



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 21, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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 futures 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 COMEX members also have trading rights with respect to certain new contracts that may be traded in the future on each division. 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 issues of whether natural persons who were COMEX Division Regular Members were "members" of COMEX under the Act and were therefore solicitable for contributions to NYMEX PAC. The Commission concluded that the economic interests of these persons constituted a sufficient financial

attachment so that they qualified as members under the Act. The opinion also stated that, since COMEX, as a subsidiary and division of NYMEX, was affiliated with NYMEX, the COMEX Regular Members were solicitable for contributions to NYMEX PAC.

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

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

You state that a member firm has membership conferred upon it by one individual member holding two memberships or two individual members (the "conferring members," who are the individual parties to the A-B-C Agreements). These individuals must be approved for membership by the Admissions Committee and Board of the Exchange. At least one of these individuals must be a senior officer of the firm or (in the case of a partnership) the partner responsible for commodity activities, or a senior executive officer or general partner who is authorized by virtue of his or her position to participate meaningfully in the firm's policy-making decisions and operations.^{2/} If one individual is neither of these (assuming two or more individual members), he or she will customarily be an expert with respect to the firm's trading in the COMEX Division. In contrast to other employees and officers of member firms who may have an indirect interest in COMEX trading, "all seaholders generally are specialists and senior managers who know or work regularly in the COMEX Division." Generally, the conferring individuals are the persons in their respective firms who have the most to gain or lose in the success or failure of the exchange. In addition, most of these members earn their livings directly in the trading pits.

Under 2 U.S.C. 441b(b)(4)(A)(i), a corporation, or a separate segregated fund established by a corporation, may solicit contributions to such a fund only from its stockholders and their

families and its executive and administrative personnel and their families. An exception set forth in 2 U.S.C. 441b(b)(4)(C) and 11 CFR 114.7(a) allows a membership organization (among other corporations without capital stock), or its separate segregated fund, to solicit contributions to the fund from the members of the organization and their families. The Commission's regulations use the term "membership association" to implement this exception. It is defined, in part, 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. 11 CFR 100.8(b)(4)(iv)(A)(1), (2), and (3); 114.1(e)(1)(i), (ii), and (iii).

The Commission regulations provide guidance as to the definition of the term "members." "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 meet one of the following requirements:

- (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. 11 CFR 100.8(b)(4)(B) and 114.1(e)(2).

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 100.8(b)(4)(C) and 114.1(e)(3).

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

As indicated above, while the general issue of membership for COMEX Regular Members is resolved, the issue still remains as to who is the solicitable member in the case of

memberships beneficially owned by firms. The Commission concludes that conferring members are "members" under 11 CFR 100.8(b)(4)(iv)(B)(1) and 114.1(e)(2)(i) for the following reasons:

(1) The Membership Rules (§ 2.01(a)) only provide for individuals to be members. So called "member firms" are not themselves "members" and only enjoy such "membership privileges" as are conferred upon them by individual "members." The A-B-C agreements, in essence, reflect merely the willingness of individual conferring members to contract away their rights and obligations. Though conferring members ordinarily get "member" status through their member firm, such firms cannot get even membership rights without the actions of conferring members.

(2) The membership privileges of a member firm terminate immediately upon the failure to have at least one conferring member. Membership Rules § 2.40(b) and (d). Where a conferring member "fails," the member firm's membership privileges are automatically revoked. Membership Rules § 2.43(c)(2). Thus, although a conferring member's membership status may be dependent upon the member firm to a significant extent, the converse is true as well.

(3) Although A-B-C agreements generally provide contractually for the member firm to pay for the membership of the conferring member and for fines, the Membership Rules (§ 2.32(e)(ii)) provide, "A member who confers membership privileges on a member firm shall be responsible for payment of fines imposed upon such member firm." Thus, regardless of the terms of the A-B-C agreement, the individual conferring member retains a significant financial obligation vis a vis COMEX under the governing documents.

(4) Conferring members stand to lose their very livelihood if COMEX itself is not successful. Conferring members' jobs and means of economic survival are conditioned on COMEX remaining a viable operation. It is needed to carry on the commodities and futures business. Though this is not an ownership interest like purchasing a seat on the exchange, it reflects a strong financial attachment to the organization.

(5) Conferring members are themselves subject to the various disciplinary rules of COMEX and thereby expose themselves and their member firms to great financial risk should they be suspended. This aspect of industry self-regulation through personal responsibility of those denominated as members by the organization presents an important financial relationship between COMEX and conferring members.

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 1994-34)

1 Terms of the A-B-C Agreement may vary. You have indicated that some agreements permit use of the membership by the individual for trading for his or her personal profit. In addition, COMEX Rules submitted by you state that a member 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).

2 The general partner should also have a substantial investment in the partnership relative to the other partners.