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February 17, 2023

Lisa J. Stevenson  
Acting General Counsel  
Office of General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

On behalf of Humana Inc. (“Humana”), this letter requests an advisory opinion regarding the impact of Humana’s spinoff of its hospice subsidiary on the affiliation status of its connected PAC, Humana Inc. PAC, and the PAC associated with the hospice business, KAH Hospice Company, Inc. PAC f/k/a Gentiva Health Services Inc. PAC. As reflected on their statements of organization, the two PACs have been “per se” affiliated while Gentiva Health Services Inc. (“Gentiva”), as the connected organization of Gentiva PAC, has been a wholly owned subsidiary of Humana Inc.

In a transaction that closed on August 11, 2022, Humana Inc. has divested majority ownership and control of Gentiva’s hospice subsidiary, namely KAH Hospice Company, Inc. (“KAH Hospice”), along with other hospice-related business entities (the “Transaction”). Gentiva PAC recently changed its connected organization to KAH Hospice Company, Inc., so that the PAC and its underlying funds remain associated with the hospice business. A conforming amendment to that PAC’s Form 1 has been timely filed. Accordingly, that PAC will be described as either Gentiva PAC or KAH Hospice PAC for purposes of this Advisory Opinion Request.

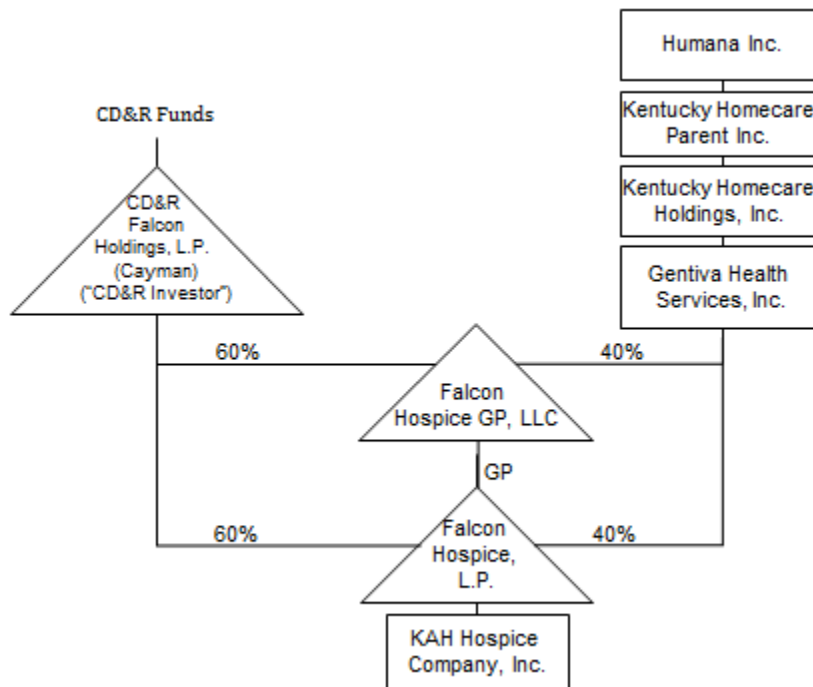
At a minimum, the Transaction ends the per se affiliation between the two PACs. Furthermore, in our judgment, the change in ownership and control resulting from the Transaction create a sufficient segregation between the ownership, management, personnel, and governance of Humana and that of spun-off hospice business such that the two PACs are no longer affiliated. This letter requests the Commission’s conclusion on that result.

**Background**

In August 2021, Humana acquired Kindred at Home (“KAH”), a combined home health & hospice company. At the time of the acquisition, Gentiva Health Services, Inc. (“Gentiva”) was the principal holding company within Humana for both the home health business and the hospice business, operating through a number of operating subsidiaries and serving as the connected organization for what was then Gentiva Health Services Inc. PAC. The statements of organization for Humana PAC and Gentiva PAC were each amended accordingly to list each other as affiliates.

At the time of its acquisition of KAH, Humana announced its intention ultimately to maintain only a minority interest in KAH’s hospice business while retaining in full KAH’s home health business. Following the acquisition, Humana completed a reorganization of KAH’s hospice business, forming KAH Hospice and transferring to KAH Hospice both the entities and assets comprising the hospice business. Following this reorganization, on August 11, 2022, as part of the above-referenced Transaction, Humana sold a 60% interest in KAH Hospice (via Falcon Hospice L.P.) to Clayton, Dubilier & Rice<sup>1</sup> (“CD&R”), retaining only a minority equity interest (40%) for itself. Following the Transaction Humana has the right to appoint only two of seven directors of the LLC that will serve as the general partner of the limited partnership that in turn will exercise control over all of the LP’s subsidiaries, including KAH Hospice Co. Inc. Similarly, Humana now holds only typical ancillary approval rights in the governance of that L.P. designed to provide basic protection of its minority ownership interest, while not allowing Humana to exercise actual control over either KAH Hospice or KAH Hospice PAC. Humana also holds an interest in less than 15% of the debt incurred by KAH Hospice at closing,

The CD&R and Humana ownership interests in KAH Hospice are illustrated below<sup>2</sup>:



The general partner of Falcon Hospice L.P. is Falcon Hospice GP LLC, which has plenary authority over Falcon Hospice L.P. Humana and CD&R (through respective subsidiaries and investment vehicles) are the members of Falcon Hospice GP LLC, which is governed by a seven-member board. CD&R appoints four members of that board, Humana appoints two, and the CEO of KAH Hospice (who is not a Humana employee) is the seventh. As further detailed below, Humana maintains rights of

<sup>1</sup> Founded over forty years ago, CD&R is one of the oldest private equity firms in the world and has invested in dozens of divestitures at least loosely analogous to this one. It has no management or significant ownership overlap with Humana Inc., and is engaging in the KAH transaction at issue here solely as an arm’s length investor and business partner.

<sup>2</sup> Percentages disregard equity interests to be held by management, which as early 2023 equals approximately 8.63% of the LP and approximately 1.12% of the GP.

approval over certain narrow categories of KAH Hospice decisions in order to protect its minority investment interest.

In sum, the Transaction ended Humana's relationship with KAH Hospice as a wholly-owned subsidiary, and vested management control over that business with a board of directors under majority control of KAH Hospice's new owners at CD&R.

### **Question Presented**

In light of the spinoff transaction, are the two relevant PACs, Humana PAC and KAH Hospice Company, Inc. PAC, now disaffiliated for purposes of the Federal Election Campaign Act?

### **Analysis**

In several prior Advisory Opinions, the Commission has evaluated similar corporate spin-offs or divestitures in light of the "ten factor test" established by regulation for determining affiliation in circumstances that fall short of establishing per se affiliation. Per 11 C.F.R 100.5(g)(4)(ii), those factors include but are not limited to:

- (A) Whether a sponsoring organization owns controlling interest in the voting stock or securities of the sponsoring organization of another committee;
- (B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- (C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees or members of another sponsoring organization or committee;
- (D) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;
- (E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;
- (F) Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;
- (G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;
- (H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

- (I) Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and
- (J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

Applying those factors here leads to clear results under factors (A), (D), (E), (F), (I), and (J).  
Namely:

- (A) Neither Humana nor KAH Hospice owns a controlling interest in the voting stock or securities of the other.
- (D) Humana's shareholder base will not overlap with that of KAH Hospice other than to the extent Humana itself is a minority owner of KAH Hospice, which has only two owners (namely CD&R and Humana).
- (E) Humana & KAH Hospice will share no officers or employees, other than two Humana executives who will serve as Humana's only appointees as Directors on the seven-member Board of KAH Hospice.
- (F) Upon Humana's acquisition of KAH in August 2021, KAH continued standalone operations as a wholly-owned subsidiary of Humana Inc., and KAH personnel continued to be employed by KAH entities. In connection with the Transaction, certain members of the KAH management team and personnel aligned with hospice operations were realigned to KAH Hospice. Following the closing of the Transaction these personnel continued to be employed by KAH Hospice. As a result, while certain KAH Hospice personnel were technically under the Humana Inc. umbrella from August 2021 to August 2022, they did not have a direct employment relationship with Humana Inc. and continued to be employed by KAH. No KAH Hospice personnel have a employment relationship with KAH (or Humana) post-spinoff and therefore none of these prior relationships suggests any formal or ongoing relationship between the two entities.
- (I) Humana had a role in forming KAH Hospice Company Inc. as it now exists, as is true by definition in any corporate spin off.
- (J) KAH Hospice and its PAC will make their own decisions, through their own separate personnel, about contributions and expenditures, so any similar pattern of contributions between the two would result only from their common participation in the health care industry.
  - i. KAH Hospice PAC is managed and operated by its duly appointed Treasurer in cooperation with key business leaders from within the restricted class of the committee's connected organization.
  - ii. Humana PAC is run by a PAC board elected by the company's restricted class.
  - iii. Neither PAC's operations (either overall or on a day-to-day basis) include any involvement by the other corporation or the other PAC.

As noted above, the two corporations will share only the two Humana executives who will serve as Humana's appointees as Directors on the seven-member Board of the LLC that controls the L.P. that owns KAH Hospice. That leaves the vast majority

of their restricted classes completely separate, all but categorically eliminating the prospect of any similar pattern of contributors.

Other factors of the “ten factor” test merit greater review and discussion, namely to analyze Humana’s minority ownership interest itself, the minority portion of KAH Hospice’s debt that Humana holds, the limited governance rights it holds in KAH Hospice, and the post-spin off business relationship between the two companies under factors (B), (C), (G), and (H).

The terms of the Transaction<sup>3</sup> provide that so long as Humana’s equity interest in KAH Hospice remains at least 50% of the amount it owned at closing, and amounts to at least 15% of the then-outstanding stock in KAH Hospice, it will retain a right of approval over the following actions:

- Any waiver or amendment to the Stockholders Agreement, charter or by-laws or similar constituent documents that (i) adversely and disproportionately affects Humana relative to CD&R or (ii) amends special rights expressly granted to Humana;
- Non-pro rata distributions, dividends, redemptions or repurchases (other than ordinary course employee stock repurchases in connection with a termination of employment);
- Transactions with CD&R (or its affiliates) other than:
  - ordinary course transactions between portfolio companies of CD&R and KAH Hospice on arm’s-length terms<sup>4</sup>, or
  - issuances of equity or equity-like securities of KAH with respect to which Humana has received an opportunity to participate pursuant to its preemptive rights;
- Approval of annual budget, provided that in the absence of approval, the budget will be 107.5% of the annual budget for the immediately preceding year;
- Hiring and firing or material changes in compensation (including equity compensation) of the CEO of KAH Hospice;
- Incurrence of indebtedness if such debt would result in the Company’s debt being greater than 7.5x Last Twelve Months EBITDA<sup>5</sup>;
- Settling litigation for over \$35 million; or
- Authorizing or entering into any transaction with respect to any of the foregoing.

As shown in Attachment A, those rights are imposed by provisions in the LLC agreement for the general partner of Falcon Hospice LP that disallow the general partner from taking the listed actions without obtaining the “Required Consents” of the Humana Member of the partnership.<sup>6</sup>

That said, nothing in the Transaction or elsewhere provides Humana with any ability to initiate any of those actions. Likewise, it has no ability to “hire, appoint, demote or otherwise control the officers, or other decisionmaking employees or members” of KAH Hospice. In fact, its only authority over “decisionmaking employees or members” is the right to approve a change of the CEO, or of the CEO’s compensation, but it has no authority to fire, demote, remove, or otherwise exercise control over the CEO or any other KAH Hospice personnel. Accordingly, while on their face these various rights of approval

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<sup>3</sup> At Section 3.8 of the Falcon Hospice GP LLC Agreement, the text of which is attached as Attachment A.

<sup>4</sup> Simply for purposes of illustration, this could include a business arrangement between KAH and a commercial real estate company leasing space to KAH.

<sup>5</sup> EBITDA stands for “Earnings Before Interest, Taxes, Depreciation, and Amortization,” and is a common measure of corporate profitability.

<sup>6</sup> Section 3.9 of the LLC agreement for the GP is also included in Attachment A, and generally allows CD&R to initiate an Initial Public Offering of Falcon Hospice, regardless of Humana’s consent, so long as other specified conditions are met.

could indicate some level of influence over KAH in limited circumstances, none of these rights rises to a level that would allow Humana to control KAH or its management decisions (over KAH PAC or otherwise). Consequently, reviewing the facts and circumstances of this transaction in light of factors (B) & (C) likewise supports a conclusion that the two PACs are not affiliated.

We similarly conclude that factors (G) & (H) also support that result, in that while Humana does hold a minority proportion (approximately 15%) in the overall debt syndicate resulting from the Transaction (meaning Humana has no ability to control that syndicate), there are no plans for it to provide additional debt or other capital funding to KAH Hospice, and no plans to provide direct or indirect administrative, fundraising, or other support to either KAH Hospice itself or to KAH Hospice PAC.<sup>7</sup>

Lastly, any actual ongoing business relationship between the two companies will be minimal. Any continued business between Humana and KAH will flow from the two companies conducting their various business operations in the normal course. For example, when the home health business identifies a patient who may be appropriate for transition to hospice, the home health clinician will consult with the patient's independent primary care physician (PCP). If the patient is subsequently referred to hospice, the independent PCP together with the patient will determine the hospice agency to which the patient should be referred. If neither the independent PCP nor patient have a preference, the home health business will assist with identifying a hospice agency (with the ultimate decision belonging to the independent PCP and patient).

The selection of a hospice agency is based on a multitude of factors, including the hospice agency's licensed coverage area and capacity, is made on a case-by-case at the patient level, and is not tracked by the home health business at the corporate level. While this process may result in a home health patient receiving services from a KAH hospice agency in the ordinary course, the home health business does not ultimately control the selection of the hospice agency.

## Conclusion

At bottom, we respectfully suggest that the circumstances of the post-spin off relationship between Humana and KAH Hospice, and between their PACs, indicates at least the level of segregation and independence that supported prior Commission disaffiliation opinions on similar corporate spin offs. Nevertheless, please contact me by email at [birkenstock@sandlerreiff.com](mailto:birkenstock@sandlerreiff.com) or by phone at (202) 479-1111 if anyone needs further information or if it would be helpful to discuss any of these aspects in closer detail.

Sincerely,



Joseph M. Birkenstock  
Counsel to Humana Inc.

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<sup>7</sup> Nothing in the Transaction precludes Humana from providing addition debt funding, capital investment, or administrative support to KAH, and the companies would revisit the question of affiliation in the event Humana's involvement with KAH increased.

**Attachment A**

Relevant provisions from the Limited Liability Company Agreement of Falcon Hospice GP, LLC

3.8 Member Consent Rights.

(a) General. In addition to any vote of the Board, and notwithstanding anything to the contrary in this Agreement (but subject to Section 3.9), for so long as (x) the Humana Holders (together with their Permitted Transferees) own (A) at least fifteen percent (15%) of the total number of Outstanding Investment Units (determined using the Threshold Calculation) and (B) at least fifty percent (50%) of the LP Units held by the Humana Holders as of the date hereof or (y) the CD&R Holders own (X) at least fifteen percent (15%) of the total number of Outstanding Investment Units (determined using the Threshold Calculation) and (Y) at least thirty three and one third percent (33.3%) of the LP Units held by the CD&R Holders as of the date hereof, the following actions by the Company, the Partnership or their respective Subsidiaries will require the approval of the Humana Member and/or the CD&R Member, as the case may be (such consents, collectively, the “Required Consents”):

- (i) except as set forth herein, non-pro rata distributions, dividends, or redemptions or repurchases of equity or equity-like securities (other than ordinary course repurchases of equity or equity-like securities, including the Common Units, from employees or other service providers in connection with a termination of employment or service with the Company, the Partnership or their respective Subsidiaries);
- (ii) (A) transactions with the CD&R Holders (or their affiliates) shall require the approval of the Humana Member other than (x) ordinary course transactions between portfolio companies (as such term is commonly used in the private equity industry) of CD&R and the Company, the Partnership or their respective Subsidiaries on arm’s-length terms, and (y) issuances of equity or equity-like securities of the Partnership (or its Subsidiaries) with respect to which the Humana Holders shall receive an opportunity to participate pursuant to Section 5.5 of the LPA, and (B) transactions with the Humana Holders (or their affiliates) shall require the approval of the CD&R Member other than (x) ordinary course transactions between Affiliates of Humana and the Company, the Partnership or their respective Subsidiaries on arm’s-length terms, and (y) issuances of equity or equity-like securities of the Partnership (or its Subsidiaries) with respect to which the CD&R Holders shall receive an opportunity to participate pursuant to Section 5.5 of the LPA;
- (iii) approving the annual budget of the Company, the Partnership and their respective Subsidiaries, provided that, in the absence of approval, the budget will be 107.5% of the annual budget for the immediately preceding year;
- (iv) hiring and firing or material changes in compensation (including equity compensation) of the Chief Executive Officer of KAH;
- (v) except as would not result in an Excessive Leverage Event, increasing the aggregate indebtedness of KAH and its Subsidiaries (of the type described in clause (i) of Consolidated Total Indebtedness in the Debt Financing Documents as in effect on the date hereof);
- (vi) settling any litigation for an amount in excess of \$35,000,000 individually;
- (vii) entering into or consummating any Sale Event prior to the second anniversary of the date hereof, if the proceeds from such Sale Event would be based on an implied enterprise value of KAH of less than \$3,490,000,000; or
- (viii) authorizing or entering into any transaction with respect to any of the foregoing.

3.9 IPO Right. The CD&R Member has the right to cause an IPO of the Partnership or any of its Subsidiaries, including KAH (“CD&R IPO”), and in the event the CD&R Member elects to proceed with a CD&R IPO, the Board shall authorize the CD&R IPO and shall initiate an IPO process, provided that a CD&R IPO prior to the second anniversary of the date hereof may only be completed subject to the CD&R Member’s compliance with Section 5.6 of the LPA. The CD&R Member shall direct and control all decisions in connection with a CD&R IPO, subject to reasonable consultation in good faith with the Board on such matters, and no Member shall have any right to vote on or otherwise consent to the CD&R

IPO but each shall be deemed to consent to and shall raise no objections against the CD&R IPO or the process associated therewith. Each Member shall, and shall cause its Affiliates that are Holders of LP Units to, take all actions in connection with the consummation of the CD&R IPO as reasonably requested by the Company or the CD&R Member, including the execution and delivery of all agreements, instruments and documents as may be reasonably necessary to effect the CD&R IPO, provided, however, that in such case: (a) the Humana Holders and the CD&R Holders shall receive the same class of shares, (b) the Humana Member's director designation rights (pursuant to Section 3.1(a)(ii) and Section 3.1(b)) would continue and (c) the Humana Holders would be able to sell proportionately in any sale of shares by the CD&R Holders in the CD&R IPO.



February 17, 2023

Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

Re: Advisory Opinion Request Submitted by Humana, Inc. Concerning Affiliation Status of its  
Separate Segregated Fund – Humana, Inc. Political Action Committee

Dear Ms. Stevenson:

This correspondence issues on behalf of KAH Hospice Company, Inc. (hereinafter "KAH Hospice") in regard to an advisory opinion matter now pending before the Federal Election Commission (hereinafter "FEC" or the "Commission") and your office. It is our understanding that Humana, Inc. (hereinafter "Humana") is submitting an advisory opinion request seeking a determination from the FEC that its separate segregated fund - the Humana, Inc. Political Action Committee (C00271007) - should be considered disaffiliated from KAH Hospice Company, Inc. PAC (C00407080) – f/k/a Gentiva Health Services Inc. PAC - following the spinoff of KAH Hospice from Humana in a corporate transaction that closed on August 11, 2022.

On behalf of KAH Hospice, I submit this letter to the Commission to express the company's support for Humana's advisory opinion request. KAH Hospice and KAH Hospice Company, Inc. PAC concur in the facts and analysis presented to the FEC in Humana's present request, and likewise ask that the Commission conclude that Humana, Inc. Political Action Committee and KAH Hospice Company, Inc. PAC are no longer affiliated in accordance with applicable law and regulation.

Thank you for your time and consideration of Humana's request and this correspondence. Should you have any questions or concerns, please do not hesitate to contact me at (678) 449-0444.

Sincerely,



Ronald C. Lazas, Jr.  
*Treasurer – KAH Hospice Company, Inc. PAC*