

Supplement to AOR 2008-21



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01/13/2009 06:56 PM

To "jlevin@fec.gov" <jlevin@fec.gov>

cc "Noble, Lawrence M" <Lawrence.Noble@skadden.com>

bcc

Subject AOR 2008-21 supplemental information

History: This message has been forwarded.

Dear Mr. Levin,

Attached please find the supplemental submission in a pdf. Please feel free to call or email if you need anything further. Thank you.

Sincerely,

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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===== AOR 2008-21 supplement.pdf

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January 13, 2009

Jonathan Levin
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Federal Election Commission
999 F Street, NW
Washington, DC 20463

2009 JAN 14 P 2:09
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

RE: Advisory Opinion 2008-21

Dear Mr. Levin:

This in response to the questions you have asked, including during our telephone conversation of January 5, 2009, regarding our Advisory Opinion request dated November 25, 2008, seeking more information about the members of CME, CBOT and NYMEX in order to determine who is a member for purposes of the Federal Election Campaign Act ("FECA"). As you know, these exchanges are three affiliated membership organizations which are wholly owned by CME Group. While the organizations have tried to harmonize their rules, there are still differences in membership between the organizations. Likewise, there may be variations in membership rules within the each group. To examine all of the variations, however, would require a detailed analysis of the membership rules for each exchange. While we are ready to provide you with the complete rules for each exchange, we recognize that such an analysis would take substantial resources.

However, as we've discussed, we believe most of these variations do not bear on the Federal Election Commission ("FEC") definition of membership. Rather, the FEC, through regulations and Advisory Opinions, has set forth standards for determining whether someone is a member of a membership organization. Therefore, the original AOR and this letter is aimed at obtaining a ruling regarding whether individuals who have, at a minimum, the relationship with an exchange

described, meet the standards for membership under FECA. What follows are the answers to your questions.

1. Why does CME stock have one hundred shares of stock outstanding and the ability to issue nine hundred additional shares?

The CME stock owned by CME Group is a vestige of prior consideration of options regarding possible corporate restructuring and has no effect on the rights and privileges of CME members. During 2000 and 2001, CME (at that time a non-profit corporation) considered becoming publicly traded. However, in December 2001, CME became the wholly owned subsidiary of CME Holdings, the predecessor of CME Group, and CME stock was provided to CME Holdings as part of the acquisition. CME Group is the sole shareholder and CME may only issue additional shares to CME Group.

2. Did CBOT and NYMEX ever issue stock?

As far as we are aware, neither CBOT nor NYMEX issued stock.

3. Is this request asking about soliciting more than one member per seat?

No. This request is not seeking an opinion on whether a seat on an exchange can support more than one member. But see AO 1997-05.

4. Can you describe the specific rules applicable to each defined group of members?

We believe the FEC has already concluded that outright seat owners who use their seats are members for purposes of the Act because of such members' significant financial attachment to the organization. Further, each of the following membership groups satisfies the regulations: i) member firm transferees (CME and CBOT Rule 106.H) ("transferees") and ii) conferring members (NYMEX Rule 2.10(A)).

First, each member has a connection to a seat on the exchange. While the connection a member has to a seat may vary from outright ownership to the contractual ability to use the seat as a basis of membership, in each case membership depends on having such a connection. They may pay for the use of the seat outright or, as in the case of firm members, be financially obligated to pay for the seat based on its use. Regardless, in each case the ability to conduct business in their chosen profession is based on a connection to the seat, and therefore represents a substantial financial connection to the exchange. The typical member will utilize the

membership for trading or leasing for many years, and there is low turnover of memberships.

Moreover, each of these members possess the other required indicia of membership under the FEC's rules. First, all prospective members must apply and be approved for membership. CME and CBOT Rule 105.A; NYMEX Rule 2.03. Among the conditions of membership is that the applicant must agree to observe and be bound by the By-laws, Certificate of Incorporation, Rules and Regulations of the applicable Exchange, and all amendments thereto. See Applications for Membership and CME and CBOT Rule 101; NYMEX Rule 2.00(B). All members must be qualified by a clearing member, and as such are subject to additional financial obligations both to the exchange and to the clearing member. See CME and CBOT Rule 103.A; CME and CBOT Rule 106.II; NYMEX Rules 2.23; 2.31; 2.32.

All members are subject to all sanctions and may participate on committees. See CME and CBOT Chapters 3, Rules 300A, 300B, 300C and NYMEX Rules 300.A, 300.B, 300.C, which establish board level committees (which may include members of the exchange depending on which CME, CBOT, and NYMEX board members are chosen for the committee) and non-board level exchange committees (many of which must include exchange members); and CME, CBOT and NYMEX Rulebooks Chapter 4¹, in particular Rules 402.A, 402.B, 406, which provide for the jurisdiction and governance mechanisms of the committees. The duties of non-Board level committees include review of investigation reports prepared by Exchange staff and conducting hearings. CME, CBOT, and NYMEX Rules 300.C. For instance, the Business Conduct Committee (CME, CBOT, NYMEX Rules 402.A) has jurisdiction over members with respect to matters relating to conduct, trading practices, sales practices, trading ethics and market manipulations or other actions that threaten the integrity of the market, and the authority to take actions against members and non-members².

AO 1995-02 found that conferring members of COMEX were members because they had a significant financial attachment to the organization. AO 1995-02 established that indicators of an important financial relationship between an exchange and its conferring members included that the transferees' economic survival was conditioned on the success of the exchange, and that

¹ While CME, CBOT, and NYMEX Rule 400 provides that for purposes of Chapter 4 "Member" shall mean both a member of an exchange and an employee, "member" throughout this chapter refers to members of the exchange.

² CME members exercise a separate form of control by way of their right to vote for CME Group board members.

transferees were subject to the various disciplinary rules of the organization. AO 1997-02 held that member-lessees established a significant organizational attachment to the exchange because the members were allowed to sit on policy-making committees and were subject to sanctions for misconduct, and that they assumed financial connections to the organization because they were obligated to be qualified for trading by a clearing member.

As in AOs 1995-02 and 1997-05, the members at issue may serve on committees and are subject to discipline and sanctions of the exchanges. Moreover, members must be qualified by a clearing member in order to trade, and may lose such qualification. Thus, transferees and conferring members have established the same type of significant organizational and financial attachments as were shown in AOs 1995-02 and 1997-05.

In addition, besides satisfying 11 C.F.R. § 114.1(e)(2)(i), transferees and conferring members satisfy 11 C.F.R. § 114.1(e)(2)(iii). In this unique situation, regular trading on the floor under the established membership rules is at least the equivalent of a typical "affirmation of membership on at least an annual basis," under 11 C.F.R. § 114.1(e)(2)(iii). More than requiring a yearly pro-forma reaffirmation of membership, it is inherent in this relationship that anyone who is conducting trading activity subject to the rules is affirming membership on a regular basis by voluntarily subject themselves to disciplinary rules and sanctions. The 1999 Explanation and Justification of the revision of the definition of "member" notes that "as with the annual dues requirement, the Commission intends to give organizations some flexibility in interpreting the phrase 'annual affirmation.'"

As noted above, the second requirement of 11 C.F.R. § 114.1(e)(2)(iii) is also satisfied. All members have the right to participate in exchange committees. Such participation is equivalent to the right to participate directly in aspects of the exchange's governance that are similar to those enumerated in the regulation.

Even should it be found that rigid reading of 11 C.F.R. § 114.1(e)(2)(iii) requires something more, these connections establish these people as members under the case-by-case analysis allowed under 11 C.F.R. § 114.1(e)(3). The facts discussed above establish both a significant organizational and financial stake in the organization. While the word "enduring" is not defined, we note that it is combined with the word "relatively" and illustrated by an example of a student who pays a lower amount of dues while in school. CME Group represents that memberships are highly coveted, there is low turnover, and that transferees and conferring members are no different in this regard from other members.

Jonathan Levin
January 12, 2009
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If you have any questions or wish to discuss this matter, please do not hesitate to contact us at 202-371-7365.

Respectfully submitted,

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