**James E. Brown**
Executive Vice President
General Counsel and Secretary

March 2, 2015

**By Electronic Mail**

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-1090
rule-comments@sec.gov

Re: *File No. SR-OCC-2015-02: Notice of Filing of a Proposed Rule Change by The Options Clearing Corporation Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systemically Important Financial Market Utility*

Dear Mr. Fields:

The Options Clearing Corporation ("OCC")[1] is submitting this letter in response to comments from Miami International Securities Exchange, LLC ("MIAX"),[2] Susquehanna International Group, LLP ("SIG")[3] and BATS Global Markets, Inc. ("BATS")[4] on OCC's recent rule filing regarding its proposed capital plan (the "Proposal").[5] OCC appreciates the opportunity to respond to these comments.

The Proposal sets forth a plan for raising additional capital (the "Capital Plan") that would support OCC's function as a SIFMU and facilitate OCC's compliance with SEC Proposed

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[1] OCC is registered as a clearing agency with the SEC and as a derivatives clearing organization with the Commodity Futures Trading Commission. The Financial Stability Oversight Council has designated OCC as a systemically important financial market utility ("SIFMU").

[2] Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchanges (March 1, 2015) ("MIAX Letter").

[3] Letter from Richard J. McDonald, Chief Regulatory Counsel, Susquehanna International Group, LLP (February 27, 2015) ("SIG Letter").

[4] Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc. (February 27, 2015) ("BATS Letter").

[5] Exchange Act Release No. 74136 (34-74136) (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR-OCC-2015-02). OCC also filed the Proposal as an advance notice under Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010. 12 U.S.C. 5465(e)(1). *See* File No. SR OCC-2014-813.

Rule 17Ad-22(e)(15) (the "Proposed Rule"). The Proposed Rule would require OCC to have liquid net assets funded by equity sufficient to cover potential general business losses so that OCC can continue operations and services as a going concern if those losses materialize, and that must in all cases cover the greater of either (i) six months of OCC's current operating expenses, or (ii) the amount determined by the Board of Directors (the "Board") to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of OCC, as contemplated by the Recovery and Wind-Down Plan that OCC will be required to create and maintain pursuant to SEC Proposed Rule 17Ad-22(e)(3)(ii). OCC would further be required under the Proposed Rule to maintain a viable plan, approved by the Board and updated at least annually, for raising additional equity capital should its equity fall close to or below the amount required under the Proposed Rule.[6]

On February 26, 2015, the Commission approved the advance notice filing in which OCC also set forth the Proposal. As of March 2, 2015, the Commission has received ten comment letters on the Proposal, including the MIAX Letter, SIG Letter, BATS Letter, a letter previously submitted by counsel on behalf of six market maker firms (the "MM Letter")[7] and six other comment letters.[8] OCC has also submitted a response to the MM Letter and to certain of the other prior comment letters containing a number of responses that apply with equal force to the MIAX Letter, SIG Letter and BATS Letter. Accordingly, for the avoidance of repetition, OCC makes reference to those responses in certain sections of this letter. As noted in the MM Letter, the Board and OCC's management ("Management") have determined, both for business reasons and in order to address current and proposed regulatory requirements, that OCC's capital is too low for a SIFMU. OCC continues to believe that the approval of the Proposal is entirely consistent with the Exchange Act.

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[6] *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29507 (May 22, 2014).

[7] Letter from Howard L. Kramer, Willkie Farr & Gallagher (February 20, 2015).

[8] *See* Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc. (February 19, 2015); Letter from Tony McCormick, Chief Executive Officer, BOX Options Exchange (February 19, 2015); Letter from Ellen Greene, Managing Director of Financial Services Operations, Securities Industry and Financial Markets Association (February 20, 2015); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchanges (February 24, 2015); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc. (February 26, 2015); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc. (February 27, 2015).

## RESPONSES TO THE MIAX, SIG & BATS COMMENTS

**MIAX/BATS COMMENT: THE PROPOSAL IMPOSES AN IMPROPER BURDEN ON COMPETITION.**

1. *The proposed dividend does not subsidize the cost of execution services that the Stockholder Exchanges provide to their members and does not provide the Stockholder Exchanges with a competitive advantage over non-stockholder exchanges.*

The Proposal would not impose any burden on competition. Both the BATS Letter and the MIAX Letter fail to acknowledge the arguments already articulated by OCC in its prior responses on this point. The MIAX Letter, for example, first suggests that because the "options exchanges operate in an extremely competitive environment," any difference whatsoever among the Stockholder Exchanges and the non-stockholder exchanges is tantamount to an unfair burden on competition. But the investment profiles of the Stockholder Exchanges and non-stockholder exchanges in OCC have never been identical. In the first instance, the non-stockholder exchanges were admitted to OCC as member exchanges, and have continued to reap the advantages of being member exchanges, without being required to make a meaningful equity investment in OCC. Currently, neither Stockholder Exchanges nor non-stockholder exchanges receive any dividends. However, under OCC's ownership structure as reflected in Article VIIB of its By-Laws (which have been previously approved by the Commission), non-stockholder exchanges such as MIAX are noteholders of OCC and are paid the interest provided for in their individual promissory notes. As such, unlike the Stockholder Exchanges, they have received a return on their capital, and that return will not change under the Proposal. Furthermore, under the Proposal, the non-stockholder exchanges are not contributing any equity capital whatsoever, nor are they committing to the substantial risk of providing replenishment capital, an absence of cost and risk that they can, no doubt, pass on to their customers. The assertions regarding the Proposal's effect on competition have no merit and were addressed in the response to the BATS and BOX comments dated February 23, 2015.

BATS and SIG also characterize the rate of return being paid to the Stockholder Exchanges as "excessive." As stated in OCC's prior responses, in considering whether to approve the Proposal, the Board reviewed financial information prepared by its financial advisors, including projected rates of return, and determined, in its business judgment, that the return was not excessive. The Commission should not second-guess business judgment in concluding the reasonableness of the return, especially given the fact that any contribution made would be made at a time when OCC is undercapitalized and therefore the risk of providing replenishment capital in the case of a sudden business loss to OCC would make that contribution would have a high degree of risk. BATS argues that it would agree with the Board's judgment if the return were reasonable; that is a matter that is within the judgment of the Board. In making this determination, the Board took into consideration not just the funded capital amount of $150 million, but also the ongoing funding commitments, including in particular the commitment to provide replenishment capital, for which no separate fee is provided. Therefore, potential dividends, if declared, should not be considered additional revenue that simply can be used to subsidize the cost of services that the Stockholder Exchanges provide, but instead as fair compensation for the substantial capital contribution, limited "upside" and future risks that would be shouldered by the Stockholder Exchanges under the Proposal. OCC will continue to

provide clearing services to the non-stockholder exchanges on the same basis as it does to the stockholder exchanges, so there is no burden on competition.

2. *OCC has in fact considered a wide range of potential alternatives to the Proposal, none of which were deemed viable, and the Board ultimately concluded that a longer process was not likely to produce a different result.*

Both the BATS Letter and the MIAX Letter also incorrectly assert that OCC has not properly addressed potential alternatives to the Proposal. Both the BATS Letter and the MIAX Letter mischaracterize the arguments already articulated by OCC in its prior responses on this point by asserting that OCC has argued in its prior response letters that the Proposal does not create an unnecessary burden on competition because none of the non-stockholder exchanges have presented a proposal under which they would provide a meaningful source of additional equity capital to OCC. OCC, of course, never made such an argument but instead articulated the argument set forth above. OCC merely noted that the non-stockholder exchanges had not previously taken the initiative to offer any proposal to achieve OCC's capital. Moreover, OCC has in fact discussed at length in its rule filing and in its prior responses to other comment letters the various alternatives to the Proposal examined by the Board. OCC makes reference to those discussions here. There is no reason to believe that a longer process that revisits the analyses and determination already made by the Board would produce a different result or garner more support from OCC's various constituencies or its regulators.

**MIAX/BATS/SIG COMMENT: GOVERNANCE ISSUES RELATED TO THE APPROVAL OF THE PROPOSAL WARRANT FURTHER CONSIDERATION.**

1. *The Proposal was properly approved in accordance with OCC's By-Laws.*

The MIAX Letter suggests that due to vacancies on the Board at the time the Proposal was approved, the Proposal did not receive the requisite two-thirds majority required under OCC's By-Laws. This is simply wrong. OCC's By-Laws very clearly state, in relevant part, that the "By-Laws may be amended at any time by the Board of Directors upon the affirmative vote of two-thirds of the directors *then in office* (but not less than a majority of the number of directors fixed by these By-Laws)."[9] (Emphasis added.) That is the relevant standard, which was clearly met when the Proposal was approved. The point merits no further discussion.

2. *The approval of the Proposal did not require any directors to recuse themselves.*

Each of the BATS Letter, MIAX Letter and SIG Letter assert that certain members of the Board were interested parties and therefore should have recused themselves from any decision to approve the Proposal. It is well-recognized under Delaware law that a decision is not improper (i.e., void or voidable) simply because directors participating in the decision had an interest in the decision.[10] Here, in line with the guidance provided by the Delaware statute, the material facts were disclosed and known to the Directors and the action was approved in good faith by

[9] *See* Article XI, Section 1 of OCC's By-Laws.

[10] *See* Section 144, Delaware General Corporation Law.

twelve of the sixteen directors present at the meeting, including the Management Director and the two Public Directors (of a total of three) who were present. As such, a majority of the "disinterested" directors voting on the Proposal approved it which, under Delaware law, means that the decision was appropriately considered and is valid and not subject to challenge.

Under Article XI, Section 1 of the By-Laws, an amendment to OCC's By-Laws requires "the affirmative vote of two-thirds majority of the directors then in office (and not less than a majority of the number of directors fixed by the By-Laws)." This requirement was met, and OCC's By-Laws do not require that such a majority consist solely of disinterested directors. In fact, where, as here, the issue involve a choice between a proposal made by the exchanges or a dramatic increase in clearing fees, it would not be possible to have a vote that would meet the "two-thirds majority of the directors then in office" standard. Accordingly, the assertion by MIAX that the necessary vote was not received because of Board vacancies is without merit.

At the meeting, the Executive Chairman of OCC asked the General Counsel to discuss the issues related to conflicts of interest that were inherent in the discussion that would follow. The General Counsel explained that the decision to be made at this meeting was not a situation where one Director has a conflict not shared by others, which is a situation for which the Code of Conduct for OCC Directors provides that the Director (i) should consider whether it is advisable under the circumstances to recuse himself or herself from the discussion and/or vote, and (ii) must recuse himself or herself if requested by the Chair of the meeting. Instead, this was a case where one group of Directors (the Member Directors) shares an interest in the outcome that is likely to be aligned, as does another group of Directors (the Exchange Directors, who are representatives of the exchanges that proposed the Capital Plan). The General Counsel explained that he and the Executive Chairman had reviewed the situation with outside governance counsel, and that the conclusion that had been reached was that this type of conflict is inherent in the way the Board is structured, and in fact is part of the design to create a "healthy tension" that assures that competing viewpoints are considered and discussed by the Board. He noted for example that a decision to change the Fee Schedule, a decision whether to issue a refund and other similar decisions pose the same issue, but that, since the inherent conflict is well known to both sides, the disclosure of the conflict is all that is required under Delaware law and the Code of Conduct, and it is not necessary for any Director to recuse himself or herself. He noted further that the Chair of the meeting was not requesting any Director to recuse himself or herself or to abstain from voting on the proposals. The General Counsel also noted that the requirement in the By-Laws that an amendment to Section 9 of Article IX of the By-Laws be approved by all five of the stockholder exchanges, as well as the supermajority provision for amending By-Laws generally that is described above, was further support for the conclusion that it was not necessary for the Member Directors and/or the Exchange Directors to recuse themselves or abstain from the vote on the proposals, since such a result would make it impractical for the By-Laws ever to be amended under these types of circumstances.

**MIAX COMMENT: OCC'S REQUEST FOR ACCELERATED EFFECTIVENESS SHOULD BE DENIED.**

MIAX submits that OCC's request for accelerated approval is unwarranted due to the other comments raised in the MIAX Letter. This comment is now moot because an immediate

approval no longer requires acceleration given the minimum period of 30 days from the date of filing without acceleration has passed. Acceleration is therefore unnecessary.

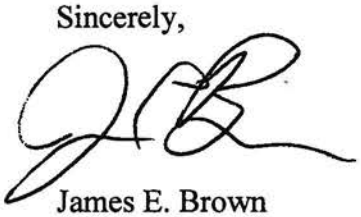
**MIAX/SIG COMMENT: REQUEST FOR ADDITIONAL TIME.**

MIAX and SIG both request that the Commission delay its approval of OCC's proposed rule change by 60 days. OCC has explained at length in its rule filing and in previous responses to comments the nearly year-long process that OCC has gone through in order to consider alternatives to the Capital Plan as currently proposed. For all the reasons stated in response to these prior comments, OCC exercised its business judgment in concluding that there is no available alternative that would allow OCC to be assured of regulatory compliance within the projected time frame for effectiveness of proposed requirements expected to be adopted by the SEC. The proposal put forward by the Stockholder Exchanges is one that the Board has determined would provide that assurance, and OCC should have no obligation to delay its implementation of that chosen solution in search of alternatives that have not materialized. As also previously stated, the governance issues to be faced and resolved by accepting capital contributions from exchanges that are not currently stockholders in OCC would lead inevitably to a protracted period of negotiation over the terms of such capital contributions without any assurance that the Stockholder Exchanges would not decline to make the contributions that they have proposed to do if they were to receive less than the compensation that they bargained for. The alternatives are illusory.

## CONCLUSION

OCC's Board has exhaustively considered numerous alternatives for raising sufficient capital to comply with the Proposed Rule by its anticipated effective date and has reached agreement with Stockholder Exchanges to provide sufficient capital on an ongoing basis for OCC's needs. To undo any of the carefully negotiated terms could prove fatal to the agreement and reset the entire, nearly year-long process OCC's Board and Management have pursued to bolster OCC's capital and to achieve compliance with the Proposed Rule. OCC continues to believe that the Proposal was and remains the only viable alternative offered for achieving this compliance and would do so without a very large increase in fees that could prove harmful to the options markets. Accordingly, the Proposal is entirely consistent with the Exchange Act and the rules and regulations thereunder applicable to OCC as well as with the public interest and protection of investors. OCC, therefore, respectfully requests that the Commission approve the Proposal.

Sincerely,



James E. Brown
General Counsel