

PAPERWORK REDUCTION ACT SUBMISSION

Rule 302

Supporting Statement

A. Justification

1. Necessity for Information Collection.

Regulation ATS sets forth a regulatory regime for “alternative trading systems” (“ATs”), which are entities that carry out exchange functions but which are not required to register as national securities exchanges under the Securities Exchange Act of 1934 (“Act”).<sup>1</sup> In lieu of exchange registration, an ATS can instead opt to register with the Securities and Exchange Commission (“SEC”) as a broker-dealer and, as a condition to not having to register as an exchange, must instead comply with Regulation ATS.

Regulation ATS is composed of Rules 300, 301, 302 and 303.<sup>2</sup> Rule 300 defines terms that provide the basis for ATS regulation. Rule 301 sets forth various obligations of ATs.<sup>3</sup> Rule 302 establishes a set of records relating to trading activity that the ATS must make. Rule 303 establishes requirements for the preservation of certain records that ATs must make.

2. Purposes of, and Consequences of Not Requiring, the Information Collection

Under Rule 302, ATs are required to make a record of subscribers to the ATS, daily summaries of trading in the ATS and time-sequenced records of order information in the ATS. The information contained in the records required to be preserved by Rule 302 is used by regulators (including the SEC and the self-regulatory organizations (“SROs”)) to ensure that ATs are in compliance with Regulation ATS as well as other applicable rules and regulations. Without the data required by the Rule, regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

3. Role of Improved Information Technology and Obstacles to Reducing Burden

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<sup>1</sup> 15 U.S.C. 78a *et seq.*

<sup>2</sup> 17 CFR 242.300 to 242.303.

<sup>3</sup> The SEC has recently proposed amendments to Rule 301(b)(3), including an amendment to lower the trading volume threshold in Rule 301(b)(3) from 5 percent to 0.25 percent. See Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009).

The SEC believes that improvements in telecommunications and data processing technology may reduce any burdens that result from the Rule. The SEC is not aware of any technical or legal obstacles to reducing the burden through the use of improved information technology.

#### 4. Efforts to Identify Duplication

Most of the records required to be made under the Rule reflect practices that prudent ATSS would establish. Because most ATSS would maintain much of the information required by the Rule, no duplication occurs with respect to such information. To the extent that the Rule establishes new collections of information, there is no similar information available that could replace the information required.

#### 5. Effect on Small Entities

Rule 302 applies generally to all ATSS and does not depend on the size of the system. Therefore, the Rule could apply to small businesses. An entity that complies with Regulation ATS must, among other things, register as a broker dealer.<sup>4</sup> Thus, the SEC's definition of small entity as it relates to broker-dealers also applies to ATSS. Pursuant to 17 CFR 240.0-10(c), the term "small business" or "small organization" when used in reference to a broker-dealer means a broker-dealer that has total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d) or, if not required to file such statements, a broker-dealer that had total capital of less than \$500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business); and is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in 17 CFR 240.0-10.

Because the risks that the SEC monitors in the operation of an ATS occur in any size business, the SEC has determined that the Rule must apply in the same manner to small as well as large entities. Hence, the Rule does not contain an exemption for small entities.

The Commission notes that there are approximately 81 ATSS that are subject to Regulation ATS. The Commission staff estimates that currently only one broker-dealer operating as an ATS registered with the Commission is a small entity as currently defined by the Act.

#### 6. Consequences of Less Frequent Collection

The information required to be collected under the Rule should increase the abilities of the SEC, state securities regulatory authorities, and the SROs to ensure that ATSS are in compliance with Regulation ATS as well as other applicable rules and regulations. If the information is not collected or is collected less frequently, regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

<sup>4</sup> See 17 CFR 242.301(b)(1).

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

The collection is not inconsistent with 5 CFR 1320.5(d)(2).

8. Consultations Outside the Agency

Not applicable.

9. Payment or Gift to Respondents

The respondents receive no payments or gifts.

10. Assurance of Confidentiality

The records required by Rule 302 are available only for the examination of the SEC staff, state securities authorities, and the SROs. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. § 522 (“FOIA”), and the SEC’s rules thereunder (17 CFR 200.80(b)(4)(iii)), the SEC does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

11. Sensitive Questions

Not applicable. The Rule does not require any questions of a sensitive nature, as described in the instructions to this Item 11.

12. Estimate of Respondent Reporting Burden

ATs that choose to register as broker-dealers and comply with Regulation ATS are required to comply with recordkeeping requirements under Rule 302. The SEC estimates that the average burden for each respondent to comply with the recordkeeping requirements under the Rule is approximately 130 hours (Compliance Clerk) per year. The SEC derived this estimate from the following: (Compliance Clerk at 0.5 hours/day) x (260 business days/year) = 130 hours/year. The SEC estimates the related cost for this hour burden per respondent at approximately \$7,670.00 per year. This estimated cost is derived from 130 hours per year at \$59 per hour.<sup>5</sup>

The SEC estimates that currently there are approximately 81 ATs registered as broker-dealers that have filed initial operation reports in compliance with Regulation ATS. The SEC estimates the average aggregate burden to comply with Rule 302 is 10,530 hours

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<sup>5</sup> \$59 per hour figure for a Compliance Clerk is from SIFMA’s Office Salaries in the Securities Industry 2009, modified by SEC staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

per year (81 ATSs at 130 hours per ATS per year). The SEC estimates that the aggregate cost for respondents for the hour burden to comply with Rule 302 is \$621,270.00 per year (81 ATSs at \$7,670.00 per ATS per year).

13. Estimates of Total Annualized Cost Burden

The SEC believes that compliance with Rule 302 of Regulation ATS does not require any capital or start up costs, or any recurring annual external operating and maintenance costs separate from the wages, salaries, or fees represented in the estimated hourly burdens discussed above.

14. Estimate of Cost to the Federal Government

The government does not experience significant costs based on the recordkeeping required pursuant to Rule 302. The information collected by the respondents typically would be reviewed only as part of an investigation. As a matter of routine, however, the SEC does not review the records kept by the respondents.

15. Explanation of Changes in Burden

As compared to the burdens and costs identified in the SEC's 2007 request to extend the current collection of information for Rule 302 ("2007 PRA Submission"), the estimated burdens associated with Rule 302 of Regulation ATS have increased as a result of an increase in the SEC's estimate of the burden under Rule 302 and an increase in the number of ATSs. The SEC's estimate of the burden under Rule 302 has increased from 36 hours per ATS per year to 130 hours per ATS per year. In addition, since the previous filing, the number of ATSs has increased from 65 to 81. For these reasons the total burden under Rule 302 has increased from 2,340 to 10,530 hours per year, and the related cost has increased from \$202,504 to \$621,270 per year.<sup>6</sup>

The estimate of total annualized cost has been reduced to zero, as the cost information previously included in Item 13 in the SEC's 2007 PRA Submission actually reflected the cost of the burden measured in hours (as set forth in Item 12) and was, therefore, being "double counted."

The SEC has updated its PRA assessment since the 2007 PRA Submission to recognize that Rule 302 requires each ATS to make and keep daily summaries of trading in the ATS (rather than annual reports, as previously reported in the 2007 PRA Submission). Accordingly, the number of responses per ATS per year was increased to 260 to reflect the number of business days in a year, rather than one time per year as was reported previously. Therefore, the number of responses by all respondents per year has increased from 65 to 21,060.

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<sup>6</sup> As noted in Item 12, the SEC believes that the regulatory obligation imposed by Rule 302 may be discharged by a Compliance Clerk, and has calculated costs on this basis. See supra note 5.

16. Information Collection Planned for Statistical Purposes

Not applicable. The information is not published for statistical use.

17. Explanation as to Why Expiration Date Will Not Be Displayed

Not applicable. The SEC is not seeking approval to not display the expiration date for OMB approval.

18. Exceptions to Certification

Not applicable. The SEC is not seeking an exception to the certification statement.

B. Collection of Information Employing Statistical Methods

Not applicable. The collection of information will not employ statistical methods.