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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

April 20, 1995

MEMORANDUM TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael Marinelli *sm*  
Staff Attorney

SUBJECT: Draft AO 1995-11

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 27, 1995.

Attachment

**AGENDA ITEM**  
For Meeting of: APR 27 1995

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**DRAFT**

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-11

Thomas J. Cooper  
Venable, Baetjer, Howard & Civiletti, LLP  
1201 New York Avenue, N.W. Suite 1000  
Washington, D.C. 20005-3917

Dear Mr. Cooper:

This refers to your April 6, March 16, and March 15, 1995, letters on behalf of the Hawthorn Group ("Hawthorn") regarding the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the Federal election contributions which Hawthorn wishes to make.

You state that Hawthorn is a limited liability company organized under the Virginia Limited Liability Company Act.<sup>1/</sup> See VA. CODE ANN. §13.1-1000 et seq. According to your request, Hawthorn is "an international public affairs company of senior political communication specialists." Its area of expertise is "solving public policy, marketing and general communications problems for corporations, associations, governments and not-for-profit organizations."<sup>2/</sup> Your inquiry

<sup>1/</sup> Hawthorn lists as its principals (members): John Ashford, Kate Mattos, Michael McAdams, and Powell Berger. None of Hawthorn's members are incorporated entities. You have also informally advised the Office of General Counsel that none of the members are foreign nationals and that Hawthorn is not a Federal government contractor. The Commission assumes for the purposes of this opinion that no member of Hawthorn is a Federal government contractor.

<sup>2/</sup> A current brochure lists some of the more recent projects of Hawthorn and/or its principals as individuals. These include public relations and lobbying related activity for various corporations, associations, and foreign embassies. The brochure also lists unspecified work related to the

3 seeks to determine whether Hawthorn would be deemed a  
4 corporation for purposes of the Act and, therefore, subject  
5 to the prohibitions of 2 U.S.C. §441b which ban corporate  
6 contributions to Federal candidates and committees. You  
7 further ask whether Hawthorn, if not treated as a  
8 corporation, would be treated as a partnership under  
9 Commission regulations at 11 CFR 110.1(e).

10 As part of your submission, you provide information  
11 comparing and contrasting the status of Hawthorn,  
12 as a limited liability company ("limited company"), with the  
13 status of corporations and partnerships under the laws of the  
14 State of Virginia. You note that under Virginia law, all  
15 three forms of business organizations are recognized as  
16 distinct and separate forms of business organization.<sup>3/</sup> The  
17 Virginia Limited Liability Company Act defines a limited  
18 company as "an entity that is an unincorporated association,  
19 without perpetual duration having two or more members that is  
20 organized and existing under this chapter." VA. CODE ANN.  
21 §13-1002. Under the laws of Virginia, a limited company

22  
23 \_\_\_\_\_  
24 (Footnote 2 continued from previous page)  
25 campaigns of various Congressional candidates. The  
26 Commission notes that this opinion deals only with Hawthorn's  
27 proposed Federal election contributions and does not address  
28 issues arising from any contract services it provides to or  
29 for Federal candidates.

30  
31 <sup>3/</sup> Virginia statutes regarding corporations are found at VA.  
32 CODE ANN. §13.1-1 et seq., while those for partnerships are  
33 found at VA. CODE ANN. §50-1 et seq. Your request includes a  
34 certificate issued by the Commonwealth of Virginia State  
35 Corporation Commission attesting to Hawthorn's status as a  
36 limited liability company.

shares the limited liability of corporations. VA. CODE ANN. §13.1-1019 et seq. However, it lacks certain characteristics associated with corporations such as the free transferability of interests and perpetual life. See VA. CODE ANN. §13.1-1038 to 1040 and 13.1-1046 to 1050.<sup>4/</sup>

Your request also notes that among the distinctions between partnerships and limited companies is the personal liability of general partners in a partnership. This is in contrast to the limited responsibility of the members of limited companies for the acts or liabilities of the organization. See VA. CODE ANN. §50-15.

Under the Act, the term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. 2 U.S.C. §431(11). The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. §441b(a). Commission regulations at 11 CFR 114.7 provide that the question of whether a professional organization is a corporation is determined by

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4/ A limited company such as Hawthorn must indicate the last date by which the company must be dissolved. VA. CODE ANN. §13.1-1011. It may also be dissolved upon the termination of the membership of a member, unless there is unanimous consent of the remaining members to continue the company. VA. CODE ANN. §13.1-1046. While a member may assign his economic interest in Hawthorn, such assignment carries no right of management. VA. CODE ANN. §13.1-1011. 4. Right of management is granted only if all members agree to the inclusion of the assignee as a new member. On limited liability companies generally, see Nicholas G. Karambelas, Limited Liability Companies: Law Practice & Forms, (Clark, Boardman, Callaghan, 1994).

the law of the state in which the professional organization exists. See also Advisory Opinion 1983-34. Contributions by partnerships are permitted, but are limited under 2 U.S.C. §441a(a). In addition, lawful contributions from a partnership are attributed proportionately against each contributing partner's limit for the same candidate and election.<sup>5/</sup> See 11 CFR 110.1(b)(1) and 110.1(e).

Section 114.7(d) refers to "professional organizations" which are described in the Explanation and Justification for this regulation as including "certain professional groups or firms such as doctors, lawyers, or accountants." Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, House Document No. 95-44 (January 12, 1977). While Hawthorn does not precisely fit into this grouping, the professional status of its principals and associates makes this regulation applicable. Therefore, Hawthorn's status as a corporation must be determined with reference to the laws of Virginia. Since Virginia law makes a clear distinction between corporations and limited liability companies, the Commission concludes that Hawthorn is not a corporation for purposes of the Act and Commission

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<sup>5/</sup> Because of the prohibitions of section 441b, an organization with attributes similar to a partnership, but formally organized as a professional corporation, is prohibited from making any contributions. See 11 CFR 114.2(b). Likewise, a corporate partner may not participate in a partnership contribution or accept any attribution of any portion of the contribution through a reduction of its share of partnership profits or an increase of its share of partnership losses. See 11 CFR 110.1(e).

regulations. Therefore, the prohibitions of section 441b will not bar Hawthorn from making contributions to Federal candidates or political committees.

The issue of Hawthorn's possible status as a partnership under Commission regulations is somewhat more complex. Limited liability companies are a recent innovation in business organizations<sup>6/</sup> and have not been considered previously by the Commission.<sup>7/</sup> The Commission notes that, while limited companies share some attributes similar to partnerships, they are recognized under the laws of Virginia

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6/ While there were early precursors to the concept, the first limited liability company statute was enacted in 1977 by Wyoming. See Karambelas at §3:01.

7/ The closest precedent is the Commission's consideration of the treatment of contributions made by business trusts in Advisory Opinion 1981-52. In that opinion, the Commission concluded that business trusts were "persons" for purposes of the Act. However, the Commission concluded that contributions made by business trusts to a political committee sponsored by a trade association would be attributed among those persons holding beneficial ownership of such trusts. The analysis in Advisory Opinion 1981-52 is based on the Commission's prior treatment of testamentary trusts and the close relationship between testamentary trusts and business trusts. Advisory Opinion 1981-52 relied on Advisory Opinion 1978-7 which concluded that contributions made by testamentary trusts would be treated in the same manner as Commission regulations treat contributions made by trusts with minor children as beneficiaries. See Advisory Opinions 1981-52 and 1978-7 and 11 CFR 110.1(i). Since limited liability companies are not trusts or governed by trust instruments, this 1981 opinion is distinguishable from the circumstances in your request.

In Advisory Opinion 1979-28, the Commission considered a contribution made by an unincorporated recreation association to a political committee. The Commission concluded that since the association was a "person" under the Act and was not incorporated, it could make the contribution. The Commission did not require attribution among its members.

3 as a distinct form of business organization, and not as  
4 partnerships.

5 Therefore, the Commission concludes that Hawthorn Group  
6 is not a corporation or partnership under the Act or  
7 Commission regulations. Hawthorn falls within the language  
8 "any other organization or group of persons," which is part  
9 of the definition of "person" under 2 U.S.C. §431(11).  
10 Therefore, it is subject to the same contribution limits  
11 as apply to any person who makes contributions under the  
12 Act.<sup>8/</sup> Contributions from the regular operating accounts or  
13 general treasury of Hawthorn will not be attributed to any of  
14 the principals who comprise the Hawthorn Group.<sup>9/</sup>

15 As noted above, this opinion does not address the  
16 services Hawthorn has provided to or for Federal candidates.  
17 The Commission notes, however, that when determining if an  
18 entity should be treated as a political committee, the  
19 standard used is whether a major purpose of the organization  
20 is campaign activity; that is, making payments or donations

21  
22 <sup>8/</sup> Hawthorn would not, however, be subject to the annual  
23 political contributions limit of \$25,000 under 2 U.S.C.  
24 §441a(a)(3). This provision applies specifically to any  
"individual," rather than any "person" who makes political  
contributions. See Advisory Opinion 1986-36.

25 <sup>9/</sup> The conclusions in this opinion are expressly limited to  
26 the circumstances of your request where the membership of the  
27 limited liability company consists of natural persons who are  
28 U.S. citizens (or legal permanent residents, see 2 U.S.C.  
29 §441e) and does not include incorporated entities or Federal  
30 contractors. The participation of corporations, Federal  
contractors, or foreign nationals as principals in a limited  
liability company would raise the issue of contributions or  
expenditures which are prohibited by 2 U.S.C. §§441b, 441c or  
441e.

3 to influence any election to public office. See 26 U.S.C.  
4 §527(e)(1),(2); Advisory Opinion 1994-25; and Akins v.  
5 Federal Election Commission, No. 92-1864 (D.D.C. March 30,  
6 1994), appeal pending, No. 94-5088 (D.C. Cir. Aug. 12, 1994).  
7 See also Federal Election Commission v. Massachusetts  
8 Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 262  
9 (1986)(The Court stated that if MCFL's independent  
10 expenditures "become so extensive that the organization's  
11 major purpose may be regarded as campaign activity, the  
12 corporation would be classified as a political committee").  
13 From the facts presented here, Hawthorn's activities do not  
14 appear, absent any further information, to indicate that  
15 making political contributions will be a major purpose of  
16 Hawthorn Group.<sup>10/</sup>

17 The Commission expresses no opinion regarding the any  
18 tax ramifications of the proposed transaction, because these  
19 issues are not within its jurisdiction.<sup>11/</sup>

20  
21 <sup>10/</sup> In Advisory Opinion 1978-51, the Commission informed a  
22 Native American community organized as an unincorporated  
23 association, which sought to contribute to candidates from  
24 its general funds, that, if its contributions to all  
25 candidates or political committees exceeded \$1,000 in a  
26 calendar year, it would have to register as a political  
27 committee. It is clear from Akins and the Supreme Court's  
28 decision in MCFL that Advisory Opinion 1978-51 is no longer  
29 good law to the extent it suggests that the "major purpose"  
30 standard is not applicable or relevant to organizations such  
as the one described here. Therefore, it is hereby  
explicitly superseded.

11/ The Commission acknowledges that under Internal Revenue  
Ruling 93-5, 1993-1 C.B. 227, Hawthorn would not be taxed as  
a corporation, but would be taxed as a partnership. However,  
the approach followed by the Internal Revenue Service to the  
classification of business organizations is fundamentally

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Danny L. McDonald  
Chairman

Enclosures (AOs 1994-25, 1986-36, 1983-34,  
1981-52, 1979-28, 1978-51 and 1978-7)

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(Footnote 11 continued from previous page)  
different from that followed by the Commission. Whereas the Commission is required by its regulations to rely on state law when determining corporate status, the Internal Revenue Service has adopted a functional approach which does not necessarily follow state law classification. The determination whether to tax a limited company as a corporation or a partnership (the two options available in most cases) is based on the number of corporate aspects that the limited company possesses. See Karambelas at §11:04.