



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 13, 1989 (Reconsideration)
January 28, 1988 */

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1987-31

Terry L. Claassen
Peper, Martin, Jensen, Maichel and Hetlage
Suite 400
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4706

Dear Mr. Claassen:

This responds to your December 3, 1987 letter and your December 29, 1987 supplement, on behalf of the Chicago Board Options Exchange, Inc. ("CBOE"), requested an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of various classes of members of CBOE for contributions to CBOE's separate segregated fund, the Chicago Board Options Exchange Political Action Committee ("CBOEPAC").

CBOE, incorporated (without capital stock) under Delaware law, operates as a securities exchange providing a market for the trading of standardized option contracts on certain equity, equity index, and debt securities. CBOE is governed by a twenty-one person Board of Directors, composed of fifteen representatives who are members or executive officers of CBOE member organizations, four representatives of the public, a President, and a Chairman of the Board (CBOE Const., Art. VI, §6.1). The Committees of the Exchange consist of an Executive Committee and such other standing and specialty committees as provided for in the CBOE Constitution and Rules (CBOE Const., Art. VII, §7.1). The articles of incorporation, Constitution, and Rules also provide for 8 types of individual participation: regular members, exercisers, registered for's, nominees, special members, lessors, lessees, and permit holders. Each type of individual possesses different rights and obligations. Regular members have full trading privileges to execute transactions in stocks and bonds on the CBOE. Regular members may sell or lease their membership rights (CBOE Const., Art. II, §2.5), are required to pay CBOE's periodic dues, fees, and assessments (Rule 2.20), and may share in assets upon CBOE's

liquidation (CBOE Const., Art. II, §2.5). Additionally, regular members may serve on the CBOE Board of Directors, and governing committees, and exercise full voting privileges (CBOE Const., Art. II, §2.6).

Exercisers are members of the Chicago Board of Trade who successfully meet the conditions for CBOE membership (Certificate of Incorporation, Art. 5(b)). As members of CBOE, exercisers possess the same rights and obligations as regular members except that exercisers may not transfer membership rights (CBOE Const., Art. II, §2.5).

Nominees and registered for's are individuals that, in essence, represent member organizations of the CBOE or nonmember brokers and dealers in options. The CBOE Constitution and Rules ensure that an organization's rights and obligations run to and from individual persons. Therefore, member organizations and nonmember brokers and dealers in options are connected to CBOE through individual affiliations.

Registered for's are those individual CBOE members or applicants who are or intend to become controlling persons with respect to organizations engaged in securities options as brokers or dealers and must therefore register their membership for such organization. CBOE Const., §2.4. Registered for's may also consist of other individual members who wish to register for a member organization. Ibid. Registered for's retain all rights and obligations as individual members, even though they represent an organization.

Nominees are individuals designated by member organizations. CBOE Const., §2.3; Rule 3.3. A member organization must designate a nominee for each membership it owns. Ibid. The nominee is subject to the same requirements for approval as if applying for membership as an individual member and is authorized to represent the organization in all matters relating to the Exchange. Ibid. Nominees are liable for payment of dues, although their member organization also may be liable. Rules 3.23; 17.1(a). Nominees are included within the term "member" in the CBOE's own constitution (CBOE Const., §1.1(b)), and are "regular members" (CBOE Const., §2.1(b)) and thus have voting rights equivalent to individual regular members. Certificate of Incorporation, Art. V; CBOE Const., §2.6(a).

Special members are those individuals who meet the requirements for CBOE membership and who were members of the Midwest Stock Exchange on May 30, 1980 (CBOE Const., Art. II, §2.1(d)). Special members may trade on the CBOE as market makers or floor brokers (CBOE Const., Art. II, §2.1(d)). Although special members do not have liquidation (Rule 3.16(b)(IV)) or transfer rights (CBOE Const., Art. II, §2.6(d)), special members may serve on the CBOE Board of Directors and governing committees (CBOE Const., Art. II, §2.6(c)) and are entitled to a one-sixth vote on all exchange matters (CBOE Const., Art. II, 2.6(c)). All special memberships will expire on May 29, 1990 (CBOE Const., Art. II, §2.1(d)).

Regular members may lease their memberships to individuals or organizations provided these lessees meet CBOE's membership requirements. Lease agreements, subject to the approval of the CBOE, must include provisions governing duration, consideration, and assignability. The agreement must also address the exercise of voting rights, and the initial responsibility for payment of any CBOE dues, fees, and assessments (Rule 3.16(b)). In the event, however, that the

lease agreement requires the lessee to pay any dues, fees, and assessments and the lessee fails to pay such amounts, the lessor is obligated to pay such amounts to the CBOE (Rule 3.16(b)). While only the lessor or the lessee is responsible for exercising voting rights or paying CBOE dues, fees, and assessments, both may serve on the CBOE Board of Directors (CBOE Const., Art. VI, §6.1) and governing committees (Rule 2.1(a)).

The CBOE also issues one year permits, renewable annually for a maximum duration of three years, that entitle holders to floor admission to trade in certain securities options as market-makers or floor brokers. In return for the right to trade certain securities, permit holders must pay an annual fee of \$10,000 (Rule 3.21(c)). Although permit holders may serve on the CBOE Board of Directors (CBOE Const., Art. VI, §6.1) and governing committees (Rule 2.1(a)), they do not possess the right to vote on exchange matters (Rule 3.21(a)).

You ask whether under the Act these 8 classes of individuals are within the restricted class of members that the Chicago Board Options Exchange Political Action Committee may solicit for contributions.

Under the Act, an incorporated membership organization, or a separate segregated fund sponsored by such a corporation, may solicit contributions to the fund from individual members of the organization. 2 U.S.C. 441b(b)(4)(C), 11 CFR 114.7(a). The regulations define members to mean "all persons who are currently satisfying the requirements for membership in a membership organization." 11 CFR 114.1(e).

To help determine if a person satisfies the requirements for membership, the Supreme Court has suggested comparing members of nonstock corporations to stockholders of business corporations. FEC v. National Right to Work Committee, 459 U.S. 197, 202 (1982). Using this standard, the Court determined that members of nonstock corporations must have "some relatively enduring and independently significant financial or organizational attachment." Id. A class of membership possesses the requisite attachment if an individual maintains some right to participate in the governance of the organization and some obligation to help sustain the organization through regular financial contributions of a predetermined minimum amount. Advisory Opinions 1985-11, 1984-33, and 1984-22. In Advisory Opinion 1984-22 the Commission determined that a class of individuals possesses the right to participate in the governance of a stock exchange if those individuals are eligible to serve on an exchange's board of directors and governing committees and those individuals have the right to vote on exchange matters. See also Advisory Opinions 1985-11 and 1984-33.

The Commission concludes that individuals who are regular members and exercisers are members under the Act. Both classes may serve on the CBOE's Board of Directors and governing committees and vote on all exchange matters. Additionally, both classes are obligated to pay all CBOE dues, fees, and assessments. Consequently, CBOEPAC may solicit these classes for contributions.

The Commission concludes that individuals who are registered for's are also members under the Act. Because registered for's must qualify as regular members, regardless of their affiliation with member organizations of CBOE or nonmember brokers or dealers in options, registered for's will

remain regular members even if their affiliated organization is no longer a CBOE member. Therefore, registered for's always retain the same rights and obligations as regular members and may be solicited by CBOEPAC.

Nominees also qualify as members. A nominee in good standing will meet "all the requirements for membership in [the] membership organization." 11 CFR 114.1(e); see CBOE Const., Art. I, §1.1(b), §2.3; see also *FEC v. NRWC*, supra, 459 U.S. at 205 (noting "the focus of the Commission's regulation on the corporation's own standards.") Although nominees have membership rights and obligations vis a vis CBOE as a result of being designated by a member organization, the relevant participatory rights and financial obligations have been shifted to them personally. Nominees are liable for payment of dues, although their member organization also may be liable. Rule 3.23; 17.1(a). Nominees are "regular members" (CBOE Const., §2.1(b)) and thus have voting rights equivalent to individual regular members. Certificate of Incorporation, Art. V; CBOE Const., §2.6(a). CBOE's unique role in regulating nominees in an individual capacity also is significant. Numerous other opportunities (such as the ability to trade on the Exchange floor and to receive member death benefits) and responsibilities (such as compliance with various rules in order to avoid suspension or disbarment) stem from membership status. These factors make even more apparent the distinct personal nature of nominee's participatory and financial attachment to CBOE. Compare Advisory Opinions 1985-11 and 1980-75. Accordingly, CBOEPAC may solicit nominees for contributions.

The Commission concludes that special members are also members under the Act until their membership expires in 1990. Special members may serve on the CBOE Board of Directors, exercise one-sixth voting rights on all exchange matters, and are obligated to pay all CBOE dues, fees, and assessments. Although special members possess less than full voting rights, this does not affect their membership status. Similar to corporations that issue different classes of stock with different rights and obligations, CBOE created special members with voting rights that are different from regular members. This difference, however, does not affect the ability of special members to participate in CBOE's governance. See Advisory Opinion 1984-22. Therefore, CBOEPAC may solicit special members for contributions.

In addition, the Commission concludes that only one full CBOE membership exists with respect to each leased membership. Under the Act, the lessor is a CBOE member unless pursuant to a given lease agreement the lessee acquires all of the lessor's voting rights and all of the lessor's obligation to pay dues, fees, and other charges assessed during the terms of the lease. If the lessee acquires these rights and obligations, the lessee is a CBOE member under the Act and CBOEPAC may solicit the lessee for contributions. If the lessee does not acquire these rights and obligations, CBOEPAC may only solicit the lessor for contributions.

Finally, the Commission concludes that permit holders are not members under the Act. Permit holders receive less than full trading privileges, cannot vote on exchange matters, cannot transfer membership rights, and have no interest in CBOE assets. Accordingly, CBOEPAC may not solicit permit holders.

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 yours,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1985-11, 1984-33, 1984-22 and 1980-75)

ENDNOTE

*/ This opinion was originally issued January 28, 1988, but was vacated and modified by the Commission on February 9, 1989, pursuant to Mr. Claassen's request for reconsideration by letter dated March 4, 1988. See 11 CFR 112.6(a). The opinion as issued today modifies the original opinion with respect to the status of nominees of member organizations of CBOE.