

September 29, 2006

AO DRAFT COMMENT PROCEDURES

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

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

Proposed Advisory Opinion 2006-20 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 4, 2006.

Please note the following requirements for submitting comments:

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

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 3, 2006.

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

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

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

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

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

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2006 SEP 29 P 3 05

September 29, 2006

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *ACS*
Associate General Counsel

Amy L. Rothstein *AR*
Acting Assistant General Counsel

Ron B. Katwan *RBK*
Attorney

Esa L. Sferra *ELS*
Attorney

Subject: Draft AO 2006-20

AGENDA ITEM
For Meeting of: 10-4-06

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 4, 2006.

Attachment

1 **ADVISORY OPINION 2006-20**

2

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

4 **Steptoe & Johnson LLP**

5 **1330 Connecticut Avenue, NW**

6 **Washington, DC 20036-1795**

7

8 **Dear Mr. Duffy:**

9 **We are responding to your advisory opinion request on behalf of Unity 08,**

10 **concerning the application of the Federal Election Campaign Act of 1971, as amended**

11 **(the "Act"), and Commission regulations to Unity 08's status as a political committee.**

12 **The Commission concludes that Unity 08 will have to register as a political committee**

13 **once it receives contributions or makes expenditures in excess of \$1,000, and therefore**

14 **will be subject to the amount limitations, source prohibitions, and reporting requirements**

15 **of the Act.**

16 ***Background***

17 **The facts presented in this advisory opinion are based on your letter received on**

18 **May 30, 2006, your comments received on July 19, supplemental submissions received**

19 **on August 16, September 18 and 22, telephone conversations with you, and information**

20 **from Unity 08's website.¹**

21 **Unity 08 is organized under the laws of the District of Columbia as a not-for-**

22 **profit corporation and under Section 527 of the Internal Revenue Code. Unity 08**

23 **describes itself as a "nascent political party" that "will act to assure that an alternative**

24 **ticket is presented to the American voters in 2008." Unity 08 was founded by individuals**

25 **who have been involved in political campaigns at the State and national levels, including**

¹ See <<http://www.unity08.com>> (last visited 9/18/06).

1 political consultants and media advisors, and by individuals who have served in high
2 government positions, including a former State Senator, former White House Chief of
3 Staff, former White House communications director, former State Governor, and former
4 heads of State agencies. Unity 08 aims to build a "solidly-funded movement of up to
5 20,000,000 Americans . . . in order to nominate a Unity Ticket of their choice for 2008."

6 Unity 08 states that it has three goals: (1) "to elect a Unity Ticket for President
7 and Vice-President of the United States" in 2008; (2) "for the American people to pick
8 that Unity Ticket in the first half of 2008" through an online nominating convention; and
9 (3) a "*minimum goal*" of "effect[ing] *major change and reform in the 2008 national*
10 *elections*" by "organizing a group of voters who comprise at least 20% of the national
11 electorate" and whose commitment to the Unity 08 agenda will have to be accounted for
12 by the major parties if they are to be successful in the 2008 presidential election.

13 (Emphasis in the original). The Unity 08 nominees may consist of candidates from either
14 or both of the two major political parties, or of independent candidates. Although Unity
15 08 may support the candidates offered by one of the two major parties, it plans to hold an
16 online nominating convention in the summer of 2008, during which Unity 08 delegates
17 will vote via the Internet to nominate candidates for the Unity 08 ticket.² Unity 08 does
18 not intend to support or oppose candidates in the 2006 elections or in any congressional,
19 State, or local election at any time.

20 Unity 08 will finance its activities with solicitations of funds and sales of t-shirts,
21 mugs, pens, bumper stickers, and other similar items. Unity 08 is currently soliciting

² In your supplemental submission, you indicated that Unity 08 will hold the online nominating convention only if necessary, and if it does become necessary you will file another advisory opinion request. Accordingly, the Commission does not address Unity 08's activities regarding an online nominating convention.

1 funds using the Internet and intends to make solicitations using telephone banks and mass
2 mailings. Unity 08's website proposes that supporters give specific monetary amounts
3 ranging from ten dollars to \$5,000, with an option to give any amount of the supporter's
4 choosing. Unity 08's online solicitation form includes the following language: "To
5 succeed we don't have to match the massive war chests of either party. And, like other
6 successful citizens' movements before us, we can raise the funds we need to build a lean
7 and effective movement if each of us simply does our part. . . . Please do your part. The
8 stakes for our country have never been higher." The movement for which Unity 08 is
9 soliciting money is to "Select and Elect a Unity Ticket in the 2008 Presidential Race,"
10 which also appears as the header on the online solicitation form. Elsewhere on the
11 website, this language is repeated: "Unity 08 is a citizens' movement to get our country
12 back on track by nominating and electing a Unity Ticket in the '08 presidential election
13 to promote leadership, not partisanship. Every day – with your support – we're making
14 progress toward this goal." The phrase "with your support" is a hyperlink to the online
15 solicitation form. A disclaimer was recently added to Unity 08's online solicitation form,
16 stating that: "Donations made on this website will not be used to support or oppose any
17 federal candidates, but will be used to support Unity08's organizational building efforts."

18 Unity 08 does not accept money or any other thing of value from "any 'prohibited
19 source,'" including corporations, foreign nationals, or government contractors. Although
20 Unity 08 did not initially place a limit on the amount of donations it solicits or accepts, it
21 recently imposed a \$5,000 limitation on donations from individuals.

22 In attempting to elect presidential and vice-presidential candidates in 2008, Unity
23 08 plans to purchase access to mass media and commission polls, and to "qualify for

1 ballot positions in certain key states for the offices of President and Vice President of the
2 United States through petitions, and if required, litigation.” Specifically, Unity 08 plans
3 to obtain “ballot access as a ‘party’” in approximately 37 States.

4 ***Questions Presented***

- 5 1. *Will Unity 08 receive “contributions” or make “expenditures”?*
- 6 2. *Must Unity 08 register as a political committee?*
- 7 3. *May Unity 08 incorporate for liability purposes only?*

8 ***Legal Analysis and Conclusions***

9 ***Question 1: Will Unity 08 receive “contributions” or make “expenditures”?***

10 Yes, for the reasons stated below, Unity 08 will receive “contributions” and make
11 “expenditures” as defined under the Act and Commission regulations.

12 ***I. Contributions***

13 A “contribution” is a “gift, subscription, loan, advance, or deposit of money or
14 anything of value made by any person for the purpose of influencing any election for
15 Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). The Act does not define the
16 phrase “for the purpose of influencing any election for Federal office.”

17 Drawing on *FEC v. Survival Education Fund*,³ Commission regulations provide
18 that funds received in response to solicitations must be treated as contributions “if the
19 communication indicates that any portion of the funds received will be used to support or
20 oppose the election of a clearly identified Federal candidate.” 11 CFR 100.57(a); *see*
21 *also Political Committee Status, Definition of Contribution and Allocation for Separate*

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

1 *Segregated Funds and Nonconnected Committees; Final Rules*, 69 Fed. Reg. 68056,
2 68057 (Nov. 23, 2004) (“*Political Committee Status Final Rules*”). The Commission has
3 determined that in certain circumstances the definition of a “clearly identified” candidate,
4 *see* 11 CFR 100.17, is satisfied when “candidates were identifiable as to specific office,
5 party affiliation, and election cycle, although the names of the eventual nominees were
6 not known.” Advisory Opinion 2003-23 (WE LEAD) (a reference to office, party
7 affiliation, and election cycle satisfied the requirement of a clearly identified candidate in
8 the definition of “earmarked” contribution in 11 CFR 110.6(b)(1)); *see also* Advisory
9 Opinions 1982-23 (Westchester Citizens for Good Government) and 1977-16 (Iowa 1980
10 U.S. Senate Campaign Committee).

11 Unity 08’s communications on its website clearly indicate that funds received will
12 be used to support the election of the Unity 08 presidential ticket. The website states
13 prominently that “Unity 08 is a citizens’ movement to get our country back on track by
14 nominating and electing a Unity Ticket in the ‘08 presidential election to promote
15 leadership, not partisanship. Every day – with your support – we’re making progress
16 toward this goal.” The phrase “with your support” is a hyperlink to the online solicitation
17 form, thereby indicating that monies given via the online form will be used to support the
18 nomination and election of Unity 08 candidates in the 2008 presidential election.

19 Additionally, Unity 08’s first goal – “Select & Elect a Unity Ticket in the 2008
20 Presidential Race” – appears as the header on the online form. While Unity 08 has not
21 yet named its candidates, it identifies its candidates by office (*i.e.*, President and Vice
22 President), party affiliation (*i.e.*, the Unity 08 ticket), and election year (*i.e.*, 2008).

1 The recent addition of a single-sentence disclaimer, which appears in small print
2 at the end of a paragraph at the bottom of Unity 08's online solicitation form, does not
3 change the result. While a disclaimer may be relevant to determining if a communication
4 is soliciting contributions, it is not dispositive.⁴ Although the disclaimer on Unity 08's
5 online solicitation form states that funds received will be used for "organization building
6 efforts,"⁵ this statement is not supported by the rest of Unity 08's website. For example,
7 Unity 08's website repeatedly states that the organization's goal is to "select and elect a
8 Unity Ticket to the White House," and explicitly solicits support for Unity 08's efforts to
9 nominate and elect a Unity Ticket in the 2008 presidential election. Additionally, 21 of
10 the 24 questions and answers in the FAQ section of Unity 08's website address the
11 identification, nomination, and election of Unity 08's presidential and vice-presidential
12 candidates.

13 Thus, notwithstanding the disclaimer on Unity 08's online solicitation form, the
14 website indicates that funds received will be used to support or oppose the election of a
15 clearly identified Federal candidate. Accordingly, funds received in response to the
16 website communications will constitute contributions under the Act and Commission
17 regulations.

⁴ See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (finding that a publication, which urged voters to "vote pro-life" and contained information about pro-life candidates, was expressly advocating the election of those candidates, despite a disclaimer stating that the publication "does not represent an endorsement of any particular candidate"); see also Advisory Opinions 2003-36 n.9 (Republican Governors Association) (a covered individual may not approve, authorize, agree, or consent to appear in publicity that would be a solicitation by the covered person of funds that exceed the limits or prohibitions of the Act, regardless of the appearance of a disclaimer in the solicitation) and 2003-03 (Cantor) (the use of a disclaimer to prevent solicitation of non-Federal funds "should not, however, be construed to permit a covered individual to inoculate a solicitation of non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to disregard the limitation").

⁵ You indicate that "organization building efforts" include identification of individuals who share Unity 08's goals, and identification and organization of volunteers to advance Unity 08's ideas and to help Unity 08 achieve ballot access.

1

2 *II. Expenditures*

3 Monies spent by Unity 08 to obtain ballot access through petition drives will be
4 expenditures. An "expenditure" is a "purchase, payment, distribution, loan, advance,
5 deposit, or gift of money or anything of value, made by any person for the purpose of
6 influencing any election for Federal office."⁶ 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a).

7 The Commission has previously determined that expenses incurred in gathering
8 signatures to qualify for a ballot for Federal office are expenditures. See Advisory
9 Opinion 1994-05 n.1 (White) ("[E]xpenditures to influence your election would include
10 amounts you spend . . . to promote yourself for the general election ballot by seeking
11 signatures on nomination petitions"); see also Advisory Opinion 1984-11 (Serrette)
12 (determining that expenses made to collect petition signatures for the general election
13 ballot are expenditures, and therefore are, "qualified campaign expenses," which are
14 expenses made in connection with a candidate's campaign for nomination, see 11 CFR
15 9032.9).

16 Although Unity 08 plans to qualify for ballot access for itself as an organization,
17 but not yet for any named candidates, Unity 08 is, in effect, using its name as a
18 placeholder for its candidates' names on the ballot. Moreover, unlike organizations that
19 secure ballot access for themselves in order to field a slate of Federal and non-Federal

⁶ The only exception in the Act from the definition of "expenditure" for ballot access costs applies to "payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official." 2 U.S.C. 431(9)(B)(x); see also 11 CFR 100.150. The purpose of this exception is to prevent a candidate or a candidate's authorized committee from having to exceed the limits on contributions to a State party committee in order to gain ballot access. See *FECA Amendments: Hearing Before the Committee on Rules and Administration, United States Senate, 96th Cong. 4-25, app. at 21 (July 13, 1979)* (Statement of Robert Tiernan, Chairman, Federal Election Commission).

1 candidates, Unity 08 has announced that it will field only two candidates – for the offices
2 of President and Vice President – in the 2008 election only. Thus, in promoting itself
3 through petition drives to obtain ballot access, Unity 08 is promoting its presidential and
4 vice-presidential candidates, and any payments by Unity 08 for these activities will
5 constitute expenditures.⁷

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

7 Yes, for the reasons stated below, Unity 08 must register as a political committee
8 when it receives more than \$1,000 in contributions or makes more than \$1,000 in
9 expenditures.⁸

10 The Act and Commission regulations, with certain exceptions, define a “political
11 committee” as “any committee, club, association, or other group of persons which
12 receives contributions aggregating in excess of \$1,000 during a calendar year or which
13 makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C.
14 431(4)(A); 11 CFR 100.5(a). Under the Act and Commission regulations, political
15 committees are subject to certain registration and reporting requirements, as well as
16 limitations and prohibitions on contributions received and made, and on expenditures
17 made. As the Commission stated previously, “[a]ny funds that are ‘contributions’ by
18 operation of new section 100.57 are contributions for purposes of the ‘political
19 committee’ definition in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a)” *Political*

⁷ The Commission’s conclusion is restricted to the facts presented here: Unity 08 intends to support only two candidates, one for the office of President of the United States and one for the office of Vice President; it “does not intend to support or oppose candidates for Congress or State and local elections at any time”; and it is “not looking to build a new and permanent party.”

⁸ Unity 08 does not ask and the Commission does not address whether Unity 08 qualifies as a “political party” under the Act and Commission regulations. The Commission notes, however, that to be a “political party,” an organization must “actually obtain ballot access for one or more Federal candidates.” Advisory Opinion 2004-34 (Libertarian Party of Virginia); see 2 U.S.C. 431(16) and 11 CFR 100.15.

1 *Committee Status Final Rules*, 69 Fed. Reg. at 68058. Once Unity 08 receives over
2 \$1,000 in contributions, or makes over \$1,000 in expenditures, it will satisfy the statutory
3 definition of “political committee,” *see* 2 U.S.C. 433.

4 The Supreme Court has held that, “[t]o fulfill the purposes of the Act,” and to
5 avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose
6 major purpose is campaign activity can be considered political committees under the Act.
7 *See e.g., Buckley v. Valeo*, 424 U.S. 1, 79; *FEC v. Massachusetts Citizens for Life, Inc.*,
8 479 U.S. 238, 262 (1986). An organization’s “major purpose” may be established
9 through its own public statements. *See e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-
10 36 (D.D.C. 2004) (finding the organization evidenced its “major purpose” through its
11 own materials which stated the organization’s goal of supporting the election of
12 Republican Party candidates for Federal office and through efforts to get prospective
13 donors to consider supporting Federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp.
14 851, 859 (D.D.C. 1996) (finding that the “organization’s [major] purpose may be
15 evidenced by its public statements of its purpose or by other means. . .”).

16 Unity 08’s self-proclaimed major purpose is the nomination and the election of a
17 presidential candidate and a vice-presidential candidate.⁹ Unity 08 clearly states this goal
18 in its advisory opinion request and on its website. While Unity 08 has a subsidiary
19 objective of influencing the major parties to adopt, in connection with the 2008 national
20 elections, the core positions of Unity 08 supporters, your letters of May 30 and August
21 16, as well as Unity 08’s website, state that Unity 08’s first goal is the election “of a
22 Unity Ticket for President and Vice-President of the United States in 2008.”

⁹ *See Buckley v. Valeo*, 424 U.S. 1, 79 (the term “political committee” encompasses organizations “the major purpose of which is the nomination or election of a candidate”).

1 Therefore, once Unity 08 receives over \$1,000 in contributions or makes over
2 \$1,000 in expenditures, it will become a political committee. As such, it must register
3 with the Commission by filing a statement of organization within ten days, and it will be
4 subject to the provisions of the Act and Commission regulations applicable to political
5 committees.¹⁰ See 2 U.S.C. 433, 11 CFR 102.1 and 102.2.

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

7 Yes, Unity 08 may incorporate for liability purposes only, once it becomes a
8 political committee. Under Commission regulations, a political committee may
9 incorporate for liability purposes only without running afoul of the Act's prohibitions on
10 corporate contributions and expenditures. See 11 CFR 114.12. Thus, Unity 08 may
11 incorporate for liability purposes without being subject to the corporate prohibitions in 2
12 U.S.C. 441b and 11 CFR part 114.

13

¹⁰ In its advisory opinion request, Unity 08 cites *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), to support its assertion that Unity 08 is not a political committee. In *Machinists*, the Court of Appeals for the D.C. Circuit held that so-called "draft groups" were not political committees under the Act. 655 F.2d at 392. Unity 08, however, is not a draft group. Draft groups do not promote the election of certain candidates for Federal office, but have the more limited aim of convincing individuals who are not yet candidates to run for office. By contrast, the declared purpose of Unity 08 is not to "draft" candidates but to get its chosen presidential candidate and vice-presidential candidate on the ballot, and to raise and spend funds in support of its two candidates. Moreover, *Machinists* expressly left open the question of whether draft groups could be treated as political committees for purposes of the Act's contribution limits after Congress's 1979 amendments to the Act. 655 F.2d at 395-96.

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

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Sincerely,

Michael E. Toner
Chairman

Enclosures (Advisory Opinions 2004-34, 2003-36, 2003-23, 2003-03, 1994-05, 1984-11, 1982-23, and 1977-16)