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NEWSLETTER

FEC Settles Urologist Associations' Messy Fight Over PAC Affiliation

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Requests for the Federal Election Commission (FEC) to rule on whether organizations and their PACs are affiliated typically are as unexciting as a urologists' conference. But a recent disaffiliation request by the American Urological Association (AUA) became surprisingly messy. The AUA's offshoot, the American Association of Clinical Urologists (AACU), responded to the AUA's request with its own opposing request for a determination that the groups are affiliated. The two organizations also filed competing comments refuting each other's requests.

After three months of agency deliberation, and what the AACU dolefully characterized as the "heartfelt debate" with its erstwhile partner entity, the FEC finally weighed in favor of the AUA late last month. With the FEC's finding that AUA and AACU are now disaffiliated, the AACU's PAC, UROPAC, may no longer solicit AUA's members for contributions (unless those members are also AACU members). The upshot is that AUA may now form its own PAC without having to share contribution limits with UROPAC. More generally, the urologists' FEC drama illustrates not only an arcane but important area of PAC law, but also the evolution over the past 50 to 60 years of the regulation of membership organizations' political activities under the non-profit laws.

To better understand the urologist associations' fight over their PAC, some historical context may be helpful. According to the AUA website and the competing FEC submissions, the AUA was first formally incorporated as a 501(c)(3) charitable organization in 1958. At that time, a 501(c)(3) entity could not devote any "substantial part" of its activities to lobbying, and this remains the default rule today. Thus, according to the AACU's submission, in 1969 "the AACU was founded

by the AUA as a related organization permitted to lobby on behalf of AUA members." (In the 1970s, the tax code was amended to permit 501(c)(3) entities to devote a not-insignificant part of their expenditures to lobbying if they filed an advance notification with the IRS. Had this law been enacted a few years earlier, it may have obviated the need to create the AACU.)

The AUA's submission recounted events slightly differently regarding the organization's role in forming the AACU. Per the AUA, "[s]everal AUA officers and members in their individual capacities may have been involved in the formation of AACU," but "[t]he two entities have always been entirely legally and organizationally separate."

In 1992, the AACU, which was formed as a 501(c)(6) trade association, created UROPAC, a federal "connected PAC." UROPAC served to enhance AACU members' political clout by pooling their contributions to disburse to candidates – something the AUA again was not permitted to do as a 501(c)(3) entity. In 2000, the AUA reorganized by also forming a 501(c)(6) trade association (known as the AUA) and a related 501(c)(3) entity (known as AUA Education and Research).

Given the significant ties between AUA and AACU at the time, the FEC confirmed in a 2003 advisory opinion that the two organizations were affiliated under the campaign finance laws. This significantly expanded UROPAC's donor base by allowing it to solicit and accept contributions not only from AACU members, but also from AUA members. The AUA apparently began growing apart from AACU and the AUA stopped contributing to UROPAC's administrative expenses. In addition, the AUA declined to renew its affiliation agreements with the AACU, under which the organizations conducted many joint activities. The latest severing of ties was the AUA's request to the FEC to confirm the two organizations were disaffiliated. As the AACU's submission to the FEC surmised, "the only legally significant purpose of [AUA's] request" was "AUA's desire to be allowed to start its own [PAC] with limits separate from those of UROPAC."

Notwithstanding AACU's self-described "heartfelt" objections, the FEC coldly applied its ten-factor affiliation rules in favor of AUA in a way that wasn't even close. The only factor that gave the agency some pause was the organizations' overlapping membership, with 98 percent of AACU's approximately 4,000 members choosing also to be AUA members. However, only approximately 18 percent of AUA's more than 22,000 members are also AACU members, and this led the FEC to conclude that the partially overlapping memberships "is only slightly suggestive of continued affiliation."

The FEC also found the fact that AUA's officers had formed AACU was merely a "neutral" factor under the agency's affiliation test. All of the other eight factors (such as lack of common governance, lack of common hiring authority, lack of common officers and employees, etc.) weighed against affiliation.

Affiliation is a concern for membership organizations and trade associations that have PACs, but also for business corporations with subsidiaries or affiliated entities if they have PACs. The same principles, solicitation restrictions, and shared contribution limits discussed above apply in both contexts. Relatedly, in states where direct corporate contributions are permitted, some jurisdictions may have "aggregation rules," under which corporate entities and related persons may be subject to a single aggregate contribution limit with respect to

any particular recipient. This is especially common in the context of "pay-to-play" laws that impose special restrictions on government contractors.

Wiley Rein's Election Law practice group routinely advises corporate and trade association clients on affiliation rules, and has represented many clients in FEC advisory opinion requests regarding this issue.