



August 7, 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-2019-015

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 an updated Regulatory Services Agreement (“RSA”) between CFE and National Futures Association (“NFA”). The RSA is contained in Appendix A (“Appendix A”) to a Supplemental Submission (“Supplemental Submission”) to CFE Rule Certification Submission Number SR-CFE-2019-015 dated August 7, 2019 (“CFE-2019-015”).

CFE-2019-015, the Supplemental Submission with 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-2019-015 in accordance with Commission Regulation §40.8(c)(2). Additionally, in accordance with Commission Regulation §40.8(c)(3), CFE-2019-015 indicates that Appendix A to CFE-2019-015 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) and (iv) of the Commission’s regulations, which implement FOIA Exemptions 4 and 7 of the Freedom of Information Act (5 U.S.C. §552(b)(4) and 5 U.S.C. §552(b)(7)), because disclosure would reveal trade secrets or confidential commercial or financial information of CFE and investigatory techniques and procedures. 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 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. Among other things, the Confidential Information is commercially valuable because it took significant time and effort to develop and negotiate an effective RSA that allows the Exchange to be competitive.

Additionally, Appendix A also qualifies 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 RSA set forth in Appendix A. It is customary for designated contract markets (“DCMs”) not to make available to the public the terms of their regulatory services agreements with regulatory services providers.⁶ For competitive and commercial reasons, CFE follows the same practice and will do so for the RSA.

Disclosure of the commercial terms of the RSA holds the potential for significant competitive harm to the Exchange as it would allow competitors of the Exchange to view the

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)).

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*, 588 U.S. ____ (2019) (slip op. at 5-6).

⁵ *Id.* (slip op. at 5).

⁶ Commission Regulation §40.8(a) sets forth the sections of an application to the Commission to become a DCM that the Commission makes publically available. §40.8(a) only requires the following sections of a DCM application to be made publically available: transmittal letter and first page of the application cover sheet, proposed rules, narrative summary of the applicant’s proposed activities and regulatory compliance chart, documents establishing the applicant’s legal status, documents setting forth the applicant’s corporate and governance structure, and any other part of the application not covered by a request for confidential treatment. There is no requirement that the clearing agreements or regulatory services agreements of DCM applicants be made publically available, and the Commission permits DCM applicants to maintain the confidentiality of these agreement through the submission of confidential treatment requests.

commercial terms of the RSA and potentially undermine any competitive advantage obtained by the Exchange. CFE voluntarily provided RSA 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.

Additionally, Exemption 7(E) protects “records or information compiled for a law enforcement purpose, ... to the extent that the production of such law enforcement records or information ... would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁷ 5 U.S.C. §552(b)(7)(E). In this case, the RSA was put in place to enable CFE to satisfy its self-regulatory obligations as a DCM, including with respect to the regulation of CFE’s market. Both documents disclose regulatory techniques and procedures utilized by CFE in coordination with NFA. Disclosure of the provisions of the RSA could assist a market participant that desires to engage in behavior that violates CFE rules, Commission regulations, and/or the CEA in seeking to avoid detection of that behavior. Therefore, the Confidential Information is exempt from public disclosure under Exemption 7(E).

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 ngordon@cboe.com if you have any questions regarding this request.

Very truly yours,



Nicole Gordon
Counsel

⁷ “[T]he qualifying phrase (‘if such disclosure could reasonably be expected to risk circumvention of the law’) modifies only ‘guidelines’ and not ‘techniques and procedures.’” *Allard K. Lowenstein Intern, Human Rights Project v. Dept. of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010).