



May 17, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Proposed Interpretive Order – Antidisruptive Practices
(76 FR 1493, March 18, 2011)

Dear Mr. Stawick:

Better Markets, Inc.¹ appreciates the opportunity to comment on the above-captioned proposed interpretive order (the “Proposed Interpretive Order”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”), the purpose of which is to provide interpretive guidance regarding three statutory disruptive practices set forth in Section 747 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

Introduction

We commend the CFTC for the positions taken in the Proposed Interpretive Order and the reasoning behind these positions. Disruptive practices undercut the fundamental purposes which underlie the markets regulated by the CFTC: effective and reliable venues for producers and consumers to hedge price risk and discover information on prices. They can also put the worldwide economy in great peril because these markets are at the very center of derivatives transactions, instruments which are both a powerful vehicle for efficient business operations and instruments of uncapped danger. Under these circumstances, the markets must be constrained so that they produce “fair and equitable trading,” in the words of the Dodd-Frank Act.²

¹ Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

² The Proposed Interpretive Order is responsive, in part, to the advance notice of proposed rulemaking (the “ANPR”) issued by the CFTC (75 FR 67301, November 2, 2010) which requested comment from the public on nineteen questions related to antidisruptive practices and the provisions of Section 747 of the Dodd-Frank Act. Better Markets, Inc. filed a comment letter (the “January 3 Comment Letter”) in response to the ANPR on January 3, 2011 and reiterates each of the points made therein, including those made in response to the nineteen questions. A copy of that letter is attached for your convenience.

In particular, we support the following elements of the Proposed Interpretive Order which answered important questions considered in the ANPR:

- Commenters had asserted the position that spoofing would, by definition, be impossible in an electronic matching environment because bids and orders cannot be canceled once they are hit or lifted by a counterparty.³ The Proposed Interpretive Order appropriately does not adopt this reasoning.
- The Proposed Interpretive Order acknowledges that an order which is filled or partially filled can constitute spoofing behavior. The fact that it is filled or partially filled is not a “safe harbor.”
- The Proposed Interpretive Order interprets “closing period” to encompass any period when the daily settlement price is determined, not limiting it specifically to the end of daily trading.
- Intentional or reckless disregard for the orderly execution of transactions during the closing period is not limited to consummated transactions under the Proposed Interpretive Order.

In addition to these important and appropriate provisions, the Proposed Interpretive Order must be strengthened in several critical respects.

The Proposed Interpretive Order states that a “‘spoofing’ violation requires that a person intend to cancel a bid or an offer before execution...”⁴ Our January 3 Comment Letter describes practices which are generally associated with high-frequency and algorithmic traders. In particular, these traders often place large numbers of orders designed to move price levels or discover market intentions. They are virtually certain that all or a substantial portion of these orders will be canceled.

The Proposed Interpretive Order appears to provide that such behavior constitutes “spoofing.” The trader engaging in the practice described above intends to cancel multiple bids or orders which have been placed, although he or she might not know precisely which orders will be canceled. Clearly, under Section 747 of the Dodd-Frank Act, the described behavior is within the scope of prohibited activity. The Proposed Interpretive Order should make clear that this pattern constitutes “spoofing.”

We point out in the January 3 Comment Letter that, inherently, certain practices are intentionally or recklessly disruptive. The practices are commonly associated with high-frequency and algorithmic trading. Under the Proposed Interpretive Order, these activities in a given context could, in the future, be determined to be intentionally or recklessly disruptive. However, clarity that this would be the result is essential.

³ CFTC Technical Advisory Committee Roundtable, October 12, 2010.

⁴ Proposed Interpretive Order, Page 1497.

Many high-frequency and algorithmic trading practices provide minimal value to markets. In our January 3 Comment Letter, we urge the CFTC to distinguish between volume and liquidity, pointing out that high-frequency and algorithmic trading provides the former but rarely the latter. Instead, it is pointed out that these tactics pose great risk of catastrophic damage, epitomized by the "flash crash."

Based on these factors, the Proposed Interpretive Order should impose limits on order cancellation depending on the asset class (5 to 10 seconds was proposed in the January 3 Comment Letter), and a similar minimal period for holding an executed order.

In the January 3 Comment Letter, we point out that privileged access to data feeds is massively disruptive to the *fair and equitable trading* which is the standard articulated by Section 747 of the Dodd-Frank Act. If a SEF or DCM sells privileged access (which is by nature limited), the purchaser's motivation is clearly to gain an advantage over other traders. That is why they are willing to pay a price for access.

The question raised is: How can this be an activity which is fair and equitable? It must be an activity which is considered disruptive under the statute. The Proposed Interpretive Order must be modified to recognize this to be the case.

Conclusion

The Dodd-Frank Act clearly establishes a policy that markets must be fair and equitable and free of disruptive practices. The Proposed Interpretive Order greatly advances this policy. We hope that our suggestions assist the CFTC in advancing the policy even further.

Sincerely,



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