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ADVISORY OPINION 2017-01

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Dear Ms. Belinski:

We are responding to your advisory opinion request on behalf of the American Urological Association, Inc. (“AUA”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to the possible disaffiliation of the AUA from the American Association of Clinical Urologists, Inc.

The Commission concludes that the AUA is no longer affiliated with the American Association of Clinical Urologists, Inc. (“AACU”).

Background

The facts presented in this advisory opinion are based on your letters received on January 25 and April 17, 2017, your emails received on February 6, 23, and March 21, 2017, and publicly available information.¹

The AUA is an incorporated, non-stock membership organization registered under section 501(c)(6) of the Internal Revenue Code. Advisory Opinion Request at AOR002, AOR006-023.² Formed in 1902, the AUA’s mission is “to promote the highest standards of

¹ In this advisory opinion, the Commission relies on the facts presented by the AUA in support of its request in Advisory Opinion Request 2017-01 (AUA) and not those presented by the AACU in support of its request in Advisory Opinion Request 2017-03 (AACU/UROPAC), even though both advisory opinion requests concern whether the AUA and the AACU remain affiliated.

² See also American Urological Association, AUA Governance, <https://www.auanet.org/about/aua-governance.cfm> (last visited May 22, 2017).

urological clinical care through education, research and the formulation of health care policy.” AOR001.³ The AUA has more than 22,000 members, including “practicing urologists, research scientists, urologists in training, and advanced practice providers.” *Id.*

The AUA’s board of directors has 15 members, of whom seven are also the AUA’s officers. AOR011, AOR013. The other eight board members are representatives of the AUA’s regional “Sections,” which are separately incorporated, non-profit entities that provide services to AUA members across North and Central America. AOR006, AOR013; Advisory Opinion Request Supplement at 1. The AUA has eight standing committees, which report to the board. AOR015.

The American Association of Clinical Urologists, Inc., a section 501(c)(6) organization founded in 1969, is “dedicated to developing and advancing health policy as it affects urologic practice and training.” AOR002. The “AUA as an organization did not have any role in founding” the AACU, AOR Supp. at 1; however, “several individuals who held leadership positions in the AUA or its Sections were involved in the formation of AACU,” AOR029; *see also* AOR Supp. at 1 (“Several AUA officers and members in their individual capacities may have been involved in the formation of AACU.”). The AUA itself did not “take a vote to establish AACU or in any other way assist with its formation.” AOR Supp. at 1. The AACU is a distinct legal entity from the AUA — it has its own separate bylaws, board of directors, mission, headquarters, and operational activities. AOR001, AOR003. The AUA states that it “has no authority to control” the AACU’s “board[], officers, employees, or operations.” AOR004 n.1; *see also* AOR006-022.

In 1992, the AACU created a separate segregated fund (“SSF”) called the American Association of Clinical Urologists PAC (“UROPAC”). AOR001-002. The AUA played no role in creating UROPAC. AOR028. In 2003, UROPAC received an advisory opinion from the Commission deeming the AUA and the AACU affiliated organizations and, as a result, both able to serve as UROPAC’s connected organizations. *See* Advisory Opinion 2002-15 (UROPAC). In making its determination, the Commission considered “factors such as overlapping membership, governance structures, and Board membership between the two entities.” *See id.* at 6-7.

After the Commission confirmed their affiliation in 2003, the AUA and the AACU shared the administrative expenses for UROPAC, AOR002, though each entity was primarily responsible for soliciting contributions to UROPAC from its own members, AOR028. The AUA and the AACU also entered into a series of affiliation agreements in which they agreed to conduct various joint activities. AOR002. For example, in an affiliation agreement executed in August 2015, the AUA and the AACU agreed to:

- plan, promote, host, and pay for an annual “Urology Joint Advocacy Conference,” the purpose of which was to develop an “advocacy strategy” regarding urology issues, to

³ *See also* American Urological Association, History of the AUA, <https://www.auanet.org/about/history-of-the-aua.cfm> (last visited May 22, 2017).

educate urologists on that agenda, and to “actively lobby our Federal Legislators,” AOR023;

- work together at the AUA annual meeting to promote health policy issues to urologists, including during a “Urology Health Policy Forum” featuring speakers from both groups, AOR025;
- encourage their delegates to the American Medical Association (“AMA”) to participate in the AMA’s “Urology Caucus,” AOR026;
- reserve seats on each entity’s health policy council or similar committee for the other entity, *id.*;
- “speak in a single unified voice” on “urologic causes,” including by “coordinating communications with legislators and regulatory agencies,” *id.*; and
- require the AACU to have a booth, and allow UROPAC to have an exhibit, at the AUA’s annual meeting, *id.*

The AUA states that over time, however, the AUA’s and AACU’s “organizational and operational agendas and priorities began to diverge and the two organizations undertook the process of unwinding many of their close connections.” AOR002. In December 2015, the AUA and the AACU “agreed that AUA would no longer provide any financial support to UROPAC.” AOR002, AOR004. The next month, UROPAC filed an amended Statement of Organization to remove the AUA as a listed connected organization. AOR002.⁴

The AUA has no plans to renew its most recent affiliation agreement with the AACU, which expired on March 17, 2017. AOR002, AOR004. The AUA states that, as a result, “the organizations will no longer provide — or cause or arrange for — significant funds or in-kind support to each other on a regular basis.” AOR004. The entities will no longer cosponsor the Urology Joint Advocacy Conference, they will keep their own separate “grassroots contact list[s],” and they will “no longer maintain a process to develop a mutual legislative agenda.” AOR004, AOR028.

The groups will, however, continue to work together in a more limited fashion on a few specific projects. The AUA and the AACU will jointly sponsor the Health Policy Forum at the AUA’s annual meeting in May 2017. AOR028. The AUA will also continue to work with the AACU and other organizations “with respect to AMA House of Delegates issues affecting urology.” *Id.* Moreover, the AUA has started to plan its “2018 Urology Advocacy Summit.” AOR Supp. at 2. The AUA is the sole sponsor of the summit, which has a planning committee comprised only of AUA leadership. *Id.* The AUA has invited 15 urology societies, including

⁴ See UROPAC, Statement of Organization, Form 1 at 5 (Jan. 14, 2016), <http://docquery.fec.gov/pdf/852/201601149004501852/201601149004501852.pdf>.

the AACU, to “be involved in some aspects of planning the Summit’s educational program”; however, the AACU has not yet agreed to participate. *Id.*

As of May 2017, no AUA board member is also a current (or former) board member of the AACU. AOR003. There is no seat on the AUA’s board that is reserved for a member of the AACU. AOR Supp. at 1. The AUA states that it was not reasonably able to obtain a copy of the AACU’s current bylaws, AOR028, but “to AUA’s knowledge, AACU does not designate any of its board seats for an AUA representative,” AOR Supp. at 2. The AUA also states that “the majority of AUA’s officers over the past ten years have never served on AACU’s board.” *Id.* at 2. Any overlapping board membership between the AUA and the AACU “is entirely coincidental and a function of the individuals’ personal interests in serving both organizations.” *Id.* at 1.

There is some overlap between the entities’ committee memberships. The AUA was historically entitled to one seat on the AACU’s Health Policy Council, State Society Committee, or “a committee of similar importance,” but the affiliation agreement between the two entities establishing that entitlement expired in March 2017. AOR026. Under the AUA’s bylaws, the AACU will continue to hold three seats on the AUA’s standing committee called the “Public Policy Council.” AOR017. Beyond these three seats, any further overlap between the two entities’ committee memberships is “not based on any effort by either organization to populate each other’s committees.” AOR Supp. at 2.

There is also overlap between the AUA’s members and the AACU’s members. AOR003, AOR023, AOR028. The AUA does not track whether its members affiliate with other organizations but acknowledges that the AUA and the AACU “share a fair number of common members.” AOR003, AOR029; *see also* AOR028 (noting the “overlapping membership of the organizations”). In their most recent affiliation agreement, the entities described themselves as “independent membership organizations that share a common membership.” AOR023.⁵ The AUA does not require its members to become members of the AACU. AOR003. The AUA states that it believes that the AACU requires certain categories of its members to be AUA members, but that the AACU can waive that requirement. AOR003, AOR028.

The AUA stated in its request that it had notified the AACU of its advisory opinion request, and that the AUA did not know whether the AACU had any position on the AUA’s request. AOR027-028. The AACU subsequently submitted to the Commission a comment stating that the AACU opposes the AUA’s request. *See* American Association of Clinical Urologists, Comment at 1.

Question Presented

Are the AUA and the AACU disaffiliated?

⁵ The AUA states that overlapping membership between it and other urology-based organizations in the United States is inevitable given the relatively small number of practicing urologists and the fact that 80 percent of them are members of the AUA. AOR003-004.

Legal Analysis and Conclusion

Yes, the AUA and the AACU are disaffiliated.

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

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

In the absence of *per se* affiliation, the Commission examines “the relationship between organizations that sponsor committees, between the committees themselves, [and] between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated.” 11 C.F.R. § 100.5(g)(4)(i). Commission regulations provide a non-exhaustive list of ten “circumstantial factors” to be considered “in the context of the overall relationship” in order to determine whether the respective entities are appropriately considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(ii), 110.3(a)(3)(ii); *see, e.g.*, Advisory Opinion 2016-02 (Enable Midstream Services) (“Enable”); Advisory Opinion 2014-21 (Cambia Health Solutions) (“Cambia”); Advisory Opinion 2014-11 (Health Care Service Corporation Employees’ PAC) (“HCSC”); Advisory Opinion 2002-15 (UROPAC).

In Advisory Opinion 2002-15 (UROPAC), the Commission concluded that the AUA was affiliated with the AACU and that both entities could therefore serve as connected organizations for UROPAC. The AUA states that the Commission should no longer consider the entities affiliated due to intervening “changes in the[ir] relationship.” AOR001; *see, e.g.*, Advisory Opinion 2014-21 (Cambia) at 4 (concluding that two entities were disaffiliated due to “changed circumstances”); Advisory Opinion 2014-11 (HCSC) at 1 (finding that two committees were no longer affiliated because business relationship between their connected organizations had “evolved over time”).

The Commission considers the ten circumstantial factors in turn.

(A) *Controlling Interest*

The “controlling interest” factor weighs in favor of finding that the AUA and the AACU are not affiliated.

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

110.3(a)(3)(ii)(A). Here, both entities are section 501(c)(6) membership organizations and neither entity has issued any shares of stock or holds any stock or other ownership interest in the other.⁶ AOR002, AOR006-022.⁷ The absence of such ownership weighs against finding that the AUA and the AACU are affiliated. *See* Advisory Opinion 2014-21 (Cambia) at 4.

(B) *Governance*

The governance factor suggests that the AUA and the AACU are not affiliated.

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

The Commission has previously found that the governance factor indicates disaffiliation where one entity controls only a small minority of the seats on the other's board of directors. For example, in Advisory Opinion 2014-21 (Cambia), the Commission concluded that Blue Cross and Cambia were no longer affiliated, in part, because Blue Cross held no seats on Cambia's board, and there was a "very limited (2-in-38) role played by Cambia in Blue Cross's governing board." *Id.* at 5; *see also* Advisory Opinion 2014-11 (HCSC) at 4 ("BCBSA's complete absence of representation on HCSC's governing board and the very limited (1-in-38) role played by HCSC in BCBSA's governing board weigh against finding that the entities' SSFs are affiliated."). In another advisory opinion, the Commission found that where an entity had the authority to appoint up to 25 percent of another entity's board of directors, this factor suggested affiliation, but did "not weigh heavily." Advisory Opinion 2016-02 (Enable) at 7 (determining that two entities were not affiliated).

In contrast, here, the AACU has no authority to appoint any of the AUA's 15 directors. AOR013; AOR Supp. at 1. Instead, the AUA's board consists of AUA officers and representatives of the AUA's regional Sections. AOR006, AOR013. As for the AACU's board, the AUA states that to its knowledge, "AACU does not designate any of its board seats for an AUA representative." AOR Supp. at 2. The AUA further states that "it has no authority to control" the AACU's "board, officers, employees, or operations." AOR004.⁸

⁶ In Advisory Opinion 2002-15 (UROPAC), the Commission did not consider the "controlling interest" factor separately, but noted in its analysis that "neither entity has issued any shares of stock or holds any stock or other ownership interest in the other." *Id.* at 6.

⁷ *See also* American Urological Association, AUA Governance, <https://www.auanet.org/about/aua-governance.cfm> (last visited May 22, 2017).

⁸ In Advisory Opinion 2002-15 (UROPAC), the Commission relied upon the AACU's bylaws in concluding that the governance factor favored the AUA's affiliation with the AACU. *Id.* at 6. The AACU's bylaws at that time required its members to hold AUA membership in order to vote or hold office. *Id.* Those bylaws also authorized a seat for the AUA on the AACU's Government Relations Committee. *Id.* Here, the AUA states that it was not reasonably able to obtain a copy of the AACU's current bylaws. AOR028.

Outside of the board of directors, the AACU has only a relatively minor ability to participate in the AUA's governance. The AUA's bylaws entitle the AACU to three seats on one of the AUA's eight standing committees. AOR015, AOR017. The AUA, in turn, used to be entitled to one seat on the AACU's Health Policy Council, State Society Committee, or "a committee of similar importance." AOR026. But the affiliation agreement between the two entities establishing that right expired in March 2017, and the AUA states that there is no plan to renew that agreement. AOR002, AOR026, AOR028. The AUA does not indicate that it holds any other ability to direct or participate in the AACU's governance.

Because the governance ties between the groups appear to be well below the level the Commission had previously found to suggest affiliation, Advisory Opinion 2016-02 (Enable) at 7, the governance factor indicates that the AUA and the AACU are not affiliated.

(C) *Hiring Authority*

Factor (C) weighs in favor of finding that the AUA and the AACU are not affiliated.

This factor concerns whether a sponsoring organization has the authority or ability to hire, appoint, demote, or otherwise control the officers or other decision-making employees of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(C), 110.3(a)(3)(ii)(C). A lack of such authority suggests that the two entities are not affiliated. *See* Advisory Opinion 2016-02 (Enable) at 7; Advisory Opinion 2014-11 (HCSC) at 5.

Here, the AUA's request indicates that the entities lack hiring authority over each other. The AUA states that it is a separate legal entity from the AACU and has "no authority to control" the AACU's "board[], officers" or "employees." AOR001, AOR004. Also, the AUA's current bylaws do not grant the AACU the authority to hire, appoint, demote, or otherwise control the AUA's officers or other decision-makers. *See* AOR006-022. This factor therefore weighs in favor of disaffiliation. *See, e.g.*, Advisory Opinion 2016-02 (Enable) at 7.

(D) *Common Membership*

The common membership factor weighs in favor of finding that the AUA and the AACU are affiliated, but not heavily.

This factor considers 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." 11 C.F.R. §§ 100.5(g)(4)(ii)(D), 110.3(a)(3)(ii)(D).

In Advisory Opinion 2002-15 (UROPAC), the Commission found this factor was "particularly significant" in concluding that the AUA and the AACU were affiliated. *Id.* at 6. At that time, approximately 71 percent of the AACU's members were also members of the AUA. *Id.* The AACU's bylaws required AUA membership as a precondition to being able to vote or hold office in the AACU, and encouraged all active members to join the AUA. *Id.* at 1, 6.

Here, the AUA acknowledges that, “[a]s was the case in 2003, the AUA and AACU continue to share a fair number of common members.” AOR003; *see also* AOR026 (describing membership of organizations as “overlapping”); AOR023 (providing agreement between the entities that states that AUA and AACU “share a common membership”). The AUA does not track how many of its members are also members of the AACU, *see* AOR029, but the AACU indicates that 98 percent of its members are concurrently members of the AUA. AACU Comment at 4. The AUA states that it has “more than 22,000 members,” AOR001, and it estimates that the AACU has “approximately 3,935” members, AOR002.⁹

This overlapping membership suggests affiliation, but only slightly, under the circumstances presented here. Under the regulation, the existence of common or overlapping members “is only significant when it indicates a formal or ongoing relationship” between the organizations, and is not merely a reflection of “similar goals for the two organizations or committees.” *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions*, 54 Fed. Reg. 34,098, 34,100 (Aug. 17, 1989) (“*Affiliated Committees*”). The Commission has explained that common membership may constitute evidence of a “formal or ongoing relationship” where two entities are made up of “largely the same people in a manner suggesting an organized control over both groups.” *Advisory Opinion 2007-13 (United American Nurses, AFL-CIO) (“United American Nurses”)* at 7-8 (internal quotation marks omitted) (finding that “maximum possible indirect overlap of 62%” failed to indicate affiliation absent any indication of control).

Here, while a large percentage (98 percent) of the AACU’s members are members of the AUA, a far smaller percentage of AUA’s members are also members of the AACU (just 18 percent, assuming that 4,000 of AUA’s 22,000 members are also members of the AACU).¹⁰ Thus, the AUA and the AACU do not consist of largely the same people since the overlap between the two organizations excludes most of the AUA’s membership. *Cf.* *Advisory Opinion 2005-17 (American Crystal Sugar Company)* at 2, 4 (finding membership overlap to favor affiliation where at or near 100 percent for both entities); *Advisory Opinion 2012-23 (Snake River Sugar Company)* at 4 (same).

Moreover, AUA posits that the entities’ partially overlapping membership is a “function of the individuals’ personal interests in serving in both organizations,” AOR Supp. at 1, rather than of organized control. The AUA does not require any of its members to be AACU members, AOR003, AOR008-011, and the AUA believes that the AACU requires only certain categories of its members to be AUA members, unless that requirement is waived, AOR003, AOR028. Also, the entities’ partially overlapping membership is consistent with their prior affiliation and the fact that both entities appeal to members of a “relatively small, but well-organized medical specialty” with similar interests. The AUA estimates that some 80 percent of all American

⁹ The AACU’s comment on the AUA’s advisory opinion request does not dispute the AUA’s estimate that the AACU has approximately 3,935 members.

¹⁰ The percentage of AUA members who are also members of AACU would likely be somewhat higher if non-U.S. national members were excluded from the calculation.

urologists are AUA members, and so it is to be expected that many individuals will be members of the AUA and other urology-focused organizations. AOR003-004. Finally, the partial membership overlap between the AUA and the AACU has not translated into either group controlling the other, since the groups currently do not share a single common board member or officer. *See infra* pp. 9-10.

Thus, the partially overlapping memberships between the AACU and the AUA is only slightly suggestive of continued affiliation.

(E) *Common Officers or Employees*

This factor indicates that the AUA and the AACU are not affiliated.

Factor (E) asks whether sponsoring organizations have common or overlapping officers or employees, indicating a formal or ongoing relationship between the organizations. 11 C.F.R. §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E). Where two organizations have no common officers or employees, this factor weighs against affiliation. *See, e.g.*, Advisory Opinion 2016-02 (Enable) at 6.

Today, the AUA and the AACU have no current overlapping board members or officers, unlike at the time of Advisory Opinion 2002-15 (URO PAC), when one person was a board member of both organizations at the same time. *See id.* at 7. Here, “as of May 2017, no AUA board member [is] a current (or former) board member of the AACU.” AOR003. And because all AUA officers sit on the AUA board, AOR011-013, it also follows that as of May 2017, no AUA officer is a current AACU board member either.

The AUA and the AACU also do not have any employees in common: The AUA states that it and the AACU “do not employ any common staff members.” AOR004. Also, the AUA and the AACU no longer “employ a contract lobbyist to provide joint representation,” *id.*, as the groups had when the Commission found them affiliated in Advisory Opinion 2002-15 (URO PAC) at 7.¹¹

The AUA’s request does not state whether any of the AUA’s members, committee members, or others holding non-officer positions also hold positions with the AACU (or vice versa). *See* AOR026-027. In Advisory Opinion 2002-15 (URO PAC), the Commission observed under factor (E) that the AUA and the AACU had some commonalities among those holding lower-level positions, in addition to considering whether the AUA and the AACU had common officers and employees. *Id.* at 7. For instance, at that time, several AACU officers were then serving on an AUA standing committee, and members of each organization were on the other’s

¹¹ In Advisory Opinion 2002-15 (URO PAC), the Commission considered the significance of the associations’ employment of one lobbyist under a catch-all section of “Additional Indicators of the Relationship Between AACU and AUA.” *Id.* at 7. Here, the Commission considers this fact under factor (E), since it is relevant to whether the AUA and the AACU have “common or overlapping officers or *employees*.” *See* 11 C.F.R. §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E) (emphasis added).

board of directors. *Id.* Here, even if the AUA and the AACU did currently share similar lower-level commonalities, it would fail to tip the balance of factor (E) in favor of affiliation in light of the groups' non-overlapping boards and officers. In Advisory Opinion 2004-41 (CUNA Mutual), the Commission noted under factor (E) that a trade association and an insurance company had "some overlap in non-governance related committees and at lower levels," but nevertheless found that factor (E) failed to support affiliation because there was no indication of a "formal or ongoing relationship" and there was "no direct overlap between [the entities'] officers and employees." *Id.* at 5.

In light of the lack of overlap among the AUA's and the AACU's current board members, officers, or employees, factor (E) fails to weigh in favor of affiliation.

(F) Former Officers or Employees

This factor also indicates that the AUA and the AACU are not affiliated.

Factor (F) concerns whether a sponsoring organization has any members, officers, or employees who previously were members, officers, or employees of the other sponsoring organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11 C.F.R. §§ 100.5(g)(4)(ii)(F), 110.3(a)(3)(ii)(F). Factor (F) weighs against affiliation where the organizations have no or few current members, officers, or employees who previously served in those roles for the other organization. *See, e.g.,* Advisory Opinion 2014-21 (Cambia) at 5.

As indicated by the AUA's request, no current AUA board member or officer is a former board member of the AACU. *See* AOR003. The AUA's request also does not identify any current AUA employees who are former employees of the AACU. Nor does the request identify any current AACU board members, officers, or employees who are former AUA board members, officers, or employees. Factor (F) therefore does not weigh in favor of affiliation.

(G - H) Providing Funds or Goods or Arranging for Provision of Funds or Goods

These factors weigh in favor of finding that the AUA and the AACU are not affiliated.

Factor (G) considers whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to the other sponsoring organization or committee. 11 C.F.R. §§ 100.5(g)(4)(ii)(G), 110.3(a)(3)(ii)(G). When evaluating this factor, the Commission has considered whether the entities "fund or otherwise support" each other's SSF. Advisory Opinion 2012-21 (Primerica) at 9, 11 (noting entity's lack of support for other entity's SSF as indicating disaffiliation under factor (G)). Factor (H) concerns whether a sponsoring organization causes or arranges for funds or goods to be provided to the other sponsoring organization in a significant amount or on an ongoing basis. 11 C.F.R. §§ 100.5(g)(4)(ii)(H), 110.3(a)(3)(ii)(H).

Beginning shortly before the Commission considered Advisory Opinion 2002-15 (URO PAC) and until 2016, the AUA and the AACU executed a series of affiliation agreements, which primarily governed their co-sponsorship and sharing of the administrative expenses for

URO PAC and sponsoring of “various advocacy conferences in Washington, D.C.” AOR002. The Commission noted the presence of one of these affiliation agreements in determining that the entities were affiliated.¹²

Since the start of 2016, the amount of funds exchanged between the AUA and the AACU has decreased in some important ways, suggesting that the groups have moved toward disaffiliation. First, the AUA no longer helps pay for URO PAC’s administrative expenses. AOR002, AOR004. Second, after 14 years of entering into a series of affiliation agreements, the AUA has “no plans” to agree to a new one after the latest agreement lapsed in March 2017. AOR002, AOR004. Third, the AUA will no longer co-sponsor the annual Urology Joint Advocacy Conference with the AACU. AOR004, AOR023, AOR028. Because of these changes, factors (G) and (H) weigh in favor of the two entities being disaffiliated.

(I) *Formation*

The formation factor is neutral regarding whether the AUA and the AACU are affiliated.

This factor involves whether a sponsoring organization or committee or its agent had an active or significant role in the formation of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I); *see, e.g.*, Advisory Opinion 2012-23 (Snake River Sugar Company) at 5 (concluding that two entities were affiliated in part because one entity “participated in the formation of” the other).

The AUA was founded in 1902.¹³ Decades later, in 1969, “[s]everal individuals who held leadership positions in the AUA or its Sections were involved in the formation of the AACU.” AOR029; *see also* AOR Supp. at 1 (“Several AUA officers and members in their individual capacities may have been involved in the formation of AACU.”); AACU, AACU History, <http://www.aacuweb.org/about/history> (last visited May 23, 2017) (describing how members of AUA “explore[d] the founding” of AACU during AUA meeting in 1968).

The involvement of AUA officers in the AACU’s founding is significant under factor (I) even though the AUA “as an organization” did not “take a vote to establish AACU.” AOR Supp. at 1. To be sure, affiliation is indicated under factor (I) where one entity creates the other using a formal process. *See, e.g.*, Advisory Opinion 2006-12 (International Association of Machinists and Aerospace Workers, *et al.*) at 2-4 (concluding that factor (I) indicated affiliation where one entity chartered other and “effectively fold[ed] the [entity] into its hierarchical structure”). But the language of factor (I) asks whether an organization “or its agent” had a role in forming another group. 11 C.F.R. §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I). The Commission

¹² Advisory Opinion 2002-15 (URO PAC) does not separately address factors (G) and (H), but rather notes the affiliation agreement as an “additional indicator” of the relationship between the AUA and the AACU. *Id.* at 7.

¹³ *See* American Urological Association, AUA History, <https://www.auanet.org/about/history-of-the-uaa.cfm> (last visited May 22, 2017). Since the AUA was formed first, the AACU could not have had a role in the AUA’s founding. *See* AOR029.

included the term “agent” in factor (I) specifically so that the rule would “also focus on the role played by the personnel of an organization or committee” in forming another entity. *Affiliated Committees*, 54 Fed. Reg. at 34,100.

Consistent with that language, the Commission has previously concluded that factor (I) reaches situations where one group’s members played a part in creating another entity. *See* Advisory Opinion 2012-23 (Snake River Sugar Company) at 5 (finding that formation factor suggested affiliation where members of several of trade associations established agricultural cooperative, and served as first directors of cooperative); Advisory Opinion 2005-17 (American Crystal Sugar Company) at 2, 4 (concluding that trade association played active or significant role in formation of cooperative because “members of the Association founded [the] cooperative”); Advisory Opinion 1996-26 (FTD Association) at 2, 4 (finding that corporation played role in association’s formation of SSF because corporation’s members constituted 20 percent of association’s board, which voted to establish SSF).

However, the significance of the involvement of AUA officers in the AACU’s founding 48 years ago is mitigated by the extent to which the organizations have grown apart since. *See* Advisory Opinion 2007-13 (United American Nurses) at 9 (finding that factor (I) did not alone indicate affiliation, even though one group helped found other, given “the steps both organizations have taken . . . to sever their operational and financial ties”); Advisory Opinion 2004-41 (CUNA Mutual Insurance Society) at 8 (citing “significant ‘period of estrangement’” between two groups in concluding that one’s “role in establishing” other “does not indicate that the two organizations, or their SSFs, are now affiliated”). The AUA states that its and the AACU’s “organizational and operational agendas and priorities” have begun to “diverge” and so the groups have undertaken “the process of unwinding many of their close connections.” AOR002. For example, as explained above, the AUA formally removed itself from UROPAC’s statement of organization and no longer serves as a connected organization. AOR002, AOR004. And the AUA has said it will no longer enter into affiliation agreements with the AACU nor will it co-sponsor the entities’ annual Urology Joint Advocacy Conference. *See supra* p. 11. The groups also now lack any common board member or officer. *See supra* pp. 9-10.

Given this divergence between the organizations, the fact that members of the AUA played a role in the formation of the AACU nearly 50 years ago fails, on its own, to indicate that the groups are affiliated today.

(J) *Contribution Patterns*

The contribution patterns factor is neutral regarding whether the AUA and the AACU are affiliated.

This factor pertains to whether the sponsoring organizations’ SSFs have similar patterns of contributions or contributors that would indicate a formal or ongoing relationship between the sponsoring organizations or committees. 11 C.F.R. §§ 100.5(g)(4)(ii)(J), 110.3(a)(3)(ii)(J).

Prior to December 2015, the AUA and the AACU both served as connected organizations for UROPAC, and so, for 13 years, had similar patterns of contributors and identical patterns of

contributions. *See* AOR004. In December 2015, however, the AUA ceased being UROPAC's connected organization, *id.*, and has not since established its own SSF, *see* AOR028. Therefore, because the AUA has not had its own SSF with which to compare UROPAC's contribution patterns, the Commission cannot consider whether patterns of contributions and contributors indicate a relationship that is currently "formal or ongoing." *Cf.* Advisory Opinion 2016-02 (Enable) at 9 (finding that factor did not apply where entity had not yet established SSF). Thus, this factor is neutral as to whether the AUA and the AACU remain affiliated.

Conclusion of Circumstantial Factors Analysis

After analyzing the relationship between the AUA and the AACU under the ten circumstantial factors discussed above, the Commission concludes that the AUA and the AACU are no longer affiliated. In contrast to Advisory Opinion 2002-15 (UROPAC), where six factors weighed in favor of affiliation between the AUA and the AACU, here, seven factors now weigh against affiliation. The AUA and the AACU own no controlling interest in each other; have no authority to appoint each other's directors or officers; have no ability to hire or otherwise control each other's decision-making employees; lack any current or former common board members, officers, or employees; and exchange fewer funds than they have in the past. In short, the AUA and the AACU lack most of the usual indicia that two organizations have a formal or ongoing relationship.

The only factor weighing in favor of affiliation is the organizations' membership overlap, but the significance of that overlap is mitigated by the disproportionate percentage of AUA's members who are not members of the AACU. Moreover, overlapping membership may well be expected where, as here, two organizations appeal to the same, relatively small interest group, and does not necessarily demonstrate that either organization controls the other. Accordingly, on balance, the factors support finding that the AACU and the AUA are no longer affiliated.

Context of the Overall Relationship Between the Entities

In considering the foregoing circumstantial factors, the Commission examines the "context of the overall relationship" between the entities to determine whether they are properly considered affiliated. *See* 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii).

Although the list of factors in the regulations is not exhaustive, 11 C.F.R. § 110.3(a)(3)(ii), no other aspects of the AUA and the AACU's relationship indicate that they continue to be affiliated. In Advisory Opinion 2002-15 (UROPAC), the Commission relied upon several "indicators of an ongoing commitment to joint endeavors" in concluding that the AUA and the AACU were affiliated. *Id.* at 7. Specifically, the AUA and the AACU coordinated their national lobbying efforts, each participated in the other's annual convention "through the provision of booths and/or sponsored lectures," and worked together to offer joint nominations for AMA elected positions and to support the elected delegates of both groups. *Id.* at 3, 7.

Here, the AUA states that the two organizations have recently engaged in and plan to continue certain joint endeavors, even though the AUA and the AACU "no longer maintain a process" to develop a mutual legislative agenda and lobbying strategy, AOR004. For example,

in May 2017, the AUA and the AACU jointly sponsored the Urology Health Policy Forum during the AUA's annual meeting. AOR028. In the future, the AUA will continue to work with the AACU on "AMA House of Delegates issues affecting urology." *Id.* Finally, the AUA has invited the AACU (along with 15 other urology societies) to the AUA's 2018 Urology Advocacy Summit. AOR Supp. at 2. At the same time, however, the AUA has clearly demonstrated its intention to pursue its own policy objectives by severing its relationship with the AACU's SSF, UROPAC, and by asking the Commission to find it to be disaffiliated from the AACU. Thus, while these examples of cooperation between the two organizations may demonstrate a shared area of interest and some shared goals, they do not indicate an ongoing relationship sufficient to find affiliation.

Considering the foregoing facts in the context of the AUA and the AACU's overall relationship, the Commission concludes that the two organizations are no longer affiliated.

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

On behalf of the Commission,



Steven T. Walther,
Chairman