



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 11, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-39

Jerrold E. Salzman, Esquire
Freeman, Freeman & Salzman
401 North Michigan Avenue
Suite 2700
Chicago, Illinois 60611

Dear Mr. Salzman:

This responds to your letter of August 18, 1988, on behalf of the Commodity Futures Political Fund of the Chicago Mercantile Exchange ("CFPF"), requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of contributions to CFPF from members of the Chicago Mercantile Exchange ("the CME"), who lease their seats.

You indicate that the CME is an exchange for futures trading incorporated under the Illinois General Not-for-Profit Corporation Act. You also indicate that the CME is a membership organization which, according to federal law, has enacted and enforced rules regulating its membership, including those admitted to membership as lessees. There are three trading privilege categories for membership in the CME. These are membership with full privileges in the Chicago Mercantile Exchange and its Divisions ("CME membership"), membership with full privileges in the IMM Division ("IMM membership") entitling a member to trade in the commodities assigned by the Board of Governors to that division and to the IOM Division, and membership with full privileges in the IOM Division entitling a member to trade in the commodities assigned by the Board to that division (CME Rule 120). Memberships can be leased in any of the categories. Your request letter and the rules attached to the letter indicate that your request refers to memberships in all three categories.¹

The CME is governed by a Board of Governors consisting of up to twenty-nine persons and an Executive Committee consisting of at least twelve Board members which exercises the authority of the Board in the management of the Exchange when the Board is not in session (CME Rules

210, 217, and 230). The Board consists of twelve CME members elected by CME members, eight IMM members elected by IMM members, two IOM members elected by IOM members, three nonmember Governors appointed by the Chairman and approved by the Board, up to three persons who represent clearing member firms and who are appointed by the Chairman and approved by the Board, and a non-voting Special Counsel appointed by the Chairman and approved by the Board. The Executive Committee includes the top officers of the Board, three past chairmen (all of whom must presently be Board members), the Special Counsel, and three IMM Governors and one IOM Governor (who may also be Board officers). There are committees, the duties of which "are to conduct investigations, advise and assist the Board and perform the specific duties assigned to them elsewhere in [the] rules" (CME Rule 300). The rules confer certain decision-making and/or disciplinary powers on the committees, but the committees are principally answerable to the Board (CME Rules 300-337). With certain exceptions, the Chairman of the Board shall appoint members to all committees with the approval of the Board and, with the exception of the floor chairman of the Pit Committee and the chairmen of the Nominating Committees, all of the chairmen of the standing committees (which comprise approximately three-quarters of the committees) must be members of the Board (CME Rule 300).

You ask whether under the Act members of the CME who lease their seats, i.e., member-lessees, are within the restricted class of members who may be solicited for contributions to CFPF.

Under the Act, an incorporated membership association, 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). 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 non stock 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 Opinion 1987-31, 1985-11, 1984-33, and 1984-22. The Commission has analyzed the right to participate in the governance of an exchange by such standards as eligibility to serve on an exchange's board of directors and governing committees and by the right to vote in exchange matters. Advisory Opinions 1987-31 and 1984-22. In Advisory Opinion 1987-31, the Commission concluded that, if a member leases that membership to an individual, only one full membership exists with respect to each leased membership. In that opinion, which presented a situation involving lease agreements governing duration, consideration, assignability, the exercise of voting rights and the initial responsibility for payment of dues, fees, and assessments, the Commission concluded that, unless the lessee acquires all of the lessor's voting rights and all of the lessor's obligations to pay dues, fees, and other charges, the lessor remains the member.

In addition to the trading privileges attendant to their particular category of membership (i.e., CME, IMM, and IOM), members of the CME have the right to serve on the Board of Governors (CME Rule 210), to vote at all regular and special meetings of the Exchange (CME Rule 121), to vote in Exchange elections for the Board and for the separate CME, IMM, and IOM Nominating Committees (CME Rules 240, 241, and 244), to petition to nominate candidates for either body (CME Rule 242), to petition for rule changes (CME Rule 262), and to vote in referenda for rule changes (CME Rules 262 and 264). Members have an obligation to pay yearly dues including Gratuity Fund dues (CME Rule 122). Members also have the right to transfer their memberships, as in the present request to the Commission where members temporarily transfer their memberships to other persons. See Rule 106.D.

Members who temporarily transfer or lease their memberships to others may, according to your request letter, negotiate "the actual economic burden of such dues" but are required to pay the dues. The transferor or lessor is the person billed for dues and assessments (Informational Manual Description of CME Rule 106). Although the transferor may not serve on the Board or committees or attend Exchange social functions, he or she may vote in Exchange elections and referenda (CME Rule 121 and Informational Manual Description of CME Rule 106). In addition, the transferor retains proprietary rights over the membership. He or she has the right to revoke the transfer upon written notice, the right to sell, transfer, bequeath, or give away the membership, and the right to have the member-lessee or transferee disqualified from trading by giving notice to the transferee's qualifying clearing member. (CME Rule 106.D and Informational Manual Description of CME Rule 106.)

Although the member-lessee or transferee may serve on committees and attend social functions, he or she may not serve on the Board, may not vote in Exchange elections or referenda, and may not have his or her signature counted toward the number of signatures necessary for a valid petition. As stated above, the transferor, not the transferee or member-lessee, retains the responsibility for the payment of the dues. Furthermore, the transferee may not sell, transfer, bequeath, or give away the membership. (CME Rules 106.D and 121 and Informational Manual Description of CME Rule 106.)

The Commission concludes that only one membership in the Exchange exists with respect to each leased membership and that the transferors are members while the transferees or member-lessees 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 on whether, under the lease agreement, the lessee acquired all of the lessor's voting rights and obligations to pay dues and other charges, the CME Rules provide for the retention by the transferor of certain rights and obligations that are not alterable by agreement. According to CME Rules, the transferor retains a substantial right to participate in the governance of the CME by virtue of his or her ability to vote in elections and referenda, a right withheld from the transferee. In addition, the transferor retains an ongoing obligation to help sustain the organization through regular pre-determined dues. Although an arrangement may be made as to who will bear the economic burden of the dues, the transferor is billed and is required to pay. Furthermore, the transferee holds his or her membership subject largely to the transferor's desire to maintain the lease relationship. Consequently, individuals or other persons who lease their

CME seats from CME members are not themselves members of CME for purposes of the Act and may not be solicited for contributions to CFPPF.

The Commission notes that, although solicitations for voluntary contributions to CFPPF may not be directed to member-lessees, CFPPF may accept unsolicited contributions from any person otherwise permitted to make contributions. 11 CFR 114.5(j), 114.7(j).²

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, and 1983-38)

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

1. Your letter states that "the CME's total number of memberships" is 2,724. The rules state that membership with full privileges in the Exchange and its Divisions shall be limited to 625, that IMM membership shall be limited to 813, and that IOM membership shall be limited to 1,287 (CME Rule 100). These figures total 2,725.

2. Although CFPPF 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.