

Maria Zyskind
Staff Attorney

FOIA CONFIDENTIAL TREATMENT REQUEST

February 11, 2019

VIA ELECTRONIC PORTAL

Assistant Secretary of the CFTC
for FOIA, Privacy and Sunshine Acts Compliance
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

**Re: FOIA Confidential Treatment Request and Detailed Written Justification
Rule Certification Submission to Formalize the ICE CDS Clearing: Back-Testing
Framework Pursuant to Section 5c(c)(1) of the Commodity Exchange Act and Commission
Regulation 40.6(a) (the "Submission")**

Dear Assistant Secretary:

In conjunction with the self-certification submitted by ICE Clear Credit LLC ("ICE Clear Credit") today, February 11, 2019, to the Secretary of the Commodity Futures Trading Commission ("Commission"), pursuant to Section 5c(c)(1) of the Commodity Exchange Act and Commission Regulation 40.6(a), ICE Clear Credit submits the attached confidential documents. A redline version showing changes to the ICE CDS Clearing: Back-Testing Framework ("Back-Testing Framework") from version 4.1, dated June 26, 2017, to proposed version 4.2 is also included to facilitate review.

Under the Freedom of Information Act ("FOIA"), 5 USC Section 552, Section 809(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and pursuant to Commission Regulations 40.8(c) and 145.9(d), Federal Reserve Board Regulation 261.15 and any other applicable regulations under or implementing FOIA, ICE Clear Credit hereby respectfully requests that confidential treatment be maintained for the documents which bear Bates numbers 02.11.2019-000001-CFTC1 to 02.11.2019-000025-CFTC1 ("Confidential Material") until further notice. In accordance with Commission Regulation 145.9(d)(4), every page of the Confidential Material bears the designation "Confidential Treatment Requested by ICE Clear Credit LLC." In accordance with Commission Regulations 40.8(c)(2) and (3), the Confidential Material has been segregated from the Submission in an appendix ("Appendix A") and the Submission indicates that the Confidential Material has been segregated from the Submission.

ICE Clear Credit also requests that the Commission or the Board notify the undersigned immediately after receiving any FOIA request for such documents or any other court order, subpoena or summons for the same. Finally, ICE Clear Credit requests that it be notified in the event the Commission or the Board intends to disclose such documents to Congress or to any other governmental agency or unit pursuant to Section 8 of the Commodity Exchange Act, as amended ("CEA") or other applicable law. ICE Clear Credit does not waive its notification rights under Section 8(f) of the CEA or other applicable law with respect to any subpoena or summons for such document(s).

The basis for the request is that disclosure of these document(s) would reveal confidential commercial and financial information of ICE Clear Credit, the disclosure of which could have a material adverse effect

on, and cause injury to, the operations and competitive position of ICE Clear Credit. This request is not to be construed as a waiver of any other protection from disclosure or confidential treatment accorded by law, and ICE Clear Credit will rely on and invoke any such confidentiality protection.

In accordance with Commission Regulation 40.8(c)(1), ICE Clear Credit hereby submits its detailed written justification in support of the confidential treatment of the Confidential Material. The Confidential Material is deemed by ICE Clear Credit to be highly confidential in its entirety and confidentiality therefore is being requested under the FOIA, 5 U.S.C. 552, Section 809(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and pursuant to Commission Regulations 40.8(c) and 145.9(d), Federal Reserve Board Regulation 261.15, and any other applicable statutes or regulations. Because this Confidential Material constitutes commercial or financial information which is privileged or confidential, it is subject to the exemption from mandatory disclosure found in Section 552(b)(4) of FOIA ("FOIA Exemption 4").

Section 552(b)(4) of the FOIA exempts from the disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential". Information has generally been deemed "commercial or financial" if it relates to business or trade. See, e.g., Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002). The Court of Appeals for the District of Columbia Circuit has rejected the argument to confine the term "commercial" to records that "reveal basic commercial operations" such as sales statistics, profits and losses, and inventories. It has instead held that the terms "commercial" or "financial" should be given their "ordinary meanings" and that records are commercial so long as the submitter has a "commercial interest" in them. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Further, the FOIA contains no definition of "privileged" or "confidential". In Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir. 1979), the Court of Appeals concluded that information is confidential for purposes of the FOIA if (i) it is not of the type normally released to the public by the submitter and (ii) the information is of the type that would cause substantial competitive harm if released. There is no requirement that "competitive harm" be established by a showing of actual competitive harm. Rather, "actual competition and the likelihood of substantial competitive injury is all that needs to be shown." Gulf & Western Indus., Inc. v. U.S., 615 F.2d at 530. Thus, in National Parks and Conservation Association v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), the Court of Appeals concluded that the disclosure of certain financial information, including costs and price-related items, was likely to cause substantial harm to the disclosing party's competitive position. Such disclosure, if required, would provide competitors with valuable information relating to the operational strengths and weaknesses of the disclosing company. Such competitive harm may result from the use of such information either by direct competitors or by persons with whom one is negotiating. See American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 868 n.13 (2d Cir.1978).

As discussed above, the Confidential Material, which is comprised of commercial or financial information, serves a commercial function. ICE Clear Credit has a commercial interest in the information contained within the Back-Testing Framework since it describes ICE Clear Credit's back-testing approach, back-testing procedures, and guidelines for remediating poor back-testing results, which support ICE Clear Credit's ability to maintain sufficient margin requirements and enhance ICE Clear Credit's approach to identifying potential weaknesses in the risk methodology and thus are key to ICE Clear Credit's activities as a clearinghouse. As such, the Back-Testing Framework holds commercial value in establishing internal processes and procedures related to back-testing, which took significant effort and time to develop. Disclosure of the Back-Testing Framework could be used by competitors of ICE Clear Credit to gain a competitive advantage and should be protected from public disclosure pursuant to this exemption. Disclosure of the Confidential Material could cause significant competitive harm since competitors could utilize the Confidential Material to mimic ICE Clear Credit's business and the opportunities identified by ICE Clear Credit. Disclosure of the commercial or financial information would provide insight and information related to ICE Clear Credit back-testing strategies, analyses, policies and procedures, or system designs, which competitors could pursue to ICE Clear Credit's detriment given the level of detail contained within the Confidential Material. Further, the information set forth in the Confidential Material is not of a type customarily made available by ICE Clear Credit to the public and has not been disclosed to the public. Consequently, the disclosure of the Confidential Material holds the potential for significant competitive harm to ICE Clear Credit as competitors could utilize the commercial or financial information contained

therein to construct similar methodologies, systems, and analyses without expending similar efforts on development to disadvantage ICE Clear Credit. For all the foregoing reasons, ICE Clear Credit requests that the Commission determine to protect the confidentiality of the Confidential Material and the information contained therein.

Please direct any questions or requests for information to the attention of the undersigned at maria.zyskind@theice.com or (312) 836-6854.

Sincerely,

A handwritten signature in cursive script that reads "Maria Zyskind".

Maria Zyskind
Staff Attorney
ICE Clear Credit LLC
353 North Clark Street, Suite 3100
Chicago, IL 60654