

Congress of the United States
Washington, DC 20515

June 10, 2016

The Honorable Timothy Massad
Chairman Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

Dear Chairman Massad:

We write to express our shared interest in reducing risk and increasing transparency in automated trading, as described in the Commodity Futures Trading Commission's ("CFTC") proposed Regulation Automated Trading ("Regulation AT") rule, published in the Federal Register on December 17, 2015. However, we have concerns about the rule's source code provisions as they are currently written in § 1.81 – Standards for Development, Monitoring, and Compliance of Algorithmic Trading Systems – and urge you to amend them before finalizing this rule.

As you know, § 1.81 of the proposed rule takes the unprecedented step of requiring a wide array of market participants engaged in algorithmic trading ("AT Persons") to maintain a source code repository and make it available for inspection by the CFTC or the Department of Justice without a subpoena. The preamble to the rule proposal doesn't provide a direct justification for the source code repository requirements but indicates that the repository will be used to "manage source code access, persistence, copies of all code used in the production environment, and changes to such code (such source code repository must include an audit trail of material changes to source code that would allow [automated trading] Persons to determine, for each such material change: Who made it; when they made it; and the coding purpose of the change.)"

Source code is the highly sensitive intellectual property of AT Persons and many innovative American technology companies and should not be accessible by the Federal Government without proper legal protections. As one member of the CFTC's Technology Advisory Committee noted in comments on the rule: "The proposed requirement to turn over all valuable IP to the government as part of a simple document request is simply unprecedented and unreasonable. It violates standards of due process. The secret formula for Coca-Cola or the source codes for Google's search algorithms are not available on demand to regulators without a subpoena. A trading firm's source code is no different."

Like Coca-Cola, employees of automated trading firms with access to company secrets sign lengthy legal agreements protecting those secrets even beyond their employment. We are sympathetic to industry objections to allowing non-employees open access to source code without the added oversight and protections of a subpoena process.

We also share the concerns about the precedential value the rule could have if technology companies are forced to comply with this provision. Not only does that arrangement raise concerns about data security risks and the potential for abuse of access to sensitive information, but it also establishes a United States federal policy that could be copied by other agencies and impact how other countries define best practices. Just last year, after significant pressure from the private sector and the U.S. Government, China suspended a similar policy that would have required companies that sell computer equipment to Chinese banks to turn over source code. This hard fought victory for American, European and Japanese trade negotiators would be undermined by Regulation AT and cause our trading partners to question our commitment to abide by the same rules by which we ask others to play.

Further, the proposed regulation does not contain an estimate of the CFTC's proposed expenses to hire qualified developers to analyze the source code. Nor does it justify the benefit of assuming the liability and expense to maintain the security of a live source code repository worth billions of dollars once it is in the government's possession. This is troubling in light of feedback from industry participants that the source code requirements were a sudden development, despite open debate about other aspects of the regulation for the past two years.

While you testified before the House Committee on Agriculture that you are committed to ensuring that source code is preserved and available to the CFTC only when needed to reconstruct market events and only accessible using "the proper procedures", we question whether the proper security and due process safeguards are in place to prevent such information from being compromised or mishandled. Accordingly, we ask that you answer the following questions:

- 1) Why is it necessary for the CFTC or the Department of Justice to have access to AT Person source code without obtaining a subpoena?
- 2) In drafting Regulation AT, did you consider any alternatives to requiring "AT Persons" to maintain source code in a repository and make it available for inspection?
- 3) Why is the requirement in § 1.81 considered to be part of the normal books and records keeping and inspection requirements in § 1.31?
- 4) Which other U.S. Government agencies have you or CFTC staff consulted in the development of Regulation AT, specifically § 1.81?
- 5) What data security protocols and procedures do you have in place currently to ensure that source code could not be maliciously exploited? Would the implementation of Regulation AT, as currently written, require changes in such data security protocols and procedures?

Thank you for the opportunity to provide our comments on the proposed rule and for considering our questions posed above which we would like you to answer by June 26, 2016. We strongly encourage you to work with interested stakeholders to reach a reasonable accommodation on the proposed rule that strikes the appropriate balance between achieving the

goals which are described in the proposed rule while ensuring the physical and legal protections for algorithmic trading systems' source codes.

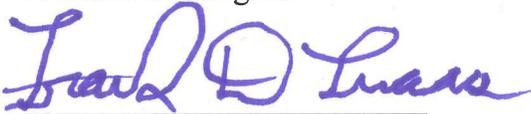
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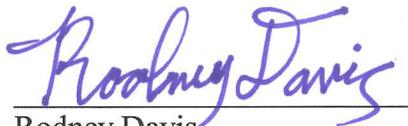
Sean P. Duffy
Member of Congress



Austin Scott
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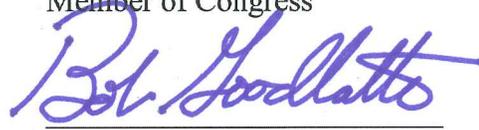
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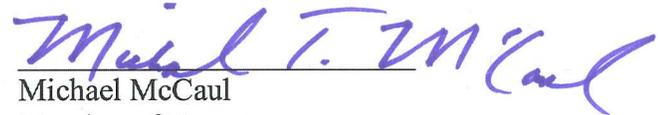
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