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Regulation Automated Trading (AT)
Supplemental Notice of Proposed Rulemaking (SN)¹

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The Institute for Agriculture and Trade Policy (“IATP”)² appreciates this opportunity to comment on the Commission’s SN to its Notice of Proposed Rulemaking (“NPRM”) for Automated Trading Systems (“ATS”). IATP commented on the NPRM³ and the Commission’s “Concept Release and System Safeguards for Automated Trading Environments” (“Concept Release”) in December 2013.⁴ Because the Commission requests comment on its SN proposal to modify the NPRM, we will try to limit our remarks to the proposed modifications and avoid repeating earlier comments on the NPRM. However, occasional reference to our prior comments may be required to provide context to our present concerns about the SN.

General comment

Whatever the final content of Regulation AT, it must be enforceable. Ordinarily, this requirement would be self-evident, but these are extraordinary times for U.S. regulators. If the final Regulation AT includes so many exemptions, exclusions and waivers as to be unenforceable with the Commission’s current and foreseeable level of resources, it would be better to allow industry Self-Regulatory Organizations to monitor the ATS activities of its members, guided by the high-level principles that have been bruited as a substitute for regulation.

If industry self-regulation fails to prevent ATS mediated misconduct, the Commission could write a robust Regulation AT that could be enforced with the Commission’s current level of resources and hopefully, with the cooperation of a chastened industry. However, as Professor Anat Admati recently noted, “There are enormous rates of recidivism in corporate misconduct. Paying a fine need not lead to significant change.”⁵

The Commission’s director of enforcement during the Obama administration said that the Commission did not have the financial, personnel or computer infrastructure required to investigate trade data signs of a “massive amount of misconduct” in futures, options and swaps markets.⁶ The Congressional majority is very unlikely to provide adequate resources

to enforce Commission rules, as it carries out a widespread War on Regulation.⁷ As a result, the Commission must enforce its rules efficiently, focusing its surveillance and enforcement on practices and actors whose misconduct not only violates Commission rules, but poses systemic risks to Designated Contract Markets (DCMs) and the broader financial system.

As Chairman Timothy Massad noted in his statement in support of the release of the SN, “more than 70 percent of trading in futures is automated,” (Federal Register (FR) Appendix 2, 85395). The Commission’s study of two years of futures contract data showed that “ATSs were presented in at least 38 percent of [agricultural] futures volume analyzed” (FR, Vol: 80, No. 42, December 17, 2013, p. 78826, footnote 6). Most of the Commission’s surveillance and enforcement activities very likely will concern ATS mediated transactions and trading strategies. For example, trader allegations about the front-running of commercial hedges in physical commodities by algorithmic traders could be a subject of Commission investigation and possible enforcement.⁸

A robust Regulation AT would increase the efficiency of Commission investigations into such allegations, for example, by requiring near real-time and comprehensive trade data reporting by registered AT Persons to expedite Commission data surveillance. The Commission has decided not to include High Frequency Trading specifically in Regulation AT. However, the increasing market share concentration among HFT firms that have become market makers⁹ will require that such firms register and report trade data as AT Persons. A robust Regulation AT would enable near real time reporting of their mammoth data flows. The final Regulation AT must facilitate access to algorithmic source codes to enable Commission staff to determine quickly whether misconduct had occurred, and, as necessary, to reconstruct how it had occurred, and to act quickly to prevent further damage to market participants by such misconduct.

The remainder of this comment addresses the following topics of proposed modifications in the SN: “Overview and Policy Rationale for [the] New Proposal; Proposed Definition of Direct Electronic Access; Algorithmic Trading Source Code; Testing, Monitoring and Recordkeeping Requirements in the Context of Third Party Providers; [Some aspects of] Changes to Overall Risk Control Framework; and Reporting and Recordkeeping Obligations.”

Overview and Policy Rationale for [the] New Proposal (responding to questions 1,2 and 9)

IATP agrees with the Commission’s new proposed approach to identifying who is to register as an AT Person, based in part on a straightforward quantitative threshold of aggregate average daily trading volume in all products traded on all electronic trading facilities of all DCMs. The main data threshold shortcoming of the Reg AT is that because it does not specifically address the intraday trade data characteristic of High Frequency Trading (HFT), the trading volume will capture only end of the day trade data reporting. Until the Commission writes a rule specific to HFT practices, strategies and data reporting, the Commission should subscribe to intraday trade reporting services¹⁰, to monitor more

comprehensively the aggregate average daily trading volume. Just as the HFT data services early distribution of trade data for a higher fee has created an uneven playing field in equities,¹¹ the CFTC may have to investigate whether certain AT Persons are the beneficiaries of advance release information.

IATP does not have a view regarding the specific number of trading volume, but we are confident that the Commission's use of daily audit trails of trades is a sound methodology, subject to the HFT caveat, for proposing its quantified threshold. (FR 85342) Whatever quantitative metric to define AT Person registration is adopted in the final Regulation AT, it is crucial that the Commission maintain the rationale that "the identification of AT Persons through the use of clear, numerical standards that can be calculated easily by market participants and are verifiable in the Commission's data" (FR 85340). Such an approach will enable both efficient compliance by market participants with AT Person registration requirements and efficient compliance verification by Commission staff.

The quantitative threshold approach is fair to market participants whose aggregate average daily of trade volume drops below the threshold for two six-month aggregation periods, allowing such participants to no longer be considered AT Persons, subject to the Commission's requirements of that designation. (FR 85342) The SN wisely proposes an anti-evasion provision to address market participant concerns that any quantitative threshold could be gamed to avoid AT Person registration. (FR, 85341)

Direct Electronic Access (DEA) (responding to question 14, FR 85346)

IATP agrees with the Commission's clarification of DEA to exclude from the DEA definition those transactions that originate with an oral or written communication from a natural person to a Futures Commission Merchant (FCM) that is subsequently transmitted electronically to a DCM. (FR 85346). The clarification will help render moot the claim by some industry commenters that Regulation AT will result in thousands of natural persons, such as farmers, being required to register as AT Persons. The SN improves the definition of DEA by clarifying that it applies it not only to trade orders but to order modifications and cancellations. (FR 85346) This improvement will ensure that Regulation AT will apply to ATS trading strategies that cancel most orders.

IATP agrees with Better Markets that a well specified definition of "routing" is crucial to the effective implementation of the DEA definition and hence of Regulation AT.¹² It is not clear to IATP how the Commission's proposed broadening of the DEA definition to anticipate future technological innovations in routing meets the Better Markets request to the Commission to defined "routing" within the DEA definition.

Algorithmic Trading Source Code (ATSC) (responding to questions 15 and 16)

IATP agrees with the Commission that to implement the Commodity Exchange Act, "it is imperative that the Commission have access to all information necessary for effective regulatory oversight, including market surveillance and maintaining the safety and soundness of markets." (FR 85347-85348) This information includes the Algorithmic

Trade Source Codes, whether proprietary of the AT Person or provided by third parties, that are the central nervous system of ATS. The Commission proposes in the SN to amend the NPRM to require a vote of the Commission to subpoena an ATSC from an AT Person in the event of market disruptions and price discovery failures (FR 85347), so that the staff can determine how the market disruption or price discovery failure occurred, and whether the ATSC was deployed in a way that violated regulations authorized under the CEA. IATP strongly supports this amendment.

The Commission also proposes in the SN to extend the CFTC's "special call" authority, following Commission approval, as an alternative way to obtaining an ATSC. (FR 85346) IATP supports this alternative approach to enable CFTC staff to expedite analysis of market disruptions and to prevent further ATSC mediated damage to market integrity. Commissioners, who might not agree on the terms of a subpoena, might agree that just as special calls have elicited from swap dealers identification of swap counterparties and data to reconstruct swaps market disruptions, a special call for an ATSC would expedite the reconstruction of ATS mediated market disruptions.

The Commission hopes enhancements to procedural protections in this amendment will allay industry concerns that Commission access to ATSCs will violate ATSC intellectual property and/or Constitutional protections of natural person's privacy. (FR 85349)¹³ Commissioner (now interim Chairman) Christopher Giancarlo, in his dissent to SN release, suggests that industry may mount a Constitutional challenge to the SN ATSC amendment, if finalized in Regulation AT, and that defending such a challenge would be a "a sad waste of American taxpayer money" by a CFTC already under-resourced. (FR 85398). Commissioner Giancarlo characterized the Commission's proposed access to the ATSC of an AT Person whose trading participated in market disruption or price discovery failure as "a reckless step onto a slippery slope" and invited "commenters to propose less burdensome solutions" (FR 85398).

IATP finds it exceedingly difficult to imagine "less burdensome solutions" to enforcing the CEA's provisions on market disruption and price discovery failure in ATS dominated derivatives markets. For example, how would CFTC staff reconstruct efficiently and accurately one or more market disruptive events involving ATS without timely access to the ATSC? If the CFTC were forced, due to AT Person non-compliance with a subpoena or special call, to hire a computer security firm to decipher the ATSC, wouldn't industry sue the CFTC to stop such a technological work around to enforcing the CEA? Unless Congress amends the CEA to no longer require surveillance and enforcement actions, IATP believes that the "less burdensome solutions" to enforcement will violate the CEA's provisions on preventing the disruption of market integrity and price discovery.

Testing, Monitoring and Recordkeeping Requirements in the Context of Third Party Providers (responding to questions 23-25)

IATP agrees with the Commission that "the use of third-party systems should not exempt market participants from compliance with regulatory standards designed to increase the safety and soundness of Algorithmic Trading." (FR, 85350) However, at the Commission's

Roundtable on Regulation AT, market participants and third party providers of ATS said that third party providers did not provide AT Persons with the ATSCs. (FR 85351) Therefore, the ability of AT Persons to comply with Commission requirements to test, monitor and keep testing and monitoring records of the third party ATS that they adopt and/or adapt to their trading strategies is limited to the extent that they do not have access to the third-party ATSCs.

The Commission proposes indirect measures for the AT Person that demonstrate compliance with ATS testing and monitoring requirements, either through certification by the AT Person of the third party ATS compliance or through due diligence by the AT Person of the third-party provider's testing, monitoring and record keeping of the ATS. The non-exhaustive list of possible due diligence measures in footnote 146 (FR 85351) indicate that Commission staff can verify some of the indirect measures to demonstrate compliance.

However, IATP does not understand how these indirect measures to verify compliance would suffice if the Commission needed to access the ATSC testing and monitoring records of an AT Person as part of its investigation into the causes of market disrupting events. If the Commission cannot access the third party ATSC adopted and/or adapted by the AT Person, how could it reconstruct efficiently such events? Furthermore, if AT Persons wished to avoid facilitating Commission access to the ATSC, whether by means of a Commission approved subpoena or special call, why wouldn't they migrate all ATSC to third parties, including those ATSC that the AT Person co-developed with the third party? IATP believes that the Commission must be able to access third party ATSC, including the ATSC testing and development data, to analyze efficiently and comprehensively the role that the ATSC deployed by an AT Person may have played in a market disruptive event.

[Some aspects of] Changes to Overall Risk Control Framework (responding to questions 27 and 33-35)

The Commission has been persuaded by industry commenters to reduce the three levels of pre-trade risk controls in the NPRM—AT Person, Futures Commission Merchants, and DCMs—to two, by giving AT Persons, under the SN, the option of delegating pre-trade risk controls to the FCMs. The reduction is intended to reduce redundancy in the application of pre-trade risk controls. (FR 85355). An answer to the Commission's question, "Will two levels of risk controls sufficiently prevent and reduce the potential risks of algorithmic and electronic trading?" depends on whether AT Persons and FCMs have the same pre-trade risk control designs, the same capacity to apply those controls and the same interests in doing so.

A recent analysis estimates that the number of FCMs has declined to a 14-year low. Fifty-five FCMs have client margins required by clearing houses in futures and options, while 19 FCMs clear swaps, as well as futures and options.¹⁴ One question for the Commission to consider before it finalizes the two-level pre-trade risk control proposal is whether and to what extent do the trading interests, strategies and capacities of the Commission estimated 120 AT Persons align with those of the FCMs, particularly if those FCMs also

register as AT Persons? If I am an AT Person, do I adopt the clearing FCM's risk controls to benefit from the FCM's clearing margin requirements? If so, will FCM risk controls become the default for most AT Persons before being subject to the DCM's risk control requirements? If AT Persons generally opt to adopt FCM risk controls, will such a trend reduce AT Person risk control innovation?

The Commission responds to such questions in the SN by distinguishing between the executing and clearing functions of FCMs and to specify which risk controls are best applied by an executing FCM and which best applied by a clearing FCM. (FR 85360) IATP supports this distinction because it clarifies the phase of trading during which risk controls are most effectively supplied. However, unless an AT Person opts to delegate application of risk controls to one FCM and to clear through a different FCM, the AT Person is likely to default to the executing FCM's risk controls if it also wants to clear its trades on that FCM. The lack of incentive for AT Person risk control innovation remains, notwithstanding the "executing FCM" clarification.

Contrary to the Chicago Mercantile Exchange view that pre-trade risk controls should only aim to mitigate Algorithmic Trade Disruption, IATP does not agree that the Commission's objective to both prevent and mitigate such disruption is inconsistent. CME believes, "it is impossible to prevent every possible disruption caused by algorithmic trading" (FR 85357), and mitigation of disruption should be the sole objective of pre-trade risk controls. IATP supports the Commission's standard of aiming to prevent disruption whenever possible, and to mitigate further damage to market integrity whenever risk controls fail and it becomes necessary for the Commission to reconstruct disruptive events and deliberate on what other measures might prevent future disruptions. If the Commission does not aim to prevent market disruption, Regulation AT is limited to after the fact damage control.

IATP agrees with the Commission's proposal in the SN "so that the risk control and order cancellation provisions applicable to AT Persons, FCMs, and DCMs now apply to Electronic Trading, rather than only to Algorithmic Trading." (FR 85356) We also support the Commission's proposal that "AT Persons also apply pre-trade risk controls to their Electronic Trading Order Messages." If finalized, the proposed amendment will apply to a broader array of current and future electronic trading methodologies than those characterized by algorithmic strategies.

However, IATP does not agree with the SN proposal that "AT Persons would no longer be required to notify their clearing member and DCM of their intended use of Algorithmic Trading" (FR 85360). Because risk controls and order cancellation provisions would apply to a broader class of trading techniques under the SN does not mean that clearing members and DCMs would not benefit from advanced notice of the intended use of Algorithmic Trading strategies. Such advanced notice could help the Commission reconstruct market disruptions more efficiently with the help of clearing member and DCM knowledge about a change in trading patterns that might be traced back to use of an Algorithmic Trading strategy. Not requiring advanced notice of the intended use of Algorithmic Trading will reduce very slightly the regulatory burden on AT Persons. Removing that advance notice requirement will substantially increase the regulatory burden on clearing members and

DCMs to assist the Commission in ensuring the safety and soundness of derivatives markets.

The Commission has framed question 34 a) in terms of the technological feasibility of AT Person delegation of pre-trade risks controls to FCMs. Question 34 b) is framed in terms of liability, since the SN asks, “Should the Commission require the AT Person to conduct due diligence or obtain a certification to ensure that the FCM is implementing sufficient controls?” Taken together, the two questions point out that who applies pre-trade risk controls is not simply a matter of technological feasibility nor of avoiding redundancy of application. Rather the AT Person who delegates pre-trade risk controls to a FCM still assumes some liability for any failure of FCM pre-trade risk controls, even if the AT Person has done due diligence or obtained a certificate about the sufficiency of FCM risk controls, relative to the risks of the AT Person’s electronic trading strategy.

Because we cannot assume that the AT Person and the executing FCM share the same objectives in the design and use of risk controls, IATP believes that the NPRM approach to three level pre-trade risks controls is preferable to the two-level approach of the SN. If the Commission finalizes Regulation AT with a two-level approach to pre-trade risk control, it should require the AT Person do perform due diligence about the sufficiency of the executing FCM re-trade risk controls relative to AT Person trading strategy and objectives. IATP does not believe that AT Persons should be able to delegate to the FCM other obligations, such as order cancellation, even if it is technologically feasible. Order cancellation ratios are part of ATS strategy, particularly among HFT firms, and AT Persons should remain responsible for their execution.

Reporting and Recordkeeping Obligations (Responding to question 37)

In response to industry comments that NPRM reporting and record keeping obligations were “overly burdensome” and would do little to “mitigate the risks of Algorithmic Trading,” the Commission proposes to reduce the reporting and record keeping requirements for AT Persons. In response to industry comments,

the Commission has eliminated the annual compliance reports requirement; retained the recordkeeping requirements; and changed the DCM annual compliance report review program to a more general program for review of AT Person and FCM compliance with §§ 1.80, 1.81 and 1.82. The Commission further proposes requiring DCMs to mandate that AT Persons and executing FCMs provide DCMs with an annual certification attesting that the AT Person or FCM complies with the requirements of §§ 1.80, 1.81, and 1.82, as applicable. (FR 85362)

IATP regrets that the Commission has reduced AT Person reporting requirements in exchange for attestations of AT Person or FCM compliance with DCM requirements.

Indeed, industry “commenters questioned the technical capability of DCMs to perform a meaningful review of AT Persons’ reports or to assess whether the quantitative settings or calibrations of any AT Person’s controls are sufficient” (FR 85363) On the other hand, “ICE [further] commented that the compliance reports are unnecessary, because “DCMs have implemented comprehensive market surveillance and regulation programs that

include automated reports and alerts designed to identify instances of aberrant or abnormal order or trade activity. These programs are already effective at identifying specific events of concern that involve Algorithmic Trading.” (FR 85363) So which will it be? DCMs are incapable of understanding AT Person risk control calibrations or DCMs are so competent in their evaluation of AT Person data that they can alert the Commission to market disruption driven by Algorithmic Trading? The Commission should not reward the inconsistent, even contradictory, industry comments with reduced reporting requirements for a burgeoning industry.

If DCMs, the last line of pre-trade risk control defense, are incapable of understanding whether AT Person risk controls comply with DCM requirements for an annual DCM compliance report that the Commission would review, why would DCMs be any more capable of understanding AT Person reports to produce an annual certificate attesting AT Person compliance? What is the validity of such a certificate to the Commission, when market participants characterize the DCMs as being incompetent to understand AT Person pre-trade risk controls and their application?

As far as IATP can tell, parsing contradictory industry comments, those commenters are seeking to minimize their reporting and record keeping obligations, not because fulfillment of those obligations are superfluous to reducing risk to markets increasing dominated by ATS mediated trading, but because they are seeking to reduce their compliance costs. As ever, industry commenters complain that the Commission has underestimated their compliance costs for reporting that one industry group characterized as “ineffective, unnecessary, and redundant with other requirements to which registrants are subject.” (FR 85363) The commenters do not specify these alleged redundancies nor do they have anything to say about the benefits to market integrity of reporting the efficacy of pre- and post-trade risk controls in ATS mediated markets.

Better Markets’ authoritative report on cost benefit analysis at the Securities and Exchange Commission shows industry’s routine over-estimating of compliance costs with equity related rules.¹⁵ As the Commission deliberates on finalizing Regulation AT, it should consider whether it will be possible to implement efficiently its’ Memorandum of Understanding with the Office of Information and Regulatory Affairs on cost benefit analysis¹⁶ with the fragmented documents to be produced under the proposed record keeping provisions of the SN. If Regulation AT reporting and record keeping requirements of are driven by industry complaints about costs, and allegations about the futility of DCM reporting based on “stale qualitative risk parameter settings” (FR 85364), the Commission should prepare its surveillance and enforcement division to reconstruct the next ATS mediated market disruption slowly and incompletely using fragmented records that industry and its academic allies will dismiss as anecdotal.

Conclusion

IATP thanks the Commission for considering our comments as it begins to finalize Regulation AT. We hope that a robust and well enforced regulation will prevent ATS mediated market manipulation and excessive speculation. Regardless of whether the

market disruptions of an algo bot can elude the legal standards of intent to manipulate, the damage to the U.S. economy of an unenforceable regulation of ATS will surely not be in the realm of science fiction.¹⁷

¹ <http://www.cftc.gov/idc/groups/public/@Irfederalregister/documents/file/2016-27250c.pdf>

² IATP is a nonprofit, 501(c)(3) nongovernmental organization, headquartered in Minneapolis, Minn., with offices in Washington, D.C. and Berlin, Germany. IATP has participated in the Commodity Markets Oversight Coalition (CMOC) since 2009, and the Derivatives Task Force of Americans for Financial Reform since 2010. IATP has submitted several comments on CFTC rulemaking, and on consultation papers of the International Organization of Securities Commissions, the European Securities and Markets Authority, and the European Commission's Directorate General for Internal Markets.

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<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60769&SearchText=Institute%20for%20Agriculture%20and%20Trade%20Policy>

⁴ <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59442&SearchText=>

⁵ Cited in Telis Demos, "Banks Seek Change to a Risk Measure," *Wall Street Journal*, May 1, 2017.

⁶ Karen Freifeld, "Misconduct rife in derivatives—ex-CFTC enforcement chief," Reuters, March 24, 2017. <http://www.reuters.com/article/us-cftc-enforcement-goelman-idUSKBN16V1D0>

⁷ Rena Steinzor, "The War on Regulation," *The American Prospect*, April 17, 2017. <http://prospect.org/article/war-regulation-0>

⁸ E.g. Emiko Terazano, "Rise of the algos rattle commodity traders," *Financial Times*, November 3, 2016. <https://www.ft.com/content/ce5a74aa-a106-11e6-86d5-4e36b35c3550>

⁹ Phillip Stafford and Nicole Bullock, "Virtu and Citadel Securities go head to head in HFT," *Financial Times*, April 25, 2017. <https://www.ft.com/content/e1cb396e-29a7-11e7-bc4b-5528796fe35c>

¹⁰ "Thomson Reuters begins rollout of high-speed data feed," Reuters, October 17, 2016. <http://www.reuters.com/article/us-global-forex-data-idUSKBN12H1NO> and Euromoney Trade Data press release, March 14, 2017. <https://www.euromoneytradedata.com/news-events/news/article>

¹¹ Jonathan Rogers, Douglas Skinner and Sarah Zechman, "Run EDGAR Run: SEC Dissemination in a High Frequency World," Chicago Booth Research Paper No. 14-36. Last revised February 17, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513350

¹²

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60776&SearchText=Better%20Markets> at 4.

¹³ It may be worth footnoting that any Constitutional defense of privacy protection for AT Persons in a law suit will require courts, and eventually the Supreme Court, to determine that the government has no substantial interest in obtaining commercial data produced by an ATSC to enforce the Commodity

Exchange Act. The Supreme Court has defended as “free speech” non-consensual data mining of the privacy of natural persons by commercial entities. Venable LLP, “U.S. Supreme Court Strikes Down Law Restricting Data Mining for Marketing Purposes,” *Lexology*, October 3, 2011.

<http://www.lexology.com/library/detail.aspx?g=dd2373fa-b730-4f15-8e88-455785b39d06> Will the Court decide that such a “free speech” precedent overrides the government’s substantial interest in accessing ATSCs to prevent future ATS mediated market disruptions that involve transactions routed by the proprietary or third party ATSC of a registered AT Person?

¹⁴ Tod Skarecky, “FCM Rankings Q2 2016,” Clarus Financial Technology, August 17, 2016.
<https://www.clarusft.com/fcm-rankings-q2-2016/>

¹⁵ “Setting the Record Straight on Cost Benefit Analysis and Financial Reform at the SEC,” Better Markets Inc., July 30, 2012.
<http://www.bettermarkets.com/sites/default/files/documents/Setting%20The%20Record%20Straight.pdf>

¹⁶ Richard Revesz, “Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation,” Institute for Policy Integrity, New York University School of Law, February 2016, 22-26.
http://policyintegrity.org/files/publications/CBA_and_the_Structure_of_the_Administrative_State.pdf

¹⁷ Gregory Scopino, “Do Automated Trading Systems Dream of Manipulating Futures Contracts? Policing Markets for Improper Trading Practices by Algorithmic Robots,” *Florida Law Review*, Vol. 67, Issue 1, Article 5, (January 2016) 222-270.
<http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1223&context=flr>