



Christopher Bowen
Managing Director and Chief Regulatory Counsel
Legal Department

October 19, 2020

VIA ELECTRONIC PORTAL

Mr. Christopher J. Kirkpatrick
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 Mr. Kirkpatrick:

By electronic portal dated today, October 19, 2020, Chicago Mercantile Exchange (“CME” or “Clearing House”) submitted a supplemental rule certification filing (Submission No. 20-404S) to the Commodity Futures Trading Commission (“CFTC” or “Commission”). The supplemental filing includes an Appendix for which CME is submitting a detailed written justification setting forth grounds for this request for confidential treatment.

Pursuant to Sections 8 and 8(a) of the Commodity Exchange Act (“CEA”), as amended, and Commission Regulation 145.9(d), CME requests confidential treatment of the Appendix on the grounds that disclosure of the Appendix would reveal confidential commercial information of CME. Pursuant to Commission Regulation 145.9(d)(5), CME requests that confidential treatment be maintained for the Appendix until further notice from CME. CME also requests that the Commission notify the undersigned immediately after receiving any FOIA request for said Appendix or any other court order, subpoena or summons for same. Finally, CME requests notification in the event the Commission intends to disclose such Appendix to Congress or to any other governmental agency or unit pursuant to Section 8 of the CEA. CME does not waive its notification rights under Section 8(f) of the CEA with respect to any subpoena or summons for such Appendix.

Should you have any questions concerning the above, please contact the undersigned at (212) 299-2200 or via e-mail at CMEGSubmissionInquiry@cmegroup.com.

Sincerely,

/s/ Christopher Bowen
Managing Director and Chief Regulatory Counsel

Attachment: Exhibit 1

Exhibit 1

DETAILED WRITTEN JUSTIFICATION



Christopher Bowen
Managing Director and Chief Regulatory Counsel
Legal Department

October 19, 2020

VIA ELECTRONIC PORTAL

Assistant Secretary of the Commission for FOIA,
Privacy and Sunshine Acts Compliance
Commodity Futures Trading Commission
Three Lafayette Centre, 8th Floor
1155 21st Street, N.W.
Washington, DC 20581

Re: FOIA Confidential Treatment Request: Appendix to CME Submission No. 20-404S

Dear FOIA Compliance Staff:

I am writing on behalf of Chicago Mercantile Exchange Inc. ("CME" or "Clearing House"), a subsidiary of CME Group Inc. In accordance with the requirements set forth in Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 40.8, the Clearing House hereby submits its detailed written justification in support of continued confidentiality of the information set out in Appendix A to Submission No. 20-404 ("Appendix") and respectfully requests that the Commission not release the information contained therein.

As discussed more fully below, Submission No. 20-404S contains confidential and proprietary commercial information of the Clearing House 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). The Clearing House provided the confidential information in the Appendix to the Commission voluntarily in connection with the above referenced submission in order to demonstrate to the Commission the compliance with the CEA and relevant Commission Regulations. The information set out in the Appendix was developed by the Clearing House at significant cost and over a substantial period of time. The Clearing House would not customarily make such information available to the public.

Disclosure Would Likely Cause Competitive Harm to the Clearing House

Notwithstanding this presumption of confidentiality, the confidential information in the Appendix still would be considered “confidential” because it is information that the Clearing House would not have disclosed to the public and its disclosure would cause substantial harm to the competitive position of the Clearing House. 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 F.2d 1280, 1291 (D.C. Cir. 1983).

Disclosure Would Likely Harm the Clearing House

The Clearing House 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 the Clearing House. 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.

The Appendix contains valuable commercial information. 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. Additionally, there is no regulatory imperative to disclose such information.

For the foregoing reasons, the Clearing House respectfully requests that the Commission maintain the confidential privilege afforded to this type of information and refrain from releasing the Appendix as such action could prove harmful to the Clearing House.

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

Sincerely,

/s/ Christopher Bowen
Managing Director and Chief Regulatory Counsel