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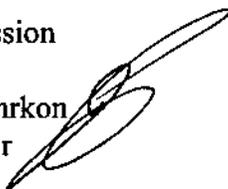
February 6, 2003

## AGENDA ITEM

For Meeting of: 2-13-03

### MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Richard Ewell   
Staff Attorney

Subject: Draft AO 2002-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 13, 2003.

Attachment

1 ADVISORY OPINION 2002-15

2  
3 Randolph B. Fenninger  
4 Executive Director  
5 UROPAC  
6 1101 17<sup>th</sup> Street, N.W.  
7 Suite 1102  
8 Washington, D.C. 20036

**DRAFT**

9  
10 Dear Mr. Fenninger:

11 This responds to your letter dated August 9, 2002, as supplemented by your letter dated  
12 December 9, 2002, requesting an advisory opinion concerning the application of the Federal  
13 Election Campaign Act of 1971, as amended ("FECA" or "the Act"), and Commission  
14 regulations to the possible affiliation of the American Association of Clinical Urologists  
15 ("AACU") and the American Urological Association, Inc., ("AUA") for the joint operation of  
16 the American Association of Clinical Urologists Political Action Committee ("UROPAC").

17 ***Background***

18 Both AACU and AUA are incorporated trade associations consisting primarily of  
19 individual physician members who specialize in urology. Both entities are tax-exempt  
20 organizations under 26 U.S.C. 501(c)(6), and both focus on health care policy and the promotion  
21 of high standards of urological care.

22 ***I. AACU Structure***

23 You state that AACU has a total membership of 3,935, with five categories of  
24 membership. There are presently 1,239 members who qualify as "Active Unified" members,  
25 they are eligible to vote and are the only category of members eligible to hold office. You state  
26 that, in order for a member to qualify as "Active Unified," he or she must be actively practicing  
27 medicine and must also be a member of both the American Medical Association (AMA) and the

1 AUA (or a section of the AUA.) In addition, you indicate that there are 1,999 “Active Non-  
2 Unified” members of AACU who are eligible to vote but are not eligible to hold office in AACU.  
3 Active Non-Unified members must be actively practicing medicine, but are not required to hold  
4 membership in both the AUA and AMA. You indicate that all but 458 of the 1,999 Active Non-  
5 Unified members are also members of the AUA or its sections. In addition, you state that there  
6 are 237 “Senior” members, 675 “Candidate” members, and 22 “Affiliate” members. Members in  
7 the latter three categories are not required to be actively practicing medicine and are not required  
8 to be members of any other organization. These 934 members are eligible to vote but cannot  
9 hold office. You state that, in sum, 2,780 of the 3,935 AACU members are also members of the  
10 AUA.

## 11 2. *AUA Structure*

12 The AUA, with a total of 11,041 members, has eight categories of membership. Only  
13 “Active” members, of which there are 6,622, are eligible to hold office. The “Active” members,  
14 “Senior” members (2,179), and “Honorary” members (50) are the only members who are eligible  
15 to vote for officers of the AUA. You do not indicate that the AUA membership categories are  
16 linked in any way to membership in other organizations.

## 17 3. *Relationship Between AACU and AUA*

18 You note a number of overlaps between the board members, officers and employees of  
19 AACU and AUA. Your request identifies one person, William Gee, M.D., who is currently a  
20 member of both the AACU Board and the AUA Board.<sup>1</sup> All 12 members of the AACU Board of  
21 Directors are also members of the AUA. Similarly, all 16 members of the AUA Board of

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<sup>1</sup> Dr. Gee also serves as the current chairman of the AUA Health Policy Committee and was a past president of the AACU.

1 Directors are members of the AACU. You indicate that it is typical for a person to serve on the  
2 Board of Directors for one of the organizations and then later serve on the Board of Directors for  
3 the other organization.

4 You state that the AUA's Health Policy Committee, which deals most directly with  
5 governmental health policy and political issues and consists of 14 members, includes the current  
6 President of AACU, the immediate past AACU President, the current AACU Secretary-  
7 Treasurer, and four other members of the AACU Board of Directors. You further note that  
8 AACU president-elect Dr. Sushil Lacy is a member of the AUA Board. Moreover, the AUA  
9 bylaws require at least three members of the Health Policy Council to also be members of the  
10 AACU. AUA Bylaws, Article V, section 1.3. You state that all of the current AUA appointees  
11 to its own Health Policy Council are also AACU members. In addition, you state that three AUA  
12 committees have representation from the AACU: the Terminology Committee, Practice  
13 Management Committee and Health Policy Research and Survey Committee. Similarly, AUA  
14 members actively participate in AACU's committee. You state that the AACU bylaws provide  
15 for AUA representation on the Government Relations Committee. By virtue of AACU's  
16 requirement that its committees include Active Unified members, all AACU committees must  
17 include AUA members.

18 You also provide other examples of regular interaction between the two organizations.  
19 You state that AACU's governance structure is specifically tailored to fit the AUA's regional  
20 structure by, for example, providing for the election of an at-large member of the AACU Board  
21 to represent each of the AUA's eight regional sections. The two groups engage in a number of  
22 reciprocal activities, including lecture exchanges, named sponsored lectures and courses at each  
23 other's meetings, and the formation of a combined Congressional agenda and legislative strategy

1 established through the collaboration of the health policy staffs of both groups. This coordinated  
2 legislative strategy is effected, in part, through a shared contract lobbyist whose statements and  
3 actions represent the positions of both groups. You state that the AACU and AUA also work  
4 together to offer joint nominations for elected positions within the AMA, and the staffs of both  
5 the AACU and AUA collaborate to support the delegates elected to the AMA from either group.  
6 You state that the AUA contributes to the cost of the AACU Washington Update as part of a  
7 formal operating agreement between the two organizations. Moreover, you indicate that both the  
8 AACU and the AUA provide issue alerts and other information to a "key contact network," a  
9 grassroots network consisting of politically active urologists in every state who support the policy  
10 goals developed by the AUA and the AACU through their contacts with Members of Congress.  
11 You indicate that the key contact network was originally established by AACU, but the AUA  
12 currently maintains the network and members of both organizations serve as key contacts.

13 On May 28, 2002, AACU and AUA entered into a formal affiliation agreement setting  
14 forth procedures for collaboration between the two groups and addressing, among other issues,  
15 the proposed joint governance and operation of a political action committee, UROPAC. The  
16 agreement includes a statement that each organization will continue to collaborate on the Joint  
17 Key Contact Network and is expected to contribute to a common effort with respect to activities  
18 in the political arena, and to cooperate in their participation in the Urology Caucus within the  
19 AMA. Under the affiliation agreement, a block of three seats on AUA's Health Policy Council is  
20 specifically reserved for the AACU. The agreement also provides that AACU will be afforded  
21 an opportunity to occupy space in AUA's planned new facility. You note that the collaboration  
22 between the two groups, as detailed in the affiliation agreement, is not dependent upon their  
23 ability to jointly operate UROPAC.

1 ***Question Presented***

2           The AUA, which previously had been organized as a 501(c)(3) organization under the  
3 name AUA, Inc., Shell Corporation, would have risked losing its tax status if it had established a  
4 separate segregated fund (SSF). 26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)-1(b)(3)(ii). In 2000  
5 the AUA reorganized under its present name and changed its tax status to 501(c)(6), thereby  
6 becoming eligible to establish an SSF. However, you indicate that, rather than establishing a  
7 separate SSF for the AUA, the AACU and AUA desire to add AUA as a connected organization  
8 for UROPAC so that UROPAC may solicit and receive contributions from members of both the  
9 AACU and the AUA. Because FECA places restrictions on who a connected organization or its  
10 SSF may solicit for contributions to the SSF, you wish to know whether, under the Act and  
11 Commission regulations, the AUA is an affiliated organization of the AACU such that the AUA  
12 can serve as a connected organization for UROPAC. Furthermore, if the Commission  
13 determines that AUA and AACU may both serve as connected organizations for UROPAC, you  
14 ask whether UROPAC will be permitted to solicit contributions from the memberships of both  
15 the AUA and the AACU.

16

17 ***Analysis and Conclusions***

18           Based on the following consideration of the affiliation factors in the context of the overall  
19 relationship between AACU and AUA, the Commission concludes that AACU is affiliated with  
20 AUA and both entities may therefore serve as connected organizations for the same SSF.

21 ***Statutory Provisions and Commission Regulations***

22           Under the Act and Commission regulations, a corporation, including an incorporated

1 trade association,<sup>2</sup> that directly or indirectly establishes, administers, or financially supports an  
2 SSF or other political committee is a "connected organization" of that SSF. 2 U.S.C. 431(7);  
3 11 CFR 100.6(a). That corporation may use general treasury funds for the establishment,  
4 administration, and solicitation of contributions to its SSF, and such support does not result in a  
5 contribution to that fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.5(b).

6 A trade association that consists of individual members and that serves as the connected  
7 organization for an SSF may solicit its individual members on behalf of that SSF subject to the  
8 provisions of 11 CFR 114.7. *See* 11 CFR 114.7(c). As provided in 11 CFR 114.7(a), such a trade  
9 association, or an SSF established by such trade association, is permitted to solicit the members  
10 and executive or administrative personnel, and the families thereof, of that trade association for  
11 contributions to the SSF. *See also* 2 U.S.C. 441b(b)(2)(C) and (4)(A)(i).

12 The Act and Commission regulations provide that committees, including separate  
13 segregated funds, are affiliated when they are established, financed, maintained or controlled by  
14 the same corporation, person, or group of persons. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g) and  
15 110.3(a). Two trade associations may jointly serve as connected organizations for a single SSF,

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<sup>2</sup> Under Commission regulations, a trade association is generally a membership organization of persons engaged in a similar or related line of commerce without operating a regular business of the kind normally operated for profit. *See* 11 CFR 114.8(a). As one type of membership organization, the trade association must also possess certain attributes. It must (i) be composed of "members," some of whom are vested with the power and authority to operate the organization pursuant to its bylaws or other formal organizational documents; (ii) expressly state the qualifications for membership in its bylaws or other formal organizational documents; (iii) make its bylaws and other formal organizational documents available to its members upon request; (iv) expressly solicit persons to become members; (v) expressly acknowledge the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list; and (vi) not be organized primarily for the purpose of influencing the nomination or election of any individual to Federal office. 11 CFR 100.134(e) and 114.1(e)(1) (defining "membership organization"); *see also* 11 CFR 100.134(f) and 114.1(e)(2) (defining "members").

1 but each of the connected organizations must be affiliated with each other. *See* Advisory  
2 Opinions 1988-14 and 1980-18. All political committees established by affiliated trade  
3 associations are considered to be one political committee for the purpose of the Act's  
4 contribution limits, and may make unlimited transfers of funds to each other. *See* 2 U.S.C.  
5 441a(a)(5); 11 CFR 110.3(a)(1) and 102.6(a)(1).

6 Where an entity, such as a trade association, is not formally a subsidiary of another  
7 entity, Commission regulations provide for an examination of various factors in the context of  
8 the overall relationship between the entities to determine whether the entities are affiliated. 11  
9 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).<sup>3</sup> These factors are also used  
10 to determine whether a connected or "parent" organization is affiliated with another organization  
11 for the purposes of establishing the class of persons from whom contributions may be solicited.  
12 11 CFR 114.5(g)(1).<sup>4</sup>

13 The factors relevant to the present analysis are: (B) whether a sponsoring organization or  
14 committee has the authority or ability to direct or participate in the governance of another  
15 sponsoring organization or committee through provisions of constitutions, by-laws, contracts or  
16 other rules, or through formal or informal practices or procedures; (D) whether a sponsoring  
17 organization or committee has a common or overlapping membership with another sponsoring  
18 organization or committee which indicates a formal or ongoing relationship between the

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<sup>3</sup> Specifically, the regulations, at 11 CFR 110.3(a)(3)(ii), state in part:

The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization.

<sup>4</sup> The Bipartisan Campaign Reform Act of 2002 ("BCRA"), which went into effect on November 6, 2002, does not change the analysis of affiliation between these two corporations.

1 sponsoring organization or committees; (E) whether a sponsoring organization or committee has  
2 common or overlapping officers or employees with another sponsoring organization or  
3 committee which indicates a formal or ongoing relationship between the organizations or  
4 committees; (F) whether a sponsoring organization or committee has any members, officers, or  
5 employees who were members, officers, or employees of another sponsoring organization or  
6 committee which indicates a formal or ongoing relationship or the creation of a successor entity.  
7 11 CFR 100.5(g)(4)(ii)(B) and (D) through (F), 110.3(a)(3)(ii)(B) and (D) through (F); *see, e.g.*,  
8 Advisory Opinion 1988-14.<sup>5</sup> The list of ten circumstantial factors set out at 11 CFR  
9 100.5(g)(4)(ii) and 110.3(a)(3)(ii) is not an exclusive list, and other factors may be considered.  
10 *See* Advisory Opinion 1995-36.

11

## 12 *Application and Legal Conclusions*

### 13 *Affiliation of AACU and AUA*

14 The relationship between AACU and AUA obviously does not fall within the generally  
15 accepted meaning of a corporate parent and subsidiary relationship since neither entity has issued  
16 any shares of stock or holds any stock or other ownership interest in the other. Nor do they fit  
17 within any of the other categories of *per se* affiliation at 11 CFR 100.5(g)(3) or 110.3(a)(2).  
18 Therefore, the Commission analyzes the relationship between the two incorporated trade

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<sup>5</sup> In Advisory Opinion 1988-14 the Commission considered a similar request from two corporations for a determination that they were affiliated and thus may jointly operate a single SSF. In that Opinion, the Commission advised the corporations that they were affiliated because, among other things, (1) the two corporations shared many of the same officers and directors; (2) the governing bodies of each corporation overlapped and many of the same individuals were vested with authority to direct both corporations; and (3) the decisions of officers and directors of both corporations were influenced by substantially the same persons.

1 associations based on the relevant affiliation factors provided in 11 CFR 110.3(a)(3)(ii)(B) and  
2 (D) through (F) to determine whether AACU and AUA are affiliated. *See also* the identical  
3 factors in 11 CFR 100.5(g)(4)(ii)(B) and (D) through (F). The Commission reviews the  
4 interactions of both entities within the context of their overall relationship. 11 CFR  
5 100.5(g)(4)(ii), 110.3(a)(3)(ii).

#### 6 *1. Membership Overlap*

7 The overlap in the membership between two sponsoring organizations under affiliation  
8 factor (D) is particularly significant in the present analysis. According to your representations,  
9 approximately 71 percent of the 3,935 AACU members are also members of AUA, and 100  
10 percent of the persons eligible to hold office in the AACU are also AUA members.<sup>6</sup> Those  
11 active members of the AACU who have not already joined the AUA are formally encouraged to  
12 do so by the AACU. AACU Bylaws, Article II, section 2(f).

#### 13 *2. Participation in Governance*

14 Moreover, this broad membership overlap is part of the structural design that indicates  
15 each entity's participation in the governance of the other. 11 CFR 100.5(g)(4)(ii)(B),  
16 110.3(a)(3)(ii)(B). The AACU bylaws establish membership in the AUA as a qualification for  
17 holding elected office in the AACU, thus mandating that all of its officers and committee  
18 members are also AUA members. Furthermore, under the AUA bylaws and the new affiliation  
19 agreement between the two groups, a block of three seats on AUA's key Health Policy Council is

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<sup>6</sup> This is similar to Advisory Opinion 1995-12, in which the Commission determined that a State association was affiliated with a related national association where 83 percent of the national members were members of the State association and 65 percent of the State association members were members of the national association. Compare the membership overlap data for groups that were not affiliated in Advisory Opinions 2002-11 (21 and 17 percent), 2000-28, n.4, and 1996-38.

1 specifically reserved for the AACU. The AACU bylaws also formally require an AUA presence  
2 on the AACU's Government Relations Committee. As noted above, there is a 100 percent  
3 membership overlap of the Active Unified members who vote and hold office.

#### 4 *3. Overlap Between Current Board Members*

5 The overlapping Board membership of the two entities is also relevant. 11 CFR  
6 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E); *see also* Advisory Opinion 1988-14. According to your  
7 request, at least one person currently serves as a member of both the AACU and AUA Board of  
8 Directors.<sup>7</sup> Six current AACU officers or Board members, in addition to the AACU's immediate  
9 past-president and president-elect, serve on the 14-member Health Policy Council, a key policy-  
10 making committee for the AUA. The AACU Board, and thereby the actions of the organization,  
11 is entirely controlled by persons who must, as a condition for holding elected office in the  
12 AACU, also be members of the AUA. Similarly, all of the members of the AUA Board are also  
13 AACU members, although that does not appear to be a requirement for holding a Board position.

#### 14 *4. Participation of Former Board Members*

15 An examination of the current participation of former members, officers, and members of  
16 the Board for each organization, relevant under affiliation factor (F), also points towards an  
17 ongoing relationship between AACU and AUA. You have provided several examples where a  
18 person has served as an officer for the AACU and then later served as an officer for the AUA, or  
19 *vice versa*, and such practices are apparently typical.

20 \_\_\_\_\_  
<sup>7</sup> There are 12 members of the AACU Board and 16 members of the AAU Board.

1    5. *Additional Indicators of the Relationship Between AACU and AUA*

2           Finally, the Commission recognizes several other indicators of an ongoing commitment  
3 to joint endeavors. The fact that AACU and AUA coordinate their national lobbying efforts,  
4 including the continued collaboration on the Joint Key Contact and the employment of the same  
5 lobbyist to provide joint representation for the two groups, is indicative of a close, ongoing  
6 relationship between the two entities as organizations formed for the same purpose and working  
7 together for those purposes.<sup>8</sup> You state that it is the current practice for the AUA and AACU that  
8 each has a specific role at the other's annual convention through the provision of booths and/or  
9 sponsored lectures. The affiliation agreement provides for the continuation of that practice, as  
10 well as for other forms of official involvement between the two entities. These joint efforts are  
11 not, you assert, dependent on the ultimate relationship between AUA and UROPAC.

12    6. *Conclusion*

13           Based on the foregoing consideration of the affiliation factors in the context of the overall  
14 relationship between AACU and AUA, the Commission concludes that AACU is affiliated with  
15 AUA, and thus they may both serve as connected organizations of UROPAC.

16

17    *Consequences of Affiliation and Connected Organization Status*

18    1. *Solicitation of Contributions*

19

20           Under the affiliation criteria provided in 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii), AUA  
21 is affiliated with AACU and may serve as a connected organization for UROPAC. Thus,  
22 UROPAC, or AACU or AUA on behalf of UROPAC, may solicit otherwise lawful contributions

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<sup>8</sup> Compare with Advisory Opinion 1999-39, noting the absence of overlap in lobbying services between two organizations found to be disaffiliated.

1 from individuals who are members, as well as executive or administrative personnel, and the  
2 families thereof, of AACU, AUA, or both. 11 CFR 114.7(a) and (c).

3 *2. Statement of Organization*

4 Currently, UROPAC's statement of organization lists the AACU as its sole connected  
5 organization. Although the Commission has interpreted the Act and regulations to permit either  
6 or both of the connected organizations to pay administrative and solicitation expenses for a single  
7 SSF under their joint operation, such an SSF must list each of the affiliated committees (if any)  
8 and each of the connected organizations. 2 U.S.C. 433(b)(2) and (c); 11 CFR 102.2(a)(1)(ii) and  
9 (2); *see, e.g.*, Advisory Opinions 1997-13, 1996-49, 1992-17, 1989-8, and 1988-42. Thus, under  
10 your proposal, AUA is a connected organization and UROPAC's Statement of Organization must  
11 be amended within 10 days of the receipt of this opinion to list both the AUA and the AACU as  
12 its connected organizations. *See* Advisory Opinion 2001-18. Moreover, the official name of the  
13 SSF must also be changed in its Statement of Organization to incorporate the full names of both  
14 of its connected organizations.<sup>9</sup>

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<sup>9</sup> Under the Act and Commission regulations, the name of any SSF must include the full names of its connected organizations "on the fund's Statement of Organization, on all reports filed by the fund," and in required disclaimer and disclosure notices. 2 U.S.C. 432(e)(5); 11 CFR 102.14(c), 109.11, 110.11; *see also* Advisory Opinions 2002-4, 1993-7, 1989-8, 1988-42, 1988-14, and 1987-26. While the regulations also permit, for limited purposes, the use of a "clearly recognizable abbreviation or acronym by which the connected organization is commonly known," the abbreviation or acronym must be a clearly recognized name that gives adequate notice to the public as to the identity and sponsorship of the SSF. 11 CFR 102.14(c). For example, an SSF may make contributions using its acronym or abbreviated name. However, when an SSF uses such an abbreviation or acronym, the SSF must also include the abbreviation or acronym, in addition to the full names of its connected organizations, "on the fund's Statement of Organization, on all reports filed by the fund," and in required disclaimer and disclosure notices. 11 CFR 102.14(c). The Commission makes no determination about whether the acronym "UROPAC" would qualify as a permissible acronym for the SSF.

