



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. §§ 40.8 and 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, as well as proprietary, information regarding its legal and business analyses and business with the Commission that should be protected from public disclosure pursuant to this exemption. Confidential treatment is requested for a period of five years.

The Supreme Court most recently revisited its jurisprudence regarding FOIA Exemption 4 in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), where the Court

explicitly expanded FOIA exemption 4 so that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." See also *Ryan, L.L.C. v. United States Dep't of Interior*, No. 22-10373, 2022 WL 17250186, at *2 (5th Cir. Nov. 28, 2022) ("In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court laid out the new Exemption 4 standard: information may be exempt from a FOIA release as "confidential" if it is (1) "both customarily and actually treated as private by its owner" and (2) "provided to the government under an assurance of privacy." 139 S. Ct. 2356, 2363–66 (2019). Importantly, the Supreme Court did not clearly answer whether the latter prong is even necessary, finding "there's no need to resolve that question in this case" because the government's confidentiality was mandated by way of federal regulations. *Id.* at 2363."). Regardless, the CFTC's regulations at 17 C.F.R. §§ 40.8 and 145.9 satisfy this prong.

Under the Supreme Court's construction in *Argus Leader*, the information conveyed by Kalshi falls squarely under the confidential information exempted from FOIA disclosure by Exemption 4. Federal case law applying the *Argus Leader* framework considers submitted information to be deemed "confidential" under Exemption 4 if it is "customarily kept private, or at least closely held, by the person imparting it." *Greenspan v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 1:21-CV-01968 (TNM), 2022 WL 17356879, at *4 (D.D.C. Dec. 1, 2022) (quoting *Food Mktg. Inst. v. Argus Leader Media*, — U.S. —, 139 S. Ct. 2356, 2363, (2019)). Kalshi customarily keeps the Confidential Information "private" and "closely held" and it is therefore "confidential" for purposes of Exemption 4.

In another iteration of the *Argus Leader* holding, the U.S. District Court for the District of Columbia succinctly framed the applicability of Exemption 4 as dependent on whether that information was "of a kind that would customarily not be released to the public by the person from whom it was obtained." *Naumes v. Dep't of the Army*, No. CV 21-1670 (JEB), 2022 WL 17752206, at *4–5 (D.D.C. Dec. 19, 2022) (quoting *Critical Mass Engine Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992)). "The critical question in so determining is how the particular party customarily treats the information, not how the industry as a whole treats the information. A party can voluntarily make protected disclosures of information, and as long as the disclosures are not made to the general public, such disclosures do not constitute customary disclosures." *Id.* (internal citations and quotations omitted). In short, "The only question here, then, is whether [the submitter] "customarily" releases her [information] to the public. The answer is plainly no." *Id.* Kalshi's Confidential Information is likewise not customarily released to the public and therefore qualifies as confidential for purposes of Exemption 4. Additionally, submitter notes that 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 xsottile@kalshi.com.

Yours,

Xavier Sottile
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KalshiEX LLC
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