



FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-34

Peter H. Rodgers
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Washington, DC 20004-2404

Dear Mr. Rodgers:

This refers to your letters of October 6, November 21, and December 7, 1994, concerning the application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, and Commission regulations to a proposed solicitation of the members of the Commodity Exchange ("COMEX") by the New York Mercantile Exchange PAC ("NYMEX PAC"), the separate segregated fund of the New York Mercantile Exchange ("NYMEX").

You state that on August 3, 1994, NYMEX completed a merger with COMEX whereupon COMEX became a subsidiary and a division of NYMEX, which is now referred to as the COMEX division.^{1/} You state that NYMEX wishes to consolidate the operations of the separate segregated funds formerly sponsored by each exchange. It proposes to dissolve COMEX PAC, the separate segregated fund of COMEX, transfer its funds to NYMEX PAC, and solicit contributions to NYMEX PAC from the former contributors to COMEX PAC. The NYMEX request explains that while the COMEX division has several different classes of membership, NYMEX wishes to solicit only one class of members who, following the merger, are called "COMEX division regular members" ("regular members").^{2/}

NYMEX requests an advisory opinion to determine whether these proposed activities are lawful under the Act and Commission regulations. The request contains the Joint Proxy Statement, which includes a summary of the merger agreement and the new bylaws of COMEX.

DETERMINING THE MEMBERSHIP OF COMEX

Act and Commission Regulations

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act states, however, that the term "contribution or expenditure" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. 441b(b)(2)(C). See also 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

Under 2 U.S.C. 441b(b)(4)(A), a corporation, or a separate segregated fund established by a corporation, may only solicit contributions to such a fund from its stockholders and their families and its executive or administrative personnel and their families. An exception set forth in 2 U.S.C. 441b(b)(4)(C) allows a corporation without capital stock or a separate segregated fund established by such a corporation to solicit contributions to the fund from members of the nonstock corporation. The Commission's regulations use the term "membership association" to implement this exception. It is defined, in part, under 11 CFR 114.1(e)(1) as a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list.

The Commission regulations provide guidance as to the definition of the term "members." Under 11 CFR 114.1(e)(2), "members" means all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who:

(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);

(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

The regulations also provide that the Commission "may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 114.1(e)(3).

COMEX as a Membership Association.

The facts and background to this request indicate that COMEX is a membership organization for purposes of the Act. For example, Article 1, section 100 of the revised COMEX bylaws meets the requirements of 11 CFR 114.1(e)(1) by expressly providing for membership. As discussed

more fully below, members of COMEX are granted significant trading rights in commodity exchange contracts; therefore, the requirement that membership be expressly recognized is also met. See 11 CFR 114.1(e)(1)(iii). The facts of the request and materials suggest that COMEX, in the past, has solicited persons to become members. See 11 CFR 114.1(e)(2).

Financial Attachment of Regular Members to COMEX.

As the membership regulations indicate, a significant financial attachment between a membership organization and its participants is a basis to recognize those participants as members of the organization under the Act.^{3/} The NYMEX request details the attachment of regular members to COMEX. Each COMEX regular member holds a seat on the COMEX exchange from which they derive their trading rights. You state that exchange seats are currently sold and purchased for approximately \$125,000 each. Regular members in the COMEX division have all of the trading rights they formerly held before the merger with NYMEX. These rights include the right to trade in gold, silver, copper and certain other contracts previously traded when COMEX was an independent entity. Regular COMEX members also now have trading privileges in NYMEX itself including, among other rights, full rights to trade new metal contracts.

Your request also mentions other monetary interests in COMEX that were conveyed to its regular members as part of the merger. These include what is termed in the request as "deferred cash payments," which the request estimates to be \$25,000 per regular member, and the right of regular division members to receive pro rata shares of \$20 million in "deferred ticker based payments" on the first four merger anniversaries.^{4/}

Given the considerable economic interests that regular members have in COMEX, the Commission concludes that these interests constitute a sufficient financial attachment so that regular members who are natural persons would qualify as solicitable members of COMEX for purposes of the Act. The Commission notes that the economic interest held by the owners of seats on stock and commodity exchanges is one of the different types of financial attachments recognized both in the Explanation and Justification to the membership regulations and past advisory opinions. See 58 Fed. Reg. 45771 (August 30, 1993) and Advisory Opinions 1987-31, 1988-38 and 1988-39.

Your November 21, 1994, letter cites various different situations regarding the disposition of the rights and benefits of regular membership in COMEX. In the first instance, there are those regular memberships owned by individuals who "retain all the rights of COMEX Division Regular Membership (as defined in the Joint Proxy Statement submitted in the AOR)." However, you also mention the situation where "seats are beneficially owned by firms under ABC agreements with individually named members holding the rights and privileges of membership." As noted in footnote two, this group is not part of your advisory opinion request. You further state there are situations where the seats that comprise regular memberships are "owned by individual owners that lease the seat to a lessee who has trading rights but no ownership rights."^{5/}

The Explanation and Justification for the membership regulations reiterates the Commission's past view that, in most instances, there exists only one membership for each seat on an exchange.

See 58 Fed. Reg. 45773. (August 30, 1993). When reviewing past opinions regarding the leasing of seats on exchanges, the Commission stated in the Explanation and Justification that:

in most instances, the owner of the seat (rather than the lessee) should be considered the member of the organization. The only situation in which the lessee would be considered the member would occur if the lessee acquired all of the lessor's voting rights and obligations to pay dues, fees, and other charges assessed during the term of the lease.

See 58 Fed. Reg. 45773. (August 30, 1993) and Advisory Opinions 1987-31, 1988-38 and 1988-39.

As presented in your request, the membership interest of regular members in COMEX is not based on governance rights, but on the significant financial interest and rights each regular member holds in a seat. However, with some adjustment, a similar analysis, as presented in the Explanation and Justification above, is possible to determine which party in a leasing situation should be considered a member for purposes of the Act.

Both parties, the owner/lessor and the lessee, can be said to hold a financial interest in the COMEX membership. While the owner/lessor retains ownership rights and has made the significant investment in obtaining a seat and draws income from the leasing of the seat, the lessee draws benefit and presumably livelihood from the exercise of the trading rights associated with the seat. However, the determining factor to resolve which party should be considered a member is based on which party also holds the "obligation to pay dues, fees and other charges assessed during the term of the lease." A particular result will vary according to the terms and type of lease and ancillary agreements, entered into between the parties.^{6/} The situation may exist, however, where the lease or agreement between the parties is silent on this issue. In this case, the owner/lessor, who would presumably remain liable for such charges, should be considered the member of COMEX for the purposes of the Act.

AFFILIATION OF COMEX WITH NYMEX

Act and Commission Regulations

All committees (including separate segregated funds) established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department, local unit thereof, are affiliated. 11 CFR 100.5(g)(2). Transfers may be made without limit between affiliated committees. 11 CFR 110.3(c)(1). Furthermore, a corporation or its separate segregated fund may solicit contributions to the fund from the restricted classes of its subsidiaries, branches, divisions, and affiliates. 11 CFR 114.5(g)(1).

Transfer of funds between COMEX PAC and NYMEX PAC and solicitation of COMEX members

The Joint Proxy Statement describes the merger arrangement between COMEX and NYMEX. It indicates that, following the merger, COMEX became a subsidiary and division of NYMEX.^{7/} As a result, any separate segregated fund maintained by COMEX will automatically become affiliated with NYMEX PAC and funds may be transferred without limit between any COMEX committee and NYMEX PAC. Therefore, any and all funds held by COMEX's political committee may be transferred to NYMEX PAC.

Furthermore, because COMEX is now a division of NYMEX, and both organizations are considered affiliated organizations, NYMEX PAC and NYMEX may also solicit voluntary contributions from the membership of COMEX as part of COMEX's restricted class. See Advisory Opinion 1981-55.^{8/} In conducting these contribution solicitations, NYMEX and NYMEX PAC must, of course, conform to the procedures set forth in Commission regulations for solicitations by membership organizations and their separate segregated funds. See 11 CFR 114.5, 114.7, see also 11 CFR 114.1(e).

Having concluded that NYMEX and NYMEX PAC may solicit the natural persons who are regular members of the COMEX division, based on the affiliation of COMEX and NYMEX, the Commission need not decide whether NYMEX may solicit COMEX members on the basis of their membership interests in NYMEX itself.

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)

Danny L. McDonald
Chairman

Enclosures: (AO 1987-31, 1988-39, 1988-38 and 1981-55)

1/ According to the information contained in your request, NYMEX, founded in 1872, is the nation's third largest futures exchange and world's largest energy commodities market. COMEX is the world's most active precious metals market. Both organizations prior to the merger were not-for-profit corporations and self-regulatory organizations. See Joint Proxy Statement at 4 and COMEX division bylaws, Article 9, section 912.

2/ The request materials identify various other types of membership interests such as COMEX division licensees, COMEX member firms, option seatholders and aluminum seatholders, but your request expressly excludes them from consideration in this opinion. According to the request materials, there are 772 seats on the COMEX exchange. Your request is also expressly limited to natural persons who own seats on the COMEX exchange as regular members. You state that of the 772 seats, 507 are owned by natural persons.

3/ Your request materials indicate that regular members have no voting rights regarding the selection of directors. COMEX division bylaws, Article 1, section 100. Regular members do, however, have the right to vote in certain situations to protect their financial interests. See footnote four.

Regarding the payment of dues, COMEX regular members currently pay none, but could be obligated by the COMEX board of directors to pay dues in the future. See COMEX division bylaws, Article 1, section 103.

4/ As you note, there are several provisions in the NYMEX/COMEX merger agreement and the COMEX division bylaws which protect the economic interests of regular members. Should the COMEX board of directors wish to increase the number of COMEX members, under the different provisions of the COMEX bylaws, the regular members have the opportunity to call their own meeting to disaffirm the action by a majority vote or, if a special meeting is called by the COMEX board of directors, a majority vote of the regular members is needed to affirm the action. Similar provisions apply to any attempt to modify the regular members pre-merger trading rights, or to permit new persons to trade additional, former COMEX contracts. See Joint Proxy Statement at 141-146 and COMEX division bylaws, Article 2, section 205.

5/ Your request states that 265 of the 772 seats in the COMEX division are owned beneficially by firms. Your request does not indicate, however, the number of the remaining 507 seats that are subject to lease agreements.

6/ The Commission notes that if, under a particular lease, a corporation rather than a natural person or a partnership is found to be the member of COMEX for purposes of the Act, that corporate member could not be solicited, nor could its separate segregated fund. See 11 CFR 114.7(b) and (j).

7/ Its new status is illustrated by the requirement that all of the members of the COMEX division's board of directors must be members of the NYMEX board of directors. COMEX division bylaws, Article 3, section 304.

8/ The Commission notes the parallels between the situation in Advisory Opinion 1981-55, cited in NYMEX's request, and the circumstances presented here. In Advisory Opinion 1981-55, the Commission found that the AMPAC could solicit members of the American Medical Association Auxiliary, Inc. ("the Auxiliary") based on the finding that the AMA and the Auxiliary were affiliated organizations. This finding was based on the degree of control exerted over the Auxiliary by the AMA through an AMA Advisory Council. No policy or recommendation of the Auxiliary could be approved by the organization without the approval of the Advisory Council. Similarly, as noted in footnote seven, the board of directors of the COMEX division must themselves be members of the NYMEX board of directors.