On March 19, 2002, AMSG repurchased 1,400,000 of its stock shares from BCBS, thereby reducing BCBS's ownership share in AMSG to approximately 39% from the previous 45%. Later, on June 4, 2002, BCBS sold an additional 3,001,500 AMSG shares, further reducing its ownership interest to approximately 15.1%. More recently, on September 11, 2002, BSBS filed a Form 144 with the U.S. Securities and Exchange Commission indicating its intention to sell further shares of AMSG stock, and as of October 16, 2002, has reduced its ownership interest to 12.3%. You have stated that "there has been no ownership of preferred stock or any other class of stock" in one of the subject entities by the other, just the BCBS ownership of AMSG common stock described above.

C. Corporate Relationships - 2002

You have stated that Cobalt/BCBS's stock ownership interest in AMSG and certain reinsurance agreements are the only remaining relationships between "the BCBS group" and "the AMS group." You have also stated that there are no current overlaps of directors, officers and employees between these two groups. The Stock Purchase Agreement among AMSG, Cobalt and BCBS that was signed on March 22, 2002, and under which the BCBS stock sales were undertaken during the first half of 2002, does include a provision whereby Cobalt/BCBS may

designate a nominee to the AMGS board of directors so long as BCBS continues to hold at least 10% of outstanding and issued AMGS stock; however, you have explained that the BCBS nominee on the AMGS board, Kenneth L. Evason, “is *not* an officer, director or employee of Cobalt, BCBS or any other BCBS entities, and he is only one of 13 AMGS board members.” (Emphasis in original.) This one BCBS nominee, who was selected in March, 2002, “is obligated to resign effective immediately upon the date the BCBS’s ownership interest in AMGS is reduced to less than 10 percent.”

With regard to the possibility of a future increase in BCBS’s present 12.3% equity interest in AMGS, you have stated that no BCBS entity is guaranteed a specific amount of AMGS shares; that “BCBS, without the written consent of AMGS, cannot purchase or otherwise acquire any additional shares of AMGS . . . until July 31, 2008”; that AMGS does not pay dividends; and that “its dividend reinvestment and direct stock purchase plan has been terminated.” Given the restrictions on the purchase of AMGS common stock by BCBS, you have stated that “[t]he possibility of an increase in BCBS ownership is extremely unlikely.”

With regard to common shareholders, you have stated: “While it is likely that there continues to be some overlap of ownership by public investors, the overlap is difficult to identify because most shareholders hold their stock beneficially through brokerage firms. Based on the beneficial ownership tables published in Cobalt’s and AMGS’s 2002 proxy statements, however – which show ownership by officers, directors, and 5 percent shareholders – there is no overlap [of shareholders] greater than 5 percent.” In other words, as of the issuance of the Cobalt and AMGS proxy statements dated April 25, 2002 and April 26, 2002 respectively, no shared stockholder owned more than 5% of the common stock of either company.

One common shareholder named in the materials you have submitted is Thomas R. Hefty, who, as of April 26, 2002, owned 1.4% of the shares of Cobalt and 1.4% of the shares of AMGS. According to the Cobalt Proxy Statement dated April 26, 2002, Mr. Hefty is chairman of the board of directors and president and chief executive officer of Cobalt Corporation, as well as president of BCBS. As of April 26 he was also a director of AMGS; however, he continued to serve in this capacity only until June 4, 2002, when he resigned in compliance with the Stock Purchase Agreement.¹

With regard to Mr. Hefty’s ownership of stock in both companies that is reported in the proxy statements, you have noted that “a significant portion of his ownership is in the form of stock options.”² In response to a question, you recently stated that while Mr. Hefty has exercised

¹ According to the Form 8-K filed by AMGS with the Securities and Exchange Commission on June 4, 2002, Mr. Hefty served as a member of the board of directors of AMGS prior to the secondary offering of AMGS stock owned by BCBS. However, the Stock Purchase Agreement required that he resign from the AMGS board effective as of the date that BCBS’s ownership share in AMGS dropped below 20%. He resigned on June 4, 2002, the date of the sale of AMGS stock that reduced BCBS’s share to 15.1%.

² The AMGS Proxy Statement also cites five other individuals who, as of April 26, 2002, were officers or directors and stockholders of AMGS and also owners of Cobalt common stock. These individuals were Kenneth L. Evason (16,900 Cobalt shares), James C. Hickman (6,726 shares including 6,626 in stock options that could be exercised before May 31, 2002), William P. Johnson (8,626 shares), Eugene A. Menden (8,126 shares including 6,626 in stock options), and Samuel V. Miller, chairman of the board, president and chief executive officer of AMGS (200,019

some of his AMMSG stock options, he subsequently sold the stock. According to your statements, his ownership interest in AMMSG, as of October 18, 2002, is approximately .70%.

The materials which you have supplied in support of the advisory opinion request include the articles of incorporation and bylaws of the AMMSG, AMS, Cobalt and BCBS. You have stated that, with the exception of mid-term vacancies, AMMSG board members are nominated by the board of directors and elected by a plurality of votes cast by shares entitled to vote at a shareholders' meeting at which a quorum [a majority vote of outstanding shares] is present.³ Under these circumstances, it is highly unlikely that a 12.3% shareholder like Cobalt/BCBS could elect an additional board member on its own. According to the Restated Articles of Incorporation of AMMSG, a vote of 80% of the outstanding shares is required to remove and replace a company director. The votes of 75% of outstanding shares are required to amend the Articles. On the other hand, according to the AMMSG Bylaws, the vote of 10% of the outstanding shares is sufficient to call a shareholders meeting. The AMMSG Bylaws provide that any shareholder holding 5% of the shares may inspect and copy business records of the company.

In your initial letter you stated: "The AMS entities and the BCBS entities maintain separate offices, personnel, information systems, and other assets. Operations of the AMS entities and the BCBS entities are wholly separate, and there is no cross-subsidization or funding of any sponsoring organization or committee." In response to a question regarding insurance arrangements, you explained that certain insurance policies underwritten by BCBS entities "were purchased by AMMSG on an arm's length basis after reviewing market-based quotes from competing insurers. There is no agreement or understanding that the purchase of these insurance policies by AMMSG will continue in the future." You have also stated that in 2001 payments by AMMSG to Cobalt for reinsurance totaled only \$362 and are expected to be zero in 2002.

With regard to the relationship of BCBS PAC and AMS PAC, you have stated that these committees share no personnel and that no officers, directors or employees of one have ever served in such capacities with the other. "The only relationship between the AMS PAC and the BCBS PAC is occasional communication between AMS governmental affairs employees and BCBS governmental affairs employees, on behalf of their respective PACs, to determine if any federal contribution limits to a particular candidate would be exceeded in making a particular PAC contribution by virtue of their current affiliate relationship." You have also stated: "Contribution and fundraising decisions by the AMS PAC and the BCBS PAC are made wholly independent of each other. There are no joint solicitations, and funds are not transferred between the two SSFs. There is no evidence of striking similar patterns of contributions to other committees" Earlier you stated: "Any administrative or fundraising expenses incurred by the AMS PAC are paid solely by the AMS PAC, or, as allowed by federal law, by AMS itself. The AMS PAC receives no funding for its administrative or fundraising expenses from a BCBS

shares including 198,019 in stock options. None of these individuals is listed in the Cobalt Proxy Statement as owning more than 5% of Cobalt common stock. Since Mr. Hefty's 562,163 shares as of April 26, 2002 constituted only 1.4% of the total outstanding, the percentages owned by each of these five individuals at that time would apparently have been considerably less, even assuming the exercise of their stock options.

³ Four directors are elected at each annual meeting. Each shareholder votes for each slot. In situations involving vacancies that occur on the board of directors during the course of a regular term, the board generally chooses the replacement.

entity. Similarly, no AMS entity pays for the administrative or fundraising expenses of the BCBS PAC.”

THE ACT AND COMMISSION REGULATIONS

The Act and Commission regulations provide that a corporation may make payments for the establishment or administration of, or the solicitation of contributions to, a separate segregated fund to be used for political purposes, without such payments resulting in a contribution to that fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). The Act and Commission regulations also provide that political committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. Contributions made to or by such political committees are to be considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5);⁴ 11 CFR 100.5(g)(2) and 110.3(a)(1). Commission regulations emphasize that committees established by a single corporation and its subsidiaries are per se affiliated. 11 CFR 110.3(a)(2)(i).

Commission regulations provide for an examination of various factors in the context of an overall relationship to determine whether one company established, finances, maintains or controls another, resulting in affiliation, and, hence, whether their respective separate segregated funds are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A) through (J), and 110.3(a)(3)(i) and (ii)(A) through (J). If political committees are affiliated, a single limit applies to the aggregate of contributions made by them and to the aggregate of contributions received by them.

The relevant factors to be considered with respect to corporations that are not membership organizations include: (A) whether one sponsoring organization owns a controlling interest in the voting stock or securities of another sponsoring organization; (B) whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, by-laws, contracts or other rules, or through formal or informal practices or procedures; (C) whether one sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers or other decision-making employees of another sponsoring organization or committee; (E) whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the organizations; (F) whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization, which indicates a formal or ongoing relationship or the creation of a successor entity; (G) and (H) whether a sponsoring organization or committee significantly, or on an ongoing basis, provides goods for or funds another organization or committee either directly or indirectly; (I) whether one sponsoring organization or committee had an active or significant role in the formation of

⁴ The Bipartisan Campaign Reform Act of 2002 (“BCRA”), which went into effect on November 6, 2002, does not change the analysis of affiliation between these separate segregated funds, or between the corporations sponsoring them, after the effective date of BCRA.

another sponsoring organization; and (J) whether the committees have similar patterns of contributions which indicate a formal or ongoing relationship between the committees. 11 CFR 100.5(g)(4)(ii)(A) through (C), and (E) through (J) and 11 CFR 110.3(a)(3)(ii)(A) through (C) and (E) through (J). This list of factors is not an exclusive one, and other factors may be considered. *See* Advisory Opinions 1995-36, 1996-42, 1997-25 and 2000-28.

LEGAL ANALYSIS

With limited exceptions, an application of the factors outlined above to the relationships of BCBS and AMS and of BCBS PAC and AMS PAC indicates that these companies and their separate segregated funds are not affiliated. Even the exceptions are not significant enough to warrant a differing conclusion.

Looking first at factor (A) or stock ownership, the information supplied in your original request and in subsequent correspondence indicates that the only remaining stock ownership by one sponsoring organization of the other is BCBS's current 12.3% equity interest in AMMSG, the parent company of AMS. Although such an equity interest gives BCBS some indirect ownership of AMS, it appears to be non-controlling given that: (1) it takes a plurality vote of a quorum at an annual meeting of the shareholders to elect directors to three-year terms; (2) the affirmative votes of 80% of the outstanding shares are needed to remove and replace a AMMSG director; and (3) the approval of 75% of outstanding shares is needed to amend the articles of incorporation. Cobalt/BCBS could, apparently, bring about a shareholders meeting or inspect and copy business records, but it could not on the strength of its share holdings alone control the decisions of the corporation.

It does appear that Mr. Hefty, the president and chief executive officer of Cobalt, continues to own some shares of both Cobalt and of AMMSG. According to the AMMSG Proxy Statement, of the 176,705 shares Mr. Hefty held in AMMSG as of April 26, 2002, 155,543 were in stock options that he had 60 days to exercise. According to the Cobalt Proxy Statement, of the 562,163 shares held by Mr. Hefty as of March 31, 2002, 528,579 were in stock options which he again could exercise within 60 days. You have, however, recently stated that while Mr. Hefty did exercise certain of his options with regard to AMMSG stock, he later sold those shares and is left with only a .70% ownership interest in that company. Such a small level of ownership interest would be far from controlling.

With regard to the right to participate in the governance of AMS or to affect the employment or control of the officers or decision-making employees of AMS, or other indications of an ongoing formal relationship, i.e., factors (B), (C), (E), and (F), BCBS's only apparent direct involvement in AMS policy is in the person of the single individual whom BCBS may appoint to the AMMSG thirteen-person board of directors so long as its stock ownership interest in AMMSG remains at 10 percent or above. The individual currently designated by BCBS to serve on the board of directors is not, however, an officer, director or employee of BCBS, of the now parent company of BCBS, Cobalt, or of another BCBS entity. The information supplied also asserts that there are no overlaps of personnel between the two separate segregated funds, and there is nothing in their reports to the Commission to indicate otherwise.

As for factors (G) and (H) or the funding of one entity by another, it appears that BCBS and AMS do not fund each other. Business arrangements that existed between the two companies following the spin-off of BCBS's parent company, now Cobalt, have been drastically reduced or eliminated. Further, as regards the relationship of BCBS PAC and AMS PAC, the information you have supplied to the Commission, and the committees' respective reports indicate no funding of one committee by the other. Neither committee has reported any transfers to or from an affiliated committee. Contributors itemized by AMS PAC in recent filings have been reported as managers and/or employees of AMS, not of BCBS.⁵

With regard to factor (I) or the formation of one entity by another, while BCBS, as the original parent company of the predecessors of AMS, could arguably be said to have had a role in establishing AMS, the drastic restructuring that has taken place over the past fourteen years, and particularly in 2001 and 2002, has rendered such early BCBS involvement in AMS affairs immaterial for purposes of present affiliation.

As for contributions to candidates and party committees or factor (J), both BCBS PAC and AMS PAC have made contributions, within their currently shared limitations, to Green for Congress and to Ryan for Congress during the 2001-2002 election cycle; however, as of June 30, 2002, each PAC had also made contributions during the same cycle to a number of candidates and party committees to which the other had not contributed.

Given the facts cited above, including the apparent separation of the two connected organizations in terms of ownership, control, and personnel, and the apparent separation of the two separate segregated funds in light of their financial independence, their separate staffs and contributors, and their largely differing patterns of contributions to candidates and committees, the Commission concludes that BCBS and AMS, and BCBS PAC and AMS PAC, are no longer affiliated for purposes of the Act.

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. *See* 2 U.S.C. 437f. 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 opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

David M. Mason,
Chairman

Enclosures (AOs 1995-36, 1996-42, 1997-25 and 2000-28)

⁵ With the exception of one \$500 contribution from a manager, all of the \$6,805 in contributions received by BCBS PAC in 2001 and the first half of 2002 have been unitemized.