



March 15, 2019

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-2019-005

Ladies and Gentlemen:

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 SR-CFE-2019-005 dated March 15, 2019 (“CFE-2019-005”).

CFE-2019-005, 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-2019-005 in accordance with Commission Regulation §40.8(c)(2). Additionally, in accordance with Commission Regulation §40.8(c)(3), CFE-2019-005 indicates that Appendix A to CFE-2019-005 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. *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)). 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 interest” in the information submitted.¹ 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.² 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 market maker program for a product traded on CFE. The Confidential Information includes the financial terms of this market 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 product. Competition in this regard includes the provision of incentives to liquidity providers to trade in CFE’s product in a manner that enhances market quality in CFE’s product to the benefit of all market participants in that product. Disclosure of the terms of CFE’s market maker program could aid these competitors in identifying and exploiting CFE’s competitive position in the market for this type of product and similar products and in relation to attracting and retaining liquidity providers for CFE’s product.

Additionally, Appendix A also qualifies as “confidential” for purposes of Exemption 4. Information that is voluntarily submitted to the CFTC is protected under Exemption 4 if it is not “customarily” disclosed to the public by the submitter. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992). The D.C. Circuit has held that information voluntarily submitted to an agency will be treated as confidential under Exemption 4 if it is the kind of information that a provider would not customarily make available to the public.³ It is customary for designated contract markets and swap execution facilities not to make available to the public the market performance benchmarks and benefits provided pursuant to their market maker programs. For competitive and commercial reasons, CFE follows the same practice and will do so for the market maker program set forth in Appendix A and any subsequently adopted or amended market maker programs. Disclosure of the commercial terms of the market maker 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 market maker 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 in order to demonstrate compliance with the CEA and relevant Commission regulations. Furthermore, it should be noted that there is no regulatory requirement that this information be publicly disclosed.

Even if the Confidential Information were not submitted voluntarily, it still would be considered “confidential” under Exemption 4 since disclosure could cause “substantial harm” to

¹ *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).

² *Baker & Hostetler*, 473 F.3d at 319-20.

³ *Id.* at 320; see also *Soghoian*, 923 F.Supp. 2d at 175.

the competitive position of the Exchange as the submitter of the information.⁴ The existence of actual competition and a likelihood of substantial competitive injury that results from the potential for the use of the submitter's proprietary information by a competitor is sufficient to establish "substantial harm."⁵ A detailed economic analysis is not required to determine the potential effects of disclosure; evidence demonstrating the potential for economic harm is sufficient.⁶

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:

400 South LaSalle Street
Chicago, Illinois 60605
Attention: General Counsel

Please contact the undersigned at 312-786-8109 or at gordon@cboe.com if you have any questions regarding this request.

Very truly yours,



Nicole Gordon
Counsel

⁴ *Soghoian*, 923 F.Supp. 2d at 175 (citing *National Parks & Conservation Association v. Morton*, 478 F.2d 765 (D.C. Cir. 1974)).

⁵ *Jurewicz v. United States Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014). 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).

⁶ *Utah v. Bahe et al.* No. 00-4018, 2001 WL 777034, at 2 (10th Cir. July 10, 2001); *Pub. Citizen Health Research Group*, 704 F.2d at 1291.