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part of eex group

November 18, 2019

**FOIA CONFIDENTIAL TREATMENT REQUEST
Pursuant to 17 C.F.R. § 145.9**

VIA PORTAL

Assistant Secretary of the Commission for FOI,
Privacy and Sunshine Acts Compliance
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Petition for Confidential Treatment

Dear Sir or Madam:

Nodal Exchange, LLC (“Nodal Exchange” or “Exchange”) Submissions 19-042.01 to 19-042.87 (“Submissions”), self-certifications of 87 new environmental futures and options contracts to be listed by the Exchange on or after December 3, 2019, were filed with the Secretary of the Commission between November 18, 2019 and November 19, 2019. As discussed more fully below, Exhibit B to the Submissions (“Exhibit B”) contains confidential and proprietary commercial information of the Exchange which is exempt from disclosure pursuant to Section 8 of the Commodity Exchange Act (“CEA”), the Commission Regulation 145.9(d), and section 522(b)(4) of the Freedom of Information Act (“FOIA”) as explained below, and Nodal Exchange respectfully requests that the Commission not release the information contained therein. Pursuant to Commission Regulation 145.9(d)(1)(ii), the Exchange requests that Exhibit B and its contents receive confidential treatment in perpetuity. Nodal Exchange further requests that the Commission notify the Exchange upon receiving any FOIA request or any other request for disclosure of Exhibit B.

Justification of Confidential Treatment

Section 522(b)(4) of FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential” from its disclosure requirements. Judicial analysis of section 522(b)(4) of FOIA has found that 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) (applying the tests detailed in Critical Mass). Nodal Exchange provided the confidential information in Exhibit B to the Commission voluntarily in the Submission in order to furnish useful commercial information and provide assurance as to the reliability of the Submissions. Notwithstanding the presumption of confidentiality, the confidential information in Exhibit B would still be considered “confidential” because Nodal Exchange would not disclose it to the public and its disclosure would cause substantial harm to Nodal Exchange’s competitive position.

Assistant Secretary of the Commission for FOI,
Privacy and Sunshine Acts Compliance
November 18, 2019
Page 2

FOIA was enacted to facilitate the disclosure of information to the public, but was clearly not intended to allow business competitors to avail themselves of 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). In Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979), the Court of Appeals concluded that information is confidential for purposes of FOIA if (1) it is not of the type normally released to the public by the submitter and (2) 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, 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. 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. It is clear that the FOIA 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, 547 F.2d at 678 n.18.

The information in Exhibit B was voluntarily provided to the Commission to support the Exchange’s self-certification that the speculative position limits for the new products are in compliance with applicable provisions of the CEA and the Commission’s regulations. This information is not of a type made available to the public by the Exchange. The information in Exhibit B took significant time, analysis, and expense to develop and is an integral part of the Exchange’s new products. Disclosure of Exhibit B creates the potential for significant competitive harm to Nodal Exchange.

For the foregoing reasons, Nodal Exchange requests that the Commission grant this request for confidential treatment for Exhibit B and the information contained therein. Should you have any questions or need additional information, please contact me at 703-962-9853 or markotic@nodalexchange.com.

Very truly yours,

/s/ Max Markotic

Director of Compliance