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CME Group
A CME/Chicago Board of Trade Company

Craig S. Donohue
Chief Executive Officer

August 20, 2007

Via Electronic Delivery

COMMENT

Mr. David A. Stawik
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Confidential Information and Commission Records and Information – 72 Fed. Reg. 39764 (July 20, 2007)

Dear Mr. Stawik:

CME Group Inc. ("CME Group™") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") proposed amendments to the procedures for confidential treatment requests by derivatives transaction execution facilities ("DTEFs"), derivatives clearing organizations ("DCOs") and designated contract markets ("DCMs") (together, "registered entities") for products and rules that are certified to the Commission or submitted for Commission review and approval under Parts 40 and 41 of the Commission's regulations.

CME Group is the world's largest and most diverse exchange. Formed by the 2007 merger of two DCMs, Chicago Mercantile Exchange Inc. ("CME®") and the Board of Trade of the City of Chicago, Inc. ("CBOT®"), CME Group serves the risk management needs of customers around the globe. As an international marketplace, CME Group brings buyers and sellers together on the CME Globex® electronic trading platform and on its trading floors. CME Group offers the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, agricultural commodities, energy, and alternative investment products such as weather and real estate. CME is also the largest DCO in the world.

Specifically, the Commission has proposed to require that DTEFs, DCOs, and DCMs file a detailed written justification simultaneously with any request for confidential treatment of product or rule submissions sent to the Commission, and that they segregate the confidential material in an appendix to the submission. The Commission has also proposed to permit, but not require, Commission staff to make an initial determination to grant or deny confidential treatment before receiving a request for such material under the Freedom of Information Act ("FOIA").

The Commission's stated purpose in proposing these amendments is to expedite the confidential treatment review process and to allow the Commission to provide the public with more immediate access to information that Commission staff determines to be non-confidential. The Commission has indicated that during the past two years there has been an increase in the number of confidential treatment requests filed by registered entities in connection with product and rule submissions. The Commission further noted that most of the confidentiality requests relate to market maker programs, particularly with respect to market maker's names, compensation, trade priorities, and bid/ask commitments.

FOIA, among other things, protects information from disclosure if it is confidential commercial or financial information. 5 U.S.C. §552(b)(4). This same exemption from disclosure is contained in Commission Regulation 145.9(d)(1)(ii). The Commission has noted that registered entities that submit confidential treatment requests under Regulation 145.9 typically cite this exemption on the basis that the release of the information would cause competitive harm to the registered entity.

Regulation 145.9(d)(1) currently provides that an entity that submits a confidential treatment request to the Commission must specify the grounds on which confidential treatment is requested, but that it does not need to provide a detailed written justification of the request unless it is notified that a FOIA request seeks such information. If such notification is given, the submitter is given 10 business days thereafter within which to file a detailed written justification with the Commission and the FOIA requester (unless the time is extended for good cause shown). Regulation 145.9(e).

If Commission staff makes an initial determination to deny the confidential treatment request, the submitter may appeal the determination to the Commission's General Counsel within 10 business days. Regulation 145.9(f). If the confidentiality request is granted, the FOIA requester may appeal to the General Counsel within 30 days. Regulation 145.7(i). In the former instance, the requester may respond to the appeal, Regulation 145.7(i)(5), and in the latter instance, the submitter may respond to the appeal. Regulation 145.9(g)(5).

Section 15(a) of the Commodity Exchange Act, as amended, requires the Commission to consider the costs and benefits of any proposed new regulation. In discussing the statutory considerations, the only potential benefit noted by the Commission is that of efficiency by making non-confidential information submitted by registered entities available to the public in a more timely manner. The Commission's proposal appears to rest on a presumption that a significant number of the confidential treatment requests made by registered entities are unjustified, and that the Commission is likely to determine that the information for which confidential treatment is sought is, in fact, non-confidential under the relevant statutory and regulatory standards. This is not a valid assumption. In particular, DCMs have a legitimate commercial and competitive interest in maintaining the confidentiality of specific information about the contractual obligations of, and incentives offered to, their market makers.

The Commission also stated that it anticipated that the costs of compliance with the proposed procedures would be minimal. To the contrary, both registered entities and the Commission will incur significant costs in terms of the unnecessary use of their resources. CME Group believes that the current procedures should be retained in order to preserve efficiency in Commission processes, and to continue to ensure fairness to both registered entities submitting confidential information and FOIA requesters.

The filing of a detailed written justification in advance of a FOIA request would place unnecessary burdens on registered entities. Regulation 145.9(e)(3) describes the requisite contents of a detailed written justification, including citations to prior determinations by the Commission, other federal agencies or courts concerning the relevant exemption from disclosure and factual affidavits, if applicable. Therefore, registered entities would be required to devote their resources to prepare potentially lengthy and time-consuming detailed written justifications when, in the vast majority of cases, it is unlikely that a FOIA request will ever be made.

The Commission's proposal would also impose a significant burden on Commission staff if it were inundated with detailed written justifications for every confidential treatment request submitted in

connection with a market maker program. It would impose an inordinate burden on the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance and her staff if they were to analyze each of these detailed written justifications when they were received. It would impose an equally unnecessary burden on the staff of the Commission's General Counsel's Office if it were to decide appeals of initial determinations to deny confidential treatment requests when no FOIA request is pending, and is likely never to be received.

On the other hand, if Commission staff can decide whether to make an initial determination with respect to the confidentiality request when it receives the confidential treatment request and the detailed written justification, but is not obligated to do so until a FOIA request is made, Commission staff can choose to avoid such a burden. However, for those registered entities that must submit the detailed written justification with every such confidential treatment request, the burden remains. Moreover, if the Commission were to delay its determination, it would defeat the purported purpose of the proposed amendment.

Current Regulation 145.9(g) attempts to increase efficiency by providing that if both a submitter of information and a FOIA requester appeal to the General Counsel from a partial grant and a partial denial of a confidential treatment request, those appeals will be consolidated. If the General Counsel's Office were to consider an appeal by a submitter of a partial denial before a FOIA request is filed, and then consider an appeal by a FOIA requester of a partial grant at a later point, the General Counsel's Office could be examining the same facts twice, thereby decreasing efficiency.

The Commission's proposal would also prejudice both FOIA requesters and registered entities submitting confidential information. The proposed amendments contemplate that a registered entity would be given the opportunity to appeal the denial of a confidential treatment request prior to the time when a FOIA request is made. However, this procedure would be unfair to a potential FOIA requester in that it would not have an opportunity to respond to the appeal, as it does under the current provisions of Regulation 145.9.

The Commission has also noted that if it determines that a confidential treatment request should be granted, it may reconsider its determination if a FOIA request is later received for the material. If it were to do so, the Commission would be doubling its workload by reviewing the confidentiality request a second time. Moreover, if the Commission staff were to then change its mind and make a determination to deny the confidentiality request, the submitter would be subject to the burden of a duplicative process, caused by a potentially significant time lag between its submission of a detailed written justification and its appeal. Specifically, the registered entity may need to submit a new updated detailed written justification based on possible changed circumstances at the time of the appeal.

In sum, there are numerous costs that would be imposed upon the Commission, registered entities and FOIA requesters if the proposed amendments were adopted. For the Commission, these costs would include the resources that would be devoted toward: (a) determining whether confidentiality requests were justified in numerous cases where a FOIA request may never be made; (b) considering separate appeals by a registered entity and a FOIA requester at two separate stages if a confidential treatment request were partially denied and partially granted; and (c) reconsidering an earlier grant of a confidential treatment request in appropriate circumstances when a FOIA request is made. For registered entities, the costs would include the resources that would be expended in: (a) preparing a detailed written justification in many cases where there will never be a FOIA request; and (b) pursuing an appeal of a later

20 South Wacker Drive Chicago, Illinois 60606 T 312 930 8275 F 312 930 3209 craig.s.donohue@cmegroup.com cmegroup.com

denial of a confidential treatment request, when the request had previously been granted based on a detailed written justification that was filed at a considerably earlier time. Last, but not least, there would be prejudice to FOIA requesters who would not have the opportunity to oppose an appeal of the denial of a confidential treatment request at the time when it was filed. All of these costs must be considered by the Commission in the context of its Section 15(a) review of the costs and benefits of its proposal.

The Commission has also proposed to adopt a provision in new Regulation 40.8 that would state that a registered entity's filing regarding a product's terms and conditions and the mechanisms for executing transactions on the DCM would be made publicly available at the time of submission and that requests for confidential treatment of such information would be denied. CME and the CBOT do not generally file confidential treatment requests in connection with submissions relating to terms and conditions of products or mechanisms for executing transactions. However, on occasion, one or the other DCM has made a confidentiality request when submitting draft terms and conditions of proposed new products or draft rules to Commission staff for the purpose of seeking guidance from Commission staff in the development process. If the Commission were to adopt its proposed provision, it should make it clear that it only relates to terms and conditions of products and mechanisms for executing transactions that have been formally submitted to the Commission for approval or pursuant to certification procedures.

The Commission's proposed requirement that material deemed confidential must be segregated in an appendix to a confidential treatment request is unnecessary. Regulation 145.9(d)(4) and (d)(8) already set forth specific and detailed requirements for identifying the confidential information.

CME Group believes that the Commission's proposal to amend the procedures for the submission of confidential treatment requests by registered entities for rules and products will create unnecessary burdens upon registered entities and the Commission, will decrease efficiency, and will impair the fairness of the process for both registered entities and FOIA requesters. CME Group urges the Commission not to adopt the proposed amendments for the reasons discussed above. We would be happy to discuss any of these issues with Commission staff. If you have any questions, please feel free to contact Anne Polaski, Associate Director, Regulatory Counsel, at (312) 435-3757 or apolaski@cmegroup.com.

Sincerely,

Craig S. Donohue

Craig S. Donohue
Chief Executive Officer
CME Group Inc.

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20 South Wacker Drive Chicago, Illinois 60606 T 312 930 8275 F 312 930 3209 craig.s.donohue@cmegroup.com cmegroup.com