

January 12, 2023

**VIA ELECTRONIC PORTAL**

Christopher J. Kirkpatrick  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

**Re: FOIA Confidential Treatment Request**

Dear Mr. Kirkpatrick:

By electronic portal dated today, January 12, 2023, New York Mercantile Exchange, Inc. (“NYMEX” or “Exchange”) submitted a supplemental rule certification filing (Submission No. 23-053S) to the Commodity Futures Trading Commission (“CFTC” or “Commission”). This supplemental filing includes an appendix (“Appendix A”), which is attached.

Pursuant to Sections 8 and 8(a) of the Commodity Exchange Act (“CEA”), as amended, and Commission Regulation 145.9(d), NYMEX requests confidential treatment of Appendix A, on the grounds that Appendix A contains confidential commercial information of the submitter (NYMEX). Pursuant to Commission Regulation 145.9(d)(5), NYMEX requests that confidential treatment be maintained for Appendix A until further notice from NYMEX. We also request that the Commission notify the undersigned immediately after receiving any FOIA request for said Appendix A or any other court order, subpoena or summons for same. Finally, we request that we be notified in the event the Commission intends to disclose such Appendix A to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. NYMEX does not waive its notification rights under Section 8(f) of the CEA with respect to any subpoena or summons for such Appendix A.

Please contact the undersigned at (212) 299-2200 should you have any questions concerning this letter.

Sincerely,

/s/ Christopher Bowen  
Managing Director and Chief Regulatory Counsel

Enclosure: Exhibit 1

# EXHIBIT 1

## Detailed Written Justification



Christopher Bowen  
Managing Director and Chief Regulatory Counsel  
Legal Department

January 12, 2023

### **VIA Electronic Portal**

Assistant Secretary of the Commission for FOIA,  
Privacy and Sunshine Acts Compliance  
Commodity Futures Trading Commission  
Three Lafayette Centre, 8<sup>th</sup> Fl.  
1155 – 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**Re: FOIA Confidential Treatment Request: Appendix A to NYMEX Submission No. 23-053S**

Dear FOIA Compliance Staff:

I am writing on behalf of New York Mercantile Exchange, Inc. (“NYMEX” or “Exchange”) a subsidiary of CME Group Inc. In accordance with the requirements set forth in Commodity Futures Trading Commission (“CFTC” or “Commission”) Regulation 40.8, NYMEX hereby submits its detailed written justification in support of continued confidentiality of the information set out in Appendix A to Submission No. 23-053S (“Appendix A”) and respectfully requests that the Commission not release the information contained therein.

As discussed more fully below, Appendix A contains confidential and proprietary commercial information of NYMEX and is thus exempt from disclosure pursuant to Section 8 of the Commodity Exchange Act (“CEA”), Commission Regulation 145.9(d) and Exemption 4 (the “Exemption”) to the Freedom of Information Act (“FOIA”).

### **Presumption of Confidentiality**

There is a presumption of confidentiality for commercial information that is (1) provided voluntarily and (2) is of a kind the provider would not customarily make available to the public. See Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc); see also Center for Auto Safety v. National Highway Traffic Safety Administration, 244 F.3d 144, 147 (D.C. Cir. 2001) (affirming continuing validity of Critical Mass and applying tests detailed in that case). NYMEX provided the confidential information in Appendix A to the Commission voluntarily in connection with the above referenced submission in order to demonstrate to the Commission the compliance of the incentive program with the CEA and relevant Commission Regulations. The incentive structure set out in Appendix A was developed by NYMEX staff at significant cost and over a substantial period of time. NYMEX would not customarily make such incentive structures available to the public.

### **Disclosure Would Likely Cause Competitive Harm to NYMEX**

Notwithstanding this presumption of confidentiality, the confidential information in Appendix A still would be considered “confidential” because it is information that NYMEX would not and have disclosed to the public and its disclosure would cause substantial harm to the competitive position of NYMEX. FOIA was enacted to facilitate the disclosure of information to the public, but was clearly not intended to allow business competitors “cheap” access to valuable confidential information, especially when “competition in business turns on the relative costs and opportunities faced by members of the same industry.” Worthington Compressors v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981).

When a submitter of confidential information has a “commercial interest in the requested information the [E]xemption is properly invoked.” ISG Group, Inc. v. Dept. of Defense, 1989 WL 168858 (D.D.C. 1989). The test for determining

confidentiality under Exemption 4 is set forth in National Parks & Conservation Association v. Morton, where the court held that information is confidential if its disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." In applying the "competitive harm" test for confidentiality, there is no requirement to demonstrate actual competitive harm. Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). "Actual competition and the likelihood of substantial competitive injury is all that need to be shown." Gulf & Western Indus., Inc. v. United States, 615 F.2d at 530. Information is confidential if: 1) there is actual competition in the relevant market; and 2) disclosure is likely to cause substantial competitive injury. Id. Neither the Commission nor the courts must conduct a sophisticated economic analysis to determine the likely effects of disclosure; evidence demonstrating the *potential* for economic harm is sufficient. Utah v. Bahe et al. No. 00-4018, 2001 WL 777034, at 2 (10<sup>th</sup> Cir. July 10, 2001); Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 (D.C. Cir. 1983).

*Disclosure Would Likely Harm NYMEX*

NYMEX also satisfies the second requirement for the "competitive harm" test for confidentiality because the release of the information would likely cause substantial competitive injury to NYMEX. See Gulf & Western Indus. Inc. v. United States 615 F.2d 527,530 (D.C. Cir. 1979). As noted above, a sophisticated economic analysis is unnecessary; the potential for economic harm is sufficient. Utah v. Bahe et al., No. 00-4018, 2001 WL 777034, at 2 (Cir. July 10, 2001); Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 (D.C. Cir. 1983).

Under circumstances similar to those involved here, courts have recognized that disclosure of commercial information holds the potential for significant competitive harm. Bahe No. 00-4018, 2001 WL 777034, at 2-3 (terms and structure of contract for storage of nuclear fuel confidential); Heeney v. Food & Drug Admin., 2001 U.S. App. Lexis 7732, at 3-4 (9<sup>th</sup> Cir. April 12, 2001) (manufacturing agreement and other information confidential); Professional Review Org. v. U.S. Department of Health and Human Servs., 607 F. Supp. 423, 425-26 (D.D.C. 1985) (business plans confidential). When applying the "substantial competitive harm test," courts "[c]onsider how valuable the information will be to the requesting competitors and how much this gain will damage the submitter." Worthington Compressors, 662 F.2d at 51.

Appendix A contains valuable commercial information with respect to the concessions that we found to be necessary to create a liquid marketplace in the products under the incentive program. This information was developed at significant cost and over a substantial period of time. It would destroy the value of that work if we were required to make that information available to competitors, who could free ride our efforts with no cost. The incentive for exchanges to develop competing market making and trading incentive programs will be destroyed. Additionally, there is no regulatory imperative to disclose such information.

For the foregoing reasons, NYMEX respectfully requests that the Commission maintain the confidential privilege afforded to this type of information and refrain from releasing Appendix A as such action could prove harmful to NYMEX.

Please contact me if you have any questions regarding this matter.

Very truly yours,

/s/ Christopher Bowen  
Managing Director and Chief Regulatory Counsel