



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

ADVISORY OPINION 2014-11
(Health Care Service Corporation Employees' Political Action Committee)

STATEMENT OF VICE CHAIR ANN M. RAVEL
AND COMMISSIONER STEVEN T. WALTHER

In its recent decision in *McCutcheon v. FEC*, the Supreme Court underscored how the Commission's committee affiliation rules play an important role in preventing groups from evading the base contribution limits. 134 S. Ct. 1434, 1453-54 (2014) (plurality op.). Just last week, the Commission approved an Advance Notice of Proposed Rulemaking in response to the *McCutcheon* decision, and asked for comments on how to improve our affiliation rules to further deter circumvention. The Commission's decision in a recent advisory opinion for Health Care Service Corporation Employees' Political Action Committee illustrates how important it is for the Commission to take action to strengthen these regulations.

Health Care Service Corporation Employees' Political Action Committee, the separate segregated fund ("SSF") of Health Care Service Corporation ("HCSC"), sought an advisory opinion stating that the SSF of HCSC is no longer affiliated with the SSF of Blue Cross and Blue Shield Association ("BCBSA"). The Commission voted to approve the request, allowing each SSF to make contributions to federal candidates and political committees under separate limits – in effect doubling the contributions the SSFs can make to any candidate or committee.¹ Given the lack of adequate information provided concerning the substantial financial overlap between HCSC and BCBSA, we could not vote with our colleagues to approve the request.²

Commission regulations provide that a "membership organization" and "related State and local entities of that organization" are *per se* affiliated.³ The limited information provided by the requestor indicates that HCSC's SSF is *per se* affiliated with BCBSA's SSF because HCSC is a member of BCBSA. HCSC stated, for instance, that written agreements between the two organizations require HCSC to "pay its BCBSA dues and maintain its status as a member in

¹ 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).

² See Certification dated October 2, 2014 available at http://saos.fec.gov/saos/searchao.jsessionid=EF65DED3D7CF51927A9E66012246152A?SUBMIT=continue&PAGE_NO=0.

³ 11 C.F.R. § 100.5(g)(3).

good standing of BCBSA.”⁴ In response to a request for further information, HCSC also stated that BCBSA is a “membership corporation” formed under Illinois law.⁵ These statements, read together, and in the absence of information to the contrary, suggest that HCSC is a “related entity” of the BCBSA membership organization, and therefore the organizations should be considered *per se* affiliated.

Even if HCSC is not *per se* affiliated with BCBSA, however, the available information suggests that the two entities appear to be affiliated under the multi-factor test the Commission uses when there is an absence of *per se* affiliation.⁶ Under that multi-factor test, a key consideration is whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to the other sponsoring organization or committee.⁷ Here, BCBSA provides HCSC with the exclusive right to use Blue Cross Blue Shield (“BCBS”) marks in five states, and in return HCSC provides funds to BCBSA in the form of licensing and membership fees. HCSC is contractually obligated to use the marks to derive four-fifths (80%) of its health insurance revenue in the five states and two-thirds of its health insurance revenue nationwide. Although HCSC’s high degree of reliance on BCBS marks to derive its revenue is but one of many factors to consider in determining whether it remains affiliated with BCBSA, it is a significant, if not dispositive, one.

Therefore, it is important to know the amount of HCSC’s total revenue derived from its BCBS products over a recent period of time, such as in calendar year 2013, or even from all of its health care plans and related services in 2013, whether or not under the BCBS mark. While the request highlights the fact that HCSC’s revenues from its non-health insurance businesses exceeded \$2.1 billion in 2013, without context that figure is meaningless, as it tells us nothing about *what portion* of HCSC’s total annual revenue is derived from non-BCBS branded products and services. Although the Commission asked HCSC for information about how its total revenue and assets were allocated between its BCBS and non-BCBS products and services, HCSC did not provide us with this information.⁸ The available facts show a close financial relationship between HCSC and BCBSA, and HCSC was unable to provide sufficient information suggesting otherwise. Given the information showing financial interdependence, we were unable to join our colleagues in finding that HCSC’s and BCBSA’s SSFs were not affiliated.

⁴ Advisory Opinion Request at 5, *available at* <http://saos.fec.gov/saos/searchao;jsessionid=EF65DED3D7CF51927A9E66012246152A?SUBMIT=ao&AO=3730&START=1303261.pdf>.

⁵ E-mail from Kenneth Gross, Counsel for Requestor HCSC, to Cheryl Hemsley, FEC Office of General Counsel (Sept. 17, 2014), *available at* http://saos.fec.gov/saos/searchao;jsessionid=EF65DED3D7CF51927A9E66012246152A?SUBMIT=continue&PAGE_NO=0.

⁶ See 11 C.F.R. § 100.5(g)(3), (4)(i).

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

⁸ See *supra* fn. 5.

The HCSC case demonstrates the need for revisions of committee affiliation rules. Under the current test, organizations which are financially intertwined can nonetheless avoid affiliation.

For the first time in more than a decade, the Commission is inviting wide-ranging public comment and holding a public hearing on issues fundamental to campaign finance. The Commission needs to hear from the public on how it believes the Commission should strengthen not only the committee affiliation rules, but also rules on joint fundraising committees, earmarking, and public disclosure. We urge you to submit comments now on how to improve campaign finance regulations to better combat corruption in our political system.

Comments can be submitted here: <http://sers.fec.gov/forces/addcomments.htm?pid=93617>.

Oct. 17, 2014
Date


Ann M. Ravel
Vice Chair

10/17/14
Date


Steven T. Walther
Commissioner