

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83760)

August 1, 2018

Order Denying Applications by New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc., and NYSE National, Inc., Respectively, for Confidential Treatment Pursuant to Rule 24b-2 under the Exchange Act for Material Filed Pursuant to Rule 6a-2 under the Exchange Act

I. Introduction

In letters dated November 26, 2014,¹ September 1, 2015,² and June 30, 2016,³ New York Stock Exchange LLC (“NYSE”), NYSE MKT LLC (“NYSE MKT”) (n/k/a NYSE American LLC), and NYSE Arca, Inc. (“NYSE Arca”) requested that the Securities and Exchange Commission (“Commission”) grant confidential treatment under Rule 24b-2 under the Securities Exchange Act of 1934 (“Exchange Act”)⁴ for information that is contained in Exhibit D of their amendments to Form 1,⁵ which they filed pursuant to Rule 6a-2 under the Exchange Act⁶ and

¹ See Letter from Martha Redding, Chief Counsel and Assistant Secretary, NYSE, to The Secretary, Commission, dated November 26, 2014, submitted on behalf of NYSE, NYSE MKT, and NYSE Arca (“FY 2013 Confidential Treatment Request”).

² See Letter from Martha Redding, Chief Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated September 1, 2015, submitted on behalf of NYSE, NYSE MKT, and NYSE Arca (“FY 2014 Confidential Treatment Request”).

³ See Letter from Martha Redding, Chief Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated June 30, 2016, submitted on behalf of NYSE, NYSE MKT, and NYSE Arca (“FY 2015 Confidential Treatment Request”).

⁴ 17 C.F.R. 240.24b-2.

⁵ 17 C.F.R. 249.1 (Form 1, “Application for, and Amendments to Application for, Registration as a National Securities Exchange or Exemption from Registration Pursuant to Section 5 of the Exchange Act.”)

⁶ 17 C.F.R. 240.6a-2. Exhibit D to Form 1 requires an exchange to “[F]or each subsidiary or affiliate of the exchange, provide unconsolidated financial statements for the latest fiscal year. Such financial statements shall consist, at a minimum, of a balance sheet and an income statement with such footnotes and other disclosures as are necessary to avoid rendering the financial statements misleading.” Exhibit D further provides that, if any affiliate or subsidiary is required by another Commission rule to submit annual financial

includes 2013, 2014, and 2015 fiscal year financial information for certain subsidiaries and affiliates, as more fully described below. In letters dated June 23, 2017,⁷ August 22, 2017,⁸ and June 28, 2018,⁹ NYSE, NYSE MKT, NYSE Arca, and NYSE National, Inc. (“NYSE National”) (collectively, “the Exchanges”) requested that the Commission grant confidential treatment under Rule 24b-2 under the Exchange Act for information that is contained in Exhibit D of their amendments to Form 1 that they filed pursuant to Rule 6a-2 under the Exchange Act, and includes 2016 and 2017 fiscal year financial information, respectively, for certain subsidiaries and affiliates. The FY 2016 Confidential Treatment Request II and FY 2017 Confidential Treatment Request also requested confidential treatment under Rule 24b-2 under the Exchange Act for the organizational charts that indicate those entities for which confidential treatment was requested, as more fully described below.¹⁰

statements, the exchange may provide a statement to that effect, with a citation to the other Commission rule, in lieu of the financial statements required by Exhibit D.

⁷ See Letter from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated June 23, 2017 (“FY 2016 Confidential Treatment Request I”), submitted on behalf of NYSE, NYSE MKT, NYSE Arca, and NYSE National.

⁸ See Letter from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated August 22, 2017 (“FY 2016 Confidential Treatment Request II”), submitted on behalf of NYSE, NYSE MKT, NYSE Arca, and NYSE National.

⁹ See Letter from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated June 28, 2018 (“FY 2017 Confidential Treatment Request”), submitted on behalf of NYSE, NYSE MKT, NYSE Arca, and NYSE National.

¹⁰ See infra note 43. The Exchanges are required to provide an organizational chart with their annual Form 1 amendments, on or before June 30 of each year, as a condition to relief granted by the Commission from the Rule 6a-2 requirement that the Exchanges file Exhibit D financial statements regarding their foreign indirect affiliates. See Securities Exchange Act Release No. 80536 (April 27, 2017), 82 FR 20671 (May 3, 2017) (Order Granting Application by New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc., and NYSE National, Inc., Respectively, for a Conditional Exemption Pursuant

The Commission believes that the FY 2013 Confidential Treatment Request, FY 2014 Confidential Treatment Request, FY 2015 Confidential Treatment Request, FY 2016 Confidential Treatment Request I, FY 2016 Confidential Treatment Request II, and FY 2017 Confidential Treatment Request (collectively, the “Confidential Treatment Requests”) do not provide a basis for withholding information because the Exchanges’ broad and conclusory arguments do not establish that disclosure of the Exhibit D financials is likely to cause competitive harm. For the reasons discussed below, this order denies the Confidential Treatment Requests pursuant to Rule 24b-2 under the Exchange Act.

II. Background

A. NYSE Group Exchanges

The Exchanges are registered with the Commission as national securities exchanges under Section 6 of the Exchange Act. Each Exchange is a wholly-owned subsidiary of NYSE Group Inc. (“NYSE Group”), a Delaware corporation. NYSE Group is wholly owned by NYSE Holdings LLC (“NYSE Holdings”), a Delaware limited liability company, which is wholly owned by Intercontinental Exchange Holdings, Inc. (“ICE Holdings”), a Delaware corporation. ICE Holdings is wholly owned by Intercontinental Exchange, Inc. (“ICE”), a Delaware corporation. According to the Exchanges, ICE owns entities whose businesses are unrelated to NYSE Holdings, NYSE Group, or the Exchanges and whose financial statements are required to be provided to the Commission by Rule 6a-2 under the Act.

to Section 36(a) of the Exchange Act from Certain Requirements of Rule 6a-2 under the Exchange Act) (“2017 Exemption Order”).

B. Form 1 Filing Requirements and Rule 24b-2

Rule 6a-1 under the Exchange Act¹¹ requires an applicant for registration as a national securities exchange to file an application with the Commission on Form 1, together with accompanying exhibits.¹² As national securities exchanges registered with the Commission under Section 6 of the Exchange Act, the Exchanges are subject to the requirements of Rule 6a-2 under the Exchange Act, which requires a national securities exchange to file as an amendment to Form 1 certain exhibits within a specified timeframe. Rule 6a-2(b) under the Exchange Act,¹³ among other things, requires that a national securities exchange, on or before June 30 of each year, file as an amendment to Form 1 Exhibit D as of the end of the exchange's latest fiscal year. Exhibit D requires a national securities exchange to provide, for each subsidiary or affiliate of the exchange, unconsolidated financial statements for the latest fiscal year of the exchange.¹⁴ Form 1 amendments historically have been accessible to the public, formerly through the Commission's public reference room and more recently through the Commission's website.¹⁵

Rule 24b-2 under the Exchange Act governs the procedure to be followed by any person that files any registration statement, report, application, statement, correspondence, notice or other document (referred to as the material filed) pursuant to the Exchange Act and makes a written objection to public disclosure of any information contained therein.¹⁶ Under

¹¹ 17 C.F.R. 240.6a-1.

¹² See supra note 5.

¹³ 17 C.F.R. 240.6a-2(b).

¹⁴ See supra note 6.

¹⁵ <https://www.sec.gov/rules/national-securities-exchanges-amendments.htm>.

¹⁶ See 17 C.F.R. 240.24b-2.

Rule 24b-2(a),¹⁷ the procedure provided in Rule 24b-2 is the exclusive means of requesting confidential treatment of information required to be filed pursuant to the Exchange Act. Rule 24b-2(b)(2) states that an application for confidential treatment shall contain, among other things, a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act ("FOIA"),¹⁸ and a justification of the period of time for which confidential treatment is sought.¹⁹

III. Description of the Confidential Treatment Requests

In their FY 2013, FY 2014, and FY 2015 Confidential Treatment Requests, NYSE, NYSE MKT, and NYSE Arca requested that the information that is contained in Exhibit D of their amendments to Form 1 and includes 2013, 2014, and 2015 fiscal year unconsolidated and unaudited financial information for certain subsidiaries and affiliates of NYSE, NYSE MKT, and NYSE Arca, respectively, as required by Rule 6a-2, be accorded confidential treatment under Rule 24b-2.²⁰ In their FY 2016 Confidential Treatment Request I and FY 2017 Confidential Treatment Request, the Exchanges requested that the information that is contained in Exhibit D of their amendments to Form 1 and includes 2016 fiscal year unconsolidated and unaudited financial information for certain subsidiaries and affiliates of the Exchanges, as required by Rule 6a-2, be accorded confidential treatment under Rule 24b-2.²¹ In their FY 2016 Confidential Treatment Request II, the Exchanges requested that the additional information that is contained

¹⁷ See 17 C.F.R. 240.24b-2(a).

¹⁸ 5 U.S.C. 552.

¹⁹ See 17 C.F.R. 240.24b-2(b)(2).

²⁰ See supra notes 1-3.

²¹ See supra notes 7 and 9.

in the updated Exhibit D of their amendments to Form 1 and includes additional 2016 fiscal year unconsolidated and unaudited financial information for certain subsidiaries and affiliates of the Exchanges, as required by Rule 6a-2, be accorded confidential treatment under Rule 24b-2.²² In their FY 2016 Confidential Treatment Request II and FY 2017 Confidential Treatment Request, the Exchanges also requested confidential treatment for the organizational chart that they are required to provide as a condition to the 2017 Exemption Order.²³ The FY 2013, 2014, and 2015 Confidential Treatment Requests, the FY 2016 Confidential Treatment Request I, the FY 2016 Confidential Treatment Request II and FY 2017 Confidential Treatment Request collectively are referred to as the “Confidential Treatment Requests.”

On November 26, 2014, NYSE, NYSE MKT, and NYSE Arca submitted their FY 2013 Confidential Treatment Request pursuant to Rule 24b-2, seeking to keep confidential Exhibit D of their amendments to Form 1 for their fiscal year 2013.²⁴ In their FY 2013 Confidential Treatment Request, NYSE, NYSE MKT and NYSE Arca stated that the information contained in their Exhibit D filings was “highly confidential in their entirety,” and was subject to the

²² See supra note 8.

²³ See supra note 10.

²⁴ See supra note 1. On June 30, 2014 and on June 26, 2015, NYSE, NYSE MKT, and NYSE Arca submitted, pursuant to Rule 83 of the Commission’s Regulation Concerning Information and Requests, confidential treatment requests with respect to their Exhibit D filings for their fiscal years 2013 and 2014, respectively. See 17 C.F.R. 200.83. In response to these confidential treatment requests, on November 13, 2014 and August 20, 2015, respectively, Division staff sent letters to NYSE, NYSE MKT and NYSE Arca advising these exchanges that Rule 24b-2 under the Exchange Act is the exclusive means of seeking confidential treatment for information required to be filed under the Exchange Act. See Letter from David Shillman, Associate Director, Division of Trading and Markets, Commission, to Martha Redding, Chief Counsel, Intercontinental Exchange-NYSE, dated November 13, 2014 and Letter from John Roeser, Associate Director, Division of Trading and Markets, Commission, to Martha Redding, Chief Counsel, Intercontinental Exchange-NYSE, dated August 20, 2015.

exemption from mandatory disclosure under FOIA Exemption 4, which exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential,”²⁵ as well as under FOIA Exemption 8²⁶ and the protections available under the Privacy Act of 1974.²⁷ NYSE, NYSE MKT, and NYSE Arca stated that the information they provided in Exhibit D was not customarily made available to the public and its disclosure “holds the potential for significant competitive harm to the Exchanges.” In addition, NYSE, NYSE MKT, and NYSE Arca requested that the Exhibit D amendments be kept confidential for a minimum of three years from the date of their letter (i.e., no sooner than November 24, 2017) to ensure the information was sufficiently stale.²⁸

On September 1, 2015²⁹ and June 30, 2016,³⁰ NYSE, NYSE MKT, and NYSE Arca submitted requests for confidential treatment pursuant to Rule 24b-2 for their Exhibit D amendments to Form 1 for their fiscal years 2014 and 2015, respectively. The FY 2014 Confidential Treatment Request and FY2015 Confidential Treatment Request also stated that the Exhibit D filings were “highly confidential in their entirety,” and “are subject to the exemption from mandatory disclosure under Exemption 4 of FOIA.”³¹ NYSE, NYSE MKT, and NYSE Arca also stated that the information that they provided in Exhibit D “is not of a type customarily

²⁵ 5 U.S.C. 552(b)(4).

²⁶ 5 U.S.C. 552(b)(8). FOIA Exemption 8 pertains to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

²⁷ 5 U.S.C. 552a. The Exchanges did not pursue their arguments about FOIA Exemption 8 and the Privacy Act of 1974 in their subsequent submissions.

²⁸ See supra note 1.

²⁹ See supra note 2.

³⁰ See supra note 3.

³¹ See supra notes 2 and 3.

made available by the Exchanges to the public.”³² NYSE, NYSE MKT, and NYSE Arca noted that disclosure of such information “holds the potential for significant competitive harm to the Exchanges.”³³ NYSE, NYSE MKT, and NYSE Arca requested that the Commission keep the Exhibit D amendments confidential for a minimum of three years (until June 26, 2018 for the FY 2014 Confidential Treatment Request and until June 30, 2019 for the FY 2015 Confidential Treatment Request) to ensure that “the information is considered sufficiently stale and therefore could not create competitive harm, disadvantage the Exchanges, or be misconstrued to the detriment of the Exchanges and/or public.”³⁴ Finally, NYSE, NYSE MKT, and NYSE Arca stated that the information contained in Exhibit D was not necessary for the protection of investors because the entities for which the financial information had been omitted were not public companies and did not hold assets of investors.³⁵

On April 18, 2017, the Division of Trading and Markets (“Division”) sent a letter to NYSE, NYSE MKT, and NYSE Arca, which stated that, after reviewing the FY 2013, 2014, and 2015 Confidential Treatment Requests, the Division did not believe that a sufficient basis existed to grant these requests and that the Division, under the authority delegated to it by the Commission, intended to deny the requests no sooner than May 2, 2017.³⁶ The 2017 Pre-Denial Letter reiterated that Form 1 explicitly states: “No assurance of confidentiality is given by the Commission with respect to the responses made in Form 1. The public has access to the information contained in

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Id.

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Id.

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Id.

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Id.

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See Letter from John C. Roeser, Associate Director, Trading and Markets, Commission to Martha Redding, Associate General Counsel, NYSE, dated April 18, 2017 (“2017 Pre-Denial Letter”).

Form 1.”³⁷ The 2017 Pre-Denial Letter further stated that, although NYSE, NYSE MKT, and NYSE Arca claimed that disclosure of the Exhibit D financial information “holds the potential for significant harm to the Exchanges,” these exchanges did not “describe any ‘competitive harm’ that they believe could result from the disclosure of the Exhibit D financial information. The Exchanges also did not identify any specific items of information whose release may cause competitive harm.”³⁸ The 2017 Pre-Denial Letter noted that “the Exchanges’ general contention that confidential treatment is necessary for all information that was submitted pursuant to Exhibit D, including information that otherwise may be publicly available, is overly broad and consequently not credible.”³⁹ In response to the claim by NYSE, NYSE MKT, and NYSE Arca that the financial information in their Exhibit D filings was not necessary for the protection of investors because the entities for which the financial information was required to be provided were not public companies and did not hold assets of investors, the 2017 Pre-Denial Letter noted that the Commission has stated that “the financial statements required to be submitted pursuant to Exhibit D would be ‘relevant to the Commission and to market participants and the public generally.’”⁴⁰ Finally, the 2017 Pre-Denial Letter provided NYSE, NYSE MKT, and NYSE Arca with the opportunity to supplement or withdraw their requests for confidential treatment for their Exhibit D submissions.⁴¹

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id. See also Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126, 71165 (December 8, 2004) (discussing the continued relevance of the financial statements of exchange affiliates).

⁴¹ Id.

On May 2, 2017, NYSE, NYSE MKT, and NYSE Arca responded to the Pre-Denial Letter with additional support for their FY 2013, FY 2014, and FY 2015 Confidential Treatment Requests (“May 2, 2017 Letter”).⁴² NYSE, NYSE MKT, and NYSE Arca raised several arguments to support their contention their “Exhibit D financials” for their fiscal years 2013, 2014, and 2015 should be kept confidential in accordance with FOIA Exemption 4. They defined “Exhibit D financials” to include “all financial information submitted to the Commission pursuant to Rule 6a-2 on June 30, 2014, June 30, 2015, and June 30, 2016, excluding the financials for (a) ICE Clear Credit LLC, which are publicly available and (b) NY Portfolio Clearing LLC, ICE US Holdings LLC, ICE Trade Vault Canada, LLC, NYFIX Millennium Group Holdings, LLC, NYFIX, Inc. and NYSE Technologies, Inc, which are no longer owned by ICE.”⁴³

As noted above, in letters dated June 23, 2017 (“June 23, 2017 Letter”), August 22, 2017 (“August 22, 2017 Letter”) and June 28, 2018 (“June 28, 2018 Letter”), the Exchanges submitted FY 2016 Confidential Treatment Request I, FY 2016 Confidential Treatment Request II and FY 2017 Confidential Treatment Request, each of which included the same arguments to substantiate confidential treatment for their Exhibit D submissions that were raised in the May 2, 2017 Letter.⁴⁴ We further note that the Exchanges did not provide any unique rationale

⁴² See Letter from Elizabeth King, General Counsel and Corporate Secretary, NYSE, to John C. Roeser, Associate Director, Commission, dated May 2, 2017, submitted on behalf of NYSE, NYSE MKT, and NYSE Arca, respectively (“May 2, 2017 Letter”).

⁴³ Id. at note 1. On April 27, 2017, the Commission granted the Exchanges, subject to certain conditions, an exemption pursuant to Section 36(a) of the Exchange Act from the requirement under Rule 6a-2 that the Exchanges file Exhibit D financial statements regarding their foreign indirect affiliates. See supra note 10.

⁴⁴ See supra notes 8 and 9. As noted above, in the August 22, 2017 Letter and the June 28, 2018 Letter, the Exchanges also sought confidential treatment for the organizational chart

supporting their request for confidential treatment applicable to the organizational charts. The May 2, 2017 Letter, June 23, 2017 Letter, August 22, 2017 Letter, and June 28, 2018 Letter are referred to as the “Substantiation Letters.”

IV. Response to Arguments Raised in the Substantiation Letters

The Exchanges, in their Substantiation Letters, presented several arguments regarding why the Confidential Treatment Requests should be granted. We believe, however, that the arguments set forth by the Exchanges state conclusory and vague concerns that neither justify withholding the Exhibit D financials in their entirety nor make it possible to identify any specific information whose disclosure would likely cause competitive harm. Consequently, the Exchanges have not shown that confidential treatment is warranted.⁴⁵

As discussed above, the Exchanges stated that the financial information of their subsidiaries or affiliates and for which they seek confidential treatment should not be disclosed under FOIA Exemption 4.⁴⁶ FOIA Exemption 4 protects information “which is (a) commercial or financial, and (b) obtained from a person, and (c) confidential or privileged.”⁴⁷ A “commercial or financial matter is ‘confidential’ for the purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial

identifying the Exchanges’ subsidiaries and affiliates that the Exchanges are required to provide as a condition to the 2017 Exemption Order.

⁴⁵ Cf. McDonnell Douglas Corp. v. U.S. Dept. of the Air Force, 375 F.3d 1182, 1192 (D.C. Cir. 2004) (finding, in a case considering a company’s challenge to an agency’s decision to release commercial information under FOIA, that “the agency reasonably concluded [the company] failed to carry its burden of showing release . . . was likely to cause it substantial competitive harm”).

⁴⁶ See supra note 25 and accompanying text.

⁴⁷ See 5 U.S.C. 552(b)(4).

harm to the competitive position of the person from whom the information was obtained.”⁴⁸ In applying Exemption 4, as with all FOIA exemptions, the Commission identifies the specific portions of documents that come within the exemption and withholds only those portions.⁴⁹

The Exchanges claimed that disclosure of the Exhibit D financials could give the competitors of ICE and the Exchanges a competitive advantage, but their conclusory and generalized arguments do not provide the Commission with a basis for determining that disclosure of any specific information would likely lead to competitive harm.⁵⁰

First, the Exchanges stated that competitors of ICE’s other business lines could use the information provided in the Exchanges’ Exhibit D financials “to determine prices and operating

⁴⁸ See National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (“National Parks I”) (holding that commercial or financial information is confidential for purposes of FOIA Exemption 4 if it is likely to cause substantive harm to the competitive position of the person from whom the information was obtained or to impair an agency’s ability to obtain information in the future). Because the information for which the Exchanges requested confidential treatment is required to be provided to the Commission under Rule 6a-2(b), disclosure of such information would not impair the ability of the Commission to obtain such information in the future. In addition, because the financial information is required to be provided to the Commission under Rule 6a-2(b), and is not provided by the Exchanges voluntarily, the standard set forth in Critical Mass Energy Project v. Nuclear Regulatory Comm’n is inapplicable. See 975 F.2d 871 (D.C. Cir. 1992) (holding that when information is voluntarily provided to a government agency, commercial or financial information is confidential for purposes of FOIA Exemption 4 if it is of the kind that would customarily not be released to the public from the person from whom the government obtained the information).

⁴⁹ See 5 U.S.C. 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

⁵⁰ See National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) (“National Parks II”) (“conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA”; “resolution of this issue in favor of the concessioners requires them to provide that (1) they actually face competition, and (2) substantial competitive injury would like result from disclosure”).

margins and in turn use the information to undercut those prices or exploit operating margins.”⁵¹ The Exchanges, however, did not explain how competitors of ICE could use the Exhibit D financial information “to determine prices and operating margins, and in turn use the information to undercut those prices or exploit operating margins.”⁵² As noted above, Exhibit D to Form 1 requires an exchange to provide, for each subsidiary or affiliate of the exchange, unconsolidated financial statements for the latest fiscal year of the exchange.⁵³ The subsidiaries’ or affiliates’ financial information provided by the Exchanges did not contain any pricing information. None of the Exchanges’ subsidiaries’ or affiliates’ income statements included a price list or similarly detailed information. The income statements included line items that relate to expenses, such as compensation expenses and depreciation and amortization expenses. The income statements also included a line item captioned as “revenue” but did not contain any additional detail on the components that make up the subsidiary’s or affiliate’s revenue.

Although persons reviewing the income statements provided in the Exchanges’ Exhibit D filings could compute a subsidiary’s or affiliate’s operating margin, the Exchanges did not explain how competitors could exploit a subsidiary’s or affiliate’s operating margin. The Exchanges stated, as an example, that CME Group (a competitor of ICE Futures U.S., Inc. and ICE Clear U.S., Inc.) could glean the operating revenues, operating income, and operating margin of ICE subsidiaries from the Exhibit D financials, which would give CME Group “insight into the specific business performance of the aforementioned subsidiaries.” The Exchanges stated generally that a competitor could use this information “to set pricing on its

⁵¹ See May 2, 2017 Letter, supra note 42.

⁵² See id.

⁵³ See supra note 6.

competing products,” but did not explain how knowing the operating revenues, operating income, and operating margin for a company as a whole could help a competitor set its own prices. The Exchanges’ bare assertion that competitors could use the financial information in Exhibit D to set prices or otherwise gain a competitive advantage does not show that disclosure of the Exhibit D financials would likely cause competitive harm.

The Exchanges’ explanation is also not compelling because the Exchanges appear to include in their Confidential Treatment Requests business lines for which ICE has no competitors and subsidiaries that appear to have minimal to no operations. Even if the Exchanges could explain how competitors could benefit from the limited information in the Exhibit D financials, those arguments would not extend to these groups.

Second, the Exchanges stated that competitors could use the Exhibit D financials to gain insight into the best and worst performing subsidiaries and business lines. The Exchanges argued that competitors, using the Exhibit D financials, could derive where ICE makes a substantial portion of its profits and then could use that information to enter into those business lines or could gain insight into experimental business lines that could reveal ICE’s confidential business or expansion strategies to competitors. The Exchanges also asserted that competitors could use the information to target employees of certain subsidiaries and hire them away from ICE.

These assertions are so broad and conclusory that they are virtually meaningless. The Exchanges stated that competitors could learn about ICE’s strategic plans by seeing which business areas ICE leaves and which ones it focuses on, but the Exchanges did not explain what information in the Exhibit D financials would provide material information about ICE’s strategic plans. We note that information about subsidiaries’ and affiliates’ business lines is already

available to the public because the Exchanges are required to provide information about the “business or functions” for each subsidiary or affiliate on Exhibit C to Form 1.⁵⁴ Therefore, because this information is available to the public, it is not eligible for confidential treatment.⁵⁵

The Exchanges also asserted that competitors “could use the liabilities, restricted assets, and operating costs identified in the Exhibit D financials of the relevant subsidiaries to formulate potential takeover bids or expansion plans.” However, the Exchanges provided no explanation of how such basic financial information regarding the Exchanges’ subsidiaries or affiliates would allow competitors to formulate any such plans.

The Exchanges provided no details or explanations to support their claim that disclosure of basic financial information required by Exhibit D would allow competitors to target and hire away employees of ICE subsidiaries. They provided no basis for concluding that the Exchanges’ competitors would have more success in hiring employees of ICE’s subsidiaries and affiliates if they knew general information about the subsidiaries’ and affiliates’ finances.

Third, the Exchanges argued that “customers could use the operating margin or profits of certain business lines in the Exhibit D financials to put pricing pressure on ICE to lower its prices or to decide to move their business somewhere else, which would put ICE at a competitive disadvantage.” The Exchanges further asserted that the information contained in their Exhibit D financials would provide data analytics firms that are competitors of ICE with information on

⁵⁴ Rule 6a-2(c) requires an exchange, every three years starting with 2001, to file as an amendment to Form 1 a complete Exhibit C, which requires an exchange to provide “a brief description of business or functions” for each subsidiary or affiliate. For their Exhibit C information that was required to be filed, the NYSE, NYSEMKT, and NYSE Arca relied on a provision of Rule 6a-2(d) that permits exchanges to provide the Exhibit C information to the Commission and the public upon request.

⁵⁵ FOIA Exemption 4 does not protect information that is already in the public domain. Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 244 (2d Cir. 2006).

ICE subsidiaries engaged in pricing analytics, market data, futures and clearing, and credit execution, without ICE having access to comparable information about their competitors in those business areas. Once again, the broad and conclusory nature of the Exchanges' claims prevents the Exchanges from justifying confidential treatment for their Exhibit D financials under FOIA Exemption 4 because they are unable to establish the substantial likelihood of harm as a result of such disclosure.⁵⁶ For example, the Exchanges did nothing to show that each subsidiary and affiliate is engaged in a business where customers aware of high profits would be in a position to push for lower prices or to provide any evidence that there is a likelihood of such a harm. Similarly, the Exchanges did not describe any negotiating scenarios where a disparity in information could play a role or otherwise establish that the disparity in information is likely to put specific subsidiaries or affiliates at a competitive disadvantage.

Fourth, the Exchanges claimed that the publication of the Exhibit D financials would allow ICE shareholders to have access to immaterial financial information and could cause them to come to an incorrect conclusion about the information. The Exchanges posited that the stand-alone financials could cause shareholders to become confused by terms such as intercompany loans between two subsidiaries. Furthermore, the Exchanges stated that media sources could publish speculative or negative stories based on incorrect interpretations of the unconsolidated stand-alone financials.

We believe that the Exchanges' argument that the publication of the Exhibit D financial could lead ICE shareholders to arrive at incorrect conclusions or that the media could publish speculative or negative stories regarding ICE is irrelevant to the test established by the courts that the disclosed information would cause substantial harm to the competitive position of the

⁵⁶ See supra note 50.

person from whom the information was obtained.⁵⁷ Indeed, the appellate court has held that FOIA Exemption 4 “does not guard against mere embarrassment in the marketplace or reputational injury.”⁵⁸

In addition, the Exchanges provided no details or explanations that go beyond general speculations. The Exchanges pointed to the use of intercompany loans between two subsidiaries as potentially causing confusion but they did not explain why an investor would jump to an incorrect conclusion or why such information regarding a private company would be material to an investor. As noted above,⁵⁹ Exhibit D to Form 1 requires the financial statements to include such footnotes and other disclosures necessary to avoid rendering the financial statements misleading. The Exchanges did not provide any footnotes or other disclosures related to the use of intercompany loans as part of their Form 1 submissions.

Fifth, the Exchanges claimed that activist investors could misuse the information contained in the Exhibit D financials, putting ICE at a competitive disadvantage. The Exchanges did not provide any information on how activist investors could use such information, and the argument appears to be highly speculative.

Because none of the five reasons that the Exchanges have provided offers more than conclusory and speculative reasons to expect competitive harm, the Exchanges have failed to demonstrate how the Exhibit D financials would cause substantial competitive harm to ICE in a manner consistent with the appellate court’s holding in *National Parks II*.⁶⁰

⁵⁷ See *United Technologies Corp. v. U.S. Dept of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010) (“*United Technologies Corp.*”). See also *National Parks I*, *supra* note 48.

⁵⁸ See *United Technologies Corp.*, *supra* note 57.

⁵⁹ See *supra* note 6.

⁶⁰ See *supra* note 50.

In addition to claiming competitive harm, in the May 2, 2017 Letter, the Exchanges posited that the “Exhibit D financials are of no real value to the Commission in its oversight of the Exchanges and are unnecessary for the protection of investors.”⁶¹ In support of their contention, the Exchanges referred to the recent exemption under Section 36(a) of the Exchange Act,⁶² in which the Commission granted the Exchanges an exemption, subject to certain conditions, from the requirement under Rule 6a-2 that the Exchanges file Exhibit D financial statements of their foreign indirect affiliates.⁶³ The Exchanges further argued in the May 2, 2017 Letter that it is not necessary for ICE to provide the Exhibit D financials to the Commission in order for the Commission and market participants to obtain information regarding the Exchanges because ICE, as a public company, is subject to SEC disclosure requirements.⁶⁴ The Exchanges contended that the disclosures made by ICE on its Form 10-K, Form 10-Q, and Form 8-K provide all material information and that the Exhibit D financials are not relevant to market participants and the public generally.⁶⁵ Accordingly, the Exchanges recommended that the Commission remove Exhibit D from Form 1.⁶⁶

In the absence of a finding of competitive harm, it is not necessary to address the public’s need for the information in Exhibit D. In the Regulation ATS Adopting Release, the Commission specifically stated “[t]he information collected, retained, and/or filed pursuant to the rules for registration as a national securities exchange will not be confidential and will be

⁶¹ See May 2, 2017 Letter, supra note 42 at 7.

⁶² 15 U.S.C. 78mm(a).

⁶³ See supra note 10.

⁶⁴ See May 2, 2017 Letter, supra note 42 at 7.

⁶⁵ See id.

⁶⁶ See id.

available to the public.”⁶⁷ Thus, the Commission made clear that information contained on Form 1 would be made available to the public for its consideration. Nothing in Rule 24b-2 or elsewhere suggests that the Commission will grant confidential treatment to information that is required to be filed and made available to the public if it does not come within a FOIA exemption.

V. Findings

The Commission has carefully reviewed the Exchanges’ Confidential Treatment Requests and the Substantiation Letters and finds that the Exchanges failed to substantiate why their Confidential Treatment Requests, in accordance with Rule 24b-2 under the Exchange Act,⁶⁸ should be granted for their FY 2013, 2014, 2015, 2016, and 2017 Exhibit D financials.

The information for which the Exchanges requested confidential treatment is required to be filed pursuant to Rule 6a-2 under the Exchange Act,⁶⁹ and, as we previously noted, Form 1 explicitly states: “No assurance of confidentiality is given by the Commission with respect to the responses made in Form 1. The public has access to the information contained in Form 1.” As stated above, the Commission, in adopting Regulation ATS, made certain amendments to Rule 6a-2 and Form 1.⁷⁰ In the Regulation ATS Adopting Release, the Commission specifically stated “[t]he information collected, retained, and/or filed pursuant to the rules for registration as a national securities exchange will not be confidential and will be available to the public.”⁷¹

⁶⁷ Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70912 (Dec. 22, 1998) (Regulation of Exchanges and Alternative Trading Systems Adopting Release) (“Regulation ATS Adopting Release”).

⁶⁸ 17 C.F.R. 240.24b-2.

⁶⁹ 17 C.F.R. 240.6a-2.

⁷⁰ See Regulation ATS Adopting Release.

⁷¹ Id. at 70912.

We believe that the Exchanges have not provided a sufficient basis to grant the Confidential Treatment Requests.⁷² The Exchanges have not identified any information in the Exhibit D financials whose disclosure is likely to cause substantial competitive harm to ICE and its subsidiaries and affiliates. As we previously stated, the Exchanges' position that confidential treatment is necessary for the Exhibit D financials for their fiscal years 2013, 2014, 2015, 2016, and 2017,⁷³ is not supported by any explanations or evidence that provide support for the Exchanges' general and conclusory claims regarding competitive harm.

Finally, the Exchanges requested confidential treatment for the organizational chart for the Exchanges' subsidiaries and affiliates that the Exchanges are required to provide in connection with the exemption granted by the Commission from the requirement that the Exchanges provide Exhibit D financial statements for their foreign indirect affiliates.⁷⁴ The Exchanges provided no justification regarding why the organizational chart should receive confidential treatment. Moreover, the Exchanges did not request confidential treatment for the organizational chart that they submitted with their exemption request and that is publicly available in connection with the Commission's exemption.⁷⁵

In light of the foregoing, the Commission denies the Exchanges' Confidential Treatment Requests.

⁷² See 2017 Pre-Denial Letter, supra note 36.

⁷³ Certain information about these entities previously was made publicly available. For example, in requesting its Section 36(a) exemption, the Exchanges provided, as part of their request, an organizational chart identifying all of the Exchange's subsidiaries and affiliates. As a result, such information cannot be included as part of the Exchange's Confidential Treatment Request. See supra notes 8 and 9. FOIA Exemption 4 does not protect information that is already in the public domain. Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 244 (2d Cir. 2006).

⁷⁴ See supra notes 10 and 44.

⁷⁵ Id.

VI. Conclusion

Accordingly, IT IS THEREFORE ORDERED that the Confidential Treatment Requests be, and hereby are, denied.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁶

Robert W. Errett
Deputy Secretary

⁷⁶ 17 C.F.R. 200.30-3(a)(19)(i).