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April 10, 2019

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

Re: The Options Clearing Corporation ("OCC") Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Revise The Options Clearing Corporation's Schedule of Fees Rel. No. 34-85322; File No. SR-OCC-2019-001 (the "Proposed Fee Increase")

Dear Mr. Fields:

Susquehanna International Group, LLP ("SIG" or the "Firm") submits this comment letter in reply to OCC's March 27, 2019 letter (the "OCC Letter") regarding the Proposed Fee Increase. The OCC Letter contains mischaracterizations and errors that distort the record and distract from OCC's failures to justify the Proposed Fee Increase and to enable the Securities and Exchange Commission (the "SEC" or "Commission") to engage in reasoned decision-making. Several of these points are discussed below.

OCC Misinterprets SEC Rule 17Ad-22(e)(15)

The OCC Letter asserts that the requirements of SEC Rule 17Ad-22(e)(15) are not satisfied by maintaining equity equal to the greater of (a) six months operating expenses or (b) the amount determined to be sufficient to ensure a recovery or orderly wind-down. In support of this assertion, OCC relies on the prefacing language to that Rule section, which requires covered clearing agencies to "[i]dentify, monitor, and manage the covered clearing agency's 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, including by [the requirements of subsections (i) and (ii)]".[1] OCC also argued that the National Securities Clearing Corporation ("NSCC") "likewise interprets Rule 17Ad-22(e)(15) to require calculation of the amount of capital to be held based on the clearing agency's general risk profile."

OCC contends that the "including by" language of this Rule requires it to maintain equity in an amount exceeding the greater of (a) six months operating expenses or (b) the amount determined to be

[1] 17 CFR 240.17Ad-22(e)(15).

sufficient to ensure a recovery or orderly wind-down. However, OCC's argument is flawed – the fact that the Rule's requirement includes, but is not limited to, the requirements of subsections (i) and (ii) does not form a mandate that OCC must hold a greater amount. Any insinuation otherwise contravenes the plain meaning of those sections, which separately require what amount of money must be "determined" (subsection (i)) and what amount must be "held" as "liquid net assets funded by equity" (subsection (ii)). Properly read, the Rule affords the flexibility of a covered clearing agency to take steps – in addition to those steps dictated in subsections (i) and (ii) – to enable it to continue operations and services as a going concern if business losses were to arise. OCC's suggestion otherwise would *de facto* re-write the liquid net assets holding requirement of subsection (ii).[2]

Additionally, NSCC did not interpret Rule 17Ad-22(e)(15) to require the holding of an amount greater than (a) six months operating expenses or (b) the amount determined to be sufficient to ensure a recovery or orderly wind-down. In its rule filing, NSCC rightly explained the subsection (i) and (ii) requirements as described above, including that subsection (i) regards what amount is required to be "determined" for recovery and wind-down and that subsection (ii) regards what amount must be "funded by equity" (the greater of six months operating expenses or the amount determined under subsection (i)).[3] NSCC's Clearing Agency Policy on Capital requirements included maintaining the larger of its Risk-Based Capital Requirement, cost of recovery or wind-down, and six month operating expenses. This determination method exceeded NSCC's requirements under the Rule; however, NSCC did not claim that it was required to do so.[4]

Notably, NSCC's proposed policy of holding amounts in excess of the Rule 17Ad-22(e)(15)(ii) requirement was not met with opposing commentary, because NSCC is ultimately owned by the members of the Depository Trust Company ("DTC"). Accordingly, the amounts paid into NSCC by those members and held as equity are for the ultimate benefit of those same parties and are not converted to the benefit of any other party, as is the case with OCC's net income inuring to the benefit of the shareholder exchanges. The NSCC ownership dynamic likewise mitigates potential concerns about the reasonability of its capital needs and clearing fee rates.

SIG agrees that OCC must be adequately funded, but disagrees that it should be gratuitously overfunded, resulting in an undue burden and harm upon the investing public, and inequitably converting monies paid by market participants into the property of OCC shareholder exchanges. As noted previously, this concern arises from the conflict of interest inherent in OCC's ownership by for-profit exchanges, which is unique among major U.S. securities clearing agencies.

In view of this conflict of interest, it is remarkable that the OCC Letter argues that its Proposed Fee Increase rule filing need not be "reviewed critically" by the SEC. This attempt to avoid critical review contravenes the Commissions' recent decision disapproving a BOX Exchange LLC fee increase.[5] That decision relied on the ruling of the D.C Circuit with respect to OCC's Capital Plan that the Commission

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[2] The OCC Letter's interpretation also contravenes OCC's own articulation of the equity holding requirement on pages 4-5 of its Proposed Fee Increase rule filing.

[3] SEC Rel. No. 34-81105, p. 12 (July 7, 2017).

[4] *Id.*, p. 13. Moreover, OCC's argument says nothing about how NSCC's approach compared to OCC's approach to "cover" potential general business losses. It certainly does not stand for the proposition that NSCC held as equity 100% of aggregate identified potential loss amounts.

[5] SEC Rel. No. 34-85459, pp. 12-13 (March 29, 2019).

"should have critically reviewed OCC's analysis or performed its own."[6] The Commission also referred to its own decision to disapprove the OCC Capital Plan, stating that in reaching that determination, "the Commission reiterated the D.C. Circuit's holding that it must 'critically evaluate the representations made and the conclusions drawn' by the SRO in determining whether a proposed rule change is consistent with the [Securities Exchange Act of 1934 (the "Act")].'"[7] OCC's proposed avoidance of critical review is a telling caution that the Commission should exercise utmost care in its determination as to whether OCC has met its burden to demonstrate that the Proposed Fee Increase is reasonable and protects investors and the public interest.

As we noted previously, the holding by OCC of funds in excess of the greater of six months operating expenses or the cost of recovery or wind-down in a *non-equity* account would allow OCC to meet reasonable capital targets to cover potential losses. It would also mitigate OCC's aforementioned conflict of interest by designating such funds to be for the benefit of OCC clearing members in the event of a sale of all or part of the clearing agency. The contrary result, under OCC's erroneous interpretation of Rule 17Ad-22(e)(15), that enriches the OCC shareholder exchanges through equity increases at the expense of the public, inequitably harms investors and contravenes public interest.[8]

The OCC Letter Did Not Justify OCC's Target Capital Requirement

The OCC Letter argues that OCC's post-remand production to the SEC of Oliver Wyman presentations fully addressed the D. C. Circuit's concern that the record reflected a lack of reasoned decision-making. It states, "These presentations detail the process by which OCC and Oliver Wyman determined the amount of capital necessary to meet the requirements under Rule 17Ad-22(e)(15)," and that "Oliver Wyman conducted a 'bottom-up' analysis of OCC's risks to quantify the appropriate amount of capital to be held against each risk, ..."[9]

This is simply not true. Oliver Wyman neither determined the amount of capital necessary to meet the requirements under Rule 17Ad-22(e)(15), nor quantified the appropriate amounts to be held against each identified risk. As we have noted previously, and as the Oliver Wyman presentation materials demonstrate, its analysis was to assess the loss values that may be associated with identified potential loss scenarios at different risk levels; it was not to determine appropriate amounts of capital to hold against these risks to comply with Rule 17Ad-22(e)(15).

As the Commission knows, the loss value at Oliver Wyman's 1-in-100 year risk level ($105 million) was at a 99% confidence level; the 1-in-200 year risk level ($136 million) was at a 99.5% confidence level; and the 1-in-1,000 year risk level ($226 million) was at a 99.9% confidence level. OCC does not justify why

[6] *Susquehanna International Group v. SEC*, 866 F. 3d 442, 447 (D.C. Cir. 2017).
[7] SEC Rel. No. 34-85459, p. 13 (citation omitted).
[8] Alternatively, in order to mitigate this conflict of interest, OCC could adopt a By-Law providing for the distribution of all money held as equity (beyond the shareholder exchanges' initial $25 million investment) to the clearing members (who fund the equity account through their clearing fees) in the event of a sale of OCC. Any protestation that OCC does not have to do this or cannot force the shareholder exchanges to agree to it would belie the self-interest embedded in the aforementioned conflict.
[9] OCC also argued that the Commission did not disapprove the Capital Plan on the basis that the target Capital Requirement was unreasonable, nor did it make any such finding. This point is inapposite. The Commission did not need to determine whether the Target Capital Requirement was reasonable, because it was already disapproving the Capital Plan on other grounds. What is relevant is that the Commission *did not find* that the Target Capital Requirement was reasonable.

any of these levels is appropriate, as opposed to, for example, a 25 year or 50 year level.[10] OCC likewise does not explain why the 99% confidence level is not sufficient, especially when the differences between the three confidence level percentages is small (less than one percentage point) but the associated dollar figure differences are enormous. Nor does OCC justify its unspoken presumption in establishing its capital target that *all* of the varied and different types of identified losses will materialize contemporaneously, such that it feels it must carry the full amount of the totality of the respective loss values because it does not consider the much likelier prospect that they will not all occur at once and OCC will have a chance to recover from loss scenarios that may occur singly or in limited sets. Finally, as noted multiple times previously and yet *never* addressed by OCC, it has offered no support for its selection of the 1-in-1,000 year risk level for the determination of its equity capital claim (and Oliver Wyman did not recommend this selection). Again, this level offers *de minimis* confidence level improvement over Oliver Wyman's other risk levels, but vastly outstrips them in the amount of money it deposits in shareholder equity for the ultimate benefit of the shareholder exchanges.

The OCC Letter Seeks That The Public And SEC "Trust The Process" Once Again[11]

Like the Proposed Fee Increase rule filing, the OCC Letter states that the OCC Board considered several factors in determining how best to meet the Target Capital requirement, then summarily delineates those factors. This again highlights that, because OCC's analysis summary was provided to the SEC as a confidential exhibit, the public has no meaningful opportunity to comment on OCC's analysis as a justification of its Proposed Fee Increase to address whether the same is reasonable. OCC either ignores the lack of such meaningful opportunity to comment, or asks that the public trust its process; and, depending on how superficial its confidential summary is, may well be asking the Commission to trust its process as well.[12]

The issue of OCC fees and expenses based on erroneous projections has been a troubling concern over the past six years – and it is alarming that market participants are, once again, being asked to "trust the process" for another fee and budget arrangement filed with a sense of urgency yet hampered by vague presumptions. In this vein, the present filing is similar to the estimated 70% transaction fee increase in 2014, likewise contended as necessary to meet regulatory requirements regarding Rule 17Ad-22(e)(15).[13] At that time, OCC repeatedly assured market participants that the higher fee schedule would be temporary, which was an important factor in the review of that proposal. Rather than reduce the fees as projected, however, the 70% fee increase has not only been kept largely in place (and indeed made higher by the present proposal) but was also quickly followed by the now disapproved Capital

[10] OCC's admission that its current capital target is based on its own analysis, and not Oliver Wyman's (it says that its results were consistent with Oliver Wyman's, but does not say how it got there), highlights that the record is devoid of the analyses supporting its current capital target, which was a requirement of the D.C. Circuit. Accordingly, the Commission lacks necessary information in order to engage in reasoned decision-making, and the public is deprived of the opportunity to comment on this basis for the Proposed Fee Increase.
[11] "Trust the process" was a term referenced in a cautionary manner by the D.C. Circuit Court in its decision to remand the approval of the now-disapproved capital plan back to the SEC for further review.
[12] As discussed *infra,* the public record does not reflect that OCC provided its budget in attempted support of its 10% fee increase, even though it did so last year for its proposed 7.4% fee increase. OCC protestations that its analysis summary, budget, or other underlying materials offered in support of it Proposed Fee Increase are sensitive and confidential does not address or resolve the preclusion of meaningful opportunity for public comments. The pronounced relevance of these materials proceeds from OCC's conflicted ownership by for-profit exchanges that was not contemplated when the exchange ownership structure was implemented.
[13] Release No. 34-71769; File No. SR-OCC-2104-05

Plan, which remarkably included the egregiously wrong presumption that OCC expenses would only grow by an estimated 2.3% annual rate for many years to come. When expenses actually grew by an annual average of more than 17% over the last three years, the added revenue from the 70% fee increase became a support lever for larger budgets that supercharged the rate of return on shareholder exchange dividends. The annual rate of return on those dividends exceeded 20% last year, and would have likely exceeded 30% this year if not for the fact that the plan was disapproved by the SEC. Thus, the present fee increase proposal cites the same rule using the same urgency and lack of clarity or transparency that marked the issues mentioned above. While the 70% fee increase was not temporary as projected and the 2.3% expense growth projection was vastly incorrect, both were influential in gaining support for the respective rule filings and, ultimately, enriching the shareholder exchanges.

The question remains how OCC could have so badly miscalculated that the 70% fee would be temporary when it was seemingly apparent, at least shortly after the fee went into effect, that it was not going to be temporary. It is likewise an open question how OCC's budget increase projection in the capital plan would be just a fraction of the realized growth. Indeed a double-digit growth rate at the time would have been a logical presumption to make, given that OCC's historical budget growth was exponentially higher than the projected amount and also because OCC was transitioning to a significantly higher employment number. Yet, OCC was defiant in defending the 2.3% budget growth projection; just as it was with the 70% fee increase being temporary – and just as it is now with the present fee increase being needed to bolster capital, even while it appears that the fee increase is not a necessary or reasonable expense to impose on investors.

OCC is experiencing a period of high volume and likely to finish 2019 with the highest options volume in its history, with the possible exception of last year when it exceeded 5.2 billion options contracts resulting in $117 million in profits. OCC has declined to share its volume projections for 2019, opting instead to provide a confidential report to the SEC with its filing. If, in fact, OCC has provided the SEC with an estimate below the 4.7 billion contracts it is currently trending to reach, the public should be able to see the facts supporting the estimate for possible comment. We do not see an appreciable need for secrecy by a clearing monopoly around projecting a range for the current year's volume. What we do see, however, is the danger of allowing OCC to make unsubstantiated projections when recent miscalculated projections became critical factors in, first, being able to pay $78 million in dividends to its shareholders over a few short years and, now, being able to direct revenue in excess of $200 million to the shareholder equity account for the ultimate benefit of those same shareholder exchanges.

The OCC Letter Does Not Justify OCC's Lack Of A Target Date

OCC objects to SIG's critique that OCC "has not explained what target date it has set for the accumulation of equity through the fee increase, let alone how and why such date was set." Citing the importance of the capital requirement and OCC's role in the financial markets, OCC responds to this critique with the observation that "[i]t is arguably OCC's obligation to the marketplace to ensure compliance with Rule 17Ad-22(e)(15) 'as quickly as possible'; in any event, it certainly is eminently reasonable for OCC to attempt to do so."

The point behind SIG's critique is that in raising clearing fees by 10% for the ostensible purpose of meeting OCC's $247 million capital target (or some greater target amount), the amount of time it has targeted to reach that goal is obviously relevant to setting the size of the increase (i.e., a shorter target date may result in a larger increase and a longer target may result in a smaller increase because the capital level may be achieved more gradually). The rationale for such target date, then, directly relates to whether it is reasonable to increase the clearing fee rate by 10%.

The OCC Letter's response that OCC is important and should reach its target "as quickly as possible" completely sidesteps SIG's critique. What is more, it is utterly confusing in view of OCC's own admission that it is currently above its $247 million Target Capital Requirement. It is senseless for OCC to seek to increase clearing fee rates by 10% to meet a capital target that it has already exceeded. As we now know from OCC's 2018 Annual report, it held $267 million as of December 31, 2018, and likely far more by now.

Having noted that its Target Capital achievement was reliant on the $40 million retention of the shareholder exchange investment, it appears that the actual purpose of the increase is not to achieve or maintain the Target Capital Requirement that it has already exceeded; but rather, at least in part, to repay the $40 million to the shareholder exchanges (while not seeking repayment of the $78 million of dividends paid out to the shareholder exchanges pursuant to the rejected Capital Plan). The lack of a sunset provision for the rate increase suggests that there is yet another undisclosed purpose for the Proposed Fee Increase, which would enhance the shareholder exchange coffers. Either way, the importance of OCC and impetus to raise capital "as quickly as possible" are wholly irrelevant when OCC is already above its alleged capital requirements.[14]

The OCC Letter Does Not Justify OCC's Rejection Of Cheaper Alternatives

The OCC Letter dismisses SIG's repeated offer to loan the shareholder exchanges money at the U.S. Treasury bill rate of return to contribute to OCC as capital. Its dismissal is based on OCC's claims that (1) it does not need the funds because it does not need to raise $247 million but rather to maintain that amount; (2) the exchanges have their own capital, but no incentive to invest it in OCC below their cost of capital and no incentive to pay SIG interest in order to invest capital with "no meaningful return"; (3) the shareholder exchanges would bear all risk to the capital; and (4) OCC has no means to coerce the shareholder exchanges into such transaction, "particularly in light of the Stockholder Exchanges' fiduciary duties to their own shareholders".[15]

All of these excuses miss the point that an investment in OCC is extremely low-risk and warrants no return greater than the U.S. Treasury bill rate. SIG is willing to "put its money where its mouth is" in support of this truism. We adjure the Commission to be mindful of this and wary if the OCC shareholder exchanges seek to exact from OCC a so-called "meaningful return" above the Treasury bill rate,

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[14] The OCC Letter reveals that the purpose of the Proposed Fee Increase is not to *raise* $247 million to meet its Target Capital requirement, but to *maintain* its capital at that level. OCC has provided no information explaining why its existing fee rates were inadequate to serve this purpose, when it was those self-same rates that enabled OCC to raise its capital to that level to begin with. Indeed, it is bewildering that OCC would seek to raise its fees at all, let alone by 10%, after experiencing an unprecedented high-water mark for cleared option volume just last year. General platitudes that it would better ensure that OCC maintains its target capital level are wholly inadequate, as otherwise they would justify any increase no matter how high it may be. Again, OCC has provided no justification for the Proposed Fee Increase, the only effect of which is to enrich the shareholder exchange equity account coffers.

[15] The fact that SIG's offer is not a coercive mandate does not justify the shareholder exchanges adopting a more onerous capital plan to the public detriment and undue shareholder exchange benefit. Additionally, the offer was originally made when the shareholder exchanges had invested $150 million that OCC claimed to need.

"particularly," as OCC says, "in light of the Stockholder Exchanges' fiduciary duties to their own shareholders". These characterizations suggest an intent to monetize the OCC monopoly.[16]

Moreover, OCC's presumption of the terms of such a transaction sets up a straw man that OCC proceeds to knock down, without any discussions between OCC, SIG, and the exchange shareholders to arrive at a workable result (including risk allocation). In connection, it ignores SIG's offer to be flexible with OCC and the shareholder exchanges in exploring other avenues to provide funding in order to satisfy the equity requirement of Rule 17Ad-22(e)(15).[17]

In actuality, under SIG's offer the OCC shareholder exchanges would be making no investment in OCC in economic terms, and would bear no cost of capital. SIG could simply purchase a Treasury bill (which is a qualifying liquid asset for purposes of Rule 17Ad-22(e)(15)) and convey said bill to the shareholder exchanges, who would then convey the same to OCC where it would be held as equity. When the interest is paid out from the U.S. government to OCC on the Treasury bill, OCC would simply convey that money back to the shareholder exchanges, who would convey the same to SIG.[18] In its financing arrangement with the shareholder exchanges, SIG would stipulate to bear the risk of OCC default on its obligation. Thus, the financing would cost OCC and the shareholder exchanges nothing. Again, the point is that OCC is such a safe, low-risk investment that it warrants no more than the Treasury bill rate of return. Any greater return would be wholly gratuitous and an unreasonable burden on the investing public.

OCC Can and Should Recoup The Dividends To The Shareholder Exchanges

The OCC Letter claimed that OCC has no basis on which it can require the shareholder exchanges to return the dividend payments made to them under the disapproved Capital Plan, and that the dividends were compensation for the "real risks to their investment", as it could have been drawn upon if operational risks had materialized.

OCC does, however, have bases on which it can require the shareholder exchanges to return the dividend payments. As SIG pointed out in our March 20, 2019 comment letter, the By-Law authorizing the shareholder exchange dividends was disapproved, the result of which was that OCC does not have the authority to issue the subject dividends.[19] As an equitable matter, it is incomprehensible that the

[16] Contrary to OCC's view, the shareholder exchanges have a strong incentive to invest in OCC if such investment is needed, because OCC is essential to their options exchange businesses. Indeed, any such investment may be considered as simply a cost of doing business as an options exchange.

[17] Contrary to OCC's mischaracterization, SIG's offer is an effort to satisfy – not circumvent – the requirement of Rule 17Ad-22(e)(15) that capital be funded by equity. OCC makes this mischaracterization without explaining how a capital investment by its shareholder exchanges does not qualify as equity merely because they may have an offsetting loan of the same amount. It similarly misses the point that carrying insurance against identified potential loss scenarios may reduce – not replace – the amount of equity capital that OCC needs to hold on a risk basis against those scenarios. Again, there is no mandate for OCC to hold funds as equity equal to 100% of aggregate potential losses.

[18] Alternatively, SIG could contribute cash through the same process, which OCC can use to buy a Treasury bill and likewise pass back the interest it receives on that instrument.

[19] OCC's Capital Plan rule filing set out that under OCC's Capital Plan, its shareholder exchanges "would receive, among other things, the right to receive dividends from OCC." This "right" was disapproved along with the rest of the OCC rule filing. See, SEC Rel. No. 34-74136; File No. SR-OCC-2015-02, p. 2.

shareholder exchanges get their entire $150 million investment back but are allowed to keep the $78 million paid to them on account of that investment.

Contrary to OCC's assertion, the dividends to the shareholder exchanges were an exaggerated over-compensation for the "real risks to their investment". The value OCC placed on these risks was materially overstated, as they were based on the extremely remote 1-in-1,000 year chance of occurrence. As noted, the proper rate of return for an investment in OCC is at or about the Treasury bill rate, and not the 52% total return the shareholder exchanges received within three years of their investment.[20]

The OCC Letter also claimed that SIG fails to explain why the disapproval order would not also require OCC to recoup refunds paid out to the industry as well as dividends, but this is untrue. SIG explained in its March 20th comment letter that, unlike the propriety of dividend recoupment, the same is not true for refunds paid out under the Capital Plan because the result of the Capital Plan on refunds is that they were cut in half.

Alarmingly, OCC summarily states in a parenthetical on the last page of its letter that refunds to clearing members "would no longer be permissible in light of the policies and procedures requirements applicable to Covered Clearing Agencies". It offers no explanation or support for this abrupt cessation of a decades long practice, the result of which places even more of public investors' money into shareholder exchange coffers by retaining budget buffer cash as OCC equity. This would further distance OCC from a market utility model and into a for-profit monopoly, and would be yet another reason to hold any retained money above a legally required equity amount in a *non-equity* OCC account. Unless and until that action is taken, OCC fee filings should be considered in light of the conflict of interest that enriches the shareholder exchanges with the more net income OCC generates, especially through fee increases.[21]

The Proposed Fee Increase Should Be Suspended

For the reasons noted above and in SIG's prior comment letters, the Proposed Fee Increase should be disapproved. Until the Commission comes to a determination on this issue, the Proposed Fee Increase should be suspended.

In 2018, the Commission exercised its authority under Section 19(b)(3)(C) of the Act to temporarily suspend OCC's January 19, 2018 proposed fee increase.[22] It should do the same for the instant Proposed Fee Increase. Now, as then, OCC's shareholder exchanges have an incentive to inflate OCC's

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[20] OCC also cited the shareholder exchange obligations to provide Replenishment Capital to OCC as a basis for dividend compensation. We have addressed the lack of merit to this argument multiple times in our Capital Plan opposition. NSCC's capital plan, upon which the OCC Letter relied, likewise showcases this lack of merit, as it includes in its replenishment plan various replenishment tools, including insurance and a line of credit, neither of which would support the outsized returns realized by the shareholder exchanges on their investment. SEC Rel. No. 34-81105, p. 9.

[21] Recall that OCC's purpose for the Proposed Fee Increase is to secure revenue over expenses that it intends to hold as shareholder exchange equity. As noted above, OCC may also mitigate its conflict of interest through a By-Law provision that OCC equity will be distributed to clearing members rather than shareholder exchanges upon a sale of OCC.

[22] Rel. No. 34-82793; SR-OCC-2018-004. We incorporate herein the comment letters that we submitted with respect to that OCC fee filing.

budget and operating expense projections, because they lead to shareholder enrichment in the form of dividends and/or equity increases. Now, as then, the public is deprived of a meaningful opportunity to comment on the budget, projections, and analyses undergirding the Proposed Fee Increase and accordingly on the reasonability of such increase.

Indeed, the situation this year appears worse than last year. Last year, for a proposed 7.4% fee increase, OCC provided a budget to the SEC on a confidential basis, and one of the questions resulting in the temporary suspension was whether the public was thereby deprived of a meaningful opportunity to comment.[23] This year, for a 10% fee increase, the record does not reflect that OCC provided even the SEC with the undergirding budget, notwithstanding its claim that the Proposed Fee Increase is reasonable because it is designed, in part, to "cover OCC's operating expenses". Certainly the public cannot comment on a budget that has not been provided at all, even though said budget directly impacts the reasonability of the Proposed Fee Increase. It would seem that the case is even more compelling this year than last year to suspend the Proposed Fee Increase, and that the SEC has even less of a basis to engage in reasoned decision-making about whether the Proposed Fee Increase is reasonable.

A suspension would not result in any harm, as OCC already has over $20 million more than the capital target that the Proposed Fee Increase is intended to maintain. Moreover, as noted, OCC makes no case for why the fee rates that accumulated the $247 million to begin with are not sufficient to maintain that capital level.

Further, inclusive of the wholly unsupported and unexplained $21 million in OCC's claimed pension risk, OCC's fee rates before the Proposed Fee Increase amply assured that OCC maintained capital well in excess of its potential business or operational losses. Assuming conservatively that OCC's current capital level, net of the $40 million it claims to owe the shareholder exchanges, is $227 million (i.e., the December 31, 2018 equity balance of $267 million less $40 million, which does not count any 2019 revenues), this amount is at least $70 million in excess of OCC's aggregate identified potential values at or above the 99% confidence level -- $126 million at the 99% (1-in-100 year) confidence level, and $157 million at the 99.5% (1-in-200 year) confidence level.[24] This fact recalls the arbitrary and unjustified selection of the absurd 1-in-1,000 year metric that gratuitously inflates OCC's alleged capital target in the extreme.

Conclusion

A conflict of interest is embedded in OCC's ownership by for-profit exchanges that are enriched by inflated budgets and resultant clearing fee increases. The conflict is evidenced by such inflated budgets and outsized dividends under the OCC Capital Plan (both of which were higher than OCC represented in its projections and higher than the SIG predictions that OCC derided), and continues to plague OCC's capitalization efforts, including fee increase proposals. Now that the "golden goose" under the capital Plan no longer produces outsized dividends, there is still enrichment to be realized by "fattening the goose" through an increase(s) to shareholder equity.

[23] This question remains open, because OCC subsequently withdrew its fee filing before the SEC came to a determination.

[24] Of course, such equity balance represents a vastly greater excess above potential losses at a 25 year, 50 year, or other risk level.

Against this background, OCC continues to fail to provide adequate support for its capitalization and to enable the Commission to engage in reasoned decision-making rather than simply rely on OCC's superficial projections and high level, conclusory remarks. For the reasons noted herein and in our prior comment letters, we respectfully request that the Proposed Fee Increase be disapproved and in the interim suspended until such determination is made.

Respectfully,

Richard J. McDonald