March 16, 2016

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

RE: ***Comments on Notice of Proposed Rulemaking on Regulation Automated Trading ("Regulation AT"), RIN 3038-AD52***

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc. ("ICE") appreciates the opportunity to provide comments and recommendations to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to the Commission's proposed rules designed to enhance the regulatory regime for automated trading on U.S. designated contract markets ("DCMs") (collectively the "Proposal," "Proposed Rules" or "Regulation AT"). As background, ICE operates regulated derivatives exchanges and clearing houses in the United States, Europe, Canada and Singapore. As the operator of domestic and international exchanges, ICE has a practical perspective of the implications of the proposed automated trading regime. Considering these factors, ICE respectfully offers the following comments regarding the framework outlined in the Commission's Proposed Rules.

Executive Summary

ICE supports the Commission's efforts to preserve the integrity of, and fair competition in, the derivative markets and the Commission's general policy goals articulated in Regulation AT to promote market integrity, transparency, and mitigate systemic risk. Regulation AT is one of the most significant rulemakings to be undertaken by the Commission and will have a significant impact on a large number of market participants engaged in trading on DCMs. If Regulation AT is not properly drafted and implemented, it has the potential to disrupt currently effective risk management safeguards and may stymie the development of new and innovative methods of risk management. Given the significance of the Proposal, ICE and several other market participants requested an extension to the comment period to ensure sufficient time to respond with thorough and complete comments. Absent this extension, the comments provided by ICE and the industry, reflect best efforts to provide thoughtful feedback and answers to the Commission's specific questions. ICE is however concerned that the lack of an extension to the comment period has not provided the industry adequate time to provide feedback.

This concern aside, ICE believes the Commission should adopt an appropriately reasoned approach in achieving these goals outlined in the Proposal. However, the Proposal's scope and applicability of Regulation AT is overly broad and should be focused specifically on trading activity that may be impactful to orderly markets while leveraging the risk control infrastructure currently employed by DCMs and market participants. The Commission can achieve the policy goals of Regulation AT without imposing unnecessary and duplicative compliance burdens and costs on the market place. We specifically encourage the Commission to consider:

- Narrowing the scope and applicability of Regulation AT to focus on algorithmic trading that presents substantiated systemic risk to derivative markets;
- Revising the Algorithmic Trading ("AT") definition to capture a limited and discrete set of market participants;
- Removing the Direct Electronic Access ("DEA") component from the definition of an Algorithmic Trading person, or, in the alternative, revising the definition to DEA to clarify that "routed through a clearing member" means any orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including such controls that are established and located at the DCM;
- Requiring all market participants who access an exchange to implement pre-trade risk controls;
- Removing the prescriptive measures proposed for self-trade prevention functionality;
- Minimizing conflicts with existing rules and practices of DCMs and any registered futures association ("RFA");
- Splitting AT registration requirements into a separate rulemaking;
- Replacing the annual report requirement with a certification process; and
- Removing the requirement that source code be held in a repository and simply be treated as books and records currently covered under § 1.35 of the CEA.

Additionally, ICE encourages the Commission to defer any final rulemaking with respect to the disclosure and transparency requirements for DCM trading and matching systems, as such provisions are ancillary to the main focus of this Proposal, which is AT. The transparency and disclosure requirements, as proposed, are flawed and should be the focus of a separate and independent rulemaking. Key concepts such as the definitions of "electronic matching platform" and "attribute" are overly broad and the articulated test for "materiality" is inconsistent with established law cited in the Proposal and would needlessly subject DCMs to onerous disclosures and rule filings It is difficult to identify any aspect of the structure, architecture, mechanics, characteristics or other elements of an electronic matching platform, no matter how insignificant, that could be changed without notice to the Commission and the public. Simple changes such as replacing a router could trigger unnecessary public disclosure under the rules as proposed.

A better approach would be to specify the individual elements of a trading and matching system that should be subject to transparency requirements and the characteristics of such

elements that need to be covered by DCM disclosures. While we suggest a potential framework for this approach below, we believe a separate rulemaking allowing additional input from market participants and other DCMs would be beneficial to the development of the best approach.

Overview

ICE welcomes improvements which protect and preserve the integrity of the markets and looks forward to working with the Commission to develop solutions which meet their goals. ICE supports the Commission's efforts to ensure continued implementation of the necessary risk controls to minimize the risk of a market disruption. This being said, ICE has concerns that the Proposal is overly broad and prescriptive and might not capture the appropriate risks in the market. The purpose of the rule is to avoid a market disruption; but casting a wide net which ensnares many unintended market participants does not enhance the oversight of Automated Trading. With that in mind, the Commission should strike the necessary balance between the regulatory goal of preventing market disruptions and adopting regulation which captures the appropriate market participants whilst allowing flexible approaches that account for new and evolving technologies.

Algorithmic Trading ("AT") Definition

It is paramount that the Commission correctly defines Algorithmic Trading. ICE recognizes defining AT is a tricky proposition and that the Commission is balancing differing interests. As Chairman Massad asked at the TAC meeting on February 23, 2016, "Are we capturing the right universe of participants?" To answer the Chairman's question, the proposed AT definition is far-reaching and if adopted as proposed, would require a large segment of market participants to register with the Commission as a "floor trader" and be subject to regulation as an AT person. Subjecting commercial market participants to additional registration is contradictory to the Commission's goal of the Proposed Rule, promoting market integrity, transparency, and mitigating systemic risk. The Proposal also conflicts with the tenants of Dodd-Frank; to increase transparency through the trading on organized markets and the clearing of transactions. As written, the Proposal may impose additional regulation as an AT Person on market participants that solely use the most basic automated order entry tools to assist in risk mitigation. Accordingly, the definition of AT should be appropriately tailored to avoid the imposition of unnecessary costs and burdensome compliance obligations on a wide array of market participants and be consistent with its intended goal of impacting a limited and discrete set of market participants. To that end, we believe that the definition should be more nuanced and should reflect the level of human judgment that is involved in trade execution. The Commission should also make a clear distinction between order routing 'automation' (an electronic system where users set certain parameters, provide manual instruction, and direct the system to execute a trade) and 'algorithmic' trading (a trading system programmed to follow a defined set of instructions to both generate and route orders).[1] This would allow the Commission

[1] See e.g., ICE Futures U.S.'s definition of Automated Trading Systems, Authorized Trade Registration Requirements, available at

to establish more effective supervision and risk management standards over the type of trading activity that the proposal is intended to cover.

The Commission should also make clear that its definition of Algorithmic Trading is intended to cover only those algorithms that both generate orders and subsequently route such orders to the DCM for execution without any element of human intervention. This definition would be consistent with ESMA's approach, as well as the approaches of ICE and CME. Finally, consistent with the requirements in MiFID II,[2] we recommend that the Commission exclude order routing and/or order processing algorithms from the proposed definition of Algorithmic Trading. Errors in these forms of automation are less likely to put the trading entity at risk of insolvency or otherwise create a material market impact because the initial order has been inputted by a natural person.

Application of the Proposed Rule to AT Persons

The definition of Direct Electronic Access should be removed from the Proposal as it is outdated and does not correlate to actual use of an algorithmic program. The Commission has proposed this definition as a narrowing tool to capture certain algorithmic traders. Instead, the definition could be interpreted so widely as to capture anyone who is trading on or through a DCM. The Commission actually removed the concept of DEA wholesale through § 1.73, which requires Futures Commission Merchants ("FCMs") establish appropriate risk controls for all customers. The financial pre-trade risk controls provided by the DCM are administered by the FCM and are an integral extension of this regulation. The proposed DEA definition does not correlate to the current state of algorithmic trading because all orders already pass through a robust set of pre-trade risk controls, whether the controls reside with the FCM or are DCM controls administered by the FCM. In addition, the phrase "without the order first being routed through a separate person who is a member of a derivatives clearing organization…" is unclear. As already is the case, there can be no electronic routing of orders to DCMs without an order first passing through a separate person who is a member of the relevant derivative clearing organization ("DCO"). Under § 1.73, each FCM that is a clearing member of a DCO and provides electronic market access or accepts orders from customers for automated execution must screen such orders for compliance with certain risk-based limits – either directly or through delegation to an executing firm.

ICE further believes that all market participants trading electronically, no matter how they access a DCM, should be required to implement and maintain minimum, reasonable pre-trade risk controls. To the extent that the definition of DEA has been proposed principally to

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https://www.theice.com/publicdocs/futures_us/exchange_notices/RevisiontoATMSReguirements1-4-2011.pdf ; and the Chicago Mercantile Exchange's definition of Automated Trading Systems, Operator Identification for Automated Trading Systems, available at https://www.cmegroup.com/rulebook/files/CME_Group_RA0908-5.pdf

[2] European Commission, "Updated rules for markets in financial instruments: MiFID 2" (June 122, 2014), available at http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm

identify persons who should be required to be registered as a Floor Trader, the definition is unnecessary and not indicative of whether a firm engages in algorithmic trading.

However, if the CFTC believes it is necessary to retain a definition of DEA for purposes of defining an AT Person, the Commission should clarify that orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including controls that are established and located at the DCM, do not constitute DEA. Current DCM rules require FCMs to administer the DCM provided controls to facilitate its risk management obligations and are a critical extension of the FCM's risk management infrastructure. This includes the use of independent software vendors ("ISV") owned servers and exchange-owned, front-end systems such WebICE and CME Direct, so long as an FCM has the ability to impose risk limits and other controls on market participants using these systems.

Pre-Trade Risk Controls

The Commission has correctly acknowledged the important role that pre-trade risk controls play in protecting against market disruption. ICE believes that all market participants trading electronically, no matter how they access DCMs, should be required to implement and maintain minimum reasonable pre-trade risk and other controls. However, a significant oversight in the Proposed Rule does not consider that algorithmic traders are not restricted from trading at a single FCM, but commonly submit orders across multiple clearing firms throughout a trading session. Therefore, many of the market protections grouped under the heading of "pre-trade risk controls" in the Proposed Rule are more appropriately situated and administered by the DCM than the trading firms and FCM as outlined in Proposed § 1.80. These include market protections related to order throttling, price collars and certain implementations of self-trade prevention functionality.

Additionally, limiting risk controls and safeguards only AT Persons complicates the rulemaking and does not enhance the oversight of Algorithmic Trading. There is a potential for all persons trading electronically to impact a market, regardless of registration status. All market participants have a responsibility to implement risk controls appropriate to their participation in the life of an order and all persons engaged in electronic trading should be required to use pre-trade risk controls and other measures to help minimize the likelihood of a market disruption. The application of Proposed §1.80 solely to persons who are already registered with the CFTC or non-registrants who access a DCM utilizing DEA to trade for their own account does not accurately capture this risk.

Self Trade Prevention

ICE has a well-established track record in developing tools to reduce unintentional self trading, having implemented functionality in its OTC markets for more than a decade and most recently with the implementation of mandatory protections for proprietary traders in 2013. The result of these protections are clear, the incidences of self-trading are statistically insignificant and the discrete example provided in the commentary of the Proposal is not representative of

current activity across the industry. Using the example month of February 2015 outlined in the Proposal[3], self-trades across the ICE represented only 0.008 percent of total volume when accounting for independence of decision making and was still insignificant at 0.013 percent for all of 2015. While ICE supports the principles contemplated by Proposed § 40.23, the prescriptive changes set out in the rule would require a complete rewrite of ICE's self-trade prevention functionality by mandating it be applied at the account level, as well as applying the functionality to all orders where the functionality would be detrimental to the technical implementation and price discovery process. Implementation of this overly prescriptive rule would have a material, adverse impact on trading, with no measurable improvement over current functionality. Rather than upend existing implementations, ICE recommends that the Commission remove the prescriptive requirements proposed in § 40.23 and instead require DCM's employ self-trade prevention functionality generally as part of the Core Principles in Part 38 and test for effectiveness during its regular review process. As evidenced in by the success of existing self-trade prevention functionality, DCM's are in a much better position to understand the implementation of effective controls based on its market structure than the overly prescriptive requirements proposed in § 40.23.

DCM and RFA Oversight

The Commission should attempt to minimize conflicts with existing rules and practices of DCMs and any registered futures association ("RFA") such as the National Futures Association ("NFA"). The Proposed Rule conflicts with existing practices designed to protect the markets. As the CFTC recognized in the Proposed Rule, DCMs and the NFA have already developed a comprehensive and robust set of rules and requirements intended to prevent market disruptions attributable to an Algorithmic Trading Disruption.[4] DCMs have comprehensive rules and requirements governing access to its electronic trading platform that address the identification of order placers as well as persons associated with Algorithmic Trading Systems.[5] ICE is concerned that the Proposed Rule requires an RFA to create an additional layer of the regulatory compliance regime. DCMs have long been leaders in the innovation, design, and implementation of various risk management functionalities. They employ significant human and technological resources to ensure resiliency of trading systems and adherence by their members to the established and well tested risk management standards.[6] Any new measures should build upon the existing regulatory infrastructure, and not conflict with what has been successfully adopted and implemented by DCMs.

[3] IV.Q.2 Self-Trade Prevention Tools -- § 40.23, Commission Analysis of Self-Trading in the Marketplace
[4] § 1.3 (uuuu).
[5] See, e.g., IFUS Rules 27.00-27.26 and *Reminder: ICE Futures U.S. Electronic Audit Trail Requirements* (February 12, 2013) and CME Group Rules 536(b) and 576, and Market Regulation Advisory Notices RA0915-5 (December 16, 2009): *Operator ID ("Tag 50") Required on All CME Globex Orders* and RA0908-5 (September 10, 2009): *Identification and Registration of Globex Operator IDs (Tag 50 IDs)*.
[6] Commissioner Giancarlo Statement, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement112415

If the Commission determines a regulatory gap exists and decides to assign responsibilities to a RFA, the Commission should employ a principal based approach. This would allow the RFA's to retain the flexibility to develop and implement approaches and tools for oversight of AT Persons. The Commission should also establish consistent sets of standards between the DCMs and RFAs. Other CFTC rules (for example, CFTC Part 38 Pre-Trade Risk Controls) already mandate certain requirements. The Commission should not require RFA's to set redundant regulations if ones already exist. An additional layer of regulation can cause confusion, unnecessary complexity and costs.

Source Code Audit Trail and Inspection

The requirement to maintain a source code repository in accordance with the Commission's recordkeeping requirements and make it available upon request by the Commission or the Department of Justice ("DOJ") raises a number of serious concerns surrounding protections of intellectual property and information security. The standard of inspection without requiring any formal process of law could adversely affect the way that algorithmic traders transact in the market. The impact of having a firm's intellectual property in a registry could also impact the writing of new algorithms, change the way algorithmic traders do business and reduce the quality of the algorithms themselves. Requiring firms to disclose data to any representative of the CFTC or DOJ also potentially exposes the firms to vulnerabilities and risks of cyber security attacks. The Commission recently released proposed cyber security requirements for certain regulated entities and recognizes the risk of cyber-attacks on the U.S. financial markets. The risk of cyber-attacks and theft of proprietary information is not only a risk for financial markets but also of persons who provides confidential information to the U.S. government. In many recent circumstances, confidential information provided to U.S. government agencies has been compromised as a result of cyber-attacks. The consequences of source code provided to the CFTC through an inspection request being stolen by an unauthorized third-party could have a disastrous impact on the market. As such, ICE believes it prudent to limit the production of source code to the government upon the issuance of a subpoena.

Disclosure and Transparency in DCM Trade Matching Systems

ICE shares the Commission's goal of providing easy access to information that explains how an electronic matching platform functions. However, ICE believes that the Proposed Rules subject DCMs to ill-defined, unnecessary and onerous transparency and rule filing requirements. If implemented, DCMs would be forced to inundate market participants with a host of technical information that could not necessarily be distilled into lay-terms. Rather, ICE suggests that the Commission identify specific: (i) individual elements of a trading and matching system that should be subject to transparency requirements; and (ii) characteristics of such elements that need to be described through DCM rules or other means of disclosure.

Our primary concern with the Proposed Rules is that they incorporate broad definitions of the terms "electronic matching platform" and "attribute" and further compound the problems created by those definitions with a new and expansive standard for materiality. DCMs will be required to disclose and codify every aspect of the structure, architecture, mechanics, characteristics or other elements of every system under the control of the DCM that interacts with a market participant order messages and are involved in market data dissemination that materially affect how participant orders are received and executed, or how market data is disseminated. When read together, the definitions are all encompassing and the materiality test--which should act to limit what must be disclosed --expands it to require that any information which a reasonable investor would consider when making an investment decision must be disclosed. In a world where trading is measured in micro seconds, it is hard to think of anything that would not meet the Commission's materiality test.

As a threshold matter, we believe that the Commission should make clear that switches, routers, ports and similar elements of any systems architecture of the DCM are not considered part of the electronic matching platform for this purpose, otherwise every change effected in the ordinary course of operating a matching platform would be subject to ongoing obligations that would be overly burdensome and not result in the disclosure of meaningful information. Rather, the definition should be limited to the matching algorithm logic developed by the DCM that determines the treatment of order priority and the corresponding logic that drives market data dissemination.

The definition of an "attribute" is also overly broad and the Commission's characterization of latency as an attribute is problematic. An attribute is defined as any aspect of the structure, architecture, mechanics, characteristics or other elements of an electronic matching platform that materially affects how participant orders are received and executed. When coupled with the proposed materiality test discussed below, the definition of attribute is all encompassing. For example, a DCM using different brands of fiber cable to connect components of the matching platform engine will be required to disclose such change and submit a rule filing if there is any difference in the latencies of such fibers.

ICE believes that unless they are intentionally created, latencies are not attributes; they are by-products of a system's architecture and functionality. There should not be a "should have known" standard regarding the disclosure of latencies. Some measure of latency is inherent in every element of an electronic matching platform; whether it is the time it takes for an order to pass through a cable or a server or the time it takes for a matching algorithm to execute a trade. Furthermore, the latency of any given piece of hardware or system logic is impacted continuously by external conditions, such as messaging rate and the number and types of connections. In addition, there will be different latencies in an electronic matching engine for any system with more than a single pathway to the matching engine. In all of the above cases, attempting to measure such latencies and disclose them to market participants will not result in the disclosure of meaningful information if the latencies are not intentionally created by the DCM and subject to its control. The Commission's focus on latencies is misplaced and seemingly based on the workings of other markets.

With respect to the materiality test upon which the disclosure and filing requirements are predicated, the Commission states that it would look to the substantial securities market case law, but then cites a different standard as the test it would apply in determining what is material for purposes of disclosure under proposed § 38.401 (a) and (c). Whereas the case law refers to a substantial likelihood that a reasonable investor would consider the information important in making a decision, and whether an objectively reasonable investor's decision-making process would be substantially affected by information, the Commission states in fn. 423 that the materiality standard it would apply in the context of attributes would include those whose existence or degree a reasonable person "would consider" when making a decision. Thus, anything that a reasonable person might consider when making a decision on whether, when or how to place orders would be material under the Proposed Rule, whether or not that information would be considered important or would substantially affect the investor's decision. Such a standard is inconsistent with the cited law and would establish a standard that, as discussed above, is impossible to meet.

Rather than adopt a broad definition of attribute and a burdensome and unworkable materiality test, the CFTC should specifically identify the elements of a system's architecture that affect an order; such as matching algorithms, self-trade prevention functionality, price limits, implied spread functionality and order types, as well as the dissemination of market data (confirmation of trades vs. dissemination of price feed). If a separate document or disclosure is to be required (rather than relying on DCM rules), the description in such document should cover how each element affects time, priority, price and quantity of order execution/market data dissemination. This approach provides certainty as to what is required to be explained, and consistency between DCMs.

To the extent that one of these suggested system elements purposefully creates latency or disadvantages orders (i.e. the latency is not a random consequence of the system architecture), the DCM would logically be expected to discuss the latency in connection with describing the element to which it relates. This approach accomplishes the CFTC's goal of alerting participants to meaningful issues within a system, rather than providing a lot of technical information captured by the overly broad definition of attribute. Moreover, it does not charge DCMs with the task of searching for latencies in isolation.

ICE strongly encourages the Commission to defer final rulemaking with respect to these requirements, as they are ancillary to the main focus of this Proposal, which is AT. We believe that the correct approach is to identify specific elements of an electronic matching engine that are subject to transparency standards and the final rules would benefit from an additional round of rulemaking with the opportunity for comments from participants as to which elements should be disclosed.

Annual Reports

The Commission should replace the annual report requirement proposed in § 1.83 with a process whereby AT Persons and FCMs certify their compliance with the requirements of §

1.80(a) and § 1.82(a)(i). ICE believes that DCMs are not in the position to evaluate the information contained in the proposed annual reports. DCMs do not have view into the complete information upon which an AT Person of FCM's control parameters are based and do not have more technical expertise than the developers or operators of an algorithmic strategy to determine whether the risk parameters set by an AT Person are appropriate for the algorithmic trading strategy employed. Further, this information would not add value to the DCMs' efforts to protect orderly markets, and at worst, may represent expired or inaccurate information. Under a certification process, affected entities, which are in the best position to do so, would be required to evaluate their system controls and internal procedures against the proposed requirements. This would accomplish the Commission's goal to ensure that appropriate controls have been implemented and are reasonably designed and calibrated without imposing an additional burden on DCMs and the affected entities.

Cost Benefit Analysis

The Commission should conduct a thorough cost-benefit analysis, taking into account the full impact of the Proposed Rule in conjunction with other regulations, including the upcoming rules that will be phased in over time through 2019. The Proposal's current cost and benefit considerations vastly underestimate the costs of complying with the many requirements of Regulation AT given the broad drafting. As the Commission correctly noted in the Proposal, many of the controls required in Regulation AT are already widely utilized by the industry. However, there are additional requirements which need to be adopted based on the prescriptive nature of the Proposed Rule in order to be compliant. The Commission should closely weigh the benefits to be achieved by adopting such requirements as proposed against the high costs that the industry would likely incur to implement such obligations. To that end, ICE supports the re-opening of the comment period to allow market participants further time to conduct a more informed cost benefit analysis. Moreover, ICE encourages the Commission to provide additional details in order for market participants to adequately perform this analysis. As currently drafted, the Proposal lacks sufficient details to undertake this analysis.

Enhancement of Controls

The Commission should allow the market participants and DCMs flexibility in the enhancement of controls. To that end, ICE recommends the Commission issue principal based rules which encourage and facilitate effective risk management policies. Proposed § 1.81 imposes one-size-fits-all obligations on a wide variety of market participants that use diverse Algorithmic Trading systems. The Commission should take the approach of broadly identifying topics that should be addressed in a relevant policy and procedure and leave it to the discretion of the AT Person to develop internal requirements most suited to its business. In addition, by requiring firms to implement written policies and procedures and treat any violation, including of a firm's own internal policies and procedures, as an Algorithmic Trading Compliance Issue, Proposed § 1.81 potentially penalizes AT Persons who adopt the most robust internal requirements. This result highlights the need for flexibility in the implementation of controls.

Separation of Rulemaking

The Proposal is so extensive and the area of the rulemaking so complex, it is difficult for the market to discern all segments of the Proposal. To that end, the Commission should separate out the registration requirements from the risk controls into a distinct rulemaking as these requirements apply to different users in the market place. The Commission should also address the registration requirements after key elements such as the definitions are addressed. This will allow the Commission to assess the controls in place to determine what controls are working and what controls should be enhanced. Accordingly, we suggest that both the expanded definition of floor trader, and related registration requirements as well as the standards for the development, testing, monitoring, and compliance of Algorithmic Trading systems be removed from Regulation AT and proposed separately.

Conclusion

ICE appreciates the opportunity to comment on the Proposal. ICE supports the Commission's goals and objectives in enhancing the regulatory regime for automated trading but is concerned that Regulation AT might not achieve these goals. We believe that requirements that are principles-based, appropriate to the role of the market participant and avoid unnecessary complexity will best serve the market. We appreciate the opportunity to continue working with the Commission to find the right balance of flexibility and regulatory oversight. In the following pages, we address in detail the questions raised in the Proposal. Again, ICE thanks the Commission for the opportunity to comment on the Proposed Rules.

Sincerely,

Kara Dutta
Intercontinental Exchange, Inc.

Appendix A

ICE's Responses to Specific Topics and Questions Raised in the Notice of Proposed Rulemaking

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I. Definitions and Registration (§§ 1.3(x), 1.3(ssss)-(yyyy), 170.18 and 170.19)

1. Is the Commission's definition of "Algorithmic Trading" generally consistent with what algorithmic trading is understood to mean in the industry? If not, please explain how it is inconsistent and how the definition should be modified. In your answer, please explain whether the definition inappropriately includes or excludes a particular type or aspect of trading.

The definition of "Algorithmic Trading" set forth in Regulation AT is overly broad in scope, including trading in any commodity interest where one or more computer algorithms or systems makes determinations with respect to an order and such order is submitted for processing or subject to the rules of a DCM. The definition excludes orders where every parameter is manually entered into a front-end system by a natural person with no further discretion by a computer system or algorithm prior to its submission. ICE supports the Commissions' exclusion of orders where a natural person has discretion to intervene and where every parameter of the order has been manually entered by a natural person, however, is concerned that the definition may include a wide range of market activity that would not otherwise amount to algorithmic trading from the industry's perspective, and may not represent the type of activity the Commission originally sought to capture within the scope of Regulation AT.

As defined, "Algorithmic Trading" could potentially include the use of an auto-spreader, smart order types, iceberg orders, or simple order routing tools which are widely available as part of exchange offered functionality or though off-the-shelf trading software. The potential risks posed by these tools are not equivalent to an algorithmic trading system that generates and submits orders to the DCM without any human interference. It is important for the Commission to clarify this distinction. By including such strategies under the definition of "Algorithmic Trading", the number of market participants whose activity would fall within the purview of Regulation AT would increase significantly. Further, registration, risk management, and annual reporting requirements associated with simple automated trading tools would impose a disproportionate burden on market participants that make use of this common functionality instead of complex automated trading strategies. ICE recommends that the Commission provide clarity on this point so that simple automated trading tools, including automated order routing systems, would not be included in the definition of "Algorithmic Trading".

4. Should the Commission's definition of "Algorithmic Trading" include systems that only make determinations as to the routing of orders to different venues (which is contemplated in the proposed definition)? With respect to the definition of "Algorithmic Trading," should the Commission differentiate between different types of algorithms, such as alpha-generating algorithms and order routing algorithms?

ICE does not support the inclusion of systems that only make determinations as to the routing of orders in the definition of "Algorithmic Trading". With respect to simple automated order routing tools, ICE encourages the Commission to consider its approach to that taken by the European Commission under MiFID II and ensure that such routing tools are likewise excluded. As noted previously, these routing tools would fall under what ICE considers simple automated trading tools that are widely available and used by many market participants separate and apart from the type of fully automated trading strategy that the spirit of Regulation AT seeks to capture. Many market participants use this functionality to transmit orders to the DCM without any other determinations as to the nature of the order.

6. The Commission posits a scenario in which an AT Person submits orders through Algorithmic Trading, and a non-clearing FCM or other entity acts only as a conduit for these AT Person orders. If the non-clearing FCM or other entity does not make any determinations with respect to such orders, the conduit entity would not be engaged in Algorithmic Trading, as that definition is currently proposed. Should the definition of Algorithmic Trading be modified to capture a conduit entity such as a non-clearing FCM in this scenario, thereby making the entity an AT Person subject to Regulation AT? In other words, should non-clearing FCMs be required to manage the risks of AT Person customers? How would non-clearing FCMs do so if the non clearing FCMs do not have risk controls comparable to the risk controls specified in proposed § 1.82?

ICE does not believe that the definition of "Algorithmic Trading" should be modified to capture non-clearing FCM or other "conduit" entities.

7. The Commission, recognizing that natural person traders who manually enter orders also have the potential to cause market disruptions, is considering expanding the definition of Algorithmic Trading to encompass orders that are generated using algorithmic methods (e.g., an algorithm generates a buy or sell signal at a particular time), but are then manually entered into a front-end system by a natural person, who determines all aspects of the routing of the orders. Such order entry would not represent Algorithmic Trading under the currently proposed definition. The Commission requests comment on this proposed expansion of the definition of Algorithmic Trading, which the Commission may implement in the final rulemaking for Regulation AT. The Commission requests comment on the costs and benefits of this proposal, in addition to any other comments regarding the effectiveness of this proposal in terms of risk reduction.

The definition of "Algorithmic Trading" should not be expanded to include orders that are manually entered into a front-end system by a natural person based on market information generated by algorithmic methods. The natural person who enters the order into a front-end system in this instance would have complete discretion with respect to how the order is entered, including each of the order characteristics specified in the Commission's proposed definition of "Algorithmic Trading". Further, computer programs that provide trading ideas are widely used across the industry by most, if not all market participants that access the DCM. Expanding the definition of "Algorithmic Trading" to include market participants that make use of computer

generated ideas or models would significantly increase the number of market participants that fall within the scope of Regulation AT. However, users of of-the-shelf and exchange offered front-end systems would largely be unable to comply with the compliance obligations of an AT Person as they do not have access to the source code of these third-party systems nor would they be able to identify all the necessary risks that could lead to an Algorithmic Trading Event. ICE does not believe the level of risk posed by such activity is commensurate with substantial costs and resources required of participants if this expanded language were included within the scope of Algorithmic Trading.

8. Should the definition of Algorithmic Trading Compliance Issue be modified to include other potential compliance failures involving an AT Person that may have a significant detrimental impact on such AT Person, the relevant DCM, or other market participants?

ICE generally supports the definition of "Algorithmic Trading Compliance Issue"; however ICE would like to stress that DCMs do not have the ability to monitor for or detect an event at the AT Person that causes its Algorithmic Trading to operate in a manner that does not comply with its own internal requirements, or the requirements of the AT Person's clearing member.

9. Should the definition of Algorithmic Trading Disruption be modified to include other types of disruptive events that may originate with an AT Person?

ICE generally supports the definition of "Algorithmic Trading Disruption" as proposed; however, similar to our concerns with the definition of "Algorithmic Trading Compliance Issue" discussed in response to Question 9 above, ICE would like to stress that DCMs do not have the ability to monitor or detect an event that disrupts or materially degrades the Algorithmic Trading of an AT Person. This is particularly true if the event at issue does not also disrupt the operation of the DCM or the ability of other market participants to trade on the DCM.

10. Should the definition be expanded to include other types of disruptive downstream consequences that may result from an Algorithmic Trading Disruption originating with an AT Person, and which may negatively impact the relevant designated contract market, other market participants, or other persons? Alternatively, should the scope of the definition be reduced, and if so, why?

Please see ICE's response to Question 9 above.

17. Should the definition of AT Person be limited to persons using DEA? In other words, should the definition capture persons registered or required to be registered as FCMs, floor brokers, SDs, MSPs, CPOs, CTAs, or IBs that engage in Algorithmic Trading on or subject to the rules of a DCM, or persons registered or required to be registered as floor traders as defined in § 1.3(x)(3), in each case if such persons are using DEA? The Commission requests comment on the costs and benefits of this approach, including comments on whether this more limited definition of AT Persons would adequately mitigate the risks associated with algorithmic trading.

The definition of "AT Person" should not be limited to persons using DEA as defined in § 1.3(yyyy). Please see ICE's responses to Questions 18 and 19 below.

18. Please explain whether the Commission's proposed definition of DEA will encompass all types of access commonly understood in Commission-regulated markets as "direct market access." In light of the proposed regulations concerning pre-trade and other risk controls and standards for the development, testing and supervision of algorithmic trading systems, do you believe that the proposed definition of Direct Electronic Access is too limited (or, alternatively, too expansive)? If so, please explain why and how the definition should be revised.

Please see ICE's responses to Questions 19 and 26 below.

ICE recommends that the Commission consider either removing the concept of DEA from the scope of Regulation AT, or, in the alternative, revising the definition of DEA to clarify that routed through a clearing member means any orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including such controls that are established and located at the DCM. As written, the phrase "without the order first being routed through a separate person who is a member of a derivative clearing organization" is unclear. Regardless of how a market participant accesses the DCM, to the extent that the market participant is engaged in Algorithmic Trading it will be subject to the FCM pre-trade and other risk controls established under § 1.82 and the risk management obligations set forth in § 1.73. Further, DCM rules require FCMs to use the Exchange provided controls to facilitate its risk management obligations, and the pre-trade and other risk management controls made available by the DCM are generally seen as an extension of the clearing FCM's own risk management infrastructure.

Additionally, ICE is concerned that Regulation AT inappropriately correlates Algorithmic Trading with DEA. DEA should not be a condition for determining who qualifies as an AT Person, as it may unnecessarily exclude certain market participants that engage in Algorithmic Trading but would not otherwise be subject to the registration requirement. This is particularly the case with respect to the definition of "floor trader".

19. Should the Commission define "routed" in its definition of DEA? If so, how? Are there specific examples of trading or routing arrangements where it would be unclear whether trading was performed through DEA?

ICE recommends that the Commission revise the definition of DEA to clarify that routed through a clearing member means any orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including such controls that are established and located at the DCM. As discussed previously, ICE has introduced a comprehensive set of market protections and risk controls, such as self-matching preventions, price protections, credit and risk management tools, price and product limits, and messaging efficiency policies.[7] Offering market protections is

[7] IntercontinentalExchange Group Inc. ("ICE") Comment Letter (Feb. 14, 2014) at 1-2.

central to ICE's exchange compliance with the Commission's regulations for DCMs and SEFs, including the requirements set forth in § 38.255(b) of Regulation AT, as well as global regulators' exchange and clearing regulations. FCMs are currently required to use the credit and risk management tools located at the DCM, and these risk controls are generally viewed as an extension of the FCM's own risk management infrastructure. If read broadly (i.e. orders routed through an FCM's risk management controls located at the exchange but not physically routed the order through the FCM are considered DEA), the Commission's estimated 100 market participants that would be impacted by Regulation AT would increase to include the vast majority of all market participants.

Further, clarifying that the "routed" condition includes orders which pass through an FCM's pre-trade controls located at the DCM is consistent with the definition broadly accepted by the industry. The FIA, for instances, does not distinguish between whether an order is physically routed through an FCM for the purpose of determining direct access.[8] ICE Futures U.S. defines Direct Access as a direct connection by an FCM or other market participant to the DCM to enter orders without passing through the credit or risk control infrastructure of an FCM. The determination of DEA, under both of these interpretations hinges not on whether there is a physical order being routed, but on whether the order first passes through pre-trade credit checks of an FCM.

26. Please supply any information or data that would help the Commission in deciding whether firms may or may not meet the definition of "floor trader" in § 1a(23) of the Act.

The Commission notes in Regulation AT that the revised definition of "floor trader" is intended to achieve registration for market participants conducting Algorithmic Trading on a DCM that are not otherwise required to be registered with the Commission. Regulation AT specifically seeks to capture proprietary traders engaging in Algorithmic Trading within the purview of the registration requirement, however, hinges such registration on the use of DEA. ICE is concerned that the proposed definition inappropriately correlates Algorithmic Trading with DEA for the purpose of achieving registration. Regardless of how a market participant accesses the DCM, to the extent that the market participant is engaged in Algorithmic Trading it will be subject to the FCM pre-trade and other risk controls established under § 1.82 of Regulation AT. Further, by including DEA in the "floor trader" definition, the Commission may be excluding certain proprietary trading firms that engage in Algorithmic Trading from the scope of Regulation AT which it may have ultimately intended to include.

As discussed in response to Question 19, ICE believes that the definition of DEA should be revised to clarify that the condition "routed through a clearing member" includes any orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including such controls that are established and located at the DCM. In light of this recommendation, ICE further recommends that the Commission remove DEA from the definition of "floor trader" and instead narrow the definition of Algorithmic Trading. In Regulation AT, the Commission

[8] The Futures Industry Association ("FIA") Comment Letter (Dec. 11, 2013) at 12.

estimates that there are approximately 100 proprietary trading firms who engage in Algorithmic Trading. The majority of market participants that access the DCM, including those proprietary trading firms that the Commission has identified, route order to the DCM that first pass through the credit and risk infrastructure of a Clearing Member, and not through DEA. While the Commission notes that the "floor trader" definition as proposed is meant to facilitate the registration of proprietary traders using DEA for Algorithmic Trading on a DCM and is not being expanded to capture all proprietary traders engaged in Algorithmic Trading, ICE is concerned that this limited definition would capture too few, if any, such proprietary traders.

Further, proprietary traders that engage in Algorithmic Trading who are not deemed "floor traders" pursuant to the proposed definition would likely not be captured under another definition included in Regulation AT. Such proprietary traders would therefore be operating Algorithmic Trading strategies outside of the scope of Regulation AT, which may frustrate the Commission's effort to ensure that appropriate compliance measures are in place across all Algorithmic Trading activity. ICE estimates that the Algorithmic Trading activity that would likely be excluded under the proposed definition would be significant. Instead, we believe it would be more appropriate, and consistent with the Commission's own stated goals, for the definition of "floor trader" be narrowed to only include proprietary trading firms that engage in Algorithmic Trading activity on the DCM and who are not otherwise registered with the CFTC as a FCM, floor broker, SD, MSP, CPO, CTA or IB. This can be accomplished by removing the DEA requirement from the proposed definition.

II. DCM Risk Controls and Test Environment (§§ 38,255, 40.20 and 40.21)

64. Are there any pre-trade and other risk controls required by § 38.255(b) and (c) that will be ineffective, not already widely provided by DCMs for use by FCMs, or likely to become obsolete?

ICE generally supports the Commission's effort to ensure pre-trade risk and other controls are implemented by FCMs and DCMs. However, ICE believes that the Commission should not mandate the same risk control requirements proposed under § 1.80 across DCMs, FCMs and AT Persons. Any proposed risk control requirements should instead be tailored to reflect the risks specific to each entity. Further, ICE believes that the DCM is most appropriately situated to administer many of the pre-trade risk controls required by § 38.255(b) and (c), as these controls are already in place at the DCM and an AT Person's activity may span across multiple FCMs. To that end, ICE recommends that the Commission amend § 38.255(b) to remove the requirement that DCMs provide FCMs with functionality to manage order message frequency and order price parameters.

First, ICE does not believe it is appropriate for FCMs to control message frequency over time for an AT Person, as this functionality is already in place, and managed effectively, at the DCM. ICE's trading platform currently imposes a restriction on all inbound message traffic, which can be set at the granular user level. The throttle limit for inbound message traffic and order quantity limits are actively managed and routinely reviewed by the DCM. These limits are critical for a DCM, as the market operator, to ensure stable and operationally efficient markets. An FCM does not have the same insight into the operations of the market to determine the impact of messaging activity. The same is true with respect to order price parameters. DCMs currently set order price parameters, which are actively managed and routinely reviewed by the DCM and are not tunable by either an AT Person or FCM. The DCM's order price parameters are determined by the DCM's supervision staff based on specific market and product characteristics, and include Non-Cancellation Ranges, Daily Price Limits, Reasonability Limits and Interval Price Limits. Like message throttle limits, these price parameters are a critical part of the DCM's efforts to ensure orderly and efficient markets.

65. Are there additional pre-trade or other risk controls that DCMs should be specifically required to provide to FCMs pursuant to proposed § 38.255(b) and (c)?

ICE has not identified any additional pre-trade or other risk controls that should be required under proposed § 38.255(b) and (c). As discussed in response to Question 64 above, § 38.255(b) should instead be amended to remove the requirement that DCMs provide FCMs with functionality to manage order message and execution frequency and order price parameters. These risk controls are currently in place at, and managed effectively by, the DCM. Additionally, ICE continues to work directly with FCMs to develop and implement additional risk controls.

67. The Commission welcomes comment on whether §38.255(b)'s requirements relating to the design of controls and the levels at which the controls should be set are appropriate and sufficiently granular.

As discussed in response to Question 64 above, § 38.255(b) does not adequately reflect the current implementation of pre-trade risk controls provided by DCMs. The risk controls currently provided by DCMs have been developed over time to address a significant array of risk conditions and have been purposefully implemented at specific levels to best reflect market conditions and prevent disruptions. ICE does not believe that § 38.255(b) should mandate specific levels at which a DCM is required to offer risk controls. Further, DCMs should continue to set messaging and price parameters at its discretion and based on prevailing market and product conditions.

68. Proposed § 38.255(b) and (c) do not require DCMs to provide to FCMs connectivity monitoring systems such as "system heartbeats" or automatic cancel-on-disconnect functions. Should § 38.255 require such functionality?

ICE does not believe it is necessary for proposed § 38.255 to require that DCMs provide FCMs connectivity monitoring systems or automatic cancel-on-disconnect functions. Providing such a specific requirement without adequately addressing the nuances of varying connectivity methods would risk disrupting efficient systems already in place.

79. The Commission proposes to require DCMs to set pre-trade risk controls at the level of the AT Person, and allows discretion to set controls at a more granular level. Should the Commission eliminate this discretion, and require that the controls be set at a specific, more granular, level? If so, please explain the more appropriate level at which pre-trade risk controls should be set by a DCM.

As discussed in response to Question 64 above, ICE believes that the Commission should not mandate the same risk control requirements proposed under § 1.80 across DCMs, FCMs and AT Persons. Any proposed risk control requirements should instead be tailored to reflect the risks specific to each entity.

With respect to § 40.20, ICE believes that the requirements outlined in this section would be more appropriately categorized as market protections rather than pre-trade risk controls. ICE has designed and implemented numerous exchange market protections to promote orderly markets and offering such market protections is central to ICE's compliance with the Commission's DCM regulations as well as global regulators' exchange and clearing regulations. The market protections employed by DCMs, as the market operators, are significantly different from the risk-controls implemented by AT Persons, and it is therefore not appropriate for DCMs to be subject to the same risk-controls and prescriptive levels required for AT Persons under § 1.80. ICE is concerned that § 40.20 does not adequately reflect this distinction. The market protections set forth under § 40.20 are currently in place at, and managed effectively by, the

DCM. Further, these market protections are critical for the DCM to ensure stable and orderly markets, and the levels underlying such market protections are actively managed and routinely reviewed by the DCM. To that end, ICE recommends that DCMs continue to be allowed flexibility and discretion in determining the level at which to set market protection.

80. The Commission requests public comment on the pre-trade and other risk controls required of DCMs in proposed § 40.20. Are any of the risk controls required in the proposed rules unhelpful to operational or other risk mitigation, or to market stability, when implemented at the DCM level?

As discussed in response to Question 79 above, ICE does not believe that DCMs and AT Persons should be expected to implement the risk-controls outlined in § 1.80 with the same level of granularity.

82. The Commission proposes, with respect to its kill switch requirements, to allow DCMs the discretion to design a kill switch that allows a market participant to submit risk-reducing orders. The Commission also does not mandate particular procedures for alerts or notifications concerning kill switch triggers. Does the proposed rule allow for sufficient flexibility in the design of kill switch mechanisms and the policies and procedures concerning their implementation? Should the Commission consider more prescriptive rules in this area?

ICE requests that the Commission provide additional clarity with respect to what constitutes a risk-reducing order.

84. Should the test environment provided by DCMs under proposed § 40.21 offer any other functionality or data inputs that will promote the effective design and testing of Algorithmic Trading by AT Persons?

ICE currently provides a test environment to market participants to promote effective design and order and trade testing with the trading platform's application programming interfaces, as well as to support the DCM's conformance testing program. Within the test environment, market participants can test current and future system releases offered by the DCM and can use the test environment to interact with themselves or with other market participants. Additionally, ICE has a separate testing environment to support anonymous playback of dated production data at an accelerated rate.

ICE does not believe, however, that requiring DCM test environments to support the simulation of real market conditions or historical transaction, order or message data in its test environment is practical, or that any benefits that this type of simulation may produce would be commensurate with the substantial cost associated with developing it. Without the actual interaction of real trades and the wide range of market conditions that can occur in a live trading environment, it is unclear what benefits would arise from this type of simulation, and the implementation would require significant financial investment to develop and maintain.

ICE recognizes and supports the Commission's goal to validate that pre-trade risk controls and other measures operate as expected. As such, ICE is generally supportive of the optional use of test symbols as a mechanism for market participants to verify connectivity and account setup before a new algorithmic trading system is deployed for live trading.

III. Self-Trade Prevention Tools (§ 40.23)

90. The Commission seeks to require self-trade prevention tools that screen out unintentional self-trading, while permitting bona-fide self-matched trades that are undertaken for legitimate business purposes. Under the regulations proposed above, DCMs shall implement rules reasonably designed to prevent self-trading ("the matching of orders for accounts that have common beneficial ownership or are under common control"), but DCMs may in their discretion implement rules that permit "the matching of orders for accounts with common beneficial ownership where such orders are initiated by independent decision makers."

(a) Do these standards accomplish the goal of preventing only unintentional self-trading, or would other standards be more effective in accomplishing this goal? For example, should the Commission consider adopting in any final rules arising from this NPRM an alternative requirement modeled on FINRA Rule 5210 and require market participants to implement policies and procedures to review their trading activity for, and a prevent a pattern of, self-trades?

ICE recognizes the benefit for self-matching prevention technology and supports implementation of such protections at the Exchange and trading firm level. In fact, ICE has a well-established track record in developing tools to reduce unintentional self trading, having implemented functionality in its OTC markets for more than a decade and most recently with the mandatory implementation of advanced protections for proprietary traders in 2013. However, the protections as proposed in § 40.23 would require a fundamental rewrite of this technology with no discernible benefit. Although the proposal purports to provide DCM's flexibility in certain aspects of the implementation (i.e. recognition of independent decision making), other portions of the Rule are so prescriptive that it risks significant impacts to the normal price discovery process and introduces an unnecessary and undue burden on the market as a whole.

Prior to ICE's mandatory implementation of Self-Trade Prevention Functionality ("STPF") at the end of 2013, the incidences of self-trading[9] were statistically insignificant at 0.051% of total Exchange volume. Since implementation, self-trading frequency remains insignificant, representing .013% of total Exchange volume. This contrasts dramatically with the discrete example provided in the Proposal's commentary, which does not appear to be representative of current activity across the industry. In the example month of February 2015, self-trades across the ICE represented only 0.008 percent of total volume when accounting for independence of decision making.

While ICE supports the principles contemplated by § 40.23, the prescriptive changes set out in the rule would require a complete rewrite of ICE's self-trade implementation by requiring the functionality be applied at the account level rather than Authorized Trader, as well as applying

[9] Defined as trading activity originating from the same Authorized Trader ID for the same Account.

the functionality to orders where it would be detrimental to the technical implementation and price discovery process. These include certain option strategies, user-defined spreads, and transactions arising out of implied functionality. ICE is not aware of any demonstration of significant self-trade activity arising from these orders, and certainly not one that would require a fundamental rewrite of the existing STPF. Rather, implementation of this overly prescriptive rule would have a material, adverse impact on implied trades as with no measurable improvement over current functionality. Implied trades rely on a multitude of inputs with pricing derived from numerous orders spanning multiple markets. This means that not one trader "owns" a derived order, but rather it is comprised of many independent orders. The resultant many-to-many relationship does not accommodate the necessary "ownership" check that would be required under the Proposal.

ICE therefore recommends that the Commission remove the prescriptive requirements proposed in Rule § 40.23 and instead require DCM's implement self-trade functionality generally as part of the Core Principles in Part 38. This would still meet the Commissions stated goal of preventing unintentional self-trading, permitting bona-fide self-matched trades, and permitting DCMs discretion in implementing rules best suited for its market structure. As it is able to do so today, the Commission can review and test the effectiveness of the DCM's implementation through the rule enforcement review process. This would allow DCMs to continue implementing an effective and tailored approach best suited to its technology and methods of market access, while eliminating an unnecessary registration process as set out in the proposed rule and any impacts to bona fide transactions critical to the price discovery process.

(b) While the regulations contain exceptions for bona fide self-match trades (described in § 40.23(b)), the regulations are intended to prevent all unintentional self-trading, and do not include a de minimis exception for a certain percentage of unintentional self-trading. Should the regulations permit a certain de minimis amount of unintentional self-trading, and if so, what amount should be permitted (e.g., as a percentage of monthly trading volume)?

ICE believes that § 40.23 should not be so prescriptive as to establish a percentage measure with respect to the intent of a transaction. The technological requirement for this type of functionality would be significant and overly burdensome, both for DCMs as well as for market participants. Additionally, establishing an acceptable threshold based solely on a de minimis threshold undermines the importance of the facts and circumstances that drive a regulatory review of the activity. Further, such a threshold would be a misleading indicator for firms as to acceptable trading practices.

(c) The following terms are used in proposed §40.23(a) and (b): (1) self-trading, (2) common beneficial ownership, (3) independent decision makers, and (4) common control. Do any of these terms require further definition? If so, how should they be defined? Should any alternatives be used and, if so, how should such substitute terms be defined?

ICE does not believe that the Commission should attempt to define any of the above terms, rather as noted in its prior response, DCM's should be required to implement self-trade functionally generally as part of the Core Principles in Part 38.

(d) With respect to "common beneficial ownership," the Commission requests comment on the minimum degree of ownership in an account that should trigger a determination that such account is under common beneficial ownership. For example, should an account be deemed to be under common beneficial ownership between two unrelated persons if each person directly or indirectly has a 10% or more ownership or equity interest in such account? The Commission refers commenters to the aggregation rules in part 150 of its regulations, including specifically § 150.4, and requests comment on a potential Commission definition of common beneficial ownership that is modeled on § 150.4.

The Commission should not define "common beneficial ownership" but rather permit DCMs to determine an application appropriate for existing STPF implementations.

(e) The Commission also requests comment on whether "common beneficial ownership" should be defined in any final rules arising from this NPR, or whether such definition should be left to each DCM with respect to its program for implementing proposed § 40.23.

Please see ICE's response to Question 90(d) above.

91. Are there any other types of self-trading that should be permitted in addition to the exceptions permitted in § 40.23(b)(1) and (2)? If so, please describe such other types of acceptable self-trading and explain why they should be permitted.

The Commission should not seek to further define permissible self-trading activities that would be subject to a filing or exception, but rather permit DCMs to determine an application appropriate for existing STPF implementations.

92. Proposed § 40.23 provides that DCMs may comply with the requirement to apply, or provide and require the use of, self-trade prevention tools by requiring market participants to identify to the DCM which accounts should be prohibited from trading with each other. With respect to this account identification process, the Commission's principal goal is to prevent unintentional self-trading; the Commission does not have a specific interest in regulating the manner by which market participants identify to DCMs the account that should be prohibited from trading from each other, so long as this goal is met. Should any other identification methods be permitted in § 40.23? For example, please comment on whether the opposite approach is preferable: market participants would identify to DCMs the accounts that should be permitted to trade with each other (as opposed to those accounts that should be prevented from trading with each other).

As discussed in response to Question 90(a) above, the Commission should not prescribe the method in which a DCM implements self-trade prevention functionality. DCMs have already

provided several levels of aggregation to prevent orders from self-trade matching at the account, firm, and trader levels, among others. Replacing the infrastructure currently in place at the DCM with a Commission mandated administration program would introduce significant and unnecessary costs with little to no benefit. The registration program proposed would be unprecedented in scale, seemingly requiring a filing of nearly every participant with multiple accounts or that trade through suspense and omnibus account structures. This is entirely unnecessary and would not result in any perceivable reduction in self-trading.

93. The Commission believes that its requirements concerning self-trade prevention tools must strike the appropriate balance between flexibility (allowing market participants with diverse trading operations and strategies the discretion in implementation so as effectively prevent only unintentional self-trades) and simplicity (a variety of design and implementation options may render this control too complex to be effective). Does the Commission allow sufficient discretion to exchanges and market participants in the design and implementation of self-trade prevention tools? Is there any area where the Commission should be more prescriptive? The Commission is particularly interested in whether there is a particular level at which it should require implementation of self-trade prevention tools, i.e., if the tools must prevent matching of orders from the same trading firm, the same trader, the same trading algorithm, or some other level.

While the proposed rule provides DCMs with the flexibility to determine an appropriate design (i.e. cancellation treatment), it unnecessarily complicates the implementation by prescribing that the functionality apply to all orders submitted to the DCM. ICE understands that the Commission is attempting to ensure unbiased treatment of order activity; however ICE believes the rule as proposed is unnecessarily broad in scope, bringing in order types that were specifically excluded under current implementations due to the inherent complexities involved. As noted previously, these include options, user defined spreads, and transactions arising out of implied functionality. Applying self-trade prevention tools to such orders would risk significant disruption to order matching algorithms at the DCM.

Additionally, proposed § 40.23(a) anchors the prohibition of self-trading at the account level, which in a vast number of situations is not indicative as to the ownership or control of an order. Rather, suspense, execution, or omnibus accounts comingle a number of beneficial owners and controllers at execution. To address this conflict, the Commission should permit DCMs to determine an application appropriate under existing STPF implementations.

94. Proposed § 40.23(a) would require DCMs to either apply, or provide and require the use of, self-trade prevention tools. Please comment whether § 40.23(a) should, in addition, permit market participants to use their own self-trade prevention tools to meet the requirements of proposed § 40.23(a), and if so, what additional regulations would ensure that DCMs are able to: ensure that such tools are comparable to DCM-provided tools; monitor the performance of such tools; and otherwise review such tools and ensure that they are sufficiently rigorous to meet the requirements of § 40.23.

In instances where beneficial ownership and/or control is known at the time the order is submitted, DCM implemented self-trade functionality is most effective. However, as is current practice, market participants should monitor for self-trading and implement additional controls as necessary and appropriate. DCMs should not be obligated to monitor third party tools, as DCMs already monitor for self-trading through their existing market surveillance functions.

95. Is it appropriate to require implementation of self-trade prevention tools with respect to all orders? Should such controls be mandatory for only a particular subset of orders, i.e., orders from AT Persons or orders submitted through DEA?

ICE does not believe it is appropriate to require implementation of self-trade prevention tools with respect to all orders. As stated above, applying self-trade prevention tools to certain orders such as options, user-defined spreads, and transactions arising out of implied functionality, would risk significant disruption to order matching algorithms at the DCMs.

96. Please comment on the requirement that DCMs disclose self-trade statistics. Is the data required to be disclosed appropriate? Is there any other category of self-trade data that DCMs should be required to disclose?

The proposal requires the display of the following: (i) percentage of approved self-trading trades; (ii) percentage of approved self-trading volume; and (iii) the ratio of orders whose matching was prevented by SMP tools. Publicly reporting approved transactions is neither relevant nor actionable for market participants. Similarly, there is no value in displaying the percentage of orders blocked by self-trade prevention tools as no transactions resulted from the orders.

97. Should DCMs be required to disclose the amount of unintentional self-trading that occurs each month, alongside the self-trade statistics required to be published under proposed § 40.23(d)?

ICE requests that the Commission provide additional clarity on what constitutes an "unintentional" self-trade. The self-trade prevention tools currently implemented at the DCM are specifically designed to block unintentional self-trade transactions, and as such, there should not be a material amount of unintentional self-trades to report with the functionality currently in place.

98. As noted above, the Commission understands that there is some potential for self-trade prevention tools to be used for wrongful activity that may include disruptive trading or other violations of the Act or Commission regulations on DCMs. Are there ways to design self-trade prevention tools so that they do not facilitate disruptive trading (such as spoofing) or other violations of the Act or Commission regulations on DCMs? Are additional regulations warranted to ensure that such tools are not used to facilitate such activities?

Self-trade prevention tools are a useful mechanism for reducing self-trades; however there may methods for market participants to engage in disruptive or manipulative trading behavior. To

this end, DCMs are obligated to monitor for and enforce anti-disruptive trading rules to identify instances of spoofing regardless of the method used to engage in this behavior. The oversight for anti-disruptive trading rules at the DCM involves a much more thorough review of the trading activity than could be implemented through a pre-trade order check or a single set of automated functionality and is therefore a much better mechanism for identifying disruptive trading practices.

151. Please comment on the cost estimates described above for DCMs and market participants to comply with the requirements of § 40.23. The Commission is interested in commenter opinion on all aspects of its analysis, including its estimate of the number of entities impacted by the proposed regulation and the amount of costs such entities may incur to comply with the regulation.

As proposed, the registration requirement for permissible trading would likely result in the registration of tens of thousands of exemption request since firms would potentially have to submit multiple requests for every trader. It would not only be unnecessarily expensive for Firms, but also for DCMs that would be charged with implementing the registration program, both at initial set up as well as an on an ongoing basis when maintaining accurate and up to date records. This would require updates multiple times a day for most firms, as new accounts, traders and strategies are employed. The cost of the proposed registration requirement is not proportional to any proposed benefit nor would it reduce the occurrence of self-trading by a meaningful amount.

152. Please comment on the benefits described above. Do you agree with the Commission's position that self-trade prevention requirements will result in more accurate indications of the level of market interest on both sides of the market and help ensure arms-length transactions that promote effective price discovery? Are there additional benefits to regulatory self-trade prevention requirements not articulated above?

As noted in the response to Question 91(a), the prevalence of self-trading is already largely insignificant. While ICE supports the Commissions goal to promote effective price discovery, the proposal would likely not have the desired result and instead introduce a significant risk of disruption to order matching algorithms at the DCMs.

154. Would any DCMs that currently offer self-trade prevention tools need to update their tools to meet the requirements of § 40.23? If so, please provide an estimate of the cost to such a DCM to comply with the requirements of § 40.23.

As noted previously, ICE believes the proposed rule would require a complete rework of its existing functionality in order to accommodate the application to self-trade functionality at the account level to all orders. Applying self-trade prevention tools to such orders would risk significant disruption to order matching algorithms at the DCM. Tailoring such functionality to the proposed registration program would also require significant investment in staffing and resources to support effectively.

156. The Commission estimates above that the number of market participants that will submit the approval requests described by § 40.23(c) is approximately equivalent to the number of AT Persons. Please comment on whether the estimate of the number of market participants submitting such approval requests should be higher or lower. For example, should the estimate be raised to account for proprietary algorithmic traders that will not be AT Persons, because they do not use Direct Electronic Access and therefore will not be required to register as floor traders?

As proposed, the registration requirement for permissible trading would likely result in the registration of tens of thousands of exemption request since firms would potentially have to submit multiple requests for every trader. This would be replicated repeatedly across every DCM.

157. Proposed § 40.23 provides that DCMs may comply with the requirement to apply, or provide and require the use of, self-trade prevention tools by requiring market participants to identify to the DCM which accounts should be prohibited from trading with each other. With respect to this account identification process, the Commission's principal goal is to prevent unintentional self-trading; the Commission does not have a specific interest in regulating the manner by which market participants identify to DCMs the account that should be prohibited from trading from each other, so long as this goal is met. Should any other identification methods be permitted in § 40.23? For example, please comment on whether the opposite approach is preferable: market participants would identify to DCMs the accounts that should be permitted to trade with each other (as opposed to those accounts that should be prevented from trading with each other). In particular, please comment on whether this approach or other identification methods would reduce costs for market participants or be easier for both market participants and DCMs to administer.

ICE's current STPF is already mandated for certain traders; however the proposed rule would require an overly burdensome registration process at the account level. As noted in response to Question 151, this would likely result in the submission of tens of thousands of requests as firms would potentially have to submit requests for every trader that execute across multiple accounts.

IV. DCM Market Maker and Trading Incentive Programs (§§ 40.25–40.28)

ICE generally supports the proposed additional market maker and trading incentive program requirements set forth in §§ 40.25 - 40.28. However, ICE recommends that the Commission provide that: (i) all Commission-regulated trading venues be subject to the same standard; (ii) the regulation does not alter or otherwise change the type of information for which a DCM may request and be granted confidential treatment under the Freedom of Information Act, specifically the information required to be published in proposed § 40.25(a)(vii) and (a)(viii); (iii) publication of the Part 40.5 or 40.6 submission on the DCM's website satisfy the requirements of § 40.25(b) for as long as such submission remains posted; and (iv) recouping program benefits for trading violations under § 40.28 be left to the DCM's discretion as part of its normal surveillance and disciplinary process. Further, ICE believes that the approval process described in proposed § 40.23(c) would be extremely burdensome and costly to market participants. Please see our more detailed comments with respect to § 40.23(c) in the self-trade section.

Confidential Treatment should be available for market maker and trading incentive programs published under § 40.25(a)(vii) and (a)(viii).

ICE currently provides the majority of information sought by the Commission in market maker and incentive program filings. However, ICE recommends that the Commission provide additional clarification that the requirements proposed in § 40.25(a)(vii) and (a)(viii) do not alter or change a DCM's ability to request and receive confidential treatment under the Freedom of Information Act for the specifics program benefits or obligations (i.e. the specific amount of any fee discount or program volume threshold, bid/ask requirement, etc.). ICE has a competitive interest in protecting those specifics which it considers to be confidential commercial information. Such programs take significant time, analysis and expense to develop and are an integral part of ICE's competitive strategy for growing the covered markets. Consequently, disclosure of the salient terms of such program holds the potential for significant competitive harm to the exchange. Furthermore, if the Commission seeks to change the information for which a DCM requests confidential treatment, it should add such requirement in the proposed regulation or openly disclose its intent so that the issue is subject to notice and comment.

The publication of the Part 40.5 or 40.6 submissions on the DCM's website should satisfy the requirements of § 40.25(b).

ICE requests further clarification from the Commission that the requirements of § 40.25(b) are satisfied by publication of the Part 40.5 or 40.6 submissions on a DCM's website. The Commission deems such website postings to be a valid and effective means to notify the public of all pending DCM rule amendments. As such, ICE sees no reason why such publications should not also be a valid means to comply with proposed § 40.25(b) and sees little benefit to the costly creation and maintenance of a separate location for the posting of program terms.

The DCM's market surveillance and disciplinary function should be responsible for recouping program benefit payments associated with potential rule violations.

ICE supports payment of market maker and incentive program benefits for all legitimate trades as per applicable DCM rules. Further, ICE believes that any trades which violate DCM rules (such as wash sales) should not receive program benefits. However, it is unlikely that a DCM will be able to prevent payment of program incentives for rule violations given that benefits are usually realized on a monthly basis and the detection and disciplinary process can take longer. As such, ICE recommends that recouping program benefits for trading violations be left to the DCM's discretion as part of their normal surveillance and disciplinary process.

99. To what extent do market participants currently trade in ways designed primarily to collect market maker or trading incentive program benefits, rather than for risk management purposes?

Market makers trade in order to make a profit by transferring risk from other market participants to themselves over a short term basis. This activity provides a fundamental liquidity service to the market, and allows for other market participants to execute their risk management strategies efficiently.

ICE has no incentive programs that allow for benefits that exceed the cost (in the form of Exchange and Clearing fees) of trading, therefore, program participants must profit on their trading strategies in order to achieve a positive P&L. Using fees paid as an upper boundary for benefits discourages trading strategies designed to profit based solely on incentive program benefits.

100. To what extent do market maker and trading incentive programs currently provide benefits for self-trades? To what extent do market participants collect such benefits for self-trades?

ICE supports payment of market maker and incentive program benefits for all bona fide trades as per applicable DCM rules (i.e. those that do not violate DCM rules or Commission regulations). As such, ICE does not currently disqualify inadvertent self-trades from receiving program benefits. However, ICE would seek to recoup benefits paid to participants for any trades that violate the DCM's rules, including wash trades. The DCM's Market Regulation Staff monitors trading activity with the assistance of the Market Supervision Department to detect trading violations. If any violations involving participants in market maker and trading incentive programs are identified, the DCM will require that the program benefits received as a result of any such violative trading be repaid to the DCM in addition to any sanction or penalty that may be issued during the disciplinary process.

101. The Commission requests comment regarding whether the information proposed to be collected in § 40.25 would be sufficient for it to determine whether a DCM's market-maker or

trading incentive program complies with the impartial access requirements of § 38.151(b). If additional or different information would be helpful, please identify such information.

The Commission should be able to identify whether a DCM complies with the impartial access requirements of § 38.151 with the information provided in § 40.25.

102. The Commission requests comment regarding whether DCMs should be required to maintain on their public websites the information required by proposed §§ 40.25(a) and 40.25(b) for an additional period beyond the end of the market maker or trading incentive program. The Commission may determine to include in any final rules arising from this NPRM a requirement that such information remain publicly available pursuant to proposed § 40.25(b) for an additional period up to six months following the end of a market maker or trading incentive program.

ICE does not see any specific benefit to maintaining public data on market maker or trading incentive programs beyond the effective period, however, also does not object to maintaining the data.

103. The Commission requests comment regarding whether the text of proposed § 40.27(a) identifies with sufficient particularity the types of trades that are not eligible for payments or benefits pursuant to a DCM market-maker or trading incentive program. What amendments, if any, are necessary to clearly identify trades that are not eligible?

Please see ICE's response to Question 100 above.

104. Section 40.27(a) provides that DCMs shall implement policies and procedures that are reasonably designed to prevent the payment of market-maker or trading incentive program benefits for trades between accounts under common ownership. Are there any other types of trades or circumstances under which the Commission should also prohibit or limit DCM market-maker or trading incentive program benefits?

Please see ICE's response to Question 100 above.

105. The Commission is proposing in § 40.27(a) certain requirements regarding DCM payments associated with market maker and trading incentive programs. Please address whether the proposed rules will diminish DCMs' ability to compete or build liquidity by using market maker or trading incentive programs. Does any DCM consider it appropriate to provide market maker or trading incentive program benefits for trades between accounts known to be under common beneficial ownership?

Please see ICE's response to Question 100 above.

106. In any final rules arising from this NPRM, should the Commission also prohibit DCMs from providing trading incentive program benefits where such benefits on a per-trade basis

are greater than the fees charged per trade by such DCMs and its affiliated DCO (if applicable)? The Commission also specifically requests comment on the extent, if any, to which one or more DCMs engage in this practice.

ICE currently does not compensate market makers or incentive program participants in excess of Exchange and Clearing fees. Further, ICE recommends that the Commission limit market maker or incentive program benefits to amounts equal to or lesser than the related per transaction fees. As discussed in ICE answer to Question 99 above, incentive programs which provide benefits that exceed the cost (in the form of Exchange and Clearing fees) of trading could encourage participants to use trading strategies designed to profit solely from incentive program benefits rather than strategies designed to earn a profit directly from the short term risk taken on through trading.

Further, to the extent the Commission has an opinion on what it believes to be appropriate and/or inappropriate compensation, ICE requests the Commission be transparent about those parameters rather than rejecting new program filings on a case-by-case basis.

107. Proposed § 40.25(b) imposes certain transparency requirements with respect to both market maker and trading incentive programs. The Commission requests public comment regarding:
a) the most appropriate place or manner for a DCM to disclose the information required by proposed § 40.25(b);

The information required by proposed § 40.25(b) should be posted to the DCM's public website.

b) the benefits or any harm that may result from such transparency, including any anti-competitive effect or pro-competitive effect among DCMs or market participants;

Details of market maker and trading incentive programs are currently an element of the Part 40 filing process, and accordingly ICE does not anticipate the new rules causing any harm, provided that DCMs are still able to request and receive confidential treatment for the specific market maker program obligations and benefits. While, ICE believes that a general description of program eligibility requirements and benefits will provide sufficient transparency to market participants, the DCM has a competitive interest in protecting certain specifics, such as the exact bid/ask spread or volume required to qualify for a program benefit and the precise amount of any program benefit. As such, ICE believes that the proposed regulations should not alter or otherwise change the type of information for which a DCM may request and be granted confidential treatment under the Freedom of Information Act.

c) whether transparency as proposed in § 40.25(b) is equally appropriate for both market maker programs and trading incentive programs, or are the proposed requirements more or less appropriate for one type of program over the other?

Subject to the limitations discussed in response to Question 107(b) above, transparency is equally appropriate for both market maker and trading incentive programs.

d) whether any of the enumerated items required to be posted on a DCM's public website pursuant to proposed § 40.25(b) could reasonably be considered confidential information that should not be available to the public, and if so, what process should be available for a DCM to request from the Commission an exemption from the requirements of proposed § 40.25(b) for that specific enumerated item?

As discussed in response to Question 107(b) above, DCMs should continue to be able to request confidential treatment for the specific program requirements and the amount of a market maker or incentive program benefit.

Market-Maker and Trading Incentive Programs (Cost Benefit)

162. Do DCM web sites currently provide adequate information regarding market-maker and trading incentive programs, and is such information easily located?

Information about market maker and trading incentive programs can currently be found on most DCM's rule filings page on the DCM's website. As noted previously, ICE has a competitive interest in protecting those specifics which it considers to be confidential commercial information. Such programs take significant time, analysis and expense to develop and are an integral part of the Exchange's competitive strategy for growing the covered markets. Consequently, disclosure of the salient terms of such program holds the potential for significant competitive harm to the DCM. Furthermore, if the Commission seeks to change the information for which a DCM requests confidential treatment, it should add such requirement in the proposed regulation or openly disclose its intent so that the issue is subject to notice and comment.

163. To what extent do DCMs currently make payments for self-trades pursuant to market-maker and trading incentive programs?

Please see ICE's response to Question 100 above.

164. The Commission requests comment on its discussion of the effects of the proposed rules on the considerations in § 15(a) of the CEA.

Details of market maker and trading incentive programs are currently an element of the Part 40 process, and accordingly ICE does not anticipate any additional costs as a result of these rules.

V. Disclosure and Transparency in DCM Trade Matching System (§ 38.401(a))

69. The Commission has proposed that certain components of an DCM's market architecture should be considered part of the "electronic matching platform" for purposes of the DCM transparency provision. Are there any additional systems that should fall within the meaning of "electronic matching platforms" for purposes of proposed § 38.401(a)?

ICE believes that the proposed definition of "electronic matching platform" is too broad, as it would include "all systems under the control of the DCM that interact with market participant order messages and are involved in market data dissemination." To limit the definition, the Commission should make clear that switches, routers, ports and similar elements of any systems architecture that are not under the control of the DCM are not considered part of the electronic matching platform for this purpose, otherwise every change effected in the ordinary course of operating a matching platform would be subject to ongoing obligations that would be overly burdensome and not result in the disclosure of meaningful information. Rather, the definition should be limited to the matching algorithm logic developed by the DCM that determines the treatment of order priority and the corresponding logic that drives market data dissemination. For the avoidance of doubt, the CFTC also should make clear that the market participant's choice as to front end system or how they connect to the platform is also not within the scope of the definition of "electronic matching platform" provided that equal access of connection method is available to all market participants. With the above exclusions, an "electronic matching platform" would define the logic from the interface through which an order is submitted to the interface where trade confirmation and market data is disseminated.

70. The Commission has specifically identified, as "attributes" that must be disclosed, latencies within a platform and how a self-trade prevention tool determines whether to cancel an order. Are there any other attributes that would materially affect the execution of market participant orders and therefore should be made known to all market participants? Should the Commission revise the final rule so that it only applies to latencies within a platform and how a self-trade prevention tool determines whether to cancel an order?

As written, the definition of an "attribute" is overly broad. It is defined as any aspect of the structure, architecture, mechanics, characteristics or other elements of an electronic matching platform that materially affects how market participant orders are received and executed. Using that definition, the Commission's first question is moot, as there could not be any other attribute that would materially affect the execution of market participant orders. Further, proposed § 38.401 (a)(1)(iii) subsumes attributes which affect time, priority, price and quantity of execution. The concept of additional attributes that are not part of the "rules and specifications" of an electronic - matching platform is confusing and not necessary.

The Commission states that it would look to the substantial securities market case law on the issue of materiality, but then cites a different standard as the test it would apply in determining what is material for purposes of disclosure under proposed § 38.401 (a) and (c). Whereas the case law refers to a substantial likelihood that a reasonable investor would consider the information important in making a decision, and whether an objectively reasonable investor's decision-making process would be substantially affected by information, the Commission states in fn. 423 that the materiality standard it would apply in the context of attributes would include those whose existence or degree a reasonable person "would consider" when making a decision. Thus, anything that a reasonable person might consider when making a decision on whether, when or how to place an order would be material under the proposed rule, whether or not that information would be considered important or would substantially affect the investor's decision. Such a standard is inconsistent with the cited law and would establish a standard that is impossible to meet.

Rather than adopt a broad definition of attribute and an unclear materiality test, the Commission should specifically identify the elements of a system's architecture that affect an order; such as matching algorithms, self-trade prevention functionality, price limits, implied spread functionality and order types, dissemination of market data (confirmation of trades vs. dissemination of price feed). If a separate document or disclosure is to be required (rather than relying on a DCM's rules), the description in such document should cover how each element affects time, priority, price and quantity of order execution/market data dissemination. This approach provides certainty as to what is required to be explained, and consistency between DCMs.

Further, unless intentionally created, latencies are not attributes; they are by-products of a system's architecture and functionality. To the extent that one of the system elements we suggest is a proper subject for disclosure (as noted above) purposefully creates a latency or disadvantages orders (i.e. , the latency is not a random consequence of the system architecture), the DCM would logically be expected to discuss the latency in connection with describing the element to which it relates. There should not be a "should have known" standard regarding the disclosure of latencies.

ICE believes that this approach accomplishes the CFTC's goal of alerting participants to meaningful issues within a system, rather than providing a lot of technical information captured by the overly broad definition of attribute. Moreover, it does not charge DCMs with the task of searching for latencies in isolation.

71. What information should be disclosed as part of the description of relevant attributes of the platform? For instance, with latencies within a platform, should statistics on latencies be required? If so, what statistics would help market participants assess any impact on their orders? Would a narrative description of attributes be preferable, including a description of how the attributes might affect market participant orders under different market conditions, such as during times of increased messaging activity?

Please see ICE's response to Question 70 above for a general discussion of the definition of an attribute (i.e. matching algorithms, self-trade prevention functionality, price limits, implied spread functionality and order types, dissemination of market data). Further, ICE would like to stress that even plain English explanations of myriad aspects of complex systems will become difficult to follow for the average person and may end up being meaningful only to the most sophisticated trader, giving them an informational advantage over other traders. Additionally, statistics and data should not be required as it is impossible for them to always be current.

Also as discussed in response to Question 70, ICE believes that unless intentionally created, latencies are not attributes, and are instead by-products of system architecture and functionality. In the abstract, latencies within the "exchange matching platform" generally do not provide any worthwhile information as overall latency on an order will be significantly impacted by connectivity and the front end system used, which is outside the control of the DCM. Further, latencies would vary on an event by event basis depending on market conditions. As such, the DCM cannot provide meaningful current statistics on latency. For the same reasons, ICE does not believe that theoretical statistics and historical averages would be of value to market participants or the public.

Disclosures are appropriate when a DCM purposefully amends or establishes logic or infrastructure that provides priority or benefits to one order over another. To the extent that latency times are determined randomly and are not otherwise under the control of the DCM, the disclosure of latencies should not be required. Additionally, there should not be a "should have known" standard with respect to required disclosures. With respect to the specifically identified elements of system architecture that affect an order discussed in response to Question 70 above (i.e. matching algorithms, self-trade prevention functionality, price limits, implied spread functionality and order types, dissemination of market data), any required narrative disclosure should facilitate a basic conceptual understanding and easy comparison of platforms.

72. The Commission notes that proposed §§ 38.401(a)(1)(iii) and (iv) are not intended to require the disclosure of a DCM's trade secrets. The Commission requests comments on whether the proposed rules might inadvertently require such disclosure, and if so, how they might be amended to address this concern. Furthermore, the Commission anticipates that the mechanisms and standards for requesting confidential treatment already codified in existing § 40.8 could be used by DCMs to identify and request confidential treatment for information otherwise required to be disclosed pursuant to proposed §§ 38.401(a)(1)(iii) and (iv), for example by incorporating § 40.8's mechanisms and standards into any final rules arising from this NPRM. If commenters believe that the mechanisms and standards in § 40.8 are inappropriate for this purpose, please describe any other mechanism that should be included in any final rules to facilitate DCM requests for confidential treatment of information otherwise required to be disclosed pursuant to proposed §§ 38.401(a)(1)(iii) and (iv).

ICE believes that the disclosures required under §§ 38.401(a)(1)(iii) and (iv) are overly broad and have the potential to result in trade secrets being revealed. For that reason, ICE recommends

that any disclosures made thereunder should be made at a very basic, high level regarding a pre-defined list of relevant features.

73. The Commission notes that DCMs are required, as part of voluntary submissions of new rules or rule amendments under § 40.5(a) and self-certification of rules and rule amendment under § 40.6(a), to provide inter alia an explanation and analysis of the operation, purpose and effect of the proposed rule or rule amendment. Would the information required under §§ 40.5(a) or 40.6(a) provide market participants and the public with sufficient information regarding material attributes of an electronic matching platform?

ICE believes that the information required under Part 40 rule filings provide market participants and the public with sufficient information. With respect to Part 40 rule filings, the Commission's review requires that it understands the purpose and operation of a Rule in order to determine that it is consistent with the CEA and the regulations thereunder. Therefore, if the Part 40 filing provides sufficient information for the Commission to make that determination, ICE believes it should follow that the Part 40 rule filing also provides market participants and the public with sufficient information to understand the purpose and operation of the Rule.

74. The Commission recognizes that DCMs are required to have system safeguards to ensure information security, business continuity and disaster recovery under DCM Core Principle 20. The Commission understands that some attributes of an electronic matching platform designed to implement those safeguards should be maintained as confidential to prevent cybersecurity or other threats. Does existing § 40.8, 17 CFR § 40.8 (2014) provide sufficient basis for DCMs to publicly disclose the relevant attributes of their platforms while maintaining as confidential information concerning system safeguards?

The disclosures called for have the potential to compromise system security. For that reason, the disclosures should be made at a very basic, high level regarding a pre-defined list of relevant features.

75. With respect to material attributes affecting market participant orders caused by temporary or emergency situations, such as network outages or the temporary suspension of certain market functionality, what is the best way for DCMs to alert market participants? How are DCMs currently handling these situations?

DCMs currently have notification protocols in place to alert market participants of any material event effecting connectivity and market status, including market alerts, email, text, phone and advisories.

76. The Commission proposes that DCMs provide a description of the relevant material attributes in a single document "disclosed prominently and clearly" on the DCM's website. The Commission also proposes that this document be written in "plain English" to allow market participants, even those not technically proficient, to understand the attributes

described. Would these requirements be practical and help market participants locate and understand the information provided?

ICE believes that a single document that provides a description of the relevant material attributes would be helpful so long as the required content is limited as described in response to Question 70 through 75 above. Additionally, it should be permissible for the document to link to rules and other information on the website on particular topics about which disclosure is being made.

77. The Commission proposes requiring DCMs to disclose information on the relevant attributes: (a) when filing a rule change submission with the Commission for changes to the electronic matching platform; or (b) within a "reasonable time, but no later than ten days" following the identification of such attribute. Do the proposed timeframes provide sufficient time for DCMs to disclose the relevant information? Do the proposed timeframes offer sufficient notice of changes or discovered attributes to market participants to allow them to adjust any systems or strategies, including any algorithmic trading systems?

An attribute about which disclosure on the website would be required would likely constitute a "rule" that requires a filing under Part 40. Since such a rule filing would not become implemented until at least 10 days after the filing, the website document should not be updated until the rule change becomes "effective." Having separate 10-day periods for the disclosure document and the rule filing is confusing and does not work.

78. The Commission proposes requiring disclosure of newly identified attributes within 10 days of discovery. Does this provide DCMs sufficient time to analyze the attribute and provide a description? Should DCMs be required to provide notice of the existence of the attribute and supplement as further analysis is performed?

Attributes should not be "discovered" randomly. Attributes which are subject to disclosure should be defined in a way that the DCM and the public know what topics are to be covered in the disclosure. Upon discovering an error in the posted description, it should be updated via a rule filing within 10 days.

147. The Commission anticipates that costs associated with the transparency requirement would come from some additional testing of platform systems and from drafting and publishing descriptions of any relevant attributes of the platform. What new costs would be associated with providing descriptions of attributes of electronic matching platforms that affect market participant orders and quotes?

As discussed in response to Question 70 above, limiting the disclosure of those elements of system architecture that affect an order should not require any substantial additional costs as these are disclosures that DCMs currently make.

149. What benefits might market participants receive through increased transparency into the operation of electronic matching platforms, particularly for those market participants without

direct electronic access who may not be able to accurately measure latencies or other metrics of market efficiency?

As ICE does not provide preferential access to any market participant, the suggested latencies would not provide any meaningful or actionable information. Market participants sensitive to operational latencies have equal access to all DCM infrastructures and therefore there is not a demonstrative benefit for latency disclosure. Furthermore, latencies are not static. The latency of any given piece of hardware or system logic is impacted continuously by external conditions, such as messaging rate and the number and types of connections. In addition, there will be different latencies in an electronic matching engine for any system with more than a single pathway to the matching engine. In all of the above cases, attempting to measure such latencies and disclose them to market participants will not result in the disclosure of meaningful information if the latencies are not intentionally created by the DCM and subject to its control.

VI. Annual Reports (§§ 1.83 and 40.22)

ICE recommends that the Commission replace the annual report requirement proposed in § 1.83 with a process where AT Persons and Clearing FCMs certify on an annual basis that they have established and maintain controls that materially comply with the requirements set forth in § 1.80(a) and § 1.82(a)(i). ICE believes this would accomplish the Commission's goal to ensure that such controls have been implemented and are reasonably designed and calibrated without imposing an undue burden on DCMs to evaluate annual reports that would be difficult to make meaningful use of.

DCMs are not in a position to evaluate the information contained in the annual report.

ICE believes that DCMs are not in a position to evaluate the appropriateness of information contained in the proposed annual report without a view into the complete information upon which an AT Person or clearing FCMs' controls is based. The information provided to a DCM under § 40.22, for example, would not provide a complete picture into an AT Person's trading strategies, financials, risk tolerances, or related positions or accounts across markets not listed on the DCM. Without this information, it would be difficult, if not impossible for a DCM to accurately assess the control parameters, procedures or testing protocols implemented by an AT Person.

Further, the Commission has noted that a DCM's evaluation of the information contained in the annual report could include a comparison against the control parameters implemented at other AT Persons that access the DCM. ICE does not believe that such a comparison would be appropriate or beneficial for compliance purposes for the reasons discussed above. Regulation AT applies to AT Persons of very different complexities. While the DCM may be able to compare the risks associated with various control parameters across AT Persons, an evaluation of the appropriateness of those risks would never be comparable based on a multitude of risk factors outside the purview of the DCM.

The information contained in the annual report may be inaccurate or expired.

The information required to be documented in the annual report (maximum AT Order Message frequency, maximum execution frequency, order price parameters, maximum order sizes) is not static, and can change frequently, even daily, based on factors such as financial conditions, market conditions and risk tolerances. Annual reports would then assuredly contain stale information at the time they are submitted to the DCMs for review or shortly thereafter. While the information contained in an annual report would provide the DCM with a glimpse into an AT Person's control parameters at a certain point in time, which would be of limited value for the DCM and certainly not enough actionable information for the DCM to provide meaningful guidance on the appropriate risk practices of a specific firm and its trading strategies. Further, given the volume of annual reports the DCMs would be required to review, the potential for

outdated information could increase significantly in the time required for the DCM to complete its reviews.

The burden on DCMs to collect and review the proposed annual reports is significant.

To undertake the type of review necessary to verify and evaluate the information contained in the proposed annual reports, despite that such information would be incomplete and of little use to the DCM, would be both costly and resource intense. The number of AT Persons and clearing FCMs that would be required to file annual reports with DCMs would far exceed the number of clearing FCMs that are currently reviewed under Designated-Self Regulatory Organization (DSRO) audit today. DCMs do not have the resources or qualified expertise that would be required to conduct a comprehensive review of the proposed annual reports and the actual algorithms developed and operated by AT Persons. Further, DCMs do not have any greater technical expertise than firm developers and operators at developing an algorithmic trading strategy, nor would the DCM have the information available to determine if the risk parameters set by the AT Person are appropriate for the algorithmic trading strategy employed. As noted previously, the evaluation for appropriateness and reasonability of specific control parameters should rest with the effected parties that have the most expertise with respect to the algorithmic system and a full view into the trading strategy employed.

57. The Commission welcomes comment on the type of information that should be included in the reports required by proposed Sec. 1.83. Should different or additional descriptions be included in the reports, which will be evaluated by DCMs under proposed Sec. 40.22?

As discussed above, ICE believes that the annual report requirement under § 1.83 should be replaced with a certification process.

60. Should a representative of the AT Person or clearing member FCM other than the chief executive officer or the chief compliance officer be responsible for certifying the reports required by proposed Sec. 1.83? Should only the chief executive officer be permitted to certify the report? Alternatively, should only the chief compliance officer be permitted to certify the report?

ICE recommends that the Commission consider including the Chief Operating Officer ("COO") of the AT Person or clearing FCM as a representative that may be responsible for certifying compliance with § 1.80(a) or § 1.82(a)(i), along with the CEO and CCO. Given the particular structure of an AT Person or Clearing FCM, the COO could have the most direct oversight and knowledge of the firm's automated trading system design, structure and function, including system safeguards, risk limits, and control parameters.

62. Should the reports required by proposed Sec. 1.83 be sent to any entity other than each DCM on which the AT Person operates, such as the Commission an RFA? For example, should the Commission require that AT Persons that are members of a RFA send compliance reports to RFA upon NFA's request?

As discussed above, ICE believes that the annual report requirement under § 1.83 should be replaced with a certification process. The certification, along with documented procedures and policies that support the recommended certification, should be maintained by AT Persons and clearing FCMs and be made readily available upon request to the DCM, RFA or the Commission.

In the alternative, if the Commission were to require that certifications be provided to the DCMs, the format of the submission should be standardized for ease of submission.

85. In lieu of a DCM's affirmative obligation in proposed Sec. 40.22 to review AT Person and clearing member FCM compliance reports, should DCMs instead be permitted to rely on the CEO or CCO representations required by proposed Sec. 1.83(a)(2)? If so, what events in the Algorithmic Trading of an AT Person should trigger review obligations by the DCM?

As discussed above, ICE believes that the annual report requirement under § 1.83 should be replaced with a certification process. However, regardless of how the requirements set forth in § 1.83 are met, DCMs will continue to monitor Algorithmic Trading pursuant to the Commissions regulations for DCMs. ICE's market regulation and surveillance functions include automated reports and alerts designed to identify instances of aberrant or abnormal order or trade activity, including activity initiated by an algorithmic trading strategy. In the event that ICE identifies any order or trade activity that is of concern, Market Regulation staff would initiate a review, which could include, among other items as necessary, requesting copies of the AT Person or clearing FCM's policies and procedures regarding the monitoring and operation of its algorithmic trading system, risk parameter settings, system trading limits, alerts, firm risk tolerances, and financial reports.

86. Should Sec. 40.22(c) provide more specific requirements regarding a DCM's establishment of a program for effective periodic review and evaluation of AT Person and clearing member FCM reports? For example, Sec 40.22(c) could require review at specific intervals (e.g., once every two years). Alternatively, Sec. 40.22(c) could provide greater discretion to DCMs in establishing their programs for the review of reports. Please comment on the appropriateness of these alternative approaches.

ICE stresses the importance of allowing DCMs flexibility in their approach to designing and implementing a program to collect, review and evaluate any information received from AT Person and clearing FCMs with respect to their Algorithmic Trading activity or strategies. This includes allowing DCMs discretion in determining the type and source of information that it can request, depending on the unique characteristics of the AT Person, clearing FCM, and issue of concern under review.

87. Should Sec. 40.22(e) provide more specific requirements regarding the triggers for a DCM to review and evaluate the books and records of AT Persons and clearing member FCMs required to be kept pursuant to Sec. 40.22(d)? For example, Sec. 40.22(e) could require

review at specific intervals (e.g., once every two years), or it could require review in response to specific events related to the Algorithmic Trading of AT Persons. Please comment on the appropriateness of these alternative approaches.

ICE does not believe that the Commission should provide specific requirements regarding the triggers for a DCM to review and evaluate the books and records of AT Persons and clearing FCMs under § 40.22(d). As noted previously, DCMs have implemented comprehensive market surveillance and regulation programs that include automated reports and alerts designed to identify instances of aberrant or abnormal order or trade activity. These programs are already effective at identifying specific events of concern that involve Algorithmic Trading.

89. Should Sec 40.22 specifically authorize a DCM to establish further standards for the organization, method of submission, or other attributes the reports described in Sec. 40.22(a)?

As mentioned, ICE believes that the annual report requirement should be replaced with a certification of compliance.

VII. RFA Oversight §170.19 (Questions 28-32)

Any rules applicable to a Registered Futures Association ("RFA") should not result in duplicative rules, or rules that are other than principles based. Although ICE appreciates the desire of the Commission to involve RFAs, ICE is concerned that the adoption of any requirements by the NFA, the only current RFA, would impose duplicative regulation and oversight. Moreover, any requirements adopted by NFA should mirror the long-established practice of promulgating principles-based obligations.

28. The Commission requests comment on the scope of responsibilities assigned to RFAs under proposed § 170.19. Should RFAs be responsible for fewer or additional areas regarding AT Persons, ATSs, and algorithmic trading than specified in proposed § 170.19, prongs (1), (2), (3), and (4) (§ 170.19(a)(1)–(a)(4))? Regulation 170.19 requires RFAs to consider the need for rules in the areas listed in prongs (1)–(4) (§ 170.19(a)(1)– (a)(4)). Should RFAs be responsible for considering whether to adopt rules in fewer or additional areas?

ICE believes that the primary responsibility for developing, implementing and enforcing standards with respect to algorithmic trading, including pre-trade risk controls and risk management controls, rests with each DCM. Proposed § 170.19 appears to require an RFA to adopt rules that are duplicative of, and may well conflict with, existing DCM practices as well as those obligations that DCMs will be required to undertake in the proposed amendments to Part 38 and Part 40.

In light of the more prescriptive obligations imposed on DCMs, we believe that an RFA's role should be limited to adopting principles-based rules that reflect industry best practices. This would allow the RFAs to retain the flexibility to develop and implement approaches and tools for oversight of Regulation AT requirements. The Commission also needs to establish consistent sets of standards; other CFTC rules (for example, Part 38 Pre-Trade Risk Controls) already mandate certain requirements. The Commission should not require RFAs to set additional regulations if ones already exist.

29. The Commission requests comment on the latitude afforded to RFAs in proposed § 170.19. Should RFAs have more or less latitude to issue rules than specified in proposed § 170.19?

Please see ICE's response to Question 28 above.

30. The Commission requests comment on RFAs' obligation in proposed § 170.19 to establish and maintain a program for the prevention of fraud and manipulation, protection of the public interest, and perfecting the mechanisms of trading, including through rules it may determine to adopt pursuant to § 170.19. The proposed rules anticipate that an RFA's program will include examination and enforcement components. Is this the appropriate approach?

Please see ICE's response to Question 28 above. In particular, we believe that the proposed amendments to Part 38 and Part 40 properly vest primary responsibility with the DCMs. An RFA should not have duplicative responsibility in this regard.

If the Commission does assign additional responsibilities to an RFA, the RFA should leverage their existing fraud and manipulation prevention programs and prior experience taking enforcement actions. The RFA would however need to supplement their existing rules to review AT persons and their certifications and establish policies and procedures to monitor algorithmic trading.

31. The Commission requests comment on whether proposed § 170.19 may result in duplicative obligations on AT Persons or any other market participant. In particular, please comment on potential duplication, if any, between algorithmic trading requirements that an RFA may impose upon its members pursuant to § 170.19, and similar requirements that may be imposed by a DCM in its role as a self-regulatory organization. What amendments would be appropriate in any final rules arising from this NPRM to clarify that unintended overlap between the role of an RFA and a DCM in this context?

Please see ICE's response to Question 28 above. In particular, we believe that the proposed amendments to Part 38 and Part 40 properly vest primary responsibility with the DCMs. NFA should not have responsibility in this regard.

If the Commission adopts § 170.19 as proposed, ICE believes there will be duplicative obligations. The CFTC should do its best to minimize conflicts and duplicative responsibilities. Regulations must be consistently to be implemented across DCMs and the NFA.

32. The Commission requests comment on whether the regulatory framework established by Regulation AT would require all AT Persons to be members of an RFA in order to be effective. Alternatively, could the goals of Regulation AT be realized without requiring all AT Persons to be members of an RFA?

The Commission needs to refine the definition of an AT person to reflect a limited subset of market participants. Assuming the Commission has appropriately narrowed the scope of an AT Person, the CFTC should not need duplicative oversight between an RFA and DCM. The DCMs should retain oversight for algorithmic traders.