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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2002 NOV 15 P 3 00

November 15, 2002

AGENDA ITEM
For Meeting of: 12-05-02

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Mai Dinh *MD*
Acting Assistant General Counsel

Anne A. Weissenborn *AAW*
Senior Attorney

Subject: Draft AO 2002-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 5, 2002.

Attachment

DRAFT

1 CERTIFIED MAIL
2 RETURN RECEIPT REQUESTED

3
4 **ADVISORY OPINION 2002-12**

5
6 Brady C. Williamson
7 Mike B. Wittenwyler
8 LaFollette Godfrey & Kahn
9 One East Main Street
10 Post Office Box 2719
11 Madison, WI 53701-2719

12
13 Dear Mr. Williamson and Mr. Wittenwyler:

14
15 This responds to your letters dated January 31, July 24, September 3, and October 18,
16 2002, requesting an advisory opinion on behalf of American Medical Security, Inc. ("AMS")
17 concerning the application of the Federal Election Campaign Act of 1971, as amended ("the
18 Act"), and Commission regulations to the relationship of American Medical Security, Inc. PAC
19 ("AMS PAC") and the Blue Cross & Blue Shield United of Wisconsin Political Action
20 Committee ("BCBS PAC").

21 **QUESTION PRESENTED**

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

1 organization as their own connected organizations; and (4) to apply the law and regulations to
2 the present relationships between AMS and BCBS and between their separate segregated funds.

3 BCBS PAC, the separate segregated fund of Blue Cross Blue Shield United of Wisconsin
4 ("BCBS"), registered with the Commission on September 8, 1980. AMS PAC, the separate
5 segregated fund of American Medical Security, Inc. registered with the Commission on August
6 30, 1993. In 1996, following certain corporate restructuring described below, AMS PAC and
7 BCBS PAC filed amended Statements of Organization with the Commission in which each listed
8 the other's connected organization as its own connected organization, thus becoming affiliated
9 committees pursuant to 11 CFR 100.5(g).

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

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

19 **BACKGROUND**

20 The factual background to your request encompasses several corporate entities, a number
21 of corporate mergers and restructurings, stock sales resulting in varying levels of ownership of
22 one company by another, and consequent shifts in the levels of financing, maintenance and
23 control that determine whether corporate entities and their respective separate segregated funds

1 are and/or remain affiliated. The following is an outline of these relationships over time,
2 beginning in 1988.

3 A. Corporate Restructuring - 1988-2001

4 As of 1988, BCBS, a Wisconsin corporation, was the sole owner of United Wisconsin
5 Service ("UWS"). That year, UWS and American Medical Security, Inc. entered into a joint
6 venture agreement whereby the latter company was to "market and administer the health
7 insurance products underwritten by UWS's insurance company subsidiaries." Pursuant to the
8 joint venture, UWS acquired a 12% equity interest in American Medical Security, Inc. Between
9 1988 and 1996, BCBS's ownership interest in UWS declined from 100% to 38% as a result of
10 the joint venture agreement and of public stock offerings.

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

21 In 1998 UWS placed all of its managed care and specialty products businesses into a new
22 subsidiary and spun it off by distributing 100% of shares in the subsidiary to UWS stockholders.
23 The subsidiary, "UWS-New," became United Wisconsin Services, Inc., while UWS changed its

1 name to American Medical Security Group ("AMSG"). AMSG retained 100% ownership of
2 AMS through American Medical Security Holdings, Inc., a wholly-owned subsidiary holding
3 company that had been created in 1996 by UWS.

4 You have stated that, prior to the spinoff of United Wisconsin Service, Inc./UWS-New in
5 1998, the chairman and CEO of AMSG, Samuel V. Miller, served as the executive vice president
6 of UWS and also as "an officer and director of various AMS entities." However, after the
7 spinoff, Mr. Miller was neither an officer of United Wisconsin Service, Inc./UWS-New (now
8 Cobalt Corporation) nor an officer of any other BCBS entity, nor did he hold any other position
9 with such entities. You have also stated that there were seven other individuals who served both
10 UWS and AMS as employees, officers or directors prior to the spinoff, but that they "resigned
11 their respective positions with the AMS entities on September 25, 1998." Since the spinoff,
12 three other individuals who served as AMSG directors also served as BCBS entity directors, but
13 none were in office later than March 2001.

14 B. Corporate Restructuring – 2001-2002

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

20 Subsequent to your January 31, 2002 letter, there have been additional changes in
21 corporate ownership. On March 19, 2002, AMSG repurchased 1,400,000 of its stock shares
22 from BCBS, thereby reducing BCBS's ownership share in AMSG to approximately 39% from
23 the previous 45%. Later, on June 4, 2002, BCBS sold an additional 3,001,500 AMSG shares,

1 further reducing its ownership interest to approximately 15.1%. More recently, on September
2 11, 2002, BSBS filed a Form 144 with the U.S. Securities and Exchange Commission indicating
3 its intention to sell further shares of AMMSG stock, and as of October 16, 2002, has reduced its
4 ownership interest to 12.3%. You have stated that "there has been no ownership of preferred
5 stock or any other class of stock" in one of the subject entities by the other, just the BCBS
6 ownership of AMMSG common stock described above.

7 C. Corporate Relationships - 2002

8 You have stated that Cobalt/BCBS's stock ownership interest in AMMSG and certain
9 reinsurance agreements are the only remaining relationships between "the BCBS group" and "the
10 AMS group." You have also stated that there are no current overlaps of directors, officers and
11 employees between these two groups. The Stock Purchase Agreement among AMMSG, Cobalt
12 and BCBS that was signed on March 22, 2002, and under which the BCBS stock sales were
13 undertaken during the first half of 2002, does include a provision whereby Cobalt/BCBS may
14 designate a nominee to the AMMSG board of directors so long as BCBS continues to hold at least
15 10% of outstanding and issued AMMSG stock; however, you have explained that the BCBS
16 nominee on the AMMSG board, Kenneth L. Evason, "is *not* an officer, director or employee of
17 Cobalt, BCBS or any other BCBS entities, and he is only one of 13 AMMSG board members."
18 (Emphasis in original.) This one BCBS nominee, who was selected in March, 2002, "is
19 obligated to resign effective immediately upon the date the BCBS's ownership interest in AMMSG
20 is reduced to less than 10 percent."

21 With regard to the possibility of a future increase in BCBS's present 12.3% equity
22 interest in AMMSG, you have stated that no BCBS entity is guaranteed a specific amount of
23 AMMSG shares; that "BCBS, without the written consent of AMMSG, cannot purchase or otherwise

1 acquire any additional shares of AMSG . . . until July 31, 2008"; that AMSG does not pay
2 dividends; and that "its dividend reinvestment and direct stock purchase plan has been
3 terminated." Given the restrictions on the purchase of AMSG common stock by BCBS, you
4 have stated that "[t]he possibility of an increase in BCBS ownership is extremely unlikely."

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

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

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

1 With regard to Mr. Hefty's ownership of stock in both companies that is reported in the
2 proxy statements, you have noted that "a significant portion of his ownership is in the form of
3 stock options."² In response to a question, you recently stated that while Mr. Hefty has exercised
4 some of his AMSG stock options, he subsequently sold the stock. According to your statements,
5 his ownership interest in AMSG, as of October 18, 2002, is approximately .70%.

6 The materials which you have supplied in support of the advisory opinion request include
7 the articles of incorporation and bylaws of the AMSG, AMS, Cobalt and BCBS. According to
8 the Restated Articles of Incorporation of AMSG, a vote of 80% of the outstanding shares is
9 required to elect a company director; 75% of such shares must vote to amend the Articles. On
10 the other hand, according to the AMSG Bylaws, the vote of 10% of the outstanding shares is
11 sufficient to call a shareholders meeting. The AMSG Bylaws provide that any shareholder
12 holding 5% of the shares may inspect and copy business records of the company.

13 In your initial letter you stated: "The AMS entities and the BCBS entities maintain
14 separate offices, personnel, information systems, and other assets. Operations of the AMS
15 entities and the BCBS entities are wholly separate, and there is no cross-subsidization or funding
16 of any sponsoring organization or committee." In response to a question regarding insurance
17 arrangements, you explained that certain insurance policies underwritten by BCBS entities "were
18 purchased by AMSG on an arm's length basis after reviewing market-based quotes from
19 competing insurers. There is no agreement or understanding that the purchase of these insurance

² The AMSG Proxy Statement also cites five other individuals who, as of April 26, 2002, were officers or directors and stockholders of AMSG 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 AMSG (200,019 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.

1 policies by AMSG will continue in the future." You have also stated that in 2001 payments by
2 AMSG to Cobalt for insurance totaled only \$362 and are expected to be zero in 2002.

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

18 THE ACT AND COMMISSION REGULATIONS

19 The Act and Commission regulations provide that a corporation may make payments for
20 the establishment or administration of, or the solicitation of contributions to, a separate
21 segregated fund to be used for political purposes, without such payments resulting in a
22 contribution to that fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). The Act and
23 Commission regulations also provide that political committees, including separate segregated

1 funds, that are established, financed, maintained or controlled by the same corporation, person,
2 or group of persons, including any parent, subsidiary, branch, division, department, or local unit
3 thereof, are affiliated. Contributions made to or by such political committees are to be
4 considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5),³
5 11 CFR 100.5(g)(2) and 110.3(a)(1). Commission regulations emphasize that committees
6 established by a single corporation and its subsidiaries are per se affiliated. 11 CFR
7 110.3(a)(2)(i).

8 Commission regulations provide for an examination of various factors in the context of
9 an overall relationship to determine whether one company established, finances, maintains or
10 controls another, resulting in affiliation, and, hence, whether their respective separate segregated
11 funds are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A) through (J), and
12 110.3(a)(3)(i) and (ii)(A) through (J). If political committees are affiliated, a single limit applies
13 to the aggregate of contributions made by them and to the aggregate of contributions received by
14 them.

15 The relevant factors to be considered with respect to corporations that are not
16 membership organizations include: (A) whether one sponsoring organization owns a controlling
17 interest in the voting stock or securities of another sponsoring organization; (B) whether a
18 sponsoring organization or committee has the authority or ability to direct or participate in the
19 governance of another sponsoring organization or committee through provisions of constitutions,
20 by-laws, contracts or other rules, or through formal or informal practices or procedures; (C)

³ 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.

1 whether one sponsoring organization or committee has the authority or ability to hire, appoint,
2 demote or otherwise control the officers, or other decision-making employees of another
3 sponsoring organization or committee; (E) whether a sponsoring organization or committee has
4 common or overlapping officers or employees with another sponsoring organization or
5 committee which indicates a formal or ongoing relationship between the organizations; (F)
6 whether a sponsoring organization or committee has any members, officers or employees who
7 were members, officers or employees of another sponsoring organization, which indicates a
8 formal or ongoing relationship or the creation of a successor entity; (G) and (H) whether a
9 sponsoring organization or committee significantly, or on an ongoing basis, provides goods for
10 or funds another organization or committee either directly or indirectly; (I) whether one
11 sponsoring organization or committee had an active or significant role in the formation of
12 another sponsoring organization; and (J) whether the committees have similar patterns of
13 contributions which indicate a formal or ongoing relationship between the committees. 11 CFR
14 100.5(g)(4)(ii)(A) through (C), and (E) through (J) and 11 CFR 110.3(a)(3)(ii)(A) through (C)
15 and (E) through (J). This list of factors is not an exclusive one, and other factors may be
16 considered. *See* Advisory Opinions 1995-36, 1996-42, 1997-25 and 2000-28.

17 **LEGAL ANALYSIS**

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

22 Looking first at factor (A) or stock ownership, the information supplied in your original
23 request and in subsequent correspondence indicates that the only remaining stock ownership by

1 one sponsoring organization of the other is BCBS's current 12.3% equity interest in AMMSG, the
2 parent company of AMS. Although such an equity interest gives BCBS some indirect ownership
3 of AMS, it appears to be non-controlling, given that the affirmative vote of 80% of the
4 outstanding shares are needed to elect an AMMSG director and that the approval of 75% of such
5 shares are needed to amend the articles of incorporation. Cobalt/BCBS could, apparently, bring
6 about a shareholders meeting or inspect and copy business records, but it could not on the
7 strength of its share holdings alone control the decisions of the corporation.

8 It does appear that Mr. Hefty, the president and chief executive officer of Cobalt,
9 continues to own some shares of both Cobalt and of AMMSG. According to the AMMSG Proxy
10 Statement, of the 176,705 shares Mr. Hefty held in AMMSG as of April 26, 2002, 155,543 were in
11 stock options that he had 60 days to exercise. According to the Cobalt Proxy Statement, of the
12 562,163 shares held by Mr. Hefty as of March 31, 2002, 528,579 were in stock options which he
13 again could exercise within 60 days. You have, however, recently stated that while Mr. Hefty
14 did exercise certain of his options with regard to AMMSG stock, he later sold those shares and is
15 left with only a .70% ownership interest in that company. Such a small level of ownership
16 interest would be far from controlling.

17 With regard to the right to participate in the governance of AMS or to affect the
18 employment or control of the officers or decision-making employees of AMS, or other
19 indications of an ongoing formal relationship, i.e., factors (B), (C), (E), and (F), BCBS's only
20 apparent direct involvement in AMS policy is in the person of the single individual whom BCBS
21 may appoint to the AMMSG thirteen-person board of directors so long as its stock ownership
22 interest in AMMSG remains at 10 percent or above. The individual currently designated by BCBS
23 to serve on the board of directors is not, however, an officer, director or employee of BCBS; of

1 the now parent company of BCBS, Cobalt; or of another BCBS entity. The information
2 supplied also asserts that there are no overlaps of personnel between the two separate segregated
3 funds, and there is nothing in their reports to the Commission to indicate otherwise.

4 As for factors (G) and (H) or the funding of one entity by another, it appears that BCBS
5 and AMS do not fund each other. Business arrangements that existed between the two
6 companies following the spin-off of BCBS's parent company, now Cobalt, have been drastically
7 reduced or eliminated. Further, as regards the relationship of BCBS PAC and AMS PAC, the
8 information you have supplied to the Commission, and the committees' respective reports
9 indicate no funding of one committee by the other. Neither committee has reported any transfers
10 to or from an affiliated committee. Contributors itemized by AMS PAC in recent filings have
11 been reported as managers and/or employees of AMS, not of BCBS.⁴

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

17 As for contributions to candidates and party committees or factor (J), both BCBS PAC
18 and AMS PAC have made contributions, within their currently shared limitations, to Green for
19 Congress and to Ryan for Congress during the 2001-2002 election cycle; however, as of June 30,
20 2002, each PAC had also made contributions during the same cycle to a number of candidates
21 and party committees to which the other had not contributed.

⁴ 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.

