

January 5, 2024

By CFTC Portal

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

RE: **FOIA Confidential Treatment Request and Written Justification – SpectrAxe**

Dear Assistant Secretary:

SpectrAxe LLC (“SpectrAxe”) hereby requests that the U.S. Commodity Futures Trading Commission (the “Commission”) accord confidential treatment under the Freedom of Information Act (the “FOIA”) to the attached SpectrAxe Fee Schedule (the “Fee Schedule”) and SpectrAxe Price Maker Discount Program (the “Discount Program”), which were submitted to the Commission on this date pursuant to Commission Regulation 40.6. This request pertains to all material set forth in the Fee Schedule and Discount Program. SpectrAxe requests that confidential treatment be afforded as long as the Commission retains the Fee Schedule and Discount Program. In accordance with the Commission’s FOIA regulations, the Fee Schedule and Discount Program each bear the designation “Confidential Treatment Requested by SpectrAxe LLC”. This request for confidential treatment under FOIA is made pursuant to Commission Regulation 145.9(d), as the Fee Schedule and Discount Program contain information that would reveal the trade secrets or confidential commercial or financial information of SpectrAxe and its affiliates.

The general test for determining whether commercial information is exempt from disclosure under FOIA pursuant to this exemption is whether release of the information would “cause substantial harm to the competitive positions of the person from whom the information was obtained.” *Acumenics Research & Tech. v. Dep’t of Justice*, 843 F.2d 800, 807 (4th Cir. 1988) (quoting *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)). There is no requirement to demonstrate actual competitive harm, rather “[a]ctual 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 527, 530 (D.C. Cir. 1979). Information is considered confidential where (i) there is actual competition in the relevant market, and (ii) disclosure is likely to cause substantial competitive injury. *Id.* With regard to proof of potential injury, evidence demonstrating the potential for economic harm is sufficient, and neither the Commission nor the courts must conduct a sophisticated economic analysis to determine the likely effects of disclosure. *Utah v. Bahe et al.*, 256 F.3d 967, 970 (10th Cir. 2001); *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

The information contained in the Fee Schedule and the Discount Program include non-public information regarding business structure and financial costs relating to certain technological means for accessing SpectrAxe. SpectrAxe believes that disclosure of this information would provide its competitors with

valuable insights regarding SpectrAxe's clients, access to its products, and how SpectrAxe operates and funds its business. Disclosure of such information would allow other swap execution facilities insight into the strengths and weaknesses of SpectrAxe which could be used to achieve a competitive advantage. Disclosure of the Fee Schedule or Discount Program would thus result in precisely the type of competitive harm to SpectrAxe that the provisions of FOIA and 17 C.F.R. § 145.9(d)(ii) are designed to prevent. See *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (prohibiting disclosure where it would "provide competitors with valuable insights into the operational strengths and weaknesses" of a company). Disclosure of the Fee Schedule or Discount Program would provide SpectrAxe's competitors with an informational windfall at SpectrAxe's expense that they are not entitled to under FOIA. See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) ("as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors"). The Fee Schedule and the Discount Program thus fall squarely within the type of information that the provisions of FOIA and Commission Regulation 145.9(d)(ii) are designed to protect from disclosure.

For the foregoing reasons, SpectrAxe respectfully requests that the Commission maintain the confidential privilege afforded to this type of information and refrain from releasing the Fee Schedule or Discount Program as such action could prove harmful to SpectrAxe.

If you have any questions, please do not hesitate to contact Cheryl L. Isaac, K&L Gates, LLP at +1-202-778-9089 or cheryl.isaac@klgates.com, or the undersigned at +1-929-581-0340 or mlee@spectrax.com.

Very truly yours,

Michael Lee
Chief Compliance Officer
SpectrAxe, LLC