FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 28, 1995

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.[1/] 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."[2/] Your inquiry seeks to determine whether Hawthorn would be deemed a corporation for purposes of the Act and, therefore, subject to the prohibitions of 2 U.S.C. 441b which ban corporate contributions to Federal candidates and committees. You further ask whether Hawthorn, if not treated as a corporation, would be treated as a partnership under Commission regulations at 11 CFR 110.1(e).

As part of your submission, you provide information comparing and contrasting the status of Hawthorn, as a limited liability company ("limited company"), with the status of corporations and partnerships under the laws of the State of Virginia. You note that under Virginia law, all three forms of business organizations are recognized as distinct and separate forms of business organization.[3/] The Virginia Limited Liability Company Act defines a limited

company as "an entity that is an unincorporated association, without perpetual duration having two or more members that is organized and existing under this chapter." VA. CODE ANN. §13-1002. Under the laws of Virginia, a limited 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.[4/]

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 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. [5/] 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 members and other personnel 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 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[6/] and have not been considered previously by the Commission.[7/] The Commission notes that, while limited companies share some attributes similar to partnerships, they are recognized under the laws of Virginia as a distinct form of business organization, and not as partnerships.

Therefore, the Commission concludes that Hawthorn Group is not a corporation or partnership under the Act or Commission regulations. Hawthorn falls within the language "any other organization or group of persons," which is part of the definition of "person" under 2

U.S.C. 431(11). Therefore, it is subject to the same contribution limits as apply to any person who makes contributions under the Act.[8/]

Contributions from the regular operating accounts or general treasury of Hawthorn will not be attributed to any of the members who comprise the Hawthorn Group.[9/]

As noted above, this opinion does not address the services Hawthorn has provided to or for Federal candidates. The Commission notes, however, that when determining if an entity should be treated as a political committee, the standard used is whether a major purpose of the organization is campaign activity; that is, making payments or donations to influence any election to public office. See 26 U.S.C. 527(e)(1),(2); Advisory Opinion 1994-25; and Akins v. Federal Election Commission, No. 92-1864 (D.D.C. March 30, 1994), appeal pending, No. 94-5088 (D.C. Cir. Aug. 12, 1994). See also Federal Election Commission v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 262 (1986)(The Court stated that if MCFL's independent expenditures "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee"). From the facts presented here, Hawthorn's activities do not appear, absent any further information, to indicate that making political contributions will be a major purpose of Hawthorn Group.[10/]

The Commission expresses no opinion regarding the any tax ramifications of the proposed transaction, because these issues are not within its jurisdiction.[11/]

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

Sincerely,

(signed)

Danny L. McDonald
Chairman

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

1 Hawthorn lists as its members: John Ashford, Kate Mattos, and Michael McAdams. 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.
2 A current brochure lists some of the more recent projects of Hawthorn and/or its personnel 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 campaigns of various Congressional candidates. The Commission notes that this opinion deals

only with Hawthorn's proposed Federal election contributions and does not address issues arising from any contract services it provides to or for Federal candidates.
3 Virginia statutes regarding corporations are found at VA. CODE ANN. §13.1-1 et seq., while those for partnerships are found at VA. CODE ANN. §50-1 et seq. Your request includes a certificate issued by the Commonwealth of Virginia State Corporation Commission attesting to Hawthorn's status as a limited liability company.
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).
5 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).
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.
8 Hawthorn would not, however, be subject to the annual political contributions limit of $25,000 under 2 U.S.C. 441a(a)(3). This provision applies specifically to any "individual," rather than any "person" who makes political contributions. See Advisory Opinion 1986-36.
9 The conclusions in this opinion are expressly limited to the circumstances of your request where the membership of the limited liability company consists of natural persons who are U.S. citizens (or legal permanent residents, see 2 U.S.C. 441e) and does not include incorporated

entities or Federal contractors. The participation of corporations, Federal contractors, or foreign nationals as members 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.

10 In Advisory Opinion 1978-51, the Commission informed a Native American community organized as an unincorporated association, which sought to contribute to candidates from its general funds, that, if its contributions to all candidates or political committees exceeded $1,000 in a calendar year, it would have to register as a political committee. It is clear from Akins and the Supreme Court's decision in MCFL that Advisory Opinion 1978-51 is no longer good law to the extent it suggests that the "major purpose" 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 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.