



**World Financial Center  
One North End Avenue  
New York, New York 10282**

**BY ELECTRONIC TRANSMISSION**

Submission No. 12-63  
September 28, 2012

Secretary of the Commission  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

**Re: Volume and Broker Incentive Programs  
Submission Pursuant to Section 5c(c)(1) of the Act and Regulation 40.6(a)**

Dear Sir or Madam:

Pursuant to Section 5c(c)(1) of the Commodity Exchange Act, as amended, and Commission Regulation 40.6(a), ICE Futures U.S., Inc. (“Exchange”) hereby notifies the Commission of its intention to implement several Volume and Broker Incentive Programs (the “Programs”) specifically related to the Exchange’s transition of OTC Energy swaps to Energy futures and options contracts.

**[REDACTED]**

The Exchange has identified the following core principles as potentially being impacted by the Programs: Monitoring of Trading, Execution of Transactions, Protection of Market Participants, Compliance with Rules and Recordkeeping. The proposed Programs will not impact the Exchange’s ability to perform its trade practice and market surveillance obligations under the CEA. The Programs do not impact order execution priority or otherwise give participants any execution preference or advantage. The Programs impose record-retention obligations on the participant where necessary and appropriate.

The Programs will become effective on October 15, 2012. The Exchange certifies that the Programs comply with the requirements of the Commodity Exchange Act and the rules and regulations promulgated thereunder. There were no substantive opposing views to the Programs.

The Exchange further certifies that a redacted version of this submission has been concurrently posted on the Exchange’s website at <https://www.theice.com/notices/RegulatoryFilings.shtml>, (consistent with the petition for Confidential Treatment filed contemporaneously with the Commission).

If you have any questions or need further information, please contact me at 212-748-4021 or at [jason.fusco@theice.com](mailto:jason.fusco@theice.com).

Sincerely,

A handwritten signature in black ink, reading "Jason V. Fusco". The signature is written in a cursive style with a large, looping initial "J".

Jason V. Fusco  
Assistant General Counsel  
ICE Futures U.S, Inc.

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



September 28, 2012

**BY ELECTRONIC MAIL**

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

**Re: FOIA Confidential Treatment Request**

Dear FOIA Compliance Staff:

ICE Futures U.S., Inc. ("Exchange") Submission No. 12-63 ("Submission"), a self certification of new Volume and Broker Incentive Programs (collectively the "Program") was filed with the Secretary of the Commission on September 28, 2012. As discussed more fully below, Appendix A to the Submission ("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 Submission 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 undersigned 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**

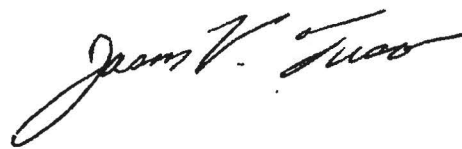
Section 552(b)(4) of the FOIA exempts from the disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The FOIA contains no definition of "privileged" or "confidential". Some courts have found there to be a presumption 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 information set forth in Appendix A was voluntarily provided to the Commission to support the Exchange's self certification that new Programs were 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 Programs took significant time, analysis and expense to develop and are an integral part of the Exchange's competitive strategy for the natural gas, electric power and emissions futures and options markets. 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 212-748-4021 or at [jason.fusco@theice.com](mailto:jason.fusco@theice.com).

Sincerely,



Jason V. Fusco  
Assistant General Counsel  
Market Regulation

Enc.

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