



Christal Lint
Director and Associate General Counsel
Legal Department

March 21, 2011

Ms. Laura Richards
Office of General Counsel
FOIA Unit
Commodity Futures Trading Commission
Three Lafayette Centre
1 155 21st Street, NW
Washington, DC 20581

RE: FOIA No. 11-0031

Dear Ms. Richards:

With regard to the above referenced case number, I write in reply to your February 25, 2011 letter conveying the Commodity Futures Trading Commission's (the "Commission") final response (the "Commission's Response") to my December 10, 2010 Freedom of Information Act ("FOIA") request. I respectfully request that the Commission disclose the withheld responsive materials or provide more detail regarding the nature of the withheld materials to allow me to evaluate the merits of the Commission's basis for withholding.

The Commission's Response asserts that the Commission is withholding certain material pursuant to FOIA Exemptions 3, 4, and 8 (5 U.S.C. § 552(b)(3), (b)(4), (b)(8)). The Commission's Response, however, does not detail, among other things, the quantity of withheld material, the nature of the withheld material, or which claimed exemptions apply to which withheld material. As such, the Commission's Response makes it impossible to assess the merits of the Commission's claimed exemptions from its FOIA disclosure obligations.

In particular, the Commission's Response asserts that the Commission is withholding certain (unidentified) material under FOIA Exemption 8 "pertaining to information contained in certain reports prepared for or by an agency responsible for regulating financial institutions." That exemption, however, is significantly more limited than the Commission suggests. FOIA Exemption 8 applies only to matters that are "contained in or related 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." 5 U.S.C. § 552(b)(8) (emphasis added).

To the extent that the Commission is relying on FOIA Exemption 8 to withhold a study of the data discussed in the Commission's Notice of Proposed Rulemaking on Core Principles and Other Requirements for Contract Markets (the "Release"), RIN 2028-AD09, setting forth the Minimum Centralized Market Trading Percentage Requirement (Release at 63), which I requested, the Commission's reliance would be misplaced. That study would not fall within FOIA Exemption 8 because the information contained therein would not be akin to an "examination, operating, or condition report" of a

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financial institution. That study would appear to be a market analysis of general industry practices and their effect on price discovery.

The primary purpose of FOIA Exemption 8 is to address the “concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks.” *Consumers Union of the United States, Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978). The market analysis at issue here would not implicate such a concern. See *McKinley v. FDIC*, Civ. Action No. 10-420 (EGS), 2010 U.S. Dist. LEXIS 135965, at *19 (D.D.C. Dec. 23, 2010) (concluding that agency had not met burden of establishing basis for withholding material under FOIA Exemption 8 where court could not “determine whether the material withheld contains or is derived from any part of an examination, operating report or conditions report”); *Forest Guardians v. United States Forest Serv.*, No. CIV 99-615M/KBM, 2001 U.S. Dist. LEXIS 26121, at *85 (D.N.M. Jan. 29, 2001) (rejecting “vague and sweeping” agency interpretation of FOIA Exemption 8 that “would shield everything banking institutions accumulate if any possibility existed the information might be reviewed in the process of a bank examination”).

Therefore, I respectfully request that the Commission fully disclose the requested study or else provide additional detail regarding the nature of the study and the basis for withholding the study that would allow me to evaluate the merits of the Commission’s claimed exemption. See *McKinley*, 2010 U.S. Dist. LEXIS 13965, at *20 (declining to uphold agency’s claimed withholding where “agency [did not] explain what specific information about the financial institutions is contained in these memoranda that would justify its withholding based on Exemption 8”).

Moreover, to the extent some portion of the requested study might be appropriately withheld pursuant to one of the FOIA exemptions, the Commission must produce any “reasonably segregable portion of the record” that is not covered by an exemption. 5 U.S.C. § 552(b); 17 C.F.R. 145.5 (“The Commission shall publish or make available reasonably segregable portions of ‘nonpublic records’ subject to a request under § 145.7 if those portions do not fall within the descriptions in paragraphs (a) through (i) of this section”). The summary assertion of FOIA exemptions in the Commission’s Response is not consistent with this disclosure obligation.

Finally, without the full study, the Release would offer no basis to support the proposed rule concerning the Minimum Centralized Market Trading Percentage Requirement. Therefore, under the Administrative Procedure Act’s (the “APA,” 5 U.S.C. § 553) notice-and-comment requirements, the Commission must make the study fully available for public comment. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (noting that “it would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment” and requiring agency to produce empirical data relied upon in rulemaking in response to FOIA request); *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007 (vacating agency rule where agency failed to make available for public comment the methodology study upon which agency relied in issuing rule).

Because under the APA the Commission has a legal obligation—independent of FOIA—to disclose the requested study, the FOIA exemptions do not provide a basis for the Commission to wholly withhold the

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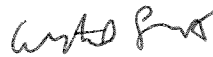
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study. See 5 U.S.C. § 552(d) ("This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section"); *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 754 (D.C. Cir. 2006) ("FOIA's exceptions to disclosure limit only the right to information conveyed pursuant to *that statute*, see 5 U.S.C. § 552(d), and other limitations on the Commission's authority to publish information, such as 7 U.S.C. § 12(a)(1), do not alter the Commission's duty to comply with lawful subpoenas after notice to the party whose information is sought" (emphasis added)). The Commission, therefore, should disclose the requested study in its entirety. Indeed, without the study, the Release appears to be insufficient to support the Commission's proposed rule.

I look forward to the Commission's prompt response. Please feel free to contact me at (312) 930-4527 or via e-mail at Christal.Lint@cmegroup.com with any questions.

Very truly yours,



Christal Lint

cc: Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Bart Chilton
Commissioner Jill Sommers
Commissioner Scott O'Malia
Dan Berkovitz
Richard Shilts
Nancy Markowitz