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Richard H. Lamm
Managing Director, Regulatory Counsel
Legal and Market Regulation

OFFICE OF THE SECRETARIAT

September 15, 2008

Received CFTC
Records Section
9/16/08

COMMENT

VIA ELECTRONIC MAIL

David Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
secretary@cftc.gov

Re: Confidential Information and Commission Records and Information – 73 Fed. Reg. 44939 (Aug. 1, 2008)

Dear Mr. Stawick:

CME Group, Inc. ("CME Group") appreciates the opportunity to comment on the Commodity Futures Trading Commission's (the "Commission") re-proposal with respect to proposed amendments to procedures under which derivatives transaction execution facilities ("DTEFs"), derivatives clearing organizations ("DCOs") and designated contracts markets ("DCMs") (collectively, "registered entities") may request confidential treatment for products and rules submitted via certification procedures or for Commission review and approval under Parts 40 and 41 of the Commission's Regulations, and to amend Commission Regulation 145.9(b) to clarify that its procedures for requesting confidential treatment do not apply to submissions filed under Parts 40 and 41.

CME Group is the world's largest and most diverse derivatives exchange. CME Group serves the risk management needs of customers around the globe. CME is also the largest DCO in the world. As an international marketplace, CME Group brings buyers and sellers together on the CME Globex electronic trading platform and on trading floors in Chicago and New York. CME Group offers the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, agricultural commodities, metals, and alternative investment products such as weather and real estate.

Background

On July 20, 2007, the Commission published a notice of proposed rulemaking to amend the procedures pursuant to which registered entities request confidential treatment for materials submitted under Parts 40 and 41. Under the proposed amendments, Commission Regulation 40.8(c) would provide that registered entities requesting confidential treatment for submissions under Parts 40 and 41 must file with the submission a detailed written justification, and that Commission staff may make an initial determination to grant or deny confidential treatment rather than waiting until a request is received under the Freedom of Information Act ("FOIA"). In August 2007, CME Group and New York Mercantile Exchange, Inc.

("NYMEX") each submitted comments in response to the notice of proposed rulemaking.¹ On August 1, 2008, the Commission published a notice of proposed rulemaking that, *inter alia*, (i) re-proposed Regulation 40.8(c) to clarify that an initial staff determination to deny confidential treatment can be appealed to the Office of General Counsel and that such an appeal will stay release of the material at issue, and (ii) proposed amendments to Regulation 145.9(b) to clarify that procedures therein for requesting confidential treatment are inapplicable when confidential treatment is sought under Parts 40 and 41. The Commission further proposed to add new paragraph (d) to Regulation 40.8, which would state: "Commission staff will not consider requests for confidential treatment of information that is required to be made public under Section 5(d)(7) of the Act or Commission Regulations 40.3(a)(7) or 40.5(a)(8)." Section 5(d)(7) of the Act is DCM Core Principle 7, which requires a board of trade to "make available to market authorities, market participants, and the public information concerning (A) the terms and conditions of the contracts of the contract market; and (B) the mechanisms for executing transactions on or through the facilities of the contract market." The phrase "mechanisms for executing transactions" is not defined in the Act, the Commission's existing Regulations or the proposed amended Regulations. Nevertheless, the Commission has stated that the phrase "generally include[s] such information as trading algorithms, market maker programs and information from an exchange's rulebook that pertain to or impact trading." 73 Fed. Reg. 44941, n.17 (Aug. 1, 2008).

Because the reproposal states that comments submitted in response to the July 20, 2007 notice need not be resubmitted, we will not repeat all of the comments made in CME Group's and NYMEX's August 2007 submissions. However, the Commission now seeks comments on one issue raised in NYMEX's August 2007 submission: confidential treatment requests for algorithms or similar proprietary trading tools that are mechanisms for executing transactions. As explained below, CME Group believes that summary denial of confidential treatment to all information relating to a registered entity's algorithms or similar proprietary trading tools would be inappropriate.

Confidential Treatment of Mechanisms for Executing Transactions

The stated purpose of the proposed amendments is to enhance the Commission's ability to provide the public with immediate access to materials filed under Parts 40 and 41 that do not merit confidential treatment. Although the Commission has stated that it considers market maker programs to be "mechanisms for executing transactions" within Core Principle 7, it has acknowledged that such programs may include commercially valuable information deserving of confidential treatment. For example, FOIA exemption (b)(4) protects from disclosure non-public commercial or financial information where its release could cause competitive harm to the submitter. As the Commission has explained, access to certain information regarding market maker programs "could give an unfair advantage to potential counterparties of market makers as well as providing other markets with a competitive edge when setting up their own market maker programs and negotiating agreements with potential market makers." Therefore, the Commission concluded that summary denial of confidential treatment to all information relating to market maker programs would be "inappropriate."

¹ On August 22, 2008, CME Group announced that it completed its acquisition of NYMEX Holdings, Inc., the parent company of NYMEX.

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The Commission should reach the same conclusion with respect to other mechanisms for executing transactions, including trading algorithms or similar proprietary trading tools. In its letter to the Commission dated August 23, 2007 commenting on the proposed amendments published in July 2007, NYMEX noted that algorithms or similar proprietary trading tools may merit confidential treatment. As with certain aspects of market maker programs, certain confidential information relating to a registered entity's trading algorithms or proprietary trading tools may fall within FOIA exemption (b)(4), as its release could cause competitive harm to the submitter.

In response to NYMEX's letter, the Commission invited public comment "with respect to specific types of trading tools that should be given consideration under a request for confidential treatment." At present, the Commission should simply provide general guidance that summary denial of confidential treatment to all information relating to a registered entity's algorithms or similar proprietary trading tools would be inappropriate. The Commission should not attempt to determine in the context of a rulemaking whether confidential treatment is merited for any specific types of trading tools. Rather, the Commission should make such a determination when presented with a request for confidential treatment from a registered entity, together with a detailed written justification as required under the proposed amendments.

CME Group thanks the Commission for the opportunity to comment on this matter. We would be happy to discuss any of these issues with the Commission. If you have any comments or questions, please feel free to contact me at (312) 930-2041 or Richard.Lamm@cmegroup.com; or Lisa Dunsky, Director and Associate General Counsel, at (312) 338-2483 or Lisa.Dunsky@cmegroup.com.

Sincerely,



Richard H. Lamm

cc: Susan Nathan, Senior Special Counsel (via e-mail)