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**BEFORE THE UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the Petitions 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

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MOTION TO STAY PAYMENT OF DIVIDENDS UNDER THE PLAN

Pursuant to Rules 154 and 401 of the SEC Rules of Practice, 17 C.F.R. § 201.154, 201.401, Petitioners Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange, Inc., hereby move to stay in part the operation of the Options Clearing Corporation's capital plan (the "Plan") while the Commission deliberates whether to reapprove the Plan or to reject it as inconsistent with the Exchange Act. Specifically, Petitioners request that the shareholder exchanges' dividend payments be stayed while the Commission determines whether the Plan is legal.

The grounds for granting this stay are set forth in detail in the supporting brief submitted herewith. Wherefore, Petitioners request an order of the Commission granting the requested stay.

DATED: September 7, 2017

Respectfully submitted,

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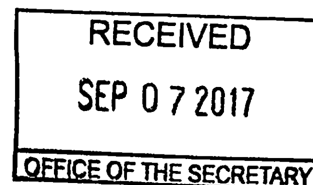

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BRIEF IN SUPPORT OF MOTION TO STAY PAYMENT OF DIVIDENDS UNDER THE PLAN

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Pursuant to SEC Rule of Practice 154, 17 C.F.R. § 201.154, Petitioners Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange LLC ("Petitioners") respectfully file this brief in support of their stay motion.

INTRODUCTION

For over two and a half years, Petitioners have protested the attempt by five national securities exchanges to leverage their equity ownership of the Options Clearing Corporation ("OCC") to gain an unjust, illegal, and anticompetitive advantage over rivals under the innocuous guise of a capital plan (the "Plan") to ensure sufficient operating funds[1]. Despite these protests—and despite the Plan's palpable violations of the Securities and Exchange Act's procompetitive requirements, as well as OCC's own bylaws—the Division of Trading and Markets and then the full Commission approved the Plan, permitting OCC's equity owners to transform what was once a public utility into a for-profit oligopoly. According to the D.C. Circuit, however, the Commission did not have sufficient data in the record and failed to adequately analyze the data that was in the record to satisfy its responsibility to find for itself that the Plan comported with the Exchange Act.[2] OCC must therefore start anew its quest to persuade the Commission that the Plan is lawful. But—as a perverse consequence of the Plan's procedural history—the shareholder exchanges continue to reap princely dividend payments under a Plan the legality of which has never been established. Because Petitioners are likely to prevail in their challenge to the Plan, investors and competing markets will suffer irreparable harm if the Plan continues in operation. While certain aspects of the Plan are readily reversible, reversion of the competitive impact of the above-mentioned dividends is far more complicated and essentially

[1] OCC maintains a separate multi-billion dollar fund to cover default risk with respect to trading.
[2] *See Susquehanna Int'l Grp., LLP v. SEC*, 2017 WL 3389269, at *3 (D.C. Cir. Aug. 8, 2017).

impossible. In order to avoid such unnecessary and probable complications and anti-competitive distortions to the marketplace, the Commission should stay the Plan until OCC can demonstrate that continuing payments is anything more than an abuse by the shareholder exchanges of their control over OCC to establish an oligopoly over the marketplace.

BACKGROUND

OCC is the central clearinghouse for stock options and equity index options listed on U.S. exchanges. The five shareholder exchanges—NYSE Arca, Inc.; NYSE MKT LLC; Chicago Board Options Exchange, Inc.; the International Securities Exchange, LLC ("ISE"); and NASDAQ OMX PHLX, LLC[3]—own OCC and, in 2002, amended OCC's bylaws to preclude any of the competing exchanges that were then beginning to enter the market from becoming shareholders.[4] In addition to the shareholder exchanges themselves, OCC's constituents include; nonshareholder "member" exchanges, each of which competes with the shareholder exchanges for trades; clearing members that clear and settle trades on behalf of their customers in exchange for fees and, in turn, pay clearing fees to OCC; and numerous "market participants," a catch-all term for the diverse institutions, broker-dealers, and investors who trade options using the clearing members' services.

From its inception to 2015, OCC met its operating costs by charging clearing members a fixed fee for each cleared transaction. OCC would set these fees at a level designed to meet the

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[3] Today, these five exchanges are effectively four, since Nasdaq purchased ISE in 2016. *See* Press Release, Nasdaq, Nasdaq Completes Acquisition of International Securities Exchange (June 30, 2016), https://goo.gl/NtM1ww; John McCrank & Arno Schuetze, *Deutsche Boerse to sell ISE options exchange to Nasdaq*, REUTERS (Mar. 9, 2016), https://goo.gl/LsrR5J ("The deal would also give Nasdaq an additional 20 percent of the Options Clearing Corporation, taking its stake in the world's largest equity derivatives clearing business to 40 percent.").

[4] *See* Order Granting Approval of a Proposed Rule Change Relating to Providing Clearing Services to Options Exchanges That Are Not Stockholders, Exchange Act Release No. 34-46469 (Sept. 6, 2002), 67 Fed. Reg. 58093, 58095 (Sept. 13, 2002) ("2002 Rule Change").

upcoming year's projected expenses plus a buffer to establish a margin of safety. At the end of each year, OCC would then refund excess fees (i.e., fees collected in excess of actual operating expenses and the need to maintain OCC's capital reserves) to the clearing members in proportion to their respective payments. In other words, OCC functioned like a classic public utility. And this conservative model served OCC well. Through 2014, OCC enjoyed a AA+ Standard & Poor's credit rating and had never once needed to access shareholder equity to meet its expenses. Indeed, even during the 2008 financial crisis, as other financial institutions foundered, OCC made a profit and paid $64.6 million in refunds.[5]

Nevertheless, in January 2015, OCC proposed amending its rules to implement a capital plan that would increase its shareholders' equity nearly tenfold.[6] In preparation for funding new expenses on the horizon that were never fully explained, OCC raised overall transaction fees in 2014 on clearing members by over 70%. At the time, OCC representatives assured clearing members that this monumental increase was necessary to fund the shareholder equity account for legitimate expenses and was not an effort to either monetize its monopoly status or prepare OCC for a sale. Also, OCC projected that the transaction fee increases would be temporary. After considerable questioning by the options community with regard to the need for the over 70% fee increase, OCC shifted its focus in 2015 to the current Plan that would use excess revenue to continue paying rebates to clearing members and begin paying an annual dividend to shareholder exchanges. Under the Plan and its precedent fee increase, OCC would increase its equity from

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[5] OCC, STATEMENTS FROM A FORWARD-LOOKING COMPANY: 2010 ANNUAL REPORT 34, https://goo.gl/rKuP2d.

[6] *See* Notice of Filing of a 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. 34-74136 (Jan. 26, 2015), 80 Fed. Reg. 5171 (Jan. 30, 2015) ("Notice of Filing").

$25 million to $247 million, a sum concededly chosen *not* to protect OCC against member default risk or market risk—which were amply protected against by OCC's multi-billion dollar margin and clearance funds—but rather as purportedly necessary to cover OCC's risk of not being able to make payroll and other similar "operational" expenses.[7] To guard against these putative risks, OCC represented that it needed to raise a "Baseline Capital Requirement" of $117 million, the equivalent of six months of projected operating expenses, plus a "Target Capital Buffer" of an additional $130 million.[8] To raise these unprecedented sums, the Plan would withhold $72 million in excess clearing fees that would otherwise have been refunded and would permit each of the five shareholder exchanges to make a $30 million capital contribution to OCC.[9] In exchange, roughly half of the clearing members' excess fees moving forward—funds that were previously refunded to clearing members in full—would be diverted to make lavish dividend payments to the shareholder exchanges.[10]

The Plan also committed the shareholder exchanges to providing additional "Replenishment Capital" if OCC's capital fell below certain thresholds. In the event that these funds were called upon by OCC, refunds and dividends would both be suspended.[11] If any Replenishment Capital were not fully repaid within twenty-four months, refunds would be

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[7] *See* Order Setting Aside Action by Delegated Authority, Approving Proposed Rule Change Concerning the Options Clearing Corporation's Capital Plan and Denying Motions, Exchange Act Release No. 34-77112 (Feb. 11, 2016), 81 Fed. Reg. 8294, 8295–96 (Feb. 18, 2016) ("Order").
[8] *See id.* at 8296 n.35.
[9] *See* 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, 13060 (Mar. 12, 2015) ("Staff Order").
[10] *See Susquehanna*, 2017 WL 3389269, at *2.
[11] *See* Staff Order, *supra* note 8, 80 Fed. Reg. at 13059.

permanently discontinued.[12] By contrast, in this situation, the shareholder exchanges' dividends would resume once the Replenishment Capital is paid back—only now at a rate reflecting one hundred percent of the excess fees that would previously have been refunded to clearing members.[13]

Remarkably, OCC developed and proposed the Plan without ever providing notice to the nonshareholder exchanges that these sweeping changes were being considered, in violation of the requirement that OCC provide those exchanges with information "of competitive significance"; [14] nor, given the lack of notice, did OCC permit nonshareholder exchanges "to make presentations to the Board of Directors or an appropriate Committee of the Board of Directors" regarding matters that affect their interests.[15] The Commission had previously emphasized that these provisions of the by-laws "should help to ensure that no burden on competition that is not necessary or appropriate in furtherance of the Act will occur."[16] Unsurprisingly, the failure to require OCC to comply with its own rules resulted in the Shareholder Exchanges using their control over OCC to burden competition unnecessarily and inappropriately.

Because OCC is a self-regulatory organization registered as a clearing agency under the Exchange Act, the Plan could take effect only if the Commission approved it. The Commission, in turn, can approve a rule change like the Plan only "if it finds that such proposed rule change is consistent with the requirements of [the Act]."[17] Accordingly, after OCC filed its proposed rule

[12] *See* Notice of Filing, *supra* note 5, 80 Fed. Reg. at 5174.
[13] *See id.* at 5174–75.
[14] OCC Bylaws ("Bylaws"), art. VIIB, § 1.01, *available at* http://goo.gl/EbDCd4.
[15] *Id.* at Art. VIIB, § 1.02.
[16] 2002 Rule Change, *supra* note 3, 67 Fed. Reg. at 58095.
[17] 15 U.S.C. § 78s(b)(2)(C)(i).

change, the Commission published a notice in the Federal Register and received seventeen comment letters, all of which—besides OCC's—opposed the Plan. Nonetheless, the Commission's Division of Trading and Markets (exercising delegated authority) dismissed these objections and approved the Plan on March 6, 2015.

Petitioners then sought, and were granted, review before the full Commission. There, they argued that the Plan violated five of the Exchange Act's procompetitive requirements:

- Section 17A(b)(3)(I), which forbids clearing agency rules to "impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter."[18]
- Section 3(f), which requires the Commission "to consider or determine" whether a self-regulatory organization's proposed rule change "will promote efficiency, competition, and capital formation."[19]
- Section 17A(b)(3)(F), which requires that clearing agency rules be "designed . . . to protect investors and the public interest" and prohibits rules "designed to permit unfair discrimination . . . among participants in the use of the clearing agency."[20]
- Section 17A(b)(3)(D), which requires that clearinghouse rules "provide for the equitable allocation of reasonable dues, fees, and other charges among its participants."[21]
- Section 19(g)(1), which requires that "[e]very self-regulatory organization shall comply with ... its own rules."[22]

Nonetheless, like the Division of Trading and Markets before it, the Commission approved the

[18] 15 U.S.C. § 78q-1(b)(3)(I).
[19] 15 U.S.C. § 78c(f).
[20] 15 U.S.C. § 78q-1(b)(3)(F).
[21] 15 U.S.C. § 78q-1(b)(3)(D).
[22] 15 U.S.C. § 78s(g)(1).

Plan on February 11, 2016.[23]

Petitioners sought review in the D.C. Circuit, which held that the Order violated the Exchange Act and the Administrative Procedure Act because the Commission had "granted approval without itself making the findings and determinations prescribed by [the Exchange Act]. Instead, it effectively abdicated that responsibility to OCC, whose representations in the Plan's favor it accepted without sufficient data or analysis.[24] The Court highlighted five specific (but nonexhaustive) ways in which the Order fell short of the "reasoned decisionmaking" the Exchange Act and the APA mandate[25]:

- In considering the "central issue" of whether the Plan's shareholder dividend rate was reasonable, the Order deferred to OCC's claim that the rate was supported by "independent outside financial experts," without identifying these "experts," confirming their independence, or describing or evaluating their analysis.[26]
- In considering whether the Plan's capital target was reasonable, the Order relied on an analysis purportedly conducted by an outside consultant for OCC but gave "no indication that the SEC knew who the consultant was, what analysis he or she conducted, or what additional analysis OCC performed."[27]
- In accepting OCC's claims that the Plan would not increase net customer fees, the Order ignored the Plan's reduction of refunds for clearing members to pass on to their customers, with no satisfactory explanation.[28]

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[23] *See* Order, *supra* note 6, 81 Fed. Reg. 8294.
[24] *Susquehanna*, 2017 WL 3389269, at *1.
[25] *Id.*
[26] *Id.* at *4.
[27] *Id.* at *6.
[28] *See id.* at *7.

- The Order fundamentally misunderstood—and thus did not adequately address—the Replenishment Capital scenario in which refunds, but not dividends, would be permanently eliminated.[29]
- Finally, the Order simply deferred to OCC's self-serving representation that it had complied with its bylaws, brushing petitioners' contrary argument to one side.[30]

The Court thus concluded that the Order was "arbitrary and capricious, unsupported by substantial evidence, and otherwise not in accordance with law," and remanded the Plan to the Commission for a proper analysis.[31]

STANDARD FOR A STAY

In considering a stay motion, "the Commission generally considers four factors: (1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer irreparable injury; (3) whether there will be substantial harm to any person if the stay were granted and (4) whether the issuance of a stay would likely serve the public interest."[32] Here, these factors uniformly favor the entry of a stay halting dividend payments while the Plan is under consideration.

ARGUMENT

Although the D.C. Circuit's decision left the Plan in effect on remand, it was emphatic

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[29] *See id.*
[30] *See id.*
[31] *Id.* at *8.
[32] 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).

that the Commission had failed to engage in reasoned decisionmaking and must "conduct[ ] a proper analysis on remand."[33] Because the Commission's "action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result,"[34] the Commission must either reject the Plan outright or else set aside the Order's reasoning (or lack thereof) and begin its deliberations anew. Those deliberations must take place on an expanded public record including, for the first time, the evidence on which OCC claims the Plan is based, as well as submissions from interested parties addressing that evidence. In other words, in its task of convincing the Commission that the Plan satisfies all applicable requirements of the Exchange Act, OCC is back to square one.

Nonetheless, while the Plan remains in effect, the shareholder exchanges continue to reap windfall dividends, while everyone else—the nonshareholder exchanges, the clearing members, and the investing public—continue to pay the price of this self-awarded largesse. Indeed, based on its 2016 results, OCC has declared—but apparently has yet to pay—a shareholder exchange dividend of $25.6 million.[35] This is in addition to the $19.6 million dividend the shareholder exchanges already received based on 2015's results.[36] Petitioners respectfully submit that the Commission should stay the payment of any and all dividends, the lawfulness of which, after two and a half years, has never been satisfactorily demonstrated. Petitioners are likely to succeed in their challenge to the Plan, and the continued payment of dividends will pile up competitive and financial harms that will be difficult to repair if a stay is denied and the Plan is subsequently rejected. The balance of equities and the public interest likewise support this stay motion.

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[33] *Susquehanna*, 2017 WL 3389269, at *8.
[34] *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).
[35] *See* Press Release, OCC, OCC Declares Clearing Member Refund and Dividend for 2016 (Mar. 28, 2017), https://goo.gl/WWbRkg.
[36] OCC, 2016 ANNUAL REPORT 29, https://goo.gl/4LTf9o

I. Petitioners Are Likely to Succeed in Their Challenge to the Plan.

As the D.C. Circuit held, the Commission never made the findings required to approve the Plan as consistent with the Exchange Act.[37] The Commission cannot make such findings now because the Plan's manifold inequitable and discriminatory provisions violate the procompetitive requirements of the Exchange Act. For the reasons set forth below, the Plan must be scrapped and the process begun anew at the OCC.

First, the defects in the procedures that the OCC followed when devising and adopting the Plan cannot be remedied before the Commission, but require that OCC conduct the process again, including following the procedures mandated by its own by-laws. The Commission simply cannot find that OCC complied with its "own rules" when adopting the Plan, as Section 19(g) requires, because there is no question that OCC did not comply with those rules when it adopted the Plan.[38] OCC bylaws require both that OCC provide "prompt[ ]" notification to nonshareholder exchanges of all matters "of competitive significance"[39] and that OCC permit nonshareholder exchanges "to make presentations to the Board of Directors or an appropriate Committee of the Board of Directors" regarding matters that affect their interests.[40] Yet the nonshareholder exchanges received no notification that OCC was considering the Plan, much less an opportunity to make presentations to the Board regarding the impact of the Plan on their interests. The first opportunity they had to comment on the Plan in any formal way was after it had been filed with the Commission.

The D.C. Circuit directed the Commission to "resolve Petitioners' argument that OCC

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[37] *See* 15 U.S.C. § 78s(b)(2)(C)(i).
[38] 15 U.S.C. § 78s(g)(1). The Exchange Act defines "rules of a clearing agency" to include bylaws. 15 U.S.C. § 78c(a)(27).
[39] Bylaws, art. VIIB, § 1.01.
[40] *Id.*, art. VIIB, § 1.02.

could not reasonably have considered the Plan to be competitively insignificant," or to give a "reasoned explanation why" "this does not matter."[41] For its part, OCC *could not* reasonably have determined that the Plan lacked competitive significance, because the Plan profoundly tips the competitive playing field in favor of the shareholder exchanges by providing them with an annually-increasing subsidy. Indeed, it is hard to conceive of a change that would have a more profound competitive impact than a plan that replaces a utility pricing model with a profit maximizing monopoly. In addition to providing for the payment of dividends to a favored class of exchanges, the Plan also affects such important matters as the determination of OCC's fees and the payment of refunds to clearing members. And it is equally clear that OCC's failure to notify nonshareholder exchanges "matters"—not just because it is an express requirement under the Exchange Act, but also because this feature of OCC's bylaws was critical to the Commission's 2002 approval of the OCC rule barring new exchanges from becoming shareholders.[42]

As Counsel for the Commission observed during oral argument before the D.C. Circuit, "given the statutory scheme we're working under here the Commission doesn't have discretion to alter the plan, that's something that would have to go back to OCC."[43] OCC's failure to provide nonshareholder exchanges with notice and an opportunity to comment *before the OCC Board* is simply not a defect the Commission can make good, but "something that would have to go back to OCC." Accordingly, for the same reason the D.C. Circuit was required to remand the deficient Order to the Commission in order to permit the Commission to perform its task anew,

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[41] *Susquehanna*, 2017 WL 3389269, at *7.
[42] *See* 2002 Rule Change, 67 Fed. Reg. at 58095 (explaining that notification would "help to ensure that no burden on competition that is not necessary or appropriate in furtherance of the [Exchange] Act will occur").
[43] Transcript at 12:5–8.

so too the Commission must now remand the Plan back to OCC to permit OCC to comply with its own by-laws and provide nonshareholder exchanges with the opportunity to be heard of which they were previously denied.

Second, the Commission cannot find that the Plan imposes only "necessary or appropriate" burdens on competition, as Section 17A(b)(3)(I) requires,[44] nor approve the Plan after it has complied with Section 3(f) of the Exchange Act and reasonably considered whether the Plan affirmatively "promote[s]" competition.[45] As the D.C. Circuit emphasized, the Commission must make its own findings and determinations on these issues; it cannot simply defer to OCC. That requirement is particularly important here, where, as the D.C. Circuit again emphasized, the shareholder exchanges sat on both sides of the table before the OCC and exercised tremendous influence over its decisionmaking:

> "Trust the process" may be a reasonable slogan for the hometown basketball team of lead petitioner Susquehanna International Group. But the process alone cannot justify the dividend rate in this case. For one thing, it is hardly accurate to describe the negotiations between Board members as "arm's length." OCC's shareholders have effective veto power over certain proposals, giving them outside bargaining power compared to clearing members represented on the Board. Indeed, only four of nine directors representing clearing members voted in favor of the Plan making it less than clear that the process struck an appropriate balance between the interests of shareholders and clearing members. What is more, not all of the interested parties were even part of the negotiations among Board members. Only a small fraction of clearing members are on the Board, and none of the nonshareholder exchanges are. So, as to any agreement between OCC and shareholders regarding the dividend rate, the shareholder exchanges were on both sides of the transaction (because they were both OCC Board members and recipients of the dividends), while nonshareholder exchanges were on neither.[46]

Given these circumstances, the Commission should view the Plan with extra skepticism, not deference.

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[44] 15 U.S.C. § 78q-1(b)(3)(I).
[45] 15 U.S.C. § 78c(f).
[46] *Susquehanna*, 2017 WL 3389269, at *5 (citations and footnote omitted).

By its own terms, the Plan takes fees charged for trades on nonshareholder exchanges and uses them to pay dividends to shareholder exchanges. Thus, even as nonshareholder exchanges (which, it should be remembered, are prohibited from becoming shareholders) compete for a larger share of the clearing market, their very success will now line the pockets of their competitors. Forcing disfavored companies to subsidize an oligopoly of elite exchanges not only does not promote competition, it is precisely the sort of anticompetitive behavior against which the Exchange Act, to say nothing of the nation's antitrust laws, were enacted to protect the consumer.

Nor, for at least three reasons, could the Commission find that these exorbitant dividend-subsidies are justified to compensate the shareholder exchanges for their capital investment under the Plan. First, OCC has never shown that the Plan's capital targets are reasonable in the first place. Even during the height of the financial crisis, clearing fees not only covered OCC's operating expenses, but also generated annual refunds exceeding $57 million between 2007 and 2009.[47] The question of why it is now necessary to add hundreds of millions of dollars to OCC's balance sheet has never been answered in any substantive way. Second, even if there were such a need, OCC had essentially already raised the desired capital simply by retaining excess fees—there was no need to rebate that "free" money simply to solicit expensive capital investments from the shareholder exchanges, and consequently no need to pay them perpetual windfall dividends in "compensation" for their one-time investment.[48] And if for some reason retaining

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[47] *See* OCC, GOOD NEWS AND NEW OPPORTUNITIES: 2009 ANNUAL REPORT 30, https://goo.gl/3sc4ud.

[48] *See* SIFMA, Comment Letter on Notice of Filing of Proposed Capital Plan at 4 (Feb. 20, 2015), https://goo.gl/3qMyyg:

> The OCC offers no explanation or analysis of how a permanent 50% reduction in refunds, even combined with slightly lower fees, amounts to a more cost-effective, efficient, fair, or reasonable source of funding [than simply withholding excess

excess fees would not have raised sufficient capital fast enough, OCC could have accepted payment from the shareholder exchanges but, rather than permanently transforming OCC into a profit-seeking oligopoly, allowed OCC to pay back the shareholder exchanges' investment at a reasonable rate over time to allow it to retain its status as a market utility. These are not the only alternatives to the Plan's expensive dividends. Petitioner Susquehanna, for example, recently offered to provide up to $150 million in capital at an annual rate of LIBOR + 3.00%, and access to replenishment capital at the same rate.[49] Third, particularly given the other available options, there can be no mistake that these dividends *are* a windfall; under the Plan, the shareholder exchanges could see annual returns as high as *twenty-six percent*.[50] The burden of financing this windfall is expensed by options market makers in the form of wider option quotes that in turn diminish liquidity in underlying stocks, ETFs and other products in the form of wider quotes in relation to these products, all to the detriment of both stock and option investors.

The Plan gets even worse. If Replenishment Capital is drawn but not repaid in full within twenty-four months, refunds are suspended *forever* but dividends will resume as soon as repayment is complete. It is unlikely that this remarkable double treatment—which could send the shareholder exchanges' return on their one-time investment as high as *fifty-two percent per year, in perpetuity*—is a "necessary or appropriate" distortion of OCC's competitive landscape,

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fees], particularly when all additional required capital would then be provided out of excess Member and end-user fees. It is clear how this structure provides significant returns for the Stockholder Exchanges, but not how it more effectively or efficiently meets the public interests or serves the interests of the Members or their customers.

[49] Letter from David M. Pollard, Head of Strategic Planning & Special Counsel, Susquehanna International Group, to OCC Board of Directors (Aug. 25, 2017), attached as Exhibit A hereto.

[50] *See* Final Brief for Petitioners Susquehanna International Group, LLP, et al. at 30–31, *Susquehanna Int'l Grp. v. SEC*, No. 16-1061 (D.C. Cir. Oct. 14, 2016), 2016 WL 6024435, at *30–*31.

much less that it "promotes" competition. Nor can the Commission likely find that it avoids "unfair discrimination . . . among participants in the use of the clearing agency," as Section 17A(b)(3)(F) requires,[51] or that it represents an "equitable allocation of reasonable dues, fees, and other charges among [OCC's] participants," as Section 17A(b)(3)(D) mandates.[52]

Third, the Plan further sacrifices the interests of investors and the public and thwarts competition by linking the shareholder exchanges' dividend payments not to the shareholder exchanges' *investments*, but rather to OCC's *costs*. It is difficult to think of a more harmful model for calculating the size of the dividend payments of oligopolists than having them rise along with costs, for this creates powerful systemic incentives to raise costs (or at least to not try to keep costs down). Predictably, costs (and, therefore, the fees OCC charges) have risen precipitously under the Plan. For example, OCC's total expenses rose from $196.6 million in 2014 to $245.7 million in 2016.[53] Likewise, in January 2014—before a fee increase adopted by OCC as it began to consider the Plan—the fee for a trade involving 2,000 contracts would have been $18; today, fees for that same trade would be $55—a 206% increase.[54]

Fourth, the Plan effects an inequitable allocation of dues, fees, and other charges in an additional way. The Plan called for OCC to raise the funds necessary to meet the initial target capital amount in two ways: first, by retaining $72 million in excess fees paid by clearing members, and, second, by receiving $150 in capital from the shareholder exchanges. The shareholder exchanges were rewarded for their contribution with lavish dividend payments; the

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[51] 15 U.S.C. § 78q-1(b)(3)(F).
[52] 15 U.S.C. § 78q-1(b)(3)(D).
[53] OCC, 2016 ANNUAL REPORT, *supra* note 6, at 27.
[54] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Reflect the Elimination of a Discount to OCC's Clearing Fee Schedule, Exchange Act Release No. 34-71769, 2014 WL 1116697, at *2 (Mar. 21, 2014); *OCC Schedule of Fees / December 2016*, OCC, https://goo.gl/PJ9C72.

clearing members, by contrast, saw their refunds slashed in half so that those dividends could be funded. This is hardly an equitable allocation of resources among OCC's participants.

Given the Plan's systematic favoritism toward the shareholder exchanges—from its windfall dividend rates to the furtive way in which it was adopted—the Commission is unlikely to find that it satisfies the Exchange Act's procompetitive requirements. Accordingly, this factor supports a stay of those dividends pending the Commission's review.

II. Petitioners Will Suffer Irreparable Competitive and Economic Injury Absent a Stay, Whereas a Stay Would Injury Nobody.

Although the D.C. Circuit found that the task of unwinding the plan would be no more difficult if done after remand rather than immediately,[55] the continuing operation of the Plan's dividend payment provisions is causing additional irreparable injury each day that those dividends continue to subsidize the shareholder exchanges at the expense of new entrants to the exchange marketplace. Indeed, consolidation in the exchange marketplace has already taken place while the Plan has been in effect.[56] A stay of the dividend is needed to prevent distortion of the competitive landscape from continuing to harm competition, for while it may be possible to unwind the Plan at a later date, unwinding the Plan will not restore competitors that have been driven from the marketplace or compensate consumers for the lost liquidity and increased transaction costs they are experiencing each day that the Plan's redistribution scheme remains in effect. In simplest terms, dividend payments are a subsidy that tilts the playing field in the shareholder exchanges' favor. The longer the shareholder exchanges enjoy these subsidies, the greater their ability to use those subsidies to undermine their competitors' market position and

[55] *Susquehanna*, 2017 WL 3389269, at *8.
[56] *See* Press Release, CBOE Holdings Agrees to Acquire Bats Global Markets to Strengthen CBOE Holdings' Global Position in Innovative Tradable Products, and Services, and Achieve Meaningful Cost and Operational Efficiencies (Sept. 26, 2016), https://goo.gl/VAf7DW.

cement their oligopoly; and the more public investors are harmed. If a stay is denied and Petitioners prevail on the merits (as they are likely to), no retrospective relief will be able to fully undo the competitive harms that will occur while the Commission is evaluating the Plan.[57]

The balance of equities strongly supports a stay. As an initial matter, Petitioners are asking that the Commission stay only the payment of dividends because it is the dividend component of the Plan that most seriously distorts the market by forcing the new entrants to subsidize the shareholder exchanges. The Plan would otherwise remain in effect. There is absolutely no risk, therefore, that the stay of dividend payments could result in OCC being undercapitalized; to the contrary, by requiring that OCC retain dividends that it would otherwise have paid out, the stay would actually *increase* the capital levels at OCC for as long as it remains in effect. As explained above, however, Petitioners are likely to suffer irreparable harm if the shareholder exchanges are allowed to continue receiving lavish dividends under a Plan that the Commission is required to review again and should never approve given its patent irreconcilability with the procompetitive requirements of the Exchange Act. By contrast, if the stay is granted, but OCC ultimately somehow manages to vindicate the Plan, then the shareholder exchanges would have suffered only a temporary separation from their dividends. Moreover, given that the shareholder exchanges have already received a dividend for 2015 that represented a 13% return on their investment in a AA+-rated company, the shareholder exchanges have already received a dividend payment that after just one year is equivalent to the

[57] *See Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, 295 F. Supp. 2d 75, 96 (D.D.C. 2003) (granting injunctive relief because, "if preliminary relief were denied at this point and [plaintiff] later won on the merits, there is no retrospective relief that would be able to cure the harm to the external business relationships, financial position, and reputation . . . that will be necessary for it to compete in the business market").

dividend payments an investor in the S&P 500 would have received *only after a full five years.*[58] In light of the windfall they have already received, it is not too much to ask the shareholder exchanges to forgo their proposed 17% dividend for a brief period while the Commission discharges its duty to engage in "reasoned decisionmaking."[59]

III. The Public Interest Supports a Stay, Which Would Preserve OCC's Capital Reserves and Facilitate Administrative Economy.

A stay would serve the public interest in several ways. First, a stay against dividend payments would protect OCC's capital reserves against any final decision of the Commission adverse to the Plan.[60] Second, issuing a stay now—as opposed to waiting for the Commission or a reviewing court to reject the Plan as inconsistent with the Exchange Act—would avoid placing any inappropriate or unnecessary burden on competition in the interim and would make it easier to unwind the Plan and remedy its anticompetitive effects when the Plan is abandoned. Finally, a stay would put OCC, the D.C. Circuit, and the public on notice that the Commission is independently reviewing the Plan in light of the defects identified by the Court of Appeals. Finally, as noted above, a temporary stay of dividends would inflict no meaningful harm on OCC—indeed, a stay would actually improve OCC's capital position—or the shareholder exchanges.

CONCLUSION

OCC's shareholder exchanges continue to reap lavish dividends under a Plan that has never been satisfactorily justified since it was first proposed over two and a half years ago. When

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[58] Using the 2.11% dividend yield for the S&P 500 for the year ended December 31, 2015. *S&P 500 Dividend Yield by Year*, MULTPL, https://goo.gl/nUC8pu.
[59] *Susquehanna*, 2017 WL 3389269, at *1.
[60] Of course, OCC cannot reply that the Commission has already approved the Plan and that it reasonably expects it will do so again. The D.C. Circuit's thorough rejection of the previous Order as arbitrary and capricious means that OCC is back to square one in its need to vindicate the Plan's consistency with the Exchange Act.

the Commission discharges its duty of reasoned decisionmaking, it is likely to conclude that the Plan violates the Exchange Act's procompetitive requirements. In the meantime, however, continued dividend payments will inflict irreparable competitive and economic harms on nonshareholder exchanges and other market participants. For these reasons, and because the balance of equities and the public interest also support a stay, Petitioners respectfully request that the Commission stay the payment of dividends under the Plan pending further proceedings.

Dated: September 7, 2017

Respectfully submitted,

____
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(202) 220-9600
Counsel for Petitioners Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange, Inc.

CERTIFICATE OF COMPLIANCE

I, David H. Thompson, counsel for Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange, Inc., hereby certify that the attached Motion to Stay Payment of Dividends under the Capital Plan and supporting brief comply with the word-count limitations of SEC Rule of Practice 154(c), 17 C.F.R. § 201.154(c). Not counting the portions exempted by Rule 154(c), the Motion and brief contain 5,893 words. I have relied on Microsoft Word's Word Count function in preparing this document.

Dated: September 7, 2017

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CERTIFICATE OF SERVICE

I, David H. Thompson, counsel for Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange, Inc., hereby certify that on September 7, 2017, I served copies of the attached Motion to Stay Payment of Dividends under the Plan and supporting brief on the below-named parties by way of Federal Express and filed the original and three copies with the Secretary by hand delivery at the following addresses:

William J. Nissen
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Counsel for OCC

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Secretary
Securities and Exchange Commission
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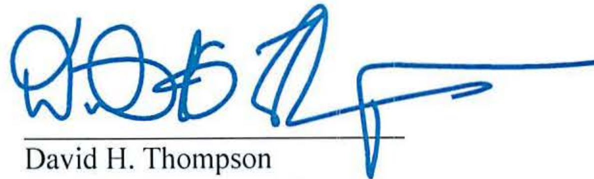

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EXHIBIT A

401 City Avenue
Bala Cynwyd, PA 19004
www.sig.com

August 25, 2017

OCC Board of Directors
Options Clearing Corporation
1 N. Wacker Drive, Suite 500
Chicago, IL 60606

Attention: Mr. Joseph P. Kamnik,
Corporate Secretary

Board Members:

We write to you in light of the recent decision in Susquehanna International Group, LLP, ET AL., v. Securities and Exchange Commission (the "Case"), in which the United States Court of Appeals for the District of Columbia Circuit (the "Court") remanded the Case to the Securities and Exchange Commission to properly evaluate the Options Clearing Corporation's ("OCC") controversial capital plan (the "Capital Plan"). Given the extent of the Court's concerns and the availability of less expensive funding alternatives (e.g., see below), the Board should terminate the Capital Plan, return the $150 Million of equity capital contributed by the Shareholder Exchanges and initiate a new and transparent review process to assess OCC's operating capital needs. If such a review determines that OCC requires additional capital, OCC should conduct a transparent, competitive process to raise the needed capital at the lowest available cost.

Although we were unable to find common ground during the Capital Plan's comment and approval process, the Court's decision is an impetus to all parties to redouble our efforts and find a mutually agreeable solution to ensuring OCC's long term business, operational and pension funding. Our concern remains that the Capital Plan's high cost, evidenced by annual dividends of approximately 17% and likely to rise significantly hereafter, will result in the continuation of higher fees to market participants, higher costs to customers and, ultimately, reduced trading volume. Less expensive alternatives exist that will allow OCC to meet its genuine operational and/or business capital needs and remain compliant with all regulatory requirements. We remain willing to work with OCC to identify and enact one of those alternatives.

During the Board's prior capital raising review process, we discussed with various Board members[1] a less expensive plan that was either not considered or rejected in favor of the Capital Plan. To that end, we are willing to provide any such necessary capital up to $150 Million[2] at an annual rate of LIBOR + 3.00%. Additionally, we will work with OCC to ensure that the transaction is structured in a manner fully compliant with all applicable regulatory guidelines, including, among other possible structures, lending

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[1] We were and remain willing to testify about certain of those discussions.
[2] In the unlikely event that additional capital is required, we would be pleased to discuss the possibility of our providing the additional capital as well.

the funds to the Shareholder Exchanges for down-streaming into OCC as equity. If the review concludes that contingent funds (replenishment capital) are required in case of unforeseen shortfalls, we are likewise willing to commit such funds "at cost" for the commitment and at the same LIBOR + 3.00% annual rate to the extent any such contingent funds are drawn.[3] If the Board is able to secure lower cost capital, we support it doing so.

For more than four decades OCC's role as a public utility served the interests of all market participants and enabled the options market to flourish. While the past few years have been tumultuous, the Court's decision provides an opportunity to correct course and regain public trust. We look forward to speaking with you about that process.

Sincerely,

David M. Pollard,
Head of Strategic Planning
and Special Counsel

cc: OCC Board Members:
Craig S. Donohue
Andrej Bolkovic
Dr. Thomas R. Cardello
Mark F. Dehnert
Thomas W. Farley
Thomas A. Frank
Meyer S. Frucher
David S. Goone
Susan E. Lester
Richard R. Lindsey
Robert Litterman
Jamil Nazarali
Christine L. Show
Edward T. Tilly
Jonathan B. Werts
Alice "Patricia" White
Thomas A. Wittman
William T. Yates

Richard Holley, SEC
Gina Lei, SEC
Heather Seidel, SEC

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[3] Given OCC's 40+ year history of operating without disruption with equity of $10 Million - $25 Million, the independent review may conclude that only replenishment capital (i.e., no immediate capital infusion) need be available to OCC.