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September 9, 2015

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-0609

Re: Release No. 34-75693; File No. SR-BATS-2015-57  
Notice of Filing of a Proposed Rule Change, as modified by Amendment No. 1  
Thereto, to Adopt New Rule 8.17 to Provide a Process for an Expedited  
Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing on  
BATS Exchange, Inc.

Dear Mr. Fields:

The FIA Principal Traders Group (“FIA PTG”) appreciates the opportunity to comment on BATS Exchange, Inc.’s (“BATS” or the “Exchange”) proposal to adopt new rules to (1) prohibit layering and spoofing activity on the Exchange and (2) provide a process for expedited suspension proceedings (the “Proposal”).<sup>1</sup> While FIA PTG supports the overall objective of the Proposal, we believe that BATS should amend the proposed definitions of layering and spoofing to clarify that both offenses require a manipulative intent element.

FIA PTG is an association of more than 25 firms that trade their own capital on exchanges in futures, options and equities markets worldwide. Our member firms serve as a critical source of liquidity, allowing those who use the markets, including individual and institutional investors, to effectively manage their risks and investments. FIA PTG supports efforts designed to identify and prevent fraudulent and manipulative behavior and strategies that intentionally distort or disrupt the markets. The presence of competitive professional traders contributing to price discovery and the provision of liquidity is a hallmark of well-regulated markets. Those who seek to undermine markets by engaging in manipulative conduct do so to the detriment of all market participants.

We believe exchanges, in their role as self-regulatory organizations, should have effective tools to detect and deter abuses, as well as the authority to act quickly when they identify conduct that negatively and intentionally distorts their markets. Moreover,

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<sup>1</sup> Exchange Act Release 75693 (Aug. 13, 2015), 80 FR 50370 (Aug. 19, 2015).

in “certain obvious and uncomplicated cases of disruptive and manipulative behavior or cases where the potential harm to investors is so large” we agree “the Exchange should have the authority to … stop the behavior from continuing on the Exchange.”<sup>2</sup> Accordingly, FIA PTG supports proposed Rule 8.17 coupled with proposed Rule 12.15. Proposed Rule 12.15 would amend the Exchange’s rules to expressly prohibit layering and spoofing; and proposed Rule 8.17 would separately provide the Exchange with the authority to promptly initiate expedited suspension proceedings in the event the Exchange believes that it has sufficient proof that a violation of proposed Rule 12.15 has occurred and is ongoing.

While a suspension hearing is inherently an escalated proceeding that can materially impact a market participant, FIA PTG believes the Exchange’s investigation, notice and hearing processes described in connection with proposed Rule 8.17 are reasonable. Specifically, BATS explains that “[a]fter an initial investigation the Exchange would then contact the Member responsible for the orders that caused the activity to request an explanation of the activity as well as any additional relevant information, including the source of the activity.”<sup>3</sup> BATS further explains “[i]f the Exchange were to continue to see the same pattern from the same Member and the source of the activity is the same or has been previously identified as a frequent source of layering activity then the Exchange could initiate an expedited suspension proceeding....”<sup>4</sup> This process of investigation, notice to the member, and the initiation of an expedited suspension proceeding only after a subsequent continued pattern of disruptive activity, is reasonably designed and commensurate with the scope of the proposed rule, namely expeditiously preventing ongoing “obvious and uncomplicated cases of disruptive and manipulative behavior.”<sup>5</sup> FIA PTG suggests that BATS include this process as part of proposed Rule 8.17 or as part of interpretative guidance, or “FAQs”, issued in conjunction with implementation of the Rule.

FIA PTG agrees that BATS should provide proper context for the situations in which the Exchange proposes to utilize the proposed expedited suspension authority and include specific examples of types of disruptive and manipulative layering and spoofing as interpretive language to proposed Rule 8.17 as stated in the Proposal.<sup>6</sup> We believe that clarity with respect to the process and the specific details describing the disruptive and manipulative behavior eliminates any appearance of arbitrary action, thereby strengthening the effectiveness of the proposed rules and adherence to them.

In connection with proposed Rule 12.15, FIA PTG is also generally in agreement with the proposed definitions of disruptive and manipulative layering and spoofing activity set forth in the Proposal. Title VII of the Dodd-Frank Wall Street Reform and Consumer

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<sup>2</sup> See Proposal, *supra* note 1 at 3.

<sup>3</sup> *Id* at 12.

<sup>4</sup> *Id.*

<sup>5</sup> *Id* at 2.

<sup>6</sup> *Id* at 11-12.

Protection Act of 2010 (“Dodd-Frank Act”)<sup>7</sup>, which amended the “Prohibited Transactions” section of the Commodity Exchange Act (“CEA”) and added a new section entitled “Disruptive Practices,” was the first time Congress introduced the concept of spoofing without offering much color on the term, stating “[i]t shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that ... is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel the bid or offer before execution).”<sup>8</sup> In 2013, the Commodity Futures Trading Commission (“CFTC”) issued interpretive guidance on the anti-spoofing provision of the CEA, whereby it states a market participant must “act with some degree of intent, or scienter, beyond recklessness to engage in the ‘spoofing’ trading practices prohibited by CEA....”<sup>9</sup> Moreover, the CFTC stated it “does not interpret reckless trading, practices, or conduct as constituting a ‘spoofing’ violation” and “a spoofing violation will not occur when the person’s intent when cancelling a bid or offer before execution was to cancel such bid or offer as part of a legitimate, good-faith attempt to consummate a trade.”<sup>10</sup> The CFTC also provided “four non-exclusive examples of possible situations for when market participants are engaged in ‘spoofing’ behavior,’ including: (i) submitting or cancelling bids or offers to overload the quotation system of a registered entity, (ii) submitting or cancelling bids or offers to delay another person’s execution of trades, (iii) submitting or cancelling multiple bids or offers to create an appearance of false market depth, and (iv) submitting or canceling bids or offers with intent to create artificial price movements upwards or downwards.”<sup>11</sup>

Five years after the use of the term by Congress, there is still a high degree of uncertainty as to what exactly constitutes spoofing, layering and other forms of market abuse in both the equities and futures markets. FIA PTG applauds BATS for seeking to clarify these terms, in particular by identifying specific actions required as part of a “frequent pattern” of behavior. However, the omission of the element of “intent” from the proposed text of Rule 12.15 does raise a concern as intent is the cornerstone of existing disruptive trading rules.<sup>12</sup> The element of intent has historically been an important factor in sanctioning market participants for fraudulent and manipulative trading practices as it prevents

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<sup>7</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1913 (codified at 12 U.S.C. § 5301 (2012)).

<sup>8</sup> 7 U.S.C § 6c(a)(5)(C).

<sup>9</sup> 78 Fed. Reg. 31,890, 31,896 (2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See e.g., CME Rule 575(A) and CME Market Regulation Advisory Notice RA1405-5R, Disruptive Trading Practices Prohibited (Sept. 15, 2014) (“No person shall enter or cause to be entered an order with the intent, at the time of order entry, to cancel the order before execution or to modify the order to avoid execution.”); ICE Rule 4.02(l)(1)(A) (“In connection with the placement of any order or execution of any Transaction, it shall be a violation of the Rules for any Person to ... [enter] an order or market message, or cause an order or market message to be entered, with ... the intent to cancel the order before execution, or modify the order to avoid execution....”); and ICE Rule 4.02 FAQ (stating the following are not considered ‘spoofing’: (i) an “order, entered with the intent to execute a bona fide transaction, that is subsequently modified or cancelled due to a perceived change in circumstances” and (ii) an “unintentional, accidental, or ‘fat-finger’ order.”).

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legitimate, good faith actions from being wrongly penalized. For this reason, BATS should expressly include an intent element in its proposed Rule 12.15 definition of these prohibited practices, as BATS did in footnotes 6 and 7 of the proposing release.<sup>13</sup>

While we strongly believe that proposed Rule 12.15 should include an intent requirement when defining prohibited layering and spoofing conduct, the Exchange could amend proposed Rule 8.17 to require a lower burden of proof in expedited suspension proceedings to enable the Exchange to more quickly institute suspension proceedings where the pattern of abusive behavior is clear and harmful. By lowering its burden of proof solely for purposes of proposed Rule 8.17 determinations, the Exchange would still be able to institute a process to quickly put a stop to “obvious and uncomplicated” behavior that will address “only the most clear and serious types of layering and spoofing”<sup>14</sup> without drastically expanding the Exchange’s definition of prohibited layering and spoofing to include completely unintentional conduct.

If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Mary Ann Burns ([REDACTED]).

Respectfully,

FIA Principal Traders Group



Mary Ann Burns  
Chief Operating Officer  
FIA

cc:    Mary Jo White, Chairman  
         Luis A. Aguilar, Commissioner  
         Daniel M. Gallagher, Commissioner  
         Kara M. Stein, Commissioner  
         Michael S. Piwowar, Commissioner  
         Stephen Luparello, Director, Division of Trading & Markets  
         Eric Swanson, BATS Global Markets, Inc.

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<sup>13</sup> Without an intent requirement, Rule 12.15 could be construed to prohibit a broad range of legitimate conduct. This is particularly true of the layering definition. For example, the following sequence of ordinary course of trading events would appear to satisfy the layering definition: (1) a market maker displays a quote on the bid side of the market at any two levels; [(12.15(a))] (2) there is any change to the order book whatsoever; [(12.15(b))] (3) market maker displays a new quote on the offer side of the market; [(12.15(c))] (4) market maker’s offer trades; [(12.15(c))] and (5) market maker cancel’s one of its bids. [(12.15(d))].

<sup>14</sup> See Proposal, *supra* note 1 at 16.