



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

February 22, 2000

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-39

James A. Sivesind  
Reed & Davidson  
520 South Grand Avenue  
Suite 700  
Los Angeles, CA 90071-2645

Dear Mr. Sivesind:

This responds to your letters dated November 4 and December 10, 1999, and January 21, 2000, on behalf of WellPoint Health Networks Political Action Committee ("WellPAC"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the question of its affiliation with Blue Cross and Blue Shield Association PAC ("BluePAC").

WellPAC is the separate segregated fund ("SSF") of WellPoint Health Networks, Inc. ("WellPoint"). Until July 1996, WellPAC was known and operated as Blue Cross of California PAC ("BCC PAC"), and Blue Cross of California ("BCC") was its reported "parent" or connected organization. In 1990, the Commission issued an opinion concluding that the Blue Cross and Blue Shield Association ("BCBSA") was affiliated with each of its regular member plans, including BCC. Advisory Opinion 1990-22. Consistent with that opinion, Blue PAC reported BCC PAC as an affiliated SSF. Between 1993 and 1996, however, there was a corporate reorganization with respect to BCC and WellPoint which resulted in WellPoint's ownership of BCC (described further below). You assert that this reorganization and related changes warrant a conclusion by the Commission that WellPAC is no longer affiliated with BluePAC. You ask the Commission to conclude the same.

***Applicable statutory and regulatory provisions***

The Act and Commission regulations provide that committees established by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). The regulations clarify the term “local unit,” stating that it may include, in appropriate cases, a franchisee or licensee. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by affiliated committees shall be considered to have been made to or by a single committee and thus such committees share contribution limits. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii). In addition, a corporation may solicit contributions to its separate segregated fund (“SSF”), from the restricted class (i.e., executive and administrative personnel and stockholders, and the families thereof) of its subsidiaries or other affiliates. 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.5(g)(1).

In the absence of certain automatically affiliated relationships such as a parent corporation and its subsidiary, Commission regulations provide for an examination of various factors in the context of an overall relationship to determine whether one company is an affiliate of another and, hence, whether their respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), 11 CFR 110.3(a)(3)(i) and (ii)(A)-(J). Included in these factors are (A) whether a sponsoring organization owns a controlling interest in the voting stock or securities of another sponsoring organization; (B) whether a sponsoring organization has the authority or ability to direct or participate in the governance of another sponsoring organization through provisions of constitutions, by-laws, contracts or other rules, or through formal or informal practices or procedures; (C) whether a sponsoring organization has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decision-making employees of another sponsoring organization; (E) whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization which indicates a formal or ongoing relationship between the organizations; (F) whether a sponsoring organization 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) whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization; (H) whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization; (I) whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization; and (J) whether the committees have similar patterns of contributions which indicates a formal or ongoing relationship between the committees. 11 CFR 110.3(a)(3)(ii)(A), (B), (C), (E), (F), (G), (H), (I), and (J). The list of ten circumstantial factors set out at 11 CFR 110.3(a)(3)(ii) is not an exclusive list, and other factors may be considered. See Advisory Opinion 1995-36.

### ***Factual background***

WellPoint is a publicly traded, managed health care corporation with subsidiaries that offer a variety of health care plans and specialty products such as preferred provider organizations, pharmacy benefit management, and dental, behavioral health, and life insurance. WellPoint's subsidiaries operate under the Blue Cross and UNICARE brand names in California and under the UNICARE brand name in other States. WellPoint and BCC have license agreements with BCBSA granting WellPoint, BCC, and Blue Cross Life & Health Insurance Company ("BC Life") the exclusive use of the Blue Cross name and marks in California; WellPoint has a primary license agreement with BCBSA, and BCC and BC Life, wholly owned subsidiaries of WellPoint, have a "controlled affiliate" license agreement with BCBSA. WellPoint subsidiaries provide medical plans and specialty products under the UNICARE name to subscribers in all fifty States with offices in twelve States and the District of Columbia. UNICARE companies compete directly with BCBSA licensees outside of California.

You briefly describe how WellPoint arrived at its present situation. BCC was originally established in 1937 as a nonprofit public benefit corporation. Prior to 1993, the organization that is now WellPoint was directed or controlled by BCC and operated various medical, dental, and pharmacy plans which were Blue Cross licensees, with two small non-licensee subsidiaries that focused on life insurance services. Between 1993 and 1996, BCC converted to a for-profit corporation, with a recapitalization that included its merger with WellPoint, which was formerly one of its subsidiaries. As a result of this reorganization, BCC became a wholly owned subsidiary of WellPoint.

Since 1993, WellPoint (as BCC and then as WellPoint) acquired other subsidiaries that are not Blue Cross licensees. These include businesses that now operate under the UNICARE brand name, such as various life, health, and group benefits divisions of Massachusetts Mutual Life Insurance Company and John Hancock Mutual Life Insurance Company, acquired in 1996 and 1997. In 1995, UNICARE became the brand name for most of the WellPoint businesses operated outside of California. WellPoint currently owns 18 operating subsidiaries and four holding companies. One holding company owns the two operating subsidiaries that do business under the Blue Cross mark and name in California (BCC and BC Life). Two of the holding companies (UNICARE Specialty Services and UNICARE National Services), hold the remaining 16 operating companies, which do business under UNICARE, WellPoint, or other names and marks. (The fourth holding company handles WellPoint's passive investments.)

WellPoint currently has 7.2 million "medical members" and 30.6 million "specialty members." Approximately 5 million of the medical members and 6.8 million of the specialty members are served by the Blue Cross subsidiaries. Approximately 2.2 million medical members and 23.7 million specialty members are served by the non-Blue Cross subsidiaries. WellPoint has approximately 10,500 employees; 59 percent are employed by the Blue Cross subsidiaries and 41 percent by the non-Blue Cross subsidiaries. WellPoint has \$4.6 billion in assets, with \$2.8 billion held through the Blue

Cross subsidiaries and \$1.3 billion with the other subsidiaries. In the first three quarters of 1999, approximately eighty percent of WellPoint's \$5.1 billion in premium revenue came from the Blue Cross subsidiaries. Sixty percent of WellPoint's \$300 million in management services revenues came from non-Blue Cross subsidiaries.<sup>1</sup>

You present facts that tend to illustrate a lack of affiliation between WellPoint and BCBSA, using the affiliation factors presented above. You note that BCBSA has no ownership interest in WellPoint nor any common shareholders; BCBSA and its licensees are not liable for the debts of another licensee; the person who is both Chairman/CEO of WellPoint and BCC is the only WellPoint or BCC person on BCBSA's board and constitutes the only board overlap that either WellPoint's seven member board or BCC's three-member board has with BCBSA's 55 member board; and only three out of WellPoint's 11,000 employees (a BCC vice president, BCC department director, and BCC project manager) are former BCBSA employees. You acknowledge that, although BCBSA provides limited administrative services to WellPoint (and to other licensees), WellPoint compensates BCBSA for these services and for the use of the Blue Cross name and mark, and thus such provision is merely part of an arms length transaction. You note that BCBSA hires lobbyists to represent the association, but that WellPoint does not share those lobbyists, has hired its own lobbyists, and does not rely on BCBSA for its lobbying activities. Although WellPAC contributed \$5,000 to BluePAC in 1998 and in 1999, it also regularly contributes to the political committees of other health care associations of which WellPoint is a member. The two PACs do not consult with each other over contributions and any occasional common recipient would result from both organizations' interest in the same issues.<sup>2</sup> In contrast to the statement in Advisory Opinion 1990-22 that BCBSA had a role in the formation of the member plans, inasmuch as they need admission to BCBSA and a license in order to operate as a Blue Cross plan, WellPoint was not formed for the sole purpose of operating the BCC plan and operates a number of subsidiaries that are not affected by the license agreement. You also cite a factor that is not specifically mentioned in the regulations, but has been discussed in previous advisory opinions (Advisory Opinions 1996-42 and 1995-36). This factor is the existence of direct competition between WellPoint subsidiaries and BCBSA member plans.

Your letters and other documents submitted by you also present the linkages between WellPoint and BCBSA. In order to maintain its licensee status with BCBSA, WellPoint must adhere to certain membership standards and other conditions. You refer to nine membership standards that are presently in effect and (with one exception) were also applicable in 1992. In general, these standards require that WellPoint and all other

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<sup>1</sup> You note that WellPoint is currently planning on acquiring another BCBSA licensee, Cerulean Companies, Inc. ("Cerulean"), the parent company of Blue Cross and Blue Shield of Georgia, which has 1.7 million members, nearly all of whom are Blue Cross subscribers. The acquisition was approved by Cerulean shareholders in June 1999 but has not yet been approved by the Georgia Department of Insurance because of pending shareholder litigation involving Cerulean. Recently, WellPoint also agreed to purchase Rush Prudential Health Plans of Illinois, which consists of 300,000 medical members; it will become part of the UNICARE system.

<sup>2</sup> You also note that neither company solicits PAC contributions from the executive and administrative personnel and stockholders of the other.

BCBSA member plans avoid control by non-member (of BCBSA) plans or by any special interest group; demonstrate strong financial viability and responsive customer service (including claims processing in all service areas); use the plan's best efforts in its service area to promote the value of the BCBSA marks; and emphasize its independence from BCBSA and other plans in its communications with customers and the public (e.g., identifying a plan as an "independent licensee" of BCBSA). One standard extant in 1992, but no longer in effect, is the requirement that a member plan operate as a non-profit entity.

There are other BCBSA requirements as to WellPoint's activities through provisions of the licensing agreement (with addendum) and through related provisions of WellPoint's charter and bylaws. For example, there are general provisions to ensure compliance with the membership standards as to the financial health and protection of the value of the Blue Cross licensed marks and name (e.g., non-assignability without BCBSA's permission). Moreover, WellPoint incurs a heavy liability to BCBSA upon termination of the license.

The license agreement, addendum, and governing documents also include various provisions that were adopted in order to prevent any special interest such as another health plan, a medical provider, or the State of California from acquiring control or influence over WellPoint. You state that the purpose of these provisions is not to give BCBSA control over WellPoint, but to ensure that WellPoint is diversely owned so that it will be responsive to the community it serves. As part of the May 1996 reorganization of BCC from parent to subsidiary of WellPoint, and the related conversion of both entities into for-profit corporations, a charitable organization known as California Healthcare Foundation ("CHF") acquired 80 percent of WellPoint's stock from BCC. Thus, there are provisions that prevent any possibility of CHF control over WellPoint's Board. CHF has now disposed of all except 6.7 percent of WellPoint's stock.

One of these measures is to preserve a line of succession from the membership of the WellPoint board before the May 1996 reorganization until the present. That board consisted of eight directors, three of whom were selected in a secret ballot by BCC's then existing board members and five of whom were selected independently by WellPoint's then existing board members. All of these eight directors were denoted as "independent" directors because they did not represent CHF or any health care providers or competitive health plans. The license addendum and bylaws provide that the board must consist of a majority of those "independent" directors (who are named in the addendum) or their successors, with three labeled as "BCC designees" and five as "WellPoint designees."<sup>3</sup> These provisions, including the designation of BCC designees, may suggest an institutional preservation of WellPoint as principally a Blue Cross company, but you explain that these labels are limited in their significance. You explain that none of the directors was selected by BCBSA, that the BCC designees have "no ongoing relationship

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<sup>3</sup> Since May 1996, one BCC designee and one WellPoint designee have resigned. The BCC designee was succeeded by a new director who had been suggested by the WellPoint management team. The WellPoint designee has not been succeeded, and a ninth undesignated seat remains vacant.

with BCC,”<sup>4</sup> and that the BCC designees “have never had any affiliation or connection with BCBSA.” The directors are elected by the shareholders, or are selected by the other directors in the event of a vacancy. A “successor” to a BCC designee is anyone nominated by the board members or WellPoint shareholders to succeed a BCC designee or successor, who then wins a shareholder election, or in the event of a vacancy of a BCC designee or successor, anyone elected by the other BCC designees. The same principles apply to successors to WellPoint designees.<sup>5</sup> With respect to the need for successors of “independent” board members, a successor is still either elected by the shareholders at the end of a term or by the other eligible board members in the event of a vacancy. The designation of “independent director” is accomplished merely by a vote of two-thirds of the independent directors (then in office) to apply that label.<sup>6</sup>

### *Analysis*

As the facts above illustrate, the overall relationship of WellPoint and BCBSA may be viewed from two different perspectives. First, there is the change in WellPoint’s relationship with BCBSA as a result of the for-profit conversion and WellPoint’s resulting transformation into an entity with business operations that extend well beyond those of Blue Cross. Presently, Blue Cross of California and the Blue Cross businesses are not at the top of the company’s structure but are subsidiaries of WellPoint, which owns a substantial number of non-Blue Cross businesses that operate, for the most part, as an entirely different insurance group. Second, there are the continuing ties to BCBSA which affect to some extent the membership of WellPoint’s board and certain aspects of WellPoint’s capitalization and operations. Moreover, there is the continuing tie of BCC, a wholly-owned subsidiary of WellPoint, to BCBSA as a “controlled affiliate” licensee.

Although the Commission acknowledged in Advisory Opinion 1990-22 that it is difficult to directly compare BCBSA’s relationship to its member plans with other franchise or license arrangements addressed in past opinions, a comparison is useful and

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<sup>4</sup> In particular, you state that none of the BCC designees on WellPoint’s board serve on BCC’s board.

<sup>5</sup> Until CHF beneficially owns less than five percent of WellPoint’s stock, WellPoint must have a nominating committee comprised of three independent directors, consisting of one BCC designee and two non-BCC designees. Nominees are selected by a majority vote of the committee. The BCC designee may veto the nomination of a proposed BCC designee board member and each WellPoint designee has the same power with respect to a proposed WellPoint designee member. Such designees have no veto power over shareholder nominations, and, if the nominating committee fails to nominate a candidate, a majority of the BCC or WellPoint designees on the board may nominate a candidate for BCC or WellPoint designee respectively.

<sup>6</sup> Other provisions of the licensing agreement, addendum, and articles of incorporation that are aimed at preventing control by a special interest state that no non-institutional investor may beneficially own stock representing five percent or more of the voting power in WellPoint, no institutional investor may own ten percent or more of such voting stock, and no investor may own any WellPoint securities which, in combination, amount to ownership of 20 percent or more. The excess stock owned by CHF is placed in a voting trust and not voted by CHF and any other investor’s excess share would be placed under the control of a share escrow agent. In either situation, the excess is to be voted in proportion to the vote of shareholders that are not subject to such an agreement. (The articles of incorporation, in addressing the powers of share escrow agents, specifically require that WellPoint stock certificates refer to the five percent limitation as being designed to ensure compliance with the BCBSA license agreement.)

relevant, particularly in view of the changing nature of the licensee. In past opinions, the Commission has interpreted the affiliation provisions of the Act and regulations as affiliating franchisees and licensees with a central franchising or licensing corporation where one entity exercises pervasive supervision and direction over the daily operations and business policies of another entity such as a franchisee. Advisory Opinion 1992-7 and 1985-7; see also Advisory Opinions 1988-46, 1979-38, 1978-61, and 1977-70. The Commission has concluded that there was affiliation in those circumstances where the franchisees conducted the relevant businesses solely under the supervision or service marks of the central organization (for example, where an insurance agency was permitted to sell only the insurance carrier's policies, or where franchisees providing tax preparation services could provide such services only under the franchisor's name and marks). See Advisory Opinions 1985-31 and 1992-7. You emphasize that WellPoint is not required to conduct its health insurance, life insurance, and other related businesses exclusively under the Blue Cross name, and conducts an extensive portion of its businesses in those fields under the UNICARE name. Accordingly, WellPoint's circumstances are more analogous to the situation presented in Advisory Opinion 1985-7 where the Commission concluded that affiliation did not exist between a malt beverage brewing company and distributors that were granted exclusive territorial rights to market its products, partly because of the ability of the distributor to market the products of other brewers.

The change of WellPoint from a company that was primarily engaged in business under the Blue Cross name, marks, and license arrangements to one with significantly more varied operations provides the "context of the overall relationship" for the examination of the affiliation factors. See 11 CFR 110.3(a)(3)(ii). Prior to the transformation, with the Blue Cross operations dominating the company structure, the BCBSA license arrangement was more pervasive in the operations of the company. Now there is a very different consideration; although there remain license agreements with BCBSA, the Blue Cross operations are owned by WellPoint and are one segment of a materially altered company structure that is significantly engaged in other activities not related to BCBSA, which activities even involve some competition with BCBSA entities.

The effect of the license restrictions on matters addressed in the Commission regulations appears to be outweighed by this competing consideration, particularly in view of the fact that the effect of these restrictions is limited. The license restrictions on the selection of WellPoint's board do not give BCBSA significant control over the board's membership; BCBSA has had no role in the placing of individuals on the WellPoint board, and your explanation indicates that the selection of successor board members is under the practical control of the WellPoint board and shareholders. Although there are general controls over the level of ownership or voting power for any one investor, the principal object of these controls, CHF, currently holds just under 7 percent of WellPoint's stock, after having held 80 percent in 1996. Moreover, other facts discussed above in relation to affiliation factors, including the lack of overlap of present or former employees, the facts related to the provision of goods and services including

lobbying services, and the direct competition between WellPoint subsidiaries and BCBSA member plans, support non-affiliation status between WellPoint and BCBSA.

The continued links of BCC to BCBSA do not change the foregoing analysis or conclusions. Commission regulations provide for affiliation of a corporation with its parent, subsidiaries, branches, divisions, and affiliates. 11 CFR 100.5(g)(2), 110.3(a)(1)(ii), and 114.5(g)(1). See, for example, Advisory Opinion 1982-18 which permitted an SSF of a subsidiary corporation to solicit the executive and administrative employees of its parent and of other first and second level subsidiaries of the parent (that were not subsidiaries of the subsidiary corporation). Unlike WellPoint in its entirety, BCC's operations are exclusively Blue Cross activities and not those of other insurance companies. Notwithstanding this fact, the past affiliated relationship of BCBSA to BCC was based on a license arrangement, not on any equity ownership of one by the other. Such a license arrangement may lead to a conclusion of affiliation based on certain aspects of control. As indicated above, however, the conversion of BCC, from a non-profit parent company whose main point of external control was BCBSA to a for-profit subsidiary subject to ownership and control by a well-diversified WellPoint, changes the entire situation. The Commission concludes that WellPoint's equity ownership and control of BCC supersedes any control held by BCBSA.

Based on the foregoing, the Commission concludes that WellPAC and Blue PAC are no longer affiliated. Thus, they no longer share limits on the receipt and making of contributions, and neither WellPoint nor BCBSA may solicit the restricted class of each other's organization for PAC contributions. The Commission emphasizes, however, that this opinion is based on the specific facts presented in connection with this request and the Commission is not hereby making a determination as to the relationship between BCBSA and any other BCBSA regular member plans.

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.

Sincerely,

(signed)

Darryl R. Wold  
Chairman

Enclosures (AOs 1996-42, 1995-36, 1992-7, 1990-22, 1988-46, 1985-31, 1985-7, 1982-18, 1979-38, 1978-61, and 1977-70)