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FOIA Confidential Treatment Request

Assistant Secretary of the Commission for FOIA Matters
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: FOIA Confidential Treatment Request and Detailed Written Justification –
NASDAQ Futures Rule Certification SR-NFX-2015-43

Dear Secretary:

I am writing on behalf of NASDAQ Futures, Inc. (the “Exchange”) to request confidential treatment in accordance with CFTC Regulations 40.8(c) and 145.9 for certain confidential information contained in the Exchange’s Rule Certification SR-NFX-2015-43 (the “Submission”).

Specifically, the Exchange is requesting confidential treatment for Confidential Appendix 1 to the Submission, which contains information concerning the Exchange’s market maker program for energy futures and futures options (the “Confidential Information”) and has been segregated and attached as Confidential Appendix 1 to the Submission in accordance with Commission Regulation 40.8(c)(2). In accordance with Commission Regulation 40.8(c)(3), the Submission also indicates that the Confidential Information has been segregated.

Pursuant to Commission Regulation 145.9(d), the Exchange requests that confidential treatment be maintained for the Confidential Information until further notice. We also request that the Commission notify the undersigned immediately after receiving any FOIA request for the Confidential Information 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 the Confidential Information to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. The Exchange 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 basis for this confidential treatment request is that disclosure of the Confidential Information would reveal confidential commercial information of the Exchange. This information is not made generally available to the public and will only be provided to regulators, and to others that sign a confidentiality agreement with respect to such information. The disclosure of the Confidential Information to the public would cause competitive harm to the Exchange as it would allow competitors of the Exchange to replicate its proprietary market maker program, and therefore potentially undermine any competitive advantage the Exchange may have as a result of the information reflected in that document.

The Confidential Information is therefore exempt from disclosure pursuant to Section (b)(4) of the Freedom of Information Act (5 USC 552(b)(4)) (commonly referred to as “Exemption 4”), which exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential;” and Commission Regulation 145.9(d)(ii), which implements Exemption 4. This request is also consistent with Section 8 of the CEA.

Exemption 4 is generally viewed to cover two broad categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

The United States Court of Appeals for the District of Columbia Circuit has firmly held that the terms “commercial and financial” should be given their “ordinary meanings” and that Exemption 4 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 to the agency.¹ A commercial interest is present where, for example, disclosure of the relevant documents could help rivals to identify and exploit a company’s competitive position.² Because, as described

¹ Baker & Hostetler LLP v. United States 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, 923 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.’”); Judicial Watch, Inc. v. United States Dep’t of Energy, No. 01-0981, 2004 WL 635180, at *24 (D.D.C. Mar. 31, 2004) (holding that reports that “constitute work done for clients” are “‘commercial’ in nature”), stay pending appeal on other grounds granted (May 26, 2004); 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.

above, the Exchange has a “commercial interest” in the Confidential Information, it is “commercial” information for purposes of Exemption 4.

Only information “obtained from a person” is included under Exemption 4. The Exchange is a person, as the term “person” includes entities such as corporations.³

The Confidential Information also qualifies as “confidential” for purposes of Exemption 4. The D.C. Circuit has made clear that when information is submitted to an agency voluntarily, it will be treated as confidential under Exemption 4 if it is of a kind the provider would not customarily make available to the public.⁴ The Exchange provided the Confidential Information to the Commission voluntarily in connection with the Submission in order to comply with Commission Regulations regarding filing of proposed market maker programs by designated contract markets. Whether such information customarily would be made available is determined by evaluating how the particular submitting party customarily treats the information,⁵ and, as noted above, the Confidential Information is not customarily made available to the public by the Exchange.

Even if the Confidential Information were not submitted voluntarily, it still would be considered “confidential” under Exemption 4 if disclosure would cause “substantial harm” to the competitive position of the person from whom the information was obtained.⁶ “Substantial harm” is established by a showing of actual competition and a likelihood of substantial competitive injury that flows from the potential for affirmative use by a competitor of the submitter’s proprietary information.⁷ Neither the Commission nor the courts need conduct a sophisticated economic analysis to determine the likely effects of disclosure; evidence demonstrating the *potential* for economic harm is sufficient.⁸

³ Id. at 319.

⁴ Id. at 320; see also Soghoian, 923 F. Supp. 2d at 175.

⁵ Soghoian, 923 F. Supp. 2d at 176.

⁶ Id. at 175 (citing National Parks & Conservation Association v. Morton, 478 F.2d 765 (D.C. Cir. 1974)).

⁷ 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).

⁸ Utah v. Bahe et al. No. 00-4018, 2001 WL 777034, at 2 (10th Cir. July 10, 2001); Pub. Citizen Health Research Group, 704 F2d at 1291.

For the foregoing reasons, the Exchange respectfully requests that the Commission staff make an initial determination to maintain the confidentiality of the Confidential Information. Please contact me at (215)496-5208 if you have any questions regarding this matter or in the event that the Confidential Information becomes subject to inquiry.

Very truly yours,

A handwritten signature in blue ink that reads "Carla Behnfeldt". The signature is written in a cursive style with a blue ink color.

Carla Behnfeldt