



FOIA CONFIDENTIAL TREATMENT REQUESTED by KalshiEX LLC – Pursuant to 17 C.F.R. §§ 40.8 and 145.9

Assistant Secretary of the Commission
for FOI, Privacy and Sunshine Acts Compliance
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: FOIA Confidential Treatment Request (Detailed Written Justification of FOIA Confidential Treatment Request)

Dear Sir or Madam:

KalshiEX LLC (“Kalshi”) hereby respectfully requests that the Commodity Futures Trading Commission (the “CFTC”) accord confidential treatment under 17 C.F.R. §§ 40.8 and 145.9 to the confidential material transmitted today with this letter that are marked confidential, and all information derived therefrom (collectively, the “Confidential Information”). Pursuant to Commission Regulation 145.9(d)(4), please consider that this cover sheet has been clearly marked “FOIA Confidential Treatment Requested by KalshiEX LLC” and is securely attached to the group of records submitted for which confidential treatment is requested.

This request for confidential treatment is made pursuant to 17 C.F.R. §145.9(d)(1) because Kalshi believes that the Confidential Information is covered by one or more exemptions in the Freedom of Information Act (the “FOIA”) (5 U.S.C. §552(b)) and is therefore exempt from the CFTC’s public disclosure requirements pursuant to 17 C.F.R. §145.5. In particular, 5 U.S.C. §552(b)(4) (“Exemption 4”) and 17 C.F.R. §145.9(d)(1)(ii) exempts disclosure that would reveal the Kalshi’s trade secrets or confidential commercial or financial information. Kalshi believes that the Confidential Information contains confidential commercial and financial information as well as proprietary information regarding business development, procedures, and analyses that

should be protected from public disclosure pursuant to this exemption. Confidential treatment is requested for a period of five years.

Judicial analysis of Exemption 4 has found that 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) (applying the tests detailed in *Critical Mass*). Kalshi provided the Confidential Information to the Commission voluntarily in order to demonstrate to the Commission the rule's compliance with the CEA and the Commission Regulations. Notwithstanding the presumption of confidentiality, the confidential information would still be considered "confidential" because Kalshi would not disclose it to the public and its disclosure would cause substantial harm to Kalshi's competitive position. The information set out in the confidential appendices was developed by Kalshi at significant cost and over a substantial period of time. Further, the Confidential Information sets forth submitter's future business plans for growing its market, but are only in a proposed state and not yet finalized. Accordingly, Kalshi would not customarily make such information available to the public. Additionally, the Confidential Information would give Kalshi's competitors insights into Kalshi's future plans, which would have the effect of placing Kalshi at a significant competitive disadvantage. That would have the deleterious effect of stifling innovation; after all, if registrants are stripped of the benefits of innovation there is no incentive to innovate.

FOIA was enacted to facilitate the disclosure of information to the public, but was clearly not intended to allow business competitors to avail themselves of 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). In *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979), the Court of Appeals concluded that information is confidential for purposes of FOIA if (1) it is not of the type normally released to the public by the Kalshi and (2) 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*, 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. 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. It is clear that the FOIA 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*, 547 F.2d at 678 n.18. The confidential information is valuable commercially because it took significant time and at substantial cost to develop.

If the Commission or its staff transmits any of the Confidential Submission to another federal agency, Kalshi requests that you forward a copy of this letter to any such agency with the Submission and further requests that you advise any such agency that Kalshi has requested that this material be accorded confidential treatment.

The requests set forth in the preceding paragraphs also apply to any memoranda, notes, transcripts or other writings of any sort whatsoever that are made by, or at the request of, any employee of the Commission (or any other federal agency) and which (1) incorporate, include or relate to any aspect of the Confidential Submission; or (2) refer to any conference, meeting, or telephone conversation between Kalshi, its current or former employees, representatives, agents, auditors or counsel on the one hand and employees of the Commission (or any other government agency) on the other, relating to the Confidential Submission.

This request is not to be construed as a waiver of any other protection from disclosure or confidential treatment accorded by law, and Kalshi will rely on and invoke any such confidentiality protection. Kalshi requests that the CFTC advise the undersigned, pursuant to 17 C.F.R. §145.9(e)(1), in advance of any disclosure of the Confidential Information pursuant to the FOIA, so that this request for confidential treatment may be substantiated.

If you should have any questions or comments or require further information, please do not hesitate to contact the undersigned at emishory@kalshi.com or (443) 839-3192.

Yours,

Elie Mishory
Chief Regulatory Officer
KalshiEX LLC
emishory@kalshi.com