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8/24/07

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New York
Mercantile Exchange

COMMENT

August 23, 2007

Ms. Eileen Donovan
Acting Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St., N.W.
Washington, D.C. 20581

Re: Confidential Information and Commission Records and Information

Dear Ms. Donovan:

The New York Mercantile Exchange, Inc. (NYMEX or Exchange) appreciates the opportunity to comment on the Commodity Futures Trading Commission's (CFTC or Commission) Federal Register Release (Release) dated July 20, 2007. The CFTC requested comment on proposed amendments to procedures for confidential treatment requests by derivatives transaction facilities (DTEF), derivatives clearing organizations (DCO), or designated contract markets (DCM) for products and rules submitted via certification or for CFTC review and approval. NYMEX is a for-profit corporation organized under the laws of the State of Delaware. It is the chief operating subsidiary of NYMEX Holdings, Inc. (NYMX Holdings). As a DCM and DCO, NYMEX is the largest exchange in the world for trading futures and options contracts on energy and metals commodities.

The CFTC is proposing to amend Commission Regulation 40.8 to add paragraph (c) as the exclusive method of requesting confidential treatment for information required to be filed under Parts 40 and 41. In addition, the CFTC proposes to add new provisions to Parts 40 and 41 to direct the registered entity requesting confidential treatment to follow the new procedures specified in Commission Regulation 40.8(c). Registered entities would be required to follow the current standard procedures, and in addition would be required to file a detailed written justification simultaneously with the request for confidential treatment, and to segregate the material deemed confidential in an appendix to the submission. Furthermore, CFTC staff could make an initial determination to grant or deny confidential treatment to such material before receiving a request under the Freedom of Information Act (FOIA). The CFTC stated that the purpose of the proposed rule changes is to expedite the confidential treatment review process and thereby provide the public with more immediate access to non-confidential information.

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The New York Mercantile Exchange, Inc., is composed of two divisions. The NYMEX Division offers trading in crude oil, heating oil, unleaded gasoline, natural gas, electricity, coal, propane, platinum, and palladium. The COMEX Division offers trading in gold, silver, copper, and aluminum.

NYMEX understands the CFTC's stated purpose of the proposed rule, which is to expedite the release of non-confidential information. However, NYMEX has several concerns about the proposal as drafted. Specifically, NYMEX questions the merit of including in the submissions a detailed confidentiality analysis, regardless of whether such materials are subject to a FOIA request. Additionally, the proposal adopts a rigid exclusive means for requesting confidential treatment when the Commodity Futures Modernization Act of 2000 (CFMA) ushered in a flexible core principles approach to regulation. Also, the proposal could potentially preclude DTEFs, DCMs and DCOs from seeking confidential treatment of proprietary intellectual property that is developed in connection with such facility's transaction execution processes. Further, the proposed rule by its own terms only applies to DTEFs, DCOs and DCMs, and does not apply to any other person or entity that makes submissions to the Commission with confidentiality requests included. Lastly, the Release does not identify specific problems encountered under the current procedure that would justify the change.

Under the proposed rule, all confidential treatment requests for submissions under Part 40 must include a detailed written justification for confidentiality, regardless of whether a FOIA request is actually received by the CFTC. NYMEX believes that this requirement imposes unnecessary burdens on certain registered entities seeking confidential treatment. There is an economy of effort issue to be addressed in a requirement that mandates extensive analysis and the development of persuasive arguments ahead of a FOIA request for release of the subject materials. The result of this approach is an expenditure of resources to prepare the detailed justification regardless of whether there is a need to justify the request for confidential treatment. We question the merits of preparing a detailed justification every time we request confidential treatment when possibly 80% of our submissions are never subject to a FOIA request. In fact, we do not believe that there is any good public policy purpose to be served by requiring registered entities to provide confidentiality justification unless there is an actual FOIA request that covers the subject materials. Neither the Commission nor the regulated entities have sufficient resources to have the luxury of engaging in hypothetical confidentiality justification just for the sake of the analysis. We believe it would be a better use of our resources, and those of the Commission, to focus our efforts only on confidentiality matters that are "ripe" through an actual FOIA request.

NYMEX also believes that requiring a justification at the time of the submission may slow our ability to roll out innovative new products and services when we are seeking confidential treatment for part of the filing. Indeed, one of the main purposes of the self-certification process, adopted under the CFMA, was to expedite the time to market of new products or other instruments and to facilitate the timely implementation of new rules. The self-certification process was considered essential to the ability of DCMs to compete with the over-the-counter markets domestically and globally. Any retrenchment on that front would contradict the CFMA and potentially dampen the successes DCMs have experienced under the CFMA.

The proposed rule would establish an exclusive method for requesting confidential treatment for information required to be filed under Parts 40 and 41 of the CFTC's regulations. NYMEX believes that a rulemaking of this kind appears on its face to be inconsistent with the spirit and intent of the CFMA, which set forth a principles-based approach to regulation to provide greater flexibility in the regulatory structure. We question the need for such a rigid requirement, and view this as potentially further erosion of the CFMA as it applies to the exchanges. We believe that the stated objective of expediting the release of non-confidential information can be accomplished in other less prescriptive ways than as proposed in the Release.

NYMEX believes that views about confidentiality can change over time. Consequently, NYMEX questions the CFTC's blanket dismissal of any request for confidential treatment of mechanisms for executing transactions on the facility. Specifically, in part II (B) of the supplementary information, the release provides as follows:

> ". . . .
> The Commission notes that mechanisms for executing transactions on or through the facilities of the contract market generally include such information as trading algorithms and information from an exchange's rulebook that pertain to trading. Moreover, the Commission notes that requests for confidential treatment covering the mechanisms for executing transactions on or through the facilities of the contract market and a product's terms and conditions will not be processed."

This explanatory paragraph supplants the actual proposed new regulation at 17 CFR 40.8(d), which does not specify what is, or is not, ". . . mechanisms for executing transactions on or though the facilities of the contract market". While we would generally agree with the Commission's observation that the mechanisms for executing transactions in a product may include algorithms, we disagree that this type of material should automatically be made public and not be eligible for confidential treatment. Indeed, NYMEX could envision a situation in which we request confidential treatment of an algorithm or other similar proprietary trading tool as part of a submission to the Commission, while we are simultaneously seeking to get intellectual property protection for the exact same thing. NYMEX believes that the CFTC should reconsider its decision to automatically exclude something from being classified as confidential if it can potentially qualify as proprietary intellectual property for which a regulated entity may seek protection under patent or trademark laws.

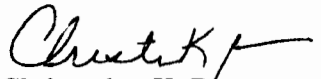
NYMEX further observes that the proposed rule applies only to DCM, DCOs and DTEFs, thus the proposal singles out registered exchanges and clearing organizations for the new requirements. Other submitters presumably would continue to follow the current procedures for requesting confidential treatment of submissions. The CFTC does not elaborate on why this new procedure is proper only for DTEFs, DCMs and DCOs. NYMEX believes that the Commission should delineate its rationale for distinguishing between the regulated entities subject to the proposed rule and others who regularly make

submissions to the Commission, or consider broadly applying this new procedure through a change to17 CFR 145.9.

Finally, in our view, the current procedure for requesting confidential treatment works well because it does not unduly burden a DTEF, DCM or DCO by requiring confidentiality justifications unless and until such time as the materials are actually subject to a FOIA request. Under the current regulations and procedures, NYMEX may request confidential treatment with respect to certain materials when filed with the Commission and, if the Commission receives a FOIA request applicable to such materials, NYMEX has 10 days to prepare a detailed written justification. Commission staff then makes a determination about whether such materials should remain confidential or not. NYMEX notes that the Release does not identify any particular complaints relative to the Commission's timeliness of handling FOIA requests or other problems that the Commission is having with respect to handling FOIA requests involving submissions by DTEFs, DCMs or DCOs. Because NYMEX believes this proposed rule would create a significant additional regulatory burden to its submissions to the Commission, we believe that it would be appropriate for the Commission to delineate the actual need for this regulatory change including identifying any complaints received such as consistent, unusual, and lengthy delays in the CFTC's response to FOIA requests.

NYMEX thanks the Commission for the opportunity to comment on this proposed rulemaking. If you have any comments or questions, please do not hesitate to contact me at any time.

Sincerely,



Christopher K. Bowen
General Counsel
Chief Administrative Officer
and Secretary