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July 19, 2006

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Draft Advisory Opinion AO 2006-20

Dear Commissioners:

Unity08, Inc., by its attorneys, strongly objects to the Office of General Counsel's (OGC's) conclusion in Draft Advisory Opinion 2006-20 that Unity08 is ***now*** a "political committee" and must register with the Federal Election Commission and abide by the constraints imposed on political committees by the Federal Election Campaign Act of 1974, as amended ("Act"). We attach to this letter as *Appendix A* a formal response to the conclusions of fact and law set forth in the Draft Advisory Opinion, which conclusions we believe are incorrect, and as *Appendix B* a substitute Draft Advisory Opinion for the Commission's consideration. We set forth below a brief summary of our arguments that show not only that the proposed decision is incorrect as a matter of fact and law, but also that, if the reasoning behind it is adopted by the Commission, it will greatly, and unconstitutionally,[1] increase the already difficult task of forming a new political organization.

[1] The government's right to limit the ability of citizens to join together in an organization to raise and spend money to advance political ideas is narrow, and justified only by the government's right to prevent the appearance of corruption. *See* Buckley v. Valeo, 424 U.S. 1, 28 (1976); McConnell, *supra*, 54 U.S. at 291. The corruption rationale is at its strongest where the organization is controlled by or has as its major purpose the support of an *identified* candidate. With respect to the activity engaged in by Unity08,it is attenuated to the point of invisibility.

The OGC does not rest its conclusion that Unity08 is a political committee on any thing Unity08 is doing **now**. It relies instead solely on Unity08's statements concerning its ***future political goals***.

Unity08 is a "nascent" political organization. Its goal is to redirect the political discussion in America and, in particular, in Presidential campaigns to "critical issues." Unity08 has recognized, as have others, that in America political discussion can often best be stimulated and focused by participation in the electoral process, and in particular in the Presidential election process. *See* McConnell v. FEC, 540 U.S. 93, 352-53 (2003) (Rehnquist, J., dissenting in part) ("political parties often foster speech crucial to a healthy democracy and fulfill the need for like-minded individuals to band together and promote a political philosophy") (citations omitted) and ("some national political parties exist primarily for the purpose of expressing ideas and generating debate"). It seeks, therefore, to run candidates in the 2008 presidential election cycle.

Unity08 has not qualified, however, at the present time to appear on the ballot in a single state. Unity08's present activities consist of the dissemination of its analysis that the country needs to focus on critical issues, creation and operation of its website that serves as a forum for the development and dissemination of its ideas, and preparing to take steps to qualify for the ballot in those states (37) that will allow it to qualify **now as a political organization *without a candidate***. The OGC does not contend that Unity08 is a political committee because its present activities constitute "contributions" or "expenditures." [2] It argues that Unity08 is a political committee -- regardless of the nature of its present activities -- because, according to the OGC, it satisfies the so-called "major purpose" test, a judicial construct that limits the reach of the statutory triggers in FECA for political committee status to organizations the major purpose of which is the support of or opposition to a candidate. The courts have repeatedly construed the

[2] In concluding that Unity08 would make "contributions" or "expenditures," the OGC focused only on ***potential future*** actions that it had concluded -- incorrectly in most cases -- that Unity08 itself would undertake. *See* Draft Advisory Opinion, at p. 4 ("Unity08's communications indicate that funds received will be used to support the election of the Unity08 presidential ticket") and p. 6 ("Unity08 plans to qualify its candidates for ballots") (Unity08 plans to hold a nominating convention) . We discuss the OGC's factual and legal errors *infra* at Appendix A.

test to apply to an "identified" candidate, *see FEC v. GOPAC*, 917 F. Supp. 851, 862 (D.D.C 1996), and have repeatedly rejected the OGC's proposed construction that would extend the reach of the trigger for political committee status to an organization, like Unity08, that merely expresses a goal of running candidates, who are as yet unknown, in a far-off future election.[3] *See* Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 394 (D.C. Cir. 1981).

The OGC's application of its broad construction of the "major purpose" test to a nascent political organization is particularly inappropriate for both legal and policy reasons. Unity08 is not a 527 organization that intends to support the nominee of one of the established parties whenever he/she is nominated. Unity08 must first raise and spend money to obtain access to the ballot in the approximately 37 states that will permit it to get ballot access as a political organization prior to the selection of a candidate. Unless it can fulfill that precondition it can have no candidate involved in the election, and no *possibility* of support exists. Because ballot qualification is a prerequisite to the possibility of candidacy, the Commission has not, to our knowledge, ever considered money spent by a political party to qualify for ballot access, including money spent for litigation to get on the ballot, to be an "expenditure" under the Act. A Unity08 disbursement cannot be for the purpose of "influencing" a federal election -- such as, for example, the Florida election for Presidential electors -- unless Unity 08's participation in the election is at least possible.[4] The Commission's regulations exempt ballot qualifying expenses

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[3] In 2004, the Commission declined to expand the scope of the definition of "political committee" stating: "[t]he "major purpose" test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future." 69 Fed. Reg. 225, 68065 (Nov. 23, 2004).

[4] The OGC cites Advisory Opinion 1994-05 to support its position that ballot access expenses are expenditures under the Act. However, in that opinion it was the candidate that sought to have the expenses classified as expenditures for purposes of determining whether he met the definition of a "candidate" under the Act. Notably, the Commission declined to address the specific issue and merely stated in a one sentence footnote that money spent on petition drives would be expenditures for purposes of whether the candidate hit the threshold.

of candidates from the two major parties from the definition of expenditure for similar reasons.[5] No rationale distinction can be made for excluding these minor amounts and including the enormous amounts needed to be raised by a new party or independent candidate to qualify, and, consequently, the Commission has not considered such payments expenditures. In the process of raising money to accomplish the herculean task of achieving ballot access in a Presidential election under our system, Unity08 will have to refer to its ultimate goal of nominating and electing candidates for President and Vice-President of the United States. Doing so will not, however, make it a political committee.

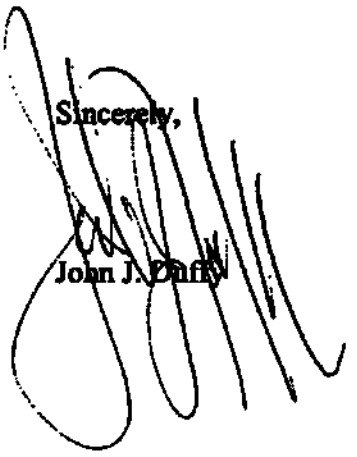
Strong policy reasons also mitigate against a Commission decision to convert ballot access expenses into an "expenditure." New political organizations have an extremely difficult time getting on the ballot in Presidential elections. The cost of qualifying in every state, which usually involves the collection of signatures from tens of thousands of registered voters in each state, is 3-4 million dollars. Additional expenses may result from the need to challenge a state's refusal to qualify a political organization for the ballot or to defend a challenge to a ballot qualification. Sufficient money to defray these expenses would be very difficult to raise under the limitations applicable to a non-connected political committee. A Commission decision that produced such a result would effectively cripple attempts to start a new political organization. The Act allows the national committee of an established party to accept contributions of $26,700 per year from individuals, but these organization have "automatic" ballot access, and any payments required to be made by candidates for that access are not "expenditures." *See* 11 C.F.R. § 100.150.

We urge the Commission, for the reasons given here and in the accompanying response, to reject the OGC's Draft Advisory Opinion and to adopt the proposed opinion that we have attached as Appendix B. Unity08 recognizes that it may, at a certain point in the future, have to establish a political committee to engage in activities covered by the Act, including the support of its candidates for President and Vice-President after their selection. Moreover, its candidates

[5] *See* 11 C.F.R. § 100.150.

would have to establish a candidate committee. But, such matters lie in the future. At the present time none of Unity08's activities have resulted in the receipt of "contributions" or the making of "expenditures" under the Act, and its articulation of a purpose to attempt to run candidates in a distant election for which it is not qualified at the present time does not itself make it a political committee.

Sincerely,



John J. Duffy

cc: Lawrence Norton, Esq.
Enclosures

APPENDIX A

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of UNITY08, Inc.	Draft AO 2006-20

RESPONSE TO THE CONCLUSIONS OF FACT AND LAW IN DRAFT AO 2006-20

Unity08, Inc. requested an Advisory Opinion under 2 U.S.C. § 437g asking, in pertinent part, whether it was currently required to register as a political committee.[1] The Office of the General Counsel ("OGC") has now issued a Draft Advisory Opinion 2006-20.

Unity08, Inc. strongly opposes the OGC's proposed Advisory Opinion 2006-20. In its proposed Advisory Opinion, the OGC does not rest its conclusions on Unity08's ***present*** actions or factual circumstances, but relies instead on Unity08 statements concerning its future political goals and on OGC assumptions as to Unity08's possible future activities to conclude that it is ***now*** a political committee and must register with the Federal Election Commission (the "Commission") and abide by the constraints imposed on political committees by the Federal Election Campaign Act of 1974, as amended ("Act"). The OGC's proposed Advisory Opinion would expand the Act's regulatory reach to include within its scope organizations, like Unity08, that are: 1) ***not at the present time*** receiving "contributions" or making "expenditures" as those terms are defined by the Act and 2) are neither controlled by a candidate, nor have as their major purpose the support of any **identified** candidate. Federal courts have held repeatedly over the last thirty years that such organizations cannot constitutionally be made subject to the Act.

We begin our response with an examination of the OGC's unwarranted factual assumptions that have placed its analysis on an unsound factual footing. We then discuss briefly the OGC's tortured use of "precedent" that is not only not on point but factually and logically wide of the mark. Finally, we discuss the OGC's contention that Unity08 is now a "political

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[1] Unity08 also requested an opinion as to whether it may incorporate for liability purposes. As noted in the request and the Draft Advisory Opinion, the answer to this question is inextricably linked to the question of whether Unity08 is currently a political committee and, therefore, that section of the Draft Advisory Opinion is not discussed herein.

committee" because it has stated that its long-term goal is to identify an appropriate candidate to support.

A. The OGC Has Made A Number of Unwarranted Factual Assumptions On Which It Has Based Its Conclusion That Unity08 Is Making Contributions or Expenditures.

1. The OGC's conclusion that Unity08 receives or intends to receive "contributions" rests on incorrect factual assumptions.

The OGC states that "Unity08's communications indicate that funds received will be used to support the election of the Unity08 presidential ticket." This is wrong for two reasons. First, the language cited by OGC does not support its conclusion. The OGC cites two disconnected sentences, which it conflates and to which it then gives its own interpretation. Unity08 did not state that monies received now will be used to support the candidates after their selection. To the contrary, it repeatedly recognized in its AO request, as have the courts, that the identification of a candidate constitutes the critical event in determining whether the Act can constitutionally cover the activity of people who are exercising their First Amendment rights to speak and form associations to more effectively speak on political issues. Second, Unity08 does not intend to use money raised now to support the Unity08 ticket, *i.e.* to support the candidates after they have been selected. Unity08's present receipts will go to finance its present activities such as the establishment and operation of its website, dissemination of its analysis of the need for a focus on central issues, and qualification for ballot access as a "party" in the approximately 37 states that permit a party to qualify for ballot access ***prior to*** having a candidate.

2. The OGC's conclusion that Unity08 makes "expenditures" also rests on incorrect factual assumptions and does not involve present activities but activities two years in the future.

Most of the states permit a party to qualify for ballot access prior to the selection of a candidate. Unity08 can qualify now for such access, and it intends to do so. In concluding that payments for ballot access would constitute an "expenditure" under the Act, however, the OGC assumed that ballot access petitions would contain the name of a candidate, and relied on a footnote in an otherwise inapposite Advisory Opinion to conclude that "seeking signatures on nomination petitions" to get on the general election ballot would constitute a "promotion" of the

requester's candidacy for election to the office sought and consequently an "expenditure." The OGC's analysis and the authority on which it relied do not apply, however, to Unity08's present ballot access activity. Since this activity does not involve any candidate promotional activity, it cannot constitute an expenditure even under the OGC's dubious legal analysis, which we will discuss subsequently. Unity08's present efforts to get on the ballot as a party do not require a candidate and, thus, do not constitute an "expenditure." Unity08 has repeatedly recognized in its AO request that selection of a candidate constitutes the critical juncture with respect to the application of the Act to its activity and that actions taken after that date may require the establishment of a political committee. Any action to qualify in the few states that require a candidate for qualification will not occur for close to two years. Unity08 will agree to seek another Advisory Opinion on the issue prior to taking any action to circulate petitions to qualify on the ballot after the selection of its candidate.

The OGC also concludes that Unity08's intention to hold an on-line convention approximately 2 years from now may result in its making "expenditures" at that time. Even if such expenses constitute expenditures under the Act, the proposed expenditures will not occur until some time in the future. Indeed, the OGC has not pointed to any activity that Unity08 is doing now that constitutes the receipt of a "contribution" or the making of an "expenditure."

B. Unity08 Will Not Receive "Contributions" or Make "Expenditures" As Those Terms Are Defined In the Act Until It Has A Clearly Identified Candidate.

The OGC's conclusions that Unity08 will receive contributions and make expenditures rests on a number of factual errors, but its legal analysis is also flawed. The operative phrase in the Act's definition of "contribution" and "expenditure" is "made for the purpose of influencing any election for Federal office." This phrase has long been interpreted as requiring an actual identified candidate. *See* FEC v. GOPAC, 917 F. Supp. 851, 858-59 (D.D.C. 1996) (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

1. The OGC inappropriately stretches unrelated law to determine that Unity08 is making "contributions."

The OGC cannot find any authority to support its view that funds received by Unity08 prior to the identification of a candidate constitute contributions, so it focuses on the regulations

governing solicitations to argue that Unity08 will be accepting contributions as defined by the Act. Under these regulations, the OGC argues alternatively that Unity08 has a clearly identified candidate as required for contributions defined by 11 C.F.R. § 100.57, or that no clearly identified candidate is necessary for contributions made under 11 C.F.R. § 102.5(a)(2(ii). As further explained below, neither of these options is viable.

The OGC first relies on relatively new Section 100.57 for its contention that Unity08 is accepting contributions under the Act. Section 100.57 states that "a gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication *indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.*" 11 C.F.R. § 100.57 (emphasis added). The OGC does not dispute that a clearly identified candidate is required under this section, but instead attempts to apply this to Unity08's requests for funds to finance its preliminary organizational efforts based on the assertion that the phrase "clearly identified candidate" may be satisfied if the solicitation identifies not a candidate, but only a specific office, party affiliation, and election cycle.

The Commission drew support for this Section from *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), which actually supports Unity08's position that the solicitation must indicate support for an actual candidate. *See* 69 Fed. Reg. 225, 68057 (Nov. 23, 2004). In that case, the court found that a 1984 letter from two nonprofit organizations solicited contributions because it included a statement that left "no doubt that the funds contributed would be used to *advocate President Reagan's defeat at the polls.*" *Id.* at 295 (emphasis added). As noted by the Commission in adopting Section 100.57, the critical statement, as found by the court, indicated that the money would be used to communicate to the voting public that "Ronald Reagan and his anti-people politics must be stopped." *Id.* at 289, *quoted in* 69 Fed. Reg. 225, 68057 (Nov. 23, 2004). Indeed, the examples cited by the Commission in its Explanation and Justification all identify actual candidates like "the President" or "electing Joe Smith." 69 Fed. Reg. 225, 68057 (Nov. 23, 2004).

The OGC also cites without discussion Section 100.17, which defines "clearly identified" as "candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your

Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" 11 C.F.R. § 100.57. The OGC uses this definition to support its contention that "in certain circumstances" the Commission has determined that candidates are sufficiently identified when identified as to specific office, party affiliation and election cycle "although [the] names of the eventual nominees were not yet known" Draft Advisory Opinion, at p. 4. However, there is nothing in the Explanation and Justification for Section 100.17 that indicates that this definition was to be used for determining whether an organization is a political committee under the Act. *See* 60 Fed. Reg. 129, 35293-94 (July 6, 1995). Indeed, the reasoning behind the section is geared toward when a candidate is clearly identified for purpose of communications and, in fact, the only reference to this section in the regulations is in the allocation rules, 11 C.F.R. 106 *et seq.* Nevertheless, the wording of the regulations and the examples cited in the Explanation and Justification make clear that the focus is on *actual candidates* for Federal office -- *not hypothetical or potential candidates*, as the OGC contends.

Moreover, the advisory opinions cited by the OGC in support of its position are limited to whether identification is sufficient for the purposes of earmarking -- not for purposes of political committee status. *See* AO 2003-23 (WE LEAD); AO 1982-23 (Westchester Citizens for Good Government). Indeed, these opinions do not involve the determination of when an organization receives a "contribution," but whether an earmarked contribution can be made without the identification of a candidate beyond a specific office, party affiliation and election cycle. The reasoning in these earmarking cases is completely inapposite. Indeed, to apply such a construction to the determination of whether an organization is a political committee is directly contrary to the court's holding in *GOPAC*, which required the major purpose of the organization to be the nomination or election of a particular, identified federal candidate. *See* GOPAC, *supra*, 917 F. Supp. 851, 862 (D.D.C. 1996). Indeed, in *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981), the court determined that a group that raised money for an identified possible candidate (which was also identifiable by a specific office, party and election cycle) was not a political committee because there was no clear candidate.

Furthermore, the earmarking regulations cannot be neatly applied to the determination of political committee status as the OGC suggests. This is because earmarked contributions are

contingent on the condition of the earmarking (e.g. the nomination of the Democratic nominee for President) taking place. For example, in WE LEAD, the Commission held that the nature of that contribution could not be determined until the actual nomination of the candidate by a particular time period. If the determining event did not occur, the contributions would be made to the Democratic Party and, therefore, would be subject to different contribution limits. *See* AO 2003-23. Moreover, the earmarked contributions are not treated as contributions to the organization who receives the contribution, but to the particular candidate for whom the contribution is earmarked. Therefore, if Unity08 accepted money "on behalf as the presumptive nominee of the Unity08 ticket" it would not be accepting contributions under the Act.

Finally, the OGC also references AO 1977-16 which held that it was *permissible* for a local search committee to accept contributions on behalf of an undetermined Federal candidate. Notably, the Commission did not engage in a discussion about the requirements for political committee status. But, more importantly, AO 1977-16 was decided before the court's decision in *Machinists*, which held that such draft organizations were *not* political committees under the Act. *See* Machinists, *supra*, 655 F.2d at 394. *See also* 11 C.F.R. § 100.72 and 11 C.F.R. § 100.131 (exempting payments from the definitions of contributions and expenditures monies used to determine whether an individual would like to run for office); 11 C.F.R. § 110.2(l) (making certain contributions by a multicandidate committee to pre-candidate committees in-kind contributions under certain circumstances).

In the alternative, the OGC argues that Unity08 would receive contributions under the solicitation rules set forth in 11 C.F.R. § 102.5(a)(2)(ii), which classifies as contributions money received in response to solicitations "which expressly state[] that the contribution will be used *in connection with a Federal election*." This section, however, *only applies to organizations already classified as political committees*. *See* 11 C.F.R. § 102.5(a). For non-political committees, the governing regulation with respect to solicitations is 11 C.F.R. § 100.57, which requires the solicitation to refer to a clearly identified candidate. In fact, unlike Section 102.5, the Commission has expressly stated that Section 100.57 can be used for determining political committee status under the Act. See 69 Fed. Reg. 225, 68058 (Nov. 23, 2004). Therefore, Section 102.5 is not applicable in this instance.

Indeed, to now apply the "in connection with a Federal election" standard set forth in Section 102.5 would essentially rewrite the test for political committee to encompass all 527

organizations that solicit money in connection with any Federal election. In 2004, the Commission expressly declined to revise the definition of political committee to include such organizations, correctly reasoning that such a broad construction would "affect[] hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA." 60 Fed. Reg. 225, 68065 (Nov. 23, 2004). If the Commission is so inclined to expand the scope of its reach to include more 527 organization now, such a decision should not be made on an ad hoc basis and is more appropriate for Congress or administrative rulemaking. Notably, such a bill is currently before Congress and appears it currently does not have the votes to pass. *See* Schor, Elana, *527 Bill Splits Republicans*, THE HILL (July 15, 2006).

2. *The OGC's arguments regarding expenditures are unsupported.*

The OGC makes two discrete arguments that Unity08 would be making "expenditures," as defined by 11 C.F.R. § 100.110. Specifically, the OGC argues that Unity08 will make expenditures under the Act because (1) it plans to make disbursements in connection with gaining ballot access and (2) it plans to hold an online nominating convention. Both of these arguments, however, must fail because, like contributions, the courts have limited the definition of expenditure to disbursements made in support of "a 'person who has decided to become a candidate' for federal office." GOPAC, *supra*, 917 F. Supp. at 859 (quoting *Machinists, supra*, 655 F.2d at 392). Thus, if there is no candidate, there can be no expenditure under the Act.

First, the OGC argues that since "Unity 08 *plans* to qualify its *candidates* for ballots through petition drives" it will be making expenditures because "this activity is for the purpose of influencing a Federal election." Draft Advisory Opinion, at p. 6 (emphasis added). As discussed above, however, Unity08's present ballot access activities would only involve the organization -- not identifiable candidates.[2] While Unity08 disagrees that ballot access expenses even after it has a candidate constitute an expenditure, it has recognized repeatedly that the selection of a candidate is the critical point at which a political committee might have to be

[2] It is not disputed that Unity08 has no intention of placing candidates on the ballot for the current election cycle.

formed. Advisory Opinion 1994-05, cited by the OGC, actually supports Unity08's position. In that opinion there was an actual candidate. (The individual had actually filed a Statement of Candidacy and declared his intent to run for U.S. Senate). Therefore, any money the candidate spent to further his election would be in support of a clearly identified candidate.[3]

The OGC's second argument regarding convention expenses is also legally unsupported. The OGC bases its conclusion that convention expenses are expenditures for purposes of determining whether an organization is a political committee on Advisory Opinion 2000-6. The issue there, however, was not whether certain disbursements were "expenditures" as defined by 11 C.F.R. § 100.110, but rather what constituted qualified expenses for the purpose of spending public money under the regulations governing the Federal financing of presidential nominating conventions, 11 C.F.R. § 9008 *et seq*. Those sections establish a system of "qualified expenses" and prohibited uses for public money separate and apart from the general regulations regarding contributions and expenditures in Parts 100-116. Indeed, the term "expenditure" is not mentioned once in Advisory Opinion 2000-6.

The Commission of course has a tighter grip on the use of public money by recognized political parties such as the Reform Party. That does not mean that authorized expenses under Section 9008 are "expenditures" as defined in Section 100.110. Indeed, general expenses incurred in connection with a convention held by an organization that does not qualify for public funding of its convention (like Unity08) are not expenditures as defined by the Act because they are not incurred in support of any particular candidate but are more in the nature of the general party support distinguished by the court in *GOPAC*. *See* GOPAC, *supra*, 917 F. Supp. at 862. *See also* AO 2000-38 (holding that only those funds used to send delegates to a national convention to vote for a particular candidate were expenditures); AO 1978-46 (only convention expenses that involve "(1) the solicitation, making or acceptance of contributions to a campaign for Federal office, or (2) any communication expressly advocating the election or defeat of a clearly identified candidate for Federal office" would be expenditures); *see also* AO 2000-06 *and* 11 C.F.R. § 9008.7(b) (prohibiting convention committees that receive public funds to make

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[3] Moreover, the issue in that opinion was not whether certain disbursements were expenditures under the Act, but whether that candidate qualified as a candidate under 2 U.S.C. 431(2). Notably, the Commission declined to address the issue and merely stated in a one sentence footnote that money spent on petition drives would be expenditures for purposes of whether the candidate hit the threshold.

expenditures to defray the expenses of any particular candidate). In any event, as discussed previously, the Unity08 convention will not take place for at least two years, and Unity08 will form a separate organization to deal with these expenses and seek an Advisory Opinion from the Commission in connection with that effort.

C. The Current Definition of "Political Committee" Still Requires Support of an Actual Candidate.

The definition of "political committee" -- an organization that makes expenditures or receives contributions in excess of $1,000 in a year -- has not changed in thirty years. *See* 11 C.F.R. § 100.5.[4] It is the same definition that the *Buckley* Court construed as vague and overbroad, and, accordingly, the Court limited its application to organizations "under the control of a candidate or *the major purpose of which is the nomination or election of a candidate.*" *Supra,* 424 U.S. at 79 (emphasis added). Now, the OGC attempts to rewrite the last thirty years in an effort to impermissibly expand the scope of the Commission's regulations.

This is not the first time that the definition of "political committee" has been tested. In 1996, the court rejected the Commission's attempt to broaden the definition of political committee to include all organizations engaged in "partisan politics" or "electoral activity." *See* GOPAC, *supra,* 917 F. Supp. at 859. For example, the Commission argued that organizations that "advocated the election of a specified class of candidates, such as all Republicans," were political committees because their "expenditures [were] by definition campaign related." *Id.* at 860 (the amicus Common Cause similarly argued that "electioneering" communications such as "elect a Republican to the White House" were sufficient).

In rejecting the Commissions argument, the *GOPAC* Court noted that where First Amendment values are at stake it is important to establish a "bright-line" rule and such a rule was conceived by the Court in *Buckley. Id.* at 861. The rule followed by *GOPAC* drew two distinctions -- (1) between federal and state candidates and (2) "between an organization whose major purpose was to support a particular federal candidate" and an organization, like Unity08, "whose major purpose did not involve support for any *particular* federal candidates, either

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[4] The regulations also provide that the term also includes separate segregated funds established by political committees; certain local committees of a political party; and individual campaign committees. There is no dispute that none of these categories are applicable to Unity08.

because there was no candidate running at the time or because the support was not directed to the election of any *particular* candidate but **was more in the nature of general party support."** *Id.* at 862 (emphasis added, citations omitted) (citing Machinists, *supra*, 655 F.2d at 392).

Nothing has changed since the "bright-line" test espoused in *GOPAC*. Since 1996, the Commission has continually reaffirmed the viability of the holding in *GOPAC* that the definition of political committee requires the support or opposition of an actual, identified candidate. *See* AO 2003-1. For example, in MUR 395, the Commission declined to continue enforcement proceedings against the College Republican National Committee for failure to register as a political committee. In so doing, Commissioners Mason, Smith and Wold stated that "we think *GOPAC* is correct in holding that general expressions of support for candidates of a party do not, absent direct contributions to federal candidates or the presence of 'express advocacy' qualify as 'expenditures' under the Act." Statement of Reasons for Pre-MUR 395, p. 3-4 (2002). Indeed, they found that "[t]he idea that a group can be considered a political committee solely because its major purpose is campaign activity has no basis in law." *Id.* at 4. *See also* Statement of Reasons by Chairman Smith and Commissioners Mason and Toner for MUR 5024 (2004) (failing to find reason to believe that the Council for Responsible Government, Inc. was a political committee because its brochures referencing candidate Tom Kean, Jr. did not constitute express advocacy and, therefore, were not expenditures under the Act).

In 2004, the Commission again declined to expand the scope of the definition of "political committee." After receiving over 100,000 comments and holding hearings, the Commission decided against revising the definition of political committee as recommended by the OGC and reaffirmed its application of the major purpose test stating:

> The "major purpose" test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future. [69 Fed. Reg. 225, 68065 (Nov. 23, 2004)].

As noted by a commentator during the hearings, "[t]he major purpose gloss that the Supreme Court imposed or clarified, which neither Congress nor the Commission has ever encoded in the statute [or] in [the] regulations is an effort to limit the reach of the statute, not to expand it." Transcript of Public Hearing on April 14, 2004 ("Hearing Transcript"), at T82:3-7 (comments by Mr. Gold of the AFL-CIO).

The Commission also expressly rejected the argument that all entities organized under Section 527 of the Internal Revenue Code are "political committees" subject to regulation under FECA. The Commission held that such a broad construction was not warranted nor mandated by Congress. *See* 69 Fed. Reg. 225, 68065 (Nov. 23, 2004) (stating such a rule would "affect[] hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when in increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA"). Indeed, as Mr. Gold from the AFL-CIO commented at the hearing on April 14, 2004, "Congress clearly has made decisions about what the governmental interest is in regulating the activities, the independent activities of independent groups. It did in FECA and it did it in BCRA and it limited it to express advocacy and electioneering communication." Hearing Transcript, at T60:8-14. *See also* Hearing Transcript, at T37:18 to T38:5 (comments by Mr. Baran from the Chamber of Commerce) ("In BCRA, Congress carefully regulated national and state party soft money and electioneering communications by certain groups at specific times. Congress did not change the definition of political committee or the more general definition of expenditure. Congress neither left gaps nor did it instruct the Commission to address those provisions ... even though Congress ordered FEC rulemaking in many other areas.").

In addition, as commented on during the hearings on the proposed revisions, there are serious problems with applying the statutory definitions under the tax code to the regulatory scheme under FECA. The IRS definition of a "political organization" is *much* broader than FECA's definition of "political committee" and it has not been similarly constrained. As one commentator noted, "[w]hat you do when you file Form 8871 to say you are a 527 is you declare that your primary purpose is to conduct 'exempt function activities' as that phrase is defined in the Internal Revenue Code and has been conducted by the Internal Revenue Service over a period of many, many years." Hearing Transcript, at T224:19 to T225:13 (comments by Mr. Trister). *See also* Hearing Transcript, at T29:12-14 (comments by Chairman Smith) ("it's not clear to me that the tax status of the group should drive our campaign finance analysis"). Moreover, as noted in AOR 2006-20, the definitions of contribution and expenditure are markedly different in the I.R.C. and under FECA.

Despite the Commission's history of affirming the test established in *Buckley* and its progeny, the OGC again seems primed to do what the Commission declined to do through rulemaking -- to greatly expand the term "political committee" to include not only those organizations that in the present raise and expend funds to influence the election or defeat of a particular candidate but all organizations who participate in the political process by broadening the meaning of "clearly identified candidate" and applying the "in connection with a Federal election" standard under 11 C.F.R. § 102.5. However, this has not been the law for the last thirty years, and is not the law now.

D. Conclusion

The Commission should reject the OGC Draft Advisory Opinion and send the proposed draft back to the OGC for revision to conclude that Unity08's *present* activities are not contributions or expenditures and that Unity08 does not now have to register as a political committee.

Date: July 19, 2006

Respectfully submitted,

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APPENDIX B

ADVISORY OPINION 2006-20

John J. Duffy, Esq.
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Dear Mr. Duffy:

This responds to your letter on behalf of Unity08 dated May 30, 2006 requesting an advisory opinion concerning the application of the Federal Election Campaign Act ("the Act") and Commission regulations to Unity08's current activities to determine whether it is making "expenditures" or accepting "contributions," as those terms are defined by the Act and, if so, is Unity08 required to register as a political committee.

Background

The Advisory Opinion Request and the Articles of Incorporation indicate that Unity08 is a not-for-profit corporation organized in the District of Columbia as a political organization under Section 527 of the Internal Revenue Code. Unity08 states that it "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." AOR 2006-20, pp. 1-2. The organization formed because of its members' deep concern over the current state of the American political system. Specifically, Unity08 believes that the current politicians are not focusing enough on the critical issues like energy independence, global warming, nuclear proliferation, political corruption and cronyism, the care of our aging parents and grandparents, the education of our children, and "the disappearance of the American Dream." *Id.* at 2.

Unity08 sets forth two goals. Goal One is to elect a ticket for President and Vice-President of the United States that will have on the ticket a person from each of the two parties. Goal Two provides that, at a "minimum," Unity08 endeavors "to effect *major* change and reform in the 2008 national elections by influencing the major parties to adopt the core features of [its] national agenda." *Id.* at 2-3 (emphasis in original).

Unity08 states that it intends to hold an on-line convention in the Summer of 2008 to select candidates for President and Vice-President. All persons who have signed up with Unity08 as delegates on the Internet will be eligible to vote during the virtual convention for the candidate they want to represent the Unity08 ticket. *Id.* at 4.

Unity08's current activities, however, are centered on the establishment of a viable organization and the exploration of the viability of a third alternative ticket in 2008. As stated by Unity08, its present focus is on the dissemination of its analysis that the country needs to focus on critical issues; creation and operation of its website that will serve as a forum for the development and dissemination of its ideas; the establishment of a plan to qualify for the ballot in fifty states and the District of

Columbia; and the qualification for the ballot in those thirty-seven states that will allow it to qualify without a candidate. Unity08 states that any funds raised will finance these activities, and will not be used to support the election of an identified candidate. Unity does not intend to promote, support, attack or oppose any candidates for office in the 2006 elections. *See* Unity08's Supplemental Filing at Appendix A, p. 1; AOR 2006-20, at p. 4.

Unity08 has recognized that formation of a separate political committee or committees may be necessary in the future.

Unity08 intends to finance it activities by soliciting donations from individuals and the sales of t-shirts, mugs, pens and similar items. Unity08 states that it will not accept donations from corporations, foreign national, or government contractors. AOR 2006-20, p. 3.

Questions Presented

Specifically you ask the following questions:

1. Whether donations to, or purchases made, by Unity08 would be "contributions" or "expenditures" under the Act prior to the time Unity08 chooses a candidate to support.
2. Whether Unity08 is required to register as a "political committee" under the Act.
3. Whether Unity08 may incorporate for liability purposes.

Legal Analysis and Conclusions

The Commission concludes that Unity08 is not now making "contributions" or "expenditures," as those terms are defined by the Act and in the regulations. *See* 11 C.F.R. §§ 100.52, 100.110. Although Unity08 has expressed as an ultimate goal the creation of a ticket to run in the 2008 presidential election cycle, the mere articulation of a goal does not make it a political committee and, thus, is not now required to register as a "political committee." *See* FEC v. GOPAC, 917 F. Supp. 851, 862 (D.D.C. 1996). While Unity08 may incorporate, as a corporation it will be bound by the prohibitions of 2 U.S.C. § 441b and it may not make or accept monies on behalf of a clearly identified candidate unless it falls within one of the exemptions allowed by the Act.

Question 1: Will donations to, or purchases made, by Unity08 be "contributions" or "expenditures" under the Act?

No, for the reasons stated below, donations to and purchases made by Unity08 will not be "contributions" or "expenditures" under the Act unless made or spent in support of a "clearly identified candidate."

A "contribution" is defined as a "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." 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(a). An "expenditure" is a "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." 11 C.F.R. § 100.111(a). The operative phrase in both these definitions is "for the purpose of influencing any election for Federal office."

In *Buckley v. Valeo*, 424 U.S. 1, 74-82 (1974), the Supreme Court held the phrase "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. Therefore, the *Buckley* Court interpreted the phrase to require that the money be received or incurred in support of the "election or defeat of a clearly identified candidate." *Id.* at 79-80.

The definitions of "expenditure" and "contributions" have not changed in the last thirty years since *Buckley*. Since then, the courts and the Commission have repeatedly reaffirmed that an organization only accepts "contributions" or incurs "expenditures" when the organization supports or opposes an actual, identified candidate for Federal office. *See* GOPAC, *supra*, at 917 F. Supp. at 862 (clarifying that the term "clearly identified candidate" requires an actual candidate, not merely general party support); Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 394 (D.C. Cir. 1981) (holding that a group that raised money for an identified possible candidate (which was also identifiable by a specific office, party and election cycle) was not a political committee because there was no clear candidate). *See also* AO 2003-1; Statement of Reasons by Commissioners Mason, Smith and Wold for Pre-MUR 395 (stating "we think *GOPAC* is correct in holding that general expressions of support for candidates of a party do not, absent direct contributions to federal candidates or the presence of 'express advocacy' qualify as 'expenditures' under the Act"); Statement of Reasons by Chairman Smith and Commissioners Mason and Toner for MUR 5024 (2004) (failing to find reason to believe that the Council for Responsible Government, Inc. was a political committee because its brochures referencing candidate Tom Kean, Jr. did not constitute express advocacy and, therefore, were not expenditures under the Act).

Currently, Unity08 has no candidates and it likely will not have any for some time in the future. Indeed, in its supplemental filing, Unity08 states that its "present activities focus on the dissemination of its analysis that the country needs to focus on critical issues, creation and operation of its website ...." While Unity08 also plans to engage in ballot access activities, it notes that it presently only seeks to gain ballot access as a political organization, not for any particular candidate. Therefore, Unity08 is not now making "expenditures" or "contributions" under the Act and would not until such time as it collected or spent monies in support an actual candidate for Federal office. We understand that, at such time, it contemplates forming a separate political committee.

It is also noted that Unity08 states as one of its goal the election of candidates for the Offices of President and Vice President in 2008. If Unity08 runs candidates for those offices and spends or collects monies in support of their election, Unity08 would be making "expenditures" or "contributions" as defined by the Act.

Question 2: Must Unity08 register as a political committee?

The Act defines the term "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[1] 2 U.S.C. § 431(4)(A); 11 C.F.R. 100.5(a). Again, the *Buckley* Court narrowed the construction of this definition to reach only those organizations "under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*" Buckley, *supra*, 424 U.S. at 79 (emphasis added). Unity08 does not qualify for political committee status because it does not currently have as its major purpose the election or defeat of an identified candidate.

In *GOPAC*, the court reaffirmed the test for political committees as set forth in *Buckley* and clarified that the "major purpose" limitation imposed by the Court does not encompass those organizations do not support or oppose an actual candidate for Federal office. *Supra*, 917 F. Supp. at 862. Thus, an organization cannot be a political committee where its "major purpose did not involve support for any particular federal candidates, either because there was no candidate running at the time or because the support was not directed to the election of any particular candidate but was more in the nature of general party support." *Ibid; accord* Machinists, *supra*, 655 F.2d at 394.

The decisive fact, therefore, is that Unity08 does not yet have any particular candidates to support. Thus, the organization is more akin to the "draft Kennedy" organizations described by the court in *Machinists*. In *Machinists*, the courts determined that such preliminary organizations were not political committees because they "[did] not promote the election of certain candidates for Federal office, but ha[d] the more limited aim of convincing individuals who are not yet candidates to run for office." Here, Unity08 does not even have a candidate to start convincing. Unity08 must first attempt to "draft" candidates for office before it can "raise and spend money in support of its candidates."[2] Before that, however, Unity08 intends to engage in activities intended to build the organization and disseminate its message.

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[1] The regulations also provide that the term also includes separate segregated funds established by political committees, certain local committees of a political party and individual campaign committees. There is no dispute that none of these categories apply to Unity08.

[2] This is consistent with the Commission's current treatment of such exploratory groups. Indeed, to treat such draft groups as political committees, would completely obviate the need for the "testing the waters" and pre-candidacy multicandidate committee regulations. *See* 11 C.F.R. §§ 100.72, 100.131; 11 C.F.R. § 110.2(l).

In addition, it should be noted that while the "testing the waters" organizations may be analogous, the regulations governing such organizations are not applicable to Unity08. The "testing the waters" regulations only apply to groups formed by individuals trying to determine whether they would like to become candidates. *See* 11 C.F.R. §§ 100.72, 100.131.

Therefore, until Unity08 has exhausted its exploratory activities and has an actual candidate or candidates to support it cannot have as its major purpose the election or nomination of a particular candidate. Thus, Unity08 does not satisfy the major purpose prong of the political committee test.

Question 3: May Unity08 incorporate for liability purposes?

Section 441b creates a prohibition on corporations from making "contributions" or "expenditures" "in connection with any election to any political office." 2 U.S.C. § 441b; *accord* 11 C.F.R. § 114 *et seq.* As a corporation, Unity08 is prohibited from making contributions and independent expenditures and "electioneering communications" unless its activities fall within one of the few exemptions provided for in the regulations. *See* FEC v. Beaumont, 593 U.S. 146 (2003). Thus, as long as Unity08 is not making "expenditures" or "contributions" under the Act it is not subject to the prohibitions in Section 441b.

If, however, Unity08 ever becomes a "political committee," it will not be subject to the prohibitions of Section 441b. The Commission regulations allow a political committee to incorporate for liability purposes without running afoul of the prohibitions of Section 441b. *See* 11 C.F.R. § 114.12.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is any change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Michael E. Toner
Chairman