



FEDERAL ELECTION COMMISSION
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ADVISORY OPINION 2014-11

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Dear Messrs. Gross and Ricciardelli:

We are responding to your advisory opinion request on behalf of Health Care Service Corporation Employees' Political Action Committee (the "Committee"), which is the separate segregated fund ("SSF") of Health Care Service Corporation ("HCSC"). The Committee asks the Commission to find that the SSF of HCSC is no longer affiliated with the SSF of Blue Cross and Blue Shield Association ("BCBSA") under the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the "Act" or "FECA"), and Commission regulations. According to the request, although HCSC and BCBSA historically have treated their SSFs as affiliated PACs for purposes of FECA, the business relationship between HCSC and BCBSA has "evolved over time," and HCSC no longer believes affiliation is required under the Act. Advisory Opinion Request at 1 (August 8, 2014) ("AOR").

The Commission concludes that the Committee is no longer affiliated with BCBSA's SSF.

Background

The facts presented in this advisory opinion are based on your letter and attachments received on August 11, 2014, supplemental information you submitted on September 17, 2014 ("AOR Supplement"), and public disclosure reports filed with the Commission.

HCSC is a nonstock health insurance corporation. Founded in 1936 and headquartered in Chicago, HCSC's purpose is to "promot[e], establish[], maintain[] and operat[e] a non-profit health care service plan." *HCSC Amended and Restated Articles of Incorporation*, Art. II. HCSC operates on a not-for-profit basis "for the mutual benefit of its [m]embers." *HCSC Amended and Restated By-Laws*, Art. IX, Sec. 9.1. The members of HCSC are its individual and group policyholders. *Id.*, Art III, Sec. 3.1. Neither HCSC nor BCBSA maintains equity

ownership in the stocks or securities of the other, and BCBSA played no role in the formation of HCSC.

HCSC is governed by a board of 13 directors. Each director is elected for a three-year term by plurality vote of HCSC's members at HCSC's annual meetings. The directors' terms are staggered, with approximately one-third expiring each year. *Id.*, Art. V, Sec. 5.1. Vacancies in the board are filled by member votes at the annual meeting or at a special meeting called for that purpose. *Id.*, Sec. 5.7. Directors can be removed from office only with the approval of at least two-thirds of HCSC's directors or a majority of all members. *Id.*, Sec. 5.8. Additionally, HCSC controls one position on BCBSA's board of directors (as does each other BCBSA licensee): HCSC's President and Chief Executive Officer is one of 38 members of BCBSA's board of directors, holds the same voting rights and privileges as each other member of the board, and maintains no special positions with respect to the BCBSA board. *See AOR at 7.*

HCSC's main line of business is health insurance marketed under licensing agreements between HCSC and BCBSA. These licensing agreements grant HCSC the exclusive rights to market and sell products under the Blue Cross and Blue Shield names and marks in five states. The Blue Cross and Blue Shield organizations of Illinois, Montana, New Mexico, Oklahoma, and Texas are all divisions of HCSC. *See id.* at 1-2. Although HCSC's use of the Blue Cross and Blue Shield names and marks is restricted to these five states, it can offer non-Blue Cross and Blue Shield branded health insurance products in any state, and HCSC now operates subsidiaries that sell such products in states across the country. *Id.* at 4. HCSC, for example, maintains a group of wholly owned subsidiaries organized under the Dearborn National Life Insurance Company brand name that are licensed to sell life and disability insurance products in all 50 states. *Id.* at 4, 12.

With respect to its sales of health insurance products marketed under the Blue Cross and Blue Shield marks, HCSC's exclusive license with BCBSA obligates HCSC to operate within certain parameters under the licensing agreements, BCBSA Membership Standards, and Guidelines to Administer Membership Standards (collectively, the "Agreements"). HCSC must display the BCBSA marks as prescribed and use best efforts in its licensed service areas to promote the value of the marks. In the five designated states, HCSC's operations under the BCBSA marks must provide at least 80% of the revenue that HCSC derives from health care plans, related services, and hospital services. Nationwide, moreover, HCSC's operations under the BCBSA marks must account for at least two-thirds of HCSC's health care and related revenue. *See id.* at 4-7. "The central purpose of these provisions is to protect the integrity and value of the Blue Cross and Blue Shield names and marks, rather than to control specific aspects of HCSC's business operations." *Id.* at 7.

Substantially all of HCSC's health insurance revenue derives from products offered under the BCBSA marks. *See id.* at 10. HCSC has recently diversified its business interests, however, by "expand[ing] its investment into non-BCBSA related activities." *Id.* at 1. Some of these other business activities involve non-health-care products, such as life insurance and other services, and some compete directly with other BCBSA licensees. *See id.* at 10. These business activities are also more geographically diverse than HCSC's BCBSA operations. *See id.*

In addition to mandating certain BCBSA-related revenue, the Agreements require HCSC, among other things, to provide responsive customer service; comply with certain BCBSA ethics policies; participate in national programs designed to provide portability of membership among BCBSA licensees; cooperate with BCBSA to address any problems should they arise; pay membership dues to and be a member in good standing of BCBSA; satisfy “certain capital and liquidity requirements”; and emphasize HCSC’s independence from BCBSA in third-party contracts and communications to the public. *See id.* at 4-7. Additionally, HCSC must not cause or allow any entity other than a BCBSA licensee to obtain control of HCSC or to acquire a substantial portion of its assets related to BCBSA licensed services. *See id.*

Finally, the Agreements place some eligibility requirements on the members of HCSC’s governing board of directors, *i.e.*, mandating that a majority of the directors be independent from HCSC and essentially unaffiliated with other health care providers. *See id.* at 5. BCBSA does not, however, play a role in selecting individual directors, and neither it nor any of its officers holds a seat on HCSC’s board. *See id.*

While the Agreements impose these restrictions and obligations on HCSC’s operations as a condition of using BCBSA’s marks, the request states that the Agreements “do not give BCBSA the ability to supervise, manage, or direct the operation of HCSC’s business.” *Id.* at 4. “In fact,” the request states, “the BCBSA amended Articles of Incorporation and By Laws require that member plans are and should be autonomous.” *Id.* Accordingly, BCBSA has no authority over the hiring, appointment, or demotion of HCSC officers or other decision-making employees.

The request states that BCBSA and HCSC have no common members, officers, or employees. A “limited” number of HCSC employees are former BCBSA employees, though only one of these employees occupies one of the 23 senior leadership positions at HCSC.

BCBSA provides limited administrative services to HCSC, such as serving as the master contractor for two large-scale contracts with the federal government and certain other clients. These transactions are governed by “agreements negotiated between the parties and the rates of compensation reflect their fair market value.” *Id.* at 8. BCBSA also offers to HCSC (and BCBSA’s other licensees) certain voluntary contractual arrangements with vendors such as AT&T, IBM, and United Airlines, but the request states that these services are “insubstantial.” *Id.* Further, while BCBSA hires lobbyists to represent the association as a whole, HCSC has its own Washington, D.C. office and employs its own lobbyists.

The request states that neither HCSC nor BCBSA solicits or receives contributions to its SSF from the other’s solicitable class. *See id.* at 9.

By letter, BCBSA has stated that it “takes no position on the facts and law contained [in the request] and consequently remains neutral as to the merits of this request.” *Id.*, Exhibit A.

Question Presented

Does the Committee continue to be affiliated with BCBSA’s SSF?

Legal Analysis and Conclusions

No, the Committee is no longer affiliated with BCBSA's SSF.

Political committees, including SSFs, 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) (formerly 2 U.S.C. § 441a(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) (formerly 2 U.S.C. § 441a(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). None of these criteria are met here.

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 SSFs are appropriately considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii); Advisory Opinion 1999-39 (WellPAC) at 2; *see also* Advisory Opinion 2009-18 (Penske); Advisory Opinion 2007-12 (Tyco).

In Advisory Opinion 1990-22 (BCBSA), the Commission concluded that BCBSA is affiliated with each of its licensed plans in the United States. Although HCSC is such a plan, the Committee's request states that on balance, because of changed circumstances, HCSC and BCBSA are no longer properly deemed affiliated. *Cf.* Advisory Opinion 1999-39 (WellPAC) (finding a BCBSA licensee's SSF to be no longer affiliated with BCBSA's SSF due to changed circumstances). The Commission considers these factors in turn.

(A) Controlling Interest

This factor asks 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). As neither HCSC nor BCBSA issues voting stock or securities, neither entity owns such stock or securities in the other. The absence of such ownership weighs against finding that the entities' SSFs are affiliated. *See* Advisory Opinion 2007-13 (United American Nurses) at 7.

(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 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).

BCBSA has no voting rights in HCSC, and neither BCBSA nor any of its other licensees maintains a seat on HCSC's board. Although the Agreements require that most of HCSC's directors meet certain general qualifications, BCBSA is not entitled to appoint any individuals to such positions.

As is true of every other BCBSA licensee, HCSC controls one position on BCBSA's board of directors. HCSC's President and CEO is one of 38 members of BCBSA's board of directors and holds the same voting rights and privileges as each other member of the board, maintaining no special positions with respect to the BCBSA board.

BCBSA's complete absence of representation on HCSC's governing board and the very limited (1-in-38) role played by HCSC in BCBSA's governing board weigh against finding that the entities' SSFs are affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 4, 8.

(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 decisionmaking employees of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(C), 110.3(a)(3)(ii)(C). BCBSA has no authority over the hiring, appointment, or demotion of HCSC's officers or other decisionmaking employees, and it does not appear that HCSC has such authority with regard to BCBSA. The mutual lack of such authority weighs against finding that the entities' SSFs are affiliated. *See* Advisory Opinion 2003-21 (Lehman Brothers) at 5.

(D) *Common Membership*

This factor considers whether a sponsoring organization has common or overlapping membership with the other sponsoring organization that indicates a formal or ongoing relationship between the sponsoring organizations. 11 C.F.R. §§ 100.5(g)(4)(ii)(D), 110.3(a)(3)(ii)(D). HCSC and BCBSA have no overlapping members.¹ Accordingly, this factor supports finding the entities' SSFs not to be affiliated.

¹ It is unclear whether HCSC itself is a member of BCBSA. *See* AOR at 5 (noting that Agreements require HCSC to "pay its BCBSA dues and maintain its status as a member in good standing of BCBSA"). Yet even if it is a member, such membership appears to grant HCSC only one of 38 seats on BCBSA's board of directors and so is, at most, a minor indication of a "formal or ongoing relationship" within the meaning of the regulation.

(E) Common Officers or Employees

This factor asks 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). HCSC and BCBSA have no overlapping officers or employees, and thus this factor also weighs against finding that the entities' SSFs are affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 7-8.

(F) Former Officers or Employees

This factor 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).

HCSC has a "limited" number of former BCBSA employees, but only one of them occupies one of HCSC's 23 senior leadership positions. Given that both entities are headquartered in the same city and operate in the same sector of the health insurance industry, the fact that a small number of former BCBSA employees are currently employed by HCSC does not suggest "a formal or ongoing relationship" within the meaning of 11 C.F.R. §§ 100.5(g)(4)(ii)(F) and 110.3(a)(3)(ii)(F). Again, this factor therefore weighs against finding that the entities' SSFs are affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 4, 8.

(G) Providing Funds or Goods

This factor 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).

As discussed, BCBSA provides HCSC with the exclusive right to use its marks within five states, as well as limited administrative support related to such use. In exchange, HCSC provides funds to BCBSA, in the form of licensing and membership fees, and is contractually obligated to use the marks to derive 80% of its health insurance revenue in the five states and two-thirds of its health insurance revenue nationwide. Although HCSC has begun to diversify its business activities, the overwhelming majority of its operations are conducted using the marks that BCBSA provides. *See* AOR at 6, n. 4. This factor therefore weighs in favor of finding HCSC's and BCBSA's SSFs to be affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 6-8.

(H) Arranging for the Provision of Funds or Goods

This factor 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). BCBSA offers all of its licensees, including HCSC, certain voluntary contractual arrangements with nationwide vendors, such as airlines and telecommunications companies. The request states that "[t]hese services are insubstantial" and insignificant. AOR at 8. The Commission thus concludes that the

arrangements that BCBSA makes for HCSC to have the option of contracting with certain vendors do not weigh in favor of finding the entities' SSFs to be affiliated under this factor. *See* Advisory Opinion 2002-11 (Mortgage Bankers) at 12.

(I) Formation

This factor involves whether a sponsoring organization 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). BCBSA played no role in the formation of HCSC. HCSC predated BCBSA and was formed as a health insurance provider three years before it adopted the Blue Cross brand. This fact weighs against finding the SSFs to be affiliated. *See* Advisory Opinion 1999-39 (WellPAC) (finding BCBSA licensee not affiliated where licensee was not formed solely to operate under their BCBSA licenses). HCSC did not play a role in forming BCBSA. AOR Supplement at 1. Moreover, the relationship between the entities is now primarily a contractual licensor-licensee arrangement. These facts also weigh against finding that HCSC's and BCBSA's SSFs are affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 7.

(J) Contribution Patterns

This factor pertains to whether the sponsoring organizations or their committees 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). In the 2014 election cycle to date, HCSC PAC and BCBSA's SSF combined have contributed to more than 250 candidates and political committees, but only 22 candidates or political committees have received contributions from both of the SSFs. And it appears that of the two SSFs' more than 800 combined itemized contributors during this election cycle, only one person has contributed to both of them. The lack of overlap in contributions made and received suggests that HCSC PAC and BCBSA's SSF are not affiliated entities.

Context of the Overall Relationship between 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. In the context of licensees and franchisees, the Commission generally has not found affiliation absent the circumstances indicating that "one entity exercises pervasive supervision and direction over the daily operations and business policies of another entity." *See* Advisory Opinion 1999-39 (WellPAC) at 7 (citing Advisory Opinion 1992-07 (H&R Block), Advisory Opinion 1985-07 (Anheuser-Busch)).

The "context of the overall relationship" shows that HCSC is now, and is continuing to become, well-diversified beyond the health insurance products it markets under the licensing agreements with BCBSA. The most relevant precedent is Advisory Opinion 1999-39 (WellPAC), where the Commission determined that the SSFs of WellPoint, another BCBSA licensee, and BCBSA were no longer affiliated based in part on the fact that WellPoint was not required to conduct its insurance and related businesses exclusively under the BCBSA mark and

conducted extensive business in those fields under a different business mark in direct competition with BCBSA licensees. *See* Advisory Opinion 1999-39 (WellPAC) at 4, 7. The facts here are similar. HCSC is not required to offer all of its products under the BCBSA marks and has become engaged in various lines of business that are not affected by the Agreements with BCBSA. In fact, HCSC offers life insurance under the Dearborn National name in all fifty states and operates other subsidiaries that sometimes directly compete with BCBSA licensed plans. HCSC has also developed non-health insurance lines of business; during 2013, total revenues generated by HCSC's non-health insurance subsidiaries exceeded \$2.1 billion. *See* AOR at 10.

Although HCSC's overall operations remain heavily tied to its use of the BCBSA marks for the sale of health insurance products — a fact that alone would weigh in favor of finding the SSFs to be affiliated — the Commission has repeatedly determined that negotiated business arrangements between two entities do not by themselves necessarily rise to the level of affiliation. *See, e.g.,* Advisory Opinion 2012-21 (Primerica) at 11; Advisory Opinion 1996-23 (ITT). As was true in the WellPAC advisory opinion, HCSC's ongoing relationship with and obligations to BCBSA under the Agreements are outweighed by the absence of facts that support a finding of affiliation under any of the other factors listed in the regulations. Accordingly, the Commission concludes that the Committee and BCBSA's SSF are no longer affiliated.²

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* 52 U.S.C. § 30108 (formerly 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 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. *See* 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f). 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,

(signed)
Lee E. Goodman
Chairman

² The Commission emphasizes that this opinion is based on the specific facts presented in this request and that the Commission is not making a determination as to the relationship between BCBSA and any other BCBSA licensees. *See* 52 U.S.C. § 30108(c)(1) (formerly 2 U.S.C. § 437f(c)(1)).