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March 20, 2015

VIA FAX (202) 772-9324 & FEDERAL EXPRESS

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

Re: Petition for Review of the 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. 74452, File No. SR-OCC-2015-02

Dear Mr. Fields:

Enclosed please find the original and three copies of the Petition for Review regarding the above-captioned matter. Miami International Securities Exchange, LLC ("MIAX") hereby submits the enclosed Petition for Review pursuant to Rule 154(c) of the Securities and Exchange Commission's Rules of Practice. MIAX certifies that the enclosed Petition for Review does not exceed 7,000 words. The enclosed Petition for Review is being sent via facsimile and Federal Express to the above address on March 20, 2015. Also enclosed, please find a Certificate of Service and facsimile confirmation sheet.

Please feel free to contact me at (609) 897-7315 should you have any questions regarding the foregoing.

Sincerely,

Barbara J. Comly
Executive Vice President, General Counsel &
Corporate Secretary

CERTIFICATE OF SERVICE

I, **Barbara J. Comly**, Executive Vice President, General Counsel and Secretary of Miami International Securities Exchange, LLC, hereby certify that on March 20, 2015, I served copies of the attached Petition for Review of SR-OCC-2015-02, Exchange Release No. 74452, by facsimile and sent the original by Federal Express to:

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

James Brown
General Counsel
The Options Clearing Corporation
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Chicago, IL 60606

Dated: March 20, 2015

Barbara J. Comly
Executive Vice President, General Counsel &
Corporate Secretary

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I. PETITION FOR REVIEW

Miami International Securities Exchange, LLC ("MIAX") hereby petitions for Commission review of the March 6, 2015 Order (the "Order") made by Commission Staff pursuant to delegated authority approving a proposed rule change by the Options Clearing Corporation ("OCC") concerning a proposed capital plan for raising additional capital (the "Capital Plan").[1]

A. OCC Background

The OCC is owned by five national securities exchanges (the "Stockholder Exchanges").[2] The OCC provides clearing services for these Stockholder Exchanges. Additionally, the OCC provides clearing services for the seven other national securities exchanges that trade options and are non-equity noteholders of the OCC (the "Non-Stockholder Exchanges") [3]. Of the seven Non-Stockholder Exchanges, however, only three, BATS, BOX and MIAX, are not affiliates of the Stockholder Exchanges (the "Non-Affiliated Exchanges"). The OCC is a non-profit utility

[1] *See* Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02) (the "Order").

[2] The Stockholder Exchanges are Chicago Board Options Exchange, Incorporated ("CBOE"), International Securities Exchange, LLC ("ISE"), NASDAQ OMX PHLX LLC ("NASDAQ"), NYSE MKT LLC ("NYSE") and NYSE Arca, Inc. ("ARCA")

[3] The Non-Stockholder Exchanges are BATS Options, NASDAQ Options, NASDAQ BX, BOX Options Exchange, C2 Options Exchange, ISE, Gemini, and MIAX.

which sets fees to its clearing members at a level designed to cover its operating expenses. The OCC also maintains capital reserves as it deems necessary to meet its obligations. OCC clearing members annually receive refunds of any fees collected in excess of the OCC's operating expenses and capital obligations. Accordingly, since its founding, the OCC has operated as a non-profit industry utility monopoly for the benefit of its clearing members and the options industry as a whole.

All options exchanges are required to be OCC "participants," which had historically been achieved by options exchanges becoming equity stockholders of the OCC until 2002, at which time the OCC amended its By-Laws to foreclose additional equity ownership by new options exchanges.[4] Options exchanges launched since this rule change, including MIAX, became participants of the OCC by becoming noteholders.

B. The OCC Capital Plan and The Order

The Order authorizes the OCC to adopt certain policies, and amend its By-Laws and other governing documents, to enable the OCC to implement a Capital Plan, pursuant to which the Stockholder Exchanges would make additional capital contributions, and a commitment to replenishment capital in the future, to OCC. In return, the Stockholder Exchanges would receive, among other incentives, the right to receive dividends from the OCC.

Under the Capital Plan, the OCC would pay dividends to this select group of Stockholder Exchanges. Such dividends are anticipated to be at a level significantly above market rates; estimated at 16% to 20% per year in the first few years and potentially significantly higher thereafter. The Capital Plan fundamentally changes the nature of the OCC, which has up to this time served as a non-profit utility operating for the benefit of its clearing members and the

[4] *See* Securities Exchange Act Release No. 46469 (September 6, 2002), 67 FR 58093 (September 13, 2002) (SR-OCC-2002-02) ("2002 By-Laws Amendment Order").

investing public, into a for-profit monopoly operating for the financial benefit of the Stockholder Exchanges. The Order will discriminate unfairly against the Non-Stockholder Exchanges, and impose excessive costs on the Non-Stockholder Exchanges and their respective members, on clearing firms and ultimately on investors. This competitive and financial advantage to this limited group of Stockholder Exchanges will severely inhibit the Non-Stockholder Exchanges' ability to effectively compete in the options market. The costs of such will be borne by clearing members and options investors who will ultimately fund the dividend payments made by OCC to the Stockholder Exchanges. Finally, the Capital Plan was approved in violation of the OCC's By-Laws and Charter which is not only a flawed corporate governance matter but also not in compliance with Section 19(g)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

C. Applicable Legal Requirements

Rules 430 and 431 of the Rules of Practice,[5] provide for Commission review of Staff action taken by delegated authority upon request by a person aggrieved by the Staff's action. MIAX operates a national securities exchange registered with the Commission that trades exchange-listed options and is directly affected by the Order because, as discussed in detail below, since the Order fundamentally alters the competitive field between Stockholder Exchanges and the Non-Stockholder Exchanges, including MIAX, to the detriment of the Non-Stockholder Exchange participants of the OCC, and especially to the Non-Affiliated Exchanges, and the industry at-large. MIAX has complied with the procedural requirements contained in Rule 430.[6]

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5 17 CFR 201.430 and 17 CFR 201.431.

6 MIAX had actual notice of the Order on March 6, 2015, and MIAX filed a Notice of Intention to Petition for Review of the Order on March 12, 2015. *See* Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, MIAX, to Brent J. Fields, Secretary, SEC, dated March 12, 2015.

Rule 431 contains the requirements relating to the Commission's review of an aggrieved party petition, providing that the Commission, in determining whether to grant review in response to a petition, must look to the standards set forth in Rule 411(b)(2) of the Rules of Practice.[7] The Commission must consider whether the petition for review makes a reasonable showing that (i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review. The Securities Exchange Act further provides that "the Commission has a unique obligation to consider the effect of a new rule upon efficiency, competition and capital formation."[8]

D. Policy Concerns and Deficiencies in Commission Approval of Rule Filing

As described below, the Order is inconsistent with fundamental and systemic policy issues and warrants Commission review. The Capital Plan was approved in violation of the OCC's By-Laws and Charter which is not only a flawed corporate governance matter but also was an action not in compliance with Section 19(g)(1) of the Exchange Act. Moreover, the Order fails to provide a substantive analysis of the likely effects of the Capital Plan on the options trading market. Accordingly, the Staff acted in an arbitrary and capricious manner and abused its discretion.[9]

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7 17 CFR 201.411(b)(2)

8 *Business Roundtable,* 647 F.3d at 1148 (quoting 15 U.S.C. §§ 78(C)(f), 78w(a)(2), 80a-2(c)). *See American Equity Inv. Life Ins. Co. v. Securities and Exchange Commission,* 513 F. 3d 166, 177 (D.C. Cir. 2009) (finding Commission's consideration of the effect of a rule on efficiency, competition and capital formation was arbitrary and capricious because the SEC did not disclose a reasoned basis for its conclusion that the rule would increase competition).

9 *See* Administrative Procedure Act, 5 U.S.C. §706(2)(A) (authorizing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with *law"); Business Roundtable v. Securities and Exchange Commission,* 647 F.3d 1144, 1148 (D.C. Cir. 2011) (holding that "the Commission acted arbitrarily and capriciously for having failed . . . adequately to assess the economic effects of a new rule"); *Chamber of Commerce v. Securities and Exchange Commission,* 412 F.3d 133, 144 (D.C. Cir. 2005) (finding Commission violated its obligations under the APA because it failed in its "statutory obligation to do what it

The Order also failed to adequately address the evidence in the record demonstrating that, in approving the Capital Plan, the OCC failed to comply with the provisions of its By-Laws and Charter designed to prevent conflicts of interest and to give non-equity exchanges fair representation in the affairs of the OCC through express notice of the type of action taken here and an opportunity to be heard. In particular, the Order acknowledges that "[s]everal commenters raised concerns that OCC's Capital Plan was not approved in accordance with OCC's By-Laws due to vacancies on the Board, that certain Board directors representing the Stockholder Exchanges were "interested parties" and therefore should have recused themselves from any decision to approve or disapprove OCC's proposal, and OCC failed to promptly inform Non-Stockholder Exchanges of the proposed change."[10] As described below, the OCC did not in fact comply with its By-Laws or Charter.

For these reasons, and as discussed in more detail below, the Order is arbitrary and capricious, and amounts to an abuse of discretion and is premised on erroneous factual findings and legal conclusions and Commission review of the Order is therefore warranted. The Order also contains material errors of fact and law analysis.

1. OCC Was Not in Compliance with Securities Exchange Act Section 19(g)(1) When it Approved the Capital Plan

Section 19(g)(1) of the Securities Exchange Act[11] requires that all self-regulatory organizations ("SRO"), which includes any registered clearing agency such as the OCC[12], comply with both the provisions of the Securities Exchange Act and its rules and regulations,

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can to apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation before it decides whether to adopt the measure.").

10 Order, *supra* note 1, at 13068.

11 15 U.S.C. § 78c (19)(g)(1) ("Every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, *and its own rules*, and (subject to the provisions of Section 17(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance." (emphasis added).

12 15 U.S.C. § 78c (a)(26) (Definition of "self-regulatory organization").

and with the SRO's own rules. The "rules of a clearing agency" specifically include the constitution, articles of incorporation, bylaws and rules, or instruments corresponding to the foregoing, of the clearing agency.[13] The OCC failed to comply with certain fundamental provisions of its own By-Laws and Charter. Namely the OCC Board approved and adopted the Capital Plan without following the process required to be followed under its By-Laws by failing to provide prompt notice to the Non-Stockholder Exchanges of the Board's consideration and vote upon the Capital Plan or the opportunity to make presentations in connection therewith. In addition, the OCC Board approved and adopted the Capital Plan in violation of the conflict of interest prohibitions contained in its Charter and Code of Conduct as described below and with an improper Board composition required by its By-Laws.

Therefore the failure of the OCC to comply with its own By-Laws and Charter in obtaining Board approval of the Capital Plan is not simply a matter of improper internal corporate governance. The Commission clearly has jurisdiction to review a Rule change which is based on noncompliance by an SRO with its own rules.

2. Capital Plan Approved Was Not in Compliance with Corporate Governance Obligations

The Staff erred in its findings related to the governance process that led to the Capital Plan Rule Filing.

a. *The OCC Failed to Inform MIAX or the Other Non-Equity Exchanges "Promptly" or Otherwise that the Rule Filing was Under Consideration by the OCC*. In 2002 the OCC amended its By-Laws so that it could provide clearing services to new options exchanges without having those exchanges become equity stockholders of the OCC.[14] The OCC ensured that non-equity exchange participants "will be entitled under that [By-Law] provision to 'fair

[13] 15 U.S.C. § 78c (a)(27) (Definition of "rules of a clearing agency").
[14] *See* 2002 By-Laws Amendment Order, *supra* note 4.

representation…in the selection of [OCC] directors and administration of its affairs.'"[15] The OCC made the following additional representations to the SEC:

> OCC has represented to the Commission that OCC management will (1) provide non-equity exchanges with the opportunity to make presentations to the OCC board or the appropriate board committee upon request and (2) will promptly pass on to non-equity exchanges any information that management considers to be of competitive significance to such exchanges disclosed to exchange directors at or in connection with any meeting or action of the OCC board or any board committee. Letter from William H. Navin, Executive Vice President, General Counsel, and Secretary, OCC (July 8, 2002).[16]

The OCC adopted the following language as Interpretation and Policy .01 to Article VIIB of its By-Laws[17]:

> .01 Non-Equity Exchanges will be promptly provided with information that the Executive Chairman considers to be of competitive significance to such Non-Equity Exchanges that was disclosed to Exchange Directors at or in connection with any meeting or action of the Board of Directors or any Committee of the Board of Directors.

The Rule Filing for the Capital Plan raises significant competitive concerns between the Non-Stockholder Exchanges and Stockholder Exchanges because the Capital Plan allows the Stockholder Exchanges to extract an excessive subsidy from the OCC which may be used to subsidize the Stockholder Exchanges' provision of option exchange execution services, which in turn will provide the Stockholder Exchanges with a significant and unfair competitive advantage over the Non-Stockholder Exchanges. These types of potential competitive concerns led to the adoption of the above-referenced By-Law provisions and the representations that the OCC made to the Commission in connection with the By-Laws Amendment Order regarding disclosure of information to non-equity exchanges and their opportunity to be heard.

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15 *See* 2002 By-Laws Amendment Order, *supra* note 4, at 58094.

16 *Id*.

17 OCC By-Laws, *available at* http://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_bylaws.pdf

Although the Rule Filing was a matter of competitive significance to the Non-Stockholder Exchanges, the OCC failed to inform MIAX or the other non-equity exchanges "promptly" or otherwise that the Rule Filing was under consideration by the OCC. By being denied the information to which they were entitled, the Non-Stockholder Exchanges, including MIAX, were unable to exercise their right before the Board voted on the Capital Plan.

Notwithstanding the foregoing, in the Order the Staff rejected this argument, merely noting that the "OCC represents that OCC and its Board of Directors have conducted its business in conformity with applicable state laws and its own By-Laws" and that "[t]he Commission has no basis to dispute OCC's position on this matter."[18]

b. ***Conflicts of Interest.*** It appears that none of the five directors representing the Stockholder Exchanges recused themselves from either the deliberations or the vote on the Capital Plan, despite the obvious conflict of interest associated with the unique financial interest of the Stockholder Exchanges that they represented in the outcome. Article V of the OCC's Charter provides that, "[e]ach Director is required to act in good faith in the best interests of OCC and with due regard to the fiduciary responsibilities owed to OCC as a business and systemically important financial market utility. In addition, each Director is required to comply with the provisions of the Code of Conduct for OCC Directors, including, without limitation, the provisions relating to conflicts of interest and confidentiality."[19] The OCC published Corporate Governance Principles which summarize the relevant portions of the Code of Conduct states the following:

> The Board has adopted a Code of Conduct for OCC Directors that includes a Conflict of Interest Policy. The Conflict of Interest Policy incorporates various provisions of applicable corporate law

[18] *See* Order, *supra* note 1, at 13068.

[19] OCC Charter, *available at:* http://www.theocc.com/components/docs/about/corporate-information/board_of_directors_charter.pdf

> and other standards adopted by OCC to ensure that Board and committee decisions are not impacted by conflicts of interest. Directors are expected to avoid any action, position or interest that conflicts with an interest of OCC, or gives the appearance of a conflict, in accordance with the Conflict of Interest Policy. OCC annually solicits information from directors in order to monitor potential conflicts of interest and directors are expected to be mindful of their fiduciary obligations to OCC as set forth in the Code of Conduct.[20]

Each of the Stockholder Exchange directors acting on behalf of those Stockholder Exchanges had a direct and significant interest in the outcome of the Board's consideration of the Capital Plan that was in direct conflict with the interests of the OCC itself. Each Stockholder Exchange had an interest in receiving the highest rate of return from the OCC in exchange for their capital investment, however it appears that none of these directors recused themselves from the deliberations or the vote on the Capital Plan.

c. ***Improper Board Composition.*** The Board also failed to maintain the requisite number of public directors on its Board as required by the OCC's By-Laws, which could have had a material impact on the quality of the deliberations as well as the outcome of the Board vote on the Capital Plan. Accordingly, the process lacked input from disinterested directors. Finally, the failure of the OCC to comply with the OCC's By-Laws regarding Board composition is a violation of this SRO of its own rules.

d. ***Failure to Review by the SEC Resulted in Erroneous Findings of Fact and Law.*** Given the role and structure of the OCC as discussed above, as well as the specific comments submitted identifying flaws in the OCC governance process relating to its approval of the Capital Plan and the noncompliance by the OCC with its own rules, MIAX believes that the Commission should conduct a review of appropriateness of the Board approval process of the Capital Plan.

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[20] OCC Board of Directors Corporate Governance Principles, *available at:* http://www.theocc.com/components/docs/about/corporate-information/board_corporate_governance_principles.pdf

For these reasons, the Staff's failure to find as much in the Order was an arbitrary and capricious abuse of discretion resulting in erroneous findings of fact and law.

3. Undue Burden on Competition

While the Staff recognized that the Capital Plan may result in some burden on competition, the Staff rejected that the burden was undue, finding that "such a burden is necessary and appropriate in furtherance of the purposes of the Act given the importance of OCC's ongoing operations to the U.S. options market and the role of the Capital Plan in assuring its ability to facilitate the clearance and settlement of securities transactions in a wide range of market conditions."[21] This finding is not supported by the record. The question of whether the competitive burden is "undue" must be determined by reference to the extent of the anticompetitive subsidy that will be paid solely to the Stockholder Exchanges (the precise amounts of which have been redacted in the record). Because as previously demonstrated, the Capital Plan resulted from a confluence of unique factors associated with the OCC's monopoly status and governance structure that inured to the benefit of the Stockholder Exchanges, the Staff's findings that any dividend payable to the Stockholder Exchanges is appropriate and necessary, notwithstanding its amount or impact on competition, constitutes an erroneous conclusion of law.

4. Capital Plan Unfairly Discriminates Against Non-Stockholder Exchanges

As previously illustrated, the OCC holds a unique position in the options market; it is a utility monopoly that clears all transactions executed in listed options. The net result of this Capital Plan is unfair discrimination against the Non-Stockholder Exchanges. The Staff's failure to find such constitutes an erroneous conclusion of law.

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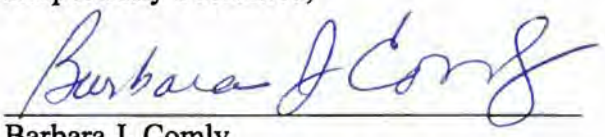
[21] Order, *supra* note 1, at 13068.

II. CONCLUSION

The Capital Plan was adopted in violation of the Rules of the OCC. It reflects an attempt by the Stockholder Exchanges to monetize an industry utility monopoly for their own unfair competitive and financial advantages. Because of the unique nature of the OCC, including its monopoly status as an options utility, and a discriminatory corporate governance process that favored the Stockholder Exchanges in the context of the Capital Plan approval, the result is to undermine competition among the various options exchanges, discriminate unfairly against Non-Stockholder Exchanges, and ultimately impose excessive costs on clearing firms and investors. The Staff made numerous errors of fact and law in approving the Capital Plan. For these reasons, MIAX respectfully requests that the Commission exercise its discretion to review and set aside the Order.

Respectfully Submitted,



Dated: March 20, 2015

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