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May 30, 2006

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Lawrence Norton, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street N.W.
Washington, D. C. 20463

AOR 2006-20

Re: Request For An Advisory Opinion On The Obligation Of A Nascent Political Party To Register As A Political Committee

Dear Mr. Norton:

Pursuant to Section 437g of Title 2 of the United States Code and Part 112 of Title 11 of the Code of Federal Regulations, I submit on behalf of Unity 08 a request for an Advisory Opinion on whether donations to it, and purchases of goods and services by it, are "contributions" or "expenditures" as those terms are defined by the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA"), whether it is required to register as a "political committee" under the Act, whether it may incorporate for liability purposes, and the effect of its becoming a political party under the Act.

Factual Background

Unity 08 is a not-for-profit corporation organized under the laws of the District of Columbia. A copy of Unity 08's Statement of Organization attached hereto as an Appendix. Unity 08 has applied to the Internal Revenue Service (the "IRS") for tax exempt status pursuant to Section 527 of the Internal Revenue Code.

Unity 08 consists of a group of citizens of different ages, backgrounds, and colors, many of whom have been active in the past in Presidential campaigns for one or the other of the major

parties. They are deeply concerned that our political system is dysfunctional and that time is short to get things back on track. Rather than the battle for those "in the middle" that had characterized Presidential campaigns during most of the 20th Century, recent Presidential elections, have focused on turning out each party's special interest groups: their "base," with each "base" representing less than ten percent of the American people. Both parties have tended to pay little attention to *crucial problems*, issues on which the future safety and welfare of our nation and people depend, such as the need for energy independence, nuclear proliferation, global warming, the corruption of the political process by money, the caring for our older citizens, the education of our children, and the disappearance of the American Dream for so many of our people, in favor of issues with an appeal primarily to particular special interest groups, such as gun control, abortion, and gay marriage, which, while important and worthy of debate, will not determine the fate or future of the United States.

As a result, most Americans have not been enthusiastic about the choices for President and Vice-President in recent elections, the key issues on which they ran, or the manner in which the campaigns were conducted. Although Unity 08 believes that the leaders of both major parties are well intentioned, good, and honest people, they are trapped in a flawed system. The two major parties seem neither relevant to the issues and challenges of the 21st Century *nor* effective in addressing them. Major parties and all who have been active in them, including many of the participants in Unity 08, share responsibility for the current lack of confidence in our political system and the widespread belief that government -- as a problem-solver -- is no longer credible nor effective.

Unity 08, therefore, is committed to exploring whether a third alternative ticket can be presented to the American voters in 2008. Unity 08 has two goals:

✦ Goal One is to elect a Unity Ticket for President and Vice-President of the United States in 2008 that will have on the ticket a person from each of the two major parties. This Unity Ticket need not necessarily be the ticket of the Unity Party. Unity 08 might, for example, support such a ticket if offered by one or the other of the two major parties.

✚ Goal Two, our *minimum* goal, is to effect *major* change and reform in the 2008 national elections by influencing the major parties to adopt the core features of our national agenda. By organizing a group of voters who comprise at least 20% of the national electorate and committed to our agenda, we feel confident that their voters will be *the balance* and ultimately *the difference* in the 2008 national election.

Unity 08 intends to finance its activities by soliciting donations from individuals who agree with its goals. Donations of money or any other things of value will not be accepted "prohibited sources," including corporations, foreign nationals, or government contractors. In addition, while limitations may be placed on the amount of donations that will be solicited or accepted from individuals, the limitations may or may not conform with the limitations placed on such donations by the regulations governing non-connected political committees. Unity 08 intends to establish a web site and many, but not all of its solicitations are likely to be made over the Internet; however, Unity 08 may also make use of other solicitation methods, including telephone banks and mass mailings. Unity 08 may also choose to raise money through the sale of t-shirts, mugs, pens, bumper stickers, and other similar items marked with the Unity 08 logo or identified with Unity 08 in some other fashion, such as a particular phrase or slogan.

Unity 08 intends to purchase access to other media of mass communication to communicate to the public its view that the two major parties have failed to address the critical problems facing the United States today. Unity 08 intends to commission polls to assess public support for its position that the two major parties offer no solution to the present crisis in government, because of their focus on the needs of the "special interest" groups that constitute their base and for its proposal to seek to bring about a Unity Ticket. Unity 08 intends to explore the feasibility of its goal of creating a Unity Ticket and to take steps to build, and demonstrate the existence of, a substantial number of potential voters who support this goal. Unity 08 intends to try to influence the two major parties to address the issues that Unity 08 believes are critical to the future of the United States and to encourage the two major parties to adopt a Unity Ticket themselves. Unity 08 intends to qualify for ballot positions in certain key states for the offices of President and Vice President of the United States through petitions, and if required, litigation,

and, if necessary, to select, using a "virtual" convention conducted over the Internet, candidates for the office of President and Vice-President of the United States to run in those ballot positions. The virtual convention would be held in the Summer of 2008, before the conventions of the two major parties, but after the likely nominees of the other parties have been identified. All persons who have signed up with Unity 08 as delegates on the Internet will be eligible to vote during the virtual convention for the candidates they want to constitute the Unity 08 ticket. Unity 08 does not intend to promote, attack, support, or oppose the candidates of the major parties for public office in the 2006 elections on the federal, state or local level, and it does not intend to support or oppose candidates for Congress or State and local elections at any time.

Advisory Opinions Requested

1. Donations to, or purchases made, by Unity 08 would not be "contributions" or "expenditures" under the Act prior to the time Unity 08 chooses a candidate to support.
2. Unity 08's application of tax exempt status under Section 527 of the Internal Revenue Code does not require it to register as a "political committee" under the Act, and it does not have to register as a "political committee" until it has made "contributions" or "expenditures" under the Act.
3. Unity 08 may incorporate for liability purposes.

Analysis

1. **Donations to, or purchases made, by Unity 08 would not be "contributions" or "expenditures" under the Act prior to the time Unity 08 chooses candidates to support for the Office of President and Vice-President of the United States.**

In *Buckley v. Valeo*, 424 U.S. 1, 74-82 (1974), the Supreme Court held that the operative phrase in the Act's definitions of "contribution and "expenditure," *i.e.* "for the purpose of influencing any election for Federal office," raised constitutional problems as applied to donations received, or expenses incurred by, organizations other than candidates or candidate controlled political committees. To avoid the vagueness and potential over breadth of the statutory definition, *Buckley* adopted a narrowing construction so that the Act's definition of "expenditure" reached "only funds used for communications that expressly advocated the

election or defeat of a clearly identified candidate." *Id.* at 79-80. *See also* *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 126 (2003).¹

Since *Buckley*, courts have repeatedly reaffirmed that an organization that collects donations and incurs expenses for political purposes does not receive "contributions" or make "expenditures" under the Act, unless and until the organization seeks to influence the election or defeat of a *identified* candidate for a federal office. *See* *Machinists*, 655 F.2d at 394 (the Act's provisions do not extend to organizations whose contributions and expenditures "do not related to an identifiable 'candidate'"). In *Machinists*, the FEC claimed that payments made by the Machinists separate segregated fund to various groups that had as their goal the persuasion of Senator Ted Kennedy to run for President were "contributions" in excess of the amounts allowed under the Act. *Id.* at 390. The D.C. Circuit Court of Appeals, however, held that moneys given to groups were not "contributions" or "expenditures" because the groups' activities were not related in any way to a person who has decided to become a candidate." *Id.* at 392. The court reasoned, "[d]raft groups [] have one thing in common ... they aim to produce some day a candidate acceptable to them, but they have not yet succeeded. Therefore, none are promoting a "candidate" for office, as Congress uses that term in the FECA." *Ibid.* Unity 08 is in an even more preliminary position. It has not yet even identified a potential candidate, and indeed the selection of such a preferred choice will not occur until the summer of 2008 at its virtual convention. Until that time, we submit that the donations received and the expenses incurred in the pursuit of its goals do not constitute "contributions" or "expenditures" under the Act.

Nothing in the Bipartisan Campaign Reform Act of 2002 (BCRA) or the Supreme Court's decision in *McConnell* is to the contrary. In the BCRA, Congress legislated narrowly

¹ Donations made to an organization that does not make "expenditures" can not constitute "contributions." Consequently, the status of an organization's expenses determine whether donations to it are contributions. *See* *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392-94 (Ct. App. D.C. 1981) (holding that the FEC had no jurisdiction to investigate alleged violations of the contribution limitations by draft committees since the expenditures of the committee were not under the control of or made with the major purpose of electing an identified candidate), *cert. denied*, 454 U.S. 897 (1981).

with respect to the receipt or expenditure of money for political purposes by groups not controlled by a candidate. In *Buckley*, the Court limited the definitions of the phrases “expenditure” and “contribution” to “express advocacy,” *i.e.* language that expressly advocates or opposes a clearly identified candidate. 424 U.S. at 43-44. In so doing, the *Buckley* Court also established a “magic words” test to determine whether advocacy was express and, therefore, subject to regulation by the FEC. *Ibid.* (stating that in order to be express advocacy the terms “vote for,” “support,” “vote against” etc. must be used). This test was replaced by the FEC after the adoption of BCRA by the term “electioneering communications,” which broadens the scope of the regulation of express advocacy to communications *referring to* a “clearly identified candidate.” *See Shays v. Federal Election Comm’n*, 414 F.3d 76, 82 (D.C. Ct. App. 2005) (the BCRA “replaced the ‘magic words’ standard for issue ads with a more robust concept termed ‘electioneering communication’”); *McConnell*, 540 U.S. at 189-90. The application on the restrictions for “electioneering communications” is limited, however, to certain times in relation to a primary or general election. *See* 2 U.S.C. § 434(f)(3)(A)(i). Thus, the core component of the *Buckley* decision and its progeny remains intact – that in order to make an “expenditure” or “contribution” there must be a clearly identified candidate. With this understanding of express advocacy, the Supreme Court found constitutional Congress’ regulation of two types of activities addressed in BCRA: “Federal election activity,” as defined in 2 U.S.C. § 431(20), and “electioneering communication,” as defined in 2 U.S.C. § 434(f)(3)(A)(i). *See McConnell*, 540 U.S. at 159-173 and 186-209.

2. **Unity 08’s application of tax exempt status under Section 527 of the Internal Revenue Code does not require it to register as a “political committee” under the Act, and it does not have to register as a “political committee” unless and until it receives donations or incurs expenses for the purpose of influencing the election of an *identified* candidate.**

The Supreme Court in *Buckley v. Valeo* explained that to fulfill the purposes of the Act, the definition of political committee “need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate,*” and that the regulations do not “reach groups engaged purely in issue discussion.” 424 U.S. at 79 (emphasis added). The Supreme Court reaffirmed, and expanded, the “major

purpose" test in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) ("*MCFL*"). In that case, Massachusetts Citizens for Life, a non-profit advocacy corporation whose "central organizational purpose" was issue advocacy had, nevertheless, paid a substantial amount of money for the preparation and public distribution of a newsletter that advocated the election or defeat of *particular* candidates for federal offices. *Id.* at 242-44. The Supreme Court held that Massachusetts Citizens did not meet the definition of a political committee, notwithstanding that it was not engaged "solely" in issue advocacy because its "major purpose" was not the nomination or election of specific candidates. *Id.* at 252-53, n.6. Had Massachusetts Citizens not made its "expenditures," however, the question of its major purpose would not have been considered. *See id.* at 251-52. The definition of "political committee" for organizations not controlled by federal candidates has, therefore, two requirements: (1) the making of expenditures sufficient to meet the annual threshold and (2) the major purpose test.

As *Buckley* held, and as we have discussed previously, "expenditures" require, as a prerequisite, a particular *identified* candidate. In *Federal Election Comm'n v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996), the District Court construed the *Buckley* addition to the definition of a political committee -- that a groups "*major purpose ... is the nomination or election of a candidate*" -- to mean a *particular candidate or candidates*. GOPAC's stated mission was: "to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government." *Id.* at 854. Although GOPAC's sole purpose was to advocate the election of Republicans as a class of candidates, the court held that the definition of "political committee" was limited by *Buckley* to groups whose major purpose was the election of a *particular* federal candidate or candidates.² *Id.* at 859 ("even if the organization's major purpose is the election of a federal candidate, the organization does not

² Advisory Opinion 2003-23 is inapposite. The Opinion was limited to the issue of identification for earmarking. WE LEAD's political committee status was *not* at issue. Advisory Opinion 1977-16 is likewise inapposite. The Commission stated that the organization that requested the Opinion could operate as a political committee, not that it had to do so.

become a 'political committee' unless or until it makes expenditures to support a 'person who has decided to become a candidate' for federal office").

Unity 08's decision to apply for tax exempt status under Section 527 of the Internal Revenue Code does not change the result of this analysis. Unity 08 has received legal advice that its request for tax exempt status should be made under Section 527, but this request does not alter the nature of its proposed actions, which as we have shown above, are too preliminary to require it to register as a "political committee" under the Act. Indeed, this Commission has previously rejected attempts to construe Section 527 as in itself creating "political committees" under the Act, most recently in 2004. *See* 67 Fed. Reg. 225, 68065 (November 23, 2004); *see also* Comm'rs Mason, Smith and Wold's Statement of Reasons for Pre-MUR 395 (February 27, 2002).³

3. Unity 08 may incorporate for liability purposes.

Unity 08 is a not for profit corporation organized under the laws of the District of Columbia. Unity 08 has also applied to the Internal Revenue Service for tax exempt status under 26 U.S.C. § 527. Section 441b of the Act prohibits corporations from making "contributions" or

³ Moreover, the definitions of "contribution" and "expenditure" as applied to I.R.C. § 527 are different than the definitions of those terms under FECA. Specifically, the I.R.C.'s definitions contain no requirement that the contributions or expenditures be made for the purpose of influencing a federal election. *Compare* 26 U.S.C. § 271(b)(2) (stating that the term "contribution" "includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable"), *with* 2 U.S.C. § 431(8)(A) (stating that the term "contribution" includes: "(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose"). *Compare* 26 U.S.C. § 271(b)(3) (stating that the term "expenditure" "includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable"), *with* 2 U.S.C. § 431(9)(A) (stating that the term "expenditure" includes: "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure").

“expenditures” “in connection with any election to any political office.” *Accord* 11 C.F.R. § 114 *et seq.* The terms “contribution” and “expenditure” are defined by the Act as the payment or receipt of anything of value “for the purpose of influencing any election for Federal office.” 11 C.F.R. §§ 100.52, 100.111. As previously explained, Unity 08 will not be making “expenditures” or “contributions” under the Act and, therefore, would not be subject to the prohibitions on corporate contributions and expenditures. Accordingly, until such time that Unity 08 engages in “electioneering communications” it may raise and spend money as an incorporated entity without contravening any of the prohibitions in 2 U.S.C. § 441b and 11 C.F.R. § 114 *et seq.*⁴

Sincerely,

John J. Duffy



⁴ The Court’s decision in *Federal Election Comm’n v. Beaumont*, 539 U.S. 146 (2003), is inapposite as it applies only to direct contributions by nonprofit advocacy corporations.

APPENDIX

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS



C E R T I F I C A T E

THIS IS TO CERTIFY that all applicable provisions of the District of Columbia NonProfit Corporation Act have been complied with and accordingly, this **CERTIFICATE OF INCORPORATION** is hereby issued to:

UNITY 08

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed as of the **24th day of May, 2006**.

Patrick J. Canavan, Psy. D.
Director

Business and Professional Licensing Administration

A handwritten signature in black ink, appearing to read 'Patricia E. Grays', is written over a horizontal line.

Patricia E. Grays
Superintendent of Corporations
Corporations Division

Anthony A. Williams
Mayor

ARTICLES OF INCORPORATION
OF
UNITY 08

To: Department of Regulatory Affairs
Business Regulation Administration
Corporations Division
941 North Capital Street, N.E.
Washington, DC 20002

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators of a corporation under the District of Columbia Nonprofit Corporate Act (D.C. Code, 1981 Edition, Title 29, Chapter 3), adopt the following Articles of Incorporation.

FIRST: The name of the corporation is Unity 08 (the "Corporation").

SECOND: The period of the Corporation's duration is perpetual.

THIRD: The Corporation shall have no stock.

FOURTH: The Corporation is organized and shall be administered and operated exclusively to operate as a political organization within the meaning of Section 527 of the Internal Revenue Code of 1986, as now in effect or may hereafter be amended (the "Code"), including the following:

1. To engage in any and all lawful activities as permitted for organizations qualifying as "political organizations" under Section 527 of the Code except as restricted herein; and
2. To engage in any lawful act or activity for which corporations may be organized under the District of Columbia Nonprofit Corporation Act.

In order to accomplish the foregoing purposes, and for no other purpose or purposes, the Corporation shall also have the power to:

- (a) sue and be sued;
- (b) make contracts;
- (c) receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and otherwise acquire and hold all property, real or personal, including shares of stock, bonds and securities of other corporations;

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(d) act as trustee under any trust whose objects are related to the principal objects of the Corporation, and to receive, hold, administer and expend funds and property subject to such trust;

(e) convey, exchange, lease, mortgage, encumber, transfer upon trust or otherwise dispose of all property, real or personal;

(f) borrow money, contract debts and issue bonds, notes, and debentures, and secure the payment of any performance of its obligations; and

(g) do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the Corporation; provided, however, that the Corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the primary purposes of the Corporation.

FIFTH: The Corporation shall have no members.

SIXTH: Notwithstanding any other provision of these Articles, the Corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 527 of the Code.

SEVENTH: Upon the dissolution of the Corporation or the winding up of its affairs, the assets of the Corporation shall be distributed exclusively for purposes described as permitted under the Code for organizations which are then exempt from federal tax under Section 527 of the Code.

EIGHTH: These Articles of Incorporation, and the Bylaws of the Corporation, may be amended by a vote of a majority of the Directors then in office.

NINTH: The number of Directors constituting the initial Board of Directors is four (4), and the names and addresses, including street and number, of the persons who are to serve as the initial Directors until the first regular meeting of the Board of Directors, or until their successors be appointed and qualified are as follows:

Douglas L. Bailey
1200 North Nash Street, #1114
Arlington, Virginia 22209

Zachary Clayton
2404 Ridge Road
Raleigh, North Carolina 27612

Gerald Rafshoon
3123 Dumbarton Street
Washington, DC 20007

Lindsay Ullman
14 Knollbrook Lane East
Painted Post, New York 14870

The Board of Directors shall at all times consist of at least three (3) directors. The number of directors shall be fixed by the Bylaws of the Corporation, except as to the number of the first Board of Directors, which is set forth above. Directors shall be elected or appointed in the manner provided in the Bylaws of the Corporation.

TENTH: The names and addresses, including street and number of the incorporators are:

Douglas L. Bailey
1200 North Nash Street, #1114
Arlington, Virginia 22209

Zachary Clayton
2404 Ridge Road
Raleigh, North Carolina 27612

Gerald Rafshoon
3123 Dumbarton Street
Washington, DC 20007

Lindsay Ullman
14 Knollbrook Lane East
Painted Post, New York 14870

ELEVENTH: The address, including the street and number, of the Corporation's initial registered office is 1090 Vermont Avenue, N.W., Washington, D.C. 20005, and the name of its initial registered agent is Corporation Service Company.

IN WITNESS WHEREOF, the undersigned subscribe these Articles of Incorporation this 19th day of May, 2006.

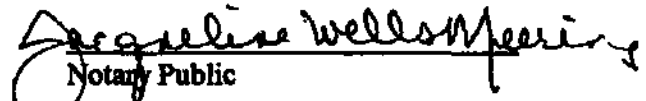


Douglas L. Bailey

Date: May 19, 2006

)
) SS. District of Columbia
)

I, Jacqueline Wells Meering, a notary public, hereby certify that on the 19th day of May, 2006, personally appeared before me Douglas L. Bailey, who being first duly sworn, signed the foregoing document as incorporator and averred that the statements therein contained are true.



Notary Public

SEAL



JACQUELINE WELLS MEERING
Notary Public, District of Columbia
My Commission Expires August 31, 2009

Zachary Clayton
Zachary Clayton

Date: May 22, 2006

)
) SS.
)

I, Natalie M. Francis, a notary public, hereby certify that on the 22 day of May, 2006, personally appeared before me Zachary Clayton, who being first duly sworn, signed the foregoing document as incorporator and averred that the statements therein contained are true.

Natalie M. Francis
Notary Public

SEAL



Gerald Rafshoon
Gerald Rafshoon

Date: May 22, 2006

)
) SS.
)

I, Clemmie Wilson, a notary public, hereby certify that on the 22nd day of May, 2006, personally appeared before me Gerald Rafshoon, who being first duly sworn, signed the foregoing document as incorporator and averred that the statements therein contained are true.

Clemmie M. Wilson
Notary Public

SEAL

Clemmie Wilson
Notary Public, District of Columbia
My Commission Expires 02-14-2011

Lindsay E. Ullman
Lindsay Ullman

Date: May 22, 2006

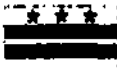
State of New York)
County of Steuben) SS.

I, Sue L. Stephens, a notary public, hereby certify that on the 22nd day of May, 2006, personally appeared before me Lindsay E. Ullman who being first duly sworn, signed the foregoing document as incorporator and averred that the statements therein contained are true.

Sue L. Stephens
Notary Public

SEAL

SUE L. STEPHENS
Notary Public, State of New York
No. 01ST6010036
Commission Expires July 6, 20 06



DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUSINESS AND PROFESSIONAL LICENSING ADMINISTRATION
CORPORATIONS DIVISION

Government
Of the District of Columbia
DCRA
Corporations Division
P.O. Box 52300
WASHINGTON, D.C. 20090

WRITTEN CONSENT TO ACT AS REGISTERED AGENT

TO:
The Superintendent of Corporations
Department of Consumer and Regulatory Affairs
Business and Professional Licensing Administration,

(A) BY A DISTRICT OF COLUMBIA RESIDENT
PURSUANT TO D.C. CODE TITLE 29, and TITLE 41
I,

A Bona fide Resident of the District of Columbia Herein Consent to Act as a Registered Agent For:

Name of Business
SIGNATURE OF REGISTERED AGENT

DATE: _____
(B) BY A LEGALLY AUTHORIZED CORPORATION
THE CORPORATION HEREIN NAMED IS:
CORPORATION SERVICE COMPANY

An Authorized Corporate Registered Agent in the District of Columbia, per Signatures of its President/Vice-President and Secretary/Assistant Secretary, Herein Consents to Act as Registered Agent

For:
UNITY 08
NAME OF COMPANY
SIGNATURE: *Sherry Butler* OF PRESIDENT OR VICE-
PRESIDENT
ATTEST: *[Signature]* OF SECRETARY OR ASSISTANT
SECRETARY

DATE: May 17, 2006

For General Information Call:
The Corporations Division - (202) 442-4432