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April 7, 2025

FOIA CONFIDENTIAL TREATMENT REQUEST
Pursuant to 17 C.F.R. § 145.9

VIA CFTC PORTAL

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

Re: Petition for Confidential Treatment

Dear Sir or Madam:

Nodal Exchange, LLC ("Nodal Exchange") has on this date filed Submission No. 25-013.01 to 25-013.04 (the "Submission"), a CFTC Regulation 40.6 self-certification of 4 futures contracts, with the Secretary of the Commission. The Submission contains information, which is segregated from the Submission into Exhibit B ("Exhibit B"), that is confidential and proprietary commercial and financial information of Nodal Exchange exempt from disclosure pursuant to Section 8 of the Commodity Exchange Act ("CEA"), the Commission Regulations, and paragraph (b)(4) of the Freedom of Information Act ("FOIA") as explained below. Nodal Exchange respectfully requests that the Commission not release the information contained in Exhibit B.

In accordance with the provisions of Commission Regulations 40.8, 145.5 and 145.9, Nodal Exchange requests confidential treatment of Exhibit B. Confidential treatment is requested, *inter alia*, on the grounds that Exhibit B contains information that would separately disclose business transactions and trade secrets that may not be disclosed to third parties, as provided in Section 8(a) of the Commodity Exchange Act and Commission Regulation 145.5(c)(1). Confidential treatment additionally is requested on the grounds that Exhibit B is exempt from disclosure under paragraph (b)(4) of FOIA ("Exemption 4") and Commission Regulations 145.5(d) and 145.9(d)(1)(ii) because it contains commercial and financial information that is confidential and would be of material assistance to competitors of Nodal Exchange.

Justification of Confidential Treatment

Judicial analysis of Exemption 4 has found that 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 Safely v. National Highway Traffic Safety Administration, 244 F.3d 144, 147 (D.C. Cir. 2001) (applying the tests detailed in Critical Mass). Nodal Exchange provided the confidential information in

Exhibit B to the Commission voluntarily in the Submission in order to demonstrate to the Commission the Program's compliance with the CEA and the Commission Regulations. Notwithstanding the presumption of confidentiality, the confidential information in Exhibit B would still be considered "confidential" because Nodal Exchange would not disclose it to the public and its disclosure would cause substantial harm to Nodal Exchange's competitive position.

FOIA was enacted to facilitate the disclosure of information to the public, but was clearly not intended to allow business competitors to avail themselves of 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). In Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979), the Court of Appeals concluded that information is confidential for purposes of FOIA if (1) it is not of the type normally released to the public by the submitter and (2) 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, 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. 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. It is clear that the FOIA 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, 547 F.2d at 678 n.18.

The information in Exhibit B was provided to the Commission to support the Exchange's self-certification that the speculative position limits for the products are in compliance with applicable provisions of the CEA and the Commission's regulations. This information is not of a type made available to the public by the Exchange. The information in Exhibit B took significant time, analysis, and expense to develop and is an integral part of the Exchange's new products. Disclosure of Exhibit B creates the potential for significant competitive harm to Nodal Exchange.

For the foregoing reasons, Nodal Exchange requests that the Commission grant this request for confidential treatment for Exhibit B and the information contained therein. Should you have any questions or need additional information, please contact me at 703-962-9853 or markotic@nodalexchange.com.

Very truly yours,

/s/ Max Markotic

Managing Director

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