SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

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From:
Name: Nissen, William J.
Voice: 312.853.7742

To:
Name: Mr. Brent J. Fields
Company: SEC
Facsimile#: 2027729324
Voice Phone:
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SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN STREET
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

wnissen@sidley.com
(312) 853 7742

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April 13, 2015

By Federal Express and Facsimile

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090
Facsimile: 202-772-9324

Re: Re: The Options Clearing Corporation ("OCC") Reply Brief in Support of Motion to Lift Stay, File No. SR-OCC-2015-02

Dear Mr. Fields:

The Options Clearing Corporation ("OCC") hereby files the enclosed Reply Brief in Support of Motion to Lift Stay. The original and four copies are enclosed. Please return a file stamped copy in the self-addressed stamped envelope.

The enclosed Reply Brief in Support of Motion to Lift Stay has been served by Federal Express and facsimile on each party of the proceeding in accordance with 17 C.F.R. § 201.150, and as reflected in the Certificate of Service attached to it.

Very truly yours,

William J. Nissen

William J. Nissen

WJN:sn

Enclosures

cc: Division of Trading and Markets *(by facsimile 202-772-9273) (w/ encl.)*
Petitioners *(by Federal Express and facsimile) (w/ encl.)*

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

REPLY BRIEF IN SUPPORT OF MOTION TO LIFT STAY

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Pursuant to Commission Rule of Practice 154, The Options Clearing Corporation ("OCC") respectfully files this Reply in Support of its Motion to Lift Stay.

Background

On March 6, 2015, the Commission's Division of Trading and Markets ("Staff") issued an Order, pursuant to delegated authority, approving a rule change that enabled OCC to implement its Capital Plan.[1] On March 12 and 13, 2015, BATS Global Markets, Inc. ("BATS"), BOX Options Exchange LLC ("BOX"), and Miami International Securities Exchange, LLC ("MIAX") (collectively, "Exchange Petitioners"), KCG Holdings, Inc. ("KCG"), and Susquehanna International Group, LLP ("SIG") (together with Exchange Petitioners, "Petitioners"), filed Notices of Intention to Petition for Review of the Order ("Notices") under Commission Rule of Practice 430(b)(1), automatically staying the Order. The Petitioners all subsequently filed Petitions for Review ("Petitions"). On April 2, 2015, OCC moved pursuant to Commission Rule of Practice 154 to lift the Rule 431(e) automatic stay.[2] On April 8, 2015, the Exchange Petitioners filed a Response in opposition to the Motion, arguing that the stay be maintained.[3] On April 9, 2015, SIG filed its Opposition to the Motion,[4] and KCG filed a Response in opposition to the Motion,[5] also arguing that the stay be maintained.

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[1] SEC 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, 80 Fed. Reg. 13058 (Mar. 12, 2015) (approving SR-OCC-2015-02) ("Order").

[2] OCC Brief in Support of Motion to Lift Stay (Apr. 2, 2015) ("Opening Brief").

[3] Response of BATS Global Markets, Inc., BOX Options Exchange, LLC, and Miami International Securities Exchange, LLC to Motion of the OCC to Lift Automatic Stay (Apr. 8, 2015) ("Exchange Petitioners' Response in Opposition").

[4] Susquehanna Int'l Grp., LLP's Opposition to OCC's Motion to Lift the Automatic Stay (Apr. 9, 2015) ("SIG's Response in Opposition").

[5] KCG's Response to Motion to Lift Automatic Stay (Apr. 9, 2015) ("KCG's Response in Opposition").

Introduction

The arguments made by Petitioners are without merit. First, Petitioners argue for the Commission to apply an incorrect standard for considering the Motion. Second, Petitioners fail to refute OCC's arguments that (1) Petitioners do not have a strong likelihood of success on the Petitions; (2) Petitioners will not suffer irreparable injury if the stay is lifted; (3) OCC and the financial system will suffer substantial harm if the stay persists; and (4) the public interest is best served by lifting the stay. The automatic stay should be lifted.

Argument

1. OCC Has Articulated the Correct Standard of Review.

Petitioners incorrectly argue that the only standard governing whether the Commission should maintain an automatic stay is "simply whether the matter decided by the Staff 'has raised important policy issues that warrant Commission consideration.'"[6] According to Petitioners, the mere existence of an important policy issue is "dispositive" of whether an automatic stay should be maintained indefinitely.[7] Such a standard is overly simplistic and one dimensional, but more importantly, relevant authority establishes that it is incorrect.

KCG does not cite to any authority supporting the application of this nebulous standard.[8] In attempting to support the same position, Exchange Petitioners and SIG point to a single Order of the Commission.[9] *In reality, the cited Order actually supports application of the standard*

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[6] Exchange Petitioners' Response in Opposition, at 5; *see also* KCG's Response in Opposition, at 3; SIG Response in Opposition, at 10. SIG in particular simply misunderstands the scope and application of the Rules of Practice, arguing that the Rules do not ever allow for the lifting of a Rule 431(e) automatic stay. *See* SIG's Response in Opposition, at 1 ("OCC's Motion to Lift Stay seeks to obtain a result nowhere provided for in the Rules of Practice—to eliminate a Rule 431(e) automatic stay.") Of course, Rule 431(e) provides for just such a result. *See* 17 C.F.R. § 201.431(e) ("Upon filing with the Commission of a notice of intention to petition for review ... an action ... shall be stayed *until the Commission orders otherwise*[.]") (emphasis added).

[7] SIG's Response in Opposition, at 10.

[8] KCG's Response in Opposition, at 3.

[9] *See* Exchange Petitioners' Response in Opposition, at 5 n.11; *see also* SIG's Response in Opposition, at 7 n.4, citing SEC Order Denying International Securities Exchange, LLC's Motion to Lift the Commission Rule 431(e)

that OCC has articulated. In that Order, the Commission notes the arguments of International Securities Exchange, LLC ("ISE") in support of lifting the stay, which included arguments about the lack of irreparable harm to the Chicago Board Options Exchange (which sought to maintain the stay), harm to ISE, and harm to the public. Rather than finding that such arguments were inappropriate or that another standard should apply, the Commission merely concluded that, on balance, "in this instance" the public interest was better served by maintaining the stay. The Commission noted that "important policy issues" were at stake, but such an observation is hardly tantamount to announcing an entirely new standard for Commission review of automatic stays.[10]

The Commission has authority to lift the stay under Commission Rule 431(e).[11] As argued in the Opening Brief and contrary to Petitioners' arguments, the factors that the Commission considers in determining whether to continue or lift a stay are well established.[12] These factors are: (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 imminent irreparable injury; (3) whether there will be substantial harm to any person

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Automatic Stay of Delegated Action Triggered by Chicago Board Options Exchange, Incorporated's Notice of Intention to Petition for Review, Release No. 60988, 2009 WL 3802460 (S.E.C. Nov. 12, 2009) ("ISE Order").

[10] ISE Order, at 2.

[11] *See id.*

[12] *See* Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Release No. 33870, 1994 WL 117920, at *1 (S.E.C. Apr. 7, 1994) ("Order on Stay Guidelines"). While the posture of the matter referred to in the Order on Stay Guidelines does not exactly match these proceedings, it nonetheless cannot be said to be "irrelevant to the Commission's analysis." Exchange Petitioners' Response in Opposition, at 3. To the contrary, the Commission itself has applied the standard articulated in the Order on Stay Guidelines. *See, e.g.*, *In the Matter of Am. Petroleum Inst.*, Release No. 34-68197, 2012 WL 5462858, at *2 (S.E.C. Nov. 8, 2012); *In the Matter of the Application of Marshall Spiegel for Stays of Commission Orders Approving Proposed Rule Changes by the Chicago Bd. Options Exchange, Inc.*, Release No. 52611, 2005 WL 2673495, at *2 (S.E.C. Oct. 14, 2005); *In the Matter of Institutional Networks Corp.*, Release No. 25039, 1987 WL 756909, at *1 (S.E.C. Oct. 15, 1987) (specifically considering whether automatic stay was "in the public interest and [had] the potential to harm" under previous version of Rule 431(e)) ("*Instinet*").

if the stay were continued; and (4) whether the stay would likely serve the public interest.[13] Any argument that OCC is somehow shifting the "burden" by seeking application of the correct standard is simply incorrect and inconsistent with relevant authority.[14] Despite Exchange Petitioners' assertion that this is the "wrong" standard of review, the Commission has applied this standard in the past and should observe it in consideration of the instant Motion. Indeed, the Commission has previously applied these factors in determining that maintaining an automatic stay was "inappropriate."[15] Specifically, the Commission lifted an automatic stay after concluding that maintaining it "would interrupt the dissemination of [certain] information ... [and that] [s]uch an interruption is not in the public interest and has the potential to harm investors and disrupt the orderly operation of that segment of the international equities securities market ...."[16] The Commission also found that the party seeking to maintain the stay "[would] not suffer irreparable harm if the Commission lifts the stay."[17] Applying the relevant factors here, it is evident that the automatic stay is similarly "inadvisable" in the instant matter and should not be allowed to remain in effect.[18]

Finally, OCC disputes any argument that the Rules of Practice somehow "evidence a policy preference for Commission review *before* the rule change goes into effect."[19] A cursory review of the actual procedure undercuts this invented "policy preference."[20] Once the Staff issues an Order pursuant to delegated authority approving a proposed rule change, it "shall have

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[13] Order on Stay Guidelines, at *1.
[14] *See, e.g.*, SIG's Response in Opposition, at 1-2.
[15] *See, e.g.*, *Instinet*, 1987 WL 756909, at *1.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Exchange Petitioners' Response in Opposition, at 4 (emphasis in original).
[20] *See, e.g.*, KCG's Response in Opposition, at 2.

immediate effect" unless and until a notice of intention to petition for review is filed.[21] It is only upon the filing of such a notice that an Order becomes subject to an automatic stay.[22] Further, if and when an automatic stay is imposed, the Commission is free to lift it at any time without requiring argument, a hearing, or notice of any kind.[23] Thus, contrary to Petitioners' interpretation that there is an unarticulated *policy preference* for Commission review, there is in fact an articulated *procedural process* in place that facilitates the immediate effectiveness of approval orders, and permits immediate override of an automatic stay.

2. Petitioners Cannot Demonstrate that the Automatic Stay Should Remain in Place.

Petitioners fail to show, under the applicable standard, that the stay should be maintained. First, Petitioners' argument that the Petitions have a strong likelihood of success simply lacks merit. More revealingly, Exchange Petitioners do not even attempt to make a showing that they would be irreparably harmed if the stay were lifted, or that the public interest would be served by maintaining the stay. They argue that OCC would not be harmed by continuation of the stay, which OCC disputes, but do not attempt to show, as required to maintain a stay, that no person would be harmed by a continuation of the stay.

A. Petitioners Have Not Shown a Likelihood of Success on the Merits.

Exchange Petitioners make three main arguments in their attempt to show that they have a likelihood of success on the merits.[24] First, they argue that Staff review of the Capital Plan was insufficient and that Commission review of the Capital Plan in connection with the advance notice filing has no bearing on the merits of the Petitions for Review. Second, they offer an analysis of the dividend to be paid to Stockholder Exchanges in order to attempt to show that it is

[21] 17 C.F.R. § 201.431(e).
[22] *Id.*
[23] *Id.*
[24] KCG also argues in cursory fashion that the Petitions have a strong likelihood of success on the merits. *See* KCG's Response in Opposition, at 4.

excessive. Third, they argue that the governance process by which OCC adopted the Capital Plan was flawed. The Commission should reject each of these arguments.

1. The Staff and Commission Determinations Reflect That Petitioners Are Not Likely to Succeed on the Merits.[25]

Exchange Petitioners criticize the Staff's review of the Capital Plan by referring to arguments made in their Petitions, which arguments have been previously considered – and rejected – by the Staff. In response, OCC incorporates by reference the arguments made in its Opening Brief, in which it has already addressed and refuted these arguments.

Exchange Petitioners and SIG also argue that the Commission's no objection notice to OCC's advance notice filing has no bearing on the merits of the Petitions before the Commission because it was issued under a different statute.[26] The Commission should reject this argument, because its notice of no objection indeed reflects that the Commission reviewed the advance notice filing for the same types of regulatory concerns, including risk management and reduction of systemic risks, that are relevant to the merits of the rulemaking approved by the Order.[27] The Commission specifically found in its no objection notice that OCC's Capital Plan was consistent with the objectives of promoting robust risk management, promoting safety and soundness, reducing systemic risks, and supporting the stability of the broader financial system.[28] While, as a technical legal matter, this finding is not dispositive of whether the Capital Plan was properly approved in the Order, it is a highly relevant factor that weighs against the Petitioners' likelihood

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[25] SIG argues that OCC has improperly challenged the merits of the Petitions. *See* SIG's Response in Opposition, at 8-9. This argument is clearly incorrect. While the Commission need not make a final decision on the merits of the Petitions at this time, whether or not the Petitions have a strong likelihood of success on the merits is one of the matters at hand. Therefore the Commission not only can, but is obligated to, consider the merits of the Petitions in order to determine the Petitioners' likelihood of success on those merits.

[26] Exchange Petitioners' Response in Opposition, at 6; *see also* SIG Response in Opposition, at 7 n.7.

[27] *See* SEC Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387, 80 Fed. Reg. 12215 (Mar. 6, 2015) (relating to SR-OCC-2014-813).

[28] *Id.*

of success in obtaining review and reversal of the Order, because the Commission's advance notice determination was based on the same types of considerations as the Staff considered in issuing the Order.

2. Petitioners Have Not Shown That the Size of the Dividend Would Be Excessive.

Exchange Petitioners and SIG also argue that the Capital Plan creates an undue burden on competition because, they claim, it pays the Stockholder Exchanges an "excessive" dividend.[29] Exchange Petitioners support this argument with an analysis purporting to show that the dividend would enable the Stockholder Exchanges to reduce their fees by 7%-22%, as opposed to the 1-1½% estimated by OCC.

Exchange Petitioners' analysis is flawed, because it artificially inflates the apparent effect of the dividend by assuming that the dividend will be devoted exclusively to subsidizing a segment of the products listed by the Stockholder Exchanges, namely equity options, that corresponds to the Exchange Petitioners' narrow business interests. Exchange Petitioners also ignore the Stockholder Exchanges' weighted average cost of capital for the capital they are contributing in the first instance and stand ready to contribute as Replenishment Capital. As a result, Exchange Petitioners inaccurately exaggerate the impact of the dividend.

A simpler and more straightforward way of viewing the dividend is to compute the dividend rate per contract side traded on the Stockholder Exchanges. Even assuming a dividend of $30 million, which is at the high end of what OCC estimates for the next ten years, the dividend rate per contract side for equity options for each of the Stockholder Exchanges would be 0.00290 for NASDQ, 0.00346 for CBOE, 0.00495 for ISE, and 0.00666 for ICE/NYSE. In other words, even if the Stockholder Exchanges were to use the dividend exclusively to subsidize

[29] Exchange Petitioners' Response in Opposition, at 7-9; SIG's Response in Opposition, at 17-19.

only their equity option products, it would be less than one cent per contract side. Additionally, if the volume of all products of each of the Stockholder Exchanges was considered, the amount available from the dividend for a subsidy would be even less for each of these exchanges. These amounts, moreover, are themselves overstated because they do not include the weighted average cost of capital.

In addition, the premise that the dividend will be used exclusively to subsidize fees is unfounded. The Stockholder Exchanges (as well as the Exchange Petitioners) have pricing power from a multitude of sources, including access fees, exchange services, market data fees, and other revenue, all of which have far more impact than the dividend on their ability to compete. Indeed, the revenue per contract variation among exchanges and among products, which Exchange Petitioners themselves note, suggests that the Stockholder Exchanges are not competing on the basis of price alone.[30] Exchange Petitioners also fail to address the alternative pricing power strategies discussed in the Opening Brief, by which the Stockholder Exchanges could otherwise use the capital they are contributing to OCC to compete on price. In other words, Exchange Petitioners' analysis is based on the obviously false assumption that the Stockholder Exchanges would not use the funds that they have committed to invest in OCC in any productive way.

SIG also argues that the dividend is excessive. SIG recasts the table initially provided in its Petition to reflect some of OCC's assumptions, and then argues that even under OCC's assumptions, the dividend is excessive. This new table still incorrectly ignores the time value of money in its display of rates of return, and continues to inaccurately portray the incremental increase in book value of OCC, which the Stockholder Exchanges cannot access or otherwise use

[30] Exchange Petitioners' Response in Opposition, at 8 n.15.

competitively, as part of the rate of return.[31] SIG's argument for including the increase in book value is wholly speculative in that SIG speculates that if OCC takes on additional investors in the future, the Stockholder Exchanges would monetize the value of the capital reserve account. This speculative future possibility is not a valid basis for finding an undue burden on competition that would lead the Commission to reverse the Order.

SIG also asserts that OCC's projection of a long term average annual increase in expenses of 2.3% is inconsistent with OCC's past statements regarding a 9% increase between 2012 and 2013, and a projected greater increase in 2014.[32] This argument should be rejected because it relies on a false comparison between near term increases and long term projections. Recent increases have been caused largely by the cost of meeting increased regulatory demands that are not likely to recur on an ongoing basis. It is not reasonable to project these extraordinary recent increases over an extended period of time.

SIG also erroneously asserts that clearing members will bear the cost of taxes paid on income used to fund dividends to the Stockholder Exchanges.[33] Under the Capital Plan, however, the Stockholder Exchanges, and not the clearing members, will bear the taxes, because the refunds to clearing members will be paid pre-tax, and taxes will then be deducted from the amounts otherwise payable as a dividend to the Stockholder Exchanges.

SIG argues that OCC has not responded to SIG's proposal to loan funds to the Stockholder Exchanges to contribute to OCC as equity.[34] As stated in the Opening Brief, however, OCC explained in the comment process that the Board considered several potential alternatives in a nearly year-long process, and determined that the Capital Plan was the best

[31] SIG's Response in Opposition, at 20.
[32] *Id.*, at 18.
[33] *Id.*, at 19.
[34] *Id.*, at 21.

alternative in view of the constraints of existing shareholders' rights, and the requirement that capital be funded by equity.[35] The Board and the Stockholder Exchanges who committed to contribute capital were each required to make a business decision regarding the acceptability of the Capital Plan, and the mere fact that SIG has a theoretical alternative, which would require the Stockholder Exchanges to assume debt in order to make equity contributions, does not provide a basis for the Commission to reverse the Order.

In any event, with respect to the core issue raised by Petitioners, which is the size of the dividend, SIG's recalculated 2015 estimated dividend rate is 15.69%. Assuming for the sake of argument that this is an accurate estimate, for the reasons stated in the Opening Brief, this rate of return would not be excessive in view of the Stockholder Exchanges' initial $150 million capital contributions, future required incremental contributions to capital, Replenishment Capital commitments of up to $200 million, investment risks inherent in making the capital contributions and Replenishment Capital commitments, and weighted average cost of capital and internal hurdle rates. The Stockholder Exchanges' ongoing commitments under the Capital Plan go far beyond the commitments typically associated with an equity investment. Furthermore, the projected rate of return for the dividend was considered reasonable by OCC's Board in its approval of the Capital Plan, after having considered the other approaches available to OCC to raise capital, including in particular the approach by which capital is accumulated by increasing clearing fees and suspending refunds.

For these reasons, the size of the dividend does not impose any burden on competition, much less the undue burden that Petitioners are claiming, and the Petitioners therefore lack a strong likelihood of success on their "undue burden on competition" argument.

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[35] Opening Brief, at 15-16.

3. Exchange Petitioners Have Not Shown That They Are Likely to Obtain Review and Reversal Based on Their Governance Argument.

Exchange Petitioners challenge two aspects of the process by which OCC's Board approved the Capital Plan. They argue that they should have been given notice that the Board was considering the Capital Plan so they could make presentations to the Board. They also assert that unfilled public director seats in OCC's Board made the approval ineffective. Both arguments lack merit and should be rejected.

OCC has already refuted in its Opening Brief the argument that OCC's Board was required to give the Exchange Petitioners notice of the proposal for the Capital Plan so that they could make presentations to the Board. Exchange Petitioners now latch on to OCC's use of the word "material" in its argument that no notification was required because there were no material competitive consequences, as the non-Stockholder Exchanges would continue to receive clearing services on the same equal basis that they had historically.[36] This criticism reveals that Exchange Petitioners are grasping at straws. Indeed, if the consequence is immaterial, Exchange Petitioners have no basis for complaining that a presentation by them would have made a difference for the purposes of any relevant Board determination. Further, Exchange Petitioners' arguments in comment letters to the Commission failed to lead the Board to change the Capital Plan prior to its final approval by the Commission and Staff, so there is no basis to believe any such arguments would have caused the Board to change the Capital Plan if they had been made earlier.

Exchange Petitioners' argument concerning the vacancies in two public directors' seats is also without merit. They concede that there was no corporate law defect and argue only that there is a general Commission policy in favor of including public directors in SRO deliberations,

[36] *See* Exchange Petitioners' Response in Opposition, at 10.

and that this policy disabled the Board from taking action on the Capital Plan before these seats could be filled. Exchange Petitioners have not, however, cited any Commission authority that prevents an SRO Board from acting whenever there is a vacancy in a public director's seat, and their argument that the Board could not adopt the Capital Plan while the seats were vacant is therefore not a valid basis for the Capital Plan to be disapproved. Exchange Petitioners have no credible likelihood of succeeding on the merits of this argument.

B. Petitioners Have Not Shown That They Would Suffer Imminent Irreparable Injury if the Stay Were Lifted.

Petitioners argue that they will be harmed if the stay is lifted because implementation of the Capital Plan "would be difficult to unwind should the Petitioners be successful on the merits."[37] This argument, which is unsupported by any specifics, is not sufficient to justify a stay and should be rejected.

Irreparable injury, by its nature, is serious and irredeemable. A showing of "some burden" is insufficient to satisfy this high standard.[38] The alleged excessiveness of the dividend is Petitioners' core objection to the Capital Plan. Because the dividend is not scheduled to be paid before 2016, however, Petitioners will not be imminently and irreparably harmed with respect to the dividend by the lifting of the stay at this time. Exchange Petitioners argue that the timing of the dividend is irrelevant to whether the stay should be lifted, but fail to say why. But the timing is relevant because the fact that it is many months away prevents it from causing imminent and irreparable harm if the stay is lifted. The Commission should therefore reject Exchange Petitioners' argument that the timing of the dividend is irrelevant to whether the stay should be lifted.

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[37] Exchange Petitioners' Response Brief in Opposition, at 3.
[38] Order on Stay Guidelines, at *2.

Nor can the Exchange Petitioners show that they will be imminently and irreparably harmed by those aspects of the Capital Plan that will go forward now if the stay is lifted. OCC is prepared to implement its new reduced fee schedule in connection with the Plan, and will be in a position to pay a $33.3 million refund of 2014 fees. In addition, OCC will have access to the Stockholder Exchanges' capital contributions and Replenishment Capital commitments. None of these immediate consequences of implementing the Capital Plan will harm Petitioners. To the contrary, these consequences will benefit the Petitioners by providing a financially stronger clearing agency for the products that are traded, and reduced fees to facilitate trading.

Petitioners' vague argument that it would be difficult to unwind the Capital Plan if the Order is reversed is wholly inadequate to demonstrate that they will suffer imminent and irreparable injury.[39] In any event, as discussed above, Petitioners have not shown a likelihood of success on the merits that would require any aspect of the Capital Plan to be unwound. Petitioners have thus failed to show that imminent and irreparable injury would result from a lifting of the stay.

C. Exchange Petitioners Have Not Shown That There Would be No Harm to Any Person if the Stay is Continued.

Although the standard for a stay is that the Commission should consider whether any person will be harmed by the stay, Exchange Petitioners address only whether OCC will be harmed. As to OCC, they argue that OCC is merely anticipating future capital needs with its Capital Plan, and that therefore there is no need to implement it immediately. Similarly, SIG argues that OCC is not suffering substantial harm because of its "strong" financial condition and its current capital levels.[40] The Commission should reject Petitioners' arguments.

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[39] *Id.*, at *1-2.
[40] SIG's Response in Opposition, at 10-12.

As to its current requirements for increased capital, OCC's Board has made the business judgment, after considerable review, that OCC's current capital structure is not adequate for it as a systemically important financial market utility ("SIFMU").[41] The fact that the SIFMU designation was made in July 2012 does not in any way undermine the necessity for additional capital now, in order to be prepared for unexpected economic shocks that could occur at any time. In its notice of no objection, the Commission recognized that the immediate injection of capital and future committed capital that are provided for in the Capital Plan would 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.

As to its future needs for capital, it is apparent that U.S. and global regulation is moving toward increased capital requirements for central counterparties such as OCC. The Capital Plan was developed over a lengthy period, and implementation will also take time. Contrary to the argument advanced by KCG that OCC is not harmed by the "mere fact that [it] is momentarily delayed in implementing [its] capital raising plan,"[42] the delay in implementation would be indefinite if the automatic stay were to remain in place, resulting in damaging uncertainty. Moreover, to tell OCC that it must wait until new requirements are actually imposed to improve its capital structure would be contrary to sound regulatory policy, which favors the anticipation of such needs.

Further, the continuation of the stay would harm both market participants and the general public. Market participants would be deprived of the additional capital and Replenishment Capital commitments, as well as the reduced fee schedule and the potential $33.3 million refund

[41] OCC has been designated as a systemically important financial market utility by the Financial Stability Oversight Council pursuant to the Payment, Clearing and Settlement Supervision Act.
[42] KCG's Brief in Opposition, at 5.

of 2014 fees. The general public would be deprived of a stronger SIFMU, which could affect their own economic transactions in the event of an unexpected economic shock to the financial system. Petitioners' failure to address these benefits to market participants and the financial system is telling. This factor weighs strongly in favor of lifting the automatic stay.

D. Petitioners Have Not Shown That Continuation of the Stay Would Serve the Public Interest.

The Petitioners argue that continuation of the stay would serve the public interest. Each of these arguments lacks merit, however, and consideration of the public interest strongly supports lifting the stay.

KCG does not provide any basis for the Commission to find that a stay is in the public interest and instead asserts that OCC does not demonstrate that the stay is against the public interest.[43] Contrary to this argument, OCC in fact showed in its Opening Brief that the lifting of the stay is in the public interest because implementation of the Capital Plan would provide a strengthened capital base for OCC and would in turn strengthen the financial system, including through reduced clearing fees for market participants.

SIG argues that the automatic stay is in the public interest because, according to SIG, implementation of the Capital Plan will increase costs to public investors.[44] Specifically, SIG argues that the Capital Plan will result in higher clearing costs, which will be passed on to market participants, as well as "higher costs of liquidity, less customer interest, less effective hedging, and poorer risk management."[45] In reality, however, the Capital Plan will result in lower clearing fees because the Stockholder Exchanges will provide capital that will allow OCC to reduce fees instead of accumulating capital from those fees. Moreover, the Fee Policy adopted

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[43] *Id.*
[44] SIG's Brief in Opposition, at 21.
[45] *Id.*

as part of the Capital Plan adopts a Target Risk Buffer of 25%, which is lower than OCC's ten year historical pre-refund average buffer of 31%, the effect of which will be to permit OCC to charge lower fees to market participants rather than maximize refunds to clearing members and dividend distributions to Stockholder Exchanges.[46]

Exchange Petitioners fail even to directly address whether continuing the stay would serve the public interest. Instead of considering the public interest, Exchange Petitioners refer cryptically to "sound policy reasons" that they argue would be served if the stay persists. The "sound policy reasons" identified by the Exchange Petitioners, however, reflect not a concern for the public interest, but rather self-interested arguments, refuted above, that the Exchange Stockholders will use the dividend to subsidize the products that compete with those offered by the Exchange Petitioners.[47]

Contrary to Petitioners' arguments, the relevant policy interest here is the significant public interest in a strong financial system. The stay is actively preventing OCC from strengthening its capital structure to satisfy its obligations as a SIFMU. The public interest is served by allowing OCC to implement a well-designed and equitable plan for its future capital needs, which the Commission's Staff, pursuant to delegated authority, has already reviewed and approved, and to which the Commission has previously issued a notice of no objection.[48] Further implementation of the Capital Plan is necessary to ensure a strong capital base for OCC as required for it to continue to perform its critical functions, to appropriately face potential

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[46] *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, 80 Fed. Reg. 5171 (Jan. 30, 2015) (relating to SR-OCC-2015-02).

[47] *See, e.g.*, Exchange Petitioners' Response Brief in Opposition, at 3.

[48] *See* SEC Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387, 80 Fed. Reg. 12215 (Mar. 6, 2015) (relating to SR-OCC-2014-813).

increased capital requirements, and to be prepared to respond to unpredictable financial conditions.[49]

In sum, the public interest is disserved by any further delay in OCC's implementation of its Capital Plan, and the stay should therefore be lifted.

Conclusion

Maintaining the automatic stay is causing significant harm to OCC and the financial system by preventing the further implementation of OCC's Capital Plan, which includes the implementation of a reduced fee schedule and the payment of the $33.3 million refund of 2014 fees. Petitioners fail to demonstrate that maintaining the stay is contingent only upon the existence of "important policy issues." Further, Petitioners do not have a strong likelihood of success in obtaining a reversal of the Staff's thorough and well-reasoned Order, nor do they face imminent irreparable injury if the automatic stay is lifted. The substantial harm to OCC and the public interest in a stable financial system require that the stay be lifted. As long as the stay remains in effect, OCC cannot proceed to implement its Capital Plan, leaving it vulnerable to the types of economic shocks that the Capital Plan is designed to address.

OCC respectfully requests that the Commission act promptly to resolve the stay and review issues that have been raised by the Petitioners. The pendency of these issues is adversely affecting OCC's capital resiliency, OCC's reduction of clearing fees for public market participants, and the $33.3 million refund of 2014 clearing fees. For the reasons stated in this Brief and in the Opening Brief, Petitioners' arguments lack merit, and they should not be

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[49] *See* Principle 15, General Business Risk, Principles for Financial Market Infrastructures, Comm. on Payment and Settlement Sys. & Bd. of the Int'l Org. of Secs. Comm'ns (April 2012). SIG argues that the automatic stay does not inhibit OCC's ability to comply with Principle 15. *See* SIG's Response in Opposition, at 16. SIG is incorrect, however, because Principle 15 requires equity funding of capital, and the Capital Plan reflects the funding that the Stockholder Exchanges have agreed to provide.

permitted to continue to be an obstacle to achieving these important objectives of OCC's Capital Plan.

THE OPTIONS CLEARING CORPORATION

By: William J. Nissen

William J. Nissen
Steve Sexton
Kristen Rau
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000
Facsimile: 312-853-7036

Dated: April 13, 2015

CERTIFICATE OF COMPLIANCE

I, William J. Nissen, counsel to The Options Clearing Corporation (OCC), hereby certify that the foregoing brief 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 brief includes 6,002 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

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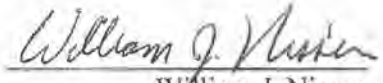

William J. Nissen
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000
Facsimile: 312-853-7036

CERTIFICATE OF SERVICE

I, William J. Nissen, counsel to The Options Clearing Corporation, hereby certify that on April 13, 2015, I served copies of the attached Reply Brief in Support of Motion to Lift Stay and Certificate of Compliance on the following persons by facsimile at the numbers shown below and by Federal Express to the addresses shown below:

John A. McCarthy
General Counsel
KCG Holdings, Inc.
545 Washington Boulevard
Jersey City, NJ 07310
Facsimile: 201-557-8024

Lisa J. Fall
President
BOX Options Exchange LLC
101 Arch Street, Suite 610
Boston, MA 02110
Facsimile: 617-235-2253

Barbara J. Comly
Executive Vice President, General Counsel
& Corporate Secretary
MIAX
7 Roszel Road, Suite 5-A
Princeton, NJ 08540
Facsimile: 609-987-2201

Joseph C. Lombard
James P. Dombach
Murphy & McGonigle, P.C.
555 13th Street N.W.
Suite 410
Washington, DC 20004
Facsimile: 202-661-7053

Eric Swanson
General Counsel & Secretary
BATS Global Markets, Inc.
8050 Marshall Drive, Suite 120
Lenexa, KS 66214
Facsimile: 913-815-7119

Dated: April 13, 2015

William J. Nissen

William J. Nissen
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000
Facsimile: 312-853-7036