



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 31, 1997

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-9

Jan Witold Baran  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Dear Mr. Baran:

This responds to your letter dated May 30, 1997, on behalf of the Chicago Board of Trade ("CBOT") requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of member trader's personal trading accounts for contributions to CBOT's separate segregated fund, the Auction Markets Political Action Committee of the Chicago Board of Trade ("AMPAC").

### ***I. Background***

CBOT is a federally licensed commodity exchange incorporated in Illinois that offers markets in various futures and options on futures contracts. It is a self-regulating membership association that defines its membership categories or "seats" by floor trading privileges. There are four basic market categories: the Agricultural and Associate Market; the Government Interest Market; the Index, Debt, and Energy Market; and the Commodities Options Market. All existing futures and options contracts traded on CBOT are listed in one of these four market categories. Full members of CBOT are entitled to trade on contracts listed in all four market categories and associate members are entitled to trade in the latter three categories. Additionally, there are membership interests for persons who trade in only one of the latter three market categories listed above. Individuals may hold a "membership" by owning a seat, leasing a self-owned or firm-owned seat, or by being the named member on a firm-owned seat (i.e., a "nominee").

CBOT's individual members typically conduct their business through firms which are structured as partnerships, corporations, and limited liability companies. These firms, which assist in clearing the trades executed by the individual members who maintain trading accounts at these firms, are also members of CBOT. CBOT members and clearing member firms are required to pay monthly fees to CBOT depending on the type and amount of trading activity in which they participate.

Under the terms of an agreement CBOT maintains with each of its clearing member firms, CBOT collects these fees by sending each firm a monthly statement indicating how much is owed to CBOT by all individual members who maintain trading accounts at that particular firm.<sup>1</sup> That statement lists the number and types of trades that have been settled through that firm in the previous month. The firms have about two weeks to review their statements, and then the fees are electronically transferred from the firms' bank accounts to CBOT's account. The firms, not CBOT, are responsible for collecting the fees from the individual member traders. In order to facilitate the billing process, traders maintain their own personal trading accounts comprised of their own personal funds on deposit with the trading firms with which they are associated. This account may be used for other third party payments as well. You have attached a sample agreement between a clearing member firm and a member trader, in which the member may check a box authorizing the firm to deduct payments such as insurance, rent, and telecommunications charges from the private account.

### ***Account Description***

You state that the funds and other property maintained in the individual trader's personal account belong to that trader, and no other person or firm has a property interest in those funds.<sup>2</sup> Member clearing firms may themselves serve as direct depositories for customer funds or, pursuant to Federal regulations, may commingle such funds with those of other customers for secondary deposit with banks or financial institutions. See 17 CFR 1.20 (Regulations of the Commodity Futures Trading Commission). However, Federal regulations require that funds held by clearing member firms for their customers, including member traders trading for themselves, be segregated from other accounts held by the firm and separately accounted for with respect to each customer. See 7 U.S.C. §6d (1983); 17 CFR 1.20. The funds must be kept under an account name that identifies them as the funds of an individual customer and shows that they are segregated as required by the Commodity Exchange Act. 7 U.S.C. §1 *et seq.*, and Commodity Futures Trading Commission Regulations. Member firms may not use customer funds except as directed by the customer who deposited the funds (and pursuant to the agreement entered

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<sup>1</sup> As part of your request, you have included sample agreements between a CBOT member trader and a clearing member firm. You state that, while each member firm has its own contracts with the members who have trading accounts at the firm, the member firms are all subject to the same Federal requirements, and thus the agreements are relatively standardized. The Commission assumes that these agreements are representative of the agreements governing the accounts at issue in this opinion.

<sup>2</sup> The Commission thus assumes that these are accounts by which the member trader conducts transactions for himself or herself and not for any of the trader's customers.

into with that customer). No agreement with a customer can alter or limit the previously-noted separation requirements. Member firms are required to maintain detailed records of the customer funds, which can only be invested in obligations of the United States, the various States and their political subdivisions, or in obligations fully guaranteed as to principal and interest by the United States. 17 CFR 1.25 and 1.27.

You note that many, if not all, transactions made on CBOT are made on margin, and that instances do occur when a trader may be short of his margin requirements. According to the sample “Customer Account Agreement” between the individual trader and the member firm, the trader is obligated to “maintain such margin and collateral as [the firm] may require from time to time and will pay on demand any amount owing with respect to any of [the trader’s] accounts,” and the trader “understands that [the firm’s] margin requirements may exceed those set by any exchange and may be increased without prior notice, including with respect to existing positions.” Article 2.

When the trader falls short of the margin requirements, the clearing firm, which guarantees the trades of the traders who clear their trades through that particular firm, notifies the trader that additional funds must be added to the trader’s account within a short, fixed period of time. This notification is referred to as a “margin call,” and the amount of time given to the trader to provide additional funds is one hour, although the clearing firm may give more or less time based on variables determined by the firm (*i.e.*, the amount of time the clearing firm has carried the trader’s account, the trader’s net worth, reliability, etc.).

In addition to the margin requirements set by CBOT, and by the member firm, the member firm requires the trader to sign an agreement with respect to “additional risk/margin guidelines.” This agreement provides that “[a]ccounts which fail to abide by these guidelines may be deemed by [the firm] as not having sufficient margin.”<sup>3</sup>

In the event the trader does not respond to a margin call for additional funds or does not comply with the additional risk/margin guidelines (e.g. where the account is “running a debit” or has open positions exposing the account to an unacceptable level of risk), the firm has the right, under the two above-described agreements, to protect itself from loss by liquidating, adjusting or offsetting a trader’s account positions, which contain the trader’s open contracts, *i.e.*, the futures or options on futures contracts which the trader has either bought or sold at CBOT. When a clearing firm resorts to these remedies, the trader is entitled to whatever profits, and responsible for any losses, that

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<sup>3</sup> Among these additional guidelines are the following: (1) The risk exposure in the account shall not exceed the current net liquidating balance in the account, given a market move of +/- 1, 2, or 3 standard deviations. (2) With respect to customers (in this case, the trader) trading “index related products,” assuming a market gap of +/- 20 percent, the account’s risk exposure shall not exceed 120 percent of the net liquidating balance with a maximum risk exposure limited to one million dollars above the net liquidating balance. (3) Should the account result in a deficit net liquidating balance, the firm may require the customer to sign documentation acknowledging his obligation to the firm, and the firm may restrict trading activity until the receipt of the documentation. (4) The firm may restrict the customer’s ability to place opening trades if the account is in a deficit net liquidating position.

may arise from the adjustment. In a more extreme remedy, the clearing firm has the option of forcing the sale of a trader's membership to cover a trader's debit to the firm if the member is the owner of the membership. You state that it is not common in the industry, however, for a firm to liquidate a trader's positions. When the account is running a debit or is exposed to too much risk, an additional margin call is the more likely remedy.

This process requires the clearing firm, which is liable to the CBOT clearinghouse for the debits of the traders who carry accounts at the clearing firm, to monitor closely the trading positions of each account at the firm. You note that, under clause 3 of the customer account agreement, the clearing firm protects itself further by holding a "lien" on other property of the trader which is being held by the clearing firm. This property could include, but is not limited to, cash, securities, or credit balances, and is available to the clearing firm to cover deficits in a trader's account.

### ***PAC Contribution Process***

CBOT wishes to collect voluntary contributions to AMPAC from its member traders at the consenting clearing member firms through the same mechanism used in collecting exchange fees on a monthly basis; that is, through electronic deduction from the member firm accounts. You state that the participating traders would be members "as defined by the Commission in Advisory Opinion 1997-5, and in Advisory Opinion 1988-38, to the extent not modified by Advisory Opinion 1997-5." The Commission interprets this to mean those individuals that were construed to be members under the Act in Advisory Opinion 1988-38 (an opinion issued to CBOT), as well as any other individual members whose situation is materially indistinguishable from the individual members of the Chicago Mercantile Exchange ("CME") who were construed to be solicitable members in Advisory Opinion 1997-5.

CBOT would do this by first soliciting the individual traders who are its members. You have attached an authorization form to be signed by the trader authorizing a monthly deduction from his account at a specified daily rate. The form presents four suggested daily rates ranging from fifty cents to ten dollars and provides an option for another daily rate. The form makes clear that the listed rates are merely suggestions; that the trader is free to contribute more, less, or not at all; and that the trader will not be favored or disadvantaged by reason of the amount contributed or the decision not to contribute. The form states that the contributions will be collected at the same time as the exchange service fees and that this deduction program will continue until the trader provides written revocation to the member firm or CBOT, which the trader may do at any time.

Once an individual trader gives AMPAC written authorization, CBOT would present the clearing member firm with the trader's instructions. The clearing member firm would then deduct that amount from the individual trader's personal account with that firm on a monthly basis and hold those funds in a bank account for transmittal to

AMPAC at the end of that day. The firm would then notify CBOT of the contributions received from contributing traders, and, pursuant to an authorization from the member firm, the firm's bank would electronically transfer the amounts, along with the regular monthly exchange fees, to a CBOT bank account. Then, the portion of the deduction which consists of member contributions to AMPAC would be automatically transferred directly to AMPAC's bank account.

If, pursuant to an individual's authorization, a clearing member firm deducts a contribution from the individual account and then discovers at the close of that business day (when the accounts are reconciled) that the account does not have a positive balance sufficient to make the contribution, the firm will not forward to CBOT any contribution for AMPAC. You state that a "positive balance" means that the individual has personal assets on deposit in the account which are greater than any existing liabilities, including margin debt and that, therefore, AMPAC will never receive any funds from an individual which are drawn on credit or on an account with a debit balance.

You note that the contributions received will be deducted from the trader's personal account by the clearing member firm prior to the transfer to CBOT's bank account. The program is designed so that member firms will not first provide the contributions and then deduct from the accounts of its individual traders after the transfer to AMPAC.

You specifically ask whether the costs of implementing and administering the above-described process constitute administrative or solicitation costs that may be paid by CBOT pursuant to 2 U.S.C. §441b(b)(2)(C), and whether corporate members of CBOT may also avail themselves of that provision and pay such costs. The Commission views this request as presenting two questions: (1) whether contributions to AMPAC may be made from the member trader's account, and (2) assuming an affirmative answer to the first question, whether the proposed deduction system may be implemented.

## ***II. Legal Analysis***

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).

A corporation without capital stock, or a separate segregated fund established by such a corporation, may solicit voluntary contributions to the fund from the corporation's members. 2 U.S.C. §441b(b)(4)(C); see also 2 U.S.C. §441b(b)(3) and 11 CFR 114.5(a). 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. For such definitional purposes, the Commission assumes that CBOT is indistinguishable from CME, another commodities exchange discussed in Advisory Opinion 1997-5, and that CBOT is thus a membership organization.

As indicated above, the member traders at issue are the same group construed to be members in Advisory Opinion 1988-38, plus any other traders whose relationships and attachments to CBOT are materially indistinguishable from those of the individuals deemed to be members of CME in Advisory Opinion 1997-5. Such traders may participate to the extent the Commission approves the proposed check-off. See below.

#### *A. Use of Member Trader's Account for Contributions*

The permissible use of a member trader's account for monthly check-off contributions to AMPAC depends upon whether the funds deducted are the personal funds of the trader.

One concern is the fact that the funds of the traders are commingled with the funds of the firm's other customers in a firm bank account. However, you note that, pursuant to statutory and regulatory obligations, the firm keeps the trader's funds under a distinct account name and the funds of each customer are separately recorded for bookkeeping purposes. In this narrow respect, the firm performs a function similar to a bank.

Notably, the firm, pursuant to the agreements entered into with the trader, has some degree of administrative control over the accounts. However, this administrative control appears to be for the purpose of protecting itself from ultimately paying for losses incurred by the trader. The margin requirements, along with the additional requirements to prevent the individual account itself from excessive exposure to risk, ensure that it is the trader's funds that pay the obligations.<sup>4</sup>

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<sup>4</sup> The Glossary of the Commodity Futures Trading Commission defines "margin" as follows:  
The amount of money or collateral deposited by a customer with his broker, by a broker with a clearing member, or by a clearing member with the clearinghouse, for the purpose of insuring the broker or clearinghouse against loss on open futures contracts. The margin is not partial payment on a purchase. (1) Initial margin is the total amount of margin per contract required by the broker when a futures position is opened; (2) Maintenance margin is a sum which must be maintained on deposit at all times. If the equity in a customer's account drops to, or under, the level because of adverse price movement, the broker must issue a margin call to restore the customer's equity. See **Variation Margin**. (Emphasis and bolding in original.) [For clarification purposes, the Commission notes that this proposal entails the member trader as both a customer and broker for himself dealing with the clearing member.]

*The CFTC Glossary: A Layman's Guide to the Language of the Futures Industry* (1997), at 26.

For purposes of the Act, the Commission views the trader's adherence to the margin requirements of CBOT and the firm and the additional margin/risk guidelines discussed above and detailed in footnote 3, as essential to ensuring that the firm is not extending credit to the trader or advancing firm funds to the trader and thus making the contribution itself.<sup>5</sup> Any amounts of margin owed, but not paid in, by the trader and any other amounts that the agreements require to be in the account to avoid excessive risk exposure (including, but not limited to, the maintenance of sufficient amounts for a surplus liquidating balance) that are not paid in by the trader, would be amounts that are covered by the firm for the time being and are not the personal funds of the trader. Therefore, at the time the contribution is sent to CBOT, the trader should satisfy all the margin and risk exposure requirements and all other currently owed obligations (e.g., the exchange fees and other third party payments such as for insurance, rent, and telecommunications charges) and still have enough left over to cover the contribution amount.<sup>6</sup> In this way, the firm will avoid making, and AMPAC will avoid receiving, a prohibited corporate contribution, if the firm is incorporated, or a possibly excessive contribution, if it is a partnership or an LLC. See 2 U.S.C. §§441b(a), 441a(a)(1)(C), 441a(f) and 11 CFR 110.1(e). In addition, the firm will avoid making a contribution in the name of the trader. See 2 U.S.C. §441f.

You have stated that the deduction of exchange fees from the firm's bank accounts is based on the trades that have gone through the firm in the previous month and occurs after the firm reviews the account for a two week period. The Commission assumes from the description of your plan that the contributions, which will be transferred to CBOT with the exchange fees, will be sent to CBOT based upon the status of the account at the time of that transfer, and not any period prior to that. This is because of the volatility of the market and the possibility that an account that satisfied the

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The Glossary defines "variation margin" as "[p]ayment made on a daily or intraday basis by a clearing member to the clearing organization based on adverse price movement in positions carried by the clearing member, calculated separately for customer and proprietary positions." *Id.*, at 41.

The Commission assumes that the margin payments from the trader to the member firm cover the amounts of the margin payments made by the firm to the CBOT clearinghouse. This appears to be reflected in your statement that the firm is liable to the clearinghouse for the debits of the traders who carry accounts at the firm.

As indicated in the statement that a margin payment is not a partial payment on a purchase, margin in the futures market differs from margin in the stock markets. Margin in the stock market is viewed as a downpayment by the customer where credit is extended by the broker-dealer through holding the purchased securities as collateral. Margin on a futures contract "represents a performance bond intended to ensure the performance of *both parties* to a futures contract." (Emphasis in original.) Thomas A. Russo & Marlisa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 Tex. L. Rev. 1431 app. at 1534-5 (1991).

<sup>5</sup> See footnote 1.

<sup>6</sup> The Commission notes that the additional margin/risk guidelines agreement states that accounts failing to abide by these guidelines "may be deemed by [the firm] as not having sufficient margin," and then the firm has the authority to liquidate or adjust positions. (Emphasis added.) For the purposes of assuring that there is not, in effect, an advance of funds by the firm for contributions, the Commission assumes that the firm will deem any failure to abide by the guidelines as not having sufficient margin and will compel the trader to meet the guidelines (and have the necessary surplus) before the contribution to AMPAC is sent to CBOT.

above-described margin and risk requirements earlier that day may no longer do so at the time of the contribution.

Based on the foregoing, the Commission concludes that the trader's account may be used for contributions to AMPAC if the prescribed conditions are met.

### ***B. Implementation of Proposed Deduction System***

Your plan entails the deduction of funds from trading accounts on deposit with the member firms and the transmittal of such funds, along with exchange fees, to CBOT. CBOT then separates the contribution funds from the exchange fee funds and transfers them to AMPAC's account. In doing so, CBOT will perform the functions of a collecting agent.

A collecting agent is defined in 11 CFR 102.6(b) as an organization or committee that collects and transmits contributions to one or more separate segregated funds to which the collecting agent is related. A collecting agent may be either: (1) a committee affiliated with the separate segregated fund ("SSF"); (2) the connected organization of the SSF as defined in 11 CFR 100.6; (3) a parent, subsidiary, branch, division, department, or local unit of the SSF's connected organization; or (4) a local, national, or international union collecting contributions on behalf of the SSF of an affiliated labor federation. 11 CFR 102.6(b)(1)(i)-(iv). A collecting agent, if it is an unregistered organization, that follows the procedures set out in 11 CFR 102.6(c), is not required to register and report as a political committee, provided that the organization does not engage in other activities such as making contributions for the purpose of influencing elections. 11 CFR 102.6(b)(2).

The collecting agent may pay any or all costs incurred in soliciting and transmitting contributions to the SSF. 11 CFR 102.6(c)(2)(i). Commission regulations also provide that a contributor may combine a payment of dues or other fees with the contribution to the SSF. Specifically, the regulations refer to one check representing both the contribution and the other fees that a contributor may write so long as it is drawn on his or her personal account or a non-repayable corporate drawing account of the individual. 11 CFR 102.6(c)(3). The full amount of each contribution collected by the collecting agent shall be transmitted to the SSF within 10 or 30 days of the collecting agent's receipt as required by 11 CFR 102.8. 11 CFR 102.6(c)(4). Contributions of \$50 or less shall be forwarded no later than 30 days after the collecting agent's receipt, and contributions above \$50 shall be forwarded within ten days. 11 CFR 102.8(b)(1) and (2).

As the connected organization of AMPAC, CBOT may function as a collecting agent for contributions from the member traders. Moreover, the collection of the contributions along with the exchange fees is permissible under 11 CFR 102.6(c)(3). Although the contribution will not be in the form of a check, your proposal entails the same protections as this regulation. See Advisory Opinion 1990-4 (where members' combined dues payments to the connected corporation along with their SSF contributions

by credit card were addressed). If the conditions discussed above are met, the funds that will be contributed are the personal funds of the trader and not funds that represent advances by, or extensions of credit from, the member firm.

The member firm of CBOT is also involved in the process of transmitting the trader's contributions to AMPAC. It is not, however, a connected organization of AMPAC, which would be able to engage in exempt activities under 2 U.S.C. §441b(b)(2)(C), nor does it otherwise qualify as a collecting agent under 11 CFR 102.6(b)(1). Therefore, the transmittal and account review functions that it performs would entail in-kind contributions subject to the Act's prohibitions (in the case of incorporated firms) or limitations (in the case of partnerships and limited liability companies), unless either another exemption applies or CBOT pays for such services.

Under the Act and Commission regulations, legal and accounting services rendered to a political committee are not contributions if the person paying for such services is the regular employer of the individual rendering the services and if such services are solely to ensure compliance with the Act or the presidential campaign funding provisions in title 26. 2 U.S.C. §431(8)(B)(ix)(II); 11 CFR 100.7(b)(14). As indicated above, the member firm must review the member's personal trading account to determine whether the trader is maintaining sufficient funds or assets in excess of the margin requirements (including the requirements ensuring against risk) and other payment obligations due at that time (including exchange fees payable at the time and other amounts such as insurance, rent, and telecommunications charges), to make the monthly contribution. The review of each trader's account to ensure that the funds being contributed are the trader's personal funds, and not funds that are advanced by the firm, would be for the purposes of ensuring compliance by AMPAC with the Act's prohibitions on the receipt of corporate or excessive contributions and contributions in the name of another. See 2 U.S.C. §§441a(a)(1)(C), 441a(f), 441b, and 441f. Moreover, setting up the process for deducting contributions from the trader's accounts and sending them to CBOT, which includes, as an integral part, a method for ensuring that sufficient funds are available, would also be for the purpose of ensuring AMPAC's compliance. Hence, the costs of the performance of the foregoing functions by the firm's regular employees; that is, salary and other compensation to the employee for the hours worked and cost of the use of the firm's facilities; would be exempt from the definition of contribution.

CBOT or AMPAC will have to contact each member firm whose employees are providing such services to ascertain the cost of the services.<sup>7</sup> Although the value of the services are not contributions, the amounts are reportable on Schedule A of AMPAC's reports as memo entries. Such entries shall include the amounts paid by the firm, the

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<sup>7</sup> The set-up of the process for deducting and transmitting the contributions (and other contribution-related system costs that arise periodically) will most likely entail modifications and adjustments to the existing process for payment of CBOT fees, rather than setting up an entirely new process. Therefore, in determining the cost of the services provided by the member firm, the costs related to the changes, not the total cost of the process whereby both fees and contributions are deducted, is the relevant amount.

date the services were performed, and the name of each person performing such services. 11 CFR 104.3(h).

As an alternative to treating the expenses discussed above as reportable legal and accounting compliance costs, CBOT may treat these expenses as exempt administrative costs under 2 U.S.C. §441b(b)(2)(C) if it pays the member firms for them. CBOT may pay the member firm on a periodic basis for the actual costs incurred by the firm. If the precise actual costs will be difficult to determine, CBOT may instead contract with the member firm for an amount based on a reasonable estimate of the anticipated cost of such services, and thereafter pay that amount.

Based on the foregoing analysis, and subject to the conditions set out above, the Commission concludes that CBOT and its clearing member firms may implement the proposal.

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)

John Warren McGarry  
Chairman

Enclosures (AOs 1997-5, 1990-4, and 1988-38)