



February 10, 2023

Assistant Secretary of the Commission
for FOIA Matters, Privacy and Sunshine Acts Compliance
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: FOIA Confidential Treatment Request and Detailed Written Justification:
Appendix A to Cboe Futures Exchange, LLC
Rule Certification Submission Number CFE-2023-001

All:

Pursuant to § 40.8(c) and § 145.9(d) of the regulations promulgated by the Commodity Futures Trading Commission (“Commission” or “CFTC”) under the Commodity Exchange Act (“CEA”) and pursuant to the Freedom of Information Act (“FOIA”), Cboe Futures Exchange, LLC (“CFE” or “Exchange”) hereby petitions the Commission for confidential treatment of Appendix A (“Appendix A”) to CFE Rule Certification Submission Number CFE-2023-001 dated February 10, 2023 (“CFE-2023-001”).

CFE-2023-001, Appendix A, and this confidential treatment request and detailed written justification for confidential treatment have all been concurrently submitted to the Commission in accordance with Commission Regulation § 40.8(c)(1). Appendix A has been segregated from CFE-2023-001 in accordance with Commission Regulation § 40.8(c)(2). Additionally, in accordance with Commission Regulation § 40.8(c)(3), CFE-2023-001 indicates that Appendix A to CFE-2023-001 has been segregated from that submission.

The information included in Appendix A (“Confidential Information”) should be afforded confidential treatment based on, among other things, § 145.9(d)(1)(ii) of the Commission’s regulations, which implements FOIA Exemption 4 of the Freedom of Information Act (5 U.S.C. § 552(b)(4)), because disclosure would reveal trade secrets or confidential commercial or financial information of CFE. This request is also consistent with Section 8 of the CEA.

Exemption 4 protects “trade secrets and commercial or financial information obtained from a person” that is “privileged or confidential.” For purposes of Exemption 4, the term “commercial information” is given its ordinary meaning.¹ The D.C. Circuit has also firmly held that § 145.9(d)(1)(ii) is not confined to records that “reveal basic commercial operations,” holding instead that records are commercial so long as the provider of the information has a “commercial

¹ *Dow Jones Company, Inc. v. Federal Energy Regulatory Commission*, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

interest” in the information submitted.² A commercial interest is present where, for example, disclosure of the relevant documents could aid competitors to identify and exploit a company’s competitive position in the market.³ The Exchange has a “commercial interest” in the Confidential Information, and it falls under the definition of “commercial” or “financial” information for purposes of Exemption 4. Appendix A sets forth a broker incentive program for products traded on CFE. The Confidential Information includes the financial terms of this broker incentive program. Among other things, the Confidential Information is commercially valuable because it took significant time and effort to develop. Other trading venues offer or may offer products that compete with CFE’s products. Competition in this regard includes the provision of incentives to brokers to educate current and prospective customers about CFE’s products which serves to foster increased liquidity in CFE’s products from customer orders and trading activity. Enhanced liquidity in CFE’s products benefits all participants in CFE’s market. Disclosure of the terms of CFE’s broker incentive program could aid these competitors in identifying and exploiting CFE’s competitive position in the market for these types of products and similar products and in relation to attracting and retaining brokers to engage in marketing and promotional activities that promote CFE’s products to current and prospective customers.

Additionally, Appendix A also qualify as “confidential” for purposes of Exemption 4. Information submitted to the CFTC is considered confidential under Exemption 4 if it is customarily kept private, or at least closely held, by the person imparting it.⁴ The U.S. Supreme Court has referred to the definitions “known only to a limited few”, “not publicly disseminated”, and “intended to be held in confidence or kept secret” as examples of definitions that elucidate this standard.⁵ Consistent with this standard, CFE both customarily and actually treats as private the benefits and detailed operational provisions described in the broker incentive program set forth in Appendix A. It is customary for designated contract markets and swap execution facilities not to make available to the public the benefits provided under and detailed operational provisions of their incentive programs. For competitive and commercial reasons, CFE follows the same practice and will do so for the broker incentive program set forth in Appendix A and any subsequently adopted or amended broker incentive program.

Disclosure of the commercial terms of the broker incentive program described in Appendix A holds the potential for significant competitive harm to the Exchange as it would allow competitors of the Exchange to view the commercial terms of the broker incentive program and potentially undermine any competitive advantage obtained by the Exchange. CFE voluntarily provided Appendix A to the Commission in connection with a rule certification to the Commission to demonstrate compliance with the CEA and relevant Commission regulations.

² *Baker & Hostetler LLP v. United Dep’t of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006); *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982) and *Bd. of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 (D.C. Cir. 1980)). See also *Soghoian v. Off. of Mgmt. & Budget*, 932 F. Supp. 2d 167, 174-75 (D.D.C. 2013) (“Commercial information withheld under Exemption 4 includes any document that ‘in and of itself’ serves a ‘commercial function or is of a commercial nature’”); *Brockway v. Dep’t of the Air Force*, 370 F.Supp. 738, 740 (N.D. Iowa 1974) (concluding that reports generated by commercial enterprise “must generally be considered commercial information”), *rev’d on other grounds*, 518 F.2d 1184 (8th Cir. 1975).

³ *Baker & Hostetler*, 473 F.3d at 319-20.

⁴ *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

⁵ *Id.* at 2363.

Furthermore, it should be noted that there is no regulatory requirement that this information be publicly disclosed.

CFE hereby requests that Appendix A be afforded confidential treatment in perpetuity.

CFE requests that the Commission notify CFE upon the receipt of any request by any party for any access under FOIA to the Confidential Information or any court order, subpoena, or summons for disclosure of the Confidential Information for the entire duration that the Commission retains the Confidential Information. CFE further requests notification in the event that the Commission intends to disclose the Confidential Information in whole or in part to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. CFE does not waive its notification rights under Section 8(f) of the CEA with respect to any subpoena or summons for the Confidential Information.

The address at which CFE can be reached is as follows:

Cboe Futures Exchange, LLC
433 West Van Buren Street, Suite 700S
Chicago, Illinois 60607
Attention: General Counsel

Please contact the undersigned at (484) 798-9350 or swilkerson@cboe.com if you have any questions regarding this request.

Very truly yours,

/s/ Shane M. Wilkerson

Shane M. Wilkerson
Senior Counsel