Joseph P. Kamnik
Senior Vice President
and General Counsel

RECEIVED
OCT 16 2017
OFFICE OF THE SECRETARY

October 13, 2017

By Federal Express and Facsimile

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090
Facsimile: (202)772-9324

RE: The Options Clearing Corporation's Post-Remand Submission to the Commission in Support of the Re-Approval of the Capital Plan, File No. SR-OCC-2015-02

Dear Secretary Fields:

The Options Clearing Corporation ("OCC") hereby files the enclosed *The Options Clearing Corporation's Post-Remand Submission to the Commission in Support of the Re-Approval of the Capital Plan* via facsimile. The OCC is sending the original documents via FedEx.

The enclosed *The Options Clearing Corporation's Post-Remand Submission to the Commission in Support of the Re-Approval of the Capital Plan* has been served by Federal Express and facsimile on each party to the proceeding in accordance with 17 C.F.R. § 201.150, and as reflected in the included Certificate of Service.

Sincerely,

Joseph P. Kamnik

Enclosures

cc: Petitioners (by Facsimile)

1 N. Wacker Drive, Suite 500, Chicago, IL 60606 312.322.7570 jkamnik@theocc.com www.theocc.com

RECEIVED
OCT 16 2017
OFFICE OF THE SECRETARY

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the The Options Clearing Corporation **For an Order Granting the Approval of** Proposed Rule Change 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 (File No. SR-OCC-2015-02)	File No. SR-OCC-2015-02

THE OPTIONS CLEARING CORPORATION'S POST-REMAND SUBMISSION TO THE COMMISSION IN SUPPORT OF THE RE-APPROVAL OF THE CAPITAL PLAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pursuant to the Securities and Exchange Commission's ("Commission") September 14, 2017 Corrected Order Scheduling Filing of Statements on Review, The Options Clearing Corporation ("OCC") hereby submits this written statement in support of the March 6, 2015 and February 11, 2016 orders approving the proposed rule change (together, the "Approval Orders") concerning OCC's capital plan (the "Capital Plan").[1] Parties seeking review of the Approval Orders are BOX Options Exchange LLC ("BOX"), KCG Holdings, Inc. ("KCG"), Miami International Securities Exchange, LLC ("MIAX"), and Susquehanna International Group, LLP ("SIG") (collectively "Petitioners").

PRELIMINARY STATEMENT

The Capital Plan has been approved three times by the Commission because it is consistent with the applicable requirements of the Securities Exchange Act of 1934 ("Exchange Act") and is necessary to promote a compelling public interest by significantly strengthening OCC's capital structure for the benefit of the investing public.

OCC has been designated a systemically important financial market utility ("SIFMU"), meaning that a failure or disruption of OCC could threaten the stability of the financial system of the United States. It is essential that OCC have sufficient capital from equity in order to continue to perform its crucial functions for the investing public, especially under severe economic conditions, and to fulfill its domestic and international regulatory obligations. OCC, with the assistance of experienced and sophisticated financial advisors and consultants, identified and quantified OCC's operational, business, and pension risks. The Capital Plan

[1] In addition, on February 26, 2015, the Commission also issued a Notice of No Objection to Advance Notice Filing, approving the Capital Plan pursuant to Title VIII of the Dodd-Frank Act. *See* Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387 (Feb. 26, 2015), 80 Fed. Reg. 12215 at 12220-12221 (Mar. 6, 2015).

was designed to enable OCC to raise capital sufficient to withstand those risks should they materialize, and to provide OCC with additional sources of replenishment capital to the extent its resources are depleted.

Since the initial March 6, 2015 Approval Order ("2015 Approval Order"), OCC's stockholder exchanges (collectively "Stockholder Exchanges") have contributed $150 million in capital contributions to OCC pursuant to the Capital Plan, and have made commitments to replenish capital up to an additional $200 million should OCC experience business or operational losses. If the Commission were to reverse its prior Approval Orders and reject the Capital Plan now, the Stockholder Exchanges would withdraw their capital, leaving OCC with significantly less capital than required by current regulations. What is more, OCC's capital resources would be substantially less than the $247 million Target Capital Requirement which OCC's Board has determined is necessary to ensure that OCC can operate as a going concern in the event of a severe market disruption, putting the financial system of the United States and the investing public at risk.

That is not a result the Commission should endorse. Because the Capital Plan satisfies all of the requirements of the Exchange Act and the Commission approved the Capital Plan based on ample evidentiary support, OCC respectfully requests that the Commission approve the Capital Plan, for a fourth and final time.

BACKGROUND

The following summary is based on the extant record before the Commission, including OCC's advance notice and proposed rule change filings, documents submitted by OCC in support thereof, seventeen comment letters from twelve commenters, and submissions previously made to the Commission after Petitioners sought review of the Staff's approval, based on delegated authority of the proposed rule change. In addition, contemporaneously with this submission, OCC is submitting a Declaration of Craig S. Donohue, Executive Chairman and Chief Executive Officer of OCC, as well as presentations made to OCC by its financial advisors in connection with the development of the Capital Plan. Some of these documents were previously provided to the Commission in connection with its prior review of the proposed rule change, but were submitted confidentially (as they are again today) and were not relied upon by the Commission in issuing its Order dated February 11, 2016, approving the proposed rule change.

A. OCC Is Required To Maintain Sufficient Capital Funded By Equity To Continue Its Essential Role As A SIFMU.

OCC is the only clearing agency for standardized U.S. options listed on U.S. national securities exchanges. As the Commission previously explained, OCC "performs critical functions in the clearing and settlement process" and its services "increase the efficiency and speed of options trading and settlement as well as reduce members' operational expenses and counterparty credit risk."[2] Because OCC is "an integral part of the national market system for clearance and settlement, and its failure or service disruption could have cumulative negative effects on the U.S. options and futures markets, financial institutions, and the broader financial system," OCC was designated as a systemically important financial market utility ("SIFMU") in 2012 by the Financial Stability Oversight Council.[3]

As a SIFMU, and due to its fundamental importance to the global financial system, OCC is required to satisfy domestic and international standards (which continue to evolve) and specific regulatory requirements to ensure that, notwithstanding shocks to the financial markets and other

[2] Order Setting Aside Action by Delegated Authority, Approving Proposed Rule Change Concerning The Options Clearing Corporation's Capital Plan and Denying Motions, Exchange Act Release No. 34-77112 (Feb. 11, 2016), 81 Fed. Reg. 8294, at 8294 (Feb. 18, 2016) ("2016 Approval Order").

[3] *Id.*; *see also* Financial Stability Oversight Council ("FSOC") 2012 Annual Report, Appendix A, https://www.treasury.gov/initiatives/fsoc/Pages/annual-report.aspx.

business risks, it can continue to perform its central role in the options markets. This includes Principle 15 of the *Principles for Financial Markets Infrastructure* ("PFMIs"), promulgated in 2012 by the Bank for International Settlements and the International Organization of Securities Commissions, which provides:

> A [Financial Market Infrastructure] should identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialise. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services.[4]

Consistent with and in furtherance of Principle 15, the Commission adopted Rule 17Ad- 22(e)(15) to address the general business risk of a covered clearing agency such as OCC. As the Commission explained when it adopted this rule, this provision requires:

> [A] covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize.[5]

In addition, Rule 17Ad-22(e)(15) requires OCC to (i) maintain sufficient capital funded by equity "equal to the greater of either six months of [its] current operating expenses or the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency" and (ii) have a viable plan "for raising additional equity should its equity fall close to or below" this amount.[6]

---

[4] Bank for Int'l Settlements, *Principles for Financial Market Infrastructures*, Principle 15 at 3 (Apr. 2012).

[5] Standards for Covered Clearing Agencies, Exchange Act Release No. 34-78961, 81 Fed. Reg. 70786, at 70834 (Oct. 13, 2016).

[6] 17 C.F.R. 240.17Ad-22(e)(15).

The Capital Plan complies with all the foregoing requirements. The Capital Plan was also specifically developed by OCC in 2014 in response to those requirements, while Rule 17Ad-22(e)(15) was under consideration by the Commission.

B. OCC Developed The Capital Plan After A Rigorous Process To Support OCC's Functions And Continuity of its Operations And To Comply With Proposed Rule 17Ad-22(e)(15).

In light of what OCC at the time understood to be the forthcoming adoption of the Rule, OCC engaged in a rigorous process to identify and quantify its business risks and develop a plan to ensure that it was capitalized at a prudent level for a SIFMU, to meet existing international principles for central counterparties, and to proactively comply with the Rule.

In March 2014, OCC's Board of Directors formed an Ad Hoc Strategic Advisory Group (the "Advisory Group") to consider modifications to OCC's capital structure as part of raising capital and developing a long-term viable capital plan to satisfy Principle No. 15 and proposed Rule 17Ad-22(e)(15).[7] The Advisory Group had nine members, all of whom were directors of OCC. The chairman was Felix B. Davidson of TD Ameritrade Clearing, Inc., a member director of OCC.[8] In addition to Mr. Davidson, two other member directors served on the Advisory Group, as well as two management directors, two exchange directors, and two public directors.[9] Accordingly, OCC's Stockholder Exchanges had only two representatives of the nine-member Advisory Group.

OCC, under the direction of the Advisory Group, retained two experienced advisory firms to assist with their risk assessment and capital planning—Barclays Capital, Inc. ("Barclays") and

[7] Declaration of Craig S. Donohue, dated Oct. 15, 2015 ("2015 Donohue Decl.") ¶¶ 2, 4.

[8] *Id.* ¶ 3.

[9] *Id.*

Oliver Wyman, Inc. ("Oliver Wyman"). Barclays was retained to conduct a capital analysis exercise to determine whether OCC needed to hold additional capital, and to advise on its capital-raising options in the event additional capital were needed. Oliver Wyman was hired to assist OCC in quantifying its operational and business risks.

Notably, Oliver Wyman conducted a "bottom-up" analysis of OCC's risks to quantify the appropriate amount of capital to be held against each risk, including consideration of credit, market, pension, operational, and business risks. Oliver Wyman gathered information about all aspects of OCC's business by conducting interviews and hosting multiple workshops with OCC personnel to understand and assess OCC's operational and business risks. With OCC, Oliver Wyman identified 92 risk events potentially faced by OCC and augmented this list based on peer and regulatory guidance. These risk events were grouped into eight categories: Internal Fraud; External Fraud; Employment Practices and Workplace Safety; Clients, Products and Business Practices; Damage to Physical Assets; Legal and Compliance; Business Disruption and System Failures; and Execution, Delivery and Process Management.

After identifying these risks, Oliver Wyman then identified and analyzed 23 different scenarios in which these risks might materialize. These scenarios were studied by Oliver Wyman and OCC in a series of workshops. These scenarios were then further refined and an extreme loss event was quantified where relevant. Oliver Wyman then aggregated these loss events and conducted loss modeling at or above the 99% confidence level to determine the amount of capital required to address OCC's operational risks. This amount totaled $226 million, which, when added to pension risks of $21 million, was used to establish a target capital requirement ("Target Capital Requirement") of $247 million. OCC then validated the reasonableness of the $247 million Target Capital Requirement by adding six months' worth of OCC's operating expenses

($117 million) ("Baseline Capital Requirement") to a Target Capital Buffer computed from operational risks, business risks, and pension risks after taking into account the baseline capital requirement of $117 million ($130 million).

In addition to the Target Capital Requirement, and in order to meet the requirements of Rule 17Ad-22(e)(15), OCC also needed to develop a replenishment plan. With the assistance of Oliver Wyman and Barclays, OCC estimated that it would need replenishment capital of $117 million, which could be increased to as much as $200 million if the Baseline Capital Requirement increases. In total, OCC needed to raise a total of $364 million between liquid net assets and replenishment capital. (This is in the context of an increasing cost environment, driven by increasing regulatory demands and technology upgrades.)

With Oliver Wyman's analysis in hand, and with the assistance of Barclays, the Advisory Group sought to raise the necessary additional capital from equity plus $117 million in replenishment commitments required for OCC to comply with its regulatory obligations. After reviewing various options with Barclays, the Advisory Group developed two alternative plans to propose to OCC's Board that would satisfy the requirement that capital requirements be funded by equity. These were Alternative A, which was the Capital Plan ultimately adopted by OCC's Board, and Alternative B, which would provide for the necessary equity capital to come from organic growth—namely by increasing fees and withholding refunds for a period of time until sufficient capital had been accumulated.[10]

Both Alternative A and Alternative B had a cost to raise additional capital. For Alternative B, that cost would have been in the form of significantly higher fees and retaining

---

[10] 2015 Donohue Decl. ¶ 7.

after-tax earnings. This not only would have reduced refunds to clearing members and ratcheted-up their fees, but it also would have been highly inefficient from a tax perspective because OCC would have had to pay taxes on its retained earnings. Even if these measures had been implemented, however, based on expectations at the time, OCC would not have obtained sufficient capital quickly enough to satisfy OCC's regulatory obligations. Nor did Alternative B include a replenishment capital provision required to satisfy the Commission's proposed standards for covered clearing agencies.[11] Alternative A therefore provided benefits to clearing members in the form of a fee refund for 2014 and lower fees in 2015 going forward, and ensured timely compliance with anticipated regulatory requirements.

Because Alternative A contemplated a significant capital infusion by OCC's stockholders, and large additional replenishment commitments, the Advisory Group recognized that those stockholders would need to be compensated for putting $150 million of equity at risk in an illiquid investment plus their commitment to capital replenishment. The Advisory Group—again a majority of which were OCC Board members other than Stockholder Exchange representatives—negotiated an after-tax dividend that it concluded was fair and reasonable consideration for the Stockholder Exchanges' capital outlays and commitments for additional capital outlays. OCC planned to calculate the dividend each year by first providing clearing members with a refund of 50% of OCC's earnings before tax and then issuing the after-tax amount of the remainder (*i.e.*, significantly less than 50% and thus significantly less than refunds to clearing members) as a dividend to the Stockholder Exchanges. The result of this arm's-length negotiation, which was submitted to and approved by OCC's Board, is the Capital Plan.

[11] *Id.* ¶¶ 8-9.

Oliver Wyman's and Barclays' rigorous and detailed analyses are reflected in a series of presentations that they made the Advisory Group and OCC's Board. Those presentations more than adequately support OCC's conclusion that, on top of its existing capital reserves of $25 million, it needed an additional $222 million of capital immediately on hand, plus replenishment capital. They also describe the robust process in which the Advisory Group and OCC Board engaged, and the consideration they gave to different options, in approving the Capital Plan. Copies of these presentations are included in the Appendix submitted contemporaneously herewith.[12]

C. The Commission Correctly Approved The Capital Plan Three Times.

In December 2014, after developing its Capital Plan, OCC submitted an advance notice filing and a proposed rule change to enable it to implement the Capital Plan.[13] Under the Capital Plan, the Stockholder Exchanges were required to (i) immediately contribute $150 million ($30 million each) in equity capital to OCC and (ii) enter into contractual agreements obligating them to provide Replenishment Capital Commitment of up to an additional $200 million, on a *pro rata* basis, to meet the requirement that OCC have a viable plan to replenish its capital in the event that OCC has general business losses causing its capital to fall

---

[12] Those presentations are: Barclays, Project Optimal: Month 1 Update – Ad Hoc Strategy Group Discussion (June 17, 2014); Oliver Wyman, Presentation: Operational / Business Risk Capital Planning Support: Final Meeting (Sept. 12, 2014); Oliver Wyman Presentation: Operational / Business Risk Capital Planning Support: Final Handoff Addendum (Sept. 15, 2014); Barclays, Business Risk Impact to Fee & Refund Policy (Nov. 24, 2014); Barclays, Project Optimal: Third Update – Ad Hoc Strategic Advisory Group Discussion (Sept. 30, 2014); Barclays, Project Optimal: Alternative Capital Raise Proposal Analysis (Dec. 5, 2014); and Barclays, Project Optimal: Analysis of Capital Raise Alternatives (Dec. 8, 2014).

[13] OCC filed the advance notice (File No. SR-OCC-2014-813) with the Commission on December 29, 2014 pursuant to Section 806(e)(l) of the Payment, Clearing, and Settlement Supervision Act, 12 U.S.C. § 5465(e)(l), and Rule 19b-4(n)(l)(i) under the Exchange Act, 17 C.F.R. § 240.19b-4(n)(l)(i). On January 14, 2015 OCC filed Amendment No. 1 to the advance notice in order to (i) update OCC's Capital Plan; (ii) correct typographical errors; and (iii) update the Term Sheet exhibit summarizing material features of the Capital Plan. *See* Notice of Filing of an Advance Notice, Exchange Act Release No. 34-74202, at 1 n.4 (Feb. 4, 2015), 80 Fed. Reg. 7056 (Feb. 9, 2015).

below specified levels. OCC's proposed rule included a Fee Policy, Refund Policy, and Dividend Policy under which, absent circumstances that would require OCC to accumulate additional reserves, fees will be adjusted periodically to cover OCC's projected operating expenses and to permit OCC to maintain a 25% Business Risk Buffer—which is a *reduction* from its historical 31% buffer.

The Capital Plan was approved by the Commission after a lengthy review process and based on an extensive record containing significant amounts of data and information relating to the Plan. During that review process, which lasted more than a full year, the Commission reviewed and approved the Capital Plan three times—first, at the Commission level, pursuant to Title VIII of the Dodd-Frank Act; second, at the Staff level under the Exchange Act, based on delegated authority following an analysis of seventeen comment letters from twelve commenters, including OCC; and third, after conducting a *de novo* review of the Staff level review under the Exchange Act, the Commission again approved the Plan after considering all prior comment letters as well as five petitions for review of the Delegated Order.[14]

Following this careful review and based on an extensive record, the Commission recognized that the Capital Plan was necessary for OCC to be prudently capitalized at a level appropriate for a SIFMU and concluded that the Plan was consistent with the requirements of the Exchange Act, including Sections 17A(b)(3)(A), 17A(b)(3)(D), 17A(b)(3)(F), and 17A(b)(3)(I).[15] Contrary to Petitioners' suggestions, the Commission concluded that the Capital Plan is designed

---

[14] *See* Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387 (Feb. 26, 2015), 80 Fed. Reg. 12215 at 12220-12221 (Mar. 6, 2015) ("Notice of No Objection"); Order Approving Proposed Rule Change 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, Exchange Act Release No. 34-74452 (Mar. 6, 2015), 80 Fed. Reg. 13058, at 13068 (Mar. 12, 2015) ("2015 Approval Order"); Order Setting Aside Action by Delegated Authority, Approving Proposed Rule Change Concerning The Options Clearing Corporation's Capital Plan and Denying Motions, Exchange Act Release No. 34-77112 (Feb. 11, 2016), 81 Fed. Reg. 8294, at 8294 (Feb. 18, 2016) ("2016 Approval Order").

[15] 15 U.S.C. § 78q-1(b)(3)(A); 15 U.S.C. § 78q-1(b)(3)(F); 15 U.S.C. § 78q-1(b)(3)(D); 15 U.S.C. § 78q-1(b)(3)(I).

"to allow OCC to continue its essential role by raising sufficient capital to cover business, operational, and pension risks" rather than "to enable the Stockholder Exchanges to monetize OCC's clearing monopoly."[16] The Commission also stated that it "does not believe that the Capital Plan operates to increase fees, inflate operating expenses or drive up transaction costs in a manner inconsistent with the protection of investors or the public interest."[17] Instead, "clearing members and customers will benefit from the proposed Capital Plan because it will allow OCC to continue to provide clearing services at expected lower fees."[18] In short, as the Commission explained, "the Capital Plan will support the critical functions and continued operations of OCC, particularly during times when its capital position is impaired."[19]

Pursuant to the Capital Plan, the Stockholder Exchanges contributed $150 million of equity capital to OCC, and have committed to provide additional capital up to a total amount of $200 million in the event OCC's liquid capital is depleted. To date, they have received two after-tax dividends—one for 2015 in the aggregate amount of approximately $17 million and one for 2016 in the aggregate amount of approximately $25.6 million. By comparison, OCC paid significantly greater refunds to clearing members—$72 million for 2015 and $46.6 million for 2016.

D. The Court of Appeals Remanded—And Did Not Vacate—The Capital Plan For Further Consideration By The Commission.

On August 8, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision on Petitioners' appeal from the Commission's Order approving the Capital Plan. Importantly, the D.C. Circuit did not hold that the Capital Plan was inconsistent with the

[16] 2016 Approval Order, 81 Fed. Reg. at 8300.

[17] *Id.* at 8301.

[18] *Id.*

[19] *Id.*

requirements of the Exchange Act or could not be approved by the Commission, as Petitioners argued. Indeed, after summarizing each of Petitioners' arguments regarding the Plan's purported shortcomings, the Court stated that it would "not reach any of those arguments."[20] Instead, the D.C. Circuit held that the Order did not sufficiently demonstrate that the Commission, before reaching its conclusions, had engaged in the type of reasoned decision-making, supported by substantial evidence, that is required by the Exchange Act and the Administrative Procedure Act ("APA").[21]

For that reason, and not because the Capital Plan was defective or inconsistent with the requirements of the Exchange Act, the D.C. Circuit held that the Order was "arbitrary and capricious, unsupported by substantial evidence, and otherwise not in accordance with law."[22] This is a procedural deficiency, not a substantive one, and it is curable. As the D.C. Circuit explained, "the SEC may be able to approve the Plan once again, after conducting a proper analysis on remand."[23]

Notably, the D.C. Circuit considered, and expressly rejected, Petitioners' request to vacate the Order. Instead, the Court directed the Commission, on remand, "to properly evaluate the Plan"—not throw it away and start from scratch. The Commission should therefore take as its starting point its prior decisions to approve the Plan (three times) and look to the extensive record before it and the additional information submitted herewith to address on remand the shortcomings in the Order that were identified by the D.C. Circuit. OCC is highly confident that the Commission can and should "approve the Plan once again" with more detailed, reasoned decision-making and

---

[20] *Susquehanna Int'l Grp., LLP v. S.E.C.*, 866 F.3d 442, 446 (D.C. Cir. 2017).

[21] *Id.* at 449 (stating that a "lack of reasoned decisionmaking recurs throughout the Order").

[22] *Id.* at 451.

[23] *Id.*

with reference to the substantial evidence that it was previously provided by OCC and accompanying this submission.

Moreover, to the extent the Commission determines that any additional information is required, OCC will promptly cooperate with any additional such requests. The Capital Plan is vital to OCC and essential to its compliance with its and its members' regulatory obligations domestically and internationally.

THE COMMISSION SHOULD RE-APPROVE THE CAPITAL PLAN

Under the Exchange Act Section 19(b)(2)(C), the Commission shall approve a proposed rule change of a self-regulatory organization "if it finds that such proposed rule change is consistent with" the provisions of the Exchange Act.[24] The D.C. Circuit focused on four requirements that Petitioners claim were not satisfied: (1) that a clearing agency's rules be "designed . . . in general, to protect investors and the public interest;" (2) that a clearing agency's rules "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act; (3) that rules not be "designed to permit unfair discrimination . . . among participants in the use of the clearing agency;" and (4) that a self-regulatory organization "comply with . . . its own rules."[25]

For the reasons discussed below, OCC respectfully submits that the Commission should confirm that the Capital Plan complies with each of these requirements and should be properly approved for a fourth and final time.

[24] 15 U.S.C. § 78s(b)(2)(C)(i).

[25] 15 U.S.C. § 78q-1(b)(3)(F), (I); 15 U.S.C. § 78s(g)(1).

A. The Capital Plan Is Designed, In General, To Protect Investors And The Public Interest.

As discussed above, OCC, with the assistance of Oliver Wyman, conducted a rigorous analysis of the operational, business, and pension risks faced by OCC and determined that OCC's preexisting capital reserve of $25 million was woefully deficient. Indeed, this amount covered only six *weeks* of OCC's operational expenses, far less capital than OCC is required to maintain its critical operations as a SIFMU and provide plausible support for a recovery in the event a recovery and wind-down plan is triggered. As of December 2014, when Oliver Wyman's analysis was completed, OCC's Board determined based on that analysis that OCC needed an additional $222 million of capital immediately on hand. Substantial evidence exists to support this determination, and OCC is therefore required by Rule 17Ad-22(e)(15) to maintain this level of capital funded by equity.[26]

The Capital Plan, as recognized by the Commission's prior approval order, is designed to do exactly that. There can be no dispute that the Capital Plan enhances OCC's capitalization by obtaining capital contributions from its equity stockholders and commitments to replenish that capital should it be depleted. This is plainly in the public interest and protects investors because it enables OCC to continue to perform its central role as a SIFMU in the event that the business, operational, or pension risks identified and quantified by Oliver Wyman and OCC come to pass. This evidence is more than sufficient to clarify who OCC used as a consultant, what analysis they conducted, and that OCC's process was sound.[27] It also demonstrates the "costs and risks" that

---

[26] *See* 17 C.F.R. 240.17Ad-22(e)(15) (requiring covering clearing agencies to maintain sufficient capital funded by equity "equal to the greater of either six months of [its] current operating expenses or the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency").

[27] *Susquehanna Int'l Grp.*, 866 F.3d at 449.

could jeopardize the Stockholder Exchanges' $150 million capital contribution and require them to pay up to $200 million more to fund OCC's ongoing operations and/or recovery.[28]

The Commission thus correctly concluded that the "Capital Plan will support the critical functions and continued operations of OCC, particularly during times when its capital position is impaired" and is "consistent with the protection of investors and the public interest under Exchange Act Section 17A(b)(3)(F)."

The Capital Plan and Dividend Policy do not, as Petitioners claim, alter OCC's essential role as a market utility, nor are they a means to monetize OCC's clearing monopoly. As the Commission explained, "OCC will continue its practice of refunding a significant percentage of excess clearing fees to clearing members, thus preserving that aspect of OCC's industry 'utility' function."[29] The D.C. Circuit did not question this finding.

The Commission also correctly concluded that the Capital Plan should not be expected "to increase fees, inflate operating expenses or drive up transaction costs in a manner inconsistent with the protection of investors or the public interest."[30] As the Commission observed, the incentives here are aligned—increasing operating expenses and corresponding clearing fees would lead to an increase in the Target Capital Requirement, which would require OCC to retain more earnings by reducing refunds and dividends. OCC accordingly has an incentive to control operating expenses and keep clearing fees as low as possible, and the Stockholder Exchanges do not make those decisions. And this has worked out in practice. In March 2016, for example, OCC *lowered* clearing fees after it became clear that fees collected would exceed OCC's operating costs plus the

[28] *Id.* at 446.

[29] Commission Approval Order, 81 Fed. Reg. at 8300.

[30] *Id.* at 8301.

25% business risk buffer.[31] This, in the context of an overall increasing cost environment, is largely the result of increased regulatory compliance costs and technology upgrades.

Nowhere is the reduction in clearing fees under the Capital Plan more evident than in the reduction in the business risk buffer from the historical 31%. This is a built-in, structural reduction in clearing fees. Clearing fees are set by taking projected operating expenses and adding a business risk buffer and, where appropriate, a provision for accumulating additional reserves.[32] The lower the risk buffer, the lower the clearing fees. Under the Capital Plan, OCC is using a business risk buffer of 25%, a significant reduction from its historical 31%.[33] This immediately lowers clearing fees. As the Commission recognized, this is "designed to give market participants the benefit of lower upfront transaction[s] costs, especially those customer end users who do not receive passed through refunds from the clearing member[s]."[34]

The benefits to clearing members in the form of lower clearing fees (and higher refunds) is also evident from other alternatives considered by OCC. Raising capital always has a cost and OCC's principal source of revenue is clearing fees. Had OCC opted to implement Alternative B to raise the required capital, rather than raise capital directly from its existing stockholders, OCC would have been required to halt refunds and increase clearing fees by an additional 364% on top

---

[31] December 17, 2015 Special Meeting Minutes of the Compensation and Performance Committee of the Options Clearing Corporation; OCC Presentation: 2016 Clearing Fee Schedule, (Dec. 17, 2015); OCC Presentation, OCC Capital Planning: Business Risk Impact to Fee & Refund Policy (Nov. 24, 2014). These documents may also be found in the accompanying Appendix.

[32] The Options Clearing Corp., 2016 Annual Report at 36 (2017) ("OCC's Board of Directors sets clearing fees to cover OCC's operating expenses plus an additional amount set by the Board in accordance with the Capital Plan.").

[33] Press Release, The Options Clearing Corporation, OCC Approves New Capital Plan (Dec. 23, 2014) https://www.theocc.com/about/newsroom/releases/2014/12_23.jsp.

[34] 2016 Approval Order, 81 Fed. Reg. at 8301-02.

of an earlier 70% increase in order to meet OCC's anticipated compliance date. The Capital Plan obviated the need to do so.

In response, Petitioners point out that clearing fees were increased in early 2014. That is irrelevant. The Capital Plan was not implemented until after this fee increase, which was necessary to pay for higher operating costs in a more complex regulatory environment. After the Capital Plan was implemented OCC reduced its clearing fees as of March 1, 2016.[35]

Petitioners also suggest, as the D.C. Circuit explained, that "net fees" might increase under the Capital Plan once the Commission takes into account the Capital Plan's reduction of year-end refunds.[36] As stated previously, OCC's understanding is that a portion, possibly a significant portion, of those refunds are *not* passed through by the clearing members to their end-user customers. Those end-user customers will see a reduction in net fees. OCC also understands that there is variability among clearing members; some may decide to pass refunds to end-user customers, while others may not. Petitioners have offered no evidence—which is within their control, not OCC's—to rebut the fact that clearing fees will be lower under the Capital Plan because the business risk buffer has been reduced.

In any event, even if net clearing fees did increase for some end-users, this would not be a reason to reject the Capital Plan. Raising capital—which OCC is required to do—has a cost. In terms of net fees, those costs were far less under the Capital Plan (Alternative A) than under the fee increase/retained earnings (Alternative B). Accordingly, even if net fees to end-users were to increase, under the Capital Plan—which again, is a matter wholly within the control of clearing members, not OCC—it would still plainly be in the public interest and for the protection of

---

[35] See *supra* note 32.

[36] *Susquehanna Int'l Grp.*, 866 F.3d at 449.

investors to affirm the Capital Plan and ensure that OCC has the required capital to continue to perform its critical function as a SIFMU. The Capital Plan, accordingly, is consistent with the protection of investors and the public interest under Exchange Act Section 17A(b)(3)(F).

B. The Capital Plan Does Not Impose Any Burden On Competition Not Necessary Or Appropriate In Furtherance Of The Purposes Of The Act.

After a thorough analysis, the Commission previously found that "the Capital Plan does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and is therefore consistent with Exchange Act Section 17A(b)(3)(I)."[37] The Commission's determination in this regard is correct and should be reaffirmed.

As discussed above, and demonstrated by the documents in the accompanying Appendix, OCC determined based on the advice and analysis of Oliver Wyman and Barclays that OCC needed an additional $222 million of capital from equity on hand. OCC's Board set the Target Capital Requirement based on this analysis and it is designed to capture identified and foreseeable business risks. OCC's Board further concluded that the Capital Plan was the most effective way to raise the required capital to satisfy OCC's regulatory obligations, which involved a $150 million capital contribution from the Stockholder Exchanges as well as their agreement to provide up to $200 million of replenishment capital if needed. OCC, of course, needed to offer compensation to the Stockholder Exchanges to make this contribution and provide this commitment. That compensation, in the form of after-tax dividends, was negotiated by an Advisory Group made up predominantly of OCC Board members who were not representatives of Stockholder Exchange. Absent those dividends, the Capital Plan would not have been possible.

[37] Commission Approval Order, 81 Fed. Reg. at 8301 (citing 15 U.S.C. 78q-1(b)(3)(I).)

Nevertheless, Petitioners challenge the Dividend Policy on the grounds that it imposes a burden on competition. According to Petitioners, the Dividend Policy should be viewed as a subsidy for Stockholder Exchanges "to offset operating costs and subsidize the cost of execution services they provide to their members," giving them "a competitive advantage over non-Stockholder Exchanges" in violation of the Exchange Act.[38] That is wrong.

To begin with, Petitioners' analysis of competition is misplaced. Because clearing members are all treated the same under the Capital Plan, the only conceivably affected competition here is between exchanges. As noted previously by the Commission, exchanges principally compete for order flow.[39] That competition is fierce, with fifteen equity options exchanges competing for order flow.[40] No basis exists in fact or logic to expect that this intense competition has been or could be diminished because of the Capital Plan. Indeed, even after two years of operating under the Capital Plan, Petitioner KCG Holdings continues to observe in its most recent Form 10-K that "competition for order flow in the U.S. equity markets continues to be intense."[41]

---

[38] MIAX Comment Letter at 2, File No. SR-OCC-2015-02 (Mar. 1, 2015).

[39] Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 34-59039 (Dec. 2, 2008), 73 Fed. Reg. 74770, at 74782-84 (Dec. 9, 2008), *vacated on other grounds by NetCoalition v. S.E.C.*, 615 F.3d 525, 539 (D.C. Cir. 2010) (agreeing with the Commission's conclusion that competition for order flow is "fierce" and remanding to allow the Commission to make more specific findings regarding the competitive forces in pricing ArcaBook).

[40] Gunjan Banerji, "Plan for New Trading Pit Triggers Feud in U.S. Options Market," Fox Business (July 9, 2017) http://www.foxbusiness.com/features/2017/07/09/plan-for-new-trading-pit-triggers-feud-in-u-s-options-market.html, NYSE Amex Options, "Two Market Models Powered by One Cutting Edge Technology 4 (2012) https://www.nyse.com/publicdocs/nyse/markets/american-options/How_NYSE_Amex_Options_NYSE_Arca_Options_Work.pdf ("With twelve exchanges competing for liquidity and order flow, the US Options market is one of the most competitive markets in the world – which helps to drive down exchange fees and tighten quoted prices."); Howard Tai, "Seven, Eleven, and Now Twelve: How Many U.S. Equity Options Exchanges Are Enough?" Aite Group (Oct. 1, 2013) http://aitegroup.com/report/seven-eleven-and-now-twelve-how-many-us-equity-options-exchanges-are-enough.

[41] KCG Holdings, Inc., Form 10-K, at 8 (Feb. 24, 2017) https://www.sec.gov/Archives/edgar/data/1569391/000156939117000003/kcg1231201610k.htm.

Petitioners do not assert otherwise. Rather, Petitioners' claim is that after-tax dividends are effectively a *cost* subsidy, reducing Stockholder Exchanges' expenses and improving their profit margins in a manner not available to non-Stockholder Exchanges. The amount of profit an exchange earns, however, does not affect inter-exchange competition for order flow. That is, Petitioners are not claiming that the Stockholder Exchanges will use their after-tax dividends to reduce the *price* of the execution services to attract order flow from non-Stockholder Exchanges. Nor could they. No evidence exists that prices for execution services have moved at all as a result of the Capital Plan despite two years of after-tax dividends. And, even if they did as a result of this purported subsidy, the result would be to *reduce* prices and benefit end-user customers—that is, it would be competition enhancing.[42]

In addition, as the Commission previously observed, Petitioners' arguments ignore that the Stockholder Exchanges made substantial equity contributions and are contractually obligated to contribute additional funds under the Replenishment Capital Commitment. "[A]ny potential dividends declared under the Dividend Policy are intended to be consideration for the Stockholder Exchanges' contribution or commitment to capital and compensation for their opportunity cost and risk of loss associated with such contribution and commitment."[43] Petitioners' complaint that the non-Stockholder Exchanges will not receive after-tax dividends under the Capital Plan thus fails to admit a key reality: that the non-Stockholder Exchanges have not contributed any equity capital whatsoever, nor are they subject to the substantial risk of the Replenishment Capital

[42] This would also be inconsistent with Petitioners' argument, discussed above, that net prices will increase under the Capital Plan. Petitioners cannot have it both ways. They cannot argue that the Capital Plan harms customers by depriving them of passed-through refunds while, at the same time, argue that the Capital Plan harms competition because that same money is being round-tripped to customers in the form of reduced prices for execution services.

[43] 2016 Approval Order, 81 Fed. Reg. at 8301.

Commitment.[44] OCC's Board reviewed the risks to the Stockholder Exchanges' capital contribution and the Replenishment Capital Commitment with the assistance of Barclays and Oliver Wyman, and concluded that the dividends to be paid were reasonable compensation for those risks.

Even if the Commission were to look at after-tax dividends alone, and ignore that the Stockholder Exchanges incurred a cost to earn them, their impact on exchange competition is *de minimis*. To date, the Stockholder Exchanges have received, in the aggregate, approximately $17 million in 2016 and approximately $25.6 million in 2017. These are insignificant figures when compared to the overall, multi-billion-dollar market for options execution services. This does not give Stockholder Exchanges any advantage over non-Stockholder Exchanges when competing for order flow, and certainly does not "burden" competition. Indeed, given the sheer size of this market and the billions of dollars exchanges spend on infrastructure, acquisitions, marketing and other things, it is difficult to imagine how these dividends (which amount to about $5 million per Stockholder Exchange) could affect anything.

In short, the Capital Plan does not impose any burden on competition. Even if it did, any such burden is "necessary" and "appropriate" in furtherance of the purposes of the Act. As the Commission observed, an assessment under Exchange Act Section 17A(b)(3)(I) "involves balancing the competitive effects of the proposed rule change against all other relevant considerations under the Exchange Act."[45] Any burden on competition is easily justified by "the importance of OCC's ongoing operations to the U.S. options market and the role of the Capital

---

[44] Declaration of Craig S. Donohue, dated Oct. 13, 2017 ("2017 Donohue Decl.") ¶ 20.

[45] *See also Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978) ("[O]nly if some action's anticompetitive impact outweighs in importance the product of the 1975 Amendments' other objectives and the likelihood that the action will achieve those objectives, is the Commission prohibited from taking that action.").

Plan in assuring its ability to facilitate the clearance and settlement of securities transactions in a wide range of market conditions."[46]

C. The Capital Plan Was Not Designed To Permit Unfair Discrimination Among Participants In The Use Of The Clearing Agency.

As an initial matter, the Capital Plan does not alter the manner in which market participants "use" OCC. Clearing members have continued to use OCC's clearing services in exactly the same manner as they did prior to the implementation of the Capital Plan, and all clearing members receive equal treatment under the Capital Plan. Because the Exchange Act only prohibits rules that are designed to permit unfair discrimination among participants in the use of the clearing agency, the Capital Plan complies with the requirements of Exchange Act Section 17A(b)(3)(F).[47]

Nor does the Capital Plan unfairly discriminate between Stockholder Exchanges and non-Stockholder Exchanges in the "use" of OCC. As discussed above, Stockholder Exchanges and non-Stockholder Exchanges are differently situated. The former have provided $150 million in capital and have committed to provide an additional $200 million under the Capital Plan. The non-Stockholder Exchanges have not made any such contribution and have no such commitment. And the Stockholder Exchanges, as stockholders, have certain rights, including the right to decline to offer equity to any third party, including non-Stockholder Exchanges. Barclays also advised OCC that this would have been more difficult and complex to accomplish than raising capital from existing stockholders.

[46] 2015 Approval Order, 80 Fed. Reg. at 13068.

[47] 15 U.S.C. § 78q-1(b)(3)(F).

Moreover, and contrary to Petitioners' assertions, the Stockholder Exchanges did not make a "risk-free investment."[48] To the contrary, it is a highly illiquid investment designed to ensure that OCC has capital if and when any of the numerous operational risks materializes that Oliver Wyman and OCC identified and quantified after a detailed analysis. Indeed, the entire point of raising this capital was to put it at risk.

Because the Stockholder Exchanges and non-Stockholder Exchanges are differently situated, OCC has not discriminated against the latter by establishing the Dividend Policy to compensate the former for the capital they have contributed and the risks they have undertaken. This would be the case even if Exchange Act Section 17A(b)(3)(F) applied to the Dividend Policy—which it does not because it has nothing to do with the "use" of the clearing agency.

For similar reasons, the manner in which the Replenishment Capital Commitment functions does not run afoul of Exchange Act Section 17A(b)(3)(F). As the D.C. Circuit observed, "[i]f Replenishment Capital becomes necessary and is not repaid in 24 months (or if the target capital requirement is not restored in the same period), refunds will end permanently but dividends can resume."[49] This provision was designed to create an incentive for OCC to repay, to the extent possible, the Replenishment Capital within 24 months.[50] OCC also has all the tools to ensure the Replenishment Capital is repaid within this time period by retaining earnings (dividends and refunds are suspended while Replenishment Capital is outstanding) and increasing fees to the extent necessary.

[48] BATS, BOX, KCG, MIAX, and SIG Memorandum in Further Support of Motion to Reinstitute Automatic Stay at 2, File No. SR-OCC-2015-02 (Sept. 25, 2015).

[49] *Susquehanna Int'l Grp.*, 866 F.3d at 450.

[50] 2017 Donohue Decl. ¶ 21.

In short, this provision is only triggered if OCC faces the dire situation where it has drawn Replenishment Capital and has not been able to repay it for two years. Under those circumstances, the Stockholder Exchanges will be paid increased dividends—to compensate them for the up to $200 million of additional capital they would then have at risk with no compensation while it was outstanding—and refunds would cease.

Putting aside that this has nothing to do with the use of OCC's clearing services, this provision is not discriminatory. Where this provision comes into play, OCC will have already depleted all $150 million of the Stockholder Exchanges' initial capital contributions under the Capital Plan and, on top of this, the Stockholder Exchanges will have provided additional capital that has not been repaid for an extended period of time. Clearing members, by contrast, will not have contributed any capital to fund OCC's operations as a going concern.[51] This provision of the Capital Plan, accordingly, does not treat differently two groups of similarly situated participants. And this provision was necessary to ensure that the Stockholder Exchanges would be compensated for contributing a substantial amount of additional capital—up to $200 million—that was not repaid for at least two years.

Accordingly, the Capital Plan complies with the requirements of Exchange Act Section 17A(b)(3)(F).

D. OCC Complied With Its Own Rules In Developing And Approving The Capital Plan.

OCC complied with "its own rules" in developing and approving the Capital Plan.[52]

[51] Clearing fund payments are not permitted to be used to cover operational losses.

[52] 15 U.S.C. § 78s(g)(1).

According to Petitioners, the Capital Plan should be disapproved because OCC, while it was considering the Capital Plan, failed to notify non-Stockholder Exchanges that the Capital Plan was in development "despite a bylaw requiring 'prompt[]' notification to nonshareholder exchanges of all matters 'of competitive significance.'"[53] As discussed previously, this position reflects a fundamental misunderstanding of OCC's bylaws. It also reflects a fundamental misunderstanding about the D.C. Circuit's guidance to the Commission regarding how to address this issue on remand.

First, Article VIIB.01 of OCC's bylaws states in full:

> Non-Equity Exchanges will be promptly provided with information **<u>that the Executive Chairman considers to be</u>** of competitive significance to such Non-Equity Exchanges that was disclosed to Exchange Directors at or in connection with any meeting or action of the Board of Directors or any Committee of the Board of Directors. (Emphasis added.)

Petitioners conspicuously omit the bolded and underlined text above from their letter to the Commission. And for obvious reasons: this language makes clear that it is for the Executive Chairman to decide, in his discretion, what "information" is "of competitive significance" and must be disclosed to non-Stockholder Exchanges. Moreover, under Article III, Section 8 of OCC's bylaws, OCC's Board is empowered to "make such interpretations of the By-Laws . . . as it may deem proper."

Here, as discussed previously, the Executive Chairman, in the exercise of his business judgment, never determined that he "considers [the Capital Plan] to be of competitive significance to [the] Non-Equity Exchanges."[54] Nor did anyone on OCC's Board ever suggest that the Capital Plan was of competitive significance and its development was required to be disclosed to non-

[53] SIG Letter to OCC Board of Directors at 3, File No. SR-OCC-2015-02 (Aug. 25 2017).

[54] 2017 Donohue Decl. ¶ 22.

Stockholder Exchanges pursuant to OCC's bylaw, despite the OCC Board's knowledge of the comments submitted on the record by the Petitioners to that effect. Indeed, the internal development of a corporate plan to raise capital is not even the type of competitively significant "information" (as opposed to "matters," as Petitioners would rewrite the bylaw) that this bylaw was designed to address.

Nor is the Capital Plan competitively significant to non-Stockholder Exchanges. As discussed above, under the Capital Plan, the Stockholder Exchanges contributed $150 million in capital to OCC and committed to provide replenishment capital; the non-Stockholder Exchanges made no such contribution. The Stockholder Exchanges thus have $150 million less liquid capital than they otherwise would—which is not the case for non-Stockholder Exchanges—and receive dividends under the Capital Plan in exchange for their contributions and commitments. These dividends do not alter in any way how the Stockholder Exchanges and non-Stockholder Exchanges compete for order flow. Nor have Petitioners offered any evidence suggesting they have altered competition in the two years in which dividends have been paid thus far.

In any event, Petitioners address only half of what the D.C. Circuit said the Commission needs to study upon remand. The D.C. Circuit's concern here was that the Order gave too "short shrift" to Petitioners' objection, not that the Commission's conclusion was erroneous.[55] The Commission therefore may also reject this argument on the ground that the "reasonableness" of OCC's determination regarding competitive significance simply "does not matter."[56]

That is the case here. Petitioners' objective, "reasonableness" standard directly conflicts with the language of OCC's bylaw. The determination of whether information is competitively

[55] *Susquehanna Int'l Grp.*, 866 F.3d at 450.

[56] *Id.*

significant is committed to the discretion of the Executive Chairman. Under the bylaw, unless he determines that information disclosed to Stockholder Exchanges is "of competitive significance to such Non-Equity Exchanges," such information need not be disclosed.

Nor is it the case that Petitioners never received notice of the Capital Plan and a full and fair opportunity to be heard. Quite the contrary—that is what this entire process is about. Petitioners were notified upon the Capital Plan's approval through the notice and comment process and have had ample opportunity to review and share their suggestions on the Plan throughout this process. In fact, as recently as August 25, 2017, Petitioners continue to share their suggestions for improving or replacing the Capital Plan with OCC.[57]

Finally, the "reasonableness" of OCC's determination regarding competitive significance "does not matter" for another independent reason. Here, Petitioners do not assert that the Capital Plan itself violates any aspect of OCC's bylaws. This is not, therefore, a situation where the Capital Plan seeks to do something that OCC's bylaws forbid. Rather, Petitioners assert that OCC violated a *procedural* bylaw regarding information disclosure in the *process* of developing the Capital Plan. But OCC's process is not under review pursuant to Exchange Act Section 19(b)(2)(C).[58] As the Commission correctly explained to the D.C. Circuit, the rule approval process is not the appropriate forum "to challenge the business judgment of an SRO's board."[59] Accordingly, any purported violation of OCC's bylaws is not relevant.

---

[57] Letter from David M. Pollard to OCC Board of Directors (Aug. 25, 2017) (attached hereto).

[58] Exchange Act Section 19(b)(2)(C) provides that "[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." This rule does not concern the *process* for developing the proposed rule change.

[59] Initial Br. of Respondent at 53, *Susquehanna Intl. Grp., LLP v. SEC*, No. 16-1061 (D.C. Cir. 2017).

CONCLUSION

The Commission conducted a thorough and independent investigation of OCC's Capital Plan before ultimately finding that the Plan was consistent with the Exchange Act. The D.C. Circuit did not vacate that finding and instead asked for more detail about the Commission's process in arriving at that finding. The Commission's prior approvals of the Capital Plan are based on ample evidentiary support, as discussed above and in the accompanying Appendix. Nothing Petitioners say alters the basic fact that OCC needed to raise a substantial amount of additional capital from equity, both to ensure that it can always continue to fulfill its critical role as a SIFMU and to comply with domestic and international regulatory standards. The Capital Plan is therefore consistent with all requirements of the Exchange Act and should be reaffirmed for a fourth, and final, time.

Dated: October 13, 2017

Respectfully submitted,

THE OPTIONS CLEARING CORPORATION

By: ______________________________
Joseph P. Kamnik
Senior Vice President & General Counsel
One North Wacker Drive, Suite 500
Chicago, IL 60606

CERTIFICATE OF COMPLIANCE

I, Joseph P. Kamnik, General Counsel of The Options Clearing Corporation (OCC), hereby certify that the foregoing Post-Remand Submission to the Commission in Support of the Re-Approval of the Capital Plan complies with the word limitation provided in 17 C.F.R. § 201.450(c). Exclusive of the exempted portions of the brief, as provided by 17 C.F.R. § 201.450(c), the Submission includes 8,450 words. The undersigned relied upon the word count function of Microsoft Word in preparing this certificate.

Dated: October 13, 2017

J.P. K

Joseph P. Kamnik

CERTIFICATE OF SERVICE

I, Joseph P. Kamnik, General Counsel of The Options Clearing Corporation (OCC), hereby certify that, on October 13, 2017, I caused to be served copies of the attached Post-Remand Submission to the Commission in Support of the Re-Approval of the Capital Plan by way of facsimile on the parties and sent the original and three copies via facsimile and Federal Express to the Secretary at the following addresses:

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549
Facsimile: 202-772-9324

Barbara J. Comly
Executive Vice President, General Counsel & Corporate Secretary
MIAX
7 Roszel Road, Suite 5-A
Princeton, NJ 08540
Facsimile: 609-987-2201

Lisa J. Fall
President
Box Options Exchange LLC
101 Arch Street, Suite 610
Boston MA 02110
Facsimile: 617-235-2253

David H. Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Facsimile: (202) 220-9601

John A. McCarthy
General Counsel
KCG Holdings, Inc.
545 Washington Boulevard
Jersey City, NJ 07310
Facsimile: 201-557-8024

Dated: October 13, 2017

J.P. K

Joseph P. Kamnik

RECEIVED
OCT 16 2017
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
Before the
Securities and Exchange Commission

In the Matter of the
The Options Clearing Corporation

For an Order Granting the Approval of
Proposed Rule Change 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 (File No. SR-OCC-2015-02)

DECLARATION OF CRAIG S. DONOHUE

I, Craig S. Donohue, hereby declares as follows:

1. I am over 18 years of age, competent to testify, and have personal knowledge of the matters contained in this Declaration.
2. I am the Executive Chairman and Chief Executive Officer of The Options Clearing Corporation ("OCC") and have held the position of Executive Chairman since January 1, 2014 and Chief Executive Officer since January 1, 2017.
3. I served on the Ad Hoc Strategic Advisory Group ("Advisory Group") that was formed by OCC's Board of Directors in March 2014 to consider modifications to OCC's capital structure in order to raise capital and develop a viable long term Capital Plan.
4. Based on my position as OCC's Executive Chairman, and my participation in the Advisory Group, I have personal knowledge of OCC's deliberative process in devising a new capital raise strategy.
5. The members of the Advisory Group were all directors of OCC. Felix B. Davidson of TD Ameritrade Clearing, Inc., a clearing member director of OCC, served as the

Advisory Group Chairman. Other members of the Advisory Group included two additional clearing member directors, two management directors, two exchange directors, and two public directors.

6. The Advisory Group's objective was to develop a Capital Plan that would, in addition to raising capital generally, satisfy the SEC's proposed standards for covered clearing agencies in proposed SEC Rule 17 Ad-22(e)(15) and Principle No. 15 of the Principles for Financial Market Infrastructures. Both standards require covered clearing agencies, like OCC, to maintain a minimum capital balance that is funded by equity and to have a plan to raise additional equity should their level of capital fall below the required amount.
7. In order to analyze the amount of capital that OCC would need to raise, OCC hired outside independent consultants: (i) Barclays in June 2014, and (ii) Oliver Wyman in August 2014.
8. These external consultants analyzed OCC's risks and determined that OCC would need to raise $247 million in additional capital that would be sourced from a $150 million capital contribution from OCC's Stockholder Exchanges together with the Shareholder Exchanges' $97 million in equity.
9. While OCC did not know the exact date the proposed rules would become effective, OCC's management expected the rules to become effective around March 2015 and that OCC would have approximately six months to raise capital to comply with the new regulations.
10. The Advisory Group developed two alternative plans to propose to OCC's Board that would satisfy the determined equity capital requirement. These were Alternative A,

which was the Capital Plan ultimately adopted by the Board, and Alternative B, which would source additional capital through fee increases and retained after-tax earnings.

11. As discussed in the Advisory Group, Alternative A provided benefits to clearing members in the form of a fee refund for 2014 and lower fees in 2015 going forward. Because Alternative A required a By-Law change, it was required to be passed by a 2/3 vote of the Board. In addition, because Alternative A required a change to section 9 of Article IX of the By-Laws, all Stockholder Exchanges were required to vote for it in order for it to be passed.

12. Alternative B did not require any By-Law changes. However, as estimated by OCC, it would have required fees to be maintained at higher rates until 2017 in order to achieve the required amount of capital. In addition, Alternative B did not include the Replenishment Capital Commitment that was included in Alternative A. Therefore another source of replenishment capital would have been needed to fully satisfy the SEC's proposed standards for covered clearing agencies.

13. At OCC's Board Meeting on December 18, 2014, both Alternative A and Alternative B were proposed to the Board. The conflicts of interest of two groups of directors were disclosed and discussed: namely that the directors who were representatives of exchanges could have one set of interests, and the directors who were representatives of clearing members could have another set of interests. Based on advice of external governance counsel to the Board, no recusal of either of these sets of directors was required after disclosure of these conflicts.

14. Based on the advice of Barclay's, OCC chose Alternative A because it would not increase upfront costs to clearing members and would also raise capital within the timeline OCC perceived it would have to comply with the SEC's new regulation.

15. The funded and unfunded capital commitments of the Stockholder Exchanges under Alternative A involved a substantial amount of risk, including the risk inherent in the $150 million equity investment, the unusual nature of the investment in OCC as a profit-constrained industry utility, the Stockholder Exchanges' cost of capital, the dire financial circumstances under which the $200 million Replenishment Capital Commitment of the Stockholder Exchanges would be funded, and the lack of an upside to the investment based on the interaction of the Fee, Refund, and Dividend Policies.

16. Considering the risk inherent in Alternative A to Stockholder Exchanges, OCC negotiated terms with the Stockholder Exchanges in order to incentivize them to participate in the Alternative A capital raise plan. The negotiations resulted in a decision to issue dividends to Stockholder Exchanges.

17. OCC planned to calculate the dividend each year by first providing clearing members with a refund of 50% of OCC's earnings before tax and then issuing the after-tax amount of the remainder as a dividend to the Stockholder Exchanges.

18. Stockholder Exchanges represented to OCC that they required payment of the dividend described above as an incentive to participate in the Plan.

19. The Advisory Group and OCC's Board determined, with the assistance of Barclays, that the after-tax dividend was fair and reasonable compensation for the significant amount of capital the Stockholder Exchanges were required to immediately provide to OCC and the additional Replenishment Capital Commitment. The investment by the Stockholder

Exchanges is illiquid, and the Replenishment Capital Commitment, which would be required to be fulfilled if OCC had financial difficulties, would be highly risky.

20. OCC's Non-Stockholder Exchanges have not contributed any equity capital whatsoever, nor are they subject to the substantial risk of the Replenishment Capital Commitment. As shareholders, the Stockholder Exchanges have no obligation to admit additional stockholders to OCC under its governing documents.

21. The Replenishment Capital Commitment includes a provision stating that "[i]f Replenishment Capital becomes necessary and is not repaid in 24 months (or if the target capital requirement is not restored in the same period), refunds will end permanently but dividends can resume." This provision, which was negotiated with the Stockholder Exchanges, was designed to create an incentive for OCC to repay, to the extent possible, the Replenishment Capital within 24 months. If OCC were not impaired, it would pay down the Replenishment Capital owed and restore the 50% refund before taxes; if OCC were impaired such that it could not, through free increases or retained revenue, pay such funds back, the refund before taxes would be discontinued.

22. In the exercise of my business judgment, I never considered the Capital Plan to be of competitive significance to the Non-Equity Exchanges.

23. OCC did not invite Non-Equity Exchanges to contribute capital in its capital raise plan. This was an intentional decision because, under the covered clearing agency standards, the capital and the Replenishment Capital Commitment must be provided as equity, so the contributed capital had to come from the Stockholder Exchanges, which are OCC's only shareholders. Any money borrowed from Non-Equity Exchanges would have to be paid back by the Stockholder Exchanges, and it does not affect the risk that is borne by

the Stockholder Exchanges under the Capital Plan. Furthermore, as shareholders, the Stockholder Exchanges have no obligation to admit additional stockholders to OCC under its governing documents.

24. OCC approved the Alternative A Capital Plan by the necessary number of directors in compliance with OCC's By-Laws and later submitted the Capital Plan to the SEC for review and approval.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 2017

Craig S. Donohue

Craig S. Donohue