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March 20, 2015

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**VIA HAND DELIVERY**

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

**RE: Petition for Review 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, Release No. 34-74452, File No. SR-OCC-2015-02**

Dear Mr. Fields,

As counsel for Susquehanna International Group, LLP ("SIG"), please find enclosed the original and three copies of SIG's Petition for Review of 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 (Securities Exchange Act Release No. 34-74452, File No. SR-OCC-2015-02).

Any questions concerning this matter can be directed to me. My contact information appears above.

Very truly yours,

Joseph C. Lombard

cc: Chair Mary Jo White, SEC
Commissioner Luis A. Aguilar, SEC
Commissioner Daniel M. Gallagher, SEC
Commissioner Kara M. Stein, SEC
Commissioner Michael S. Piwowar, SEC
Stephen Luparello, Director, Division of Trading and Markets, SEC

## CERTIFICATE OF SERVICE

I, Joseph C. Lombard, counsel for Susquehanna International Group, LLP, hereby certify that on March 20, 2015, I served the foregoing Petition for Review of 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 (Securities Exchange Act Release No. 34-74452, File No. SR-OCC-2015-02) on Brent J. Fields, Secretary, Securities and Exchange Commission, by causing hand delivery of the original and three copies to 100 F Street, N.E., Washington, D.C. 20549-1090.

Dated: March 20, 2015

Joseph C. Lombard

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

| | | |
|---|---|---|
| In the Matter of the Petition of: | ) | File No. SR-OCC-2015-02 |
| Susquehanna International Group, LLP | ) | |

**PETITION FOR REVIEW OF ORDER MADE PURSUANT TO DELEGATED AUTHORITY APPROVING PROPOSED RULE CHANGE BY OPTIONS CLEARING CORPORATION**

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Pursuant to Rule 430 of the Rules of Practice of the Securities and Exchange Commission ("SEC" or the "Commission"), Susquehanna International Group, LLP, and its affiliated and related entities (collectively, "SIG"), hereby petition the Commission for review of the March 6, 2015 Order set forth in Exchange Act Release No. 74452 (the "Order") in which the Staff of the Division of Trading and Markets (the "Staff"), pursuant to delegated authority, approved a proposed rule change by The Options Clearing Corporation ("OCC") implementing its proposed capital plan (the "Capital Plan").

## Preliminary Statement

For approximately 40 years, OCC has functioned as the sole provider of essential clearing services for SEC-governed, exchange-listed options in the United States. During that time, it has operated as a self-regulatory organization approved and overseen by the Commission and vested with delegated governmental authority. In accordance with this position, OCC historically has acted as a not-for-profit utility for the benefit of all market participants, including its clearing members and the investing public and, in fact, holds itself out as such. OCC now claims that it needs a tenfold capital increase, and its Capital Plan to achieve that level would change the character of OCC, aligning it more as a for-profit than a not-for-profit entity. Rather than incentivizing OCC to be a steward of the public interest and ensuring that its five exchange owners (the "Stockholder Exchanges"[1]) benefit not from the OCC fees paid by market participants but simply from their interests as exchange operators in the options marketplace, the Capital Plan would correlate the Stockholder Exchanges' financial reward (an egregiously high rate of return growing from 20% per annum in the current year to nearly 35% per annum by 2022) with OCC's increased expenses and budgets. It does so needlessly, as OCC's increased

[1] The Stockholder Exchanges are: Chicago Board Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ OMX PHLX LLC (formerly known as Philadelphia Stock Exchange); NYSE MKT LLC (formerly known as the American Stock Exchange); and NYSE Arca, Inc.

capital requirements can be met through means that are far less burdensome, far less anti-competitive, and much more fair.

Given that the Capital Plan unreasonably enriches the Stockholder Exchanges at the expense of the investing public and other market participants, it was an error of law for the Staff to rule that the Capital Plan did not violate Section 17A(b)(3)(I)'s requirement that the rules of a registered clearing agency do not provide any burden on competition not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934 (the "Exchange Act"). To this point, several comment letters asserted that the Capital Plan was approved (i) through the financially-conflicted Stockholder Exchanges' threat of veto of competing and less expensive alternatives that were more beneficial to OCC, and (ii) without recusal by the Stockholder Exchanges that stand to benefit from the Capital Plan at the expense of other market participants. The Stockholder Exchanges cannot have it both ways: exercising their veto rights against alternative sources of equity at a far lower cost, while simultaneously requiring above-market rates of return on their equity.

Moreover, the Staff erroneously approved the Capital Plan without requiring OCC to demonstrate that it was in any way open to market bid or subject to a customary "market check" or other process that could have identified potential suppliers of capital on terms materially more favorable to OCC and the investing public. This is not to suggest that the Exchange Act dictates any specific steps that the (conflicted) board of a clearing agency must follow in considering capital plans, but it was error here for the Staff not to consider in any meaningful way potentially less burdensome capital-raising alternatives. Absent such consideration, the Staff had no basis to conclude that the burden on competition to finance the Stockholder Exchanges' excessive returns under the Capital Plan is necessary or appropriate, nor could the Staff reasonably find that fees

charged to finance such excessive returns are reasonable. Indeed, considering OCC's specialized status as a monopoly and SRO, this failure is even more troubling. The Staff also failed to require OCC to provide detailed information on the more specific question of whether alternative capital raising plans on terms more beneficial to OCC were considered and actually rejected by some or all of the Stockholder Exchanges even though SIG raised the issue (and OCC's own comment letters note the lurking veto threat)[2] that the Stockholder Exchanges may have used their veto rights in an anticompetitive manner.[3] Instead, the Commission merely deferred to the business judgment of OCC's Board of Directors as to the appropriateness of the Capital Plan, in effect abstaining from the kind of substantive regulatory review required to ground findings of consistency with the Exchange Act. Such deference has no appropriate legal place in this process. To the contrary, the Exchange Act requires the Staff to find affirmatively that the Capital Plan "is consistent with the requirements of [the Exchange Act]," detailing why the burden on competition is necessary or appropriate and not an unreasonable cost to the investing public.

Although acknowledging that the Capital Plan may impose a burden on competition, the Staff simply declared that any burden on competition associated with the Capital Plan was necessary and appropriate in furtherance of the purposes of the Exchange Act given OCC's importance to the U.S. options market and the Capital Plan's facilitation of the clearance and settlement of options transactions in various market conditions. Such findings of necessity and

[2] Letter from James E. Brown, General Counsel, OCC (February 23, 2015) (responding to MM Letter), at 6 n. 10 ("[T]he Stockholder Exchanges have certain rights with respect to proposed changes to OCC's capital structure. These include the right not to have their investment in OCC diluted through the issuance of additional equity capital, as well as the right to elect directors to OCC's Board. The Board determined that it was not likely to be the case that all five Stockholder Exchanges would agree to changes to the capital structure that would be to their detriment, at least on a timetable that would permit OCC to raise the necessary capital 'funded by equity' to achieve compliance with the Proposed Rule.").

[3] Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, (March 4, 2015).

appropriateness were legally erroneous where the Staff engaged in no review whatsoever of whether more advantageous alternatives to the Capital Plan existed, particularly given clear indications of a skewed and anticompetitive process for developing and approving the Capital Plan. The flawed absence of review was even more critical in light of the unique combination of OCC's government-sanctioned monopoly with its position of public trust as an SRO: exchange-listed options transactions are *obliged* to be cleared through OCC. The Stockholder Exchanges who control OCC *must not* be permitted to tax the fees for those transactions to finance an excessive return on their own capital.

We do not question the importance of OCC, its need to raise additional capital, or the benefits of a well-functioning clearance and settlement facility. Nor do we question the Commission's interest in a well-capitalized OCC. What we do question, however, is the manner in which the Capital Plan proposes to raise capital by fundamentally altering the nature of OCC's business and providing a windfall to the Stockholder Exchanges at the expense of the investing public. We also question the sufficiency of the process by which the Capital Plan was developed and approved by OCC. In determining that the Capital Plan's benefits outweigh the inherent burden on competition and the unreasonable costs that would be borne by investors, the Staff erred because it did not consider the other viable capital-raising alternatives that were proposed and available to OCC. Nor did it seriously consider other alternatives offered by commenters, such as the "Payer-Asset Approach" detailed in a comment letter submitted by leading options market makers.[4] Without any review of those alternatives or any scrutiny of the process by which they were considered (or rejected) by OCC, no reasonable assessment of the necessity or

[4] Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading, (February 20, 2015), at 10-11.

propriety of the Capital Plan's burden on competition occurred, thus invalidating the cost/benefit conclusion reached by the Staff.

In addition, the Order erred as a matter of law by finding that the Capital Plan did not violate Section 17A(b)(3)(D)'s requirement that the rules of a registered clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. Specifically, the cost to sustain the excessive rate of return to be allocated to the Stockholder Exchanges under the Capital Plan would impose an unreasonable level of clearing fees on OCC's clearing members whose rebates would (at a minimum) be cut in half under the Capital Plan (with the other half paid to the Stockholder Exchanges). As a result, clearing members' transaction costs would increase and be passed along to and borne by investors and other market participants like SIG.

The Order also erred as a matter of law by finding that the Capital Plan did not violate Section 17A(b)(3)(F)'s requirement that the rules of a registered clearing agency be designed to, among other things, "protect investors and the public interest." Indeed, the Order makes absolutely no findings with respect to this fundamental requirement – and fails to even mention it – even though its purpose lies at the heart of the Exchange Act, notwithstanding commenters' pleas regarding the incongruence between the Capital Plan and the protection of investors.[5] Instead, the Order simply offers conclusory statements about the Capital Plan's design to allow OCC to promptly and accurately clear transactions and safeguard securities and funds, without providing any detail, and without addressing the core requirement that the plan protect investors and the public interest. The Order attaches a determinative significance to the assertion that OCC would be better capitalized under the Capital Plan. This finding, however, misses the point

[5] *See infra* n. 37.

in that this would be true under any capitalization plan. The legally relevant question is whether the *way* capital is being raised protects investors and serves the public, a question the Order fails to address.

Finally, the Order represents an important policy decision that improperly defers to the self-serving statements of OCC about the Capital Plan and OCC's inadequate responses to the many legitimate concerns that commenters proffered on the Capital Plan, to the detriment of the investing public. It is as if the Staff felt constrained by the business judgment rule, a doctrine of abstention and *non-review*, which has no proper place in a proceeding where the Commission must make a finding of consistency with the Exchange Act. The lack of detailed and reasoned analysis in the Order indicates that the Staff has not fully explored the Capital Plan's effects, and therefore, a fulsome review by the Commission is warranted to ensure that the Commission's expertise is properly utilized and satisfies the requirements of the Administrative Procedure Act ("APA"). In particular, the Order's shortcomings are reminiscent of those that formed the basis of the D.C. Circuit's decision criticizing the Commission in *NetCoalition v. S.E.C.*[6] There, the court remanded the Commission's order after finding that the Commission failed to meet the APA requirement of "reasoned decisionmaking." The court stressed that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[7] Similarly, further Commission review is warranted here under the APA's requirement that the Commission "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

[6] 615 F.3d 525 (D.C. Cir. 2010).

[7] *Id.* at 538-539 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

facts found and the choice made."[8] It is hard for the Commission to justify its "choice" to approve the Capital Plan when the Staff did not explore the less-expensive alternatives presented to OCC.

In short, the Commission is duty-bound under the Exchange Act to determine the consistency of the Capital Plan with competition, fairness, and the protection of investors. The Commission cannot simply defer to OCC's business judgment, particularly given OCC's joint status as a government-granted monopoly and an SRO. Accordingly, because of the Orders' numerous errors of law and the important public policy issues that the Capital Plan presents, we respectfully request that the Commission grant this Petition and review the Staff's findings.

## Factual Background

### A. The Economic and Legal Situation of OCC

OCC is a monopoly. It is the only clearing house for SEC-governed, exchange-listed options in the United States. Two important implications flow from this situation. First, OCC has wide latitude to price options clearing services.[9] Second, OCC potentially will be less than vigilant with regard to controlling its expenses. The leading antitrust scholars Areeda and Hovenkamp put it this way: "[U]nlike the competitive firm whose survival depends on efficiency, the monopoly firm is under no life-or-death compulsion to minimize costs, and it is widely suspected, with some empirical evidence in support, that monopoly tends to beget waste and a less than zealous effort to develop cost-saving innovations."[10] These concerns are of

[8] *See id.* at 531 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[9] *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)) (noting that a monopolist has the ability to 'set[] prices with little concern for its competitors'). OCC increased its clearing fees by 70% in April 2014 and saw negligible effects on its clearing volume for the rest of the year. *See* Securities Exchange Act Release No. 71769 (Mar. 21, 2014), 79 FR 17214 (Mar. 27, 2014).

[10] *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶403 (4th ed. 2014).

particular relevance here because the Capital Plan compensates the Stockholder Exchanges in direct proportion to OCC's expenses, none of which are borne by the Stockholder Exchanges – a clear conflict of interest. Concerns about pricing in the context of a monopoly are not unique to the parties challenging the Capital Plan, but rather are appreciated by at least one of the Stockholder Exchanges. As NASDAQ Chief Executive Officer Robert Greifeld stated just last week when describing NASDAQ's entry into the energy trading business, "[m]onopolies are not the natural order of things."[11]

In this regard, OCC is not a monopoly of natural origin. Its role as the centralized clearing exchange did not just happen by chance or arise by virtue of evolution. OCC's monopoly arose under the Commission's supervision and indeed was approved by the Commission for that role after market participants collectively voiced the preference for a central clearing agent that would be ecumenical in its approach, free from conflicts of interest, and fiercely efficient in keeping costs to a minimum for everyone in the marketplace – brokers, traders, clearing members, exchanges, and the investing public.[12] As such, the Capital Plan is antithetical to the very premise of OCC's origin.

Importantly, OCC's Articles of Incorporation, By-Laws, and Stockholders Agreement also constitute SRO rules under the Exchange Act.[13] As discussed more fully below, the organizational framework contained therein facilitated the closed and effectively skewed process by which OCC's Board approved the Capital Plan at above-market rates to OCC and its non-equity stakeholders. Because this organizational framework is itself codified as SRO rules, the self-interested actions within this framework constitute the exercise of delegated government

[11] Bradley Hope and Nicole Friedman, *Nasdaq to Launch Energy Futures Market*, WALL ST. J., March, 11, 2015.

[12] *See* Securities Exchange Act Release No. 11423 (May 15, 1975).

[13] *See* 15 U.S.C. § 78c(a)(27) (defining "rules of a clearing agency" to include "the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing").

authority that is subject to comprehensive Commission oversight. Accordingly, the enormous power vested with the Stockholder Exchanges which enabled them to veto competing, less expensive financing proposals squarely implicates the concrete and arguably heightened supervisory obligations of the Commission.

**B. The Capital Plan**

Pages five and six of the Order provide OCC's description of the Capital Plan. What the description fails to disclose, however, is the manner and extent to which the Stockholder Exchanges will profit at the expense of public investors and other market participants. Based on our review of the limited information provided by OCC in this regard, we shed light on this topic with the analysis below. At bottom, the analysis makes clear that the Capital Plan is an effort on the part of the Stockholder Exchanges to monetize a monopoly.

As substantiated in Table 1 below, the Capital Plan would produce for the Stockholder Exchanges an exorbitant rate of return of over 20% on their $150 million capital contribution in the first year of operation.[14] The rate of return is comprised of two components: (1) the annual dividends payable to Stockholder Exchanges, and (2) the annual increase to OCC's book value generated by the steadily increasing Business Risk Buffer, a portion of which is to be deposited into the capital reserve account every year based on OCC's estimated budgets. As demonstrated by Table 1 below, each of these components of the Stockholder Exchange's rate of return is projected to increase over the following years. Put simply, the capital reserve account, a

[14] The rate of return is calculated with reference to the $150 million initial investment. The Replenishment Capital is not considered for purposes of this calculation because the Capital Plan is structured in such a way so that the likelihood of it ever being called is exceedingly low. In addition, the Capital Plan ensures that alternative remedies to avoid calling upon the Replenishment Capital will be largely available in all but the most improbable cases. Moreover, the Capital Plan affords special treatment to any provided Replenishment Capital. The Capital Plan calls for the repayment in full of any Replenishment Capital which is contributed to OCC, including permanently terminating clearing member rebates if the Replenishment Capital is not fully refunded within two years. Thus, the Replenishment Capital is more analogous to a line of credit than a capital commitment. As such, it should not serve as a justification for an enhanced rate of return because what it adds in the way of risk to the Stockholder Exchanges is de minimis, if anything at all.

Stockholder Exchange asset, increases in direct proportion to OCC's budget (expenses) as does the Business Risk Buffer from which the Stockholder Exchange dividends are paid. Both the capital reserve account and the Business Risk Buffer are funded solely by fees from market participants who were shut out of the Capital Plan development and approval process but who are obligated to clear their listed option transactions through OCC. As a result, the Stockholder Exchanges stand to receive a double windfall, receiving excessive dividends into perpetuity and accumulating additional equity in the capital reserve account that they could monetize if the OCC monopoly ever demutualizes.

That the Capital Plan is structured so as to incentivize the Stockholder Exchanges to maintain, if not increase, the current expense growth trajectory of OCC is incongruous with its role as a public utility. Specifically, because the capital reserve account, a Stockholder Exchange asset, and dividends paid to the Stockholder Exchanges are effectively a percentage of operating costs, the value extracted from OCC by the Stockholder Exchanges increases as operating costs rise. Due to OCC's monopoly status, increased operating costs can be directly passed on to the public without any adverse effect on its market share. Thus, the Capital Plan's structure puts the Stockholder Exchanges' economic interest directly at odds with the marketplace, directly contravening OCC's role as a public utility and a steward of the marketplace.

Given OCC's consistent performance over the past 40 years in generating revenues above projected budgets, and given projections for annual budget increases from regulatory and other increased expenses in coming years, it is highly probable that the aggregate annual payment value from the Capital Plan to the Stockholder Exchanges (including both the dividend payments and the asset accumulations in the reserve account) will collectively exceed 30% per annum

within just a few years. Table 1 below reflects an estimate of these effects for the next eight years.[15]

**Table 1: Returns on Stockholder Exchanges' Capital Contribution**

(Dollars in millions)

| | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|---|---|
| Expenses | $234.0 | $252.6 | $272.7 | $294.4 | $317.9 | $343.2 | $370.5 | $400.0 |
| Six Months Minimum Capital (Baseline Capital Amount) | $117.0 | $126.3 | $136.4 | $147.2 | $158.9 | $171.6 | $185.3 | $200.0 |
| Business Risk Buffer | $78.0 | $84.2 | $90.9 | $98.2 | $106.0 | $114.4 | $123.5 | $133.3 |
| Margin Cap. Adj. | $9.3 | $10.1 | $10.9 | $11.7 | $12.7 | $13.7 | $14.8 | $15.9 |
| Reinvestment Rate* | 6.2% | 6.7% | 7.2% | 7.8% | 8.4% | 9.1% | 9.8% | 10.6% |
| Amount Refunded to Clearing Firms | $34.3 | $37.0 | $40.0 | $43.2 | $46.6 | $50.4 | $54.4 | $58.7 |
| Pre-Tax Income | $43.7 | $47.1 | $50.9 | $54.9 | $59.3 | $64.0 | $69.1 | $74.6 |
| After-Tax Income (Based on 30% Tax Rate) | $30.6 | $33.0 | $35.6 | $38.5 | $41.5 | $44.8 | $48.4 | $52.2 |
| Funds Available for Dividend | $21.3 | $22.9 | $24.8 | $26.7 | $28.9 | $31.2 | $33.6 | $36.3 |
| Dividend Rate* | 14.2% | 15.3% | 16.5% | 17.8% | 19.2% | 20.8% | 22.4% | 24.2% |
| Total Return** | 20.4% | 21.9% | 23.8% | 25.6% | 27.7% | 29.9% | 32.3% | 34.8% |

* The Reinvestment Rate and the Dividend Rate are each calculated as a percentage of the $150 million one-time Stockholder Exchange capital contribution.

** The Total Return is the sum of the Reinvestment Rate and the Dividend Rate.

Any investment in an AA+ quality company like OCC with an excellent financial track record that has served as a government-sanctioned monopoly for 40 years would attract eager

[15] The annual rate of increase to operating expenses reflected in Table 1 is 7.9%, the average rate of increase based on OCC's stated expectations that its Baseline Capital Amount will not exceed $200 million until 2022.

capital investors.[16] Indeed, similar to other proposals that we understand the Stockholder Exchanges precluded in order to extract a far higher return for themselves, SIG is willing, alone or as part of a group, to commit capital for a far lower, reasonable rate of return, and to structure the same as a loan to the Stockholder Exchanges so they may contribute such monies to OCC as equity. **But SIG was never asked about its willingness to do so**, nor apparently was anybody else who may well have provided funds on more reasonable terms. On the contrary, it appears that the Stockholder Exchanges ignored glaring conflicts of interest by designing and approving a plan that unjustly rewards themselves on commercially unreasonable terms at the expense of public investors and other market participants. What is particularly troubling is that OCC is using a proposed SEC capital rule, along with principles articulated by unelected officials of international organizations not accountable to the US investing public, as a pretext to implement such an unjust and unfair transformation. There clearly are more equitable and less burdensome means to raise sufficient, additional capital. Therefore, it is not necessary to accept such onerous and anticompetitive terms.

## SIG Seeks Review of the Staff's Order As An Aggrieved Party

Under Rule 430 of the SEC Rules of Practice,[17] any person aggrieved by Staff action taken by delegated authority may seek Commission review of that action. SIG is aggrieved by the Order approving the proposed rule change. SIG is an options market maker in numerous options classes that, like other market makers, would be financially impacted by the Capital Plan, including by incurring unreasonable fees and the consequential reduced trading activity if the proposed rule change is enacted. SIG has duly complied with the procedural requirements of

[16] Standard & Poor's Rating Services, Full Analysis of Options Clearing Corporation (March 28, 2014), *available at* http://www.optionsclearing.com/components/docs/about/sp_rating.pdf.

[17] 17 CFR § 201.430.

Rule 430(b) by filing on March 13, 2015, a timely Notice of Intention to Petition for Review, and filing this Petition within five days thereafter, as computed in accordance with Rule 160(a) of the SEC's Rules of Practice.[18]

**The Applicable Standards for Granting Review and Demand for Relief**

Rule 431(b)(2) of the SEC Rules of Practice sets forth the standards for the Commission's decision to grant review pursuant to a Rule 430 petition. Namely, the Commission "shall consider the factors set forth in Rule 411(b)(2)."[19] And Rule 411(b)(2) requires the Commission to 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.[20]

**I. The Order Approving the Capital Plan Was Premised on Errors of Law**

In approving the Capital Plan, the Order found that it was consistent with the following provisions of the Exchange Act: (i) Section 17A(b)(3)(I); (ii) Section 17A(b)(3)(D); and (iii) Section 17A(b)(3)(F). But, as detailed below, these conclusions of law are erroneous, requiring the Commission to grant review of the Order.

**A. The Order's Finding That The Capital Plan Is Consistent With Section 17A(b)(3)(I) Is Erroneous**

Section 17A(b)(3)(I) requires that the rules of a registered clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the

[18] 17 CFR § 201.160(a).

[19] 17 CFR § 201.430(b)(2).

[20] 17 CFR § 201.411(b)(2).

Exchange Act. The Order concedes that the Capital Plan may impose a burden on competition.[21] The only legal question, therefore, is whether it is necessary or appropriate in furtherance of the purposes of the Exchange Act. For the reasons set forth below, the Order improperly concluded that the burden on competition was necessary or appropriate.

**1. The Staff Failed to Consider Viable Alternatives to the Capital Plan**

The Order does not consider the multiple and less-expensive alternative capital raising plans described by commenters.[22] Accordingly, the Order's finding that the Capital Plan does not impose any burden on competition not necessary or appropriate was an error of law. Without considering the viable alternatives, there is no basis for finding that the burden imposed by the Capital Plan is necessary or appropriate.[23] Indeed, the burdens on competition from the Capital Plan are unnecessary and inappropriate even when viewed in isolation, as the Capital Plan is not commercially reasonable.

It is well-settled in the context of Commission rulemaking that when faced with reasonable alternative plans, the Commission must consider them or explain why it refuses to do so.[24] Here, particularly given OCC's status as a monopoly exercising delegated governmental

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[21] *See* Securities Exchange Act Release No. 74452 (Mar. 6, 2015), 80 FR 13058, 13068 (Mar. 12, 2015) ("OCC Capital Plan Approval Order").

[22] *See* Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc., (February 19, 2015); Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading, (February 20, 2015); Letter from Ellen Greene, Managing Director, Financial Services Operations, SIFMA, (February 20, 2015); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchange, LLC (February 24, 2015); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., (February 26, 2015); Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, (March 4, 2015).

[23] OCC's argument that alternative financing arrangements with Non-Stockholder Exchanges are not feasible because they require amending OCC's By-Laws is baseless, as OCC concedes that the Capital Plan too requires amending OCC's By-Laws.

[24] *See Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005) (stating that "where a party raises facially reasonable alternatives . . . the agency must either consider those alternatives or give some reason . . . for declining to do so."); *see also International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1982) (holding that because the Secretary of Labor did not consider alternatives raised by commenters, it was

authority, the Order should have given substantive consideration to alternative capital raising plans that would not radically alter the options trading market to the detriment of competition and the investing public. It is simply not enough to abstain from review in deference to the (conflicted) business judgment of OCC's Board of Directors.[25]

In its February 23, 2015 letter to the Commission, OCC stated that it considered several alternative methods for achieving additional capital and liquidity, but that "**nearly all**" of the alternatives posed significant tax, compliance, or governance and shareholder rights issues that made such alternatives uncertain or unfeasible. OCC's incantation, however, neither identified nor provided any details concerning the "alternative methods" that it supposedly considered and rejected, effectively depriving the Staff of the ability to assess them and determine if the Capital Plan is the best option for OCC and, more importantly, the public. Nor did OCC explain the basis for the "issues" that caused it to reject the alternative methods, or articulate which issues applied to which alternatives.[26] More importantly, the logical conclusion of the carefully formulated statement that "**nearly all**" of the alternatives posed issues is that some alternatives

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"absolutely clear from decisions by the Supreme Court and this court that such an 'artificial narrowing of options,' *Pillai v. CAB,* 485 F.2d 1018, 1027 (D.C.Cir.1973), is antithetical to reasoned decision-making and cannot be upheld").

[25] We understand a general reluctance to scrutinize the decision of a conflict-free corporate board, and a general hesitancy with regard to prescribing particular board processes. However, even Delaware courts, while careful to avoid dictating specific mechanisms, look closely at board processes where conflicts present hazards, and remain willing to declare particular actions or inactions unreasonable. *See Chen v. Howard-Anderson*, 87 A.3d 648, 674 (Del. Ch. 2014) ("Viewed as a whole, the record supports an inference that it fell outside the range of reasonableness for the Board to rely on Jefferies's 24–hour, July 4th market check and, under the circumstances then existing, to deliver an ultimatum to Adtran to make an offer within 24 hours."). The Commission, obliged by the Exchange Act to make specific findings regarding competition, fairness, and investor protection, should be similarly willing to scrutinize processes of an SRO with monopoly pricing power, particularly where the context contains concrete indications of an anticompetitive and self-interested process.

[26] Notably, the insider deal approved by OCC's Board embodied distinct tax inefficiencies. Indeed, the dividends to be paid to the Stockholder Exchanges are taxable, which costs will likely be passed on to the investing public, whereas the refunds that historically have been paid are not taxable. Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading, (February 20, 2015), at 10.

did not pose such issues. Yet the Staff never required OCC to identify those alternatives, their cost, or OCC's basis for rejecting them.

### 2. OCC's Board Approval Process Was Designed to Serve the Stockholder Exchanges, Not Protect the Public Interest

The self-interested Stockholder Exchanges that stand to obtain a windfall from the Capital Plan controlled the process to gain Board approval of the plan. Such domination requires the Commission to scrutinize the Capital Plan to ensure it is designed to protect investors and the public interest rather than serve the private interests of the Stockholder Exchanges as an undue burden on competition. The obfuscatory process by which the Capital Plan was approved should only enhance the Commission's skepticism of the plan's effect on the public:

1) Each of the Stockholder Exchanges had the right to veto any plan that diluted their equity interest in OCC through acceptance of capital contributions from other parties.[27] OCC advised the Staff that, "[t]he Board determined that it was not likely to be the case that all five Stockholder Exchanges would permit OCC to raise the necessary capital 'funded by equity' to achieve compliance with the Proposed Rule."[28] It can be surmised (and has been stated)[29] that one or more of the Stockholder Exchanges either vetoed or threatened to veto any capital-raising plan that involved equity participation from any additional parties, and any less expensive proposals from any Stockholder Exchanges, taking those alternative options off the table and effectively coercing the Board to adopt the currently

[27] *See* Letter from James E. Brown, General Counsel, OCC (February 23, 2015) (responding to MM Letter), at 6 n. 10.

[28] *See id.*

[29] Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, (March 4, 2015).

at-issue plan that provides outsized financial benefits to the Stockholder Exchanges at the expense of the investing public.[30]

2) Notwithstanding that the Stockholder Exchanges had a direct financial interest in extracting the highest rate of return from OCC in exchange for their capital contributions, OCC's five directors who were appointed by the Stockholder Exchanges all failed to recuse themselves from the deliberations or the vote on the Capital Plan despite the glaring conflict of interest they faced. While OCC finds this acceptable, that does not mean the Commission must agree.

3) OCC did not provide other stakeholders an opportunity to propose alternative approaches to the Capital Plan, or utilize a market check to determine an appropriate level for the proposed dividends.

4) There is no indication that the Public Directors met in an executive session with the opportunity to discuss the Capital Plan in a frank and open manner, free from the presence of the directors appointed by the Stockholder Exchanges.[31]

5) OCC's Board failed to maintain the requisite number of public directors as required by OCC's By-Laws, which may have impacted the deliberations on the matter as well as the outcome of the board vote. This failure deprived the board of input from disinterested

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[30] Furthermore, OCC's statements regarding the potential negative consequences the Stockholder Exchanges will experience as a result of the Capital Plan are inconsistent with the Capital Plan's amendments to the By-Laws and other corporate documents shoring up the exclusivity of the Stockholder Exchanges investment opportunity and making it more difficult to access outside capital. Such changes belie OCC's profession of a fair rate of return, and rather reflect the Stockholder Exchanges' desire to restrict the ability of others to upset the sweetheart deal they have engineered for themselves.

[31] *See* Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126, 71140 (Dec. 8, 2004) ("The Commission believes that independent directors must be provided with the opportunity to discuss any important matters regarding the exchange or association in a frank and open manner, free from the presence of management. Therefore, the Commission proposes that the independent directors of the exchange's or association's board meet regularly in executive session.").

directors who would be most likely to argue for an outcome that is in the best interest of OCC and the options trading industry.

As clearly demonstrated by these numerous conflicts of interest and corporate governance issues, the Stockholder Exchanges' control over the approval process for a plan that enriched them created, at the very minimum, the appearance of impropriety. This tainted process of self-dealing by the Stockholder Exchanges undermines public confidence not only in the Capital Plan's approval, but also in the efficient operation of the options market. When considered with the fundamental market change implemented by the proposed rule change, these issues militate in favor of Commission review of the Staff's approval of the plan.

In response to commenter concerns regarding the above-described process, the Staff stated that OCC represented that it conducted its business in conformity with applicable state laws and its own By-Laws, effectively deferring to the business judgment of OCC's Board of Directors. Indeed, despite noting that "[s]everal commentators raised concerns that OCC's Capital Plan was not approved in accordance with OCC's By-Laws", the Order makes no findings about those concerns. <u>But the business judgment rule's deference fails to satisfy the Exchange Act's requirement that the Staff affirmatively make specific findings before approving a proposed rule.</u> Specifically, the business judgment rule is a rule of "abstention" or "*non*-review."[32] What OCC invites the Commission to do, in effect, is to abdicate regulatory scrutiny of a major rule change by an SRO. By invoking that rule, OCC implicitly argues – and the Order

[32] *See, e.g.,*Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, UCLA School of Law, Law and Economics Research Paper No. 03-18 (July 23, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=429260 (stating that "the business judgment rule can be seen as an abstention doctrine" that "establishes a presumption against judicial review", under which "the court abstains from reviewing the substantive merits of the directors' conduct"); *see also* Lyman Johnson, *The Modest Business Judgment Rule,* 55 BUS. LAW. 625, 633 (2000) (explaining the business judgment rule as a "policy of nonreview").

accepts – that the Staff should not "second guess [OCC's] business judgments."[33] However, section 19(b)(2)(C)(i) of the Exchange Act clearly provides that the Commission may only approve an SRO's proposed rule change "**if it finds** that such proposed rule change is consistent with the requirements of this chapter that are applicable to such organization."[34] And if the Commission does not make such a finding, Section 19(b)(2)(C)(ii) provides that the Commission "shall disapprove a proposed rule change."[35] Accordingly, the Commission needs to scrutinize whether the options market as a whole, not just the Stockholder Exchanges, are benefitted by the Capital Plan. The Exchange Act calls for diligence, not deference, here.

Therefore, as a result of OCC's and the Staff's failure to even consider several viable alternatives to the Capital Plan, including some more beneficial and less costly to OCC, the finding in the Order that the Capital Plan does not impose a burden on competition not necessary or appropriate was an error of law.

### B. The Order's Finding That The Capital Plan Is Consistent With Section 17A(b)(3)(D) Is Erroneous

The Order also erred as a matter of law in finding that the Capital Plan is consistent with Section 17A(b)(3)(D) of the Act, which requires that the rules of a registered clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. The Order found that the Capital Plan is consistent with this requirement in the following ways: (1) the Fee Policy includes the Business Risk Buffer, which the Order notes is designed to ensure that fees will be sufficient to cover projected operating expenses; (2) the Refund Policy and Dividend Policy both allow for refunds of fees or payment of dividends,

[33] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (*modified*, 636 A.2d 956 (Del. 1994), *aff'd sub nom. Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995)).

[34] 15 U.S.C. § 78s(b)(2)(C)(i) (emphasis added).

[35] 15 U.S.C. § 78s(b)(2)(C)(ii).

respectively, only to the extent that these distributions would allow OCC to maintain shareholders' equity at the Target Capital Requirement; (3) the Refund Policy and Dividend Policy also prohibit refunds and dividends when Class C Common Stock is outstanding under the Replenishment Capital Plan, and OCC is in the process of rebuilding its capital base; and (4) the Replenishment Capital Plan establishes a mandatory mechanism for the contribution of additional capital by the Stockholder Exchanges in the event capital falls below desired levels.

The Order's findings appear to address the question of *whether* the Capital Plan would provide capital to OCC and maintain certain capital levels. But these are not the questions the Commission must address to find the required consistency with the Exchange Act. The question Section 17A(b)(3)(D) asks is whether the *way* in which the Capital Plan raises capital would provide for equitable allocation of reasonable dues, fees, and other charges among its participants. It was an error to conclude that, if the Capital Plan is implemented, OCC's fees going forward will be reasonable where, as here, the Plan would provide the Stockholder Exchanges with an above-market dividend stream, in perpetuity, and inflate market participants' fees to finance the outsized returns over the same time horizon.

Specifically, without the Capital Plan, OCC rebates close to 100% of its excess capital to its clearing members, who in turn, either pass those rebates on to their customers (i.e., the investing public), or use those rebates themselves to keep their transaction costs down. But the Capital Plan, at a minimum, cuts those rebates in half, with the other half paid exclusively to the Stockholder Exchanges as dividends, and at maximum diverts the entire rebate amount to the capital reserve account, an OCC asset. Accordingly, the clearing members' transaction costs will increase and eventually will be borne by investors and market makers like SIG. Moreover, to the extent that OCC's transaction fees increase to allow OCC to continue paying the dividends, the

clearing members – not the Stockholder Exchanges – will be solely responsible for those fees, which will likely be passed along to the investing public. In short, unlike the current rebate structure where OCC raises a reasonable amount of capital and returns any excess revenue to the clearing members who actually pay OCC's transaction costs, the Capital Plan imposes a structure where OCC raises unnecessary and excessive capital and pays not less than half of such after-tax excess to the Stockholder Exchanges in the form of dividends or capital reserve deposits. As a result, OCC can now be expected to pay over $15 million dollars in taxes each year for the privilege of providing an oversized return to the Stockholder Exchanges.

Accordingly, given that the plan excessively and unfairly burdens OCC's clearing members and the investing public while ensuring significant value to the Stockholder Exchanges, the Order erred as a matter of law in concluding that the Capital Plan is consistent with providing for equitable allocation of reasonable dues, fees, and other charges among participants.

### C. The Order's Finding That The Capital Plan Is Consistent With Section 17A(b)(3)(F) Is Erroneous

The Order also erred as a matter of law in finding that the Capital Plan is consistent with Section 17A(b)(3)(F) of the Act, which requires, in part, that the rules of a registered clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and in general, to protect investors and the public interest. The Order found that OCC's Capital Plan is consistent with these requirements because OCC is amending its By-Laws and other governing documents to adopt certain policies for the purpose of implementing the Capital Plan, which, as the Order described, is designed to ensure that OCC can continue to promptly and accurately clear and settle securities transactions, and assure the safeguarding of securities and funds which are in the

custody or control of OCC or for which it is responsible even if it suffers significant operational losses.

Most notably, the Order erred as a matter of law in finding that the Capital Plan is consistent with Section 17A(b)(3)(F) because it failed to address – or even *mention* – the core requirement of the section: that the proposed rule change be designed "to protect investors and the public interest."[36] The oversight bears particular emphasis given that the comment file was replete with concrete and substantiated statements that the proposed Capital Plan was inconsistent with investor protection and the public interest.[37]

What the Order does say about the Capital Plan's consistency with Section 17A(b)(3)(F) is contained in a single, cursory paragraph, which simply states that OCC is amending its By-Laws and other governing documents to adopt policies to implement the Capital Plan, declaring that the plan is designed to "ensure that OCC can continue to promptly and accurately clear and settle securities transactions and assure the safeguarding of securities and funds which are in the custody or control of OCC or for which it is responsible even if it suffers significant operational losses." Here, too, this conclusory assertion is not a reasoned finding or analysis, and it fails to address directly or indirectly the core concern raised by commenters: that insiders may have maneuvered a sweetheart deal though the board of an SEC-approved monopoly that is duty-bound under the Exchange Act to protect investors, and that such deal would unreasonably raise

[36] *See* 15 U.S.C. § 78q-1(b)(3)(F).

[37] *See, e.g.*, Letter from Ellen Greene, Managing Director, Financial Services Operations, SIFMA, (February 20, 2015) ("It is clear how this structure provides significant returns for Stockholder Exchanges, but not how it more effectively or efficiently meets the public interests or serves the interests of the Members or their customers."); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., (February 26, 2015) ("There are several examples that illustrate a change in focus designed to maximize dividends to Stockholder Exchanges that will have a detrimental effect on the interests of clearing members, customers and the general public."); Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, (March 4, 2015) ("[T]he negative comment letters on the Proposal . . . reflect a deep-seated fear that OCC, the crown jewel of the U.S. options markets, will be used to siphon money from the investing public and degrade the high liquidity that is the hallmarket of our options markets, all simply to enrich the five owners.").

transaction costs for the investing public and other market participants. The Order's view that the reasonableness of OCC's fees will be determined with respect to future fee filings misses the point that *any* fees promulgated under the Capital Plan are *per se* unreasonable in that they are used to finance excessive Stockholder Exchange returns.

Accordingly, by failing to find that the Capital Plan will protect investors and the public interest, and given that the plan would impose additional costs on the investing public and adversely impact the efficient operation of the options market, the Order erred as a matter of law.

## II. The Order Embodies an Exercise of Discretion and a Decision of Policy that is Important and that the Commission Should Review

As described above, the Stockholder Exchanges have seized on a plan to exploit OCC's monopoly status to extract extraordinary profits through a plan by which the Stockholder Exchanges can expect to receive increasingly above-market returns in perpetuity. This plan to monetize OCC's monopoly will be at the expense of public investors and other market participants, and consequently, the Order embodies an exercise of discretion and a decision of policy that is important. The Capital Plan's potentially far-reaching effects on the options market warrant full Commission review, particularly since the justification for the dividends (and associated rate of return) – the amount of capital needed to ensure OCC's protection – lacks a concrete foundation.

### A. The Commission Should Review Whether the Capital Plan Overstates the Needed Capital Level, Thereby Improperly Bolstering Support for the High Rates of Return Provided to the Stockholder Exchanges

While we do not question the Commission's desire for a well-capitalized OCC, we question OCC's analysis of the proper level of capitalization, along with its proposed method to reach that goal. The capital requirements do not give OCC carte blanche to impose unnecessary burdens on competition, and the Commission should carefully analyze the Capital Plan to

determine whether it is necessary or appropriate in furtherance of the purposes of the Exchange Act. In particular, it appears that OCC has drastically overstated its capital requirements, as it has not provided detail for these calculations. The following points undermine the level of funding that OCC claims it requires:

1. Neither the proposed amendments to Rule 17Ad-22[38] nor Principle 15[39] requires any "Target Capital Buffer," no less a $130 million buffer. Such a significant buffer is without basis since in its more than 40 years of existence, OCC has never had more than a de minimis deficit or loss, and has routinely operated with a cash reserve of less than 20% (and usually less than 10%) over its annual budget.
2. OCC has not offered support for its assertion that it needs to maintain a $117 million commitment for "Replenishment Capital." Indeed, the proposed amendments to Rule 17Ad-22 require OCC only to maintain a "viable plan . . . for raising additional equity should its equity fall" below a certain level. The proposed amendments do not quantify the replenishment amount, and do not require the replenishment amount to equal the total Baseline Capital Requirement, or in this case, $117 million.
3. It does not appear that OCC needed to raise any additional capital to satisfy the Baseline Capital Requirement (*i.e.*, six months of projected operating expenses). Specifically, when the Staff approved the Capital Plan, OCC already had six months of operating expenses in the form of net liquid assets. OCC claims that it needed to accumulate $117

[38] The Commission's sense of urgency for OCC to raise capital is antithetical to the current proposed status of Rule 17Ad-22. Rule 17Ad-22 has been proposed for over a year but still is not finalized. *See* Securities Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 16865 (Mar. 26, 2014).

[39] OCC relies in important part on Principle 15 to justify the capital level it seeks to reach and maintain. Principle 15 is the standard of international organization (IDS and IOSCO) made up of unelected officials who remain unaccountable to the public investors of the US. It therefore provides no legitimacy to capital levels OCC seeks to raise to "comply" with it. If OCC believes independently of Principle 15 that the referenced levels are necessary, it should be required to demonstrate as such.

million to cover six months operating expenses, but with $25 million in shareholder equity at the end of 2013 and $142 million in excess revenue over operating expenses collected as a result of last year's increased fees,[40] and revenue so far this year from the 70% fee increase it imposed on clearing members last year, OCC would have already had sufficient funds to cover six months operating expenses.[41]

4. Even accepting *arguendo* OCC's need to raise a Target Capital Buffer of $130 million, OCC had significant reserves and issued large rebates over the last few years that could have met these additional capital needs. In 2013 and 2014, OCC issued a $47 million rebate and a $33 million rebate, respectively. At the end of 2014, OCC had shareholder equity in an amount of $97 million. Further, we estimate OCC will have revenues of $78 million in excess of operating expenses for 2015. Collectively, these reserves and rebates total $255 million, which easily satisfies the additional capital that OCC now claims it needs to raise ($117 million in Baseline Capital and $130 million in a Target Capital Buffer). This highlights that OCC may fund its capital needs over time through OCC fees, which time measure seems reasonable in view of the lack of urgency attendant to this matter given the Order's discounting of proposed SEC Rule 17Ad-22 from consideration (together with its Replenishment Capital requirement).

### B. The Order Will Lead to Increased Clearing Costs for Investors and Market Makers, Potentially Resulting in Significant Adverse Consequences for the Options Market that Need to be Thoroughly Reviewed Before Implementation

The combination of increased fees possibly unrelated to OCC's actual operating costs along with the proposed limitation that only 50% of excess revenue be refundable to clearing

[40] *See* OCC 2014 Annual Report, available on OCC's website, http://www.optionsclearing.com/components/docs/about/annual-reports/occ_2014_annual_report.pdf.

[41] Instead of using these available funds to cover six months of operating expenses, OCC is issuing a $33 million rebate for 2014, lowering its shareholder equity to $97 million at the end of 2014, and stated its need to raise additional capital to comply with proposed Rule 17Ad-22.

members is likely to have significant adverse effects on the options market that would harm options market participants and the public interest. The ultimate bearer of increased costs, of course, is likely to be public investors and other market participants.

Additionally, the increased costs to options market makers will be detrimental to the efficient operation of the options market. Options market makers provide roughly 90% of the displayed liquidity in listed options and therefore play a crucial role in ensuring an adequate level of liquidity on and an efficient operation of the options market. But options market makers will need to quote wider to account for the higher fees flowing from the Capital Plan. Wider quotes not only result in worse prices for public investors and other market participants, but also lead to higher costs of liquidity, less customer interest, less effective hedging, and poorer risk management.

As noted, the Order contends that future changes to OCC's fee schedule as well as changes to the Fee Policy, Refund Policy, and Dividend Policy will be subject to the rule filing requirements of Section 19(b)(1). Respectfully, the Order simply overlooks the profound significance of what is in fact being proposed. What OCC seeks to implement is a comprehensive and interrelated framework for the calculation of fees, dividends, and refunds that will combine to produce a continued increase of costs that will be paid by investors in perpetuity. Such a framework surely calls for more oversight and scrutiny than that offered by the necessarily expedited and streamlined review of Section 19(b)(3)(A). Therefore, the potential implications of the Capital Plan should be properly reviewed now – not as part of summary fee filings.

## Conclusion

The Capital Plan warrants Commission review because the Order erred as a matter of law by finding that the Capital Plan was consistent with Section 17A of the Exchange Act, despite a number of open issues and unanswered questions that should have been addressed before the Staff could have made findings concerning consistency. Furthermore, as an important exercise of discretion and decision of policy that has potentially far-reaching consequences on the options market, the Commission should review the Order to ensure that these open issues and unanswered questions are thoroughly addressed. For example:

- Did the Staff adequately address the Capital Plan's inherent conflict between the Stockholder Exchanges profiting from higher expenses and fees and the marketplace's interest in lower expenses and fees?
- Did OCC or its advisers undertake a "market check" to test the willingness of any other potential suppliers of liquidity to offer more advantageous terms?
- Did anyone offer an alternative to the Capital Plan that would have satisfied OCC's capital needs on terms more beneficial to OCC than the Capital Plan?
- Did the Stockholder Exchanges or their Board representatives veto, or threaten to veto, any alternative capital raising plans that would have been more beneficial to OCC than the Capital Plan?
- Was the use of the veto threatened in conjunction with the SEC's requirement that additional capital be raised immediately?
- Did the manner in which OCC approved the Capital Plan violate its By-Laws or other corporate governance documents?

We reserve our right to offer more developed considerations for the Commission to consider, or for the Commission to instruct the Staff to consider, in the event the Commission grants this Petition. At the very minimum, however, these significant open issues and unanswered questions – which go to the very heart of the effect of the Capital Plan on the

investing public and the manner in which it was approved – should be addressed before the Capital Plan is implemented.

Dated: March 20, 2015

Respectfully submitted on behalf of
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