Christopher Bowen
Managing Director and Chief Regulatory Counsel
Legal Department

August 15, 2014

VIA ELECTRONIC PORTAL

Ms. Melissa Jurgens
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: FOIA Confidential Treatment Request

Dear Ms. Jurgens:

By e-mail dated today, August 15, 2014, Commodity Exchange, Inc. ("COMEX" or "Exchange") submitted a supplemental rule certification filing (Submission No. 14-335S) to the Commodity Futures Trading Commission ("CFTC" or "Commission"). 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), COMEX requests confidential treatment of Appendix A, on the grounds that Appendix A contains confidential commercial information of the submitter (COMEX). Pursuant to Commission Regulation 145.9(d)(5), COMEX requests that confidential treatment be maintained for Appendix A until further notice from COMEX. 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 to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. COMEX does not waive its notification rights under Section 8(f) of the CEA with respect to any subpoena or summons for such Appendix A.

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

Sincerely,

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

Enclosure: Exhibit 1

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EXHIBIT 1

Christopher Bowen
Managing Director and Chief Regulatory Counsel
Legal Department

August 15, 2014

VIA Electronic Portal

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 COMEX Submission 14-335S

Dear FOIA Compliance Staff:

I am writing on behalf of Commodity Exchange, Inc. ("COMEX" or "Exchange") a subsidiary of CME Group Inc. In accordance with the requirements set forth in Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 40.8, COMEX hereby submits its detailed written justification in support of continued confidentiality of the information set out in Appendix A to Submission No. 14-335S ("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 COMEX 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). COMEX 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. The incentive structure set out in Appendix A was developed by COMEX staff at significant cost and over a substantial period of time. COMEX would not customarily make such incentive structures available to the public.

Disclosure Would Likely Cause Competitive Harm to COMEX

Notwithstanding this presumption of confidentiality, the confidential information in Appendix A still would be considered "confidential" because it is information that COMEX would not have disclosed to the public and its disclosure would cause substantial harm to the competitive position of COMEX. 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 COMEX

COMEX 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 COMEX. 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 a liquid marketplace in the products under the incentive program. 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 for exchanges to develop competing market making and trading incentive programs will be destroyed. Additionally, there is no regulatory imperative to disclose such information.

For the foregoing reasons, COMEX 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 COMEX.

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

Very truly yours,

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

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