



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 11, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-38

Thomas R. Donovan, President and CEO
Chicago Board of Trade
LaSalle at Jackson
Chicago, Illinois 60604

Dear Mr. Donovan:

This responds to your letter of August 18, 1988, on behalf of the Chicago Board of Trade ("CBOT"), requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the mailing of partisan communications to and the solicitation of various classes of members of CBOT for contributions to CBOT's separate segregated fund, the Auction Markets Political Action Committee of the Chicago Board of Trade ("AMPAC/CBOT").

You state that CBOT is a federally-licensed commodity exchange incorporated in Illinois that offers markets in various futures and options on futures contracts. You also indicate that CBOT is a self-regulatory membership association that defines its "membership" categories or "seats" by floor trading privileges. There are four market categories: the Agricultural and Associate Market ("AAM"), the Government Instruments Market ("GIM"), the Index, Debt and Energy Market ("IDEM"), and the Commodity Options Market ("COM"). Full Members are entitled to trade on contracts listed in all four categories while Associate Members are entitled to trade on contracts in the latter three categories (CBOT Rules 211.00, 291.00, 292.00, and 293.00). There are three separate types of Membership Interests, GIM Membership Interests, IDEM Membership Interests, and COM Membership Interests, which have trading privileges in each of their respective market categories (CBOT Rules 291.00, 292.00, and 293.00). Individuals may hold a "membership" by owning a seat, leasing a self-owned or firm-owned seat, or holding an interest for a seat attributed to a firm (CBOT Rule 221.00 and Regulation 249.01). Members who lease their memberships are called delegates. CBOT is governed by a twenty-four person Board of Directors consisting of a Chairman, Vice Chairman, fifteen Full Member Directors, three Associate Member Directors, three public member Directors, and the President of CBOT (CBOT

Rules 101.00 and 120.00). In addition, the Nominating Committee makes nominations for all elective offices (CBOT Rules 101.00 and 102.00). There is a committee structure consisting of approximately fifty standing and special committees, approximately fifteen subcommittees that report to the standing committees, and approximately thirty separate pit committees. These committees and subcommittees are all appointed by the Chairman with the approval of the Board. In addition, Associate Members and the three Membership Interests groups each have their own committee to represent their interests. The chairpersons of these committees serve as liaisons to the Board of Directors [CBOT Rules 215.00, 291.00(B), 292.00(B), and 293.00(B)].

You ask whether under the Act AMPAC/CBOT may solicit contributions from the individuals in each of the membership categories listed above and also from noncorporate member firms. You also ask whether under the Act the CBOT may make partisan communications, including independent partisan communications expressly advocating the election or defeat of certain candidates, to the individuals in each of the membership categories.

Under the Act, an incorporated membership organization, or a separate segregated fund sponsored by such a corporation, may solicit contributions to the fund from noncorporate members of the organization. 2 U.S.C. 441b(b)(4)(C), 11 CFR 114.7(a). In addition, an incorporated membership organization may make communications including partisan communications to its members on any subject. 11 CFR 114.3(a)(1) and (a)(2). If a membership organization makes a communication to its members expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the election or defeat of a clearly identified candidate), the organization shall report the costs directly attributable to such communication to the Commission if such costs exceed \$2,000 for any election. 11 CFR 100.8(b)(4) and 104.6.

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 1987-31, 1985-11, 1984-33, and 1984-22. In Advisory Opinion 1984-22, the Commission concluded 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 in exchange matters. See also Advisory Opinions 1987-31, 1985-11, and 1984-33. In Advisory Opinion 1987-31, the Commission concluded that individuals designated as nominees who represent a member organization but do not have membership rights, membership obligations, and a proprietary interest of their own are not members. The Commission also concluded that, if a member leases that membership to an individual, only one full membership exists with respect to each leased membership. Therefore, unless the lessee acquires all of the lessor's voting rights and obligations

to pay dues, fees, and other charges assessed during the term of the lease, the lessor remains the solicitable member if the lessor is an individual or noncorporate entity.

In analyzing which seatholders are solicitable, the Act and the Commission's standard as established in prior advisory opinions will be applied to each of the membership categories described in your request.

Full and Associate Individual Members Who Do Not Delegate Their Seats and Who Are Not Delegates

Full Members are required to pay quarterly dues (CBOT Rules 240 and 242), may serve on the Board of Directors, as Chairman or Vice Chairman, as members of the Executive Committee, as members of the Nominating Committee, and as members of all committees except the special Associate Members, GIM, IDEM and COM Membership Interest Committees (CBOT Rules 101.00, 120.00, and 124.00 and Regulations 162.01, and 924.01). They may vote for elected officers (CBOT Rules 101.00) and for amendments to the CBOT Rules and other matters submitted for a vote by the Board of Directors (CBOT Rules 107.00 and 109.00). They may petition for Rule amendments (Rule 107.00), and may appear before the Nominating Committee to recommend candidates for elective office and petition to have candidates placed on the ballot (CBOT Rule 102.00). They may sell or transfer their memberships and they have full liquidation rights (CBOT Regulation 249.01 and Rule 211.00).

Associate members are required to pay quarterly dues equivalent to those of a Full Member (CBOT Rules 213.00, 240.00, and 242.00). They may vote for elected officers, Rule amendments, and other matters submitted for a vote by the Board of Directors and may petition for Rule amendments (CBOT Rules 101.00, 107.00, 109.00, and 216.00). They may also appear before the Nominating committee to recommend candidates for elective office and may petition to get candidates on the ballot (CBOT Rule 102.00). An Associate Member's vote equals one-sixth of a Full Member's vote (CBOT Rule 216.00). Associate members may also vote in the annual election of the Associate Members Committee and serve on that committee (CBOT Rule 215.00). They may serve on the Board of Directors and may serve on all exchange committees except the special GIM, IDEM, and COM Committees. They may sell or transfer their memberships and their memberships carry liquidation rights equal to one-sixth the share of a full member (CBOT Regulation 249.01 and Rule 211.00).

The Commission concludes that Full and Associate Members who are individual or noncorporate entities, who do not delegate their seats, and who are not delegates, are members under the Act. Both classes may serve on the Board of Directors, which is the governing body of CBOT, and all exchange committees except those that represent the interests of specific classes of seatholders. Both classes have voting and petition rights for elected officers of CBOT and for amendments to the rules. Additionally, both classes have regular dues obligations and proprietary interests in their memberships to the extent that they may sell or transfer their memberships and their memberships carry liquidation rights. Consequently, CBOT may solicit voluntary contributions for AMPAC/CBOT from these classes and make partisan communications, including communications expressly advocating the election or defeat of candidates, to these classes.¹

Full and Associate Individual Members Who Delegate Their Seats (Member-Lessors) and Full and Associate Members Who Are Delegates

Full and Associate Members who delegate their seats may vote for elected officers, Rule amendments, and other matters submitted for a vote by the Board of Directors and may petition for Rule amendments (CBOT Rules 101.00, 107.00, 109.00 and 216.00). They may also appear before the Nominating Committee to recommend candidates for elective office and may petition to get candidates on the ballot (CBOT Rule 102.00). The vote of an Associate Member-Lessor equals one-sixth of a Full Member's vote (CBOT Rule 216.00). An Associate Member-Lessor may vote for and serve on the Associate Members Committee (CBOT Rule 215.00). Full and Associate Member-Lessors may transfer their memberships (CBOT Regulation 249.01) and they have the same liquidation rights as Full and Associate Members who are not lessors or delegates (CBOT Rule 211.00). The Full or Associate Member-Lessor and the delegate arrange between themselves who will be responsible for the payment of dues, but CBOT will bill the lessor for dues and hold the member-lessor and the delegate jointly and severally liable for the payment, and both are subject to suspension for nonpayment [CBOT Rules 221.00(c), 240.00, and 242.00].

Full and Associate Members who are delegates may serve as voting members on any standing and special committees except fifteen committees listed in CBOT Regulation 924.01.2 They may also serve as non-voting advisors on any special or standing committee and as voting members on most subcommittees and on any pit committee. Id. They may not vote for Directors, elected officers, and Rule amendments (CBOT Regulation 221.07). They may not recommend candidates before the Nominating Committee or petition to get them on the ballot and they may not petition for Rule amendments ("Appendix 2 - Description of the CBOT Membership, By Category," pp. 5-7 and 11-13). In addition, delegates do not have rights to transfer their seats and have no liquidation rights (CBOT Rule 221.00 and Regulation 249.01).

The Commission concludes that only one CBOT membership exists with respect to each leased membership and that Full and Associate Member-Lessors, who are individuals or noncorporate entities, are members, while Full and Associate Member Delegates are not. See Advisory Opinion 1987-31. Although the Commission determined in Advisory Opinion 1987-31 that the lessee could be a member for purposes of the Act depending upon whether, under the lease agreement, the lessee acquired all of the lessor's voting rights and obligations to pay dues and other charges, the CBOT Rules and Regulations provide for the retention by the Member-Lessor of certain rights and obligations that are not alterable by agreement. According to CBOT Rules, the member-lessors retain a substantial right to participate in the governance of CBOT by virtue of their ability to vote and petition for candidates for elected office and for Rule amendments. In addition, the member-lessor retains an ongoing obligation to help sustain the organization through regular pre-determined dues. Although the member-lessor and the delegate may make their own arrangement as to who will pay the dues, the Member-Lessor still retains liability for the payment, is still subject to suspension for non-payment, and is the person who is billed by the CBOT. Furthermore, the member-lessor, and not the delegate, retains the proprietary rights of transferability and liquidation. Consequently, CBOT may solicit voluntary contributions to AMPAC/CBOT from and make partisan communications to Full and Associate Member-Lessors who are individuals or noncorporate entities, but may not solicit contributions from or make partisan communications to Full and Associate Member Delegates.

Membership Interests

Those in the Membership Interests categories are obligated to pay quarterly dues [CBOT Rules 240.00, 242.00, 291.00(E), 292.00(E), and 293.00(E)]. They are eligible to serve as non-voting advisors on any standing committee (CBOT Regulation 162.01), as voting members on most subcommittees and on any pit committees (Appendix 2 - p.13), and as voting members of their particular Membership Interest committee, i.e., GIM, IDEM, or COM [CBOT Rules 291.00(B), 292.00(B), and 293.00(B)]. Membership Interest holders who are not delegates may also vote for the members of their particular Membership Interest Committee. [CBOT Rules 291.00(B), 292.00(B), and 293.00(B)]. Those holding Membership Interests and who are not Delegates have rights of transferability [CBOT Regulation 249.01 and Rules 291.00(F), 292.00(F), and 293.00(F)] and liquidation. The holder of a GIM Membership Interest shall have a liquidation right worth eleven percent of a Full Member's share, and the holder of an IDEM or a COM Membership Interest shall have a liquidation right worth one-half of one percent of a Full Member's share [CBOT Rules 291.00(C), 292.00(C), and 293.00(C)]. Holders of Membership Interests may not vote for the Board of Directors, for elected officers, or for amendments to the Rules [CBOT Rules 291.00(A), 292.00(A), and 293.00(A)].

The Commission concludes that holders of Membership Interests are not members under the Act. Their participation in the governance of the CBOT is minimal. They can vote for neither the Directors, the principal officers, nor Rule amendments, and may only vote for members of an interest committee. Such a committee is not a standing or special committee but merely represents the interests of a particular trading category through a chairman who functions as a liaison with the Board. Consequently, the CBOT may not solicit contributions from or make partisan communications to holders of Membership Interests.

Memberships Attributed to Firms

The category of memberships attributed to firms encompasses two situations. First, a firm may be a member firm of CBOT by virtue of a Full or Associate Membership held by one of its officers or general partners. Such an officer or partner who desires to designate his or her firm applies to the Membership Committee to have the membership registered for the benefit of the firm. If the application is granted, the firm shall be entitled to member firm privileges with respect to all contracts or with respect to contracts in which Associate Members have privileges, whichever the case may be (CBOT Rule 230). Second, ownership of the title and value of a Full or Associate Membership of an individual may be vested in a firm registered in accordance with CBOT Rule 230 if the individual is a general partner, active executive officer, or full-time employee of the firm. Additionally, a registered firm may own GIM, COM, and IDEM Membership Interests on behalf of individual nominees who are full-time employees of the firm. In such circumstances, all rights and responsibilities of membership shall remain the exclusive personal privilege of the approved individual except that the registered firm shall be entitled to transfer such membership or membership interest and receive the net proceeds therefrom after satisfaction of all claims against the departing approved individual or the firm. [CBOT Regulations 249.01(b) and 250.02].

The Commission concludes that, in the first situation, where the individual's membership is registered for the benefit of the firm, the individual, and not the firm, is a member. In such a situation, the firm's name may be used for doing business, but the individual retains all rights and obligations of membership. The Commission concludes that, in the second situation, where the title and value are owned by the firm, the firm, and not the individual, is the member. Although, in the latter situation, the individual retains the rights and responsibilities of membership, he or she does so at the sufferance of the firm (once ownership of the title and value is vested in the firm). In addition, the firm, not the individual, may transfer the membership and thus appears to have the proprietary interest in the membership. Consequently, in the first situation, CBOT may solicit voluntary contributions for AMPAC/CBOT and make partisan communications to the individual registered for the firm, but not the firm itself. In the second situation, CBOT may solicit contributions from or make partisan communications to the firm, but only if it is not a corporate entity, and not the individual. Solicitations and partisan communications by CBOT may not be directed to any corporation. See 11 CFR 114.2(b) and 114.7(b).

The Commission notes that, although solicitations for voluntary contributions to AMPAC/CBOT, which is the separate segregated fund of CBOT, may only be directed to the members in certain classes cited above, AMPAC/CBOT may accept unsolicited contributions from persons otherwise permitted to make contributions, including the separate segregated funds established by member firms. 11 CFR 114.5(j) and 114.7(j).³ In addition, AMPAC/CBOT may, using voluntary contributions, make partisan communications to the general public, provided that those communications do not solicit contributions to AMPAC/CBOT. 11 CFR 114.5(i).

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,

(signed)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (AOs 1987-31, 1985-11, 1984-55, 1984-33, 1984-22, 1983-38)

Commissioner Elliott voted against approval of this opinion and will file a dissenting opinion at a later date.

1. The Rules and Regulations of CBOT also provide for fractional participation in Associate Memberships. According to CBOT Rule 296.00, however, "[f]ractional participations in an Associate Membership shall carry no privileges of a Membership or Membership Interest, including but not limited to trading and voting privileges." The Commission therefore concludes that holders of such fractional interests in Associate memberships are not members.

2. These committees include the Executive, Nominating, Membership, Finance, Arbitration, Business Conduct, Floor Conduct, and Floor Governors Committees. These committees have significant governance and/or disciplinary powers.

3. Although AMPAC/CBOT may accept such unsolicited contributions, the Commission has held that where a separate segregated fund informs an individual whom it may not solicit that the individual has the right to make unsolicited contributions to the fund, the act of informing that individual that the fund may accept his contribution is itself a solicitation. Advisory Opinions 1984-55 and 1983-38; see Explanation and Justification of Part 114, 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 923, p. 1604.