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September 17, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Cheryl Hemsley *[Signature]*
Attorney

Subject: Draft AO 2014-11 (Health Care Service Corporation Employees' Political Action Committee)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on September 18, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-11

2

3 Kenneth A. Gross, Esq.
4 Charles M. Ricciardelli, Esq.
5 Skadden, Arps, Slate, Meagher & Flom LLP
6 1440 New York Avenue, N.W.
7 Washington, D.C. 20005-2111

DRAFT

8

9 Dear Messrs. Gross and Ricciardelli:

10 We are responding to your advisory opinion request on behalf of Health Care Service
11 Corporation Employees' Political Action Committee (the "Committee"), which is the separate
12 segregated fund ("SSF") of Health Care Service Corporation ("HCSC"). The Committee asks
13 the Commission to find that the SSF of HCSC is no longer affiliated with the SSF of Blue Cross
14 and Blue Shield Association ("BCBSA") under the Federal Election Campaign Act, 52 U.S.C.
15 §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the "Act" or "FECA"), and Commission
16 regulations. According to the request, although HCSC and BCBSA historically have treated
17 their SSFs as affiliated PACs for purposes of FECA, the business relationship between HCSC
18 and BCBSA has "evolved over time," and HCSC no longer believes affiliation is required under
19 the Act. Advisory Opinion Request at 1 (August 8, 2014) ("AOR").

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

21 ***Background***

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

25 HCSC is a nonstock health insurance corporation. Founded in 1936 and headquartered in
26 Chicago, HCSC's purpose is to "promot[e], establish[], maintain[] and operat[e] a non-profit
27 health care service plan." *HCSC Amended and Restated Articles of Incorporation*, Art. II.

1 HCSC operates on a not-for-profit basis “for the mutual benefit of its [m]embers.” *HCSC*
2 *Amended and Restated By-Laws*, Art. IX, Sec. 9.1. The members of HCSC are its individual and
3 group policyholders. *Id.*, Art III, Sec. 3.1. Neither HCSC nor BCBSA maintains equity
4 ownership in the stocks or securities of the other, and BCBSA played no role in the formation of
5 HCSC.

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

16 HCSC’s main line of business is health insurance marketed under licensing agreements
17 between HCSC and BCBSA. These licensing agreements grant HCSC the exclusive rights to
18 market and sell products under the Blue Cross and Blue Shield names and marks in five states.
19 The Blue Cross and Blue Shield organizations of Illinois, Montana, New Mexico, Oklahoma,
20 and Texas are all divisions of HCSC. *See id.* at 1-2. Although HCSC’s use of the Blue Cross
21 and Blue Shield names and marks is restricted to these five states, it can offer non-Blue Cross
22 and Blue Shield branded health insurance products in any state, and HCSC now operates
23 subsidiaries that sell such products in states across the country. *Id.* at 4. HCSC, for example,

1 maintains a group of wholly owned subsidiaries organized under the Dearborn National Life
2 Insurance Company brand name that are licensed to sell life and disability insurance products in
3 all fifty states. *Id.* at 4, 12.

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

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

22 In addition to mandating certain BCBSA-related revenue, the Agreements require HCSC,
23 among other things, to provide responsive customer service; comply with certain BCBSA ethics

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

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

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

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

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

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

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

13 ***Question Presented***

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

15 ***Legal Analysis and Conclusions***

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

17 Political committees, including SSFs, are “affiliated” if they are established, financed,
18 maintained, or controlled by the same corporation, labor organization, person, or group of
19 persons, including any parent, subsidiary, branch, division, department, or local unit thereof. *See*
20 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)); 11 C.F.R. §§ 100.5(g)(2),
21 110.3(a)(1)(ii). For purposes of the Act’s contribution limits, contributions made to or by
22 affiliated political committees are considered to have been made to or by a single political

1 committee. *See* 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)); 11 C.F.R.
2 §§ 100.5(g)(2), 110.3(a)(1).

3 Commission regulations identify certain committees that are *per se* affiliated, such as
4 those established, financed, maintained, or controlled by a single corporation and its subsidiaries.
5 *See* 11 C.F.R. §§ 100.5(g)(3)(i), 110.3(a)(2)(i). None of these criteria are met here.

6 In the absence of *per se* affiliation, the Commission examines “the relationship between
7 organizations that sponsor committees, between the committees themselves, [and] between one
8 sponsoring organization and a committee established by another organization to determine
9 whether committees are affiliated.” *See* 11 C.F.R. § 100.5(g)(4)(i). Commission regulations
10 provide a non-exhaustive list of ten “circumstantial factors” to be considered “in the context of
11 the overall relationship” in order to determine whether the respective SSFs are appropriately
12 considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii); Advisory Opinion
13 1999-39 (WellPAC) at 2; *see also* Advisory Opinion 2009-18 (Penske); Advisory Opinion 2007-
14 12 (Tyco).

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

21 (A) *Controlling Interest*

22 This factor asks whether a sponsoring organization owns a controlling interest in the
23 voting stock or securities of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(A),

1 110.3(a)(3)(ii)(A). As neither HCSC nor BCBSA issues voting stock or securities, neither entity
2 owns such stock or securities in the other. The absence of such ownership weighs against
3 finding that the entities' SSFs are affiliated. *See* Advisory Opinion 2007-13 (United American
4 Nurses) at 7.

5 *(B) Governance*

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

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

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

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

21 *(C) Hiring Authority*

22 This factor concerns whether a sponsoring organization has the authority or ability to
23 hire, appoint, demote, or otherwise control the officers or other decisionmaking employees of the

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

6 *(D) Common Membership*

7 This factor considers whether a sponsoring organization has common or overlapping
8 membership with the other sponsoring organization that indicates a formal or ongoing
9 relationship between the sponsoring organizations. 11 C.F.R. §§ 100.5(g)(4)(ii)(D),
10 110.3(a)(3)(ii)(D). HCSC and BCBSA have no overlapping members.¹ Accordingly, this factor
11 supports finding the entities' SSFs not to be affiliated.

12 *(E) Common Officers or Employees*

13 This factor asks whether sponsoring organizations have common or overlapping officers
14 or employees, indicating a formal or ongoing relationship between the organizations. 11 C.F.R.
15 §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E). HCSC and BCBSA have no overlapping officers or
16 employees, and thus this factor also weighs against finding that the entities' SSFs are affiliated.
17 *See* Advisory Opinion 1999-39 (WellPAC) at 7-8.

18 *(F) Former Officers or Employees*

19 This factor concerns whether a sponsoring organization has any members, officers, or
20 employees who previously were members, officers, or employees of the other sponsoring

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 1 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.

1 organization, indicating a formal or ongoing relationship or the creation of a successor entity.

2 11 C.F.R. §§ 100.5(g)(4)(ii)(F), 110.3(a)(3)(ii)(F).

3 HCSC has a “limited” number of former BCBSA employees, but only one of them
4 occupies one of HCSC’s twenty-three senior leadership positions. Given that both entities are
5 headquartered in the same city and operate in the same sector of the health insurance industry,
6 the fact that a small number of former BCBSA employees are currently employed by HCSC does
7 not suggest “a formal or ongoing relationship” within the meaning of 11 C.F.R.

8 §§ 100.5(g)(4)(ii)(F) and 110.3(a)(3)(ii)(F). Again, this factor therefore weighs against finding
9 that the entities’ SSFs are affiliated. *See* Advisory Opinion 1999-39 (WellPAC) at 4, 8.

10 *(G) Providing Funds or Goods*

11 This factor considers whether a sponsoring organization provides funds or goods in a
12 significant amount or on an ongoing basis to the other sponsoring organization or committee.

13 11 C.F.R. §§ 100.5(g)(4)(ii)(G), 110.3(a)(3)(ii)(G).

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

23 *(H) Arranging for the Provision of Funds or Goods*

1 This factor concerns whether a sponsoring organization causes or arranges for funds or
2 goods to be provided to the other sponsoring organization in a significant amount or on an
3 ongoing basis. 11 C.F.R. §§ 100.5(g)(4)(ii)(H), 110.3(a)(3)(ii)(H). BCBS offers all of its
4 licensees, including HCSC, certain voluntary contractual arrangements with nationwide vendors,
5 such as airlines and telecommunications companies. The request states that “[t]hese services are
6 insubstantial” and insignificant. AOR at 8. The Commission thus concludes that the
7 arrangements that BCBSA makes for HCSC to have the option of contracting with certain
8 vendors do not weigh in favor of finding the entities’ SSFs to be affiliated under this factor. *See*
9 *Advisory Opinion 2002-11 (Mortgage Bankers)* at 12.

10 *(I) Formation*

11 This factor involves whether a sponsoring organization had an active or significant role in
12 the formation of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(I),
13 110.3(a)(3)(ii)(I). BCBSA played no role in the formation of HCSC. HCSC predated BCBSA
14 and was formed as a health insurance provider three years before it adopted the Blue Cross
15 brand. This fact weighs against finding the SSFs to be affiliated. *See Advisory Opinion 1999-39*
16 *(WellPAC)* (finding BCBSA licensee not affiliated where licensee was not formed solely to
17 operate under their BCBSA licenses). HCSC did not play a role in forming BCBSA. AOR
18 Supplement at 1. Moreover, the relationship between the entities is now primarily a contractual
19 licensor-licensee arrangement. These facts also weigh against finding that HCSC’s and
20 BCBSA’s SSFs are affiliated. *See Advisory Opinion 1999-39 (WellPAC)* at 7.

21 *(J) Contribution Patterns*

22 This factor pertains to whether the sponsoring organizations or their committees have
23 similar patterns of contributions or contributors that would indicate a formal or ongoing

1 relationship between the sponsoring organizations or committees. 11 C.F.R.
2 §§ 100.5(g)(4)(ii)(J), 110.3(a)(3)(ii)(J). In the 2014 election cycle to date, HCSC PAC and
3 BCBSA's SSF combined have contributed to more than 250 candidates and political committees,
4 but only 22 candidates or political committees have received contributions from both of the
5 SSFs. And it appears that of the two SSFs' more than 800 combined itemized contributors
6 during this election cycle, only one person has contributed to both of them. The lack of overlap
7 in contributions made and received suggests that HCSC PAC and BCBSA's SSF are not
8 affiliated entities.

9 *Context of the Overall Relationship between Entities*

10 In considering the foregoing circumstantial factors, the Commission examines the
11 "context of [the] overall relationship" between the entities to determine whether they are
12 properly considered affiliated. In the context of licensees and franchisees, the Commission
13 generally has not found affiliation absent the circumstances indicating that "one entity exercises
14 pervasive supervision and direction over the daily operations and business policies of another
15 entity." *See* Advisory Opinion 1999-39 (WellPAC) at 7 (citing Advisory Opinion 1992-07
16 (H&R Block), Advisory Opinion 1985-07 (Anheuser-Busch)).

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

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

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

18 This response constitutes an advisory opinion concerning the application of the Act and
19 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
20 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a
21 change in any of the facts or assumptions presented, and such facts or assumptions are material

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.C.S. § 437f(c)(1)).

1 to a conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific transaction
3 or activity which is indistinguishable in all its material aspects from the transaction or activity
4 with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See*
5 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the law
7 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any
8 advisory opinions cited herein are available on the Commission's website.

9 On behalf of the Commission,

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Lee E. Goodman
Chairman