



Joseph P. Karnik
Senior Vice President
and General Counsel

September 8, 2017

VIA ELECTRONIC MAIL

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

Re: *File No. SR-OCC-2015-02: Notice of Filing of a Proposed Rule Change by The Options Clearing Corporation Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systematically Important Financial Market Utility*

Dear Mr. Fields:

The Options Clearing Corporation (“OCC”)¹ is submitting this response to the letter from Susquehanna International Group, LLP, Miami International Securities Exchange, LLC, and BOX Options Exchange, Inc. (“Petitioners”) following the D.C. Circuit’s decision in *Susquehanna International Group, LLP v. SEC*, 2017 WL 3389269 (D.C. Cir. 2017), regarding the Commission’s order (“Order”) approving OCC’s capital plan (“Plan”). OCC appreciates the opportunity to respond to the Petitioners’ letter.

As the Commission knows, the Plan was approved by the Commission after a lengthy review process and based on an extensive record containing significant amounts of data and information relating to the Plan. (Order at 57.) During that review process, which lasted more than a full year, the Commission reviewed and approved the Plan three times—first, at the Commission level, pursuant to Title VIII of the Dodd-Frank Act; second, at the staff level under the Exchange Act, based on delegated authority following an analysis of seventeen comment letters from twelve commenters, including OCC; and third, after conducting a *de novo* review of the staff level review under the Exchange Act, the Commission again approved the Plan after considering all prior comment letters as well as five petitions for review of the Delegated Order. Following this careful review and based on an extensive record, the Commission recognized that the Plan was necessary for OCC to be prudently capitalized at a level appropriate for a SIFMU and

¹ OCC is registered as a clearing agency with the SEC and as a derivatives clearing organization with the Commodity Futures Trading Commission. The Financial Stability Oversight Council has designated OCC as a systemically important financial market utility (“SIFMU”).

concluded that the Plan was consistent with the requirements of the Exchange Act, including Exchange Act Sections 17A(b)(3)(A), 17A(b)(3)(D), 17A(b)(3)(F), and 17A(b)(3)(I).²

In their letter, Petitioners ask the Commission to disregard and discard all its prior work and thoughtful analysis, and “start[] the process anew at the OCC level.” (Petitioners’ Letter at 1.) As discussed below, nothing in the D.C. Circuit’s decision—which expressly held that there was “no immediate need to vacate the Order” (slip op. at 18)—warrants this result.

The Court of Appeals Remanded—And Did Not Vacate—The Plan For Further Consideration By The Commission

Contrary to Petitioners’ suggestion, the D.C. Circuit did not say that the Plan was inconsistent with the requirements of the Exchange Act or could not be approved by the Commission. Indeed, after summarizing each of Petitioners’ arguments regarding the Plan’s purported shortcomings, the Court stated that it would “not reach any of those arguments.” (Slip op. at 7.) Instead, the D.C. Circuit held that the Order did not sufficiently demonstrate that the Commission, before reaching its conclusions, had engaged in the type of reasoned decision-making, supported by substantial evidence, that is required by the Exchange Act and the APA. (*Id.* at 13 (stating that a “lack of reasoned decision-making recurs throughout the Order”).)

For that reason, and not because the Plan was defective or inconsistent with the requirements of the Exchange Act, the D.C. Circuit held that the Order was “arbitrary and capricious, unsupported by substantial evidence, and otherwise not in accordance with law.” (Slip op. at 17.) This is a procedural deficiency, not a substantive one, and it is curable. As the D.C. Circuit explained, “the SEC may be able to approve the Plan once again, after conducting a proper analysis on remand.” (*Id.* at 17.)

Notably, the D.C. Circuit considered, and expressly rejected, Petitioners’ request to vacate the Order. Instead, the Court directed the Commission, on remand, “to properly evaluate the Plan”—not throw it away and start from scratch. The Commission should therefore take as its starting point its prior decisions to approve the Plan (three times) and look to the extensive record before it (and any additional information the Commission determines that it needs) to address on remand the shortcomings in the Order that were identified by the D.C. Circuit. The OCC is highly confident that the Commission can and should “approve the Plan once again” with more detailed, reasoned decision-making and with reference to the substantial evidence that it was previously provided by the OCC.

Petitioners Are Wrong That The Plan Should Be Disapproved “Outright” Because The OCC Violated Its Bylaws

According to Petitioners, the Plan should be disapproved “outright” because OCC, while it was considering the Plan, failed to notify nonshareholder exchanges that the Plan was in development “despite a bylaw requiring ‘prompt[]’ notification to nonshareholder exchanges of all matters ‘of competitive significance.’” (Petitioners’ Letter at 3.) As discussed previously, this position reflects a fundamental misunderstanding of OCC’s bylaws. It also reflects a fundamental

² 15 U.S.C. § 78q-1(b)(3)(A); 15 U.S.C. § 78q-1(b)(3)(F); 15 U.S.C. § 78q-1(b)(3)(D); 15 U.S.C. § 78q-1(b)(3)(I).

misunderstanding about the D.C. Circuit's guidance to the Commission regarding how to address this issue on remand.

First, Article VIIB.01 of OCC's bylaws states in full:

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. (Emphasis added.)

Petitioners conspicuously omit the bolded and underlined text above from their letter to the Commission. And for obvious reasons. This language makes clear that it is for the Executive Chairman to decide, in his discretion, what "information" is "of competitive significance" and must be disclosed to nonshareholder exchanges. Moreover, under Article III, Section 8 of OCC's bylaws, the Board of Directors is empowered to "make such interpretations of the By-Laws . . . as it may deem proper."

Here, as discussed previously, the Executive Chairman, in the exercise of his business judgment, determined that the Plan was not "of competitive significance." Indeed, the internal development of a corporate plan to raise capital is not even the type of competitively significant "information" (as opposed to "matters," as Petitioners would rewrite the bylaw) that this bylaw was designed to address.

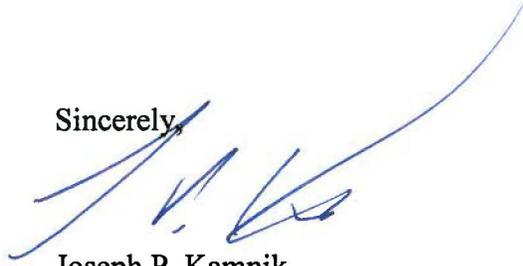
Second, Petitioners focus on the Commission's purported failure to carefully analyze their argument "that OCC could not reasonably have considered the Plan to be competitively insignificant." (Petitioners' Letter at 3.) The Commission, however, did review and reject Petitioners' arguments in this regard, namely that the Plan will lead to higher costs and fees.

In any event, Petitioners address only half of what the D.C. Circuit said the Commission needs to study upon remand. The D.C. Circuit's concern here was that the Order gave too "short shrift" to Petitioners' objection, not that the Commission's conclusion was erroneous. (*Id.* at 16-17.) Petitioners accordingly do not address the fact that the Commission may also reject this argument on the ground that the "reasonableness" of OCC's determination regarding competitive significance simply "does not matter." (Slip op. at 17.) This conclusion could be supported on several grounds, for example, because an objective, "reasonableness" standard conflicts with the language of OCC's bylaw, or because Petitioners were notified upon the Plan's approval through the notice and comment process and have had ample opportunity to review and share their suggestions on the Plan throughout this process. In fact, as recently as August 25, 2017, Petitioners continue to share their suggestions for improving or replacing the Plan with OCC.

Conclusion

For the reasons explained above, OCC respectfully submits that the Commission approval of the Plan can and should be reaffirmed with a well-reasoned determination, supported by substantial evidence.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Kamnik', is written over the word 'Sincerely,'. The signature is fluid and cursive, with a long, sweeping line extending upwards and to the right.

Joseph P. Kamnik