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June 15, 1998

Mr. Bradley Litchfield  
Associate General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

AOR 1998-13

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Dear Mr. Litchfield:

On behalf of Lawrence, O'Donnell, Marcus, L.L.C. ("LOM"), I respectfully request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Federal Election Commission (the "FEC") regulations to contributions from (1) a New York limited liability company and (2) a limited liability company's non-repayable draw account.

New York Limited Liability Companies Should be Deemed to be an  
"Other Organization or Group of Persons" under the Act

LOM is a limited liability company organized under the New York Limited Liability Company Law § 101 *et. seq.* (the "New York LLC Law").<sup>1</sup> LOM has 18 members, all of whom are natural persons who are citizens of the United States. LOM is not a federal government contractor.

The FEC has determined that limited liability companies ("LLCs") in Missouri, Virginia, the District of Columbia, and Pennsylvania are not corporations or partnerships and may make contributions to federal candidates and political committees within the limits of the Act. Advisory Opinions 1997-17, 1997-4, 1996-13, and 1995-11. The FEC determined that LLCs in these states fell 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). As a result, LLCs in those states are permitted to make contributions to federal candidates and political committees, subject to the contribution limits that apply to any person who makes contributions under the Act.<sup>2</sup>

<sup>1</sup> In 1995, Lawrence, O'Donnell, Marcus & Co., a limited partnership, was converted to a limited liability company and re-named Lawrence, O'Donnell, Marcus LLC, in accordance with the provisions of the New York Limited Liability Law. See attached Certificate of Conversion (April 18, 1995).

<sup>2</sup> LLCs are not, however, subject to the annual aggregate political contribution limit of \$25,000 under 2 U.S.C. §441a(a)(3), which applies specifically to any "individual," rather than any "person" who makes political contributions.

LOM has reason to believe that it is not a corporation or a partnership under the Act or FEC regulations and, therefore, it should be permitted to make contributions as a person, subject to the applicable contribution limits, to federal candidates or political committees in 1998.

Under New York law, three forms of business organizations are recognized as distinct and separate forms of business entities: corporations, partnerships and limited liability companies.<sup>3</sup> A limited liability company is defined as “an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business ... other than a partnership or trust.” N.Y. LIMITED LIABILITY COMPANY LAW §102(m) (emphasis supplied). The name of an LLC must contain the words “Limited Liability Company” or the abbreviation “L.L.C.” or “LLC.” N.Y. LIMITED LIABILITY COMPANY LAW §204(a). Moreover, the name of an LLC may not contain the following phrases, abbreviations or derivatives thereof: “corporation,” “incorporated,” or “partnership.” N.Y. LIMITED LIABILITY COMPANY LAW §204(e).

In addition to these clear statements in New York law that LLCs are a distinct and separate form of business organization, there are other differences between LLCs, corporations and partnerships which demonstrate that they are, in fact, different and distinct entities. Specifically, New York LLCs lack certain, important, characteristics associated with corporations such as the free transferability of interests and perpetual life. N.Y. LIMITED LIABILITY COMPANY LAW §603 and §701.<sup>4</sup> Unlike partnerships, a New York LLC may not be formed unless the members execute a written agreement, the articles of organization. N.Y. LIMITED LIABILITY COMPANY LAW §203 and N.Y. PARTNERSHIP LAW §11.<sup>5</sup> A very significant difference between a New York LLC and a general partnership is that partners have unlimited personal liability for the debts of the partnership in excess of the partnership’s assets, while the personal liability of a member of an LLC is limited. N.Y. PARTNERSHIP LAW §26 and N.Y. LIMITED LIABILITY COMPANY LAW §609.

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<sup>3</sup> New York statutes regarding corporations are found at N.Y. BUSINESS CORPORATION LAW §101 et. seq., those for partnerships are found at N.Y. PARTNERSHIP LAW §1 et. seq. and those for limited liability companies are found at N.Y. LIMITED LIABILITY COMPANY LAW §101 et. seq.

<sup>4</sup> While a member of a LLC may assign his or her interest in the LLC, such an assignment does not entitle the assignee to participate in the management of the LLC or to become or exercise any rights or powers of a member, without the specific grant of such authority to the assignor in the operating agreement. N.Y. LIMITED LIABILITY COMPANY LAW §603(a)(2). The consent of a majority in interest of the members is necessary to permit the assignee to become a member, subject to a different requirement in the operating agreement. N.Y. LIMITED LIABILITY COMPANY LAW §602(b)(1).

The New York statute was drafted in such away to not permit a LLC to have “continuity of life.” An LLC may indicate the latest date on which it is to dissolve in its articles of organization or an LLC will be dissolved upon the first occurrence of, *inter alia*, the “bankruptcy, death, dissolution, expulsion, incapacity or withdrawal of any member,” unless the remaining members, pursuant to the terms of the operating agreement or the statute, agree to continue the LLC. N.Y. LIMITED LIABILITY COMPANY LAW §701 and “Practice Commentaries” by Bruce A. Rich and Cheryl Parsons-Reul, N.Y. LIMITED LIABILITY COMPANY LAW, at 20, (McKinney 1998).

<sup>5</sup> A partnership may exist without a written agreement. *Cohen v. Biernoff*, 84 A.D. 2d 802, 444 N.Y.S. 2d 152 (N.Y.App.Div. 1981).

In this case, LOM was converted from a limited partnership to a LLC pursuant to the New York LLC Law which specifically provides for the conversion of a partnership or limited partnership to a limited liability company. N.Y. LIMITED LIABILITY COMPANY LAW §1006

Overall, there is a clear distinction under New York law between LLCs, corporations and partnerships. The FEC regulations provide that state law governs with respect to the classification of professional organizations for the purposes of the Act.<sup>6</sup> Therefore, we respectfully request the issuance of an advisory opinion that New York LLCs, such as LOM, are 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) and that they are not corporations, subject to the prohibitions of 2 U.S.C. §441b, or partnerships. Therefore, LOM may make contributions as a person, subject to the applicable contribution limits under the Act, to federal candidates or political committees.

Contributions by Members from Lawrence, O'Donnell, Marcus, L.L.C.'s  
Non-Repayable Draw Account Should be Deemed Permissible

LOM deposits its members' monthly salary and interest on capital into a non-repayable draw account. The Commission has previously found that individuals may make contributions to federal candidates and political committees from a corporate account which is a non-repayable draw account.<sup>7</sup> Similarly, members of LOM would like to make individual federal contributions from their LLC non-repayable draw account.

In its 1978 Notice, the FEC distinguished among three types of corporate accounts used by employees: repayable draw accounts, non-repayable draw accounts, and expense accounts. The FEC determined that contributions made from draw accounts that the employee is responsible to repay are considered corporate contributions for the outstanding period of the draw, and therefore, are prohibited. They further determined that contributions written against standard expense accounts are also prohibited corporate contributions. The FEC, however, distinguished non-repayable draw accounts that are established to permit partial draws against salary, profits or commissions and concluded that contributions from such accounts to federal candidates and political committees would be considered permissible personal contributions.

To ensure compliance with federal law, LOM respectfully requests the issuance of an advisory opinion which states that members of an LLC may make individual contributions to federal candidates and political committees from an LLC account which is a non-repayable draw account.

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<sup>6</sup> The question of whether a professional organization is a corporation is determined by the law of the state in which the professional organization exists. 11 C.F.R. §114.7(d).

<sup>7</sup> FEDERAL ELECTION CAMPAIGN FINANCE GUIDE CCH ¶9064 (Federal Election Commission Notice, August 28, 1978) and Advisory Opinions 1978-42 and 1980-6.

If you have any questions or need additional information regarding this advisory opinion request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Lyn Utrecht". The signature is written in a cursive, flowing style.

Lyn Utrecht

F950426000040

**CERTIFICATE OF CONVERSION**  
-of-  
**LAWRENCE, O'DONNELL, MARCUS & CO.,**  
a Limited Partnership,  
-to-  
a Limited Liability Company,  
under Section 1006 of the  
Limited Liability Company Law

**FIRST:** The Limited Partnership was, in accordance with the provisions of the Limited Liability Company Law, duly converted to a Limited Liability Company.

**SECOND:** The name of the Limited Partnership was **LAWRENCE, O'DONNELL, MARCUS & CO.**

**THIRD:** The name of the Limited Liability Company is **LAWRENCE, O'DONNELL, MARCUS LLC.**

**FOURTH:** The County within this State in which the office of the Limited Liability Company is to be located is New York County.

**FIFTH:** The Secretary of State is designated as the agent of the Limited Liability Company upon whom process against it may be served. The post office address within or without this State to which the Secretary of State shall mail a copy of process against the Limited Liability Company served upon him or her is:

**LAWRENCE, O'DONNELL, MARCUS LLC**  
61 Broadway  
Suite 2324  
New York, N.Y. 10066.

**SIXTH:** The Limited Liability Company is to be managed  
by

- 1 or more members
- A class of members
- 1 or more managers
- A class of managers

IN WITNESS WHEREOF, this Certificate has been subscribed this 18 day of April 1995, by the undersigned who affirms that the statements made herein are true under the penalties of perjury.

  
\_\_\_\_\_  
(Signature)

**JOHN F. O'DONNELL,**  
Member

L 950426000040

Certificate of Conversion  
of

Lawrence, O'Donnell Marcus + Co.,  
Under section 1006 LIRC Law

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STATE OF NEW YORK  
DEPARTMENT OF STATE  
FILED APR 26 1995

TAX \$ \_\_\_\_\_  
BY: *MVK*

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748 FIFTH AVENUE  
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