



July 27, 2012

**BY ELECTRONIC MAIL**

Assistant Secretary of the Commission  
FOIA, Privacy and Sunshine Acts Compliance  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW

Re: Freedom of Information Act ("FOIA") Request for Confidential Treatment

Dear FOIA Compliance Staff:

By electronic mail dated today, July 27, 2012, ICE Trade Vault, LLC ("ICE Trade Vault") submitted certain information to Ms. Eve Gutman in the Division of Market Oversight, (the "Confidential Documents"), for which ICE Trade Vault hereby requests Confidential Treatment under the Freedom of Information Act ("FOIA"). Copies of the Confidential Documents accompany this request. As discussed more fully below, the Confidential Documents contain confidential and proprietary commercial and financial information of ICE Trade Vault which is exempt from disclosure pursuant to Section 552(b)(4) of the FOIA and Commission Regulation 145.9(d). ICE Trade Vault requests that the Confidential Documents and their contents receive confidential treatment in perpetuity, unless ICE Trade Vault otherwise notifies the Commission. ICE Trade Vault further requests that the Commission notify the undersigned upon receiving any FOIA request, or any other court order, subpoena or summons for the Confidential Documents. ICE Trade Vault also requests that it be notified if the Commission intends to disclose the Confidential Documents to Congress or to any other governmental agency or unit pursuant to Section 8 of the Commodity Exchange Act ("CEA").

**DETAILED WRITTEN JUSTIFICATION**

Section 552(b)(4) of the FOIA exempts from the disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The FOIA contains no definition of "privileged" or "confidential". Some courts have found there to be 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 tests from Critical Mass). Even if there were no presumption of confidentiality, the information in the Confidential Letter still would be considered "confidential" because the Exchange would not ordinarily disclose it to the public and disclosure would cause substantial harm to the competitive position of the Exchange. In Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir. 1979), the Court of Appeals concluded that information is confidential for purposes of the FOIA if (i) it is not of the type normally released to the public by the submitter and (ii) 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 Indus., Inc. v. U.S., 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. Such disclosure, if required, would provide competitors with valuable information relating to the operational strengths and weaknesses of the disclosing company. Such competitive harm may result from the use of such information either by direct competitors or by persons with whom one is negotiating. See American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 868 n.13 (2d Cir.1978). It is also clear that the 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, supra, at 678 n.18.

The information set forth in the Confidential Documents was voluntarily provided to the Commission in connection with ICE Trade Vault's application as a Swap Data Repository. This information is not of a type customarily made available by ICE Trade Vault to the public. Consequently, the disclosure of the information holds the potential for significant competitive harm to ICE Trade Vault. Additionally, it should be noted that there is no regulatory requirement that such information be disclosed.



For all the foregoing reasons, ICE Trade Vault requests that the Commission determine to protect the confidentiality of the Confidential Documents and the information contained therein. Please contact me at (312)836-6734 or [carolyn.vandendaelen@theice.com](mailto:carolyn.vandendaelen@theice.com) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolyn K. Van den Daelen".

Carolyn K. Van den Daelen, Esq.  
Assistant Chief Compliance Officer  
ICE Trade Vault, LLC

Enclosures

CC: Eve Gutman, Senior Counsel, Division of Market Oversight  
Bruce Tupper, Vice President, ICE Trade Vault  
Trabue Bland, IntercontinentalExchange, Inc.  
Eric Nield, Chief Compliance Officer, ICE Trade Vault