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Supplement to
AOR 2006-20

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

Re: Supplement to Advisory Opinion Request 2006-20

Dear Mr. Norton:

In light of issues and concerns raised by the OGC and the Commission in response to its Advisory Opinion Request, Unity08 submits this supplement to clarify some of the factual misconceptions and address issues raised by the Office of the General Counsel ("OGC") in Draft Advisory Opinion 2006-20 and by the Commissioners during the public hearing on July 20, 2006. Specifically, in response to the OGC's argument under Section 100.57, Unity08 has added a disclaimer to its website and mailings that make clear that any money raised now would not be used to support a candidate, but would be used for party building activities. In addition, we clarify that Unity08 currently plans to gain ballot access only as an organization -- not for a candidate -- in those states that allow it to do so. While we don't agree with the OGC's arguments that disbursements made for its online convention or to gain ballot access for a candidate constitute expenditures, such activities will not occur (if ever) for over two years. Therefore, it is not necessary for the Commission to decide those issues in the current Advisory Opinion. Unity08 recognizes that before engaging in those activities it will be necessary to seek another Advisory Opinion.

FACTUAL SUPPLEMENT

On its website, Unity08 sets forth three goals. *Goal One* is to elect a ticket for President and Vice-President of the United States that will be comprised of a person from each of the two major parties. *Goal Two* is for the American people to pick that Unity Ticket in the first half of 2008 via a virtual and secure online convention in which all American voters will be qualified to vote. And, *Goal Three* provides that Unity08's "minimum goal" is "effect major change and reform in the 2008 national elections by influencing the major parties to adopt the core features of [Unity08's] national agenda." *See* http://www.unity08.com/believe#3. To accomplish its goals, Unity08 anticipates four phases of organizational activity: (1) exploration and development; (2) ballot access as a party organization; (3) nomination of a candidate through an online convention; and (4) the general election campaign. Unity08 only seeks an Advisory Opinion with respect to Phases I and II, as further described below, and will file another Advisory Opinion Request with respect to the activities described in Phases III and IV.

Phase I - Exploration and Development: Unity08's current activities are centered on establishing an organization and exploring the viability of a third alternative ticket in 2008. Its focus is on the dissemination of its analysis that the country needs to focus on crucial issues; creation and operation of its website that will serve as a forum for the development and dissemination of its ideas; and the establishment of a plan to qualify for the ballot in fifty states and the District of Columbia. While its website is the main source of information, Unity08 may purchase access to other media to communicate to the public its view that the two major parties have failed to address the critical problems facing the United States today. Unity08 also 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 and for its proposal for a Unity Ticket. In addition, Unity08 will explore the feasibility of its goal of creating a Unity Ticket and take steps to bring together, and demonstrate the existence of, a substantial number of potential voters who support this goal. Ultimately, Unity08 hopes to influence the two major parties to address the issues that

Unity08 believes are critical to the future of the United States and to encourage the two major parties to adopt a Unity Ticket themselves.

Phase II - Ballot Access as a Party: Unity08 plans to qualify in the approximately thirty jurisdictions that will allow it to qualify without a candidate. Ballot access efforts include petition drives and filing fees. In its Draft Advisory Opinion the OGC argued that Unity08 would make expenditures in its efforts "to qualify its *candidates* for ballots." Draft AO 2006-20, p. 9 (emphasis added). However, during this phase Unity08's ballot activities would be *focused solely on ballot access for the organization* -- not identifiable candidates. At the present time, Unity08 has not qualified on the ballot in any state.

Financing for Phases I - II: Unity08 intends to finance its activities conducted in Phases I and II by soliciting donations from individuals who agree with its goals. As previously noted, donations will not be accepted from "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. Unity08 has established a website and many, but not all of its solicitations are likely to be made over the Internet; however, Unity08 may also make use of other solicitation methods, including telephone banks and mass mailings. Unity08 may also choose to raise money through the sale of t-shirts, mugs, pens, bumper stickers, and other similar items marked with the Unity08 logo or identified with Unity08 in some other fashion, such as a phrase or slogan.

As noted its Advisory Opinion Request, Unity08 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. Because of issues raised by the OGC in its Draft Advisory Opinion, Unity08 has added clarifying language to its website to make clear that any monies raised now will not go to support a clearly identified candidate, but will be used for

the party building activities described above. The donations page of the website now reads: "Donations made on this website will not be used to support or oppose any federal candidates, but will be used to support Unity08's organizational building efforts." http://www.unity08.com (go to Donations page).

Phase III - Convention: If necessary, Unity08 intends to select, via 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 Unity08 as delegates on the Internet will be eligible to vote during the virtual convention for the candidates they want to constitute the Unity08 ticket.

Phase IV - General Election Campaign: During this phase, Unity08 plans to help the nominated candidate gain ballot access in those states that did not allow it to qualify as a party At this time, however, Unity08 will file another Advisory Opinion Request.

ANALYSIS

POINT I

UNITY08 IS NOT ASKING FOR A DISPENSATION -- THE ELECTION REGULATIONS DO NOT APPLY.

During the public hearing on Draft AO 2006-20, one of the Commission's major concerns was that Unity08 was requesting a dispensation from the regulations. This is not the case. In fact, Unity08 requested an advisory opinion because it seeks to follow the law in every instance and seeks the opinion of the Federal Elections Commission to interpret the law where it is breaking new ground. However, after careful analysis, it is apparent that Unity08's current activities do not make it a political committee under the Act.

The fundamental difficulty with the question posed is that FECA and its corresponding regulations were not designed to deal with an organization, like Unity08, that is not yet a party and does not yet have a candidate, but may nominate a candidate in the future. As Commissioner Mason mentioned during the hearing on Draft AO 2006-20, FECA and the regulations were designed to address the major parties, party organizations that were candidate driven, or parties built from the local level up, so that the organizations were clearly functioning in support of an actual candidate or were established political parties by the time they participated in federal elections. Unity08, however, is an organization seeking to form a party first at the national level prior to having an identified candidate on its ticket.

But this is not merely a drafting issue. The government's right to limit the ability of citizens to join together in an organization to raise and spend money in order 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 v. FEC, 540 U.S. 93, 291 (2003). The Court has determined that 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 Unity08's activity, the rationale is attenuated to the point of invisibility because Unity08 has no party nor elected officials in office to be corrupted, nor does it promote or oppose the election of any actual candidates.

The Bipartisan Campaign Reform Act of 2002 (BCRA) and *McConnell* did not change this. While the Court in *McConnell* recognized that political parties were subject to the Act, it recognized that such regulation does not apply until an organization gains official status. *See* McConnell, *supra*, 540 U.S. at 159 ("[N]othing ... prevents individuals from pooling resources to start a new national party. *Only when an organization has gained official status*, which carries with it significant benefits for its members, will the proscriptions of [this section] apply.") (emphasis added). As demonstrated below, the Act and the corresponding regulations do not neatly (or otherwise) apply to Unity08.

A. Unity08 is Not a "Political Party" Until it has a Candidate on the Ballot.

While Unity08 has referred to itself as a "nascent political party," the Commission has made clear that Unity08 cannot be a "political party," as that term is defined by the Act, until it has placed a candidate on the ballot. The regulations define "political party" as "an association, committee, or organization *which nominates or selects a candidate* for election to any Federal office, *whose name appears on an election ballot as the candidate of the association, committee, or organization.*" 11 C.F.R. § 100.15 (emphasis added). The Commission has interpreted this definition to require that an organization has at one time (past or present) placed an actual candidate on the ballot. *See* AO 2004-9 (the term political party "requires that the party organization *actually* obtain ballot access for one or more federal candidates") (emphasis added); AO 1980-3 (committee did not qualify as a political party until it had satisfied the ballot access requirements noting that while the committee intends to nominate candidates for federal office, the nominating process is in the early stages and no individuals have been nominated as candidates of the party). Thus, even if Unity08 achieves ballot access as an organization in a number of states, it will not be a "political party" -- and be subject to the limitations or get the benefits of such designation -- until it has selected its candidate and placed its nominated candidate on the ballot in any state. *See* AO 2002-3.

B. Unity08 Cannot Have a National Committee and, Thus, Unity08 is Robbed of the Benefits Conferred on the Major Parties.

Even if Unity08 becomes a "political party," Unity08 can *never* become a national committee under the Commission's current interpretation of the Act and Unity08, therefore, is denied the significant benefits afforded to the national committees of the major parties. The Act defines a "national committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." 2 U.S.C. § 431(14); *accord* 11 C.F.R. § 100.13. In determining whether an organization is a "national committee," the Commission looks to see whether the party has established a sufficient national presence. The Commission has

determined that "national presence" is evidenced by a variety of factors, including: the nominating of qualified candidates for President and various Congressional offices in numerous states; engaging in certain activities -- such as voter registration and get-out-the-vote drives -- on an ongoing basis; publicizing the party's supporters and primary issues throughout the nation; holding a national convention; setting up a national office; and establishing state affiliates. However, the Commission has also stated that an organization cannot be a national committee if that organization focuses solely on the Presidential and Vice Presidential elections. *See* AO 1980-131; AO 1988-45; AO 1995-16. *See also* AO 1996-35 ("most important element in determining the extent of a committee or party's national activity is the degree to which the organization successfully attains ballot access for its Presidential *and* Congressional candidates") (emphasis added).

Thus, Unity08 is denied the significant benefits of national committee status and is at a severe disadvantage against the major parties. The "national committees" of the major parties are allowed a contribution limit that is more than "five times" the contribution limit ($26,700) that would be applicable to a non-candidate political committee ($5,000). And, if the OGC's argument -- that Unity08 already has a "clearly identified candidate" -- is taken to its full extent it would be a single candidate committee with a contribution limit less than one-twelfth ($2,100) of that of the national committees of the major parties. *See* Point II.B, *infra*. Moreover, Unity08 is deprived of public convention funding because it cannot be a national committee. *See* AO 2002-1; 11 C.F.R. § 9008.3.[1]

[1] The argument that Unity08's position that it is not a political committee would cause the major parties to abandon their status so they could be outside regulation is disingenuous. The argument ignores the obvious fact that, unlike those organizations, Unity08 is not a party under the Act. In addition, as noted above, the major parties enjoy significant benefits from their status, including having a guaranteed place on the election ballot in every State in the Union; while Unity08 does not have a place on the ballot of any State.

C. Unity08's Funding and Activities will not go Unreported.

Another concern raised by the Commission during the public hearing was the perceived lack of transparency if Unity08 was not somehow regulated by the FEC as a political committee. But, as a non-political committee Unity08's activities will not go unreported or unnoticed. As a 527 organization, Unity08 is required to file disclosure reports with the IRS. *See* 26 U.S.C. § 527(j)(3)(A) (527 organizations must file a report disclosing all expenditures that aggregate to more than $500 per person per calendar year and contributions that aggregate to more than $200 per person per calendar year); *cf.* 11 C.F.R. § 104.7 (requiring political committees to provide similar disclosure for its "best efforts" requirement). *See also* 26 U.S.C. § 527(k) (527 organizations must make all their filings available for public inspection). In addition, although it does not intend to at this time, *if* Unity08 makes any independent expenditures or electioneering communications it would be required to report such expenses to the Commission. *See* 11 C.F.R. § 100.29 (electioneering communications must be reported within 24 hours if they exceed $10,000); 11 C.F.R. § 109.10 (reporting requirements for independent expenditures).

POINT II

UNITY08 IS NOT MAKING "EXPENDITURES" OR ACCEPTING "CONTRIBUTIONS" AS DEFINED BY THE ACT.

A. Donations to, or purchases made by, Unity08 would not be "contributions" or "expenditures" under the Act prior to the time Unity08 identifies candidates to support for the Office of President and Vice-President of the United States.

In *Buckley,* the Supreme Court held that the operative phrase in the Act's definitions of "contribution and "expenditure" -- "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. 424 U.S. at 74-82. 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, 540 U.S. at 126.[2]

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 *an actual* candidate for a federal office. *See* Machinists, *supra*, 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 the 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 (emphasis added). 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.* Unity08 is in an even more preliminary position. It has not even identified a potential candidate yet, and indeed the selection of such a preferred choice will not occur until the summer of 2008 at its virtual convention. Therefore, until that time, 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 BCRA or *McConnell* is to the contrary. In BCRA, Congress legislated narrowly with respect to the receipt or expenditure of money for political purposes by groups not

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[2] Donations made to an organization that does not make "expenditures" can not constitute "contributions." Consequently, the status of an organization's expenses determines 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).

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 broadened by BCRA to include communications *referring to* a "clearly identified candidate," but only with respect to communications made in close proximity to a primary or general election. *See* 2 U.S.C. § 434(f)(3)(A)(i). *See also* Shays v. Federal Election Comm'n, 414 F.3d 76, 82 (D.C. Ct. App. 2005); McConnell, *supra*, 540 U.S. at 189-90. 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.[3]

B. Unity08 is not Accepting "Contributions" Under Section 100.57.

In the Draft Advisory Opinion, the OGC relied 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.

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[3] BCRA also imposed limitations on the raising and spending of soft money by national, state and local party committees. As mentioned above, however, Unity08 is not a party under the Act.

The Commission drew support for Section 100.57 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). There, 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). Moreover, as Commissioner Toner noted during the hearing, this situation is different than stating the "Democratic nominee" because such a candidate is "virtually assured." Public Hearing 7/20/06.

The OGC's reference to Section 100.17 does not 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. The Act's definition, which Section 100.17 was based upon, clearly contemplates an actual candidate. Section 431(18) defines "clearly identified" as (1) "the name of the candidate involved;" (2) "a photograph or drawing of the candidate;" or (3) "the identity of the candidate is apparent *by unambiguous reference*." 2 U.S.C. § 431(18) (emphasis added). The wording of the regulations and the examples cited in the Explanation and Justification for Section 100.17 make clear that the focus is on *actual candidates* for Federal office -- *not hypothetical or potential candidates*, as the OGC contends.[4]

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[4] Section 100.17 defines "clearly identified" as a "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

The advisory opinions cited by the OGC in support of its broadening of the phrase "clearly identified" are also inapposite as they 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). 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 *FEC v. GOPAC*, 917 F. Supp. 851, 862 (D.D.C. 1996), which requires the major purpose of the organization to be the nomination or election of a particular, identified federal candidate. *See also* Machinists, *supra*, 655 F.2d at 394 (determining 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). Indeed, the earmarking regulations cannot be neatly applied to the determination of political committee status as the OGC suggests 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, 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, even if Unity08 accepted money "on behalf as the presumptive nominee of the Unity08 ticket" it would not be accepting contributions under the Act.[5]

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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. § 100.17 (emphasis added).

[5] The OGC cites 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

Nevertheless, in order to clarify that Unity08 is not currently raising money to support a candidate for office, Unity08 has added a disclaimer on its website clearly indicating that all money raised "will not be used to support or oppose any federal candidates, but will be used to support Unity08's organizational building efforts." http://www.unity08.com (go to Donations page). Unity08 understands that if this should change, an additional Advisory Opinion request will be necessary.[6]

C. Unity08 is not Accepting Contributions under Section 102.5.

The OGC also argued that Unity08 would be receiving 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*." (Emphasis added). This section, however, only applies to organizations *already* classified as political committees. *See* 11 C.F.R. § 102.5(a). In accordance with *Buckley* and its progeny, the Commission has made clear that the governing regulation with respect to non-political committees is 11 C.F.R. § 100.57, which requires a clearly identified candidate. *See* 69 Fed. Reg. 225, 68058 (Nov. 23, 2004). Therefore, Section 102.5(a)(2)(ii) is inapplicable in this instance.

(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).

[6] In the Draft Advisory Opinion, the OGC cited language on Unity08's website that stated "In 2008, we'll select and elect a Unity Ticket to the White House ... Our success depends on small gift contributions from all of us." As we noted in our response, that specific language no longer appears on the website.

D. Monies spent or raised for the on-line convention are not "expenditures" or "contributions" under the Act.

The OGC argued in the Draft Advisory Opinion that funds spent on Unity08's convention would be expenditures under the Act based upon what constitutes a "qualified expense" under the regulations governing public convention funds, 11 C.F.R. § 9008 *et seq*. *See* Draft AO 2006-20, pp. 9-10 *and* AO 2000-6 (cited by the OGC). Those regulations 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. The Commission of course has a tighter grip on the use of public money by recognized political parties such as the Reform Party. As noted in our initial response and as recognized by the Commissioners, that does not necessarily mean that authorized expenses under Section 9008 are "expenditures" as defined in Section 100.110.[7]

It is our position that money spent on the convention is not in support of a particular candidate and, thus, cannot be expenditures under the Act, since it is more in the nature of the general party support distinguished by the courts. *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). *Cf.* AO 2000-6 and 11 C.F.R. § 9008.7(b) (prohibiting convention committees that receive public funds from making expenditures to defray the expenses of any particular candidate).

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[7] Even if Unity08 was a political committee or party committee it would not be eligible for convention funding. *See* AO 2002-1 (only the national committee of a major or minor party is eligible for convention funding; thus, a prerequisite for convention funding is the existence of a national committee of a political party); AO 1996-22.

In any event, as discussed previously, the Unity08 convention will not take place for at least two years and Unity08 will seek an Advisory Opinion from the Commission in connection with that effort.

E. Monies spent or raised for ballot access are not "expenditures" or "contributions" under the Act.

1. Monies spent or raised to place *the organization* on State ballots are not "expenditures" or "contributions" under the Act.

Contrary to the assumption by the OGC that Unity08 is seeking ballot access for a candidate, Unity08 currently plans to qualify for ballot access only in those states that permit an organization to qualify for ballot access prior to the selection of a candidate. 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 as an organization, including money spent for litigation to get on the ballot, to be an "expenditure" under the Act. In the Draft Advisory Opinion, the OGC assumed that ballot access petitions would contain the name of the 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 requestor'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. *See* AO 1994-05 (The individual had actually filed a Statement of Candidacy and declared his intent to run for U.S. Senate). Unity08's present efforts to get on the ballot as a party do not require a candidate and, thus, do not constitute an "expenditure."

Strong policy reasons also mitigate against a Commission decision to convert ballot access 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 organizations 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.

2. Monies spent or raised to place the nominated candidate on the ballot in the remaining states are not "expenditures" or "contributions" under the Act.

Ballot access is governed by state laws even when running for a Federal office. Therefore, just because an individual is a candidate in some states does not mean he is a candidate for all. He or she must qualify in each state to be a candidate in each state. In other words, the individual is not a "candidate" in New Jersey until he or she gets on the ballot regardless of whether the individual has gained ballot access in Maryland. Therefore, in our opinion, expenses incurred as a result of seeking to place the newly nominated candidate on the ballot in the states that would not allow Unity08 to qualify as a party would not be "expenditures" or "contributions" under the Act. This is because such funds would not be spend in support of a "clearly identified *candidate*" since ballot access is a prerequisite to candidacy. Indeed, a Unity08 disbursement cannot be for the purpose of "influencing" a federal election unless Unity08's participation in the election is at least possible. The Commission's regulations exempt ballot qualifying expenses of candidates from the two major parties from the definition of expenditure for similar reasons. *See* 11 C.F.R. 100.150. No rational 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.

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 the purpose of determining whether he met the definition of "candidate" under the Act. Notably, the Commission declined to address the specific issues 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.

Nevertheless, no activity will take place to gain ballot access for a candidate until after the convention -- over two years from now. Unity08 recognizes that prior to engaging in any activity to place the nominated candidate on the ballot (as opposed to the organization) another Advisory Opinion will be required.

POINT III

UNITY08 IS NOT A POLITICAL COMMITTEE.

In Draft AO 2006-20, the OGC argued that Unity08 is a political committee because it satisfies the so-called "major purpose" test, a judicial constraint that limits the reach of the statutory triggers in FECA for political committee status to organizations the major purpose of which is the support or opposition of a candidate. The courts have repeatedly construed the test to apply to an "identified candidate," *see GOPAC*, *supra*, 917 F. Supp. at 862, 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. *See* Machinists, *supra*, 655 F.2d at 394. As further described below, the OGC's proposed application of the broad construction of the "major purpose" test to a political organization such as Unity08 is particularly inappropriate for both legal and policy reasons.

The definition of "political committee" -- an organization that makes expenditures or receives contributions in excess of $1,000 in a year[8] -- is the same definition that the *Buckley* Court construed as vague and overbroad and, accordingly, 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). The *Buckley* "major purpose test" was reaffirmed, and expanded, by the Court 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.[9]

In *GOPAC*, the court clarified that the test requires as a prerequisite, an *actual identified* candidate. 917 F. Supp. 851, 859 (D.D.C. 1996). In that case, 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

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[8] *See* 11 C.F.R. § 100.5. The regulation also states that the term 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.

[9] 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. Thus, if the Commission determines that Unity08 would not be accepting contributions or making expenditures in excess of the annual threshold, it does not need to address whether Unity08 satisfies the major purpose test.

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. *Id.* at 859 ("even if the organization's major purpose is the election of a federal candidate, the organization does not become a 'political committee' unless or until it makes expenditures to support a 'person who has decided to become a candidate' for federal office").

In so holding, 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 this argument, the *GOPAC* Court noted that where First Amendment values are at stake it is important to establish a "bright-line" rule. *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 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, the definitions of contribution and expenditure are markedly different in the IRC and under FECA.[10]

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[10] 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

Despite the Commission's history of affirming the test established in *Buckley* and its progeny, the OGC argued in its Draft Advisory Opinion for a broadening of the interpretation of the major purpose test to include not only those organizations that raise and expend funds to influence the election or defeat of a particular candidate but to encompass 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.

POINT IV

UNITY08 CAN INCORPORATE FOR LIABILITY PURPOSES.

As noted by the Commission during the hearing, the question of whether Unity08 may incorporate of liability purposes is linked with the question of whether it is a political committee, as defined by the Act. If Unity08 is a political committee, which it disputes, it may incorporate without running afoul of the prohibitions of Section 441b (which prohibit a corporation from making "contributions" or "expenditures" in connection with any election) by virtue of 11 C.F.R. 114.12. On the other hand, if, as Unity08 contends, it is not a political committee, it is bound by the prohibitions of Section 441b to the extent it intends to make "expenditures" or "contributions" under the Act. As previously explained, however, Unity08 will not be making "expenditures" or "contributions" under the Act and, therefore, would not be subject to the

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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").

prohibitions on corporate contributions and expenditures. Accordingly, as a non-political committee until such time that Unity08 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.* [11]

CONCLUSION

We urge the Commission, for the reasons given here to reject the OGC's Draft Advisory Opinion and to find that none of the activities proposed by Unity08 would make it a political committee under the Act. As noted, 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 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

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[11] 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.