



May 1, 2017

**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 Supplemental Notice of Proposed Rulemaking for 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 supplemental notice of proposed rulemaking for Regulation AT (“Supplemental Proposal”)<sup>1</sup>. 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 Regulation AT and Supplemental Proposal (collectively, the “Proposed Rules”).

***Overview***

ICE appreciates the Commission’s efforts to modify the Proposed Rules and commends the Commission’s attempts to address many of the comments submitted by ICE and other market participants. In particular, ICE is pleased that the Commission has proposed to require that all electronic trading be subject to pre-trade risk controls. As discussed in the ICE’s previous comment letter<sup>2</sup>, the extension of pre-trade risk controls to all electronic trading is critical to

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<sup>1</sup> ICE’s comments herein supplement its prior comments regarding Regulation AT. ICE incorporates its prior comments by reference and urges the Commission to evaluate ICE’s prior comments in conjunction with the comments below prior to adopting any finalize version of Regulation AT.  
<sup>2</sup> See ICE’s previous comment letters dated June 24, 2016 and March 16, 2016.

assuring that markets and market participants are protected from inadvertent trading disruptions. ICE continues however to have concerns that the Proposed Rules remain overly prescriptive and complex, and in some instances, the purported benefit does not appear to be commensurate with the substantial cost associated with developing and implementing the required infrastructure. In particular, ICE is concerned with the obligations placed on the Designated Contract Markets (“DCMs”) to conduct periodic reviews. While the Supplemental Proposal alleviated the burdens on FCMs and AT persons, the Supplemental Proposal did not alleviate the burdens imposed on DCMs. ICE supports the Commission’s removal of the annual report requirement but urges the Commission to address and remove the review obligations from DCMs.

ICE recognizes that the Supplemental Proposal improves the initial rule in certain aspects but believes that significant areas of concerns remain which warrant the Commission to reconsider the entire Proposed Rules. ICE supports the Commission’s policy goals however we believe that the Commission’s goals can be achieved without imposing unnecessary compliance burdens on DCMs and market participants. Regulation of electronic trading, including algorithmic trading, should build on and leverage the successful risk controls and safeguards currently in place at DCMs, rather than proposing new, significant regulations which require substantial industry investment. As such, ICE encourages the Commission to consider:

- Removing the periodic review requirement from the Supplemental Proposal and replacing it with a certification process or limited scope periodic review of books and records.
- Eliminating the registration requirement, and by extension the definition of AT Person, from the Proposed Rules;
- Proposing pre-trade risk control requirements as part of a separate and independent rulemaking;
- Avoiding quantitative measures, including a volume threshold test, to define AT Person;
- Removing the Direct Electronic Access (“DEA”) component from the Proposed Rules, and by extension the definition of AT Person;
- Limiting the production of source code data to instances where a subpoena has been issued;
- Removing §1.82(a)(1)(i) from the Supplemental Proposal wholesale, and revising §1.82(a)(1)(ii) to remove order price parameters.



## **DCM Compliance Programs**

ICE supports the Commission's elimination of the annual compliance report requirement from the Proposed Rules, as the requirement imposed an undue burden on DCMs who are not in the appropriate position to evaluate the information contained in the reports. Unfortunately, replacing the annual compliance report requirement with a periodic review requirement, as proposed in the Supplemental Proposal, still requires DCMs to perform onerous and duplicative evaluations pursuant to DCM programs that are designed to identify and remediate any insufficient mechanism, policies and procedures, including identification and remediation of any inadequate quantitative settings or calibrations of pre-trade risk controls required by §1.80(a). DCMs do not have a complete view into the basis of an AT Person or FCM's control parameters and are not best suited to determine whether the AT Person's risk parameters are appropriate for the algorithmic trading strategy employed. Further, it is not clear that such an evaluation by DCMs would produce any additional benefit beyond the robust market surveillance and regulation functions DCMs currently have in place to identify potential instances of aberrant trading activity. To that end, ICE continues to recommend that the Commission adopt a certification process, whereby affected market participants would be required to evaluate their internal procedures and risk control parameters against the Proposed Rules. This would accomplish the Commission's goal of ensuring that appropriate risk controls are implemented and monitored. Alternatively, a limited scope periodic audit of the books and records of AT Persons and FCMs could be performed to verify that the kinds of procedures and evaluations required of them have been instituted, as more fully detailed in our response to Question 38.

## **AT Person Status**

ICE believes that all market participants that trade electronically should be required to implement and maintain reasonable pre-trade risk and other controls, regardless of how they access a DCM. To that end, ICE is concerned that the Commission's focus on creating a registration category, and by extension defining "AT Person", is unreasonably complex and unnecessary for the Commission to accomplish its policy goals of promoting market integrity, transparency, and mitigating systemic risk. Instead, the definition of Algorithmic Trading should be appropriately tailored to capture the type of systemic risk that the Proposed Rules are attempting to capture. ICE does not believe that it is necessary, or particularly useful for the purpose of deterring trading activity that may pose a risk to derivatives markets, for the Proposed Rules to require registration or define AT Person. Finally, as also noted in ICE's previous comment letter, because we believe that all electronic trading should be subject to pre-trade risk controls, it is unnecessary to designate certain traders as AT Persons or to require that such persons be registered with the Commission as New Floor Traders (if not already registered in

some capacity). Therefore, we do not support this aspect of proposed Regulation AT. By requiring all market participants implement pre-trade risk controls, the Commission can more effectively and efficiently reduce the risk of trading disruptions. We also encourage the Commission to defer any decision with respect to the proposed registration requirement. In our view, the designation of AT Persons and the registration of New Floor Traders is not necessary and that the Commission has ample authority to regulate the activities of AT Persons without imposing a registration requirement.

To the extent that the Commission moves forward with the proposed AT Persons definition, the Commission should focus on electronic trading activity which may inadvertently disrupt the markets. This latter focus would assure that all electronic trading is subject to pre-trade and other risk controls appropriate to each participant's trading activity. Further, ICE does not support the volume threshold test outlined in the Supplemental Proposal as a filter for identifying market participants who should qualify as AT Persons. The test's reliance on traded volume is inconsistent with the scope of Regulation AT, which focuses on applying pre-trade risk controls to orders routed to a DCM. Such a test would be ineffective because it is not a reliable indicator of whether an order message was routed to the DCM via an algorithmic trading program.

ICE is also concerned that the Proposed Rules incorrectly correlate trading conducted via DEA with algorithmic trading for the purpose of triggering the registration requirement. As previously noted, ICE recommends that the Commission remove the DEA component from the Proposed Rules wholesale, as the concept of DEA as reflected in the Proposed Rules is not consistent with to the current state of electronic trading, and is not necessary for the purposes of this rulemaking. All orders already pass through a robust set of pre-trade risk controls, regardless of whether the controls reside with the FCM or are DCM controls administered by the FCM. ICE cautions the Commission from defining DEA solely for the purpose of creating an artificial registration trigger. However, if the Commission moves forward with the proposed DEA definition, of the definition must reflect how DEA actually functions in derivatives markets. An inaccurate definition of DEA could have negative consequences for the markets and liquidity.

### **Source Code**

As previously noted<sup>3</sup>, ICE believes that the production of source code to the government should continue to be limited to instances where a subpoena has been issued. To that end, ICE does not believe that the Special Call provision introduced in the SNPRM is adequate to address

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<sup>3</sup> ICE's Comment Letter (Mar. 15, 2016) at pg. 7.

market participants' concerns of privacy and confidentiality. Requiring firms to disclose data to the government could expose firms to serious intellectual property risks and cyber security attacks, and a disclosure of that data should only be made in the most limited circumstances and under strict control.

### **Risk Control Framework**

As previously noted<sup>4</sup>, ICE is concerned that the pre-trade risk control framework set out in the Supplemental Proposal is too prescriptive and does not accurately reflect the current risk control framework already in place across the industry, nor does it effectively establish new risk controls to effectively mitigate risks that may be produced via algorithmic trading. ICE recommends that the Commission remove §1.82(a)(1)(i) from the Supplemental Proposal wholesale, and revise §1.82(a)(1)(ii) to remove order price parameters. Order price parameters are currently and more appropriately administered by DCMs. Market based risk controls purposefully located at the DCM should not be mandated for implementation by FCMs or trading firms. Further, the execution throttle and price limit controls described in the Supplemental Proposal risk disrupting normal trading activity. Instead, any proposed risk control framework should be principles based, recognize current implementations, and apply to all market participants engaging in electronic trading, not just algorithmic trading.

### **Separation of Rulemakings**

As noted previously, ICE supports the Commission's willingness to implement the Proposed Rules in stages and to implement risk controls separately from AT Person registration.<sup>5</sup> As discussed above, ICE does not believe that AT Person registration is necessary to accomplish the Commission's policy goals. However, to the extent that the Commission is determined to implement a registration requirement, ICE recommends that this requirement is considered in a rulemaking separate from the risk control requirements outlined in §§ 1.80, 1.82 and 40.20. The pre-trade risk control requirements detailed in these sections of the Proposed Rules should apply to all market participants, regardless of whether the market participant engages in Algorithmic Trading, and should not be specific to AT Persons.

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<sup>4</sup> ICE's Comment Letter (Mar. 15, 2016) at pg. 5.

<sup>5</sup> Keynote Remarks of Chairman Timothy Massad before the Global Exchange and Brokerage Conference (June 9, 2016), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-47>.



*Conclusion*

ICE appreciates the opportunity to comment on the SNPRM. ICE supports the Commission's willingness to continue to work in partnership with DCMs and market participants in developing reasoned and appropriate regulatory requirements, particularly given the complexity and potential market impact of the Proposed Rules. In the following pages, we will address in detail the questions raised in the Supplemental Proposal. Again, ICE thanks the Commission for the opportunity to comment on the Proposed Rules.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kara Dutta', is positioned above the printed name.

Kara Dutta  
Intercontinental Exchange, Inc.

## Appendix A

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

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#### AT Person Status and Requirements for AT Persons

***1. The Commission invites comment on the proposed volume threshold test set forth in Supplemental proposed § 1.3(x)(2). In particular, the Commission specifically invites comment on whether the volume threshold test is an appropriate means of identifying those market participants who should qualify as AT Persons and therefore be subject to the proposed risk control, recordkeeping testing and monitoring and other requirements in Regulation AT. (PG 35)***

As noted previously<sup>6</sup>, ICE does not support the use of quantitative measures, including a volume threshold test, as a filter for identifying those market participants who should qualify as AT Persons. The NPRM and its definitions of Algorithmic Trading and AT Person, pre-risk control requirements, conformance testing requirements, source code, and compliance obligations focus on orders that are routed to a DCM, not on trades. It is important that the Commission not mistake order and trade activity, particularly given the scope of the NPRM focuses on pre-trade activity. ICE is concerned that the Commission inappropriately correlates high trading volumes with algorithmic trading in the Supplemental Proposal.

Additionally, the use of a volume threshold test would be ineffective not only because it is market and contract specific, but because it is not a reliable indicator of whether an order message was derived from an algorithmic program. The volume threshold test proposed in the Supplemental Proposal, for example, could implicate order messages entered manually as well as those entered via an algorithmic program.

To the extent that the Commission adopts a volume threshold test, ICE recommends that the Commission more clearly define “volume”. Execution level volume would vary significantly from cleared level volume, since the clearing of spreads strategies and other bundled transactions results in significantly larger calculations of volume.

***2. If you believe that AT Persons should be identified by a quantitative measure other than the proposed volume threshold test, please identify and describe such alternative measure,***

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<sup>6</sup> ICE's Comment Letter (Jun. 24, 2016) at pg. 4.

*including the number and types of market participants that would qualify as AT Persons. (PG 35-36)*

ICE does not support the use of quantitative measures to identify AT Persons. Instead, ICE encourages the Commission to focus on narrowing the definition of Algorithmic Trading or adopting a set of exclusions to its current definition.

***3. The proposed volume threshold test would require a potential AT Person to determine whether it trades an aggregate average daily volume of at least 20,000 contracts over a six-month period. Do you believe that a potential AT Person's average daily volume for purposes of the volume threshold test should instead be calculated only over the days in which the potential AT Person trades during the six-month period? Would such alternative better address potential AT Persons who may trade infrequently over the course of a six-month period, but in large quantities when they do trade?***

ICE does not support the use of a volume threshold test to identify AT Persons. Regardless of whether the Commission was to require volume to be calculated only over the days in which the potential AT Person trades, the test would capture trades entered manually as well as trades entered via an algorithmic program within the definition of AT Person.

***4. The Commission estimates that its proposed volume threshold of 20,000 contracts traded per day, including for a firm's own account, the accounts of customers, or both, across all products and DCMs, would capture approximately 120 market participants, including new and existing registrants. Please comment on the Commission's estimate. Do you believe that the number of market participants captured by this volume threshold test would be greater or fewer than 120? Please indicate how many of these market participants are currently registered with the Commission and how many are not.***

While ICE does not have access to the methodology the Commission used to identify impacted firms, especially through intermediated access, ICE believes the number of market participants captured through the proposed volume threshold would likely exceed 120. This is largely due to the overly broad definitions of DEA and algorithmic trading.

***5. With the addition of the proposed volume threshold test, do you believe that any AT Person will be a natural person or a sole proprietorship with no employees other than the sole proprietor?***

Yes, it is likely that a small number of individual traders employing algorithms would be captured by the proposed volume threshold test.



***6. For the proposed volume threshold test, please explain any challenges that could arise with respect to implementation. For example, what difficulties might an entity potentially subject to Regulation AT encounter in calculating whether it meets the volume threshold? Will the entity be able to readily distinguish between trades executed on a DCM’s electronic trading facility and other trades executed on or pursuant to the rules of the DCM? Does the volume threshold test potentially capture a set of entities that should not be subject to Regulation AT?***

As noted above, ICE recommends that the Commission more clearly define “volume” for the volume threshold test. This presents challenges and complications related to interpretations of contract volumes at execution or through the clearing process where conversions from quoted volumes to lot equivalents are common. Volume thresholds also do not provide a precise measurement of trading activity or risk, since volume is a direct product of the multiplier established in the contract specification, which varies widely across related contracts, asset classes and DCMs.

***7. For the proposed volume threshold test, please explain whether the proposed rule should specify a different aggregation level for purposes of deciding who is an AT Person (e.g., individual DCMs, individual products), or whether the aggregation should be done over a time period different than the proposed semiannual window.***

ICE does not support the use of a volume threshold test to identify AT Persons. To the extent that the Commission determines to adopt a volume threshold test, ICE believes that the volume should be aggregated across products and DCMs as currently proposed. Volume aggregated at the individual product or individual would be arbitrary and would not provide full insight into the overall messaging activity of an AT Person.

***8. For the proposed volume threshold test, please explain whether certain trades should be weighted differently in calculating the volume aggregation, or whether certain trades such as spread trades should be excluded from the aggregation.***

ICE does not support the use of a volume threshold test to identify AT Persons.

***9. For the proposed volume threshold test, the Commission proposes to set a single threshold incorporating trading in all products and on all DCMs in order to facilitate calculations for potential AT Persons. Please explain whether the Commission should instead set different thresholds for groups of related products, or on a per-DCM basis, or other more granular measures than the aggregation of a potential AT Person’s trading across all products and DCMs. Please also discuss the added complexity of any such alternate system, and explain why such system is preferable despite such complexity.***

Please see ICE’s response to Question 7 above.

***10. Supplemental proposed § 1.3(x)(2)(ii) calls for aggregate average daily volume to be calculated in six-month periods, from each January 1 through June 30 and each July 1 through December 31. The Commission requests comment regarding when to begin the first six-month measurement period for any final rules that the Commission adopts. For example, the Commission anticipates that for any final rules with an effective date prior to July 1, 2017, the first measurement period will be July 1 through December 31, 2016. Alternatively, the Commission could delay the effective date for certain elements of the final rules to a date from July 1, 2017 onwards. In such case, the first measurement period could be January 1 to June 30, 2017.***

ICE does not support the use of a volume threshold test to identify AT Persons. However, to the extent that the Commission determines to adopt a volume threshold test, ICE believes that the first six-month period should start the first January or July *following* publication of the rule.

***11. The Commission invites comment on whether any future changes to the volume threshold deemed appropriate by the Commission (subsequent to a final rulemaking on Regulation AT) should be made by notice and comment rulemaking. Commenters are particularly invited to address potential alternatives to updating the volume threshold, if any.***

ICE does not support the use of a volume threshold test to identify AT Persons. However, to the extent that the Commission determines to adopt a volume threshold test, ICE encourages the Commission to make any future changes to the volume threshold by notice and comment rulemaking.

***12. The Commission invites comment as to how the proposed volume threshold test should be applied to members of an affiliated group. Commenters are particularly invited to address how the Commission should interpret common control for these purposes, and whether this interpretation should be limited to wholly-owned affiliates.***

ICE does not support the use of a volume threshold test to identify AT Persons.

#### Proposed Definition of DEA

***14. Does the amended proposed definition of DEA appropriately capture all order submission methods to which the additional filters for New Floor Trader status (i.e., Algorithmic Trading and the volume threshold test) should be applied?***

As noted previously<sup>7</sup>, ICE recommends that the Commission remove the DEA component from the NPRM wholesale, as DEA does not serve as a useful proxy for determining whether a market

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<sup>7</sup> ICE's Comment Letter (Jun. 24, 2016) at Appendix A, pg. 4.

participant engages in algorithmic trading. ICE believes that all market participants should be subject to reasonable pre-trade risk and other risk controls to prevent potential market disruptions regardless of how the market participant accesses the DCM. The concept of DEA 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. To that end, ICE is concerned that the Commission is attempting to create a definition of DEA solely for the purpose of creating a registration category, instead of defining how DEA actually functions from a market perspective. Modifying the definition of a market access concept for this purpose alone has potentially serious consequences for future rulemakings, DCM rules, and jurisdictional issues for foreign boards of trade.

Changes to Overall Risk Control Framework including Questions

***27. Will two levels of risk controls sufficiently prevent and reduce the potential risks of algorithmic and electronic trading? If there is any element of the revised proposed risk control framework that is not feasible or will not sufficiently address the risks of algorithmic and electronic trading, please explain.***

Yes, ICE understands that existing risk control practices are implemented at a minimum of two levels and are therefore sufficient.

***28. Supplemental proposed §§ 1.82(b) and 38.255(c) provide discretion to the FCM to comply with § 1.82(b) in the DEA context using its controls, or controls provided by a DCM or other third party, as long as those controls are substantially similar to the controls provided by the DCM. Do you agree with this level of discretion, or do you believe that FCMs should be required to use DCM-provided controls in the DEA context to comply with § 1.82?***

As stated previously, FCMs already administer financial risk controls located at the DCM and must continue to have discretion to do so. For activity which require more advanced or comprehensive controls than those provided by DCMs, such as in option markets, FCMs must continue to have the ability to monitor and administer appropriate risk controls. In addition, the growing use of user-defined trading strategies makes the prospect of a singular set of risk controls even more tenuous, as volume-based limits and currency-based risk checks may differ. However, as stated previously, certain risk controls required under §1.82(a)(1)(i) should be removed from the Supplemental Proposal.

***29. Supplemental proposed § 1.82(c) provides that the FCM may also comply with § 1.82(c) by using the pre-trade risk controls and order cancellation systems provided by DCMs pursuant to § 38.255. Do you agree with this discretion? Given the revised definition of DEA, should proposed §§ 1.82 and 38.255 make any distinction between DEA and non-DEA orders?***

ICE agrees that FCMs should have discretion in supplementing DCM provided risk controls for all orders. DCM risk controls are developed on the behalf of, and in conjunction with, FCM risk personnel feedback. Additionally, DCM risk control enhancements are regression tested to be in-line with Commission rules specifically for the purposes of reliance by FCMs. In instances where further granular risk controls are needed beyond those provided by the DCM, the FCM must necessarily retain the ability to determine where and how to deploy appropriate risk controls to meet its obligations.

***30. The Commission assumes that, given the definition of DEA provided in Supplemental proposed § 1.3(yyyy), risk controls implemented by an FCM for non-DEA orders might function similarly to a DCM-provided controls implemented by an FCM for DEA orders. Should Regulation AT therefore require that DCMs provide § 1.82 risk controls for both DEA and non-DEA orders?***

DCMs currently provide a common set of risk controls for all orders, regardless of origination by type of market participant, trading strategy, connection method, DEA or non-DEA. It is therefore unnecessary for the Supplemental Proposal to specifically require DCMs to establish risk controls defined in §1.82. The risk controls covered in §1.82 would be problematic for both DEA and non-DEA originating orders.

***31. With respect to the term “Electronic Trading,” should the definition exclude trading on a hybrid trade execution model, i.e., one that includes non-electronic components?***

The term “Electronic Trading” should not exclude trading on a hybrid trade execution model. ICE believes that the prospect of “non-electronic components” could be widely misinterpreted which would preclude effective rules enforcement for electronic trading. As stated previously, pre-trade risk controls should apply to all electronic trading.

***32. The Commission considers the term “order” to include all firm, actionable messages, and understands mass quotes to be actionable messages. Are there other types of firm, actionable messages that constitute orders—and therefore fall within the scope of the terms AT Order Message and Electronic Trading Order Message—that the Commission should clarify in the final rules? If mass quotes are not firm, actionable messages, please explain.***

Although ICE is not certain the Commission’s definition of “order” is complete, ICE believes that mass quotes are actionable messages.

***33. The Commission has changed Regulation AT references to “clearing member” FCMs to “executing” FCMs. Do you agree or disagree with this change? Is the term “executing” FCMs sufficiently clear? Does the term “executing” FCMs more appropriately capture the type of FCMs that can apply pre-trade risk controls and order cancellation systems to***

***electronic trading orders? Does the term “executing” FCMs inappropriately exclude certain FCMs that should otherwise comply with § 1.82 obligations?***

ICE supports this change and believes it may more accurately reflect where the appropriate administration of risk controls should be placed. However, as noted in response to question 30 above, DCMs currently provide a common set of risk controls for all orders, regardless of origination by type of market participant, trading strategy, connection method, DEA or non-DEA. This is true regardless of whether the executing FCM or clearing FCM is administering the controls.

***34. Please explain whether you support or oppose the ability of AT Persons to delegate certain § 1.80 obligations to FCMs, including implementation of pre-trade risk controls, order cancellation systems and system connectivity requirements.***

***a. Does the language of Supplemental proposed §§ 1.80(d)(2) and (g)(3) providing that “[a]n AT Person may only delegate such functions when (i) it is technologically feasible” adequately ensure that delegation only occurs when the FCM can implement controls on a pre-trade basis?***

A firm should be able to delegate the administration of pre-trade risk controls when appropriate and when there is an agreement as to the specific controls to be provided the FCM.

***b. Should the Commission require the AT Person to conduct due diligence or obtain a certification to ensure that the FCM is implementing sufficient controls?***

No, due diligence or certification should not be mandated or prescribed in any specific manner. It is not necessary for the Commission to codify by rule the specific terms of the agreement and acceptance of such risks controls arising from the provisioning of pre-trade risk controls by the FCM.

***c. Should the Commission allow AT Persons to delegate to FCMs compliance with other § 1.80 obligations, such as § 1.80(b) order cancellation requirements? For which obligations would FCM delegation be technologically feasible?***

Yes, the Commission should allow AT Persons to delegate to FCMs compliance with §1.80(b) obligations to ensure flexibility in all instances. For example, in instances where a trading firm’s connectivity is compromised and responsibility is delegated to the FCM to withdraw unexecuted, firm, actionable messages from the DCM’s systems under §1.80(b).

***35. Do you agree with the Commission’s determination to eliminate the notification of the use of Algorithmic Trading requirement that had been required in NPRM proposed § 1.80(d)? If you believe that the Commission should retain such a requirement, please explain why.***

Yes, ICE supports the elimination of this requirement.

***36. Will DCMs be able to comply with Supplemental proposed § 40.20(c)'s system connectivity requirements as to AT Persons without an explicit requirement that AT Persons or FCMs notify DCMs that the AT Persons will be conducting Algorithmic Trading?***

Yes, DCMs currently comply with the proposed connectivity requirements as a matter of course. Trading firms or FCMs do not specifically notify the DCM today that they will be conducting Algorithmic Trading during conformance testing process. Regardless, algorithmic traders cannot access the market without confirmed connectivity to the DCM's trading systems and market data feeds. Additionally, the identification of algorithmic trading is supported by a separate regulatory process at the DCM, which is more appropriate for accurate determination and enforcement of identification.

Reporting and Recordkeeping Obligations

***38. Do you agree with the elimination of the annual compliance report requirement? Do you believe that the current AT Person/executing FCM recordkeeping and DCM review program proposed rules will sufficiently ensure that AT Persons and executing FCMs have effective risk controls? Is there any aspect of Supplemental proposed §§ 1.83 and 40.22 that should be changed to better ensure that AT Persons and executing FCMs are implementing effective risk controls?***

ICE strongly supports eliminating the annual compliance report requirement. As noted previously<sup>8</sup>, the annual compliance reporting requirement imposes an undue burden on DCMs who are not in the appropriate position to evaluate the information contained in the report. Unfortunately, the amendments to §1.83 and §40.22 do not relieve DCMs of this burden, and instead replace the annual compliance report requirement with a “periodic” review requirement, which is functionally the same in terms of the onerous and inappropriate evaluation required to be performed by the DCM.

Under amended §40.22, DCMs must have a program for effective periodic “review and evaluation” of AT person and FCM compliance with Regulations §§1.80-1.82. This requirement is not different than what was previously proposed, except that under the Supplemental Proposal DCMs will have to elicit the information to be reviewed, as it will no longer be in a single source document, such as the annual compliance report. The changes contained in the Supplemental Proposal unfortunately overlook the numerous comments submitted by DCMs as to the cost and burden associated with such a review.<sup>9</sup>

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<sup>8</sup> ICE's Comment Letter (Mar. 15, 2016) at Appendix A, pg. 30.

<sup>9</sup> SNPRM at pgs. 109-114.

Likewise, the scope of the review to be performed has not been diminished in any respect with the amendments included in the Supplemental Proposal. The Commission characterizes the type of DCM review contemplated as “similar to their existing programs for periodically reviewing compliance with audit trail recordkeeping requirements”, however, §40.22 expressly states that an effective program must include measures by the DCM designed to “identify and remediate any insufficient mechanism, policies and procedures, including identification and remediation of any inadequate quantitative settings or calibrations of pre-trade risk controls required by §1.80(a). This would require an in depth, substantive review and level of interaction by the DCM that is inconsistent with any general audit practices associated with recordkeeping reviews, and ignores the prior comments concerning the burdens and difficulties associated with probing into the operational aspects of AT Person programs.

If the Commission determines to impose compliance obligations on DCMs, they should be limited to verifying, through the books and records required to be maintained by the AT Person or FCM, that mechanisms, policies and procedures have been instituted which facially appear to meet the regulatory obligations under §§1.80-1.82. For example, it would be more appropriate for DCM reviews to address whether an AT Person’s risk program includes written policies and procedures specifying its processes for setting and measuring the performance of quantitative settings or calibrations of pre-trade risk controls, procedures for identifying and addressing any inadequacies in those settings, and evidence demonstrating that the AT Person has followed such procedures. However, the Commission eliminated proposed §40.22(e), which had required review of the AT Person’s books and records for evidence that it had instituted the required mechanisms, policies and procedures and if none existed, to remediate the matter, presumably through disciplinary action. This type of review of books and records would be more in the nature of the audit trail reviews the Commission has referenced in the Supplemental Proposal. Accordingly, if the Commission determines to impose AT Person compliance obligations on DCMs it should limit §40.22 in a manner consistent with the foregoing.

As previously discussed, ICE believes that DCMs are not in a position to evaluate the appropriateness of information required under either an annual report or the proposed periodic review requirement. 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, 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 affected parties that have the most expertise with respect to the algorithmic system and a full view into the trading strategy employed.

DCMs currently have robust market surveillance and regulation functions in place that have been designed, in accordance with the Commission's guidance, to identify instances of aberrant or abnormal order or trade activity, including activity initiated by an algorithmic trading strategy. As noted previously<sup>10</sup>, as part of this market regulation and surveillance function, DCMs may initiate reviews, 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. Therefore, in lieu of a DCM's obligations under §40.22 to review and evaluate an AT Person or FCM's compliance reports or to perform periodic reviews of them, DCMs should be permitted to rely on the CEO or CCO representations required under §1.83, and continue to evaluate and remediate potential instances of abnormal trading activity that originate from an algorithmic trading system as part of the DCM's regular market regulation and surveillance function.

#### Additional Changes to NPRM Rules Under Consideration

***39. The Commission welcomes all comments regarding its consideration of potential amendments, deferral, or elimination of provisions proposed in the NPRM as discussed in this Section VIII of the Supplemental NPRM.***

#### §1.3(ttt)-(vvv) - Algorithmic Trading Events

ICE generally supports the proposed changes to the definitions of Algorithmic Trading Compliance Issue, Algorithmic Trading Disruption, and Algorithmic Trading Event. References to an AT Person's own internal rules, those of its clearing member, any DCM on which it trades, or an RFA should be eliminated from the NPRM. 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 doesn't comply with its own requirements. Additionally, 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, NPRM proposed §1.81 potentially penalizes AT Persons who adopt the most robust internal requirements.

#### §1.81(a)(1)(ii) - Standards for the development, monitoring, and compliance of Algorithmic Trading systems.

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<sup>10</sup> ICE's Comment Letter (Mar. 15, 2016) at Appendix A, pg. 32.





ICE supports the elimination of the requirement under NPRM proposed §1.81(a)(1)(ii) that AT Persons must test all Algorithmic Trading code and related systems on each DCM on which Algorithmic Trading will occur. Instead, the Commission has proposed a “reasonable design” standard and flexibility as to where testing will occur. This approach appropriately allows an AT Person discretion to develop internal requirements most suited to its business.

#### §40.21 - DCM Test Environments

ICE strongly supports the Commission’s decision to remove proposed §40.21 from the NPRM. As noted previously<sup>11</sup>, 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. However, requiring DCM test environments to support the simulation of real market conditions or historical transaction, order or message data would have been impractical, required significant financial investment to develop and maintain, and would not have produced any clear benefit.

#### §40.25 - Additional Public Information Required for Market Maker and Trading Incentive Programs

ICE generally supports clarifying in any final rules that the requirements for market maker and trading incentive programs under §40.25 do not apply retroactively. To that end, ICE continues to encourage the Commission to consider its previous comments regarding DCM market maker and trading incentive programs, and specifically that the Commission provide in a further rule amendment 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.

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<sup>11</sup> ICE’s Comment Letter (Mar. 15, 2016) at Appendix A, pg. 10.