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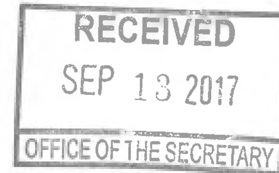

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SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:	)	
BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange LLC, and Susquehanna International Group, LLP	)	File No.: SR-OCC-2015-02

RESPONSE OF THE OPTIONS CLEARING CORPORATION IN OPPOSITION TO PETITIONERS' MOTION TO STAY PAYMENT OF DIVIDENDS UNDER THE PLAN

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The Commission should deny Petitioners' Motion to Stay Payment of Dividends Under the Plan.[1]

This is Petitioners' fourth attempt to prevent OCC's Capital Plan from operating.[2] The three previous attempts have been rejected, and nothing has changed that supports a different result now. To the contrary, the reasons for the Capital Plan to continue to operate have strengthened, because Petitioners were unsuccessful in their attempt to persuade the Court of Appeals to vacate the Commission's order approving the Capital Plan. Instead, the Court left the Capital Plan intact while giving the Commission the opportunity to make a more complete record to support its approval order.

Petitioners' current motion to stay payment of the dividends is weaker than their previous attempts to stay the operation of the Capital Plan in another respect. Petitioners previously sought to stay operation of the entire Capital Plan. Now they seek to stay only part of the Capital Plan, i.e., the payment of dividends, while leaving the remainder of the Capital Plan intact, including the obligations of OCC's shareholders to provide additional capital and their ongoing replenishment capital commitment, by which they stand ready to provide additional capital if

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[1] The following references are used in this response: "OCC" – The Options Clearing Corporation; "Petitioners" – Susquehanna International Group, LLP, Box Options Exchange LLC and Miami International Securities Exchange, LLC (petitioner KCG Holdings Inc. did not join Petitioners' Motion and petitioner BATS Global Markets, Inc. withdrew while this matter was on appeal); "SEC" or "Commission" – the U.S. Securities Exchange Commission; "Court of Appeals" or "Court" – The United States Court of Appeals for the District of Columbia District; "Exchange Act" – the Securities Exchange Act of 1934, "Susquehanna" – Susquehanna International Group, LLP.

[2] As discussed below, *infra* at 5-7, Petitioners unsuccessfully opposed OCC's motion to lift the automatic stay. Days after the SEC entered an order lifting the automatic stay, Petitioners filed a motion to reinstate the automatic stay, which the SEC ultimately denied as moot in its order approving the Capital Plan. On appeal of that order to the Court of Appeals, Petitioners filed an emergency motion to stay the Capital Plan, which the Court denied.

needed by OCC. In other words, Petitioners want OCC's shareholders to continue to shoulder their obligations of capitalizing OCC, while denying them the agreed upon compensation for doing so. The manifest unfairness of what Petitioners seek is compounded by the fact that the shareholders have already earned the compensation for all of 2016 and most of 2017 by performing their obligations under the Capital Plan, which was approved by the Commission, and which the Court declined to vacate or stay when asked to do so by Petitioners.

Rather than vacate the Commission's order approving OCC's Capital Plan, the Court remanded to the Commission so that the Commission could make additional findings and determinations whether the Capital Plan is consistent with the Exchange Act. The Court concluded that "the SEC may be able to approve the Plan once again, after conducting a proper analysis on remand."[3] In doing so, moreover, the Court expressed no views on the merits of Petitioners' arguments, but rather merely identified certain of those arguments for the Commission to address on remand.[4] Hence neither the Commission nor the Court has supported Petitioners' positions on their merits.

Based on the Court's clear intent that the Capital Plan remain in full effect while the Commission makes additional findings and determinations concerning the Capital Plan, the fact that the issue of a stay has already been decided adversely to Petitioners by the Commission and the Court, and the fact that the Court expressed no view supporting the merits of the Petitioners' arguments, the Petitioners' motion should be denied without the Commission having to consider, once again, the factors that determine whether a stay should be issued. Nevertheless, even if

[3] *Susquehanna Int'l Grp., LLP v. SEC*, No. 16-1061, slip op. at 17 (D.C. Cir. Aug. 8, 2017).

[4] *See Susquehanna Int'l Grp.*, slip op. at 7 ("We do not reach any of those arguments, all of which contend that the OCC's Plan is inconsistent with the above-described requirements of the Exchange Act.").

those factors were considered again, the result should be the same, because they all favor a continuation of OCC's Capital Plan while the remand is proceeding.

BACKGROUND

The Financial Stability Oversight Council designated OCC a systemically important financial market utility in 2012.[5] OCC is the only clearing agency for standardized options listed on U.S. national securities exchanges and also provides clearing services for commodity futures, commodity options, security futures, and the securities lending market. These functions are critical to the operation and stability of the global financial system. Given the obligations of its important role in the financial system, OCC must remain adequately capitalized and compliant with evolving domestic and international regulatory requirements.

In 2014, OCC was anticipating the approval by the Commission of its then-proposed Standards for Covered Clearing Agencies ("CCA standards"), which were adopted in October 2016 as proposed by the Commission.[6] Those standards, which are now mandatory, require that the capital consist of 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, and also require the ongoing commitment to add additional funds to the clearing agency's equity if needed.[7]

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[5] *See* Financial Stability Council 2012 Annual Report, Appendix A, *available at* https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2012%20Annual%20Report.pdf.

[6] *See* Standards for Covered Clearing Agencies, Exchange Act Release No. 34-78961 (Sept. 28, 2016), 81 Fed. Reg. 70786 (Oct. 13, 2016); 17 C.F.R. 240.17Ad-22(e)(15).

[7] *See id.* at 191-201, 81 Fed. Reg at 70834-36.

After extensive and detailed deliberations, OCC's Board determined that it was undercapitalized and began developing a strategy for addressing its undercapitalization. Among other things, OCC retained an outside consultant to conduct a "bottom-up" analysis of OCC's risks and to quantify the appropriate amount of capital to be held against each risk, including consideration of credit, market, pension, operational, and business risk.[8] Based on internal operational risk scenarios and loss modeling at or above the 99% confidence level, OCC established a target capital requirement ("Target Capital Requirement") of $247 million.[9] OCC reached the same $247 million Target Capital Requirement result by adding six months of operating expenses, or $117 million, to a Target Capital Buffer of $130 million, computed from operational risk, business risk and pension risk (after taking into account the baseline capital requirement of $117 million).[10]

OCC designed each component of the Capital Plan to address specific risk concerns and to allow OCC to reach the Target Capital Requirement. For example, OCC determined that the best way to raise the necessary amount of equity capital was from the options exchanges that own equity in OCC ("Stockholder Exchanges"). The Capital Plan developed by OCC called for the Stockholder Exchanges to make an immediate capital contribution of $150 million and to commit to provide replenishment capital of $117 to $200 million ("Replenishment Capital Commitment") in specified circumstances. In return, the Stockholder Exchanges would have the right to receive dividends from OCC to compensate them for their immediate investments and their ongoing commitment to provide replenishment capital if needed.

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[8] OCC's Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan, File No. SR-OCC-2015-02, at 3-4 (Oct. 7. 2015) ("OCC Written Statement").

[9] *Id.*

[10] *Id.*

In addition to the new capital contribution and the Replenishment Capital Commitment, the Capital Plan includes (i) a policy establishing OCC's clearing fees at a level that would be sufficient to cover OCC's estimated operating expenses in addition to retention of additional funds as a "Business Risk Buffer" ("Fee Policy"), (ii) a policy establishing the amount of the annual refund of OCC's fees to clearing members ("Refund Policy"), and (iii) a policy for calculating the amount of dividends to be paid to the Stockholder Exchanges ("Dividend Policy"). Under the Capital Plan, OCC is also required to make an annual determination of its Target Capital Requirement using a baseline capital requirement calculated by a formula, and a target capital buffer linked to plausible operational, business, and pension risk scenarios. These components of the Capital Plan ensure the continuity of OCC's business operations and reflect the interrelatedness of the Capital Plan's key components.

In December 2014, OCC filed an advance notice, regarding its intent to implement the Capital Plan, with the Commission pursuant to the Payment, Clearing, and Settlement Supervision Act of 2010. On February 26, 2015, the Commission, acting directly, and subsequent to consultation with the Board of Governors of the Federal Reserve as required by the statute, issued a notice of no objection to the advance notice filing.[11] In its notice of no objection, the Commission stated that the Capital Plan serves the public interest:

> The Capital Plan will … help ensure that [OCC] can continue to provide its clearing services if it suffers business losses as a result of a decline in revenues or otherwise. Given that OCC has been designated as a systemically important financial market utility, OCC's ability to provide its clearing services if it suffers business losses contributes to reducing systemic risks and supporting the stability of the broader financial system.[12]

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[11] Notice of No Objection to Advance Notice Filing ("Notice of No Objection"), Exchange Act Release No. 34-74387, at 6-7 (Feb. 26, 2015), 80 Fed. Reg. 12215 (Mar. 6, 2015)

[12] *Id.* at 25.

In January 2015, OCC also submitted a proposed rule change to enable OCC to implement the Capital Plan. On March 6, 2015, the Commission's Division of Trading and Markets, by delegated authority, issued a Commission order approving OCC's rule change to implement the Capital Plan.[13] This order was automatically stayed about one week later, when Petitioners sought administrative review of the order by the Commission. On September 10, 2015, in granting administrative review of the March 6 order and lifting the automatic stay over Petitioners' objection, the Commission found that immediate implementation of OCC's Capital Plan served the public interest, stating:

> The Commission finds that it is in the public interest to lift the stay during the pendency of the Commission's review. Under the circumstances of this case, the Commission believes, on balance, that strengthening the capitalization of a systemically important clearing agency, such as OCC, is a compelling public interest. The Commission also believes that the concerns raised by the Petitioners regarding potential monetary and competitive harm do not currently justify maintaining the stay during the pendency of the Commission's review.[14]

Petitioners brought a motion to reinstate the automatic stay on September 15, 2015.[15] On February 11, 2016, the Commission issued an order setting aside the March 6, 2015 decision by delegated authority, approving the Capital Plan ("Approval Order"), and denying the motion to reinstate the automatic stay as moot.[16]

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[13] 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 (Mar. 12, 2015).

[14] Order Discontinuing the Automatic Stay ("SEC Stay Order"), Exchange Act Release No. 34-75886, at 4 (Sept. 10, 2015), 80 Fed. Reg. 55668, 55669 (Sept. 16, 2015).

[15] Mot. to Reinstitute Automatic Stay, File No. SR-OCC-2015-02 (Sept. 15, 2015).

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

Petitioners then filed in the Court of Appeals an emergency motion to stay the approval of the Commission's February 11, 2016 Order approving the Capital Plan.[17] Although the Capital Plan had been in full effect since the Commission lifted the automatic stay on September 10, 2015, the Petitioners sought, among other things, to block the payment of dividends to the Stockholder Exchanges for the 2015 fiscal year – just as Petitioners are now attempting to block payment of the dividends for 2016 and beyond. In its opposition to the stay request, the Commission argued that payment of the 2015 dividends would not irreparably harm Petitioners.[18] The Commission also argued that the balance of equities and public interest did not favor a stay.[19]

On February 23, 2017, the Court of Appeals issued an Order denying Petitioners' emergency motion for a stay, concluding that "Petitioners [had] not satisfied the stringent requirements for a stay."[20] OCC paid the 2015 dividends and refunds. On March 28, 2017, OCC announced $25.6 million in dividends to Stockholder Exchanges and $45.6 million in refunds, which OCC said it planned to pay in the third quarter of 2017.[21]

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[17] Mot. for Stay by Pet'rs Susquehanna Int'l Grp., LLP, KCG Holdings, INC., & Bats Global Markets Inc., *Susquehanna Int'l Grp v. SEC*, No. 16-1061 (Feb. 17, 2016).

[18] Opposition of the Securities and Exchange Commission to Petitioners' Emergency Motion for Stay, *Susquehanna Int'l Grp., LLP*, No. 16-1061, at 13 (D.C. Circ. Feb. 22, 2016).

[19] *Id.* at 20.

[20] Order ("D.C. Cir. Stay Order"), *Susquehanna Int'l Grp.* (D.C. Cir. Feb. 23, 2016) (citing *Niken v. Holder*, 556 U.S. 418, 434 (2009)).

[21] Press Release, OCC, OCC Declares Clearing Member Refund and Dividend for 2016 (Mar. 28, 2017), *available at* https://www.theocc.com/about/newsroom/releases/2017/March-28-OCC-Declares-Clearing-Member-Refund-Dividend-2016.jsp.

ARGUMENT

I. THE COMMISSION AND THE COURT HAVE REJECTED PETITIONERS' PRIOR ATTEMPTS TO STAY THE CAPITAL PLAN AND PETITIONERS HAVE RAISED NOTHING NEW TO WARRANT A DIFFERENT RESULT.

Both the Commission and the Court of Appeals have previously ruled that the Capital Plan should not be stayed. Over Petitioners' opposition, the Commission lifted the automatic stay in September 2015 to allow the Capital Plan to be implemented while Petitioners were petitioning for review,[22] and then denied Petitioners' motion to reinstitute the stay as moot after approving the Plan.[23] When Petitioners moved for a stay in the Court of Appeals pending review, the Commission argued against a stay, and the Court denied Petitioners' motion.[24] In ruling on Petitioners' appeal of the Commission's order approving the Capital Plan rulemaking, the Court declined to vacate the Commission's approval order or stay the operation of the Capital Plan.[25] Moreover, Petitioners themselves have recognized that the Court's decision allows the Capital Plan to remain in effect.[26]

The result of the Commission's and Court's rulings is that the Commission's order approving OCC's rulemaking that established the Capital Plan remains in effect. Pursuant to that order and the previous approval order entered by the Division of Trading and Markets pursuant to delegated authority, the Capital Plan has been in effect and operating since September 2015.

[22] SEC Stay Order at 4, 80 Fed. Reg. at 55669.

[23] Capital Plan Order at 50, 81 Fed. Reg. at 8306.

[24] D.C. Cir. Stay Order.

[25] *Susquehanna Int'l Grp.*, slip op. at 17-18.

[26] *See* Petitioners' Unopposed Motion to Expedite Issuance of the Mandate, *Susquehanna Int'l Grp., LLP v. SEC*, No. 16-1061, at 2 (Aug. 16, 2017) ("Rather than vacating the approval order and requiring that the Plan be unwound, . . . the Court remanded to the SEC for further proceedings. . . . As a result, operation of the Plan, including its expensive dividend provisions, continues unimpeded.").

The Stockholder Exchanges have had their capital at risk during this period and have stood ready to make additional replenishment capital contributions if called upon during this period. Neither the Commission nor the Court has made any ruling on the merits that supports any of Petitioners' arguments against the Capital Plan. Instead, the only change in the legal status of the SEC's approval order is that the Court has remanded the matter to the Commission to conduct further analysis to support the order.

The legal proceedings that have occurred since the Capital Plan was approved, and since the Petitioners made their previous attempts to stay its operation, have thus had no material impact on the Commission's past rulings on the merits of the Capital Plan, or on the issue of whether the operation of the Capital Plan should be stayed. Therefore there is no reason for the Commission to revisit the factors that it typically considers when deciding whether to impose or continue a stay. Those factors have previously been argued by the parties, Petitioners' arguments have been rejected, and Petitioners now are just recycling the very same arguments for a stay that the Commission and the Court have already rejected.

Furthermore, Petitioners' arguments for a stay have even less merit now than they had when they were rejected the first time. Instead of seeking, as they previously did, to stay the operation of the entire Capital Plan, they are now picking just one piece of what is an integrated whole, and trying to remove it from the Capital Plan while allowing all other elements to remain in place. But the piece they seek to stay is a necessary component of the entire Capital Plan, because it is the agreed-upon compensation to the Stockholder Exchanges for providing the capital and the Replenishment Capital Commitment to OCC. Thus, Petitioners want the Commission to deprive the Stockholder Exchanges of their agreed-upon compensation, which induced them to supply the capital and the Replenishment Capital Commitment, after they have

performed their obligations pursuant to OCC rules that were approved by the Commission and earned that compensation. By itself, the unfairness of this position taken by Petitioners causes it to collapse of its own weight without any need to consider again the factors that determine whether or not to impose a stay. If OCC does not make payments on the declared 2016 dividends, the Stockholder Exchanges would have a basis to demand return of their capital and to cancel their commitments to provide replenishment capital to OCC, thus destroying the Capital Plan and leaving OCC undercapitalized.

II. PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS FOR A STAY.

Even if the Commission were to consider once again the factors that generally govern whether a stay should be imposed, it should find that the Petitioners once again have not met their burden to warrant a stay. In order to warrant a stay, Petitioners must establish: (1) a strong likelihood of success on the merits; (2) they will suffer imminent irreparable injury absent a stay; (3) there will be no substantial harm to any person if the stay were imposed, and (4) a stay is in the public interest.[27] As with Petitioners' previous failed attempts to obtain a stay, none of these four factors is satisfied by Petitioners' recycled arguments.

A. Petitioners Have Not Established a Strong Likelihood of Success in Establishing that the Capital Plan is Inconsistent with the Exchange Act.

The Court did not address the merits of Petitioners' claims, and its decision lends no support whatsoever to Petitioners' arguments that they have established a strong likelihood of success on the merits. Contrary to Petitioners' suggestion, the Court did not say that the Plan was inconsistent with the requirements of the Exchange Act or could not be approved by the

[27] *See* Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 34-33870, 1994 WL 117920, at *1 (Apr. 7, 1994); *see also, e.g.*, *In the Matter of Am. Petroleum Inst.*, Exchange Act Release No. 34-68197, 2012 WL 5462858, at *2 (Nov. 8, 2012).

Commission. Indeed, after summarizing each of Petitioners' arguments regarding the Capital Plan's purported shortcomings, the Court stated that it would "not reach any of those arguments."[28] Instead, the Court 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 APA.[29] 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."[30]

Petitioner raises the same arguments for likelihood of success on the merits that they have raised in their previous, unsuccessful efforts to maintain or impose a stay of the Capital Plan. These arguments should be rejected as insufficient to meet Petitioners' burden on this factor.

First, Petitioners' argument that OCC was required to provide information to the non-Stockholder Exchanges and permit them to make presentations to OCC's Board during the development of the Capital Plan is without merit. On this issue the Court directed the Commission to "resolve Petitioners' argument that OCC could not reasonably have considered the Plan to be competitively insignificant" *or* provide a "reasoned explanation why" it "does not matter."[31] On both these issues, OCC is likely to prevail on the merits.

OCC's By-Laws only require information be provided to non-Stockholder Exchanges if the Executive Chairman determines that the matter is of "competitive significance" to the non-

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[28] *Susquehanna Int'l Grp.*, slip op. at 7.

[29] *Susquehanna*, slip op. at 13 (stating that a "lack of reasoned decision-making recurs throughout the Order").

[30] *Susquehanna*, slip op. at 17.

[31] *Susquehanna*, slip op. at 16-17.

Stockholder Exchanges.[32] The plain language of OCC's By-Laws gives the Executive Chairman discretion to determine whether a matter is of "competitive significance," and the Executive Chairman determined in his discretion that the Capital Plan was not such a matter. This is not surprising, as the internal development of a corporate plan to raise capital is not the type of competitively significant "information" that this bylaw was designed to address. The Commission is likely to find that the Executive Chairman's determination was reasonable because, as explained below, the Capital Plan does not have competitive significance.

The Commission is also likely to find that it "does not matter" whether the Executive Chairman "reasonably" considered the Capital Plan to be competitively insignificant. To begin with, the bylaw does not contain an objective, "reasonableness" standard—it affords discretion to the Executive Chairman to make in his business judgment the subjective determination of whether information is or is not of competitive significance.

Moreover, and in any event, the Executive Chairman's decision not to discuss OCC's Capital Plan while it was still under development with non-Stockholder Exchanges "does not matter" for another reason. Petitioners have had ample opportunity to voice their views regarding the Capital Plan during Commission and Court proceedings, beginning with the notice and comment period, and continuing with review by the Commission and further review by the Court. During this lengthy process, OCC's Board has not withdrawn its support of the Capital Plan, or made any changes to it. There is thus no basis for Petitioners to prove that there would have been a different result if the non-Stockholder Exchanges had presented their arguments prior to OCC's submission of the rulemaking proposal to the Commission.

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[32] *See* OCC By-Laws, Art. VIIB § 1.01.

Second, Petitioners claim that the dividend payable to the Stockholder Exchanges under the Capital Plan results in a "windfall" that "subsidize[s] an oligopoly of elite exchanges."[33] OCC determined, and the Commission is likely to find, that the dividend is fair compensation for the significant amount of capital the Stockholder Exchanges were required to immediately provide to OCC and the additional Replenishment Capital Commitment.[34] 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. Moreover, under the CCA standards, the capital and the Replenishment Capital Commitment must be provided as equity, so that it had to come from the Stockholder Exchanges, which are OCC's only shareholders. The proposal of Petitioner Susquehanna to loan OCC the required capital is not viable because of the requirement that additional capital be funded by equity. Nor is Susquehanna's offer to loan capital to the Stockholder Exchanges a basis for objecting to the Capital Plan, because any such borrowing 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.

The Petitioners' core argument regarding the alleged competitive significance of the Capital Plan is that the dividend is a "subsidy" to the Stockholder Exchanges that they could use

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[33] Brief in Support of Motion to Stay Payment of Dividends Under the Plan ("Pet'rs' Br.") at 13.

[34] *See* Letter from James E. Brown, Exec. V.P., OCC, to Brent J. Fields, Secretary, SEC 3 (Feb. 23, 2015) (responding to BATS and BOX letters) ("OCC Letter I") ("[T]he funded and unfunded capital commitments of the Stockholder Exchanges under the Proposal in fact involve a substantial amount of risk, including the risk inherent in the $150 million equity investment, the unusual nature of the investment in OCC as an industry utility, the Stockholder Exchanges' cost of capital, the dire financial circumstances under which the $200 million replenishment capital commitments would be funded, and the lack of 'upside' to the investment based on the interaction of the Fee, Refund, and Dividend Policies.").

to unfairly compete with the non-Stockholder Exchanges.[35] This argument is wholly without merit. In addition to the fact that the Stockholder Exchanges are bearing significant risk and are devoting funds to an illiquid investment, as well as standing ready to provide additional replenishment capital in times of financial distress for which they deserve compensation, and in addition to the calculation that OCC has previously submitted to the Commission to show the de minimis nature of the dividend if the Stockholder Exchanges were to decide to use it entirely as a subsidy to compete with the non-Stockholder exchanges,[36] the "subsidy" argument makes no sense on its face. Each Stockholder Exchange was required to invest $30 million in capital in OCC at the outset. So far one dividend of approximately $3.4 million per Stockholder Exchange has been paid,[37] and another dividend of approximately $5.12 million per Stockholder Exchange has been declared.[38] If the Stockholder Exchanges wanted to use this money to subsidize their fees, they could have done so much more directly by simply using their $30 million investment to do so, rather than place it at risk in an illiquid investment. Under the current rates of dividend payments, and disregarding the Replenishment Capital Commitment, it would take at least another four years for each of the Stockholder Exchanges to recoup its $30 million investment, and thereby receive the alleged "subsidy" to compete with the non-Stockholder exchanges.

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[35] *See* Pet'rs' Br. 11.

[36] Reply Brief in Support of Motion to Lift Stay, File No. SR-OCC-2015-02, at 7-8 (Apr. 13. 2015).

[37] *See* Press Release, OCC, OCC Declares Clearing Member Refund and Dividend for 2015 and Reduction of Fees under Approved Capital Plan (Dec. 17, 2015), *available at* https://www.theocc.com/about/newsroom/releases/2015/12_17.jsp (announcing 2015 dividend of approximately $17 million, to be split between the five Stockholder Exchanges). The 2015 dividend was pro-rated for the period following the Stockholder Exchange funding of the Capital Plan on March 3, 2015.

[38] *See* Press Release, *supra* note 20.

Thus, Petitioners' "subsidy" argument is a contrived excuse for opposing the Capital Plan. Therefore the non-Stockholder Exchanges have not shown that they are likely to prevail on their argument that the development of the Capital Plan was of competitive significance to them.

Nor do any of the other reasons Petitioners offer as a basis for likelihood of success on the merits meet their burden. Petitioners' contention that OCC's capital targets are unreasonable is an attempt to serve Petitioners' own interests at the expense of the public interest. OCC did considerable analysis, with outside assistance, to determine that the Target Capital Requirements are necessary to satisfy its regulatory requirements as a SIFMU, the CCA standards, evolving international standards for central counterparties generally, and the various international capital requirement standards and capital requirements that OCC may have to meet as a derivatives clearing organization registered with the Commodity Futures Trading Commission.[39] Petitioners also rehash their argument that OCC could have retained excess fees as "free" money to raise the desired capital.[40] Petitioners ignore that substantial taxes would have had to be paid on any such retention of funds, thus reducing the amounts available for capital. Furthermore, it would have taken longer to achieve the capital levels that were needed if the capital were raised by the retention of fees. Although it is easy for Petitioners to state in hindsight that the higher capital levels were not needed in the interim, OCC had no ability to predict the future when it established its capital requirements and obtained the investments from its Stockholder Exchanges, and the higher levels could have been needed at any time. In addition, Petitioners have not shown that the dividend is or will be as high as 26%, because the experience to date has

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[39] *See* OCC Written Statement at 3-4.

[40] Pet'rs' Br. 13.

shown it has been much less.[41] Thus, apart from other flaws and inadequacies, Petitioners' argument is wholly speculative at this point and does not meet their burden of showing likelihood of success on the merits.

Petitioners also criticize the provision in the Capital Plan whereby the dividend would resume, but refunds would not, in the highly unlikely event that the Stockholder Exchanges provide Replenishment Capital that is not repaid within 24 months but is later repaid. OCC submitted an explanation to the Commission that the 24-month window was intended to encourage prompt repayment of the Replenishment Capital by OCC's Board, in order to restore OCC's equity to the target capital requirement and allow both the dividend and refund to resume.[42] Moreover, OCC's Board includes significant representation from clearing members, who would benefit from resumption of the refund, and therefore the Board would be incentivized to ensure prompt repayment of Replenishment Capital if at all feasible. In addition, if the Replenishment Capital were not repaid within 24 months, the Stockholder Exchanges would have had their initial capital and Replenishment Capital at risk for that entire period without receiving any dividend whatsoever.[43] Moreover, any failure to repay the Replenishment Capital within 24 months would have to be due to a true inability of OCC to accomplish repayment, likely signifying a catastrophic economic development that would preclude all dividends under the current Capital Plan going forward. Finally, consistent with the foregoing valid reasons for including this provision, this provision was negotiated for by the Stockholder Exchanges who

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[41] Based on a $30 million capital investment, and disregarding the Replenishment Capital Commitment, the 2015 and 2016 dividends were approximately 13.6% (annualized) and 17%, respectively.

[42] OCC Letter I at 6.

[43] Letter from James E. Brown, Exec. V.P., OCC, to Brent J. Fields, Secretary, SEC 15-16 (Feb. 23, 2015) (responding to six market marker firms) ("OCC Letter II").

were being asked to provide the capital and the Replenishment Capital Commitment, and the Board, exercising its business judgment, agreed to the provision. For all of these reasons, Petitioners' argument that this provision is a basis for not paying the dividend or for invalidating the Capital Plan, should be rejected.

Third, Petitioners are not likely to succeed in their argument that the Capital Plan harms investors and the public by causing OCC's costs and fees to increase. The Commission is likely to find that the Capital Plan serves the public interest by ensuring that OCC has sufficient capital to meet its current and projected operating expenses, as well as to continue to operate during times of unanticipated economic distress. Petitioners present nothing but speculation that the increases in OCC's total expenses are attributable to a "systemic incentive[ ] to raise costs" in order to increase dividend payments.[44] Moreover, when the Capital Plan was implemented, OCC was able to *reduce* clearing fees by 19%, effective March 1, 2016, because the Capital Plan permits the OCC to operate with a smaller business risk buffer.[45] Petitioners claim that fees have increased since January 2014, which was before OCC determined that it needed more capital. This is an unfair comparison, because the interim increase was needed to raise capital pending adoption of the Capital Plan, and the fees were then reduced when the Capital Plan was adopted. The Commission recognized the value of reduced fees to the public, noting that the Capital Plan is "designed to give market participants the benefit of lower upfront transaction costs, especially those customer end users who do not receive passed through refunds from the clearing members."[46] Thus, OCC has presented valid reasons that the Capital Plan is designed to protect

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[44] Pet'rs' Br. 15.

[45] Press Release, *supra* note 35.

[46] Capital Plan Order at 36, 81 Fed. Reg. at 8302.

investors and the public interest, and Petitioners have not met their burden of showing that they are likely to succeed on the merits of this issue.

Fourth, Petitioners have not shown that they are likely to prevail with their arguments that the Capital Plan inequitably allocates dues, fees, and other charges. Petitioners argue that the dividend is inequitable because persons who paid fees that were retained as capital did not receive compensation for those fees, where the Stockholder Exchanges receive dividends for their contributions to capital.[47] Reflecting the lack of any coherent alternative from Petitioners, this argument contradicts another argument they make, which is that OCC should have raised all of its needed capital by retaining fees. Moreover, OCC has explained that the dividends the Stockholder Exchanges are to be paid under the Capital Plan were designed to fairly compensate the Stockholder Exchanges for their capital commitments, *i.e.*, an initial $150 million infusion, plus a promise to commit up to $200 million in the future.[48] Under the Capital Plan, fees charged by OCC to clearing members on all exchanges are computed the same way and treated the same way, so there is no valid basis for the argument that fees are allocated in an inequitable or discriminatory manner. Also under the Capital Plan, OCC will continue to make refunds of fees to its clearing members, and all clearing members will share in those refunds on the same basis.[49]

In short, Petitioners are not likely to succeed on the merits of their challenges to the Capital Plan.

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[47] Pet'rs' Br. 15.

[48] OCC Written Statement at 22.

[49] *See* Notice of No Objection to Advance Notice Filing ("No Objection Notice"), Exchange Act Release No. 34-74387 (Feb. 26, 2015), 80 Fed. Reg. 12215 at 12220-12221 (Mar. 6, 2015).

B. Petitioners Will Not Be Irreparably Harmed in the Absence of a Stay.

Petitioners have once again failed to show any irreparable harm should the dividend payment provisions of the Capital Plan remain in operation, as they have been since September 2015. This issue is solely about money and is plainly not the type of irreparable harm that warrants injunctive relief. As the Commission itself argued, the payment of declared dividends "is precisely the sort of alleged 'economic loss' that [is] insufficient to warrant a stay."[50]

The 2016 dividend payment, which has already been declared and to which the Stockholder Exchanges are legally entitled, based on capital that they had invested and committed in 2016, is no different in principle from the 2015 dividend payment that the Court found was insufficient to justify a stay. The 2015 dividend has already been paid and Petitioners do not even attempt to point to any harm they suffered, much less irreparable harm, as a result.

While Petitioners' make sweeping assertions about competition generally,[51] they adduce no evidence through affidavit or otherwise to support their purported claim of irreparable harm. The closest they come is to point to CBOE's acquisition of BATS Global Markets.[52] But Petitioners do not even attempt to connect that acquisition to any competitive effect of OCC's Capital Plan or the dividends at issue, nor could they. Petitioners' argument that the dividend payment harms "new entrants" to the exchange marketplace and drives away competitors is the

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[50] *See* Opposition of the SEC to Petitioners' Emergency Motion for Stay, *Susquehanna Int'l Grp.*, at 13; *see also Sociedad Anonima Viña Santa Rita v. U.S. Dep't of Treasury*, 193 F. Supp. 2d 6, 14 (D.D.C. 2001) ("[F]inancial harm alone cannot constitute irreparable injury unless it threatens the very existence of the movant's business."); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

[51] Pet'rs' Br. 16.

[52] *Id.*

very type of speculative and unsupported argument that is insufficient to justify a stay.[53] For example, one of the Petitioners just launched a new options exchange in February 2017.[54] Nor, as shown above, is there any valid basis for Petitioners' argument that the dividend is a "subsidy" to the Stockholder Exchanges.

In short, Petitioners have put forward no evidence to support their arguments that *Petitioners* will be irreparably harmed absent a stay.

C. OCC and the Financial System Would Suffer Substantial Harm if a Stay is Imposed.

OCC, the U.S. options industry, and the financial system as a whole would suffer significant harm in the event that the Commission imposes a stay of the payment of the dividend to its shareholders. Such a stay would disrupt the Capital Plan as a whole. The Stockholder Exchanges made capital commitments in exchange for the payment of dividends, and they performed their obligations under OCC rules that had been approved by the Commission. They are entitled to the agreed-upon compensation that is required under those same rules. Once a dividend is declared, it is recognized under Delaware law that the dividend is effectively set aside for the benefit of stockholders.[55] If OCC does not make those dividend payments for 2016, to which the Stockholder Exchanges are entitled, the Stockholder Exchanges would have a basis to demand return of their capital and to cancel their commitments to provide replenishment capital to OCC, thus destroying the Capital Plan and leaving OCC undercapitalized. The Capital

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[53] It is well-settled that injury is irreparable only if it is "both certain and great." *Wis. Gas Co. v. FERC*, 758 F.2d 660, 674 (D.C. Cir. 1985) (per curiam).

[54] *See* MIAX PEARL Confirms Feburary 6, 2017 Launch Date (Feb. 3, 2017), *available at https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_02032017.pdf*.

[55] *See generally* Folk on Delaware General Corporation Law § 170.07.

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Plan was designed as a whole, and the Capital Plan as a whole cannot continue to operate as designed in the absence of the payment of the dividend when due.

For these reasons, Petitioners cannot satisfy the third factor for a stay that there will be no substantial harm to any person if the stay were imposed.

D. A Stay Would Not Serve the Public Interest.

Finally, as the Commission has expressly recognized on numerous occasions, imposing a stay would be contrary to the public interest. A stay of the dividend payments would disrupt the Capital Plan as a whole, which in turn could leave OCC unprepared to weather unforeseen financial shocks from business losses. As explained above, a stay of payment of the dividend could cause the entire Capital Plan to unravel, as the Stockholder Exchanges could seek withdrawal of their $150 million in capital and could cancel their commitment to provide $117 to $200 million in additional capital to OCC to ensure OCC's business continuity in times of need. If such replenishment capital were not available to OCC, OCC would be in violation of the CCA standards which the Capital Plan was in large measure designed to satisfy.

In short, the public interest is served by allowing OCC's Capital Plan to continue to be implemented.

CONCLUSION

For the foregoing reasons, the Petitioners' Motion for Stay should be denied.

Dated: September 13, 2017

Respectfully submitted,

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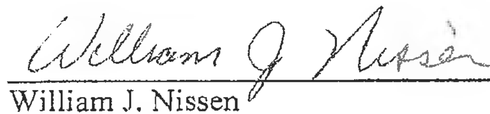
CERTIFICATE OF COMPLIANCE

I, William J. Nissen, counsel to The Options Clearing Corporation (OCC), hereby certify that the foregoing Response of the Options Clearing Corporation In Opposition to Petitioners Motion to Stay Payment of Dividends Under the Plan complies with the word count limitation provided in 17 C.F.R. § 201.154(c). Exclusive of the exempted portions of the brief, as provided by 17 C.F.R. §. 201.154(c), the response includes 6,905 words. The undersigned relied upon the word count function of Microsoft Word in preparing this certificate.

Dated: September 13, 2017



William J. Nissen

CERTIFICATE OF SERVICE

I, William J. Nissen, counsel to the Options Clearing Corporation, hereby certify that on September 13, 2017, I served copies of the attached Response of the Options Clearing Corporation In Opposition to Petitioners Motion to Stay Payment of Dividends Under the Plan by way of facsimile on the parties and sent the original and three copies by Federal Express and by facsimile to the Secretary at the following addresses:

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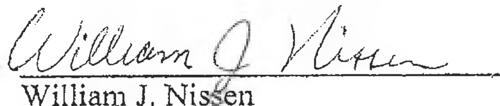
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