



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 18, 1984

ADVISORY OPINION 1984-22

Michael S. Berman
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Berman:

This responds to your letter of April 24, 1984, on behalf of the American Stock Exchange, Inc. ("the Exchange"), requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of various classes of members of the Exchange for contributions to the Exchange's separate segregated fund, the American Stock Exchange Federal Political Action Committee ("AMEX FED PAC").

You state that the Exchange is incorporated in the state of New York under §402 of the New York Not-for-Profit Corporation Act. As set forth in its articles of incorporation, the purpose of the Exchange is to serve as a securities market place, as a board of trade under New York law, as an exchange under the Securities Exchange Act of 1934, and as a not-for-profit corporation. The Exchange is governed by a 25-person Board of Governors, composed of 12 representatives of the Exchange, 12 representatives of the public, and the chairman, or chief executive officer, of the Exchange. Nominees for board membership are selected by an eight-person nominating committee composed of four Exchange representatives and four public representatives. The articles also provide for four classes of individual memberships in the Exchange: regular members, options principal members, associate members, and allied members. The constitution of the Exchange limits regular memberships to 675 and options principal memberships to 200. You state that there are presently 661 regular members and 95 options principal members. Associate and allied members are not limited to any specific number. There are presently 156 associate members and an undisclosed number of allied members. Regular, options principal, and associate members must be of the minimum age of maturity for entering into contracts in the jurisdictions in which they do business, must make a written application for membership and have it approved by the Exchanger and must sign the constitution of the Exchange and agree to abide by it. Allied members must pledge in writing to abide by the constitution of the Exchange.

Regular members have full trading privileges on the Exchange to execute agency and principal transactions in stocks and bonds. They purchase their membership from the Exchange

or another member, may be required to pay an initiation fee, and are obligated to pay annual dues or assessments set by the Exchange.

Options principal members have limited trading privileges on the Exchange to trade only in options for their own account. They also purchase their membership from the Exchange or another member, may be required to pay an initiation fee, and are also obligated to pay annual dues or assessments.

Associate members have no trading privileges on the Exchange and can execute their transactions through only a regular member. These memberships are available only to persons actively engaged, in the business of buying and selling securities as a broker or dealer, either as a partner in a firm or as a director or executive officer in a corporation. Associate memberships are not transferable, but associate members may be required to pay an initiation fee, and are obligated to pay annual dues or assessments.

Allied members have no trading privileges on the Exchange except when they are substituting for a member of their firm or corporation who is a regular or options principal member. Allied memberships are available only to general partners in a member firm or to employees who control a member corporation.¹ Allied members pay no initiation fees and no annual dues or assessments because at least one person in their firm or corporation is paying dues. These memberships are also not transferable.

Only regular members have the right to vote to elect the 24 members of the Board of Governors who represent the Exchange and the public² and the eight members of the nominating committee. The articles of incorporation specifically state that options principal, associate, and allied members "shall have no right to vote whatsoever." Nevertheless, all four classes of members-- regular, options principal, associate, and allied -- have the capacity to be elected as Exchange representatives on the board and the nominating committee. All four classes also are appointed to serve on the Exchange's standing committees and to sit on its disciplinary panels. All classes are subject to regulation by the Exchange and to the Exchange's disciplinary process, which may result in fines as well as the suspension or expulsion from membership.

The articles of incorporation also establish a formula for regular and options principal members to share in any distribution of assets in any liquidation, dissolution, or winding up of the Exchange's affairs. Although the articles give only regular members the right to vote on any amendments to the constitution, any change in the articles of incorporation that adversely affects the rights of options principal members, on dissolution of the Exchange must receive the consent of at least two-thirds of such members. Options principal members also have a right to vote, along with the regular members, on any merger or consolidation that adversely affects the option principal members' rights on dissolution. The articles of incorporation preclude associate and allied members from sharing in any distribution of assets on dissolution.

¹ A member firm or corporation is defined as one with which a regular, options principal, or associate member is affiliated. It must also meet other requirements and be approved by the Exchange.

² The Board of Governors elects the chairman.

You ask whether regular, options principal, associate, and allied members are within the restricted class of members who may be solicited for contributions to the Exchange's separate segregated fund, AMEX FED PAC.

Under the Act, an incorporated membership organization (or corporation without capital stock), or a separate segregated fund established by such a corporation, may solicit contributions to the fund from individual members of the organization. 2 U.S.C. 441b(b)(4)(C). The regulations define members to mean "all persons who are currently satisfying the requirements for membership in a membership organization...or corporation without capital stock." 11 CFR 114.1(e).

The United States Supreme Court has recently considered the requirements of the restricted class of members of a connected organization who may be solicited for contributions to its separate segregated fund in FEC v. National Right to Work Committee, 459 U.S._____, 103 S.Ct. 552 (1982). The Court noted that the statutory provision of 2 U.S.C. 441b limits solicitation by nonprofit corporations "to those persons attached in some way to it by its corporate-structure." 103 S.Ct. at 556. After reviewing the statute's legislative history, the Court concluded that members of nonstock corporations "were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions." Id. at 557. The Court added that the "analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under 441b(b)(4)(C)." Id. The Court noted that in determining this question it was "entirely permissible" for the Commission to consider the corporation's charter and by-laws. Id. at 558.

In determining if a class of membership has the requisite "enduring" and "independently significant" financial or organizational attachment, the Commission has considered whether such persons have any interests and rights in the organization through some right to participate in the governance of the organization and an obligation to help sustain the organization through regular financial contributions of a predetermined minimum amount. See Advisory Opinions 1982-2, 1979-69, 1977-67, and 1977-17. It has concluded that commodity representatives were not members of the Chicago Mercantile Exchange, and thus not solicitable by the exchange's separate segregated fund, because they had no right to vote in exchange elections or on rules changes, had no capacity to serve as an officer or director of the exchange, and had no trading privileges on the exchange floor. Advisory Opinion 1977-17. The Commission has also said that a membership class was not solicitable where the organization's by-laws specifically stated that such class "shall not have a right to vote in any meeting or have any voice in the affairs of the organization or control over its officers." Advisory Opinion 1979-69. And the Commission has stated that where a person's relationship with an organization is indirect or derivative such a person is not a member of the organization who is solicitable for contributions to the organization's separate segregated fund. Advisory Opinions 1981-23 and 1980-75. By contrast, the Commission concluded that where a membership class of a trade association lacked a right to vote for the officers and directors of the organization but were eligible to be elected as at-large directors and to serve on the organization's committees and were limited to a defined business

group, the class were members of the organization pursuant to 11 CFR 114.1(e) and could receive partisan communications. Advisory Opinion 1982-2.³

With regard to this request, all four classes of members have the capacity to serve on the Board of Governors and the nominating committee, although only regular members have a right to vote for Exchange representatives on the board and the committee. All four classes of members are also appointed to serve on the Exchange's standing committees and to sit on its disciplinary panels. In this regard, the Commission notes that the disciplinary process of the Exchange is an important and integral means by which the Exchange exercises its powers of governance and regulates its members in a fashion unique and distinct from that of most other membership organizations. Thus except with regard to voting rights, all four classes share equal rights and opportunities to participate in the governance of the Exchange. Nevertheless, only three classes of members--regular, options principal, and associate members--have a regular financial obligation to support the Exchange through annual dues or assessments. Allied members pay no initiation fee and no annual dues.

Furthermore, the Exchange extends floor trading privileges to only regular and options principal members, who purchase their membership from the Exchange or another member and whose number is limited by the Exchange's constitution. Allied members have no trading privileges except when they are substituting for a person in their firm or corporation who is a regular or options principal member. In fact, eligibility for allied membership depends on another officer's, director's, or partner's holding direct membership in the Exchange. Allied members are also specifically excluded from sharing in any distribution of assets on dissolution of the Exchange. Only regular and options principal members have a right to share in the distribution of such assets--a right analogous to that of shareholders in a for-profit corporation. These differences in the rights of allied members indicate that as individuals they have an indirect relationship with the Exchange.

By a unanimous vote, the Commission concludes that regular members are sufficiently attached to the Exchange's corporate structure to be within the restricted class who may be solicited for contributions to the Exchange's separate segregated fund, AMEX FED PAC. In a split vote, a majority of the Commission (Commissioners Harris and McDonald dissenting) concludes that options principal members are also within this solicitable class, but a majority (Commissioner Aikens dissenting) concludes that allied members lack sufficient attachment to the Exchange's corporate structure to bring them within the class who may be solicited for contributions to AMEX FED PAC. By a the vote (Commissioners Aikens, Elliott, and McGarry voting to include associates as members and Commissioners Harris, McDonald, and Reiche voting to exclude) the Commission is unable to agree on whether associate members fall within or without the solicitable class⁴. These conclusions are based on the unique facts and circumstances presented in this request. Of course, any solicitation of regular and options

³ This regulation's definition of "members" also applies for purposes of the restricted class that may be solicited for contributions to the organization's separate segregated fund.

⁴ The Commission notes that Article IV of the by-laws of AMEX PED PAC authorizes solicitation of only individual Exchange members. Therefore, the Commission offers no opinion regarding whether the Exchange is a trade association and eligible to solicit certain personnel of its member corporations and member firms. See 2 U.S.C. 441b(b)(4)(C) and (b)(4)(D); 11 CFR 114.8(c); see also Advisory Opinion 1982-12.

principal members must comply with the Act and Commission regulations. See 11 CFR 114.5 and 114.7.

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 yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1982-12, 1982-2, 1981-23, 1980-75, 1979-69, 1977-67, and 1977-17)