



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 13 5 03 PM '95

April 13, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1995-2

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 20, 1995.

Attachment

AGENDA ITEM
For Meeting of: APR 20 1995

DRAFT

ADVISORY OPINION 1995-2

Peter H. Rodgers
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

Dear Mr. Rodgers:

This responds to your letters dated January 4 and March 8, 1995, on behalf of the New York Mercantile Exchange ("NYMEX") and NYMEX Political Action Committee ("NYMEX PAC") which request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the proposed solicitation by NYMEX PAC of certain members of the Commodity Exchange ("COMEX") Division of NYMEX.

NYMEX is the nation's third largest future's exchange, the world's largest energy commodities market, and the world's most active precious metals market. It operates through two trading divisions, the NYMEX Division and the COMEX Division. The COMEX Division, which trades primarily metals contracts, was an independent exchange known as Commodity Exchange, Inc., until August 3, 1994, when it became a subsidiary of NYMEX. COMEX continues to trade its old contracts and certain new contracts of both divisions. You state that COMEX Division Regular Members, one of the classes of membership in the division, have an economic stake in NYMEX generally based on the future economic success of both NYMEX trading divisions.

In Advisory Opinion 1994-34, the Commission analyzed the

3 issues of whether natural persons who were COMEX Division
4 Regular Members were "members" of COMEX under the Act and
5 were therefore solicitable for contributions to NYMEX PAC.
6 The Commission concluded that the economic interests of these
7 persons constituted a sufficient financial attachment so that
8 they qualified as members under the Act. The opinion also
9 stated that, since COMEX, as a subsidiary and division of
10 NYMEX, was affiliated with NYMEX, the COMEX Regular Members
11 were solicitable for contributions to NYMEX PAC.

12 You state that, of the 772 COMEX Division Regular
13 memberships, 265 are held by individuals on behalf of member
14 firms. These individuals are not beneficial owners of their
15 seats. The status of such individuals under the Act was
16 specifically excluded from the request and analysis in
17 Advisory Opinion 1994-34. You now ask whether such persons
18 may be solicited for contributions to NYMEX PAC (just as
19 other COMEX Division regular members who own their seats as
20 individuals).

21 Individuals who hold membership on behalf of member
22 firms have entered into an "A-B-C Agreement" with the trading
23 firm that employs him or her. The firm provides funds to the
24 employee to purchase, or finance the purchase of, a
25 membership. The agreement sets out the respective rights of
26 the firm and the individual in the membership. According to
27 the sample agreement provided by you, the individual
28 contributes to the firm "the use of the membership" and
29 agrees that "he will not sell, transfer or in any way
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3 encumber the Membership" and will use the membership only in
4 furtherance of the firm's business. The agreement states
5 that all benefits to be derived from the membership "shall
6 accrue to the Firm." All dues, fines, assessments, and
7 other expenses of maintaining the membership are paid by the
8 firm as a firm expenses, and "[i]nsofar as it is necessary
9 for the protection of creditors of the Firm, the proceeds of
10 the Membership [are] considered assets of the Firm subject to
11 the By-Laws and Rules of COMEX."^{1/} The agreement further
12 provides that the individual agree, upon the occurrence of
13 certain events, to pay the proceeds that are derived from the
14 sale or other disposition of his seat to the firm, or to
15 transfer the seat to the firm's designee. These events
16 typically include termination of the firm membership through
17 dissolution of the firm or other event, the individual's
18 death, or the individual's resignation from the firm.

19 You state that a member firm has membership conferred
20 upon it by one individual member holding two memberships or
21 two individual members (the "conferring members," who are the
22 individual parties to the A-B-C Agreements). These
23 individuals must be approved for membership by the Admissions
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26 ^{1/} Terms of the A-B-C Agreement may vary. You have
27 indicated that some agreements permit use of the membership
28 by the individual for trading for his or her personal profit.
29 In addition, COMEX Rules submitted by you state that a member
30 firm will be responsible for payment of fines imposed upon a
member who has conferred membership privileges on the firm
(i.e., the individual) and the individual will be responsible
for payment of fines imposed upon the firm. Rule
2.32(e)(ii).

3 Committee and Board of the Exchange. At least one of these
4 individuals must be a senior officer of the firm or (in the
5 case of a partnership) the partner responsible for commodity
6 activities, or a senior executive officer or general partner
7 who is authorized by virtue of his or her position to
8 participate meaningfully in the firm's policy-making
9 decisions and operations.^{2/} If one individual is neither of
10 these (assuming two or more individual members), he or she
11 will customarily be an expert with respect to the firm's
12 trading in the COMEX Division. In contrast to other
13 employees and officers of member firms who may have an
14 indirect interest in COMEX trading, "all seatholders
15 generally are specialists or senior managers who know or work
16 regularly in the COMEX Division." Generally, the conferring
17 individuals are the persons in their respective firms who
18 have the most to gain or lose in the success or failure of
19 the exchange. In addition, most of these members earn their
20 livings directly in the trading pits.

21 Under 2 U.S.C. §441b(b)(4)(A)(i), a corporation, or a
22 separate segregated fund established by a corporation, may
23 solicit contributions to such a fund only from its
24 stockholders and their families and its executive and
25 administrative personnel and their families. An exception
26 set forth in 2 U.S.C. §441b(b)(4)(C) and 11 CFR 114.7(a)
27 allows a membership organization (among other corporations
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29 ^{2/} The general partner should also have a substantial
30 investment in the partnership relative to the other partners.

3 without capital stock), or its separate segregated fund, to
4 solicit contributions to the fund from the members of the
5 organization and their families. The Commission's
6 regulations use the term "membership association" to
7 implement this exception. It is defined, in part, as a
8 membership organization that (i) expressly provides for
9 "members" in its articles and bylaws; (ii) expressly solicits
10 members; and (iii) expressly acknowledges the acceptance of
11 membership, such as by sending a membership card or inclusion
12 on a membership newsletter list. 11 CFR
13 100.8(b)(4)(iv)(A)(1), (2), and (3); 114.1(e)(1)(i), (ii),
14 and (iii).

15 The Commission regulations provide guidance as to the
16 definition of the term "members." "Members" means all persons
17 who are currently satisfying the requirements for membership
18 in a membership association, who affirmatively accept the
19 membership association's invitation to become a member, and
20 who meet one of the following requirements:

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

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

4 (iii) Are entitled to vote directly for all of those on
5 the highest governing body of the membership association. 11
6 CFR 100.8(b)(4)(B) and 114.1(e)(2).

7 The regulations also provide that the Commission "may
8 determine, on a case by case basis, that persons seeking to
9 be considered members of a membership association for
10 purposes of this section have significant organizational and
11 financial attachment to the association under circumstances
12 that do not precisely meet the requirements of the general
13 rule." See 11 CFR 100.8(b)(4)(C) and 114.1(e)(3).

14 Advisory Opinion 1994-34 specifically concluded that
15 COMEX was a membership organization for purposes of the Act.
16 COMEX bylaws expressly provide for membership, and membership
17 is explicitly recognized through the granting to members of
18 significant trading rights in commodity exchange contracts.
19 In addition, COMEX has specifically solicited persons to
20 become members. The factors that served as a basis for
21 concluding that the regular members had significant financial
22 attachments to COMEX included: (1) extensive trading rights
23 derived from holding the seat, (2) the fact that the market
24 value of a seat was approximately \$125,000; and (3) rights to
25 "deferred cash payments and pro rata shares of "deferred
26 ticker based payments". In addition, COMEX regular members,
27 while not possessing the right to vote for directors [hence,
28 falling short of membership under 11 CFR 114.1(e)(2)(ii) and
29 (iii)], have the right to vote in certain situations to
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3 protect their financial interests.

4 As indicated above, while the general issue of
5 membership for COMEX Regular Members is resolved, the issue
6 still remains as to who is the solicitable member in the case
7 of memberships beneficially owned by firms. The Explanation
8 and Justification for the membership regulations reaffirms
9 the Commission's past view that "since only one membership
10 exists for each seat on a stock exchange or comparable
11 organization, only one person per seat should be considered a
12 member for section 441b(b)(4)(C) purposes." Commission
13 Regulations on the Definition of "Member," Explanation and
14 Justification, 58 Fed. Reg. 45770, 45773 (August 30, 1993).
15 See Advisory Opinions 1988-39, 1988-38, and 1987-31. See
16 also Advisory Opinion 1994-34.

17 Although the firm provides funds to the individual to
18 purchase the COMEX Division membership, membership is
19 "conferred" upon these firms by the individual member.
20 According to the sample A-B-C agreement, the firm is
21 responsible for paying all dues, fines, assessments, and
22 other expenses. Nevertheless, the financial stake of the
23 individuals is considerable. The individual members holding
24 on behalf of the firm are within the group of persons that
25 has a greater stake in the success of the COMEX Division than
26 others associated with the firm. Furthermore, these persons
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3 most likely earn their living in the trading pits.^{3/}

4 In addition, as members holding seats on behalf of the
5 firm, these persons may have personal trading privileges in
6 the COMEX Division and the NYMEX Division for their own
7 profit, if the A-B-C agreements with their firms permit this.
8 Those persons would also enjoy lower fees on such personal
9 trades as a result of the performance of the Exchange.
10 Regardless of the ability to make personal trades for their
11 own profit, members holding seats on behalf of firms
12 participate in programs providing insurance and retirement
13 benefits.

14 As is the case with the other Regular Members of the
15 COMEX Division, individuals holding memberships on behalf of
16 firms do not have the right to vote for members of the Board,
17 and hence, their membership status could not be based on
18 governance rights. Nevertheless, they may exercise voting
19 rights that protect the trading privileges and seat value
20 underlying their economic stake. For example, NYMEX may not
21 increase the number of COMEX Division memberships (thus
22 diluting the trading value) without a majority vote of COMEX
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24 ^{3/} The financial stake of the individuals is further
25 manifested by provisions in COMEX rules as to the treatment
26 of "failed" firms, e.g., firms that are in bankruptcy, firms
27 that have failed to fulfill an award in arbitration, or firms
28 that are unable to fulfill obligations to other members or
29 member firms or obligations of doing business on the
30 Exchange. If a firm enjoying membership privileges or a
conferring individual fails, the privileges of the firm will
be revoked and the membership of the conferring individual
will be suspended. In addition, all of the firm's remaining
officers or directors, or general partners, who are members
may be suspended from membership. Rule 2.43(c)(2).

3 Division Regular members. Pre-merger COMEX Regular Member
4 trading privileges may not be significantly reduced or
5 terminated without a majority vote (two-thirds vote for
6 allowance of certain competing contracts) of COMEX Regular
7 Members. A two-thirds majority of such members is required
8 to allow new persons to trade contracts historically traded
9 on COMEX. As to each of these issues, individuals holding
10 seats on behalf of member firms have all the voting rights of
11 individual members. Those holding on behalf of firms also
12 vote for the COMEX Governors Committee which advises the
13 COMEX Board on matters uniquely pertinent to COMEX Division
14 Members. Among the committee's powers is the requirement of
15 its consent before the COMEX Board may levy dues and
16 assessments.

17 The foregoing information indicates that individuals
18 holding seats on behalf of member firms have considerable
19 economic interests in COMEX. The situation of these persons
20 is comparable to "nominees," a category of membership in the
21 Chicago Board of Options Exchange ("CBOE") discussed in
22 Advisory Opinion 1987-31. The opinion considered a
23 membership organization that operated as an exchange for the
24 trading of valuable property interests. The entities owning
25 seats on the exchange were required to designate a nominee
26 for each seat or membership owned by the entity. (This
27 nominee was subject to the same approval requirements for
28 membership as applied to any individual member and was
29 authorized to represent the firm in all matters related to
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3 the CBOE.) Nominees were liable for payment of dues, but
4 their member firm might also be liable. The Commission
5 concluded that, since the relevant participatory rights,
6 responsibilities, and financial obligations had been shifted
7 to the nominees, the nominees were solicitable members.
8 The individual holding the COMEX seat on behalf of the member
9 firm has more significant attachments to COMEX than those
10 held by the CBOE nominee group as regards CBOE.^{4/} Although
11 the firm finances the purchase of the membership, the
12 individual "contributes" the use of his or her membership to
13 the firm and, thereby, confers membership privileges on the
14 firm. In addition, COMEX rules require that at least one of
15 the two individual memberships required for a firm to have
16 membership privileges must be a senior executive officer
17 whose position enables him or her to participate in the
18 firm's policy-making and operations or a senior officer
19 responsible for commodities activities. The other members
20 are customarily experts in the firm's COMEX trading. There is
21 no indication in Advisory Opinion 1987-31 that the nominee
22 was someone who already held such a prescribed or otherwise
23 significant position.^{5/}

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25 ^{4/} COMEX does not assess dues at this time. If it does so
26 in the future, the sample A-B-C agreement indicates that the
firm will pay them.

27 ^{5/} In this respect, the individuals at issue in this
28 opinion bear a similarity to the "registered for's" of the
29 CBOE. Those were individual CBOE members or applicants who
30 intended to become or were controlling persons with respect
to firms and who registered their memberships for such firms.
According to the COMEX requirements, it is likely that many

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3 The individual member holding on behalf of the firm
4 exercises trading rights and has a role in protecting those
5 trading rights. In addition, these members come largely from
6 a group that already has a large stake in the affairs of
7 COMEX. Given the considerable economic interests of
8 individuals holding seats on behalf of firms, the Commission
9 concludes that such individuals, not the firms themselves,
10 are solicitable members of COMEX for purposes of the Act. In
11 view of the affiliated status of COMEX and NYMEX, as
12 demonstrated in Advisory Opinion 1994-34, these persons may
13 be solicited for contributions to NYMEX PAC.

14 This response constitutes an advisory opinion concerning
15 application of the Act, or regulations prescribed by the
16 Commission, to the specific transaction or activity set forth
17 in your request. See 2 U.S.C. §437f.

18 Sincerely,

19
20 Danny L. McDonald
Chairman

21 Enclosures (AOs 1994-34, 1988-39, 1988-38, and 1987-31)

22
23 (Footnote 5 continued from previous page)
24 of the individuals conferring membership are in similar
controlling positions.

25 The individuals holding seats on behalf of the firms
26 are distinguishable from the lessees discussed in Advisory
27 Opinion 1994-34 who may be solicitable members, depending
28 upon their assumption of the obligation to pay dues and other
29 assessments. Unlike a lessee, the type of individual at
30 issue in this request confers the use of his membership on
the firm. An arrangement enabling a firm to be a member firm
of an exchange through the membership of an individual is
different from an arrangement whereby one natural person
receives rent from another natural person so that the latter
may trade on the exchange.