

RECEIVED

By Office of the Commission Secretary at 5:22 pm, Jun 21, 2017



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 17-22-B
AGENDA ITEM
For meeting of June 22, 2017
SUBMITTED LATE

June 21, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Esther D. Gyory *EDG*
Acting Assistant General Counsel

Kevin P. Hancock *KPH*
Attorney

Subject: AO 2017-01 (AUA) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on June 22, 2017.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2017-01

2

3 Kate A. Belinski, Esq.

4 Nossaman LLP

5 1666 K Street, NW

6 Suite 500

7 Washington, DC 20006

8

9 Dear Ms. Belinski:

DRAFT B

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

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

16 ***Background***

17 The facts presented in this advisory opinion are based on your letters received on January
18 25 and April 17, 2017, your emails received on February 6, 23, and March 21, 2017, and
19 publicly available information.¹

20 The AUA is an incorporated, non-stock membership organization registered under
21 section 501(c)(6) of the Internal Revenue Code. Advisory Opinion Request at AOR002,
22 AOR006-023.² Formed in 1902, the AUA’s mission is “to promote the highest standards of
23 urological clinical care through education, research and the formulation of health care policy.”

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).

1 AOR001.³ The AUA has more than 22,000 members, including “practicing urologists, research
2 scientists, urologists in training, and advanced practice providers.” *Id.*

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

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

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

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

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

- 14 • plan, promote, host, and pay for an annual “Urology Joint Advocacy Conference,” the
15 purpose of which was to develop an “advocacy strategy” regarding urology issues, to
16 educate urologists on that agenda, and to “actively lobby our Federal Legislators,”
17 AOR023;
- 18 • work together at the AUA annual meeting to promote health policy issues to urologists,
19 including during a “Urology Health Policy Forum” featuring speakers from both groups,
20 AOR025;
- 21 • encourage their delegates to the American Medical Association (“AMA”) to participate
22 in the AMA’s “Urology Caucus,” AOR026;

- 1 • reserve seats on each entity’s health policy council or similar committee for the other
2 entity, *id.*;
- 3 • “speak in a single unified voice” on “urologic causes,” including by “coordinating
4 communications with legislators and regulatory agencies,” *id.*; and
- 5 • require the AACU to have a booth, and allow UROPAC to have an exhibit, at the AUA’s
6 annual meeting, *id.*

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

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

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

1 The groups will, however, continue to work together in a more limited fashion on a few
2 specific projects. The AUA and the AACU will jointly sponsor the Health Policy Forum at the
3 AUA’s annual meeting in May 2017. AOR028. The AUA will also continue to work with the
4 AACU and other organizations “with respect to AMA House of Delegates issues affecting
5 urology.” *Id.* Moreover, the AUA has started to plan its “2018 Urology Advocacy Summit.”
6 AOR Supp. At 2. The AUA is the sole sponsor of the summit, which has a planning committee
7 comprised only of AUA leadership. *Id.* The AUA has invited 15 urology societies, including
8 the AACU, to “be involved in some aspects of planning the Summit’s educational program”;
9 however, the AACU has not yet agreed to participate. *Id.*

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

19 There is some overlap between the entities’ committee memberships. The AUA was
20 historically entitled to one seat on the AACU’s Health Policy Council, State Society Committee,
21 or “a committee of similar importance,” but the affiliation agreement between the two entities
22 establishing that entitlement expired in March 2017. AOR026. Under the AUA’s bylaws, the
23 AACU will continue to hold three seats on the AUA’s standing committee called the “Public

1 Policy Council.” AOR017. Beyond these three seats, any further overlap between the two
2 entities’ committee memberships is “not based on any effort by either organization to populate
3 each other’s committees.” AOR Supp. at 2.

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

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

18 ***Question Presented***

19 *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.

1 ***Legal Analysis and Conclusion***

2 Yes, the AUA and the AACU are disaffiliated.

3 Political committees, including separate segregated funds, are “affiliated” if they are
4 established, financed, maintained, or controlled by the same corporation, labor organization,
5 person, or group of persons, including any parent, subsidiary, branch, division, department, or
6 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
7 purposes of the Act’s contribution limits, contributions made to or by affiliated political
8 committees are considered to have been made to or by a single political committee. *See* 52
9 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1).

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

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

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

9 The Commission considers the ten circumstantial factors in turn.

10 (A) *Controlling Interest*

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

13 This factor asks whether a sponsoring organization owns a controlling interest in the
14 voting stock or securities of the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(A),
15 110.3(a)(3)(ii)(A). Here, both entities are section 501(c)(6) membership organizations and
16 neither entity has issued any shares of stock or holds any stock or other ownership interest in the
17 other.⁶ AOR002, AOR006-022.⁷ The absence of such ownership weighs against finding that the
18 AUA and the AACU are affiliated. *See* Advisory Opinion 2014-21 (Cambia) at 4.

19 (B) *Governance*

⁶ In Advisory Opinion 2002-15 (URO PAC), 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.aunet.org/about/aua-governance.cfm> (last visited May 22, 2017).

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

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

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

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

23

1 control” the AACU’s “board[], officers, employees, or operations.” AOR004.⁸

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

11 Because the governance ties between the groups appear to be well below the level the
12 Commission had previously found to suggest affiliation, Advisory Opinion 2016-02 (Enable) at
13 7, the governance factor indicates that the AUA and the AACU are not affiliated.

14 (C) *Hiring Authority*

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

16 This factor concerns whether a sponsoring organization has the authority or ability to
17 hire, appoint, demote, or otherwise control the officers or other decision-making employees of
18 the other sponsoring organization. 11 C.F.R. §§ 100.5(g)(4)(ii)(C), 110.3(a)(3)(ii)(C). A lack of

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.

1 such authority suggests that the two entities are not affiliated. *See* Advisory Opinion 2016-02
2 (Enable) at 7; Advisory Opinion 2014-11 (HCSC) at 5.

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

9 *(D) Common Membership*

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

12 This factor considers whether “a sponsoring organization or committee has a common or
13 overlapping membership with another sponsoring organization or committee which indicates a
14 formal or ongoing relationship between the sponsoring organizations or committees.” 11 C.F.R.
15 §§ 100.5(g)(4)(ii)(D), 110.3(a)(3)(ii)(D).

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

21 Here, the AUA acknowledges that, “[a]s was the case in 2003, the AUA and AACU
22 continue to share a fair number of common members.” AOR003; *see also* AOR026 (describing
23 membership of organizations as “overlapping”); AOR023 (providing agreement between the

1 entities that states that AUA and AACU “share a common membership”). The AUA does not
2 track how many of its members are also members of the AACU, *see* AOR029, but the AACU
3 indicates that 98 percent of its members are concurrently members of the AUA. AACU
4 Comment on AOR 2017-01 (AUA) at 4. The AUA states that it has “more than 22,000
5 members,” AOR001, and it estimates that the AACU has “approximately 3,935” members,
6 AOR002.⁹

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

19 Here, while a large percentage (98 percent) of the AACU’s members are members of the
20 AUA, a far smaller percentage of AUA’s members are also members of the AACU (just 18

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.

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

7 Moreover, AUA posits that the entities’ partially overlapping membership is a “function
8 of the individuals’ personal interests in serving in both organizations,” AOR Supp. at 1, rather
9 than of organized control. The AUA does not require any of its members to be AACU members,
10 AOR003, AOR008-011, and the AUA believes that the AACU requires only certain categories
11 of its members to be AUA members, unless that requirement is waived, AOR003, AOR028.
12 Also, the entities’ partially overlapping membership is consistent with their prior affiliation and
13 the fact that both entities appeal to members of a “relatively small, but well-organized medical
14 specialty” with similar interests. The AUA estimates that some 80 percent of all American
15 urologists are AUA members, and so it is to be expected that many individuals will be members
16 of the AUA and other urology-focused organizations. AOR003-004. Finally, the partial
17 membership overlap between the AUA and the AACU has not translated into either group
18 controlling the other, since the groups currently do not share a single common board member or
19 officer. *See infra* p. 14.

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

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.

1 (E) *Common Officers or Employees*

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

3 Factor (E) asks whether sponsoring organizations have common or overlapping officers
4 or employees, indicating a formal or ongoing relationship between the organizations. 11 C.F.R.
5 §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E). Where two organizations have no common officers or
6 employees, this factor weighs against affiliation. *See, e.g.*, Advisory Opinion 2016-02 (Enable)
7 at 6.

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

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

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).

1 The AUA’s request does not state whether any of the AUA’s members, committee
2 members, or others holding non-officer positions also hold positions with the AACU (or vice
3 versa). *See* AOR026-027. In Advisory Opinion 2002-15 (URO PAC), the Commission observed
4 under factor (E) that the AUA and the AACU had some commonalities among those holding
5 lower-level positions, in addition to considering whether the AUA and the AACU had common
6 officers and employees. *Id.* at 7. For instance, at that time, several AACU officers were then
7 serving on an AUA standing committee, and members of each organization were on the other’s
8 board of directors. *Id.* Here, even if the AUA and the AACU did currently share similar lower-
9 level commonalities, it would fail to tip the balance of factor (E) in favor of affiliation in light of
10 the groups’ non-overlapping boards and officers. In Advisory Opinion 2004-41 (CUNA
11 Mutual), the Commission noted under factor (E) that a trade association and an insurance
12 company had “some overlap in non-governance related committees and at lower levels,” but
13 nevertheless found that factor (E) failed to support affiliation because there was no indication of
14 a “formal or ongoing relationship” and there was “no direct overlap between [the entities’]
15 officers and employees.” *Id.* at 5.

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

18 *(F) Former Officers or Employees*

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

20 Factor (F) concerns whether a sponsoring organization has any members, officers, or
21 employees who previously were members, officers, or employees of the other sponsoring
22 organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11
23 C.F.R. §§ 100.5(g)(4)(ii)(F), 110.3(a)(3)(ii)(F). Factor (F) weighs against affiliation where the

1 organizations have no or few current members, officers, or employees who previously served in
2 those roles for the other organization. *See, e.g.*, Advisory Opinion 2014-21 (Cambia) at 5.

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

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

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

10 Factor (G) considers whether a sponsoring organization provides funds or goods in a
11 significant amount or on an ongoing basis to the other sponsoring organization or committee. 11
12 C.F.R. §§ 100.5(g)(4)(ii)(G), 110.3(a)(3)(ii)(G). When evaluating this factor, the Commission
13 has considered whether the entities “fund or otherwise support” each other’s SSF. Advisory
14 Opinion 2012-21 (Primerica) at 9, 11 (noting entity’s lack of support for other entity’s SSF as
15 indicating disaffiliation under factor (G)). Factor (H) concerns whether a sponsoring
16 organization causes or arranges for funds or goods to be provided to the other sponsoring
17 organization in a significant amount or on an ongoing basis. 11 C.F.R. §§ 100.5(g)(4)(ii)(H),
18 110.3(a)(3)(ii)(H).

19 Beginning shortly before the Commission considered Advisory Opinion 2002-15
20 (UROPAC) and until 2016, the AUA and the AACU executed a series of affiliation agreements,
21 which primarily governed their co-sponsorship and sharing of the administrative expenses for
22 UROPAC and sponsoring of “various advocacy conferences in Washington, D.C.” AOR002.

1 The Commission noted the presence of one of these affiliation agreements in determining that
2 the entities were affiliated.¹²

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

11 *(I) Formation*

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

13 This factor involves whether a sponsoring organization or committee or its agent had an
14 active or significant role in the formation of the other sponsoring organization. 11 C.F.R.
15 §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I); *see, e.g.*, Advisory Opinion 2012-23 (Snake River Sugar
16 Company) at 5 (concluding that two entities were affiliated in part because one entity
17 "participated in the formation of" the other).

18 The AUA was founded in 1902.¹³ Decades later, in 1969, "[s]everal individuals who
19 held leadership positions in the AUA or its Sections were involved in the formation of the

¹² Advisory Opinion 2002-15 (UROPAC) 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.

1 AACU.” AOR029; *see also* AOR Supp. at 1 (“Several AUA officers and members in their
2 individual capacities may have been involved in the formation of AACU.”); AACU, AACU
3 History, <http://www.aacuweb.org/about/history> (last visited May 23, 2017) (describing how
4 members of AUA “explore[d] the founding” of AACU during AUA meeting in 1968).

5 The involvement of AUA officers in the AACU’s founding is significant under factor (I)
6 even though the AUA “as an organization” did not “take a vote to establish AACU.” AOR
7 Supp. at 1. To be sure, affiliation is indicated under factor (I) where one entity creates the other
8 using a formal process. *See, e.g.*, Advisory Opinion 2006-12 (International Association of
9 Machinists and Aerospace Workers, *et al.*) at 2-4 (concluding that factor (I) indicated affiliation
10 where one entity chartered other and “effectively fold[ed] the [entity] into its hierarchical
11 structure”). But the language of factor (I) asks whether an organization “or its agent” had a role
12 in forming another group. 11 C.F.R. §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I). The Commission
13 included the term “agent” in factor (I) specifically so that the rule would “also focus on the role
14 played by the personnel of an organization or committee” in forming another entity. *Affiliated*
15 *Committees*, 54 Fed. Reg. at 34,100.

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

1 played role in association’s formation of SSF because corporation’s members constituted 20
2 percent of association’s board, which voted to establish SSF).

3 However, the significance of the involvement of AUA officers in the AACU’s founding
4 48 years ago is mitigated by the extent to which the organizations have grown apart since. *See*
5 Advisory Opinion 2007-13 (United American Nurses) at 9 (finding that factor (I) did not alone
6 indicate affiliation, even though one group helped found other, given “the steps both
7 organizations have taken . . . to sever their operational and financial ties”); Advisory Opinion
8 2004-41 (CUNA Mutual Insurance Society) at 8 (citing “significant ‘period of estrangement’”
9 between two groups in concluding that one’s “role in establishing” other “does not indicate that
10 the two organizations, or their SSFs, are now affiliated”). The AUA states that its and the
11 AACU’s “organizational and operational agendas and priorities” have begun to “diverge” and so
12 the groups have undertaken “the process of unwinding many of their close connections.”
13 AOR002. For example, as explained above, the AUA formally removed itself from UROPAC’s
14 statement of organization and no longer serves as a connected organization. AOR002, AOR004.
15 And the AUA has said it will no longer enter into affiliation agreements with the AACU nor will
16 it co-sponsor the entities’ annual Urology Joint Advocacy Conference. *See supra* p. 16. The
17 groups also now lack any common board member or officer. *See supra* p. 14.

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

21 (J) *Contribution Patterns*

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

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

4 Prior to December 2015, the AUA and the AACU both served as connected organizations
5 for UROPAC, and so, for 13 years, had similar patterns of contributors and identical patterns of
6 contributions. *See* AOR004. In December 2015, however, the AUA ceased being UROPAC's
7 connected organization, *id.*, and has not since established its own SSF, *see* AOR028. Therefore,
8 because the AUA has not had its own SSF with which to compare UROPAC's contribution
9 patterns, the Commission cannot consider whether patterns of contributions and contributors
10 indicate a relationship that is currently "formal or ongoing." *Cf.* Advisory Opinion 2016-02
11 (Enable) at 9 (finding that factor did not apply where entity had not yet established SSF). Thus,
12 this factor is neutral as to whether the AUA and the AACU remain affiliated.

13 *Conclusion of Circumstantial Factors Analysis*

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

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

7 *Context of the Overall Relationship Between the Entities*

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

11 Although the list of factors in the regulations is not exhaustive, 11 C.F.R.
12 § 110.3(a)(3)(ii), no other aspects of the AUA and the AACU’s relationship indicate that they
13 continue to be affiliated. In Advisory Opinion 2002-15 (URO-PAC), the Commission relied upon
14 several “indicators of an ongoing commitment to joint endeavors” in concluding that the AUA
15 and the AACU were affiliated. *Id.* at 7. Specifically, the AUA and the AACU coordinated their
16 national lobbying efforts, each participated in the other’s annual convention “through the
17 provision of booths and/or sponsored lectures,” and worked together to offer joint nominations
18 for AMA elected positions and to support the elected delegates of both groups. *Id.* at 3, 7.

19 Here, the AUA states that the two organizations have recently engaged in and plan to
20 continue certain joint endeavors, even though the AUA and the AACU “no longer maintain a
21 process” to develop a mutual legislative agenda and lobbying strategy, AOR004. For example,
22 in May 2017, the AUA and the AACU jointly sponsored the Urology Health Policy Forum
23 during the AUA’s annual meeting. AOR028. In the future, the AUA will continue to work with

1 the AACU on “AMA House of Delegates issues affecting urology.” *Id.* Finally, the AUA has
2 invited the AACU (along with 15 other urology societies) to the AUA’s 2018 Urology Advocacy
3 Summit. AOR Supp. at 2. At the same time, however, the AUA has clearly demonstrated its
4 intention to pursue its own policy objectives by severing its relationship with the AACU’s SSF,
5 UROPAC, and by asking the Commission to find it to be disaffiliated from the AACU. Thus,
6 while these examples of cooperation between the two organizations may demonstrate a shared
7 area of interest and some shared goals, they do not indicate an ongoing relationship sufficient to
8 find affiliation.

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

11 This response constitutes an advisory opinion concerning the application of the Act and
12 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
13 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
14 assumptions presented, and such facts or assumptions are material to a conclusion presented in
15 this advisory opinion, then the requestor may not rely on that conclusion as support for its
16 proposed activity. Any person involved in any specific transaction or activity which is
17 indistinguishable in all its material aspects from the transaction or activity with respect to which
18 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
19 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
20 affected by subsequent developments in the law including, but not limited to, statutes,
21 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
22 on the Commission’s website.

1
2
3
4
5
6
7
8

On behalf of the Commission,

Steven T. Walther,
Chairman.