



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 16, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-5

Paul B. O'Kelly, General Counsel
Chicago Mercantile Exchange
30 South Wacker Drive
Chicago, Illinois 60606

Dear Mr. O'Kelly:

This responds to your letter dated April 1, 1997, on behalf of the Chicago Mercantile Exchange ("CME") and its separate segregated fund, the Commodity Futures Political Fund ("the Committee"), regarding whether those CME "members" who lease their seats on the Exchange from the seat owners would be considered members under the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, and could be solicited for contributions to the Committee by CME.

FACTUAL BACKGROUND

CME Organization

You state that CME is a not-for-profit corporation organized under Illinois law that provides markets for the trading of futures contracts and options on futures contracts. It is organized on a non-stock membership basis and governed by a Board of Directors of up to 36 members representing the different divisions and personnel active in CME. There is also an Executive Committee consisting of at least twelve Board members, including its officers, which exercises the authority of the Board in the management of the Exchange when the Board is not in session. CME Rule 217. Within the structure of CME, the committees play a role in the formation of policy through the recommendations they make to the Board. The Chairman of the Board, with Board approval, appoints committee members. With some exceptions, the chairman of each committee must be a Board member. CME Rule 300A.

CME Membership Structure

The CME has four divisions that provide markets in different products, each with a limited number of seats that are the focus for trading on the Exchange. These are: the CME proper with 625 seats, the IMM (International Monetary Market) with 813 seats, the IOM (Index and Option Market) with 1,287 seats, and the GEM (Growth and Emerging Markets) with 123 seats.¹ Each seat is also described as a membership in the CME. However, while ownership of a seat confers membership status, an alternate basis for CME membership lies in the leasing of seats from the owners.²

You state that a lessee becomes a CME member through the same process as an owner of a seat.³ After an application is submitted with the \$1,500 non-refundable fee, the CME Membership Department prepares a report on the applicant's qualifications. CME Rule 105C. The same procedures regarding interviewing, membership committee vote and publication of membership application are followed. CME Rule 108C. A member-lessee must execute a lease of a seat either prior to election to membership or within 30 days thereafter, and the election to membership is vacated if the member-lessee fails to do so within that time limit. CME Rule 105A.

Rights and Obligations of Member-Lessees

The materials included in the request indicate that member-lessees, like all other members, must agree to abide by all Exchange rules and agree to be responsible for any violation of those rules. CME Rule 101. They must take part in the educational programs required of all members.⁴ Member-lessees receive all the mailings to members and may attend members' social functions. However, lessees may not vote in CME elections and may not be elected to the Board of Directors. The lessor of the seat retains the rights to

¹ Your request indicates that GEM began in 1996 with the offering of 50 full seats as well as fractional interests in 417 other seats. There are presently 123 full GEM seats and 163 GEM members holding fractional interests in GEM seats.

² You state that there are currently 1,173 member-lessees: 217 in the CME Division, 285 in the IMM; 628 in the IOM; and 43 in the GEM Division. The terms of the lease are negotiated between the lessor and the lessee. You indicate that in recent weeks, CME seats have been leased for \$3,700-3,900 per month on a six month basis; IMM seats for \$3,550-3,700 per month; IOM seats for \$2,375-2,500 per month and the new GEM seats for \$200 per month. You also state that, in practice, leases run for substantial periods, often several years, and that virtually all lessees remain members for at least a year. CME actively encourages the purchase of seats by lessees through a program where a portion of the lessee's clearing fees is placed in account that can be used by that lessee toward the purchase of a seat.

³ The Commission assumes that only natural persons can become member-lessees. Therefore, this opinion does not consider any possibility that corporate entities might lease seats from CME members. In addition, the Commission assumes that each lease agreement permits only one lessee per seat and that there are no leases which allow two (or more) individuals to share the leased seat on any time sharing basis (for example, lessee A holding the seat for two days per week and lessee B for three different days).

⁴ As a new member, a member-lessee must take part in "Floor orientation programs" which include a written examination. If member-lessees wish to trade on behalf of others, they must also complete a separate program for floor brokers consisting of 18 hours of training. In addition, there is a requirement to attend supplemental educational programs at least once every three years.

vote in CME elections and to run for election to the Board.⁵ The member-lessee has the same right to participate on committees with the same committee voting rights as any other CME member. CME Rule 106D; see also CME Membership Summary, page 3; and CME Informational Manual Rule 106, p. 16-17.⁶

According to CME rules, member-lessees must agree to abide by all Exchange rules and agree to be responsible for any violation of those rules. CME Rule 101.⁷ Lessees, again like all other members, are required under CME rules to submit all disputes arising at the Exchange to binding arbitration. While the lessor is billed for the dues and assessments with respect to the seat, the member-lessee carries several financial membership obligations. Before any member can execute a trade on the trading floor, the member must be guaranteed or "qualified" to trade by a Class A clearing member. The result of the qualification is that the clearing member is made responsible, as a principal, to the clearing house for all trades executed by that member. When the owner subsequently leases the seat to a member-lessee, the member-lessee must be likewise qualified for trading by the lessor's clearing member, or by a clearing member approved by the lessor. CME Rule 106D(7). If the clearing member has indemnified the lessor with respect to the lessee's trading, which you describe as the normal arrangement, then the lessee must either post \$50,000 in cash or readily marketable securities with the clearing member, or the clearing member will be assessed a \$50,000 capital charge by the Exchange.⁸ You explain that virtually all lessees post the cash or securities, which the clearing member retains for the entire period of the lessee's membership.

DETERMINING STATUS OF MEMBER-LESSEES

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

⁵ The lessor retains the actual title to the seat and may sell it at any time. The lessor may also revoke the transfer upon written notice to the membership department and may have the lessee disqualified from trading at any time by giving notice to the lessee's clearing member.

⁶ The member-lessee may not, however, serve on any nominating committee.

⁷ You indicate that violations for various CME rules can carry penalties of expulsion, suspension, and/or a fine not exceeding \$250,000, plus the monetary value of any benefit received as a result of the violation. Minor offenses are punishable by a fine not exceeding \$50,000, plus the monetary value of any benefit received through the violation, or suspension for not more than one year, or both.

⁸ The requirement is \$25,000 for GEM member-lessees.

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 the 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.

On the question of what constitutes membership for purposes of the Act, the Supreme Court has suggested that members of nonstock corporations were to be defined, at least in part, by analogy to stock holders of business corporations and members of labor unions. See *FEC v. National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also *Chamber of Commerce v. FEC*, 69 F. 3rd 600 (D.C. Cir. 1995); *petition for rehearing denied*, 76 F. 3d 1234 (1996).⁹

CME as Membership Association.

The facts and background to this request indicate that CME is a membership organization for purposes of the Act. For example, Chapter 1 of CME Rules meets the requirements of 11 CFR 114.1(e)(1) by expressly providing for membership. All members of CME are granted significant trading rights in the trading of futures contracts and options 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 indicate that CME, in the past, has solicited persons to become members. See 11 CFR 114.1(e)(2).

⁹ In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that significant portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber* at 604. The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, had defined members to mean:

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 had also provided 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).

Member-Lessees as Members of CME

The court in *Chamber* interpreted the *NRWC* decision in order to consider what might constitute a significant organizational attachment for purposes of membership. The court noted that the members of the Chamber of Commerce, a plaintiff in the case, were permitted to serve on policy formulating committees, and that belonging to the American Medical Association (“the AMA”), a second plaintiff, and agreeing to abide by AMA ethical code placed the member-physician under the sanctioning authority of the organization. *Chamber*, at 605. With respect to questions relating to the acceptable range of financial attachment, the court cited favorably the payment of \$1,000 in annual dues and also noted that some members in the Chamber of Commerce paid annual dues to that organization equaling \$100,000. *Id.*

The Commission notes that the rights and duties of member-lessees are similar to those cited with approval by the court in *Chamber*. Member-lessees may serve on policy formulating committees and are subject to sanctions within CME which would impact their professions. They also assume financial obligations with respect to their attachments to CME at a similar level to that noted in *Chamber*. Therefore, the Commission concludes that the specific circumstances of member-lessees within the described organizational structure of CME would qualify them as CME members for purposes of the Act and Commission regulations.¹⁰ Accordingly, as members of CME, member-lessees who are individuals may be solicited by CME and the Committee for voluntary contributions to the Committee. In conducting these contribution solicitations, CME and the Committee 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 and 114.7.

The Commission notes, for your information, that it has received a Petition for Rulemaking to amend its regulations on membership.¹¹

¹⁰ The Commission notes that, in Advisory Opinion 1988-39, it concluded that member-lessees of CME did not have sufficient organizational and financial attachments to CME to qualify them as members of the organization for purposes of the Act and Commission regulations. The Commission also concluded that only one membership in the Exchange existed with respect to each leased membership. These conclusions are superseded by this opinion. Similarly, Advisory Opinion 1987-31, which first presented the one seat, one membership principle, is also superseded to the extent that the attachments of the member-lessees to the exchange described in that opinion are indistinguishable in all material aspects from the attachments considered here with respect to CME. 2 U.S.C. §437f(c)(1). Portions of other opinions, such as Advisory Opinions 1988-38 and 1994-34, are also superseded to the same extent as stated above with respect to Advisory Opinion 1987-31.

¹¹ Following the *Chamber* decision, the Commission received a Petition for Rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Rulemaking Petition, Notice of Availability, published in the *Federal Register* on March 20, 1997, at page 13355 through 13356. The conclusion of this opinion could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a specific date announced in the *Federal Register*. In addition, the Commission's

This response constitutes an advisory opinion concerning the 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)

John Warren McGarry
Chairman

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