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December 30, 2013

Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Concept Release on Risk Controls and System Safeguards for Automated Trading Environments, RIN 3038-AD52

Dear Ms. Jurgens:

COMMENT

We are submitting this comment letter on behalf of a client of our law firm, a company that, among other things, trades equities, fixed income securities, and commodity, index, and derivative products. It is active in many trading markets inside and outside the United States and provides substantial liquidity and efficiency to trading markets. The company has asked us to convey views in response to questions 76 and 77 in the Federal Register notice of September 12, 2013, 78 F.R. 56542, et seq.

76. The Commission requests public comment concerning the lock-up process for government economic reports, and any additional measures that might be taken to protect against inappropriate disclosure.

Our client has found the "lock up" process for government agency disclosure of economic reports, which is used for example by the Bureau of Labor Statistics, to operate fairly and effectively and to achieve the crucial objectives of (1) timeliness, (2) accuracy, and (3) fairness of information dissemination. The method ensures that all news agencies receive the information simultaneously with adequate time for their personnel to review and verify its accuracy before it is reported to their customers. In addition, the sophisticated technology associated with the method ensures that all the news agencies are permitted to release the information at the same moment. Using the hardware and software that the news agencies and their customers have created, the information is distributed virtually simultaneously to all the agencies' customers. There has been no indication that the lock up process has been misused, abused, or bypassed. It results, therefore, in all market participants who need, analyze, and act instantly on information in the government economic report to have equal access and equal opportunity to place the trades they believe are appropriate based on their assessment of the information.

By contrast, other methodologies do not meet two of the three crucial objectives.

A second approach posts the report on a website. This results in materially unequal access to the report because the website cannot be accessed simultaneously by all who seek the information and downloads the information sequentially rather than simultaneously to those who want it. This method, which is used for example by the Department of Energy for its Petroleum Status and Natural Gas Storage Reports, requires those seeking the report to continuously “ping” the agency’s website asking if it is “ready” or “open” to provide the report. Once the website is “ready” and “opened,” that company that has the luck that its “ping” coincided closest in time with the opening of the site is the first one to receive the data. A second “pinger,” perhaps less than a microsecond behind the first, then receives the data second, and so forth in a seriatim fashion. The DOE permits ten “pings” per second. Supposing five entities are “pinging” ten times a second to get into the website and receive the data, each one has an equal 20% chance of being first. But the equal chance of being first still discriminates to the disadvantage of the second through fifth because they must stand in line to receive the report and act on it. In market decisions that involve microseconds, such as markets on which DOE data have a significant impact, sequential availability of information harms the markets by preventing all market participants from having their orders placed simultaneously to interact with each other on the market.

Furthermore, even this serious problem is not the only defect in this method of releasing critical government economic information. It is possible and may be the fact that some companies are “gaming the system” by using deception to evade the ten per second limit on pinging the government website. This involves one or more information seekers setting up anonymous dummies, each of which pings the DOE’s server ten times a second but which collectively ping it for that company’s benefit thousands of times per second. That process significantly changes the odds of the other hypothetical firms being first, lowering them from 20% to a very tiny fraction of one percent. Consequently, a firm that breaks the rules has a clear and unfair continuous advantage over those who abide by them. It would not materially increase government agencies’ costs to change to that method but it would achieve the crucial objectives of (1) timeliness, (2) accuracy, and (3) fairness.

A third method used by some agencies is to provide the report or information to news agencies or others on condition that they not release it until a specified time, *i.e.*, a news “embargo.” The disadvantages of this method are that (a) it may be insecure because observing the embargo depends on unreliable and unpredictable adherence to the “honor system;” and (b) even if all the recipients do hold the information for release at the same specified “time,” it is virtually inevitable that each sender’s computer clock will be different from the others so microseconds or longer can elapse between the first and last to release the information to customers even though all think they are acting simultaneously. Therefore, this method has the same defects of untimeliness and sequentiality, even if inadvertent, that make the second approach discussed above unfair to end-users of the information and, ultimately, to the trading markets.

Methods that are hybrids of these three approaches suffer from the same disadvantages of the methods on which they are based. Those disadvantages may even be compounded.

For these reasons, our client believes the lock-up method is the best approach to government disclosure and dissemination of critical economic information. Any equivalent or better method would require substantial capital investments by the government, news agencies, their customers, and others, which may not be a sufficient improvement over the lock-up method to justify the expenditures. Efforts to detect and deter cheaters in the "website" approach would require significant funding, and cheaters still would discover ways to evade the rules. The embargo method may be appropriate for some kinds of information, but it is not suitable for critical, potentially market moving data, for which only the lock-up method is sufficient.

77. Please describe the extent to which potentially market-moving data from non-governmental economic reports can be obtained prior to its public release for a fee. Are there specific reports or types of reports for which early disclosure should not be permitted? What process should be used for identifying non-governmental economic reports whose early release should not be permitted? Should the data release process for such reports be similar to the data lock-up process implemented for the release of government economic data?

Our client's view is that a free market and free speech leave decisions regarding the dissemination of information developed by private enterprises to the developing enterprises. They need to be free to determine when, to whom, and for what consideration to provide that data. A private company should be free to provide its information to some but not all, on different schedules, or for different prices. Competition in a free market provides the outlet if any data consumers think they are disadvantaged: unmet demand is what causes another company to enter the market to meet that demand. But it is not necessary to accept or reject this general view to understand why differential reporting of non-governmental economic reports is not a problem requiring a solution.

The fact is that there always has been tiered disclosure of information, differentiated by those willing to pay to get the information earlier. Those paying the premium are usually those for whom the information has the most value. Thus, a merchant who hired a messenger to stand at the port and rush information back to the trading center in town to have an advantage over merchants who waited for the news to arrive by other means is an example of a trading market participant obtaining data early for a price and using it to conduct transactions. Other merchants could have hired messengers, or pooled their resources to do so, but they did not consider the information important enough to them to do so.

In more modern times, some market participants pay news services to provide up-to-the-second market data. Others are satisfied learning the same information later on television, in a daily newspaper, or from a monthly magazine. For example, trading firms are willing to pay substantial licensing fees in order to access up to the second trading information through Bloomberg terminals. Retail investors, on the other hand, are generally satisfied with receiving the very same information for free on a twenty-minute delay through Yahoo Finance. Nobody contends that this twenty-minute disparity is untoward, but critics of tiered disclosure of economic information still assert that a two-second dissemination differential constitutes a form of insider trading or market manipulation. They are mistaken.

The important question is whether the trading markets are harmed if some market participants pay a premium and receive information earlier than other market participants. In this respect, economic data is no different from market data and the answer is no. In the context of the questions under discussion, some market participants have invested substantially to obtain information (be it market data, weather forecasts, or economic reports) that they analyze and act on instantly. The information has no value to an investor who has not made that investment and will not place substantial orders based on such information.

Even so, assuming the sellers of private economic reports will sell to any investor who pays the premium, the only disparity is between those who want and those who don't want the data, which is likely a function of those who can and those who cannot make use of the data. If the data will not be used, access to it is irrelevant. That is true whether the data users get the information before or at the same time as the data non-users.

Thus, a premium payment for earlier access to private data may appear at first blush to favor some over others. But, as with Bloomberg terminals, it is not the tiered pricing system that differentiates but rather the willingness of investors to develop the tools to use the data. As with the other merchants, an investor can pool resources with others to develop the ability to use and buy the data. But there is no reason to believe that there is any investor who has been disadvantaged because an information provider charged more for earlier access.

Accordingly, our client believes that the government should not intrude on free enterprise or free speech by private parties by trying to regulate dissemination of economic information. It surely would not consider trying to regulate the timing and price for receiving information by newspaper, magazine, television, or the Internet. Private economic reports are no different.

We appreciate the opportunity to advance these views on behalf of our client.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Richard A. Cirillo".

Richard A. Cirillo