

February 6, 2009

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2008-21 is available for public comments under this procedure. It was requested by Lawrence M. Noble, Esq. and Patricia M. Zweibel, Esq., on behalf of CME Group, Inc.

Draft Advisory Opinion 2008-21 is scheduled to be on the Commission's agenda for its public meeting of Thursday, February 12, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on February 11, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

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To obtain copies of documents related to AO 2008-21, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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2009 FEB -6 P 4: 01

February 6, 2009

MEMORANDUM

AGENDA ITEM
For Meeting of: 2-12-09

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2008-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 12, 2009.

Attachment

1 ADVISORY OPINION 2008-21

2
3 Lawrence M. Noble, Esquire
4 Patricia M. Zweibel, Esquire
5 Skadden, Arps, Slate, Meagher & Flom, LLP
6 1440 New York Avenue, N.W.
7 Washington, D.C. 20005

DRAFT

8
9 Dear Mr. Noble and Ms. Zweibel:

10 We are responding to your advisory opinion request on behalf of CME Group, Inc.
11 concerning the application of the Federal Election Campaign Act of 1971, as amended (the
12 "Act"), and Commission regulations to the ability of CME Group, Inc. to solicit individuals
13 whom CME Group, Inc. regards as members¹ of its wholly owned mercantile exchanges for
14 voluntary contributions to CME Group, Inc.'s separate segregated fund, CME Group, Inc. PAC
15 (CME/CBOT PAC) (hereafter "CME Group, Inc. PAC"), regardless of whether such members
16 own shares of stock in CME Group, Inc.

17 The Commission concludes that CME Group, Inc. may solicit voluntary contributions to
18 CME Group, Inc. PAC from certain categories of members of two of its wholly owned
19 exchanges, the Chicago Board of Trade ("CBOT") and the New York Mercantile Exchange
20 ("NYMEX"), as described below, regardless of whether such members own shares of stock in
21 CME Group, Inc. The Commission concludes that CME Group, Inc. may also solicit members
22 of its third wholly owned mercantile exchange, the Chicago Mercantile Exchange ("CME"), but
23 only in their capacity as holders of stock in CME Group, Inc.

24 ***Background***

25 The facts of this request are based on your letter and attachments received on

¹ That the exchanges regard these individuals as members pursuant to their own governing documents does not resolve the question of whether such members qualify as "members" as that term is used in Commission regulations. To avoid confusion, in this advisory opinion the Commission will employ the term "members" in quotation marks to mean "members" as defined by Commission regulations.

1 November 26, 2008, on e-mails received on December 9, 2008 and January 13, 2009, telephone
2 conversations with Commission attorneys, and information available on publicly accessible
3 websites.

4 Prompting this request is a recent series of mergers resulting in the association of three
5 formerly independent, incorporated mercantile exchanges. These exchanges, which are all still
6 incorporated, are the Chicago Mercantile Exchange (“CME”), the Chicago Board of Trade
7 (“CBOT”), and the New York Mercantile Exchange (“NYMEX”). The three exchanges are now
8 wholly owned subsidiaries of the requestor, CME Group, Inc. – a Delaware corporation.²

9 Some, but not all, members of each of the three exchanges own stock in CME Group,
10 Inc., the parent corporation.³ CME Group, Inc. wishes to solicit not only the members of the
11 exchanges who qualify as CME Group, Inc. stockholders under Commission regulations for
12 voluntary political contributions, but also certain categories of members of the exchanges, as
13 described below, who are not CME Group, Inc. stockholders for contributions.

14 ***Question Presented***

15 *May CME Group, Inc. solicit voluntary contributions to CME Group, Inc. PAC from*
16 *certain categories of members of its wholly owned mercantile exchanges (CME, CBOT, and*
17 *NYMEX), as described below, regardless of whether such members also hold stock in CME*
18 *Group, Inc.?*

² This ownership structure resulted from two mergers. First, the incorporated holding companies of CME and CBOT merged in 2007 to form CME Group, Inc.. Second, a CME Group, Inc. subsidiary merged with NYMEX’s holding company in August 2008 to create a new, wholly owned CME Group, Inc. subsidiary that in turn wholly owns NYMEX.

³ CME Group, Inc. issues two classes of stock. Class A common stock is publicly traded on the NASDAQ. Class B common stock is not traded publicly. It is owned exclusively by CME seatholders. See *Exhibit 24, CME Group Certificate of Incorporation, Article IV and Division B, Subdivision 2, Section 2*. Each seat in CME is associated with a single share of class B common stock in CME Group, Inc., and holding a seat in CME is inseparable from ownership of the share. *Id.*

1 ***Legal Analysis and Conclusion***

2 CME Group, Inc. may solicit voluntary contributions to CME Group, Inc. PAC from
3 certain categories of members of CBOT and NYMEX, as described below, regardless of whether
4 such members also hold stock in CME Group, Inc. These categories are: (1) outright owners of
5 seats on the exchanges, including owners who lease their seats to others (“lessors”), (2) owners
6 of seats who temporarily transfer their memberships to others (“temporary transferors”), and (3)
7 certain individuals who do not own seats, but who hold them and exercise membership rights
8 associated with them on behalf of others (“temporary transferees”). However, CME Group, Inc.
9 may only solicit voluntary contributions to CME Group, Inc. PAC from members of CME in
10 their capacity as stockholders in CME Group, Inc.

11 Generally, under the Act and Commission regulations, a corporation may not contribute
12 to political committees from its general treasury funds. 2 U.S.C. 441b(a); 11 CFR 114.2(a). As
13 an exception to this prohibition on corporate contributions, a corporation is permitted to use its
14 general treasury funds to establish and administer an SSF, which may accept voluntary
15 contributions from individuals and make contributions to political committees. 2 U.S.C.
16 441b(b)(2)(C); 11 CFR 114.5(b). The Act and Commission regulations delineate the types of
17 persons who may be solicited for contributions to SSFs such as CME Group, Inc. PAC. Such
18 persons comprise the corporation’s “solicitable class.” 2 U.S.C. 441b(b)(4); *see also* 11 CFR

19

1 114.1(j).⁴

2 The solicitable class of a corporation includes its stockholders⁵, its executive and
3 administrative personnel, and their families. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.1(j). The
4 solicitable class of incorporated “membership organizations,” a type of organization, such as a
5 trade association, cooperative, corporation without capital stock, or a local, national, or
6 international labor organization, which is membership-based rather than stockholder-based,
7 includes its “members,” as well as its executive and administrative personnel, and their families.
8 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.1(e)(1), (2), and (3).

9 Commission regulations provide that a corporation’s solicitable class also includes the
10 executive and administrative personnel, and the families of those personnel, of its subsidiaries or
11 other affiliates. *See* 11 CFR 114.5(g)(1). Under Commission regulations, SSFs, and the
12 corporations or other entities that directly or indirectly establish, finance, maintain or control
13 those committees, are “affiliated” with each other. *See* 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g).
14 Affiliated committees share contribution limits and may transfer funds freely among themselves.
15 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 11 CFR 102.6(a)(1), 110.3(a)(1) and 110.3(c)(1). As
16 discussed in further detail below, the Commission has interpreted section 114.5(g)(1) in its

⁴ Section 114.1(j) uses a different term, “restricted class,” to describe the group of people who may receive express advocacy communications from a stock corporation and receive solicitations for contributions to the corporation’s SSF. However, with respect to membership organizations, section 114.1(j) distinguishes between the persons who may receive express advocacy communications and those who may be solicited, and refers to the latter group as the “solicitable class”. For example, a corporation that is a member of a membership organization may receive an express advocacy communication from the membership organization (*i.e.*, to one or two normal representatives of the member), but may not be solicited for a contribution to the membership organization’s SSF. *See* 11 CFR 114.7(b); Advisory Opinion 1996-21. In this advisory opinion, the Commission uses the term “solicitable class” to refer generally to the persons whom a corporation may solicit for contributions to its SSF.

⁵ A “stockholder” is a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted, if it is voting stock, and has the right to receive dividends. 11 CFR 114.1(h).

1 advisory opinions to include the entire solicitable class of a subsidiary or other affiliate in the
2 corporation's solicitable class. *See, e.g.* Advisory Opinion 2003-28 (Horizon Lines).

3 Consequently, based on the above legal principles, the question CME Group, Inc.
4 presents may be resolved into four subsidiary questions: (1) Do CME, CBOT and/or NYMEX
5 qualify as "membership organizations" that have "members" under the Act and Commission
6 regulations? (2) If one or more of the exchanges does not qualify as a "membership
7 organization," then do the individuals of the non-qualifying exchanges who own stock in CME
8 Group, Inc. qualify as "stockholders" and therefore qualify as solicitable under the Act and
9 Commission regulations? (3) Are the three exchanges "affiliated" with CME Group, Inc.? (4)
10 Are the categories of "members" described below, or "stockholders," of the three exchanges part
11 of CME Group, Inc.'s "solicitable class?"

12 1. *Do CME, CBOT, and/or NYMEX qualify as "membership organizations" that have*
13 *"members" under the Act and Commission regulations?*

14 a. Are the Exchanges "Membership Organizations?"

15 CBOT and NYMEX qualify as "membership organizations" with "members," but CME
16 does not qualify as a "membership organization."

17 Commission regulations define a "membership organization" as a "trade association,
18 cooperative, [or] corporation without capital stock" that:

- 19 (i) Is composed of members, some or all of whom are vested with the power and
20 authority to operate or administer the organization, pursuant to the
21 organization's articles, bylaws, constitution or other formal organizational
22 documents;
23
24 (ii) Expressly states the qualifications and requirements for membership in its
25 articles, bylaws, constitution or other formal organizational documents;
26

1 (iii) Makes its articles, bylaws, constitution, or other formal organizational
2 documents available to its members upon request;

3
4 (iv) Expressly solicits persons to become members;

5
6 (v) Expressly acknowledges the acceptance of membership, such as by sending a
7 membership card or including the member's name on a membership
8 newsletter list; and

9
10 (vi) Is not organized primarily for the purpose of influencing the nomination for
11 election, or election, of any individual to Federal office.

12
13 11 CFR 114.1(e)(1)(i)-(vi) and 100.134(e)(1)-(6). An entity must meet all six criteria in 11 CFR
14 114.1(e)(1) and 100.134(e) to qualify as a "membership organization."

15 The three mercantile exchanges (CME, CBOT and NYMEX) are all corporations.

16 *See Certificates of Incorporation, Exhibits 7 (CME), 14 (CBOT) and 27 (NYMEX).* Neither
17 CBOT nor NYMEX issues capital stock. *See Certificates of Incorporation, Exhibit 14, Article*
18 *IV A (CBOT) and Exhibit 27, Article IV A (NYMEX).* CBOT and NYMEX are "corporations
19 without capital stock" and therefore satisfy the threshold condition as to the type of organization
20 that qualifies as a membership organization.

21 CME, however, has the authority to issue 1,000 shares of capital stock (each having a par
22 value of one cent). *See Exhibit 7, CME Certificate of Incorporation, Fourth Article.* Currently,
23 CME has issued 100 shares of capital stock, all of which are held by CME Group, Inc. Because
24 CME has the authority to issue capital stock and has in fact issued stock to CME Group, Inc., the
25 Commission concludes that CME is not a "corporation without capital stock" under the
26 regulation, and therefore is not a membership organization.

27 The facts presented indicate that CBOT and NYMEX meet the six enumerated
28 requirements of membership organizations. First, as required by 11 CFR 114.1(e)(1)(i), CBOT
29 and NYMEX are composed of members, at least some of whom, as discussed below, are

1 “members” under Commission regulations. At least some of these members also are vested with
2 the power and authority to govern those organizations. CBOT and NYMEX are both governed
3 by CME Group, Inc.’s 33-member Board of Directors.⁶ Each exchange is entitled to designate
4 members to serve as voting members of CME Group, Inc.’s Board of Directors. *Exhibit 24,*
5 *CME Group Certificate of Incorporation, Article Five, Paragraph (A); Exhibit 26, CME Group-*
6 *NYMEX Holdings Merger Agreement.* As the highest governing body of each exchange, the
7 Board is empowered to make policy for both of them. This power includes: (1) establishing
8 rules concerning exchange operations; (2) fixing and assessing membership dues, fees, and
9 assessments; (3) determining what commodities will be traded, by which division they will be
10 traded, and at what times they will be traded; and (4) conducting investigations of members for
11 misconduct or other violations of the rules, acting in a judicial capacity respecting charges
12 brought against members, and sanctioning members for violating the rules. *See Exchange*
13 *Rulebooks, Exhibit 10, Rule 230 (CBOT); and Exhibit 18, Rule 230A (NYMEX).*

14 Second, the Rulebooks of CBOT and NYMEX expressly state the requirements and
15 qualifications for membership, which is required by 11 CFR 114.1(e)(1)(ii). *See Exchange*
16 *Rulebooks, Exhibit 9, CBOT, Rules 101, 103, and 105; Exhibit 17, NYMEX, Rules 2.00 and 2.09.*

17 Third, as required by 11 CFR 114.1(e)(1)(iii), CME Group, Inc. makes CBOT’s rules available
18 to its members on its website, and NYMEX does the same on its website, and also upon request.

19 Fourth, CBOT and NYMEX expressly solicit membership, as required by 11 CFR
20 114.1(e)(1)(iv), by advertising the benefits of membership on their websites and inviting
21 applications. Fifth, in compliance with 11 CFR 114.1(e)(1)(v), CBOT and NYMEX formally

⁶ CME is governed by the same Board of Directors; however it is not included in the analysis that follows because the Commission has concluded that CME cannot qualify as a membership organization on account of its issuance of capital stock.

1 acknowledge the fact of an individual's membership by virtue of the exchanges' detailed
2 procedures for applying for membership and for approving membership. *See Exchange*
3 *Rulebooks, Exhibit 9, CBOT, Rule 105; Exhibit 17, NYMEX, Rules, 2.03 – 2.09.* In addition,
4 CBOT and NYMEX provide jackets or badges to new members that permit access to the trading
5 floor. *See Exchange Rulebooks, Exhibit 12, Rule 513 (CBOT), and Exhibit 17, Rule 2.27(C)*
6 *(NYMEX).* Finally, in accordance with 11 CFR 114.1(e)(1)(vi), CBOT and NYMEX were
7 organized and continue to operate as trading organizations providing markets for the trading of
8 futures contracts and options on futures contracts and are not organized primarily for the purpose
9 of influencing Federal elections.

10 **b. Persons who are "Members" of CBOT and NYMEX**

11 Commission regulations provide that the term "members" includes all persons who are
12 currently satisfying the requirements for membership in a membership organization,
13 affirmatively accept the membership organization's invitation to become a member, and either:

14 (i) Have some significant financial attachment to the membership organization, such as a
15 significant investment or ownership stake; or

16
17 (ii) Pay membership dues at least annually, of a specific amount predetermined by the
18 organization; or

19
20 (iii) Have a significant organizational attachment to the membership organization which
21 includes: affirmation of membership on at least an annual basis; and direct participatory
22 rights in the governance of the organization. For example, such rights could include the
23 right to vote directly or indirectly for at least one individual on the membership
24 organization's highest governing board; the right to vote directly for organization officers;
25 the right to vote on policy questions where the highest governing body of the membership
26 organization is obligated to abide by the results; the right to approve the organization's
27 annual budget; or the right to participate directly in similar aspects of the organization's
28 governance.

29 11 CFR 114.1(e)(2)(i)-(iii) and 100.134(f)(1)-(3).
30

1 The Commission may also determine on a case-by-case basis that individuals who do not
2 precisely satisfy the above requirements nevertheless qualify as “members,” provided that such
3 individuals demonstrate a “relatively enduring and independently significant financial or
4 organizational attachment to the organization.” *See* 11 CFR 114.1(e)(3) and 100.134(g). As
5 examples, these regulations identify long term dues paying members who qualify for lifetime
6 membership status with little or no dues obligation, and retired members. *Id.*

7 CME Group, Inc. has asked whether the following categories of individuals qualify as
8 “members” of the exchanges under Commission regulations: (1) outright owners of seats,
9 including owners who lease their seats to others (“lessors”), (2) owners of seats who temporarily
10 transfer their memberships to others (“temporary transferors”), and (3) certain individuals, as
11 described below, who do not own seats, but who hold them and exercise membership rights
12 associated with them on behalf of others (“temporary transferees”). As described below, these
13 categories of individuals qualify under Commission regulations as solicitable “members.”

14 ***I. Outright Owners of Seats, Including Lessors***

15 Individual outright owners of a seat, who are currently satisfying the requirements for
16 membership in an exchange and have affirmatively accepted such membership, have paid
17 substantial amounts of money for their seats or have been given, or were bequeathed, a seat
18 having substantial value. CME Group, Inc. indicates that the cost of a seat on any of the three
19 exchanges has typically ranged between \$500 thousand and \$1.5 million. The Commission has
20 specifically recognized such an ownership stake in a stock or commodity exchange as a
21 significant “investment or ownership stake,” and hence a significant financial attachment. *See*
22 *Explanation and Justification for Final Rules on the Definition of “Member” of a Membership*
23 *Organization*, 64 FR 41266, 41270 (July 30, 1999); *Explanation and Justification for Final Rules*

1 on the Definition of “Member” of a Membership Association, 58 Fed. Reg. 45770, 45771
2 (August 30, 1993). Accordingly, the Commission concludes that individuals who own seats
3 outright are “members.”

4 Respecting CBOT and NYMEX owners who lease their seats, the Commission notes that
5 both CBOT and NYMEX lessors retain beneficial ownership of the seats. *See Sample*
6 *CME/CBOT Lease, Exhibit 6, Term 5 and Sample COMEX/NYMEX Lease, Exhibit 23, Term 6.*
7 CBOT lessors may revoke the leases and have the lessees disqualified from trading at any time,
8 whereas it appears, though this is unclear, that termination of the NYMEX lease prior to the term
9 requires mutual agreement of the lessor and lessee. *See CBOT Rulebook, Exhibit 9, Rule*
10 *106.D.1-2 and Sample COMEX/NYMEX Lease, Exhibit 23, Term 12.* Both CBOT and NYMEX
11 lessors retain the right to unilaterally sell their seats, however, and the leases terminate
12 automatically upon such a sale. *See CBOT Rulebook, Exhibit 9, Rule 106.D.5 and Sample*
13 *COMEX/NYMEX Lease, Exhibit 23, Term 12.d.* The retention of beneficial ownership and
14 exclusive rights of alienation in substantially valuable seats indicates that owners who lease their
15 seats retain their significant financial attachments to their respective exchanges during the lease
16 period. Thus these individuals are “members” pursuant to 11 CFR 114.1(e)(2)(i).

17 II. *Temporary Transferors*

18 Apart from outright transfer of membership through sale or gift, individual members of
19 CBOT who own seats may temporarily transfer their memberships to other individuals subject to
20 certain conditions. For example, member-owners may transfer their memberships to immediate
21 family members, to a trust, or to a family limited partnership. *CBOT Rulebook, Exhibit 9, Rules*

1 *106.C, 106.K. and 106.P.*⁷ Similarly, members of NYMEX may transfer their memberships to
2 either a trust or to a family limited partnership. *NYMEX Rulebook, Exhibit 17, Rule 2.50(B)(2)*
3 *and (3).*

4 CBOT transferors may revoke the transfers at any time. *CBOT Rulebook, Exhibit 9,*
5 *Rules 106.C.1 and 106.K.*⁸ Further, although the transferee enjoys the trading privileges
6 associated with the membership while the transfer remains in effect, the transferor still retains
7 the ultimate right to sell, transfer, or assign the membership. *Id, Rules 106.C.6.* NYMEX
8 transferors also may revoke the transfers, at which time membership may be transferred back to
9 the transferor, if the transferor is living, or to the transferor's estate. *NYMEX Rulebook, Exhibit*
10 *17, Rules 2.50(B)(2)(vi) and 2.50(B)(3)(vi).* The membership may also be sold after revocation.
11 *Id.*

12 Even if the exchanges do not currently consider these individual temporary transferors to
13 be members, the Commission nevertheless considers the temporary transferors to remain
14 solicitable "members" of their respective exchanges for corporate solicitation purposes pursuant
15 to 11 CFR 114.1(e)(3). While they do not exercise most of the prerogatives of membership
16 associated with the seats, they have reversionary interests in the memberships and may reacquire
17 those prerogatives at any time. In effect, temporary transferors may be considered "temporarily
18 inactive" or "temporarily retired" members. Accordingly, the Commission concludes that,
19 CBOT and NYMEX temporary transferors demonstrate "relatively enduring and independently

⁷ CBOT Rules 106.K and 106.P are not in the Exhibits, but may be accessed at
<http://www.cmegroup.com/rulebook/CBOT/1/1/1.pdf> (Last visited 1/16/09).

⁸ CBOT transfers to family limited partnerships may be transferred back to the transferor, but it is unclear whether this return transfer may be accomplished at the will of the transferor. *CBOT Rule 106.P.* If so, then this discussion of temporary transfers in general applies also to this class of transfers.

1 significant financial” ties to the exchanges sufficient to qualify them as “members” because of
2 their ownership interests, their reversionary interests, and their ability to exercise certain
3 prerogatives associated with the memberships even while the transfers remain in effect.

4 *III. Temporary Transferees*

5 The request asks about two types of temporary transferees. In addition to those
6 individuals who hold seats by virtue of having purchased seats, or of having received seats by
7 inheritance, bequest, or gift, there are individuals in CBOT who are not lessees but who hold
8 seats through transfer from a member firm⁹ (an individual executive or significant trading
9 employee) (hereafter “member-firm transferees”). *See CBOT Rulebook, Exhibit 9, Rule 106.H.*
10 In NYMEX, there are individuals who qualify for membership in the exchange, but who
11 essentially hold their memberships on behalf of member firms. *See NYMEX Rulebook, Rule*
12 *2.10.*¹⁰ These individuals are known as “conferring members.”¹¹

13 Although these classes of transferees do not own their seats, they must apply and be
14 accepted for membership in the exchanges through the same processes that member-owners
15 undergo. *CBOT Rulebook, Exhibit 9, Rule 105.A and NYMEX Rulebook, Exhibit 17, Rule 2.03.*
16 In affirmatively accepting such membership, member-firm transferees and conferring members
17 agree to abide by, and are bound by, the rules of their respective exchanges. *CBOT Rule 101 and*
18 *NYMEX Rule 2.00(B).* Further, member-firm transferees and conferring members are subject to

19 ⁹ By “member firm,” we mean a firm that is a member of CBOT. *CBOT Rulebook, Exhibit 9, Rule 106.H.*

¹⁰ This rule is not included in the exhibits submitted with the advisory opinion request, but may be found on the Internet at http://www.nymex.com/rule_main.aspx?pg=1 (Last visited 1/16/09).

¹¹ The Commission previously considered “conferring members” in Advisory Opinion 1995-2 (NYMEX). In such arrangements, an individual employed by the firm enters into an “A-B-C Agreement” under which the firm provides funds to the employee to qualify for membership and in return the employee agrees to use the membership only in furtherance of the firm’s business.

1 additional financial obligations to their exchanges and to the “clearing members” who
2 are responsible for qualifying them to exercise trading privileges. *See CBOT Rules 103.A and*
3 *106.H; NYMEX Rules 2.23, 2.31, and 2.32.* As members qualified to trade on the floors of the
4 exchanges, member-firm transferees and conferring members are subject to the exchanges’ range
5 of sanctions and disciplinary procedures. *CBOT Rulebook, Exhibits 11 and 12, Chapters 4 and*
6 *5; NYMEX Rulebook, Exhibit 22, Chapter 8.* The range of penalties for violations includes
7 warning letters, reprimands, the payment by the individual of substantial fines, suspension of
8 floor trading privileges, and suspension or expulsion from the exchange. *See Exchange*
9 *Rulebooks, Exhibits 11, 12, and 13, Chapters 4-6 (CBOT); and Exhibits 17, 20, and 21, Chapters*
10 *2, 5, and 6 (NYMEX).*

11 Thus, although member-firm transferees and conferring members do not own their seats,
12 the Rulebooks show that they are current, fully functioning trading members, having significant
13 privileges in the trading of options contracts, futures contracts, and/or commodities contracts and
14 earn their livelihoods, or at least a part thereof, through such trading privileges. These
15 individuals must obey the rules and regulations of their particular exchange and are subject to
16 discipline for violating trading rules and other rules of conduct. The fact that they are personally
17 liable for violations of membership rules and that their livelihoods, in terms of their enjoyment of
18 trading privileges, are dependent upon their continued status in their respective exchanges,
19 suffices as a significant financial attachment for these classes of transferees despite the absence
20 of an ownership interest. In analogous situations, the Commission has concluded that non-owner
21 members of exchanges qualified as “solicitable members” because they otherwise held similar
22 rights, including trading rights, and duties to those of owner-members; they were subject to the
23 disciplinary rules of the exchange, and they were personally liable for violation of those rules.

1 The dependence of the non-owner member's livelihood upon the viability of the exchange and
2 upon maintenance of his or her good standing within the exchange, both illustrated by the
3 aforementioned considerations, have been considered a source of significant financial
4 attachment. See, e.g. Advisory Opinion 1997-5 (CME) ("member-lessees") and Advisory
5 Opinion 1995-2 (NYMEX) (conferring members).

6 *IV. Conclusion Regarding "Members"*

7 In sum, the individuals of the exchange who own seats outright, including those owners
8 who lease their seats, or are non-lessee individuals described above (member-firm transferees
9 and conferring members) who, although not the seat owners, have floor trading privileges on an
10 exchange and are subject to the disciplinary authority of the exchange, qualify as "members"
11 under Commission regulations because they: (1) currently satisfy the membership requirements
12 set forth in the Rulebooks of the respective exchanges; (2) affirmatively accept invitations to
13 become members; and (3) have significant financial attachment to an exchange. 11 CFR
14 114.1(e)(2)(i). Owners who temporarily transfer their seats qualify as "members" under
15 Commission regulations because they have a "relatively enduring and independently significant
16 financial attachment" to their respective exchanges. 11 CFR 114.1(e)(3).

17 *2. Are the individual members of CME "stockholders," and therefore solicitable, under*
18 *the Act and Commission Regulations?*

19 Yes, the individual members of CME are "stockholders" under the Act and Commission
20 regulations. As noted above, a "stockholder" is defined as one who: (1) has a vested beneficial
21 interest in stock, (2) has the power to direct how that stock shall be voted, if it is voting stock,
22 and (3) has the right to receive dividends. 11 CFR 114.1(h). Individuals acquiring seats in CME
23 automatically own one share of class B stock in CME Group, Inc. *CME Group Third Amended*

1 *and Restated Certificate of Incorporation, Exhibit 24, Article 4, Division B, Subdivision 2,*
2 *Section 2.* Ownership of the share of class B stock is not contingent upon the occurrence of any
3 other events or upon the satisfaction of any other conditions. Accordingly, the first condition of
4 qualification as a “stockholder” under the regulation is satisfied. *See* Advisory Opinion 1994-36
5 (SAIC); Black’s Law Dictionary 1595 (8th ed. 2004) (defining “vested” as “[h]aving become a
6 completed, consummated right for present or future enjoyment; not contingent; unconditional;
7 absolute.”) Further, individuals holding seats in CME have regular and special voting rights
8 associated with their shares of stock, and they have the right to receive dividends. They also
9 have the right to receive value for the share in the event of CME Group, Inc.’s liquidation. *See*
10 *Exhibit 24, CME Group, Inc. Third Amended Certificate of Incorporation, Subdivision 1,*
11 *Sections 3 (Dividends), 4 (Voting Rights), and 5 (Liquidation Rights); Subdivision 2, Section 1*
12 *(Special Voting Rights).* Therefore, the second and third criteria of “stockholder” status are
13 satisfied as well.¹²

14 3. *Are the Exchanges affiliated with CME Group, Inc.?*

15 Committees, including SSFs, that are established, financed, maintained or controlled by
16 the same corporation, person, or group of persons, including any parent, subsidiary, branch,
17 department, or local unit thereof are affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and
18 110.3(a)(1)(ii). Commission regulations provide that the committees of a parent corporation and
19 its subsidiaries are affiliated *per se*. The factors set out in the Act and Commission regulations

¹² CME owners may also lease or temporarily transfer their seats in substantially the same manner that CBOT seat owners may employ. *See, e.g. CME Rulebook, Exhibit 1, Rule 106.* In such cases, the solicitable individual would be the person who is considered to hold the Class B stock. In the case of a lease, the lessor is considered to hold the stock. *CME Group, Inc. Third Amended and Restated Certificate of Incorporation, Exhibit 24, Article Four, Division B, Subdivision 2, Section 2(a).* In the case of a temporary transfer, it appears that the Class B share may be transferred to the transferee if the transfer takes place in accordance with the rules, though this is not entirely clear. *Id.*, Section 2(b). In any event, the solicitable individual will be the person whom CME considers to hold the share.

1 that govern whether the SSFs of discrete organizations are affiliated are also used to determine
2 whether corporations are affiliated with each other for solicitation purposes. *See* Advisory
3 Opinions 1999-28 (Bacardi-Martini) and 1984-36 (American Health Capital). Hence, as wholly
4 owned subsidiaries, each of the exchanges (CME, CBOT, and NYMEX) is affiliated with CME
5 Group, Inc.

6 4. *Are the "members" of CBOT and NYMEX described above, and the "stockholders" of*
7 *CME, within CME Group, Inc.'s solicitable class?*

8 Yes, as holders of Class B stock in CME Group, Inc., the individual members of CME
9 are solicitable by CME Group, Inc. pursuant to 2 U.S.C. 441b(b)(4)(A)(i) and 11 CFR 114.1(j),
10 which include a corporation's stockholders in the corporation's solicitable class.

11 With respect to the categories of "members" of CBOT and NYMEX noted above, the
12 Commission has concluded in previous advisory opinions that a corporation may solicit all
13 individuals within the solicitable classes of its subsidiaries or other affiliates. *See* Advisory
14 Opinions 2005-17 (American Crystal Sugar Company), 2003-28 (Horizon Lines), and 2001-18
15 (BellSouth). In some of these opinions, the Commission has permitted an incorporated
16 membership organization to solicit the members of its subsidiary or other affiliate membership
17 organizations. *See* Advisory Opinions 2005-03 (ACOG), 1999-16 (Commercial Finance
18 Association), 1994-34 (NYMEX), and 1981-55 (American Medical Association PAC).

19 Although CME Group, Inc., which is a corporation, and CBOT and NYMEX, which are
20 membership organizations, are not the same types of entities under the Act and Commission
21 regulations, the Commission has previously affirmed that this is not an obstacle to permissible
22 solicitation in an analogous situation. *See* Advisory Opinion 2005-17 (American Crystal Sugar
23 Company) (concluding that a *non-trade* association membership organization could solicit

1 voluntary contributions to its SSF from the owners and executive and administrative personnel of
2 an affiliated trade association's incorporated members under certain conditions.)

3 Because CBOT and NYMEX are affiliated with CME Group, Inc., and are incorporated
4 membership organizations with "members" solicitable under the rules for membership
5 organizations at 2 U.S.C. 441b(b)(4)(C) and 11 CFR 114.7, any SSF established by either of the
6 exchanges could transfer without limit its Federally permissible contributions, received from its
7 own "members," to CME Group, Inc. PAC. For the reasons given in Advisory Opinion 2005-17
8 (American Crystal Sugar Company), it follows that CME Group, Inc. may solicit the solicitable
9 "members" of CBOT and NYMEX for contributions to CME Group, Inc. PAC.

10 *5. Conclusion*

11 Because CME, CBOT and NYMEX are each affiliated with CME Group, Inc., and
12 CBOT and NYMEX are membership organizations, CME Group, Inc. may solicit contributions
13 to CME Group, Inc. PAC from the categories of individuals described above who qualify as
14 "members" of CBOT and NYMEX under Commission regulations, regardless of whether such
15 "members" qualify as stockholders in CME Group pursuant to 11 CFR 114.1(h). Because
16 individual members of CME qualify as "stockholders" of CME Group, Inc. under 11 CFR
17 114.1(h), CME Group, Inc. may solicit contributions to CME Group, Inc. PAC from these
18 individuals as well.

19 This response constitutes an advisory opinion concerning the application of the Act and
20 Commission regulations to the specific transaction or activity set forth in your request. *See*
21 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
22 assumptions presented and such facts or assumptions are material to a conclusion presented in
23 this advisory opinion, then the requester may not rely on that conclusion as support for its

1 proposed activity. Any person involved in any specific transaction or activity which is
2 indistinguishable in all its material aspects from the transaction or activity with respect to which
3 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
4 Please note the analysis or conclusions in this advisory opinion may be affected by subsequent
5 developments in the law including, but not limited to, statutes, regulations, advisory opinions
6 and case law. All cited advisory opinions are available on the Commission's website at
7 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman