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CME Group

Christopher Bowen
Managing Director and Chief Regulatory Counsel
Legal Department

December 20, 2011

VIA E-MAIL

Mr. David Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

RE: SUPPLEMENTAL SUBMISSION NYMEX Submission No.11-515S: Additional supplemental information relating to the Non-member Core Energy & Natural Gas Incentive Program. Subject to a Freedom of Information Act Protection.

Dear Mr. Stawick:

Previously, pursuant to Submission No. 11-515 dated December 20, 2011, the New York Mercantile Exchange, Inc ("NYMEX") notified the Commodity Futures Trading Commission ("Commission") that they planned to implement a Non-member Core Energy & Natural Gas Incentive Program ("Program").

In this letter, NYMEX is providing the Commission with certain additional information related to the incentives under the Program. The additional supplemental information is provided in Appendix A, for which a request for confidential treatment and accompanying detailed written justification is being simultaneously submitted to the Commission. A copy of the request for confidential treatment and detailed written justification is included with this supplemental filing.

NYMEX certifies that the Program complies with the Commodity Exchange Act and the regulations thereunder. A concise explanation and analysis of the operation, purpose and effect of the Program was provided in Submission No. 11-515. There were no substantive opposing views to this Program.

NYMEX certifies that a description of this submission has been concurrently posted on NYMEX's website at http://www.cmegroup.com/market-regulation/rule-filings.html

If you require any additional information regarding this submission, please contact Robert Lev at 312-930-3019 or via e-mail at robert.lev@cmegroup.com, or contact me at 212-299-2200. Please reference our NYMEX Submission No. 11-515S in any related correspondence.

Sincerely,

/s/ Christopher Bowen
Managing Director, Chief Regulatory Counsel

Attachments

December 20, 2011

VIA E-MAIL AND OVERNIGHT MAIL

Stacy Easter
Paralegal Specialist
FOIA Compliance Office
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: FOIA Confidential Treatment Request

Dear Ms. Easter:

By e-mail dated today, December 20, 2011, the New York Mercantile Exchange, Inc. ("NYMEX" or the "Exchange") submitted a rule certification filing to the CFTC (submission No. 11-515S). This supplemental filing includes an appendix ("Appendix A"), which is attached.

Pursuant to Sections 8 and 8(a) of the Commodity Exchange Act ("CEA"), as amended, and Commission Regulation 145.9(d), NYMEX requests confidential treatment of Appendix A, and the accompanying detailed written justification attached hereto as Exhibit 1 ("Exhibit 1") on the grounds that Appendix A and Exhibit 1 contain confidential commercial information of the submitter (NYMEX). Pursuant to Commission Regulation 145.9(d)(5), NYMEX requests that confidential treatment be maintained for Appendix A until further notice from the Exchange. We also request 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, we request that we be notified in the event the Commission intends to disclose such Appendix A or Exhibit 1 to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. NYMEX does not waive its notification rights under Section 8(f) of the CEA with respect to any subpoena or summons for such Appendix A or Exhibit 1.

Please contact the undersigned at (212) 299-2200 should you have any questions concerning this letter.

Sincerely,

/s/Christopher Bowen
Managing Director and Regulatory Counsel

Enclosure

EXHIBIT 1

December 20, 2011

VIA Electronic Mail – foiasubmissions@cftc.gov

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

Re: FOIA Confidential Treatment Request: Appendix A to NYMEX Submission 11-515S

Dear FOIA Compliance Staff:

I am writing on behalf of the New York Mercantile Exchange, Inc. ("NYMEX" or the "Exchange"), a subsidiary of CME Group Inc. In accordance with the requirements set forth in Section 40.8 of the Commodity Exchange Act ("CEA"), the Exchange hereby submits its detailed written justification in support of continued confidentiality of the information set out in Appendix A to submission No. 11-515S ("Appendix A") and respectfully requests that the Commodity Futures Trading Commission (the "Commission") not release the information contained therein.

As discussed more fully below, Appendix A contains confidential and proprietary commercial information of the Exchange 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). The Exchange provided the confidential information in Appendix A to the Commission voluntarily in connection with the above referenced submission in order to demonstrate to the Commission the compliance of the incentive program with the CEA and relevant Commission Regulations. Further, the incentive structure set out in Appendix A is much more complex than the simple incentives that may in some circumstances accompany a market maker or trading incentive program. The incentive structure set out in Appendix A was developed by Exchange staff at significant cost and over a substantial period of time. The Exchange would not customarily make such complex incentive structures available to the public.

Disclosure Would Likely Cause Competitive Harm to the Exchange

Notwithstanding this presumption of confidentiality, the confidential information in Appendix A still would be considered "confidential" because it is information that the Exchange would not and have disclosed to the public and its disclosure would cause substantial harm to the competitive position of the Exchange. 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 Exemption 4 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 (10th Cir. July 10, 2001); Public Citizen Health Research Group v. Food & Drug Admin., 704 F2d 1280, 1291 (D.C. Cir. 1983).

Disclosure Would Likely Harm the Exchange

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 the Exchange. 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 (9th 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.

Appendix A contains valuable commercial information with respect to the concessions that we found to be necessary to create liquid contracts in the Program's products. This information was developed at significant cost and over a substantial period of time. It would destroy the value of that work if we were required to make that information available to competitors, who could free ride our efforts with no cost. The incentive of exchanges to develop competing trading incentive programs and market making programs will be destroyed. Additionally, there is no regulatory imperative to disclose such information.
For the foregoing reasons, the Exchange respectfully requests that the Commission maintain the confidential privilege afforded to this type of information and refrain from releasing Appendix A as such action could prove harmful to the Exchange.

Please contact me if you have any questions regarding this matter.

Very truly yours,

/s/Christopher K. Bowen
Managing Director, Chief Regulatory Counsel