



February 14, 2018

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: The Options Clearing Corporation Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Revise The Options Clearing Corporation's Schedule of Fees  
Rel. No. 34-82596; File No. SR-OCC-2018-004**

Dear Mr. Fields:

Susquehanna International Group, LLP ("SIG") appreciates the opportunity to comment on the above-referenced proposed fee revisions. The proposed rule change should be disapproved as it is without justification; and because it is an exorbitant increase that realizes the negative consequences portended by The Options Clearing Corporation's ("OCC") controversial Capital Plan, which is currently under Securities and Exchange Commission ("SEC" or the "Commission") review.<sup>1</sup>

The Securities Exchange Act (the "Act") requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.<sup>2</sup> The burden is on the OCC to establish, and on the Commission to determine, that the proposed fees are reasonable. Moreover, the Act requires that a clearing agency's rules be designed, in general, to protect investors and the public interest.<sup>3</sup> To the extent the proposed OCC fee increase is not reasonable, it harms, rather than protects, investors and the public interest.

As the D.C. Circuit recently pointed out, in determining the reasonability of a rule filing, the Commission must undertake a reasoned analysis supported by substantial evidence, and may not take OCC's word for it.<sup>4</sup> Indeed, the Court specifically found that "the SEC was .... too quick to accept OCC's claims that [the OCC Capital Plan] would not increase fees for customers," and noted critically that "[i]n determining that the Plan is designed to protect investors and the public interest, the SEC's Order relies on the proposition that the Plan will "allow generally lower fees, or at least will not make higher fees

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<sup>1</sup> We incorporate our respective comments regarding the OCC Capital Plan at File No. SR-OCC-2015-02.

<sup>2</sup> 17 U.S.C. § 78q-1(b)(3)(D).

<sup>3</sup> 17 U.S.C. § 78q-1(b)(3)(F).

<sup>4</sup> *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 447 (D.C. Cir. 2017).

“inevitable.”<sup>5</sup> (citations omitted) As the SEC is aware, in support of the OCC’s proposed Capital Plan, the OCC proffered high-level, conclusory statements that purported to summarize its analyses; and, they were rejected as insufficient by the Court. The SEC is now faced with a proposed fee increase that directly contradicts OCC’s assurances of low fees in its Capital Plan submissions; and we (and the investing public) are once again deprived of the ability to examine the numbers and rationale proffered to support the contradictory increase.

The instant rule filing makes similarly vacuous proffers in support of its proposal for an exorbitant fee increase of 7.4%. OCC claims that the proposed fee change is reasonable “because the fee increase would be set at a level intended only to facilitate the maintenance of OCC’s Business Risk Buffer of 25%”.<sup>6</sup>

This conclusory premise is belied by the fact that the Buffer itself is simply 33% of OCC’s projected operating expenses, so its reasonability (apart from the concerns about the Capital Plan from which it derives) is based on the reasonability of the underlying expense projections. Indeed, OCC noted, “In reviewing the Schedule of Fees, OCC analyzed: (i) expenses budgeted for 2018, (ii) projected other revenue streams for 2018, (iii) projected volume “mix” and (iv) projected volume growth for 2018. Based on the foregoing analysis, OCC determined that the current fee schedule is set at a level that would be insufficient to ensure that OCC achieves its Business Risk Buffer of 25% as required under the Fee Policy.”<sup>7</sup>

This says almost nothing. Like its earlier Capital Plan proffers that were rejected by the D.C. Circuit, these high-level statements are wholly devoid of substance and cannot provide a basis upon which the SEC may conclude that the proposed fee increase is reasonable. While OCC stated that it “has provided a summary of its analysis in confidential Exhibit 3 of the filing”, the Commission’s notice included no exhibits except the proposed Schedule of Fees (marked as “Exhibit 5”), and OCC rejected our request for its exhibits despite our offer to accept them subject to confidentiality obligations similar to those governing the use of the confidential materials in the SEC proceedings regarding the Capital Plan.<sup>8</sup>

Accordingly, the public has no basis to believe that the proposed fee increase, which directly contradicts several years of prior OCC statements that the Capital Plan would reduce fees, is reasonable; and no ability to comment critically on any supporting materials proffered by OCC. We object to this and

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<sup>5</sup> *Id.*, at 449.

<sup>6</sup> SEC Rel. No. 34-82596, p. 5. OCC’s continued characterization of a “Business Risk Buffer of 25%” is false and grossly misleading. As OCC well knows, the Business Risk Buffer is 33% of its expense projection, plain and simple. Under OCC’s Capital Plan Fee Policy, its annual revenue target is equal to its twelve month expense forecast divided by .75, which is a curiously convoluted way of saying 33%. For example, if the expense forecast was simply \$100, dividing that figure by .75 equals \$133, with the \$33 Business Risk Buffer equaling 33% of the projected budget. The reference to “25” is wholly gratuitous and in any event is not a percentage at all of any number whatsoever, whether involved in the annual revenue target calculation or otherwise. OCC’s curious characterization, then, of “Business Risk Buffer of 25%” (by which OCC means dividing by .75) misleads one into thinking that the buffer is 25% of the expense projection. This continued gross distortion impugns the credibility of OCC’s other representations in support of its fee increase proposal.

<sup>7</sup> *Id.*, p. 4

<sup>8</sup> It is bewildering that OCC would not even share its projected expense figure, when it publicized its projected expense figure of \$234 million in its Capital Plan proposal to explain its Baseline Capital figure of \$117 million. OCC has since offered no justification for any operating budget increase, despite our repeated warnings about self-serving budget increases to enrich the OCC Shareholder Exchanges.

request that the supporting materials be made available for public scrutiny as we are otherwise deprived of the opportunity to meaningfully comment on the propriety of the proposed fee increase.

OCC's refusal to share the support for its proposed fee increase is all the more troubling in view of the Commission's rejection of our concerns that the OCC Capital Plan does not provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. We had noted that the Capital Plan's Dividend Policy creates a conflict of interest for the OCC Stockholder Exchanges that could influence future fees, and that OCC should not increase its budget without the ability of market participants, who ultimately finance OCC through transaction fees, to be assured that OCC (as the only clearing agency for U.S. listed options) continues to operate with the public marketplace foremost in mind. In rejecting these concerns, the Commission stated:

Neither of these concerns about possible future fees convinces the Commission that the Capital Plan is inconsistent with providing for the equitable allocation of reasonable dues, fees, and other charges among its participants. Future changes to OCC's fee schedule ..... are subject to Section 19(b)(1) of the Act and Section 806(e) of the Payment, Clearing, and Settlement Supervision Act, as applicable, both of which require OCC to (i) submit appropriate regulatory filings with the Commission, (ii) provide an opportunity for public comment, and (iii) require the Commission to review and ultimately disapprove, object to, or require modification or rescission, as applicable, if these future proposed changes do not meet regulatory requirements.<sup>9</sup> (footnotes omitted)

The protection afforded by the "opportunity for public comment" is utterly hollow if the public is not provided the basis of the fee increase proposal. OCC cannot mask that the fee increase proposal is substantially based on its expense projection. Due to the conflict of interest at the heart of the OCC Capital Plan, the OCC Shareholder Exchanges are incited to overestimate its expenses, because such overestimation increases the Business Risk Buffer amount, which is the source of the Shareholder Exchange dividends. Now, OCC seeks to hide from public scrutiny its expense projection (among other things) and how it seeks to justify the same. This is the very thing that is subject to exploitation to the harm of public investors. OCC is continuing the selfsame "trust the process" approach that was soundly rejected by the D.C. Circuit.

We also note that the proposal flies in the face of OCC's promise that the Refund, Dividend, and Fee Policies within its Capital Plan "will continue to have the benefit of OCC's low fee structure."<sup>10</sup> However, the instant situation is precisely as we predicted, that fees would inappropriately increase and thereby unduly enrich the Shareholder Exchanges. As the D.C. Circuit noted, the decision-making process to arrive at OCC's Capital Plan (including the Fee Policy) was hardly "arm's length";<sup>11</sup> its consequent fees cannot be different.

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<sup>9</sup> 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, pp. 40-41. SEC Rel. No. 34-74452 (Mar. 6, 2015). Of course, as our continued opposition to the Capital Plan makes clear, we in no way concede that even a meaningful opportunity to comment on proposed fee increases would justify the Plan.

<sup>10</sup> OCC Letter to Brent J. Fields, dated February 23, 2015, SEC File No. SR-OCC-2015002.

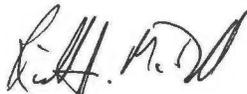
<sup>11</sup> *Susquehanna Int'l Grp.*, 866 F.3d at 448.

Moreover, 2018 OCC volume appears poised to significantly outpace 2017 volume. The highest volume month in 2017, November, saw total OCC volume of 396,779,462 contracts, with average daily volume of 18,375,829 options contracts and 518,431 futures contracts. January 2018 saw total OCC volume of 479,812,469, with average daily volume of 22,281,179 options contracts and 567,033 futures contracts. The first nine (9) days of February 2018 has already seen total OCC volume of 221,456,859 with average daily volume of 31,636,694 options contracts and 1,048,189 futures contracts. OCC volume for 2017 was itself an increase over 2016 (4,327,576,930 contracts vs. 4,167,747,777 contracts).

These volume increases render OCC's fee increase request all the more dubious. Of course, the proposed fee increase is completely consistent with our oft-repeated fears about OCC budget bloat inappropriately enriching the OCC Shareholder Exchanges on the backs (and to the harm) of market participants, including the investing public, in exploitation of the OCC monopoly.

For these reasons, we request that the Commission disapprove OCC's fee increase proposal, and thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "R. J. McDonald". The signature is stylized and cursive.

Richard J. McDonald