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July 12, 2019

BY ELECTRONIC MAIL

Assistant Secretary of the Commission
FOIA, Privacy and Sunshine Acts Compliance
Commodity Futures Trading Commission
Three Lafayette Centre, 8th Fl.
1155 21st Street, N.W.
Washington, DC 2058

Re: FOIA Confidential Treatment Request

Dear FOIA Compliance Staff:

ICE Futures U.S., Inc. ("Exchange" or "IFUS") Submission Nos. 19-193 - 19-207, 19-209 - 19-210, 19-226 - 19-232, 19-235, and 19-238 - 19-240 ("Submissions"), self-certification of 15 new Financial Gas, two new Financial Power, 11 new Oil Americas futures, and one new Oil Americas options on futures contracts (collectively, "New Contracts"), which will be listed by the Exchange on or about July 29, 2019, or such other date as the Exchange shall determine which shall be no sooner than the second business day following the business day on which the submissions were received by the Commission, was filed with the Secretary of the Commission on July 12, 2019. As discussed more fully below, Appendix A to the Submissions ("Appendix A") contains confidential and proprietary commercial and financial information of the Exchange which is exempt from disclosure pursuant to Section 552(b)(4) of the Freedom Of Information Act ("FOIA") and Commission Regulation 145.9(d). Copies of the Submissions and Appendix A accompany this request. Pursuant to Commission Regulation 145.9(d)(1)(ii), the Exchange requests that Appendix A and its contents receive confidential treatment in perpetuity. IFUS further requests that the Commission notify the Exchange upon receiving any FOIA request, or any other court order, subpoena or summons for Appendix A. The Exchange also requests that it be notified if the Commission intends to disclose Appendix A to Congress or to any other governmental agency or unit pursuant to Section 8 of the Commodity Exchange Act ("CEA").

DETAILED WRITTEN JUSTIFICATION

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". The FOIA contains no definition of "privileged" or "confidential". Some courts have found there to be a presumption of confidentiality for commercial information that is (1) provided voluntarily and (2) is of a kind the provider would not customarily make available to the public. See Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc); see also Center for Auto Safety v. National Highway Traffic Safety Administration, 244 F.3d 144, 147 (D.C. Cir. 2001) (applying tests from Critical Mass). Even if there were no presumption of confidentiality, the information in Appendix A still would be considered "confidential" because the Exchange would not ordinarily disclose it to the public and disclosure would cause substantial harm to the competitive position of the Exchange.

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). It is also clear that the exemption was intended to prevent the fundamental unfairness that can result from one side having confidential information about the other in a business context. Cf. National Parks, supra, at 678 n.18.

The deliverable supply analysis set forth in Appendix A was voluntarily provided to the Commission to support the Exchange's self-certification that the speculative position limits for the New Contracts are in compliance with applicable provisions of the CEA and the regulations thereunder. This information is not of a type customarily made available to the public by the Exchange. The deliverable supply analysis took significant time, analysis and expense to develop and is an integral part of the Exchange's new contracts. Consequently, disclosure of the salient terms holds the potential for significant competitive harm to the Exchange. Additionally, it should be noted that there is no regulatory requirement that such information be disclosed.

For all the foregoing reasons, the Exchange requests that the Commission grant the Exchange's request for confidential treatment for Appendix A and the information contained therein. If you have any questions or need further information, please contact me at 312-836-6745 or at patrick.swartzer@theice.com.

Sincerely,

Patrick Swartzer
Manager
Market Regulation

Enc.
cc: Secretary of the Commission
Division of Market Oversight
New York Regional Office