



2001 Pennsylvania Avenue NW
Suite 600 | Washington, DC 20006
T 202 466 5460
F 202 296 3184

By Electronic Submission

May 1, 2017

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

Re: RIN 3038–AD52: Notice of Supplemental Proposed Rulemaking on Regulation Automated Trading (“Regulation AT”), 81 Fed. Reg. 85334 (November 25, 2016)

Dear Mr. Kirkpatrick:

The Futures Industry Association (“FIA”)¹ and FIA Principal Traders Group (“FIA PTG”)² are pleased to submit this letter in response to the Commodity Futures Trading Commission’s (“Commission” or “CFTC”) supplemental notice of proposed rulemaking regarding Regulation AT (“Supplemental NPRM”). FIA member firms have taken a leadership role in identifying risks and strengthening safeguards in the futures markets globally. Since April 2010, FIA has published six papers proposing industry best practices and guidelines related to these important topics.³ In addition,

¹ FIA is the leading trade organization for the exchange-traded and centrally cleared derivatives markets worldwide. FIA’s membership includes international and regional banking organizations, clearing houses, exchanges, brokers, vendors and trading participants. FIA’s mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and to promote high standards of professional conduct. Further information is available at www.fia.org.

² FIA PTG is an association of more than 20 firms that trade their own capital on exchanges in futures, options and equities markets worldwide. FIA PTG members engage in manual, automated, and hybrid methods of trading, and they are active in a wide variety of asset classes, including equities, fixed income, foreign exchange and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. FIA PTG advocates for open access to markets, transparency, and data-driven policy. Throughout this letter, references to “FIA” and “FIA member firms” should be read to include FIA PTG member firms.

³ These papers were published by FIA itself, FIA Principal Traders Group, and/or FIA European Principal Traders Association: [Market Access Risk Management Recommendations](#) (Apr. 2010); [Recommendations for Risk Controls for Trading Firms](#) (Nov. 2010); [Order Handling Risk Management Recommendations for Executing Brokers](#) (Mar. 2012); [Software Development and Change Management Recommendations](#) (March 2012); [Drop Copy Recommendations](#) (Sept. 2013); [Guide to the Development and Operation of Automated Trading Systems](#) (“Guide”) (Mar. 2015).

FIA has submitted a comprehensive response to (i) the Commission's 2013 Concept Release on Risk Controls and System Safeguards for Automated Trading Environments ("**Concept Release**"),⁴ (ii) the Commission's earlier notice of proposed rulemaking on Regulation AT ("**NPRM**"),⁵ as well as (iii) the Staff Roundtable on Elements of Regulation Automated Trading ("**Roundtable**").⁶ We look forward to continuing to work with the Commission and its staff as the Commission considers an efficient and effective regulatory program governing automated trading.

For the reasons explained in detail herein and in the attached Appendix A, we reaffirm our strong view that proposed Regulation AT is too prescriptive and is neither necessary nor appropriate to address the risks of electronic trading.⁷ Indeed, proposed Regulation AT may well be counterproductive. The proposals to: (i) impose new registration requirements on certain market participants; (ii) require the industry to implement new designated contract market ("**DCM**") or system-based controls; (iii) adopt new testing, documentation, and monitoring procedures; and (iv) subject highly sensitive, proprietary source code to random inspection could undermine the best practices that are already in place.

Before turning to our comments on the specific provisions of proposed Regulation AT, we (i) discuss immediately below the principles that we believe should guide the operation of electronic trading systems and the controls provided by DCMs and (ii) describe how such principles have been, and are being, implemented on an industry-wide basis. These initiatives and successes demonstrate that the proposed rules are unnecessary.

If, however, the Commission determines that rules at the federal level are necessary, we encourage the Commission, in lieu of moving forward with the current proposal, to adopt instead principles-based rules. Such rules would require that all electronic trading be subject to policies and procedures "reasonably designed" to achieve the purposes of the rule, and defer to the DCMs to adopt more

⁴ 78 Fed. Reg. 56542 (Sept. 12, 2013). See Letter from Walter L. Lukken, President and CEO, FIA, to Melissa D. Jurgens, Secretary, CFTC (December 11, 2013), available at https://secure.fia.org/downloads/CFTC_Concept_Release_on_Risk_Controls_121113.pdf.

⁵ 80 Fed. Reg. 78824 (Dec. 17, 2015). See Letter from Walter L. Lukken, President and CEO, FIA to Christopher J. Kirkpatrick, Secretary, CFTC (Mar. 16, 2016), available at https://fia.org/sites/default/files/content_attachments/2016-03-16_Regulation_AT_Comment_Letter.pdf (the "**FIA Comment Letter**"). Except as may be modified in this letter, we reaffirm and incorporate herein by reference our comments on the Concept Release and NPRM.

⁶ 81 Fed. Reg. 36484 (June 7, 2016). See Letter from Walter L. Lukken, President and CEO, FIA; Stuart J. Kaswell, Executive Vice President and General Counsel, Managed Funds Association; Katherine Tew Daras, General Counsel, ISDA; Laura Martin, Managing Director and Associate General Counsel, SIFMA AMG to Christopher J. Kirkpatrick, Secretary, CFTC, (June 24, 2016), available at https://fia.org/sites/default/files/2016-06-24_RegAT_Roundtable_Group_Comment.pdf (the "**Industry Comment Letter**"). Except as may be modified in this letter, we reaffirm and incorporate herein by reference our comments on the Concept Release, the NPRM and the Roundtable.

⁷ As noted throughout this letter, we believe that all electronic trading should be subject to pre-trade risk controls and other requirements appropriate to each market participant's trading activity. The term "electronic trading," therefore, should be read to include, but not be limited to, algorithmic trading.

detailed rules as appropriate for each market and market participant's trading activity.⁸ We believe this approach would provide the flexibility necessary to accommodate new technologies and practices in this dynamic and evolving marketplace. This approach would also be consistent with the Acting Chairman's recently announced initiative to simplify the application of the Commission's existing rules.

Existing Robust Risk Management Controls and Procedures

As the Commission is aware, over the past decade, DCMs, futures commission merchants ("FCMs"), and market participants have developed and implemented a number of risk-reducing controls and policies. In this regard, DCMs currently have comprehensive risk controls and other safeguards in place. For example, the CME Group exchanges ("CME"), ICE Futures U.S. ("IFUS"), CBOE Futures Exchange, Nasdaq Futures Exchange and Eris Exchange employ: (i) order-size controls at the DCM level; (ii) dynamic price collars; (iii) market pauses; (iv) message policies; and (v) cancel-on-disconnect functionality. In addition, these DCMs require conformance testing of relevant software before such software may access the DCM platform.⁹ Further, both CME and IFUS have implemented self-match prevention mechanisms that have reduced unintended self matches to negligible amounts.¹⁰

Moreover, in separate surveys that FIA conducted in 2013 in connection with preparing its response to the Concept Release: (i) all responding FIA PTG firms indicated that they use some form of pre-trade maximum order size screens, data reasonability checks, repeated automated execution throttles, and self-trading controls; and (ii) all responding FCMs confirmed that they use message throttles, price collars, maximum order size limits, and order cancellation controls, either administered internally or at the DCM level.

⁸ For the avoidance of doubt, we are not recommending that all market participants should be required to adopt and implement pre-trade and other risk controls. To the contrary, a market participant should be permitted to rely on risk controls provided by the DCM on which the market participant trades.

⁹ In July 2015, FIA conducted a survey of 33 exchanges globally on their risk management controls and policies. The five named exchanges all confirmed that they have such risk management controls in place.

¹⁰ As we noted in the FIA Comment Letter:

In fact, in the fourth quarter of 2015, more than 85% of all order messages submitted to CME Group contained instructions to avoid self-trades through the CME Globex self-match prevention ("SMP") functionality. As a result of these DCM SMP tools and a better understanding by DCMs of the source of some self-trades, it is our understanding that incidences of problematic self-trading are statistically insignificant. One metric that illustrates this is the measure of self-trade volume at the individual trader level where the same participant with the same account was on both sides of a trade. In mid-2013, before SMP functionality was introduced, these self-trades represented approximately 1/10th of 1% of average daily volume (0.093%). By mid-2015, these self-trades dropped to approximately 1/100th of 1% of average daily volume (0.012%). In October 2013, prior to the implementation of SMP functionality on ICE Futures U.S. ("IFUS"), the number of self-trades was 0.051%. For all of 2015, the number of self-trades on IFUS represented 0.013% of the total volume.

FIA Comment Letter, Attachment A, at 79.

Principles for Electronic Trading

Based on the recommendations set out in the papers listed in footnote 3, above, and as discussed in our comment letters referenced in footnotes 4-6, above, we have identified certain principles that should govern the operation of electronic trading systems and the controls provided by DCMs, and we have found that these principles are largely implemented across the industry:

- All electronic orders should be subject to DCM-based pre-trade and other risk controls and policies designed to prevent inadvertent and disruptive orders and reduce excessive messaging.
- DCMs should provide tools to control orders that may no longer be under the control of the trading system.
- DCMs should adopt policies to require operators of electronic trading systems to ensure that their systems are tested before accessing the DCM.
- DCMs should be able to identify the originator of an electronic order and whether the order was generated automatically or manually.

We discuss each of these principles in more detail below as well as describe how they have been implemented by DCMs and market participants.

DCM-Based Pre-Trade and Other Risk Controls

All market participants that trade electronically have the potential to disrupt markets. For this reason, FIA has consistently advanced the view that all electronic trading should be subject to pre-trade risk controls and other measures to help minimize the likelihood of a market disruption, and has worked with the industry to implement appropriate controls.¹¹ The location of these controls should be a function of market structure, the nature of the product being traded, the type of trading being conducted, efficiency and cost.

Currently, all electronic futures trading in the United States must go through DCM pre-trade controls. Market participants accessing a DCM directly are held accountable for disrupting the market, if they have not taken steps reasonably designed to prevent disruption.¹² Therefore, in addition to the pre-trade order size and intraday position controls that DCMs employ, and which their clearing FCMs may require them to implement, such market participants also generally implement additional controls within their trading systems.¹³

¹¹ These controls have been adopted either in the absence of, or well in advance of, any rules requiring such controls.

¹² For example, market participants have been fined for not testing their systems before using them to enter orders into the production market under CBOT Rule 432.Q, which governs acts that are considered detrimental to the interests or the welfare of the Exchange.

¹³ Further, FCMs are required to apply pre-trade risk-based limits to all clients executing electronically in accordance with Commission Rule 1.73 and are subject to risk management program requirements under Commission Rule 1.11 and DCM regulations.

Depending on the circumstances and system functionality, the following examples of DCM and trading system controls may be appropriate in mitigating the risk of market disruption:¹⁴

- *Maximum Order Size.* Maximum order size sets the maximum quantity that is allowed to be submitted per order. These limits are commonly referred to as “fat-finger” limits. Errors may be prevented by rejecting the order in the case of a limit breach.
- *Message Throttles.* Message throttles are controls designed to prevent excessive messaging which could disrupt, slow down, or impede normal market activity.
- *DCM Dynamic Price Collars.* A dynamic price collar, also called price banding, is the maximum amount an order’s price can deviate from a reference price such as the instrument’s last trade price, and is typically used by a DCM as part of their error trade policy. Errors may be prevented by rejecting the order in the case of a limit breach.
- *DCM Market Pauses.* DCMs may choose to pause trading when market conditions may lead to aberrant price discovery and pausing the market for a finite duration would allow for the re-establishment of the price discovery process in a fair and orderly manner.
- *DCM Message Policies.* DCMs may set policies designed to measure a market participant’s messages over a defined interval of time and set defined limits on the amount of messages that would be appropriate over such interval. Action is generally taken after the messages have exceeded the limits. Messaging policies cannot be dynamic because market participants need to know what is expected of them.
- *Other Controls Designed to Prevent Inadvertent Orders.* A wide range of “catch-all” risk controls are generally designed to prevent certain orders in the appropriate circumstances from being submitted to the DCM or from being processed by the DCM’s matching engine. Such controls might include maximum intraday position limits within a given contract and repeated automated execution limits, which restrict the maximum number of times a strategy or identical order is filled and then re-enters the market without human intervention.

These controls are generally located at the DCM, with some configured either by the market participant or the FCM; some are applicable to all orders. To comply with DCM rules on market behavior and FCM internal risk policies, supplementary pre-trade controls are likely located within the trading system itself and operated by either the market participant or the FCM that provides access to the DCM. They may also be located within an FCM-provided infrastructure and controlled by the FCM.

Mechanisms to Control Orders

Mechanisms should be provided to afford market participants and FCMs the ability to cancel orders, if orders need to be removed quickly or if the trading system no longer has control of the order. The type and location of these mechanisms will vary depending on the type of trading system being used

¹⁴ All control descriptions are taken from the FIA’s *Guide*.

and the DCM's own infrastructure. In addition, access to these tools may vary, with an FCM sometimes overriding a market participant or with a DCM providing the ultimate backstop. As we have previously advised, some of these control mechanisms, such as kill switches (defined below), are currently very difficult to implement in an across-the-board fashion and need to be applied more intelligently.

These mechanisms are widely deployed in the United States and have been refined over the years to provide additional granularity and the ability to incorporate these mechanisms into trading systems to enable automation. For example, the CME has just announced major enhancements to FirmSoft, its independent order management system used to cancel or view orders. Further, in our 2015 survey, CME, IFUS, Eris Exchange, CBOE Futures Exchange and Nasdaq Futures Exchange all stated that they offer kill switches. Most DCMs also offer cancel on disconnect and other mechanisms for controlling orders.

Examples of order control mechanisms may include:

- *Kill Switches.* A kill switch is a control that, when activated, immediately disables all trading activity for a particular participant or group of participants, typically preventing the ability to enter new orders and cancelling all working orders. It may also allow for risk-reducing orders while preventing risk-increasing orders.
- *Cancel-on-Disconnect.* Cancel-on-Disconnect is a service provided by DCMs that monitors for a loss of connectivity between a participant's trading session and the DCM's trading platform. If a loss of connection is detected, it initiates a best-efforts attempt to cancel all resting orders for the disconnected session. FIA recommends that trading participants have the choice to opt in or out of this service.
- *DCM-Provided Order Management Systems.* DCMs may provide an independent mechanism for viewing and cancelling working orders for a given session or user. Such functionality is independent from the trading access that might be subject to disconnection or disruption. Alternative order cancellation channels may also allow a firm to proactively pull orders on behalf of trading sessions that they have themselves deemed in error.

We do not believe that any additional regulation is required to ensure that these mechanisms are deployed. As we indicated in the FIA Comment Letter:

FIA does not recommend that the Commission mandate automated order cancellation systems or systems that enable 'immediate' cancellation of orders. As FIA has stated previously, unintended or disruptive orders can be better prevented by the application of other pre-trade controls rather than so-called kill switches. Order cancellation systems must be applied carefully and thoughtfully and only as a last resort in order to prevent the risk created by the blocking of legitimate orders.¹⁵

¹⁵ FIA Comment Letter, Attachment A at 24.

Testing

Trading systems and algorithms should be thoroughly tested before being deployed into the marketplace. To this end, DCMs require relevant system conformance testing before a system can be deployed in the production environment. DCM-based conformance testing is a type of testing that typically follows a script of tests designed and administered by a DCM to confirm that market participants' systems interact with a DCM's systems properly. By administering and performing such tests, DCMs can confirm that each market participant system exhibits a baseline level of functionality that has been deemed necessary for maintaining orderly markets.

In addition to requiring conformance testing, DCMs have put in place rules and policies that require those accessing the marketplace to ensure testing practices that are reasonably designed to prevent generating orders that are unintended or that disrupt the market. As mentioned above, DCMs have implemented market oversight programs, which have led to market participants being fined for implementing systems and algorithms that have been determined to have been inadequately tested.

Recognizing the importance of testing, market participants often supplement DCM conformance testing with further testing where appropriate. In addition to clearly-defined, widely-applicable DCM conformance testing, a wide variety of tests might also be performed depending on the circumstances, including unit testing, functional testing, non-functional testing, acceptance testing, and other testing methodologies.

Identification of Traders and Automated Systems

It is not the registration status of a person engaged in electronic trading that creates the risk of a market disruption, but rather, the act of electronic trading itself. As we stated repeatedly in the FIA Comment Letter:

FIA believes that all persons that engage in Algorithmic Trading – in fact all those trading electronically – may potentially disrupt markets and, therefore, should be subject to reasonable principles-based requirements aimed at avoiding market disruptions regardless of whether they are registered with the CFTC or not.¹⁶

In lieu of a registration requirement, FIA has advocated for the inclusion of unique identifiers in the messages transmitted to the DCM such that the originator of the order and the type of system being deployed can be readily identified for oversight purposes.

These identifiers are already widely implemented in the United States.¹⁷ They are a straightforward way of enabling market oversight to properly understand the nature of the trading, and they obviate the need for more expensive and complex ways of identifying automated trades such as registration of individuals or of specific algorithms. The industry has worked together to ensure that the identification requirements are clear and can be adapted to the more complex type of trading generated by systems of the future.

¹⁶ FIA Comment Letter, Attachment A at 1.

¹⁷ CME Rule 576 and IFUS Rule 27.09 have been refined and clarified over the past few years to provide guidance on when and how traders and systems should be identified.

FIA believes that a principles-based approach, including by delegation to DCMs, to requiring the identification of operators of trading systems as well as automated systems will ensure that these identifiers can continue to evolve as the market evolves.

FIA has suggested that the following identifiers may be useful in regulating electronic trading in lieu of registration:

- *Trader Identification.* DCM audit trails should be designed such that the depth of information provided enables DCMs and regulators to identify market participants and analyze their behavior. Passing such information along with the trade information at the time of the order, or shortly afterward in the clearing process, can be an efficient and cost-effective way of identifying the source of trades.
- *Automated versus Manual System Identification.* An identifier indicating whether an order is generated by a manual trading system or by an automated or semi-automated system will indicate to the DCM or regulator how the order was generated and guide any further steps in oversight of the trading.

Specific Comments on Regulation AT

As discussed, it is our position that proposed Regulation AT is too prescriptive and is neither necessary nor appropriate to address the risks of electronic trading. If the Commission nevertheless determines that rules at the federal level are necessary, the Commission should adopt instead principles-based rules, which would require that all electronic trading be subject to policies and procedures “reasonably designed” to achieve the purposes of the rule, and defer to DCMs to adopt more detailed rules as appropriate for each market and market participant’s trading activity.

Notwithstanding the foregoing, we set out below and in the attached Appendix A our specific comments on various provisions of the proposal. As will be made clear, we continue to have serious concerns regarding many of the proposed rules. In particular, as discussed in the FIA Comment Letter and below, the requirements set out in proposed Rule 1.81 and newly-proposed Rule 1.85 raise a number of complex issues, which require additional analysis. At the least, therefore, the Commission should take no action in these areas pending further study and recommendations by a group comprised of the Commission, DCMs, FCMs, independent software vendors (“ISVs”) and market participants.

Further, because we believe that all electronic trading should be subject to pre-trade risk controls and other requirements appropriate to each market participant’s trading activity, 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). Again, action on these provisions should be deferred unless and until experience establishes that such designation and registration is necessary and appropriate.

In Appendix A, we respond to each of the questions posed in the Supplemental NPRM. In considering our responses, we ask the Commission to keep in mind our overarching positions discussed above. For example, the fact that we have prepared substantive answers to the Commission’s questions on the definition of an AT Person and related registration requirements does not mean we agree with the premise that AT Persons should be designated and required to be registered as New Floor Traders (if not already registered in some capacity). As noted, we believe it is unnecessary to designate certain traders as AT Persons or to require that they be registered with the Commission.

Our responses to the Commission's questions are divided into the following categories: (i) definition of "AT Person"; (ii) definition of "Direct Electronic Access"; (iii) source code retention and inspection; (iv) third-party requirements; (v) changes in risk control framework; (vi) recording and reporting obligations; (vii) testing, monitoring and recordkeeping; and (viii) other definitions. An overview of our comments follows.

Definition of "AT Person"

The Commission's approach to regulating automated trading has been to attempt to identify the "who", *i.e.*, "those responsible for significant trading volumes and liquidity" and to impose upon such persons "risk control, testing, recordkeeping and other requirements." Our view is that the Commission should focus on the "what", *i.e.*, the activity – electronic trading – that may inadvertently disrupt the markets, adversely affecting market integrity. It should also acknowledge, in so doing, that this activity might result from any market participant regardless of the scale or frequency of activity. Accordingly, FIA opposes the use of arbitrary "bright line" quantitative tests and, accordingly, does not support the addition of a volume threshold test to the definition of AT Person. Focusing on the activity rather than identifying new registrants would assure that all electronic trading is subject to pre-trade and other risk controls appropriate to each participant's trading activity. It would also make the "AT Person" category, and the concomitant requirement that such persons be registered with the Commission in some capacity, unnecessary.

In our view, the designation of AT Persons and the registration of New Floor Traders are not necessary. We believe the Commission has ample authority to regulate the activities of AT Persons without imposing a registration requirement.

We also oppose the adoption of the proposed "group test." We are concerned that the Commission may not appreciate the number of additional persons that would fall within the definition of an AT Person as a result of the application of the "group test." Many large corporations have numerous entities (located throughout the world) within their umbrella frameworks that legitimately trade for their own account or on behalf of customers. Requiring the aggregation of the trading volume of these numerous affiliated entities will likely require multiple entities to register as New Floor Traders that, on their own, would not qualify as an AT Person.

Definition of "Direct Electronic Access"

We are concerned that the very broad definition of "Direct Electronic Access" that has been proposed will capture virtually all customer orders placed through an FCM. The proposed definition would exclude only those situations in which an order is "first received from an unaffiliated natural person by means of oral or written communications" and then submitted to a DCM for or on behalf of the third party. However, FCMs now receive comparatively few orders "by means of written or oral communications." We believe the Commission intended to exclude from the definition of "Direct Electronic Access" all orders that are intermediated by an FCM, *i.e.*, orders that pass through pre-trade risk controls implemented or administered by the FCM that guarantees or facilitates electronic access to the relevant DCM.

Algorithmic Trading Source Code Retention and Inspection

We have consistently and vehemently opposed the Commission's proposal set out in the NPRM that would make Algorithmic Trading Source Code available upon request for inspection by any representative of the Commission or the Department of Justice. The Supplemental NPRM seeks to address our concerns, and the concerns of many other commenters, by proposing that Algorithmic Trading Source Code may be requested by means of a special call authorized by the Commission ("**Enhanced Special Call**") or by subpoena. Although we appreciate the Commission's efforts to offer additional safeguards against unnecessary demands for disclosure of intellectual property, the Enhanced Special Call process does not provide the protections available to market participants when a subpoena is required.

The Commission has posited that, in executing the Enhanced Special Call, the Division of Market Oversight ("**Division**") could specify further procedures to help ensure the security of the records provided. For example, the Division could specify the means by which it will access Algorithmic Trading Source Code or other records required by the Enhanced Special Call, including on-site inspection at the facilities of the AT Person, or require that records provided to the Commission be maintained on secure storage media or on computers lacking network connectivity or that records be transferred to secure Commission systems with controlled access.

However, it remains our view that, in the absence of a voluntary production of Algorithmic Trading Source Code from an AT Person subject to agreed restrictions, the Commission or the Department of Justice should be required to obtain such Algorithmic Trading Source Code through a validly authorized subpoena. The subpoena process provides a clear legal route for a source code owner to challenge the production of source code or to seek and obtain legally enforceable protections (*e.g.*, a protective order) for sensitive property.

This is particularly so since Algorithmic Trading Source Code provided to the Commission under Regulation AT would likely be considered a "record" under the Federal Records Act ("**FRA**"). The FRA broadly defines "records" to include any recorded information made or received by a federal agency under federal law or in connection with public business, which the agency preserves or believes is appropriate for preservation as evidence of the "organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government, or because of the informational value of the data in the record."¹⁸ Once source code is provided to the Commission staff, therefore, it may not be destroyed except as provided in the rules of the National Archives and Records Administration or as may be provided by court order.

Importantly, we note that proposed Rule 1.84, establishing the Enhanced Special Call procedure, does not expressly provide that it will be the sole means by which the Commission may gain access to Algorithmic Trading Source Code and related records, nor has the Commission proposed to amend Rule 1.31 to exclude from its requirements those records required to be maintained under proposed Rule 1.84. Regulation AT, as currently proposed, therefore, would prohibit neither the Commission nor the Department of Justice from requesting this information under Rule 1.31.¹⁹

¹⁸ 44 U.S.C. § 3301(a)(1).

¹⁹ We note that the Commission has separately proposed to amend Rule 1.31 "to reorganize and update the existing recordkeeping regulation, eliminating certain outdated provisions while still maintaining the ability of the Commission to examine and inspect required records." 82 Fed. Reg. 6356, 6358 (Jan. 19, 2017). In the Federal Register release accompanying the proposed amendments to Rule 1.31,

Third-Party Requirements

We are concerned that proposed Rule 1.85 oversimplifies the complexity of third-party system issues and makes them so uncertain as to be unworkable. Proposed Rule 1.85(a) provides that an AT Person should obtain a certification from the third-party system developer that the relevant system or component meets regulatory requirements. However, depending on the sophistication of the market participant or its appetite for internal development, a participant may utilize third-party software that provides anything from low-level electronic messaging to comprehensive algorithmic trading, order management, order routing and risk management systems. Moreover, systems are increasingly modular and may be integrated with internally developed systems or those provided by other vendors.

In circumstances where systems are highly interconnected, the boundaries of systems that fall within the scope of the proposed rule and those that do not are unclear. This is especially true when an ISV supplies components that allow trading systems to be built on top of those components. Such an ISV may properly believe that its component is not a “relevant” component and, therefore, that it has no need to provide a certification of compliance with the proposed rule. Moreover, an ISV may be hesitant to certify their compliance when it has no knowledge or control over how its components may interact with components provided by others.

At a minimum, the certification requirement, combined with the requirement that the AT Person remain responsible for compliance with Rule 1.84’s obligations, will require parties to amend current software licensing agreements. Current software licenses typically include liability and indemnification clauses but do not contemplate the requirements of Rule 1.84 or the appropriate allocation of responsibility. Negotiating these amendments will be very costly and time-consuming.

Risk Control Framework

As discussed in the FIA Comment Letter and herein, the proposed pre-trade risk controls are too prescriptive, particularly with respect to order cancellation systems at the DCM and FCM levels and the requirement that DCMs and FCMs monitor for breaches of controls. Also, execution throttles are not widely deployed as a risk control measure. The pre-trade risk controls set out in proposed Rule 1.80, therefore, should be replaced with principles-based rules, which would assure that all electronic trading is subject to pre-trade and other risk controls appropriate to each participant’s trading activity. The Commission should also make clear that it does not intend to prescribe the manner or means by which DCMs and FCMs will apply risk controls.

Recordkeeping and Reporting

We support the Commission’s decision to eliminate the proposed requirement that AT Persons and FCMs file annual compliance reports with DCMs and that each DCM establish a program for effective review and evaluation of such reports. Nonetheless, we are disappointed that the Commission has chosen to impose on FCMs and swap dealers an obligation to prepare and file an annual certification in light of their obligation to already prepare and certify an annual compliance report under Commission Rule 3.3. We also question the meaning and purpose of imposing on DCMs the obligation to require such “periodic reporting” from AT Persons and FCMs “as necessary” as part of their oversight program of electronic trading on their markets.

the Commission referenced proposed Regulation AT and its provisions relating to source code and the production of source code but emphasized that the proposed amendments to Rule 1.31 were not intended to address these issues. *Id.* at 6359.

Software Development, Testing, Deployment and Monitoring

Rule 1.81 remains overly prescriptive and unworkable. It attempts to impose rigid requirements for design, development, testing, documentation, support, and change management procedures – each of which requires a significant amount of flexibility to best meet the needs of the organization and its unique operations and structure. Consequently, the proposed rule, will have the adverse effect of creating, rather than mitigating, risk, and stifling the flexibility and innovation that we find currently in DCM conformance testing and oversight of trading system behavior as discussed above.

Although the Commission has proposed to amend Rule 1.81(a)(1)(ii) to provide that the testing requirements should be “reasonably designed” to effectively identify circumstances that may contribute to future Algorithmic Trading Events, the Commission failed to carry through the same revisions to proposed Rules 1.81(a)(1)(iii) and (iv). More importantly, the Commission has not addressed the myriad significant concerns we raised regarding 1.81 in our previous comment letters.

Other Definitions

We understand that the Commission is considering further amending the definitions of “Algorithmic Trading Compliance Issue,” “Algorithmic Trading Disruption” and “Algorithmic Trading Event.” Although we obviously have not seen the text of the intended revisions, we would support amending these provisions along the lines the Commission has suggested. In addition, we continue to believe that certain automated order routing systems that act solely as a conduit to a DCM without any discretion should be outside the scope of the definition of “Algorithmic Trading.” Finally, we note that the Commission references a “disruption associated with Electronic Trading” or an “Electronic Trading disruption” several places throughout the proposed rules. To ensure clarity of meaning, we believe the Commission should propose a specific definition of the term “Electronic Trading Disruption.”

* * *

As we emphasized in the FIA Comment Letter and reiterate herein, FIA fully supports the Commission’s goals and objectives in attempting to mitigate the risks associated with automated trading. We continue to be concerned, however, that proposed Regulation AT, as revised by the supplemental NPRM, is too prescriptive and will not achieve these goals.

As we await the nomination and confirmation of new members of the Commission, we urge the Commission and the staff to take this opportunity to re-evaluate the current structure and approach of Regulation AT, which we believe is neither necessary nor appropriate to address the risks of electronic trading. If the Commission ultimately concludes that rules at the federal level are necessary, we encourage the Commission, in lieu of moving forward with the current proposal, to adopt instead principles-based rules. Principles-based requirements can evolve with the market, are appropriate to the role of the market participant, avoid unnecessary complexity, and ultimately will best serve the market. We look forward to continuing to work with the Commission and its staff as the Commission considers an efficient and effective regulatory approach to automated trading.

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If you have any questions or need any additional information with respect to the matters discussed herein, please contact Allison Lurton, Senior Vice President and General Counsel, at 202.466.5460 or alurton@fia.org.

Respectfully submitted,

A handwritten signature in cursive script that reads "Walt L. Lukken".

Walt Lukken
President & Chief Executive Officer

Enclosure: Appendix A

cc: Honorable J. Christopher Giancarlo, Acting Chairman
Honorable Sharon Bowen, Commissioner

Amir Zaidi, Director, Division of Market Oversight
Sebastian Pujol Schott, Associate Director, Division of Market Oversight

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APPENDIX A

I. AT Person Status and Requirements for AT Persons including Questions 1-13

Comments	<p>FIA strongly opposes arbitrary quantitative thresholds and accordingly strongly opposes the addition of a volume threshold test to the definition of AT Person.</p> <p>This section of Appendix A answers Questions 1-13, which relate primarily to the proposed volume threshold test for AT Persons, as defined in proposed Rule 1.3(xxxx). The volume threshold test responds to the numerous comments that the Commission received on the definition as initially proposed. In particular, the commenters had noted that the proposed definition would capture far more persons than the Commission anticipated. The proposed volume threshold test reflects the Commission’s conclusion that “it is appropriate to limit the population of AT Persons to larger market participants, including those responsible for significant trading volumes and liquidity” on DCMs.²⁰</p> <p>FIA strongly opposes the use of a volume threshold test. FIA has historically opposed the use of arbitrary “bright line” quantitative tests and, accordingly, strongly opposes the addition of a volume threshold test to the definition of AT Person. The Commission’s approach to regulating automated trading has been to identify the “who”, <i>i.e.</i>, “those responsible for significant trading volumes and liquidity” and to impose upon such persons “risk control, testing, recordkeeping and other requirements,” all of which impose significant compliance costs. Our view is that the Commission should focus on the “what”, <i>i.e.</i>, the activity – electronic trading – that may inadvertently disrupt the markets, adversely affecting market integrity. 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. It would also make the “AT Person” category, and the concomitant requirement that such persons be registered with the Commission in some capacity, unnecessary.</p> <p>The challenge for the Commission is to adopt a regulatory program that achieves these goals without imposing on all market participants the regulatory and financial burdens that are the consequence of the Commission’s proposed Regulation AT. We submit the solution is to replace the highly prescriptive requirements set out in the proposed rules, in particular Rule 1.81, with less burdensome, principles-based rules. This approach would provide flexibility to accommodate new technologies and market practices and would dramatically simplify the regulations by eliminating the need to define an AT Person and to require such AT Persons to be registered with the Commission. In addition, a more principles-based approach would make it easier to bring third-party vendors into compliance with a regulation designed to protect the market from disruptions caused by lack of testing and poorly</p>
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²⁰ As discussed below, we do not support the addition of the volume threshold. Nonetheless, we would caution the Commission that, based on feedback from our members, we expect that the Commission’s estimate of 120 AT Persons is too low.

designed controls.

Our recommended approach would also have the added benefit of eliminating the need for an anti-evasion policy, as proposed in the Supplemental NPRM. Proposed Rule 1.3(x)(4) would prohibit any person from trading contracts or causing contracts to be traded through multiple entities “for the purpose of evading the registration requirements imposed on floor traders . . . or to avoid meeting the definition of AT Person.” As we discuss below with regard to the proposed “group test”, an entity may have multiple affiliates located in the US and abroad, each of which trades on one or more DCMs (either for its own account or the account of customers) and has no knowledge of each other’s trading activities. These entities should not be aggregated for any purpose. Yet, the proposed anti-evasion policy may cause regulators to erroneously flag such legitimate trading activity as potentially violating the proposed anti-evasion policy and lead such regulators and entities to waste extensive time and money researching “false positives.”

Market participants may move business away from DCMs. If the Commission nonetheless elects to move forward with utilizing a volume-based threshold using daily volume on DCM electronic trading facilities to trigger designation as an AT Person, market participants may take steps to stay under the threshold by moving trading to non-US exchanges, or entering into block or OTC transactions. Such a development would be a step backwards for the thriving, transparent DCM-marketplace that has evolved over recent years.

The method of calculating volume is uncertain. The treatment of calendar spreads and other multi-legged transactions in the calculation of volume is unclear. For example, it is unclear whether a one-lot fill of a multi-legged product should count as one contract for the purpose of calculating the volume threshold or whether each leg of the transaction should be counted separately.

A New Floor Trader’s ability to terminate registration is unclear. We note that existing Commission registrants that meet the requirements to be an AT Person pursuant to Rule 1.3(xxxx)(1) will no longer be considered an AT Person when applicable volume measures fall below the prescribed threshold for two consecutive semi-annual periods. However, this same termination mechanism does not seem to exist for New Floor Traders, including those that voluntarily opt to register as AT Persons. FIA requests that this same termination provision be made available to New Floor Traders.

RFA membership is unnecessary. All AT Persons do not need to be members of a registered futures association (“RFA”) in order for Regulation AT to be effective. In particular, persons likely to be required to be registered as New Floor Traders under proposed Regulation AT are already directly or indirectly subject to the requirements and jurisdiction of each DCM on which they trade on matters related to their trading and access. Historically, no RFA has overseen or regulated floor traders because of the solely proprietary nature of their trading and the oversight by DCM(s) on which floor traders are members. As a result, an RFA would have no experience in overseeing and regulating New Floor Traders. Moreover, it is difficult to contemplate areas where an RFA’s and DCM’s oversight would not be mostly redundant, causing an RFA to augment its staff and systems for no practical additional benefit and New Floor Traders to be subject to duplicative requirements

and oversight.²¹

As we detailed in the FIA Comment Letter, we believe the goals of Regulation AT can be realized by continuing to defer to DCM oversight of their own members and the trading activities on their own facilities. The Supplemental NPRM already requires DCMs to establish a program for effective periodic review and evaluation of AT Persons' compliance with elements of Regulation AT. Membership in an RFA would impose additional operational costs to New Floor Traders, without adding to their effective oversight.

The “group test” is unnecessary and flawed. FIA urges the Commission to eliminate the “group test” contained in proposed Rule 1.3(x)(2)(iii) and (3)(ii), which would require a person to aggregate its trading volume “with that of any other person controlling, controlled by or under common control” with another for purposes of determining average daily trade volume for the volume threshold test under Rule 1.3(x)(2). The proposed “group test” is fundamentally flawed and would likely significantly expand the number of persons captured under the AT Person definition and that would be required to register as a New Floor Trader.²²

In particular, the “group test” makes no distinction between aggregating the volumes of another person controlling, controlled by or under common control with a person that is already registered with the Commission (*e.g.*, FCM, swap dealer) and those that are not. Notwithstanding a firm's current registration status, the “group test” would require an entity or multiple entities to register as New Floor Traders until the aggregated volume of the remaining commonly controlled entities was below the volume threshold. For example, a corporate umbrella entity that contains a large FCM with multiple overseas broker affiliates that also trade US futures for non-US customers through DEA (as defined under the Supplemental NPRM), as well as several trading entities located both in the US and abroad (each of which by itself might not meet the volume threshold test) would have to be aggregated with the volumes of their affiliated FCM. As a result, one or more non-FCM entities within the group would be required to be registered as a New Floor Trader until the difference between the remaining commonly-controlled entities was below the volume threshold. Deciding which entity(ies) should so register would be arbitrary, as no entity by itself might meet the Volume Threshold Test. This outcome could potentially create significant issues related to supervision and conflicts of interest.

Moreover, the requirement to aggregate all persons “controlling, controlled by or under common control” with another person is so broad that it potentially captures entities that have no knowledge of each other's trading and should have no

²¹ Indeed, as contemplated by proposed Rule 170.19, an RFA would only have to adopt rules addressing certain elements of Algorithmic Trading systems as it “deemed appropriate.” Because any such rules would likely duplicate – and certainly could not conflict with – rules that DCMs have already adopted, an RFA might choose to adopt no rules at all in deference to the DCMs' rules. As a result, a New Floor Trader would be required to become an RFA member but have no specific obligations under the RFA's rules.

²² We assume the Commission's proposed “group test” is another means to prevent firms from evading categorization as an AT Person by restructuring their current trading practices to divide the volume among multiple entities.

	<p>knowledge for conflicts of interest or other reasons. Such aggregation would be administratively impracticable and would not accurately reflect the nature of the entities' trading.²³</p> <p>Finally, we are concerned that the Commission may not appreciate how many additional persons would fall within the definition of AT Person as a result of the application of the “group test.” Indeed, many large corporations have numerous entities (located throughout the world) within their umbrella organizations that properly trade for their own account. Requiring the aggregation of the trading volume of these numerous affiliated entities will likely require multiple entities, including many small entities, to register as New Floor Traders that, on their own, would not qualify as an AT Person.</p>
1	<p>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.</p>
Response	<p>As discussed above, FIA opposes the use of arbitrary “bright line” quantitative tests and, accordingly, strongly opposes the addition of a volume threshold test to the definition of AT Person. Moreover, we do not agree with the CFTC’s approach of centering the definition of an AT Person on larger market participants. Rather, all electronic trading – not just algorithmic trading – should be subject to principles-based pre-trade and other risk controls appropriate for each market participant’s trading activity in order to mitigate market disruptions caused by excessive messages and errant orders.</p>
2	<p>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, including the number and types of market participants that would qualify as AT Persons.</p>
Response	<p>See response to Question 1.</p>

²³ In contrast, under the “owned entity exemption” in Rule 150.4(b)(2) with respect to aggregation for federal position limits, any person with an ownership or equity interest in an owned entity of 10 percent or more is ordinarily required to aggregate the positions of the owned entity with its own to assess its compliance with CFTC position limit requirements to the extent such person is aware or should be aware of the activities and practices of the owned entity. *See* Rule 150.4(a). However, the CFTC makes clear that a person otherwise required to aggregate the positions of an owned entity need not aggregate such positions provided that the two entities (i) do not have knowledge of the trading decisions of the other; (ii) trade pursuant to separately developed and independent trading decisions of the other; (iii) have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other; (iv) do not share employees that control the trading decisions of either; and (v) do not have risk management systems that permit the sharing of its trades or its trading strategy with employees that control the trading decisions of the other. *See* Rule 150.4(b)(2). Independent entities within group structures should not be required to aggregate trades to calculate compliance with the volume threshold.

3	<p>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?</p>
Response	<p>See response to Question 1.</p>
4	<p>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.</p>
Response	<p>FIA does not have access to the data required to perform this analysis, but some of our members expect the number of new registrants to be higher than the 120 that the CFTC estimates and will include commercials and other non-principal trading firm market participants.</p>
5	<p>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?</p>
Response	<p>We do not know for certain, but we believe it is unlikely that an individual natural person would trade in excess of 2.5 million contracts electronically on DCMs in a six-month period.</p>
6	<p>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?</p>
Response	<p>Currently, electronic trade records contain various pre-defined tags, which can be used to isolate electronic trades and perform the necessary computation. Although this calculation potentially could be performed by any one market participant close to or above the proposed threshold, it is likely to be far more difficult for companies within group structures required to aggregate their executed contracts.</p> <p>Moreover, as noted above, the treatment of complex spreads, including multi-legged transactions under the proposed volume threshold test is unclear.</p>

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.
Response	See response to Question 1.
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.
Response	See response to Question 1.
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.
Response	See response to Question 1. We believe that a per-DCM (or some other more granular) level aggregation would be even more difficult to manage.
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.
Response	See response to Question 1. However, if the Commission decides to move forward with this measure, we believe that the first six-month measurement period should start the first January or July following the publication of any final rule. Market participants should have no calculation obligations in this regard until final rules requiring such calculations have been promulgated. Under no circumstances, therefore, should volume generated prior to the publication of any final rule be counted for the purposes of determining if a registrant is designated as an AT Person or if a market participant must register as a New Floor Trader with the AT Person designation.

<p>11</p>	<p>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.</p>
<p>Response</p>	<p>See response to Question 1. If the Commission decides to go forward with this measure, we believe any changes to these thresholds in the future should first be proposed and made available for comment before being implemented.</p>
<p>12</p>	<p>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.</p>
<p>Response</p>	<p>As discussed above, FIA strongly opposes the application of the volume threshold test to members of an affiliated group. If the Commission insists on adopting a “group test,” we recommend that it apply the owned-entity exemption approved in Commission Rule 150.4(b)(2) with respect to the aggregation of federal position limits.</p>
<p>13</p>	<p>The Commission requests comment regarding the appropriate amount of time for an entity to register as a New Floor Trader and come into compliance with all requirements applicable to AT Persons, once such entity has triggered the criteria for registration and AT Persons status.</p>
<p>Response</p>	<p>FIA believes that an entity may need 30 days after the end of each six-month measurement period to determine whether it has reached the volume threshold and, therefore, is required to register. Once this determination has been made, New Floor Traders should complete the registration process within six months of the close of the measurement period and should be in compliance with all requirements within nine months of the close of the measurement period. Similar grace periods should also apply to existing registrants that might reach the volume threshold during any six-month period. An existing registrant should also be given 30 days to complete its analysis after the end of each measurement period to determine whether it has reached the volume threshold and would be deemed an AT Person. Once this determination has been made a new AT Person should be in compliance with all requirements applicable to AT Persons within nine months of the close of the measurement period.</p>

II. Proposed Definition of DEA including Question 14

<p>Comments</p>	<p>The broader definition of Direct Electronic Access encompasses the vast majority of ways that market participants interact with DCMs</p> <p>This section of Appendix A addresses Question 14, which relates to the definition of “Direct Electronic Access.”</p> <p>As originally proposed in the NPRM, the definition of “Direct Electronic Access” was critical in identifying those current non-registrants that would meet the definition of an AT Person and be required to be registered with the CFTC as New Floor Traders and become subject to the requirements of proposed Rules 1.80, 1.81 and 1.83. FIA and other commenters argued that the proposed definition was too broad and would capture significantly more market participants than the CFTC expected. FIA urged the Commission to amend the rule to make clear that “Direct Electronic Access” applied only to orders routed by any person without passing through pre-trade risk controls implemented or administered by the clearing member that guarantees or facilitates electronic access to the relevant DCM.</p> <p>Instead of adopting FIA’s proposed clarifying change or otherwise narrowing the definition, the CFTC has proposed to expand the definition of “Direct Electronic Access” to mean the electronic transmission of any order, modification or cancellation thereof, except orders, or modifications or cancellations thereof, electronically transmitted to a DCM by an FCM that such FCM “first received from an unaffiliated natural person by means of oral or written communications.” Concurrently, the CFTC has revised proposed Rule 1.82 to require executing FCMs to establish pre-trade risk controls for all electronic trading.</p> <p>In proposing the revised definition of Direct Electronic Access, the Commission notes that the definition is intended to exclude those situations “where the FCM is acting in a true intermediating role, <i>i.e.</i>, where the FCM receives an order from a third-party (who may or may not be a Commission registrant) and the FCM then submits such order to a DCM for or on behalf of the third party.” However, all client orders that are placed electronically and then pass through an FCM’s systems (or limits administered by an FCM) are FCM-intermediated orders.</p> <p>The newly-proposed definition, therefore, encompasses the overwhelming majority of all electronic trading and will negate or offset any reductions in the number of market participants that qualify as AT Persons that the Commission hopes to achieve by the addition of the Volume Threshold Test.</p> <p>The challenge of developing a meaningful basis to identify and also limit the number of currently unregistered persons that would be required to register as a New Floor Trader and be subject to all requirements of AT Persons through application of the volume threshold and the definition of Direct Electronic Access again highlights the practical benefit of requiring that all electronic trading – including algorithmic trading – be subject to principles-based pre-trade and other risk controls appropriate for each market participant’s trading activity in order to mitigate market disruptions.</p>
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	Accordingly, we urge the Commission to abandon its currently-proposed definition. ²⁴
14	Does the amended proposed definition of DEA appropriately capture all order submission <i>methods</i> to which the additional filters for New Floor Trader status (<i>i.e.</i> , Algorithmic Trading and the volume threshold test) should be applied?
Response	As we have discussed, FIA believes that the broader definition of DEA incorporates the vast majority of ways in which market participants interact with a DCM. As stated above, we are concerned that this very broad definition will capture a large amount of trading activity that is intermediated by an FCM, which we do not believe was the Commission’s intention. If the Commission believes that additional types of market participants should be registered – which we do not – the Commission should address this directly, rather than through an expanded definition of DEA.

²⁴ FIA previously proposed that “Direct Electronic Access” be defined as “an arrangement where a person electronically transmits an order to a Designated Contract Market via the DCM Application Programming Interface without the order first being routed through any order routing system that is under the administrative control of a separate person who is a futures commission merchant facilitating electronic access for its customers.” FIA Comment Letter at 18.

III. Algorithmic Trading Source Code Inspection Requirements including Questions 15-22

<p>Comments</p>	<p>Regulation AT Rule 1.84 fails to protect market participants’ critically important and sensitive proprietary information.</p> <p>This section of Appendix A answers Questions 15-22, which relate primarily to the procedures set out in proposed Rule 1.84 relating to (i) the maintenance of Algorithmic Trading Source Code and related records, and (ii) the production of such Algorithmic Trading Source Code and related records to the Commission. Proposed Rule 1.84 responds to the numerous comments filed in connection with the NPRM, in which the Commission proposed that Algorithmic Trading Source Code would be required to be made available to Commission staff, upon request, in accordance with the “ordinary” books and records provisions of Rule 1.31.</p> <p>Algorithmic Trading Source Code should be made available only pursuant to a subpoena. FIA has consistently and vehemently objected to the CFTC’s proposed requirements that would make Algorithmic Trading Source Code available upon request for inspection by any representative of the CFTC or the Department of Justice (“DOJ”).²⁵ As has been discussed exhaustively since the NPRM through dozens of public comment letters,²⁶ the Roundtable,²⁷ and the Statement of Dissent by Commissioner J. Christopher Giancarlo Regarding Supplemental Notice of Proposed Rulemaking on Regulation Automated Trading,²⁸ the Commission’s proposal is unprecedented among government agencies and potentially violates source code owners’ due process and property rights.²⁹</p> <p>Moreover, the CFTC has offered no compelling reason to justify having such broad domain over critically sensitive intellectual property or putting this information at increased risk of misappropriation. As we have previously explained,³⁰ FIA believes that there can be little, if any, practical benefit to the CFTC having broad access rights to Algorithmic Trading Source Code as contemplated under proposed Rule 1.84 given Algorithmic Trading Source Code’s inherent complexity and the CFTC’s limited resources.</p> <p>In light of the irreparable harm that could result if Algorithmic Trading Source Code is not protected from improper disclosure, we argued, and continue to maintain, that this intellectual property should only be made available to the government under the most limited circumstances and with the strictest controls to protect the information against disclosure and misappropriation. Neither the CFTC nor any other government agency should be able to access Algorithmic Trading Source Code without making a reasonable showing of cause and obtaining a subpoena.</p>
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²⁵ See, e.g., Industry Comment Letter at 6.

²⁶ http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1762&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1.

²⁷ <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/transcript061016.pdf>

²⁸ <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement110416>

²⁹ See generally FIA Comment Letter at 46 – 56 and cases cited therein as authority.

³⁰ FIA Comment Letter at 46-48.

The enhanced special call procedures in proposed Rule 1.84 do not adequately address our concerns. The Supplemental NPRM seeks to address the concerns of the commenters by proposing a new Rule 1.84, which provides that Algorithmic Trading Source Code may be requested by means of a special call authorized by the Commission (“Enhanced Special Call”).³¹ We appreciate the Commission’s efforts to offer additional safeguards against unnecessary demands for disclosure of intellectual property. Nonetheless, the Enhanced Special Call process does not provide the protections available to market participants when a subpoena is required. For all of the same reasons we have provided in our previous response, therefore, we strongly oppose it.³²

The Enhanced Special Call procedure offers no additional protections to Algorithmic Trading Source Code once provided to the CFTC, potentially exposing this most valuable intellectual property to being shared with third parties or made more vulnerable to hackers. Moreover, the proposal puts no limit on the authority to share this information within the CFTC or, more troubling, outside of the CFTC, if authorized by an act, regulation, or memorandum of understanding.³³

In the Supplemental NPRM, the Commission has posited that, in executing the Enhanced Special Call, the Division of Market Oversight (“Division”) could specify further procedures to help ensure the security of the records provided. For example, the Division could specify the means by which it will access Algorithmic Trading Source Code or other records required by the Enhanced Special Call, including on-site inspection at the facilities of the AT Person, or require that records provided to the Commission be maintained on secure storage media or on computers lacking network connectivity or that records be transferred to secure Commission systems with controlled access. All such protections would be welcomed and, if the Commission elects to go forward with the rule, we recommend that safeguards to help ensure the security of any Algorithmic Trading Source Code provided to the CFTC be formally included in the rule in order to be legally binding on the Commission.

It remains our view that in the absence of a voluntary production of Algorithmic Trading Source Code from an AT Person subject to agreed restrictions, the CFTC or DOJ should be required to obtain such Algorithmic Trading Source Code through a validly issued subpoena. The subpoena process provides a clear legal route for a source code owner to challenge the production of source code or to seek and obtain

³¹ The Commission would also retain its authority to issue a subpoena, in accordance with the procedures set out in Part 11 of the CFTC’s rules.

³² FIA Comment Letter Attachment A at 46-56.

³³ Such third parties may include consultants hired by the Commission to review the source code where the necessary expertise does not exist within the Commission, personnel within the CFTC other than the DMO including Commission IT staff responsible for administering the systems on which the source code resides. Moreover, under the Commodity Exchange Act (“CEA”), the CFTC may potentially furnish any information in its possession to Congress, as well as a wide-range of domestic and foreign governments and agencies, including any department or agency of the US, any department or agency of any state or any political subdivision thereof, any foreign futures authority, or any department or agency of any foreign government or any political subdivision thereof, subject to certain conditions. *See* CEA §§ 8(a)(1) and 8(e).

legally enforceable protections (*e.g.*, a protective order) for sensitive property.

This is particularly so because Algorithmic Trading Source Code provided to the Commission under Regulation AT would likely be considered a “record” under the FRA. The FRA broadly defines “records” to include any recorded information³⁴ made or received by a federal agency under federal law or in connection with public business, which the agency preserves or believes is appropriate for preservation as evidence of the “organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government, or because of the informational value of the data in the record.”³⁵ Once source code is provided to the Commission staff, therefore, it may not be destroyed except as provided in the rules of the National Archives and Records Administration or as may be provided by court order.³⁶

We appreciate, as the Commission notes in the Supplemental NPRM and as the procedures set out in the Commission’s Part 11 Rules clearly contemplate, that subpoenas are typically issued “in the course of a particular investigation.” We respectfully submit there is no reason why the Commission should not, or cannot, adequately protect Algorithmic Trading Source Code by requiring issuance of a subpoena for its production. Certainly, we are aware of no provision of the CEA or other law that would prevent the Commission from adopting a procedure comparable to Part 11 with respect to Algorithmic Trading Source Code and related records.³⁷ To the contrary, we believe the Commission has ample authority under Section 8a(5) of the CEA to do just that.³⁸

We also understand that the Commission “believes it is important to distinguish investigatory proceedings from access to records by DMO in connection with market surveillance and related work.”

Nonetheless, we fail to see how the presence or absence of a subpoena is essential to drawing this distinction. The Commission can require a subpoena in both circumstances and still make its purpose clear in other, more straightforward ways.

Proposed Rule 1.84 is further flawed because it does not provide that Algorithmic Trading Source Code is not subject to Rule 1.31. We understand that the Commission intends that a market participant’s obligations with respect to

³⁴ The term “recorded information” includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form. 44 U.S.C. § 3301(a)(3).

³⁵ *Id.* § 3301(a)(1).

³⁶ 36 C.F.R. § 1226.14.

³⁷ We do not view the provisions of CEA Section 6(c)(5), which authorize the Commission to issue subpoenas in connection with any investigation or proceeding under the CEA, as limiting the purposes for which a subpoena may be issued. Rather, this provision merely confirms the Commission’s authority to issue subpoenas for the specific purposes set out in that section.

³⁸ CEA Section 8a(5) authorizes the Commission “to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this Act.”

the maintenance and production of Algorithmic Trading Source Code and related records be governed exclusively by proposed Rule 1.84, and not by Rule 1.31.³⁹ In doing so, the Commission has acknowledged that Algorithmic Trading Source Code is a unique asset and should not, and cannot, be treated in the same manner as “ordinary” books and records.

However, proposed Rule 1.84 does not expressly provide that it will be the sole means by which the Commission can gain access to Algorithmic Trading Source Code and related records, nor has the Commission proposed to amend Rule 1.31 to exclude from its requirements those records required to be maintained under Rule 1.84. Therefore, proposed Regulation AT prohibits neither the Commission nor the DOJ from requesting this information under Rule 1.31.

The Commission’s recordkeeping requirements should not extend to logs or log files. FIA strongly opposes the proposed expansion of the Regulation AT recordkeeping requirements to include any logs or log files generated by an AT Person in the ordinary course of business that record the activity of the AT Person’s Algorithmic Trading system. For some AT Persons, this requirement will generate enormous amounts of data that will need to be stored for five years. As a practical matter, we expect the Commission will be able to do very little with this data, and we question whether the very limited benefit justifies the significant intellectual property risks and material retention costs.

The Commission has not defined the term “system.” We appreciate that the newly proposed definition of Algorithmic Trading Source Code is in line with the definition of source code commonly used by the technology industry but are concerned that the Commission has introduced ambiguity by referring to the source code of an “Algorithmic Trading system.” By including “system” in the proposed language, but not defining it, the Supplemental NPRM implies that all aspects of an Algorithmic Trading system’s source code are captured by this requirement, including those aspects that are not directly responsible for the act of Algorithmic Trading. These auxiliary aspects of an Algorithmic Trading system’s source code should not be included in the requirements in proposed Rule 1.84.⁴⁰

³⁹ “[A]ccess to Algorithmic Trading Source Code would not be governed by Rule 1.31.” 81 Fed. Reg. 85334, 85346 (Nov. 25, 2016).

⁴⁰ Examples of such source code include source code responsible for:

- Messaging functionality that passes data (of virtually any variety) from one system component to another;
- Rendering information onto a computer screen via a User Interface;
- Interfacing with non-exchange based external data—*e.g.*, databases;
- Integrating with a firm’s operational processes—*e.g.*, back-office; reference data, compliance;
- Providing system diagnostics;
- Enforcing system security requirements;
- Portfolio risk management (as opposed to automated trading system risk controls);
- Interacting with and configuring system hardware and operation systems and
- Providing auxiliary mechanisms such as logging, thread management, and memory management.

15	Please comment on whether, through Supplemental proposed § 1.84, the Commission has appropriately balanced its responsibility to oversee markets and market participants with the privacy and confidentiality concerns that market participants have raised with respect to access to Algorithmic Trading Source Code.
Response	<p>We do not believe that proposed Rule 1.84 appropriately balances the CFTC’s responsibilities with the privacy and confidentiality concerns of market participants. The Enhanced Special Call procedure offers no additional protections to Algorithmic Trading Source Code once provided to the CFTC, potentially exposing this most valuable intellectual property to being shared with third parties or made more vulnerable to hackers.</p> <p>It remains our view that, in the absence of a voluntary production of Algorithmic Trading Source Code from an AT Person subject to agreed restrictions, the CFTC or DOJ should be required to obtain such Algorithmic Trading Source Code through a validly issued subpoena.</p>
16	Please comment on the Commission’s determination to obtain access to Algorithmic Trading Source Code via special call, rather than have such access be governed by § 1.31.
Response	See response to Question 15. In addition, as we noted above, proposed Rule 1.84 does not expressly provide that it will be the sole means by which the Commission can gain access to Algorithmic Trading Source Code and related records, nor has the Commission proposed to amend Rule 1.31 to exclude from its requirements those records required to be maintained under Rule 1.84. Therefore, proposed Regulation AT prohibits neither the Commission nor the DOJ from requesting this information under Rule 1.31.
17	Is the definition of “Algorithmic Trading Source Code” sufficiently clear to allow AT Persons to comply with the recordkeeping requirements in Supplemental proposed § 1.84? Which, if any, components of Algorithmic Trading systems should be added to the definition of Algorithmic Trading Source Code? Which, if any, should be excluded?
Response	<p>No. Although we appreciate that the newly proposed definition of Algorithmic Trading Source Code is in line with the definition of source code commonly used by the technology industry, the Commission has introduced ambiguity by referring to the source code of an “Algorithmic Trading system.”</p> <p>By including “system” in the proposed language, but not defining it, the Supplemental NPRM implies that all aspects of an Algorithmic Trading system’s source code are captured by this requirement, including those aspects that are not directly responsible for the act of Algorithmic Trading. These auxiliary aspects of an Algorithmic Trading system’s source code should not be included in the requirements in proposed Rule 1.84. We refer the Commission to the proposed</p>

	definition of Algorithmic Trading Source Code in the Industry Comment Letter in connection with the Roundtable. ⁴¹
18	Are log files described in sufficient detail in the Supplemental NPRM? Please explain why or why not. (PG 61)
Response	Log files are adequately described; however, they should not be included in the records required to be retained. For some AT Persons this requirement will generate enormous amounts of data that will need to be stored for five years. As a practical matter, we expect the Commission will be able to do very little with this data, and we question whether the very limited benefit justifies the significant intellectual property risks and material retention costs.
19	The NPRM's Question 131 (NPRM at 78913) sought comment on NPRM proposed § 1.81(a)'s standards for the development and testing of Algorithmic Trading systems and procedures, including requirements for AT Persons to test all Algorithmic Trading code and related systems and any changes to such code and systems prior to their implementation. The Commission renews that question here as to Supplemental proposed § 1.84(a). Are any of the requirements of Supplemental proposed § 1.84(a) not already followed by the majority of market participants that would be subject to § 1.84(a) (or some particular segment of market participants), and if so, how much will it cost for a market participant to comply with such requirement(s).
Response	We believe the records, with the exception of log files, are generally retained as proposed in Rule 1.84(a). The costs of maintaining log files for five years will be significant. (See our response to Question 18.)
20	If a firm uses FPGA or a similar technology, how would it record the design of the programming?
Response	Firms may record FPGA programming in many different ways, including those similar to the source code of non-FPGA based technology. However, any obligation to record the design of the programming should be principles-based and not specify how the design should be recorded.
21	How do firms store or record configurations and parameters that impact their trading system? For example, are these components stored or recorded in their Algorithmic Trading Source Code or log files?
Response	Firms may store a record of such configurations in many different ways including, but not limited to, within Algorithmic Trading Source Code or log files. Typically, the manner in which such records are stored depends on a firm's unique technology solutions and operational division of responsibilities.

⁴¹ Industry Comment Letter at 9-10.

22	If a firm uses a chip or FPGA as a part of its ATS, how does it describe the records?
Response	Firms typically log the actions taken by FPGAs in a manner similar to actions taken by non-FPGA-based systems. Nonetheless, the design of such logging functionality is commonly dictated by a number of factors, including, but not limited to, a firm's unique technology solutions and operational division of responsibilities. The method for describing the record should not be prescribed as part of a regulation.

IV. Testing, Monitoring and Recordkeeping Requirements in the Context of Third-Party Providers including Questions 23-26

<p>Comments</p>	<p>The Commission should defer taking final action on Rules 1.81, 1.84 and 1.85 until it has an opportunity to consult further with the industry and other interested parties to develop principles-based rules, which will allow for changes in practice and eliminate unnecessary costs and operational burdens.</p> <p>This section of Appendix A addresses Questions 23-26 relating to testing, monitoring and recordkeeping requirements with respect to third-party software providers.</p> <p>The provisions of proposed Rule 1.81 establishing standards for the development, testing and monitoring of Algorithmic Trading systems elicited considerable comment from FIA and other commenters. Among other concerns, we noted that the proposed rule does not sufficiently differentiate between an Algorithmic Trading system designed by an AT Person and one designed and licensed by a third party and imposes the same obligations on AT Persons for both types of systems. Moreover, in cases of third-party systems, licensing agreements or organizational barriers may prevent market participants from complying with the testing and monitoring requirements.</p> <p>Proposed Rule 1.85 seeks to address many of the identified concerns by allowing AT Persons that use third-party Algorithmic Trading systems to comply with the provisions of Rule 1.81, as well as the requirements of proposed Rule 1.84 relating to the maintenance and production of Algorithmic Trading Source Code and related records, by obtaining a certification from the third party that the relevant system or component meets applicable regulations. The AT Person must conduct due diligence to reasonably determine the accuracy and sufficiency of the certification.</p> <p>We are pleased that the Commission has sought to address the issues arising from the use of third-party systems. Nonetheless, we are concerned that proposed Rule 1.85 introduces a level of complexity and uncertainty - explained in greater detail below - that makes it unworkable. For these reasons, we urge the Commission to defer taking final action on Rules 1.81, 1.84 and 1.85 until it has an opportunity to consult further with the industry and other interested parties to develop principles-based rules, which will allow for changes in practice and eliminate unnecessary costs and operational burdens due to the current proposal.</p> <p>The certification requirement presents a number of challenges to both AT Persons and third-party independent software vendors (“ISVs”) owing to the numerous ways in which AT Persons use third-party software and integrate it into their systems. Depending on the sophistication of the market participant or its appetite for internal development, a participant may utilize third-party software that provides anything from low-level electronic messaging to comprehensive algorithmic trading, order management, order routing and risk management systems. Increasingly, systems are modular and may be integrated with internally developed systems or those provided by other vendors. Certain third-party systems may leverage software licensed and provided by yet another party that specializes in specific functionality. Moreover, the ISV down-the-line may itself rely on other</p>
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	<p>down-the-line licensees. It is not clear whether, and if so, how, the Supplemental NPRM’s certification requirements will apply when AT Persons and other providers’ systems are so interconnected.</p> <p>The systems that fall within scope are not clear. Proposed Rule 1.85(a) provides that the AT Person should obtain a certification from the third party that the relevant system or component meets regulatory requirements. As noted above, however, an ISV may provide only part of the trading systems that fall into scope. This is especially true of an ISV that supplies components that allow trading systems to be built on top of those components. Such ISV may properly believe that its component is not a “relevant” component and, therefore, it has no need to provide a certification of compliance with the proposed rule.⁴² Moreover, an ISV may be hesitant to certify its compliance when it has no knowledge or control over how its components may interact with components provided by others.</p> <p>Identifying modifications that constitute a material change requiring certification under proposed Rule 1.85(b) presents similar challenges. All software development goes through regular review and change, with changes commonly implemented to add new features and fix issues with existing features. Some changes may be readily considered material, in that a function may be dramatically changed in how it works, while the software developer may not consider other changes material. If a change that was initially considered non-material (<i>i.e.</i>, straightforward or “run-of-the-mill”) adversely affects software functionality to the point where it may be considered material, an AT Person may subsequently be deemed to have violated the rule. Moreover, there may be instances where the third party makes material changes without the AT Person’s knowledge. In such circumstances, the AT Person would not even know that the requirement for a new certification was triggered.</p> <p>Negotiating new software licensing agreements and renegotiating existing agreements will be difficult and expensive. Separately, we note that the certification requirement, combined with the requirement that the AT Person remain responsible for compliance with the obligations set forth in proposed Rule 1.84, will require the parties to amend current software licensing agreements. Current software licenses typically include liability and indemnification clauses but almost certainly do not contemplate the requirements of Rule 1.84 or the appropriate allocation of responsibility. Negotiating these amendments will cause the parties to incur significant legal and other costs. -</p>
23	The Commission invites comment on all aspects of Supplemental proposed § 1.85.
Response	See our comments immediately above.

⁴² As discussed earlier, certain source code is not directly responsible for the act of Algorithmic Trading. *See*, fn. 40 and related text. The Commission should make clear that, at a minimum, such source code should not be subject to a certification requirement.

24	Should the requirements for AT Persons who develop their own systems and code differ from requirements imposed on AT Persons that use systems or components provided by a third party? If so, how should the requirements be different, while continuing to ensure a consistent baseline of effectiveness in the development and testing of ATSSs?
Response	The difficulty in devising a workable solution that adequately addresses the challenges of ensuring that such testing, monitoring and source code retention occurs when an electronic trading system, including an Algorithmic Trading system, is provided by an ISV, merits the delay of imposing any requirements until a practical principles-based solution can be developed that affords equivalent treatment to proprietarily developed and third-party developed electronic trading systems.
25	What specific steps should AT Persons take when conducting due diligence of the accuracy of a certification from a third party, as required by Supplemental proposed § 1.85? Should proposed § 1.85(c) provide greater detail with respect to such due diligence? For example, should due diligence be required to specifically include review of technical design information, testing protocols and test results, documented dialogue between staff of the AT Person and the third party, or other measures?
Response	FIA believes that the CFTC’s proposed certification requirements are not practical in light of the potential difficulty that ISVs will likely have in providing certifications when such ISVs themselves rely on down-the-line systems. To the extent the CFTC determines to implement a certification requirement, any required due diligence should be principles-based.
26	Supplemental proposed § 1.85(b) requires that the AT Person must obtain a certification each time there has been a material change to third-party provided systems or components. What is a reasonable estimate as to the average frequency of such material changes? Should the Commission base the certification requirement on another timing metric?
Response	<p>As discussed above, identifying modifications that constitute a material change requiring certification under proposed Rule 1.85(b) presents considerable challenges. All software development goes through regular review and change, with changes commonly implemented to add new features and fix issues with existing features. Some changes may be readily considered material, in that a function may be dramatically changed in how it works, while the software developer may not consider other changes material.</p> <p>It is difficult to estimate the frequency of such changes in any event, because third-party software providers may use different schedules for their software releases and may categorize many changes as non-material. Similarly, where third-party providers rely on other parties to provide specific functionality, a change within such a component may or may not be considered material.</p>

V. Changes to Overall Risk Control Framework including Questions 27-36

<p>Comments</p>	<p>This section of Appendix A responds to Questions 27-36, which principally relate to the overall risk control framework for AT Persons, FCMs and DCMs as set forth in proposed Rules 1.80, 1.82, 38.255 and 40.20.⁴³ As proposed by the CFTC in the NPRM, prescriptive pre-trade risk controls and other requirements, such as order cancellation systems, were required at three points in the trade execution chain for all Algorithmic Trades: at the AT Person, at the AT Person's clearing FCM and at the relevant DCM.</p> <p>In the FIA Comment Letter, FIA and other industry participants argued that all electronic trading – not just algorithmic trading – should be subject to principles-based pre-trade and other risk controls appropriate for each market participant's trading activity in order to mitigate market disruption caused by excessive messages and errant orders, and that such controls should not be duplicated in precisely the same manner across the trade execution chain. Moreover, we noted that the appropriate FCM in the trade execution chain to implement pre-trade risk controls was not the clearing FCM but rather the FCM that provided electronic access to its customers or its own trading. Finally, FIA argued that some of the recommended pre-trade and other risk controls that were recommended by the CFTC in the NPRM were too prescriptive and granular, and some – such as the maximum execution frequency per unit of time – were not controls that are typically used pre-trade, nor had previously been recommended by FIA when describing industry best practices.</p> <p>To address these concerns, the CFTC has proposed in the Supplemental NPRM that pre-trade and other risk controls should apply to all electronic trading and not just algorithmic trading and that such controls should be applied at only two points in the execution chain: (1) for AT Order Messages and Electronic Trading Order Messages placed by market participants defined as AT Persons, by the AT Person or the AT Person's executing FCM and by the relevant DCM, and (2) for Electronic Trading Order Messages placed by market participants not defined as AT Persons, by the participant's executing FCM and by the relevant DCM. The CFTC has also proposed to grant AT Persons, FCMs and DCMs greater flexibility to determine the level of granularity at which controls are set. FIA supports market participants having greater flexibility in the controls they employ.</p> <p>However, FIA continues to object to the creation of the designation as an AT Person (including potential registration as a New Floor Trader) for the purpose of requiring pre-trade risk controls as well as the prescriptive nature of some of the controls required to be instituted by FCMs and DCMs.</p> <p>The nature of trading, not the type of market participant, is relevant. To achieve its regulatory goals, the CFTC's program should focus on the type of</p>
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⁴³ We note that proposed Rules 1.82 and 38.255 do not affect a clearing FCM's obligations under Rule 1.73 to ensure that appropriate pre-trade risk controls are in place for its customers, whether or not such customers may be designated AT Persons.

	<p>trading rather than the type of market participant. Consequently, the CFTC was mistaken in originally proposing to establish pre-trade risk controls and other requirements exclusively for AT Persons as a class. FIA supports the application of pre-trade risk controls to all forms of Electronic Trading as well as the ability of market participants to delegate their pre-trade risk control obligations to an FCM when “it is technologically feasible.” The Supplemental NPRM recognizes that, even for AT Persons, one-size-fits-all approaches to pre-trade risk controls aimed to reduce the risk of a market place disruption do not work and that non-prescriptive principles that allow adaption “as appropriate” are best.</p> <p>Risk controls should be principles-based, not prescriptive. FIA wishes to reiterate, as it pointed out in its response to the NPRM, that a “maximum execution frequency throttle” does not serve a useful purpose as a pre-trade risk control and is not traditionally deployed as such. Similarly, we believe that “maximum order frequency” throttles adjustable at the participant-level are not typically deployed by FCMs and DCMs. Instead, order frequency levels should be monitored for trading over a specific time period and order activity stopped only in the event of excessive messaging at the time.</p> <p>Clarify Obligations Regarding Order Cancellation Features. The Supplemental NPRM requires FCMs to “make use” of order cancellation systems that provide the ability to immediately disengage Electronic Trading, among other features, as part of their pre-trade risk controls. As FIA previously has argued, order cancellation systems should be utilized only as a last-ditch measure, and not as a primary pre-trade risk control. FIA asks the Commission to confirm that a requirement to “make use” of such functionality only applies “when applicable” in the reasonable discretion of the FCM.</p> <p>Obligations of natural person monitors at FCMs should be clarified. The Supplemental NPRM requires each executing FCM to have policies and procedures reasonably designed to ensure that natural person monitors at the firm are “promptly alerted” when established pre-trade risk control parameters are breached, <i>e.g.</i>, a trader inadvertently places an order for 1,000 contracts when the traders limit is 100 contracts.⁴⁴ FIA believes this requirement should be eliminated for FCMs, as it has been eliminated for AT Persons in the Supplemental NPRM. In any case, this notification requirement is too prescriptive. At a minimum, an FCM should have discretion to determine which breaches should be “promptly” notified to a natural person, and which breaches are more suitable to an after-the-fact analysis. Moreover, the CFTC should make clear that such natural persons, as well as their FCMs, have the authority to respond to any breach as they reasonably determine to be appropriate, including not at all.</p>
27	<p>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.</p>

⁴⁴ To be clear, pre-trade risk control parameters are not breached when an order is rejected and, therefore, is not executed.

Response	As we have discussed previously, FIA believes that two levels of risk controls – suitably implemented by the appropriate parties – are adequate to mitigate the potential risks of electronic and algorithmic trading.
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?
Response	FIA supports discretion in the FCM’s use of various types of pre-trade risk controls. This may include the use of controls that are provided by the FCM itself, those provided by a third party that a customer of the FCM uses to access the market, or potentially those provided by the DCM for the FCM to use, as suggested in proposed Rule 38.255. Such controls should follow the same principles that FIA has advocated, which would make them substantially similar but not necessarily identical to those provided by a DCM. The FCM should then be able to choose whether such pre-trade risk controls are appropriate for the type of activity of its customer.
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?
Response	FIA supports granting FCMs discretion to use the Rule 38.255 risk controls. FIA notes that, in cases where the FCM is not facilitating direct market access to a DCM, the FCM may choose to employ additional risk controls that are more granular than the DCM’s pre-trade risk controls. FIA supports flexibility in allowing an FCM to determine where and how to deploy appropriate risk controls to meet its obligations under Rules 1.11, 1.73 and 1.82, as well as its own internal risk requirements.
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?
Response	FIA believes an FCM should have flexibility in determining where and how to deploy appropriate risk controls to meet its obligations under Rules 1.11, 1.73 and 1.82, as well as its own internal risk requirements.
31	With respect to the term “Electronic Trading,” should the definition exclude trading on a hybrid trade execution model, <i>i.e.</i> , one that includes non-electronic components?

Response	FIA believes pre-trade risk controls appropriate to Electronic Trading should apply to all electronic trading, even if it is a component of a so-called hybrid model.
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.
Response	FIA believes that mass quotes are actionable messages and, therefore, supports deployment of certain pre-trade controls such as order size limits and order price parameters to mass quotes. ⁴⁵ However, additional flexibility may be required in the case of message throttles and order cancellation systems. FIA believes that non-actionable messages such as requests for quotes or indications of interest should not be subject to the same level of control as 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” FCM 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?
Response	FIA believes the term “executing” FCM is clear.
34	<p>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.</p> <p>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?</p> <p>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?</p> <p>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?</p>
Response	FIA believes that an AT Person should be able to delegate its pre-trade risk control responsibilities under Rule 1.80 when it is appropriate to do so, based on the relationship between the AT Person and the FCM.

⁴⁵ “Mass quotes” allow authorized CME Globex customers to create and maintain a market on a large number of instruments belonging to the same product group code simultaneously.

	<p>The Commission does not need to require additional AT Person due diligence or certification when the AT Person has delegated controls to an FCM.</p> <p>It is not necessary for the Commission to allow delegation of an AT Person’s order cancellation requirements as typically an FCM would not be in an appropriate position to provide the order cancellation functionality required by an AT Person that needs to minimize its risk through immediate cancellation of working orders.</p>
35	<p>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.</p>
Response	<p>FIA agrees that this requirement should be eliminated.</p>
36	<p>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?</p>
Response	<p>FIA believes that DCMs already comply with this requirement.</p>

VI. Reporting and Recordkeeping Obligations including Question 37

<p>Comments</p>	<p>FIA supports the elimination of the requirement that AT Persons and FCMs file annual compliance reports with DCMs but requests that a separate certification requirement be eliminated for FCMs and swap dealers.</p> <p>This section of Appendix A addresses Question 37, which principally relates to the obligation of AT Persons and FCMs under the Supplemental NPRM to file annual certifications with DCMs that they comply with all requirements of Rules 1.80, 1.81 and 1.82, as applicable.</p> <p>FIA appreciates that the CFTC in the Supplemental NPRM has eliminated the requirement contained in the NPRM that AT Persons and FCMs file annual compliance reports with DCMs and that each DCM establish a program for effective review and evaluation of such reports. The CFTC’s proposal responds to the concerns that we and others expressed that the preparation of such reports by AT Persons and FCMs would be overly burdensome with no attendant benefits. We also pointed out that, for FCMs and swap dealers, the preparation of such reports would be redundant, as they are already obligated to prepare and file annual compliance reports under Rule 3.3(e). Moreover, DCMs would have no meaningful way to effectively assess the wide variety of policies and procedures they would receive from AT Persons in conjunction with such annual compliance reports, let alone the numerous snapshots of quantitative risk parameter settings.</p> <p>Instead, the CFTC now proposes that AT Persons and FCMs must prepare an annual certification attesting that the entity complies with its requirements under Rules 1.80, 1.81 and 1.82, as applicable, and file such certifications with the relevant DCM. DCMs would be required to establish a program “for effective periodic review” of AT Persons’ compliance with Rules 1.80 and 1.81 and FCMs’ adherence to Rule 1.82.</p> <p>Notwithstanding this substantial accommodation, FIA is disappointed that the CFTC has chosen to impose on FCMs and swap dealers an annual obligation to prepare and file a certification in light of their obligation to already prepare and certify an annual compliance report. FIA also questions the meaning and purpose of a new requirement on DCMs to require such “periodic reporting” from AT Persons and FCMs “as necessary” as part of their oversight program of electronic trading on their markets.</p> <p>Certification requirements are redundant for FCMs and swap dealers. Under Rule 3.3(e), FCMs and swap dealers are obligated to prepare and file an annual compliance report with the CFTC that requires them to identify the policies and procedures reasonably designed to ensure their adherence with applicable requirements under the Commodity Exchange Act and the Commission’s rules, assess the effectiveness of such policies and procedures, and make recommendations for improvement, among other components. Accordingly, FCMs and swaps dealers would, as part of their annual compliance reports, be obligated to assess their compliance with Rules 1.80, 1.81 and 1.82, as applicable, once adopted.</p>
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	It is redundant, therefore, for FCMs and swap dealers to also have to prepare a separate certification to DCMs regarding these rules.
37	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?
Response	FIA supports the elimination of the annual compliance report requirement. As discussed above and in both the FIA Comment Letter and the Industry Comment Letter, FIA believes that, to the extent the CFTC seeks assurance that AT Persons are following Regulation AT, an annual certification that the AT Person has complied with Rules 1.80, 1.81, and 1.82, as applicable, is a more appropriate and less burdensome method.

VII. Testing, Monitoring and Recordkeeping Requirements (Rule 1.81)

Comments	<p>Many previously articulated concerns with Rule 1.81 remained unaddressed.</p> <p>Although the Commission has addressed some of our concerns regarding proposed Rule 1.81 in proposed Rule 1.84, we are disappointed that the Commission has yet to address many of the concerns that were raised in the FIA Comment Letter.⁴⁶ Rule 1.81 remains overly prescriptive and unworkable. It attempts to impose rigid requirements for design, development, documentation, support, and change management procedures—each of which requires a significant amount of flexibility to best meet the needs of the organization and their unique operations and structure. Consequently, Rule 1.81 remains overly prescriptive and unworkable. The proposed rule, therefore, will have the adverse effect of creating, rather than mitigating, risk, and stifling the flexibility and innovation that we find currently in DCM conformance testing and oversight of trading system behavior as discussed above. As noted earlier, therefore, we encourage the Commission to defer taking final action on Rules 1.81 (and Rules 1.84 and 1.85), until it has an opportunity to consult further with the industry and other interested parties to develop principles-based rules, which will allow for changes in practice and eliminate unnecessary costs and operational burdens.</p> <p>The “reasonably designed” standard should be applied to each requirement under Rule 1.81(a)(1). We support the proposed changes to Rule 1.81(a)(1)(ii) that introduce a “reasonably designed” standard for tests and allow flexibility regarding the manner in which such tests are carried out by removing the requirement to test all changes “internally within the AT Person and on each DCM on which Algorithmic</p>
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⁴⁶ FIA Comment Letter at 9 and Attachment A at 57-78, *e.g.*:

- a. NPRM Rule 1.81(a)(1)(i) – FIA Comment Letter Attachment A at 60.
- b. NPRM Rule 1.81(a)(1)(ii) – FIA Comment Letter Attachment A at 60-62.
- c. NPRM Rule 1.81(a)(1)(iii) – FIA Comment Letter Attachment A at 62-63.
- d. NPRM Rule 1.81(a)(1)(iv) – FIA Comment Letter Attachment A at 63.
- e. NPRM Rule 1.81(a)(2) – FIA Comment Letter Attachment A at 63.
- f. NPRM Rule 1.81(b)(1) – FIA Comment Letter Attachment A at 63-65.
- g. NPRM Rule 1.81(b)(1)(i) – FIA Comment Letter Attachment A at 65.
- h. NPRM Rule 1.81(b)(1)(ii) – FIA Comment Letter Attachment A at 65-66.
- i. NPRM Rule 1.81(b)(1)(iii) – FIA Comment Letter Attachment A at 66-67.
- j. NPRM Rule 1.81(b)(1)(iv) – FIA Comment Letter Attachment A at 67.
- k. NPRM Rule 1.81(b)(2) – FIA Comment Letter Attachment A at 67.
- l. NPRM Rule 1.81(c)(1) – FIA Comment Letter Attachment A at 67-68.
- m. NPRM Rule 1.81(c)(2)(i) – FIA Comment Letter Attachment A at 68.
- n. NPRM Rule 1.81(c)(2)(ii) – FIA Comment Letter Attachment A at 68-69.
- o. NPRM Rule 1.81(c)(3) – FIA Comment Letter Attachment A at 69.
- p. NPRM Rule 1.81(d)(1) – FIA Comment Letter Attachment A at 69.
- q. NPRM Rule 1.81(d)(1)(i) – FIA Comment Letter Attachment A at 69-70.
- r. NPRM Rule 1.81(d)(1)(ii) – FIA Comment Letter Attachment A at 71.
- s. NPRM Rule 1.81(d)(1)(iii) – FIA Comment Letter Attachment A at 71.
- t. NPRM Rule 1.81(d)(2) – FIA Comment Letter Attachment A at 71.

Trading will occur.” This change will allow AT Persons the flexibility necessary to design effective tests and testing procedures based on the scope of the change in question.

We support Commission action on several matters still under consideration. In the Supplemental NPRM, the Commission highlights several aspects of the original proposal that are still under active consideration. We encourage the Commission to take action on several such matters.

- a) In addition to adding the welcomed flexibility to Rule 1.81(a)(1)(ii) described above, the Commission is considering further modifying Rule 1.81(a)(1)(ii) by adding a materiality standard. As described in the FIA Comment Letter,⁴⁷ we support the testing of any material change to an Algorithmic Trading system, but believe there are many immaterial changes to such systems that should not require testing as defined by Regulation AT. We support adding a materiality standard to Rule 1.81(a)(1)(ii) to address this concern.
- b) The Commission is considering language in the NPRM preamble that states the CFTC expects the natural person monitors required in Rule 1.81(b) “should [not] simultaneously be engaged in trading.” As described in the FIA Comment Letter,⁴⁸ FIA believes the Commission should eliminate language in the NPRM preamble regarding the CFTC’s expectations that the person monitoring an algorithm should not simultaneously be engaged in trading.
- c) The Commission is considering whether to eliminate in its entirety NPRM proposed Rule 1.81(c)(2)(ii), which provides that each AT Person must implement written policies and procedures requiring a plan of internal coordination and communication between compliance staff of the AT Person and staff of the AT Person responsible for Algorithmic Trading regarding Algorithmic Trading design, changes, testing, and controls, which plan should be designed to detect and prevent Algorithmic Trading Compliance Issues. As described in the FIA Comment Letter, the Commission should eliminate this requirement.⁴⁹

⁴⁷ FIA Comment Letter Attachment A at 61.

⁴⁸ FIA Comment Letter Attachment A at 63-65.

⁴⁹ FIA Comment Letter Attachment A at 68-69.

VIII. Definitions

<p>Comments</p>	<p>FIA supports the amendment of certain definitions to address additional concerns that FIA and other commenters raised in connection with the NPRM. Further, FIA requests that the CFTC define “Electronic Trading Disruption.”</p> <p>This section of Appendix A addresses question 38, which principally responds to the CFTC’s invitation to commentators to provide new or additional comments on any potential amendments, deferral or elimination of provisions proposed in the NPRM identified in the Supplemental NPRM.⁵⁰</p> <p>The definitions of Algorithmic Trading Compliance Issue and Algorithmic Trading Disruption should be revised. FIA understands that the CFTC is evaluating certain provisions introduced in the NPRM that have received extensive comment. Among other things, the CFTC indicated that it is considering limiting the definition of Algorithmic Trading Compliance Issue to violations of the CEA and CFTC rules, and eliminating references to breaches of an AT Person’s own internal requirements, the requirements of a clearing member, or the rules of any DCM on which it trades or those of an RFA. The CFTC is also considering adopting analogous amendments to the definition of Algorithmic Trading Disruption to limit such an event to disruptions of a marketplace and others’ ability to trade on such market. This would clarify that events originating within an AT Person are excluded from the scope of Algorithmic Trading Disruption unless they have an external impact. Likewise, the CFTC indicated it is also considering an amendment to the definition of Algorithmic Trading Event to exclude an AT Person’s violation of its own internal policies or a disruption of its own Algorithmic Trading. Additionally, the CFTC is considering adopting a number of enumerated additional amendments to its proposed NPRM. Although we have not seen the text of the intended revisions, the amendments that the Commission has suggested appear to respond to the criticisms that FIA and other commenters raised in connection with the NPRM.</p> <p>The definition of Algorithmic Trading should be revised to exclude certain automated routing systems. FIA continues to believe that the CFTC should amend the definition of Algorithmic Trading to exclude certain automated order routing systems because systems that act solely as a conduit to a DCM without any discretion should be outside the scope of the definition of Algorithmic Trading.</p> <p>The Commission should not use the phrase “Electronic Trading Disruption” without defining it. In numerous places within the Supplemental NPRM, specifically in proposed Rules 1.80(g), 1.82(a), 38.255 and 40.20, the CFTC references a “disruption associated with Electronic Trading” or “Electronic Trading disruption.” FIA believes that any rule using the phrase “Electronic Trading disruption” should have a specific definition of the phrase in order to ensure clarity of its meaning, consistent with FIA’s prior comments regarding the definition of Algorithmic Trading Disruption in the NPRM and the CFTC’s own apparent evolutionary thinking regarding that provision.⁵¹</p>
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⁵⁰ 81 Fed. Reg. 85334, 85364-66 (Nov. 25, 2017).

⁵¹ FIA Comment Letter Attachment A at 5-6 and 11.

	<p>In addition to these changes, we believe it is still imperative to address the concerns with these terms that we detailed in the FIA Comment Letter.⁵² In particular, we believe that a materiality threshold should be added to the definitions of an Algorithmic Trading Compliance Issue, an Algorithmic trading Disruption and an Algorithmic Trading Event. Further, the Commission should pay special attention to the use of the word “disrupt” in the context of Regulation AT, given its use by DCMs in other contexts.</p>
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⁵² FIA Comment Letter Attachment A at 5-6.