



MODERN MARKETS  
INITIATIVE

January 20, 2017

**VIA ELECTRONIC SUBMISSION**

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

**Re: Supplemental Notice of Proposed Rulemaking for Regulation AT**

Dear Mr. Kirkpatrick:

On behalf of Modern Markets Initiative (“MMI”), the advocacy organization devoted to the role of American technological innovation in creating the world’s best markets, I respectfully submit this letter in response to the Supplemental Notice of Proposed Rulemaking on Regulation Automated Trading (“Supplemental”)<sup>1</sup> by the Commodity Futures Trading Commission (“CFTC” or “Commission” or “Agency”).

As stated<sup>2</sup> in our previous comment letters, MMI stands in broad support of the CFTC’s proactive efforts to codify industry best practices and enforce high standards for automated trading. We appreciate the Agency’s thoughtful acknowledgement and consideration of industry concerns regarding the shift of algorithmic trading source code inspection from a judicial process to books and records provisions (Commission Regulation 1.31)<sup>3</sup>. However, we continue to believe that access to algorithmic trading source code and related records via “a special call approved by the Commission itself” is not an acceptable replacement for a subpoena process. It has been presented as “a heightened procedural step” but it falls short of affording the constitutional protections of a court order, including the right of appeal. In addition, the proposed special call would grant the CFTC overly broad discretion in the location of the source code review, without clarifying whether source code review would be conducted on the physical premises of “Reg AT persons”. (The rule rather indicates the CFTC may have the option to conduct the review on “secure Commission systems with controlled access,” as an alternative to the physical premises of a Reg AT person.)

The specified reason by the Agency for this unprecedented access to intellectual property and trade secrets is the Agency’s need to “have access to all information necessary for effective regulatory oversight.” What is not specified is the reason why the CFTC believes the existing subpoena process needs replacement, and then only for market oversight purposes. To the best of our knowledge, the Commission has never been denied a subpoena to obtain information necessary for effective oversight, nor are we aware of any instance where the Commission has not been able to collect needed information once a subpoena has been issued.

---

<sup>1</sup> See Supplemental notice of proposed rulemaking for Regulation Automated Trading 81 FR 85334 17 CFR Parts 1, 38, 40, and 170 (November 25, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-27250c.pdf>

<sup>2</sup> See Modern Markets Initiative comment letter for proposed Rule 80 FR 78824 available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60590&SearchText=> and Modern Markets Initiative comment letter for proposed Rule 81 FR 36484 available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60883&SearchText=>

<sup>3</sup> See Commission Regulation 1.31 available at <http://www.cftc.gov/opa/press99/opa4266-99-attch.htm>

Also, we continue to have numerous concerns related to the protection of source code and algorithms that could potentially be requested by regulators. While we respect U.S. government regulators' efforts to protect intellectual property, untethering its access from the confines of a subpoena process is perilous.

For example, in addition to the security breaches we cited in previous comment letters, we note that in successive reports to Congress<sup>4</sup>, the Securities and Exchange Commission's Office of Inspector General ("OIG") wrote that it has investigated allegations of a supervisory employee requesting and downloading proprietary trading code. Allegedly, this employee "unnecessarily requested proprietary trading code from registrants and downloaded this proprietary training (sic) code onto a personal computer." Regardless of OIG's eventual findings, this incident should additionally serve as a cautionary tale about the necessity of treating source code with the utmost of caution.

Of note, and also stated in our previous comment letters, in 2015, the Financial Industry Regulatory Authority ("FINRA") issued guidance on effective supervision and control practices for firms engaging in algorithmic trading strategies ("ATS"). FINRA's prescriptive approach has proven successful in balancing transparency and trade secrets in conducting comprehensive oversight. Among other guidance, FINRA Regulatory Notice 15-09<sup>5</sup> sets forth standards for archiving code versions in a retrievable manner, maintaining a basic summary description of code, establishing pre and post-implementation procedures for code and implementing security measures to limit code access and control system entitlements. I respectfully suggest the Commission consider the merits of FINRA's approach when finalizing Regulation AT.

In closing, the U.S. is a global standard bearer in providing legal, commercial and civil protections for intellectual property. As a result, our country has nurtured a robust entrepreneurial culture of innovation. In fact, the Commerce Department estimates that intellectual property-intensive industries supported 45.5 million jobs and contributed \$6.6 trillion in value added in 2014, equivalent to 38.2 percent of U.S. GDP.<sup>6</sup>

This Proposed Rule threatens to erode confidence in our country's resolve to uphold the regulatory standards that protect the innovation that drives much of our economy. Despite the changes in the proposed rule as listed in the Supplemental, it still grants a government agency the ability to bypass due process to access confidential and highly sensitive trade secrets protected by intellectual property rights. As such, this provision should not be included in the final rule and the subpoena process should remain.

If you have any questions, please contact me.

Very Truly Yours,



William R. Harts  
Chief Executive Officer  
Modern Markets Initiative

---

<sup>4</sup> See OIG Semiannual Report to Congress 04.01.16 to 09.30.16 available at <https://www.sec.gov/oig/reportspubs/Semiannual-Report-to-Congress-April-1-2016-through-September-30-2016.pdf> and OIG Semiannual Report to Congress 10.01.15 to 03.31.16 available at <https://www.sec.gov/oig/reportspubs/Semiannual-Report-to-Congress-October-1-2015-through-March-31-2016.pdf> <https://www.sec.gov/oig/reportspubs/Semiannual-Report-to-Congress-April-1-2016-through-September-30-2016.pdf> and OIG Semiannual Report to Congress 10.01.15 to 03.31.16 available at

<sup>5</sup> See Guidance on Effective Supervision and Control Practices for Firms Engaging in Algorithmic Trading Strategies, available at <http://www.finra.org/industry/notices/15-09>

<sup>6</sup> See Intellectual Property and the US Economy: 2016 Update available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>