



Christopher Bowen  
Managing Director and Chief Regulatory Counsel  
Legal Department

September 15, 2017

**VIA ELECTRONIC PORTAL**

Mr. Christopher J. Kirkpatrick  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: FOIA Confidential Treatment Request**

Dear Mr. Kirkpatrick:

By electronic portal dated today, September 15, 2017, New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") submitted a supplemental product certification filing (Submission No. 17-310S) to the Commodity Futures Trading Commission ("CFTC" or "Commission"). The supplemental filing includes an Appendix A for which the Exchange and The Steele Index ("TSI") are submitting a detailed written justification setting forth grounds for this request for confidential treatment.

Pursuant to Sections 8 and 8(a) of the Commodity Exchange Act ("CEA"), as amended, and Commission Regulation 145.9(d), the Exchange requests confidential treatment of Appendix A on the grounds that disclosure of Appendix A would reveal confidential commercial information of the Exchange and of TSI. Pursuant to Commission Regulation 145.9(d)(5), the Exchange requests that confidential treatment be maintained for Appendix A until further notice from the Exchange. The Exchange also requests that the Commission notify the undersigned immediately after receiving any FOIA request for said Appendix A or any other court order, subpoena or summons for same. Finally, the Exchange requests notification in the event the Commission intends to disclose such Appendix A 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 such Appendix A.

Should you have any questions concerning the above, please contact the undersigned at (212) 299-2200 or via e-mail at [CMEGSubmissionInquiry@cmegroup.com](mailto:CMEGSubmissionInquiry@cmegroup.com).

Sincerely,

/s/ Christopher Bowen  
Managing Director and Chief Regulatory Counsel

Attachment: Exhibit 1

# Exhibit 1

## DETAILED WRITTEN JUSTIFICATION



Christopher Bowen  
Managing Director and Chief Regulatory Counsel  
Legal Department

September 15, 2017

### VIA ELECTRONIC PORTAL

Assistant Secretary of the Commission for FOIA,  
Privacy and Sunshine Acts Compliance  
Commodity Futures Trading Commission  
Three Lafayette Centre, 8<sup>th</sup> Floor  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**Re: FOIA Confidential Treatment Request: Appendix A to NYMEX Submission No. 17-310S**

Dear FOIA Compliance Staff:

I am writing on behalf of New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") and The Steele Index ("TSI"). In accordance with the requirements set forth in Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 40.8, the Exchange and TSI hereby submit their detailed written justification in support of continued confidentiality of the information set out in Appendix A to Submission No. 17-310S ("Appendix A") and respectfully requests that the Commission not release the information contained therein.

As discussed more fully below, Appendix A contains confidential and proprietary commercial information of TSI and is thus exempt from disclosure pursuant to Section 8 of the Commodity Exchange Act ("CEA"), Commission Regulation 145.9(d) and Exemption 4 (the "Exemption") to the Freedom of Information Act ("FOIA").

### **Presumption of Confidentiality**

There is 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) (affirming continuing validity of Critical Mass and applying tests detailed in that case). TSI provided the confidential information in Appendix A to the Commission voluntarily in connection with the above referenced submission. Disclosure of the confidential information would reveal confidential commercial information of TSI, which TSI licensed to the Exchange for a fee in connection with the development of the FOB Australia Premium Hard Coking Coal (TSI) Futures contract.

The terms of the license between TSI and the Exchange do not permit the Exchange to make the confidential information available to the public. TSI, which is in the business of gathering and providing information related to the freight markets, maintains the information as confidential and only discloses such information to persons who pay a license fee. The disclosure of the confidential information to the public would cause competitive harm to TSI by taking away its ability to collect license fees with respect to

the confidential information and would cause competitive harm to the Exchange by limiting its ability to provide the cash market analysis needed for new product submissions.

### **Disclosure Would Likely Cause Competitive Harm to the Exchange and TSI**

Notwithstanding this presumption of confidentiality, the confidential information in Appendix A still would be considered “confidential” because it is information that the Exchange and TSI would not and have not disclosed to the public and its disclosure would cause substantial and irreparable harm to the competitive position of the Exchange and TSI. FOIA was enacted to facilitate the disclosure of information to the public, but was clearly not intended to allow business competitors “cheap” access to valuable confidential information, especially when “competition in business turns on the relative costs and opportunities faced by members of the same industry.” Worthington Compressors v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981).

When a submitter of confidential information has a “commercial interest in the requested information the [E]xemption is properly invoked.” ISG Group, Inc. v. Dept. of Defense, 1989 WL 168858 (D.D.C. 1989). The test for determining confidentiality under the Exemption is set forth in National Parks & Conservation Association v. Morton, where the court held that information is confidential if its disclosure would “cause substantial harm to the competitive position of the person from whom the information was obtained.” In applying the “competitive harm” test for confidentiality, 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). “Actual competition and the likelihood of substantial competitive injury is all that need to be shown.” Gulf & Western Indus., Inc. v. United States, 615 F.2d at 530. Information is confidential if: 1) there is actual competition in the relevant market; and 2) disclosure is likely to cause substantial competitive injury. Id. Neither the Commission nor the courts must conduct a sophisticated economic analysis to determine the likely effects of disclosure; evidence demonstrating the *potential* for economic harm is sufficient. Utah v. Bahe et al. No. 00-4018, 2001 WL 777034, at 2 (10<sup>th</sup> Cir. July 10, 2001); Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 (D.C. Cir. 1983).

The Exchange also satisfies the second requirement for the “competitive harm” test for confidentiality because the release of the information would likely cause substantial competitive injury to CME. See Gulf & Western Indus. Inc. v. United States 615 F.2d 527,530 (D.C. Cir. 1979). As noted above, a sophisticated economic analysis is unnecessary; the potential for economic harm is sufficient. Utah v. Bahe et al., No. 00-4018, 2001 WL 777034, at 2 (Cir. July 10, 2001); Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 (D.C. Cir. 1983).

Under circumstances similar to those involved here, courts have recognized that disclosure of commercial information holds the potential for significant competitive harm. Bahe No. 00-4018, 2001 WL 777034, at 2-3 (terms and structure of contract for storage of nuclear fuel confidential); Heeney v. Food & Drug Admin., 2001 U.S. App. Lexis 7732, at 3-4 (9<sup>th</sup> Cir. April 12, 2001) (manufacturing agreement and other information confidential); Professional Review Org. v. U.S. Department of Health and Human Servs., 607 F. Supp. 423, 425-26 (D.D.C. 1985) (business plans confidential). When applying the “substantial competitive harm test,” courts “[c]onsider how valuable the information will be to the requesting competitors and how much this gain will damage the submitter.” Worthington Compressors, 662 F.2d at 51. Since TSI sells this information to individuals for a fee pursuant to strict usage restrictions and it is not distributed publicly, making the confidential information public would clearly be valuable to TSI’s competitors and cause substantial damage to it.

Appendix A contains valuable commercial information with respect to pricing that was developed at significant cost and over a substantial period of time by TSI. It would destroy the value of that work if the Exchange was required to make that information available to the general public and/or TSI’s competitors, who could free ride with no cost. Additionally, there is no regulatory imperative to disclose such information.

For the foregoing reasons, the Exchange and TSI respectfully request that the Commission maintain the confidential privilege afforded to this type of information and refrain from releasing Appendix A as such action could prove irreparably harmful.

Should you have any questions concerning the above, please contact the undersigned at (212) 299-2200 or via e-mail at [CMEGSubmissionInquiry@cmegroup.com](mailto:CMEGSubmissionInquiry@cmegroup.com).

Sincerely,

/s/ Christopher Bowen  
Managing Director and Chief Regulatory Counsel