

July 13, 2006

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-20 is available for public comments under this procedure. It was requested by, John J. Duffy, Esq., on behalf of Unity 08

Proposed Advisory Opinion 2006-20 is scheduled to be on the Commission's agenda for its public meeting of Thursday, July 20, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on July 19, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-20, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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July 13, 2006

MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 07-20-06

TO: The Commission

THROUGH: Patrina M. Clark *PMCKW*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS by ALR*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Acting Assistant General Counsel

Ron B. Katwan *RBK by ALR*  
Attorney

Esa L. Sferra *ELS*  
Attorney

Subject: Draft AO 2006-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 20, 2006.

Attachment

1 **ADVISORY OPINION 2006-20**

2

3 **John J. Duffy, Esq.**

4 **Steptoe & Johnson LLP**

**DRAFT**

5 **1330 Connecticut Avenue, NW**

6 **Washington, DC 20036-1795**

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8 **Dear Mr. Duffy:**

9 **We are responding to your advisory opinion request on behalf of Unity 08,**  
10 **concerning the application of the Federal Election Campaign Act of 1971, as amended**  
11 **(the "Act"), and Commission regulations to Unity 08's status as a political committee.**  
12 **The Commission concludes that Unity 08 must register as a political committee and**  
13 **therefore is subject to the reporting requirements and limitations and prohibitions of the**  
14 **Act.**

15 ***Background***

16 **The facts presented in this advisory opinion are based on your letter received on**  
17 **May 30, 2006 and on information from Unity 08's website.<sup>1</sup>**

18 **Unity 08 is organized under the laws of the District of Columbia as a not-for-**  
19 **profit corporation and under Section 527 of the Internal Revenue Code.**

20 **Unity 08 describes itself as a "nascent political party" that "will act to assure that**  
21 **an alternative ticket is presented to the American voters in 2008." Unity 08 was founded**  
22 **by individuals who have been involved in political campaigns at the State and national**  
23 **levels, including political consultants and media advisors, and by individuals who have**  
24 **served in high government positions, including a former State Senator, former White**  
25 **House Chief of Staff, former White House communications director, former State**

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<sup>1</sup> See <<http://www.unity08.com>> (last visited 6/13/06).

1 Governor, and former heads of State agencies. Unity 08 aims to build a “solidly-funded  
2 movement of up to 20,000,000 Americans . . . in order to nominate a Unity Ticket of their  
3 choice for 2008.”

4 Unity 08 states that it has two goals: (1) “to elect a Unity Ticket for President and  
5 Vice President of the United States in 2008”; and (2) a “*minimum* goal” of “organizing a  
6 group of voters who comprise at least 20% of the national electorate” and whose  
7 commitment to the Unity 08 agenda will have to be accounted for by the major parties if  
8 they are to be successful in the 2008 presidential election. The Unity 08 nominees may  
9 consist of candidates from either or both of the two major political parties, or of  
10 independent candidates. Although Unity 08 may support the candidates offered by one of  
11 the two major parties, it plans to hold an online nominating convention in the summer of  
12 2008, during which Unity 08 delegates will vote via the Internet to nominate candidates  
13 for the Unity 08 ticket. Unity 08 does not intend to support or oppose candidates in the  
14 2006 elections or in any congressional, State, or local election at any time.

15 Unity 08 will finance its activities with solicitations of funds and sales of t-shirts,  
16 mugs, pens, bumper stickers, and other similar items. Unity 08 is currently soliciting  
17 funds using the Internet and intends to make solicitations using telephone banks and mass  
18 mailings. Unity 08’s website proposes that supporters give specific monetary amounts  
19 ranging from ten dollars to \$5,000, with an option to give any amount of the supporter’s  
20 choosing. Unity 08’s online solicitation form includes the following language: “To  
21 succeed we don’t have to match the massive war chests of either party. And, like other  
22 successful citizens’ movements before us, we can raise the funds we need to build a lean  
23 and effective movement if each of us simply does our part. . . . Please do your part. The

1 stakes for our country have never been higher.” The movement for which Unity 08 is  
2 soliciting money is to “select and elect a Unity Ticket to the White House.” Elsewhere  
3 on the website, this language is repeated: “In 2008, we’ll select and elect a Unity Ticket  
4 to the White House . . . Our success depends on small gift contributions from all of us.”

5 Unity 08 does not accept money or any other thing of value from corporations,  
6 foreign nationals, or government contractors. Unity 08 does not place a limit on the  
7 amount of donations it solicits or accepts, although it may do so in the future.

8 In attempting to elect presidential and vice-presidential candidates in 2008, Unity  
9 08 plans to purchase access to mass media and commission polls, and to “qualify for  
10 ballot positions in certain key states for the offices of President and Vice President of the  
11 United States through petitions, and if required, litigation.”

## 12 *Questions Presented*

- 13 1. *Will Unity 08 accept “contributions” or make “expenditures”?*
- 14 2. *Must Unity 08 register as a political committee?*
- 15 3. *May Unity 08 incorporate for liability purposes?*

## 16 *Legal Analysis and Conclusions*

### 17 *Question 1: Will Unity 08 accept “contributions” or make “expenditures”?*

18 Yes, for the reasons stated below, Unity 08 will accept “contributions” and make  
19 “expenditures” as defined under the Act and FEC regulations.

#### 20 *I. Contributions*

21 A “contribution” is a “gift, subscription, loan, advance, or deposit of money or  
22 anything of value made by any person for the purpose of influencing any election for

1 Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). The Act does not define the  
2 phrase “for the purpose of influencing any election for Federal office.”

3 Drawing on *FEC v. Survival Education Fund*,<sup>2</sup> Commission regulations provide  
4 that funds received in response to solicitations must be treated as contributions “if the  
5 communication indicates that any portion of the funds received will be used to support or  
6 oppose the election of a clearly identified Federal candidate.” 11 CFR 100.57(a); *see*  
7 *also Political Committee Status, Definition of Contribution and Allocation for Separate*  
8 *Segregated Funds and Nonconnected Committees; Final Rules*, 69 FR 68056, 68057  
9 (Nov. 23, 2004) (“*Political Committee Status Final Rules*”). The Commission has  
10 determined that in certain circumstances the definition of a “clearly identified” candidate,  
11 *see* 11 CFR 100.17, is satisfied when “candidates were identifiable as to specific office,  
12 party affiliation, and election cycle, although names of the eventual nominees were not  
13 known.” Advisory Opinion 2003-23 (WE LEAD) (a reference to office, party affiliation,  
14 and election cycle satisfied the requirement of a clearly identified candidate in the  
15 definition of “earmarked” contribution in 11 CFR 110.6(b)(1)); *see also* Advisory  
16 Opinions 1982-23 (Westchester Citizens for Good Government) and 1977-16 (Iowa 1980  
17 U.S. Senate Campaign Committee).

18 Unity 08’s communications indicate that funds received will be used to support  
19 the election of the Unity 08 presidential ticket. For example, Unity 08’s website states:  
20 “In 2008, we’ll select and elect a Unity Ticket to the White House . . . Our success  
21 depends on small gift contributions from all of us.” While Unity 08 has not yet named its

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<sup>2</sup> *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995). In that case, the court stated that “[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of [2 U.S.C.] 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office.” *Id.* at 295.

1 candidates, it identifies its candidates by office (*i.e.*, President and Vice President), party  
2 affiliation (*i.e.*, the Unity 08 ticket), and election year (*i.e.*, 2008). Thus, Unity 08 intends  
3 to use the funds received in response to its solicitations to support the election of clearly  
4 identified candidates for President and Vice President.<sup>3</sup>

5 In addition, the Commission has emphasized that “[a] solicitation that states that  
6 the funds received will be used to influence Federal elections will generate FECA  
7 contributions, *see* 11 CFR 102.5(a)(2)(ii), even though such a communication would not  
8 be subject to new section 100.57 because it does not mention a clearly identified Federal  
9 candidate.” *Political Committee Status Final Rules*, 69 FR at 68058.<sup>4</sup> Unity 08’s  
10 solicitations, which explicitly state that the organization’s goal is to “select and elect a  
11 Unity Ticket to the White House,” indisputably indicate that the funds received will be  
12 used to influence a Federal election, namely to support the election of Unity 08’s  
13 candidates for President and Vice President. Thus, under either analysis – (i) the  
14 communication indicates that any portion of the funds received will be used to support or  
15 oppose the election of a clearly identified Federal candidate, 11 CFR 100.57, or (ii) the  
16 communication states that the funds received will be used to influence Federal elections,  
17 11 CFR 102.5(a)(2)(ii) – funds received by Unity 08 in response to its solicitations will  
18 constitute contributions under the Act and Commission regulations.

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<sup>3</sup> Unity 08 does not ask and the Commission does not address whether Unity 08 qualifies as a “political party” under the Act and Commission regulations. The Commission notes, however, that to be a “political party,” an organization must “actually obtain ballot access for one or more Federal candidates.” Advisory Opinion 2004-34 (Libertarian Party of Virginia); *see* 2 U.S.C. 431(16) and 11 CFR 100.15.

<sup>4</sup> As the Commission noted, “New Section 100.57 provides one example of communications that can generate contributions; it is not an exhaustive list. The rule addresses communications that indicate that the funds received in response will be used to support or oppose the election of a clearly identified Federal candidate. Other communications that do not include such an indication may also generate contributions under FECA.” *Political Committee Status Final Rules*, 69 FR at 68058.



1 *II. Expenditures*

2 An “expenditure” is a “purchase, payment, distribution, loan, advance, deposit, or  
3 gift of money or anything of value, made by any person for the purpose of influencing  
4 any election for Federal office.” 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). Examples  
5 of expenditures are listed in the Commission regulations at 11 CFR 100.110 through  
6 100.114, and have also been recognized through Commission precedent, as discussed  
7 below. The amounts Unity 08 spends on expenses such as qualifying candidates for  
8 ballot positions through petition drives and holding an online nominating convention will  
9 be expenditures under the Act and Commission regulations.

10 *A. Ballot access costs*

11 The Commission has previously determined that expenses incurred in gathering  
12 signatures to qualify for a ballot for Federal office are expenditures. *See* Advisory  
13 Opinion 1994-05 n.1 (William White) (“[E]xpenditures to influence your election would  
14 include amounts you spend . . . to promote yourself for the general election ballot by  
15 seeking signatures on nomination petitions”). Unity 08 plans to qualify its candidates for  
16 ballots through petition drives, and this activity is for the purpose of influencing a Federal  
17 election. Therefore, any expenses paid by Unity 08 for its activities to qualify candidates  
18 for ballot access through petitions will constitute expenditures.<sup>5</sup>

19 *B. Online nominating convention costs*

20 The Commission has determined that expenses for holding an online nominating  
21 convention are in connection with a Federal election. In Advisory Opinion 2000-06

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<sup>5</sup> The Commission notes that “payments made to the appropriate State official of fees collected from candidates or their authorized committees as a condition of ballot access are not expenditures.” 11 CFR 100.150.

1 (Reform Party), the Commission stated that the costs of compiling a computer database  
2 of members eligible to vote in the convention and mailing ballots for a convention where  
3 members vote via email, phone, or mail, is a permissible use of convention funds under  
4 the Presidential Election Campaign Fund Act, 26 U.S.C. 9001, *et seq.*, because the  
5 convention is how the party chooses and announces its presidential candidate. Because  
6 Unity 08's online nominating convention will be the manner in which it nominates  
7 presidential and vice-presidential candidates, the purpose of the convention will be to  
8 influence a Federal election, and Unity 08's expenses for the convention will be  
9 expenditures under the Act.

10 Therefore, Unity 08 will make expenditures when gaining ballot access and when  
11 preparing for its convention.

12 *Question 2: Must Unity 08 register as a political committee?*

13 Yes, for the reasons stated below, Unity 08 must register as a political committee  
14 when it receives more than \$1,000 in contributions or makes more than \$1,000 in  
15 expenditures.

16 The Act and Commission regulations, with certain exceptions, define a "political  
17 committee" as "any committee, club, association, or other group of persons which  
18 receives contributions aggregating in excess of \$1,000 during a calendar year or which  
19 makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C.  
20 431(4)(A); 11 CFR 100.5(a). Under the Act and Commission regulations, political  
21 committees are subject to certain registration and reporting requirements, as well as limits  
22 and prohibitions on contributions received and made, and on expenditures made. As the  
23 Commission stated previously, "[a]ny funds that are 'contributions' by operation of new

1 section 100.57 are contributions for purposes of the 'political committee' definition in 2  
2 U.S.C. 431(4)(A) and 11 CFR 100.5(a) . . . ." *Political Committee Status Final Rules*, 69  
3 FR at 68058. Once Unity 08 receives over \$1,000 in contributions, or makes over \$1,000  
4 in expenditures, it will satisfy the statutory definition of "political committee," see 2  
5 U.S.C. 433.

6 However, the Supreme Court concluded that, "[t]o fulfill the purpose of the Act  
7 [the term 'political committee'] need only encompass organizations that are under the  
8 control of a candidate or *the major purpose of which is the nomination or election of a*  
9 *candidate.*" *Buckley v. Valeo*, 424 U.S. 1, 79 (emphasis added).

10 An organization's "major purpose" may be established through its own public  
11 statements. See e.g., *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004)  
12 (finding the organization evidenced its "major purpose" through its own materials which  
13 stated the organization's goal of supporting the election of Republican Party candidates  
14 for Federal office and through efforts to get prospective donors to consider supporting  
15 Federal candidates); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) (finding that  
16 the "organization's [major] purpose may be evidenced by its public statements of its  
17 purpose or by other means. . .").

18 Unity 08 satisfies the major purpose test. Unity 08 makes clear in its Advisory  
19 Opinion request and through its solicitations and other statements that its goal is to elect  
20 candidates to the Offices of President and Vice President. While Unity 08 has a  
21 subsidiary objective of influencing the major parties to adopt, in connection with the  
22 2008 national elections, the core positions of Unity 08 supporters, your letter of May 30  
23 states that Unity 08's first goal is the election "of a Unity Ticket for President and Vice-

1 President of the United States in 2008.” Thus, Unity 08’s self-proclaimed major purpose  
2 is the nomination and election of its candidates for Federal office, specifically President  
3 and Vice President of the United States.

4 Therefore, once Unity 08 receives over \$1,000 in contributions or makes over  
5 \$1,000 in expenditures, it must register as a political committee with the Commission by  
6 filing a statement of organization within ten days, *see* 2 U.S.C. 433, 11 CFR 102.1 and  
7 102.2, and will be subject to the provisions of the Act and Commission regulations  
8 applicable to political committees.<sup>6</sup>

9 *Question 3: May Unity 08 incorporate for liability purposes only?*

10 Yes, Unity 08 may incorporate for liability purposes only. Under Commission  
11 regulations, a political committee may incorporate for liability purposes only without  
12 running afoul of the Act’s prohibitions and limitations on corporate contributions and  
13 expenditures. *See* 11 CFR 114.12. Thus, Unity 08 may incorporate for liability purposes  
14 without being subject to the corporate prohibitions and limitations in 2 U.S.C. 441b and  
15 11 CFR part 114.

16 This response constitutes an advisory opinion concerning the application of the  
17 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>6</sup> In its advisory opinion request, Unity 08 cites *Machinists’ Non-Partisan Political League v. FEC*, 655 F.2d 380 (D.C. Cir. 1981), to support its assertion that Unity 08 is not a political committee. In *Machinists’*, the Court of Appeals for the D.C. Circuit held that so-called “draft groups” were not political committees under the Act. 655 F.2d at 392. Unity 08, however, is not a draft group. Draft groups do not promote the election of certain candidates for Federal office, but have the more limited aim of convincing individuals who are not yet candidates to run for office. By contrast, the declared purpose of Unity 08 is not to “draft” candidates but to get its chosen presidential and vice-presidential candidates on the ballot, and to raise and spend funds in support of its candidates. Moreover, *Machinists’* expressly left open the question of whether draft groups could be treated as political committees for purposes of the Act’s contribution limits after Congress’s 1979 amendments to the Act. 655 F.2d at 396.

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity.

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Sincerely,

Michael E. Toner  
Chairman

Enclosures (Advisory Opinions 2004-34, 2003-23, 2000-06, 1994-05, 1982-23,  
and 1977-16)