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October 7, 2015

**VIA COURIER AND FAX**

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


Re: Susquehanna International Group, LLP *et al.* Motion for an Order Referring this Matter to Hearing Officer and Directing Discovery in Advance of Hearing and Supporting Brief

Dear Mr. Fields:

Petitioners BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange Group, and Susquehanna International Group, LLP and its affiliated and related entities, (collectively "Petitioners"), hereby file the enclosed Motion for an Order Referring this Matter to Hearing Officer and Directing Discovery in Advance of Hearing and supporting brief. The original and three copies are enclosed.

The enclosed Motion and supporting brief have been served by 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.

Very truly yours,



Joseph C. Lombard  
Counsel for Susquehanna International  
Group, LLP

Enclosures

Cc: Division of Trading and Markets (*by facsimile, w/ encl.*)  
Petitioners and OCC (*by facsimile, w/ encl.*)

**CERTIFICATE OF SERVICE**

I, Joseph C. Lombard, counsel for Susquehanna International Group, LLP, hereby certify that on October 7, 2015, I served copies of the attached for an Motion for an Order Referring this Matter to Hearing Officer and Directing Discovery in Advance of Hearing and supporting brief by way of facsimile and Federal Express on the parties and sent the original and three copies by way of facsimile and hand delivery to the Secretary at the following addresses:

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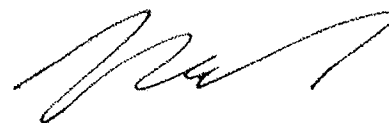
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Dated: October 7, 2015



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Joseph C. Lombard

**CERTIFICATE OF COMPLIANCE**

I, Joseph C. Lombard, counsel to SIG, hereby certify that the foregoing Motion and supporting brief complies with the word count limitations 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 Motion and supporting brief include 5,801 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

Dated: October 7, 2015



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Joseph C. Lombard

**Before the  
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the Petitions of:	)	
	)	File No. SR-OCC-2015-02
	)	
BATS Global Markets, Inc.	)	
BOX Options Exchange LLC	)	
KCG Holdings, Inc.	)	
Miami International Securities Exchange, LLC and	)	
Susquehanna International Group, LLP	)	
	)	
	)	

**MOTION FOR AN ORDER (1) REFERRING THIS MATTER  
TO A HEARING OFFICER FOR THE TAKING OF ADDITIONAL  
EVIDENCE, AND (2) DIRECTING DISCOVERY IN ADVANCE OF THE HEARING**

Pursuant to Rule 452<sup>1</sup> of the Rules of Practice, Petitioners BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP and its affiliated and related entities (collectively “Petitioners”) move for an order (1) referring this matter to a hearing officer for the taking of additional evidence, and (2) directing discovery in advance of the hearing.

The Commission has already granted the Petitioners’ petitions for review of the Division of Trading and Markets’ March 6, 2015 order (the “Approval Order”) approving, pursuant to delegated authority, a capital plan (the “Plan”) proposed by the Options Clearing Corporation (“OCC”).<sup>2</sup> Petitioners request an evidentiary hearing and discovery in advance of that hearing to allow the Commission to consider the Plan’s consistency with the Exchange Act based on a sufficient factual record, as the Exchange Act requires. The grounds for granting the Petitioners’ motion are set forth in detail in Petitioners’ supporting memorandum and the Affidavit of Joel

<sup>1</sup> 17 CFR § 201.452.

<sup>2</sup> Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02).

Greenberg, submitted herewith. Among other things, the current record before the Commission is insufficient for the Commission to properly evaluate the propriety of the Plan. Moreover, this matter concerns unique and important policy issues that have implications for the investing public.

Wherefore, the Petitioners pray for an order of the Commission (1) referring this matter to a hearing officer for the taking of additional evidence, and (2) directing the hearing officer to require OCC and other relevant entities and persons to produce relevant documents and information in advance of the hearing as set forth in detail in the accompanying memorandum.

Respectfully submitted,

/s/ Joseph C. Lombard

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Dated: October 7, 2015

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Before the  
SECURITIES AND EXCHANGE COMMISSION

_____	)	
In the Matter of the Petitions of:	)	File No. SR-OCC-2015-02
	)	
BATS Global Markets, Inc.	)	
BOX Options Exchange LLC	)	
KCG Holdings, Inc.	)	
Miami International Securities Exchange,	)	
LLC and	)	
Susquehanna International Group, LLP	)	
_____	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER (1) REFERRING THIS  
MATTER TO A HEARING OFFICER FOR THE TAKING OF ADDITIONAL  
EVIDENCE, AND (2) DIRECTING DISCOVERY IN ADVANCE OF THE HEARING**

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Petitioners BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP and its affiliated and related entities (collectively "Petitioners") respectfully submit this memorandum in support of their motion pursuant to Rule 452<sup>1</sup> of the Rules of Practice for an order (1) referring this matter to a hearing officer for the taking of additional evidence, and (2) directing discovery in advance of the hearing.

The Commission has already granted the Petitioners' petitions for review of the Division of Trading and Markets' March 6, 2015 order (the "Approval Order") approving, pursuant to delegated authority, a capital plan (the "Plan") proposed by the Options Clearing Corporation ("OCC").<sup>2</sup> Because the current record before the Commission is insufficient for the Commission to properly evaluate the propriety of the Plan, the Commission should refer this matter to a hearing officer for the taking of additional evidence. And in light of the unique and important policy issues involved in this matter and its implications for the investing public, the Commission should explicitly direct the hearing officer to require OCC and other relevant entities and persons to produce relevant documents and information and appear for depositions in advance of the hearing, as set forth in detail below. This additional evidence and discovery are necessary to develop a sufficient factual record to allow the Commission to make the findings that the Exchange Act requires.<sup>3</sup>

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<sup>1</sup> 17 CFR § 201.452.

<sup>2</sup> Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02).

<sup>3</sup> The Commission has the power to direct the hearing officer to require this necessary pre-hearing discovery to develop a sufficient record to weigh the important public interest considerations at the core of this matter. Rule 100(c) of the Rules of Practice explicitly provides that the Commission "may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary." 17 CFR § 201.100(c).

## INTRODUCTION

The Exchange Act precludes the Commission from approving an SRO's proposed rule change, such as OCC's proposed Plan, unless the Commission affirmatively finds that the proposal is consistent with the requirements of Section 17A of the Exchange Act and the rules and regulations thereunder. But the Commission cannot make those required findings when the record before it is insufficient. Indeed, on numerous occasions, the Commission has referred matters to an administrative law judge for the taking of additional evidence where relevant factual questions remained unanswered and the record needed further development. That is precisely the case here.

Throughout these proceedings, Petitioners have raised fundamental questions about the Plan, which OCC refuses to address. In view of OCC's unique monopoly status, whereby its substantial capital claim has a direct, material, and unavoidable impact on option fees ultimately borne by the investing public, it is appropriate that OCC justify its claim. For example, the basis for OCC's purported need for \$247 million of capital under the Plan is an unknown consultant's supposed analysis utilizing an unspecified methodology based on undisclosed assumptions. At the very least, OCC should be required to produce to Petitioners and the Commission the consultant's report, along with documents and communications surrounding that report.

Similarly, concrete evidence proffered by Petitioners shows that one of the Exchange Owners<sup>4</sup> proposed a less expensive alternative capital plan with far better terms for OCC.<sup>5</sup> One or more of the other Exchange Owners, however, vetoed (or threatened to veto) that proposal in

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<sup>4</sup> The "Exchange Owners," also referred to herein as 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.

<sup>5</sup> See Affidavit of Joel Greenberg, dated October 7, 2015 at ¶¶ 8-14.

favor of the Plan,<sup>6</sup> which provided them with significant financial benefits.<sup>7</sup> OCC has not provided any information concerning any specific alternative plans that OCC's Exchange Owners or Board considered. Again, given OCC's role as a monopoly and public utility with resulting obligations to the marketplace, the Commission cannot adequately review the Plan without considering what alternatives were considered and why they were rejected. OCC should be required to produce documents and information showing the specific alternative capital plans that were proposed and explaining why those plans were rejected. This information is critical to provide a sufficient administrative record for the Commission to determine whether the Plan is consistent with the Exchange Act.

The Commission also needs *current* financial information from OCC to determine whether implementing the expensive Plan is necessary or appropriate. OCC recently stated that its "adjusted shareholder's equity" as of August 31, 2015 was ~\$150 million. But OCC failed to provide *any* documents or other support for this figure, including whether OCC included accrued but unpaid clearing fee rebates for 2014 and 2015, which would likely total at least an additional \$66 million by year-end. This is significant because, using OCC's own figures, it appears that OCC will essentially reach its Target Capital Requirement within the next six months *without implementing the Plan*. Consequently, implementing the Plan that replaces OCC's current cost-free capital with capital costing in the range of 20% per year the next several years defeats the Plan's stated purpose of strengthening OCC financially. OCC should be required to produce in

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<sup>6</sup> See Letter from James E. Brown, General Counsel, OCC (February 23, 2015), at 6 n.10 ("The [OCC] 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 . . .").

<sup>7</sup> As discussed in SIG's Statement of Opposition to the Order Approving OCC's Capital Plan, the Plan would produce a stream of exorbitant dividends and increase the value of the OCC stock held by the Exchange Owners.

advance of an evidentiary hearing current financial information, including its accrued rebates, current capital levels, projected year-end accrued rebates and capital levels, and disclosing how OCC calculated those amounts. Absent factual development as to OCC's actual current accrued rebates and capital level, the Commission will not have a sufficient administrative record to consider the adequacy of OCC's capital base and whether adopting the Plan is consistent with the Exchange Act.

### **BACKGROUND**

On March 6, 2015, the Staff, pursuant to delegated authority, issued the Approval Order approving OCC's proposed rule change implementing the Plan. The Plan allows OCC to increase its capital to a Target Capital Requirement of \$247 million through Exchange Owner capital contributions totaling \$150 million that will receive annual returns in the range of 20% for the next ten years (and over 30% in years to come). On March 12-13, 2015, the Petitioners filed timely notices of intention to petition for review of the Approval Order under Rule 430(b)(1) of the Rules of Practice,<sup>8</sup> triggering the automatic stay. Between March 16 and 20, 2015, the Petitioners filed their petitions for review of the Approval Order.

The Petitioners argued that the Approval Order is premised on errors of law, and embodies an exercise of discretion and a decision of policy that is important for the Commission to review. The Petitioners also objected that there are "a number of open issues and unanswered questions that should have been addressed before the Staff could have" approved the Plan.<sup>9</sup> The Petitioners urged the Commission to "review the [Approval] Order to ensure that these open issues and unanswered questions are thoroughly addressed," including:

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<sup>8</sup> 17 CFR § 201.430(b)(1).

<sup>9</sup> SIG Petition at 27.

- 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 Commission'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?<sup>10</sup>

Without answers to these questions, it is not reasonable (or even possible) to conclude whether the Plan imposes an undue burden on competition and whether any fees promulgated pursuant to the Plan are reasonable.

On September 10, 2015, the Commission granted the petitions for review, finding that "the Petitioners are aggrieved by the Approval Order . . . ." <sup>11</sup> The Commission also allowed the parties or any other person to submit additional written statements supporting or opposing the Approval Order by October 7, 2015. <sup>12</sup> The Petitioners are submitting additional statements opposing the Approval Order contemporaneously with this motion.

Since the Petitioners submitted their petitions for review more than six months ago, OCC has filed more than 50 pages of additional briefing. First, OCC moved to lift the automatic stay,

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<sup>10</sup> *Id.*

<sup>11</sup> Securities Exchange Act Release No. 75885 (September 10, 2015), 80 FR 55700, 55701 (September 16, 2015).

<sup>12</sup> *Id.*

which the Commission granted (on the same date that it granted the petitions for review),<sup>13</sup> allowing OCC to immediately move forward with implementing the Plan during the Commission's review. Next, OCC opposed the Petitioners' motion to reinstitute the automatic stay (which motion remains pending). Yet, nowhere in all of OCC's extensive briefing does it address any of the factual questions raised by Petitioners, including those noted above. To the contrary, OCC's briefing raises additional important questions that *support* the Petitioners' argument that the Plan is not necessary for OCC to achieve its inflated Target Capital Requirement. Specifically, OCC asserted for the first time – without any support or explanation – that it had ~\$150 million in “adjusted shareholders' equity” as of August 31, 2015 (a 600% increase from just twenty months earlier).<sup>14</sup> As explained below, *based on OCC's own figures*, it appears that OCC will essentially achieve its Target Capital Requirement (through accrued rebates and retained earnings) within the next six months *without implementing the egregiously burdensome Plan*.

### ARGUMENT

**I. The Commission Must Make Affirmative Findings That the Plan is Consistent with the Exchange Act, and It Should Refer the Proceeding to a Hearing Officer for the Taking of Additional Evidence to Make Those Findings**

The Exchange Act requires the Commission to make affirmative findings before it can approve an SRO's proposed rule change. Specifically, the Commission may only approve a proposed rule change “if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are

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<sup>13</sup> See Securities Exchange Act Release No. 75886 (September 10, 2015), 80 FR 55668 (September 16, 2015).

<sup>14</sup> OCC Opp. to Mot. to Reinstitute Automatic Stay at 5.

applicable to such organization.”<sup>15</sup> If the Commission does not make those affirmative findings, the Exchange Act requires the Commission to “disapprove” the proposed rule change.<sup>16</sup>

It is axiomatic that the Commission cannot make the affirmative findings that the Exchange Act requires if the record before it is insufficient. To that end, Rule 452 of the Commission’s Rules of Practice expressly provides a mechanism for the parties to supplement the record by submission of additional evidence.<sup>17</sup> It also permits the Commission to “refer the proceeding to a hearing officer for the taking of additional evidence.”<sup>18</sup> Indeed, just last year in the *NetCoalition* matter, the Commission relied on Rule 452 in referring a proceeding “to an administrative law judge for additional record development and proceedings consistent with this order.”<sup>19</sup> The Commission has also referred numerous other matters to an administrative law judge where – as here – the record before it was “insufficient to permit necessary determinations” or “require[d] development in certain areas.”<sup>20</sup>

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<sup>15</sup> 15 U.S.C. § 78s(b)(2)(C)(i). Specifically, 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 Exchange Act; Section 17A(b)(3)(D) requires the rules of a registered clearing agency to provide for the equitable allocation of reasonable dues, fees, and other charges among its participant; and Section 17A(b)(3)(F) requires the rules of a registered clearing agency to be designed to, among other things, “protect investors and the public interest.”

<sup>16</sup> 15 U.S.C. § 78s(b)(2)(C)(ii).

<sup>17</sup> 17 CFR § 201.452.

<sup>18</sup> *Id.*

<sup>19</sup> Securities Exchange Act Release No. 72182, 2014 WL 1998525 (May 16, 2014), at \*11.

<sup>20</sup> Order Accepting Jurisdiction and Establishing Procedures, Nasdaq Stock Market, LLC, Securities Exchange Act Release No. 55909, 2007 WL 1725775, at \*1 (June 14, 2007) (“Because we find the record at this stage to be insufficient to permit the necessary determinations, we have decided that the best procedure under the circumstances is to designate an administrative law judge to preside over this matter and to conduct further proceedings consistent with this Order”); Cincinnati Stock Exchange, Securities Exchange Act Release No. 43316, 2000 WL 1363274, at \*3, 4 (September 21, 2000) (referring proceeding to an administrative law judge because the Commission “determined that the record requires development in certain areas,” and listing 12 questions (including subparts) for the parties to address).

The Commission's referral Order in *NetCoalition* is instructive. There, the Commission had approved a proposed rule change that allowed NYSE Arca to charge fees for non-core market data that it had previously provided for free.<sup>21</sup> The Court of Appeals for the D.C. Circuit vacated the Commission's approval order because of, among other things, "a lack of support in the record for [the Commission's] conclusion that order flow competition constrains market data prices."<sup>22</sup> The Court further held that "the record contained insufficient evidence to conclude that a trader interested in [non-core data] would substitute any of the alternatives [the Commission] identified ... or forgo it, instead of paying a supracompetitive price."<sup>23</sup> The Court stated that "without additional evidence of trader behavior . . . , [the Commission] had not adequately supported [its] determination that alternatives constrain NYSE Arca's [non-core data] fees."<sup>24</sup> In accordance with the Circuit Court's order, and after identifying a number of open issues to be addressed,<sup>25</sup> the Commission referred a later proceeding to an administrative law judge, concluding that "[w]e believe it prudent for the law judge to consider a fully developed record given the focus of the D.C. Circuit on the state of the record in *NetCoalition*."<sup>26</sup> The Commission should refer this matter to a hearing officer for the same reasons.

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<sup>21</sup> 2014 WL 1998525, at \*1.

<sup>22</sup> *Id.* at \*3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> The issues included "the number of potential users of the data," "how they might react to a change in price," and "how many traders accessed NYSE [non-core data] during the period it was offered without charge." *Id.*

<sup>26</sup> *Id.* at \*12.



## **II. OCC Fails to Address Fundamental Questions, Precluding the Commission Review Required by the Exchange Act and Warranting the Taking of Additional Evidence**

Throughout these proceedings, the Petitioners have raised fundamental questions concerning the process by which OCC proposed and approved the Plan, and whether the Plan is even necessary considering OCC's current capital level and its inflated Target Capital Requirement. These questions remain unanswered, precluding the Commission from effectively conducting its review and making the affirmative findings that the Exchange Act requires.

### **A. Does the Plan Impose an Unnecessary Burden on Competition?**

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 Exchange Act. Because the Approval Order concedes that the Plan may impose a burden on competition,<sup>27</sup> the only remaining question is whether the burden is necessary or appropriate in furtherance of the purposes of the Exchange Act. In concluding that the burden on competition was necessary or appropriate, the Staff erred because it failed to address open questions concerning: (1) whether OCC considered viable, less expensive alternatives to the Plan, and (2) whether OCC's Board approval process was designed to serve the Exchange Owners at the expense of the public interest.

#### **1. Did OCC Consider Less Expensive Alternatives to the Plan?**

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

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<sup>27</sup> See Approval Order, 80 FR at 13068.

so.<sup>28</sup> But the Approval Order does not consider (or even mention) the multiple and less-expensive alternative capital-raising plans that the commenters described.<sup>29</sup> Moreover, to date, OCC has failed to identify *any* specific alternative capital plan that was proposed, considered, or rejected, or explain why it rejected *any* specific alternative capital plan, including the terms of any rejected plan. This is especially troubling considering that the CEO of one of the five Exchange Owners has stated that his Exchange proposed an alternative capital plan that was significantly less expensive to OCC than the Plan.<sup>30</sup> Specifically, Exchange Owner Chicago Board Options Exchange, Inc. (“CBOE”) offered to provide OCC with a \$150 million capital infusion at an 8% to 9% annual rate of return for a 2-2.5 year payback period, as opposed to the Plan’s annual returns in the range of 20% for the next ten years (and over 30% in years to come) to be paid to each of the Exchange Owners in perpetuity.<sup>31</sup> Notwithstanding these far superior terms, one or more of the other Exchange Owners vetoed, or threatened to veto, CBOE’s proposal because they wanted OCC to adopt the more expensive proposed Plan that paid all of

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<sup>28</sup> 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.”) (quoting *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989); 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 “absolutely clear from decisions by the Supreme Court and this court that such an ‘artificial narrowing of options,’ is antithetical to reasoned decision-making and cannot be upheld”) (internal citations omitted).

<sup>29</sup> 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).

<sup>30</sup> See Joel Greenberg Aff. ¶¶ 8-11.

<sup>31</sup> See *id.* ¶¶ 9-10.

the Exchange Owners a high dividend.<sup>32</sup> Indeed, even OCC concedes that the Exchange Owners had the “right not to have their investment in OCC diluted through the issuance of additional equity capital,”<sup>33</sup> and the Exchange Owners effectively exercised that right by blocking CBOE’s significantly less expensive proposal.

In light of this glaring conflict of interest and the availability of viable alternative capital plans more beneficial to OCC than the Plan,<sup>34</sup> the Commission should grant this motion and refer this matter to a hearing officer to obtain evidence regarding the answers to the following questions:

- Did OCC or its advisers undertake a “market check” to test the willingness of any other potential suppliers of funding to offer more advantageous terms to OCC than the Plan?
- Did anyone offer an alternative to the Plan that would have satisfied OCC’s capital needs on terms more beneficial to OCC than the Plan? Did OCC consider those alternatives? If not, why? If so, what was the basis for rejecting the alternative plan(s)?
- Did any Exchange Owner(s) or their Board representative(s) veto, or threaten to veto, any alternative capital raising plans that would have been less expensive to OCC than the Plan? If so, what were terms of the alternative plans, and why was the plan(s) vetoed or threatened to be vetoed?

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<sup>32</sup> See *id.* ¶¶ 13-14.

<sup>33</sup> See Letter from James E. Brown, General Counsel, OCC (February 23, 2015), at 6 n.10 (“Under OCC’s Certificate of Incorporation, its By-Laws and the Stockholders Agreement to which OCC and the Stockholder Exchanges are parties (all of which have been filed with, and approved by, the SEC), and under Delaware corporate law, the 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.”).

<sup>34</sup> See Letter from James E. Brown, General Counsel, OCC (February 23, 2015), at 7 (Letter in Response to Exchanges) (“The Board examined the possibility of involving outside investors and determined in the course of its nearly year-long investigation into potential alternative capital plans that *nearly all* of the alternatives examined, including using outside investors as a sources of capital, posed significant tax, compliance or governance and shareholder rights issues that made such alternatives uncertain or unfeasible.”) (emphasis added).

- Which Exchange Owner(s) vetoed or threatened to veto CBOE's alternative proposal described above? On what basis did they veto or threaten to veto CBOE's alternative proposal? Did any Exchange Owner or Board member view CBOE's proposal as more beneficial or less expensive to OCC than the Plan?
- Did any Exchange Owner or its Board representative veto, or threaten to veto, any alternative capital raising plan (including CBOE's plan referenced above) for self-interested reasons, including the desire to receive dividends under the Plan, even though the alternative plans may have been more beneficial or less expensive to OCC?
- Did any Exchange Owner or its Board representative veto, or threaten to veto, any alternative capital raising plan (including CBOE's plan referenced above) in conjunction with the Commission's requirement that additional capital be raised promptly, or otherwise as a result of pressure from the SEC staff for OCC to approve a plan that involved raising capital?
- Will the Plan result in increased transaction costs, including wider bid-ask spreads and less secondary market liquidity, as compared to alternative capital raising plans (including CBOE's plan referenced above) to the detriment of the investing public and other market participants?<sup>35</sup> If so, by how much will the costs to the investing public and other market participants increase?

To allow the parties to effectively participate in an evidentiary hearing addressing these issues, the Commission should expressly order that the following discovery be produced in advance of the hearing:<sup>36</sup>

- OCC should produce all documents and communications<sup>37</sup> concerning its efforts to solicit capital proposals or otherwise raise capital to meet the Target Capital Requirements;

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<sup>35</sup> See *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993) (holding that the required cost-benefit analysis required the SEC to determine how much bid-ask spreads widened as a result of professional trading at issue, and remanding to SEC to supplement the record to address open questions).

<sup>36</sup> Rule 232 of the Rules of Practice provides that a party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place. Rules 233 and 234 provide for the taking of depositions under certain circumstances. 17 CFR §§ 201.232-34.

<sup>37</sup> "Document" and "communication" have the meanings ascribed to them in Rule 26.3 of the Local Rules of the United States District Court for the Southern District of New York.

- OCC should produce all documents and communications concerning any alternative capital raising plans, including agendas, presentations, board packages, and minutes in relation to OCC Board meetings or other activities at which any alternative plan was discussed or considered;
- OCC should produce all documents and communications concerning the Plan, including any statement by the SEC Staff or any other SEC representative regarding the advisability of or requirement that OCC raise capital, including any statement concerning the anticipated, required, or preferred timing of raising capital;
- CBOE should produce all documents and communications concerning its alternative capital raising plan referenced above;
- Deposition testimony should be provided by each Exchange Owner and its Board representative concerning any alternative capital raising plan; and
- Deposition testimony should be provided by a CBOE representative with the most knowledge concerning CBOE's alternative capital raising plan referenced above.

**2. Was OCC's Board Approval Process Designed to Serve the Exchange Owners Instead of the Public Interest?**

The process by which the Plan was approved also raises fundamental questions that must be answered before the Commission can provide meaningful review of the Approval Order, and requires adducing further evidence. As set forth above and in the accompanying affidavit, the conflicted Exchange Owners had the ability to veto any alternative capital raising plan, even if the alternative plan was less expensive and more beneficial to OCC (and therefore better served the public interest) than the Plan. Additionally, OCC's governing documents authorize each of the five Exchange Owners to appoint one of OCC's Board members, and not one of these designees recused himself from the deliberations or the vote on the Plan; instead, each such individual voted in favor of the Plan's adoption.

There are a number of unanswered questions concerning the Public (and non-interested) Directors' role – or lack thereof – in the approval process. Contrary to the Commission's guidance 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,”<sup>38</sup> there is no indication that the Public Directors had that opportunity here. This is significant because the disinterested Public Directors would be most likely to argue for an outcome that is in the best interest of OCC and the options trading industry.

The Petitioners raised these concerns in comment letters and their petitions, although the Staff did not address them or make the affirmative findings with respect to these issues that the Exchange Act requires. Instead, 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. But the Exchange Act requires diligence, not deference, particularly in view of OCC’s institutionalized monopoly status; and the Commission should therefore scrutinize the Board’s approval process and make its own determinations as to whether the process complied with the relevant corporate governance documents, rules, and regulations, as well as the public interest and the protection of investors.

Accordingly, because of the inadequate and conflict-ridden process by which the Plan was approved, the Commission should grant this motion and refer this matter to a hearing officer to address the following unanswered questions during an evidentiary hearing:

- Did the Staff adequately address the Plan’s inherent conflict of interest between the Exchange Owners’ profiting from the Plan’s higher expenses and fees, and the marketplace’s interest in lower expenses and fees?
- Did the process by which the Plan was approved violate any applicable state laws, OCC’s By-laws, OCC’s corporate governance documents, or any other applicable rules or regulations?

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<sup>38</sup> See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126, 71140 (December 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.”).

- Was any analysis or guidance sought or provided concerning the appropriateness or legality of the Board members designated by the Exchange Owners not recusing themselves from considering the Plan or voting on it?
- Did OCC's independent directors have the opportunity to discuss any important matters regarding the Plan or alternative plans in a frank and open manner, free from the presence of management?
- Did OCC's failure to maintain the requisite number of Public Directors affect the approval process, or otherwise violate OCC's By-laws, corporate governance documents, or any applicable laws or regulations?

To allow the parties to effectively participate in an evidentiary hearing addressing these issues, the Commission should expressly order that the following discovery be provided in advance of the hearing:

- OCC should produce all documents and communications concerning the process by which the Plan was approved, including any relevant corporate governance documents and analysis or guidance that was provided to OCC concerning the appropriateness or legality of the process;
- OCC should produce the agendas, presentations, board packages, and minutes in relation to any OCC Board meetings or other activities at which the Plan was discussed or considered, including the meeting where the Board ultimately voted on and approved the Plan;
- OCC should produce documents showing the composition of OCC's Board on the date the Plan was approved, how each Board member voted, and whether the Board members voting in favor of the Plan had or has any prior or present affiliation, relationship, or arrangement with the Exchange Owners or the Board members appointed by the Exchange Owners; and
- Deposition testimony should be provided by one or more of OCC's Board members concerning the approval process.

**B. Will OCC Effectively Achieve its Target Capital Requirement Within Six Months Without Implementing the Plan?**

A fundamental threshold question that OCC has yet to answer – which may render the need for the Plan moot – is whether OCC's current capital level and trajectory will allow it to

substantially achieve its \$247 million Target Capital Requirement within six months without implementing the Plan.<sup>39</sup>

For starters, there remain a host of unanswered questions concerning OCC's need for a \$247 million Target Capital Requirement (which includes a \$130 million Target Capital Buffer). Neither the proposed amendments to Rule 17Ad-22<sup>40</sup> nor Principle 15<sup>41</sup> requires any "Target Capital Buffer," no less a \$130 million buffer. Indeed, the need for such a significant buffer is even more questionable considering that 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. OCC has done little to address these concerns, other than referring to an undisclosed report from an unnamed consultant who allegedly conducted a "bottom-up" analysis of certain risks.<sup>42</sup> OCC has not disclosed the information on which the unnamed consultant allegedly relied, whether the consultant was given any direction, or whether the consultant ultimately opined on the need for the Plan. Nor did OCC – or the unnamed consultant, for that matter – articulate any plausible scenario under which \$247 million in capital reserves (plus \$117 million in Replenishment Capital) would be needed.

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<sup>39</sup> This accepts, for purposes of argument, OCC's proposed \$247 million Target Capital Requirement, a level that Petitioners have previously demonstrated is inflated and designed to produce an above-market investment return to the Exchange Owners, not to establish OCC's capital adequacy.

<sup>40</sup> 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 (March 12, 2014), 79 FR 29508 (May 22, 2014).

<sup>41</sup> OCC relies in important part on Principle 15 to justify the capital level it seeks to reach and maintain. Principle 15 is a standard of the International Organization of Securities Commissions (IOSCO), not the product of the Commission or any other US government agency. It therefore does not provide a proper basis for capital levels with which OCC seeks to "comply."

<sup>42</sup> *See* Securities Exchange Act Release No. 74387 (February 26, 2015), 80 FR 12215 (March 6, 2015) (SR-OCC-2014-813).



OCC's need for an additional \$117 in Replenishment Capital, essentially in the form of a line of credit, raises even more questions. 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; they 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. Indeed, as opposed to the Target Capital Requirement that was allegedly based on an unknown consultant's "bottom-up" analysis, OCC tacitly concedes that the consultant played no role in developing the Replenishment Capital amount. In fact, OCC's only basis for \$117 million in Replenishment Capital is the following: "OCC determined that a viable plan for Replenishment Capital should provide for a replenishment capital amount which would give OCC access to additional capital as needed up to a maximum of the Baseline Capital Requirement."<sup>43</sup>

Putting aside the unanswered questions concerning OCC's supposed need to maintain a \$247 million capital account, it appears that OCC will effectively reach that amount within the next six months *without implementing the Plan*, which raises the inherent question of whether the Plan is even necessary. Specifically, OCC recently stated for the first time that its "adjusted shareholders' equity would be \$149,613,874" as of August 31, 2015.<sup>44</sup> OCC offered no support for its calculation. Moreover, it seems that this number excluded the \$33.3 million of accrued but unpaid clearing fee rebates for 2014 set forth in the "Refundable clearing fees" line of its Balance Sheet,<sup>45</sup> as well as the 2015 year-to-date accrued but unpaid clearing fee rebates. This

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<sup>43</sup> *Id.* at 12216.

<sup>44</sup> Opp. to Mot. to Reinstitute Stay at 11.

<sup>45</sup> As previously stated in SIG's Reply Brief in Further Support of the Motion to Reinstitute Automatic Stay, OCC's Statements of Income and Comprehensive Income in its 2014 Annual Report supports this

issue is significant because, as SIG explained in its statement in opposition to the Approval Order, it appears that OCC will essentially achieve its Target Capital Requirement within six months *based on OCC's own figures*. Specifically, if the "Refundable clearing fees" line item of OCC's balance sheet references accrued but unpaid rebates for 2014 and 2015 that are not being included in OCC's calculation of its available capital (as they could be), then by its own numbers, OCC will have more than \$230 million by year-end, effectively reaching its inflated Target Capital Requirement and obviating the purported need for the Plan entirely. Therefore, adopting the Plan is tantamount to OCC unnecessarily replacing cost free capital with capital costing in the range of 20% for the next ten years (and over 30% in years to come), an irrational business decision.

Accordingly, the Commission should grant this motion and refer this matter to a hearing officer to address the following unanswered questions during an evidentiary hearing:

- Who is the consultant that conducted the referenced "bottom-up" analysis? On what information did that consultant rely in conducting its analysis? What direction was given to the consultant and by whom?
- Has OCC articulated any plausible scenario under which \$247 million in capital reserves (plus \$117 million in Replenishment Capital) would be needed?
- What is the basis for OCC's need for \$117 million in Replenishment Capital? Did OCC rely on any consultant or other expert in calculating this number?
- What are the terms of the line of credit for the Replenishment Capital?
- How did OCC calculate the \$149,613,874 in "adjusted shareholders' equity" as of August 31, 2015? Did OCC include the \$33.3 million accrued but unpaid clearing fee rebate for 2014? If not, why?

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conclusion, as OCC determined its shareholders' equity after deducting "refundable clearing fees" from its clearing fee revenue, with a mere footnote reference to the source of the associated declared current liability on the balance sheet. See OCC 2014 Annual Report, at 24-25, 33, available at [http://www.optionsclearing.com/components/docs/about/annual-reports/occ\\_2014\\_annual\\_report.pdf](http://www.optionsclearing.com/components/docs/about/annual-reports/occ_2014_annual_report.pdf) (listing \$97 million in shareholders' equity and \$33 million in "refundable clearing fees" as a liability).

- Is OCC accruing a clearing fee rebate for 2015? If so, what is the current amount of such accrual, and was it included in the \$149,613,874 “adjusted shareholders’ equity” amount? If not, where is it accounted for?
- How much capital does OCC currently have (including shareholders’ equity, accrued rebates, and accrued dividends)?
- How much capital does OCC project or anticipate having at year-end 2015 (including shareholders’ equity, accrued rebates, and accrued dividends)?

To allow the parties to effectively participate in an evidentiary hearing addressing these issues, the Commission should expressly order that the following discovery be produced in advance of the hearing:

- OCC should produce all agendas, presentations, board packages, and minutes in relation to any OCC Board meetings or other activities at which OCC’s capital requirements were discussed or considered;
- OCC should produce current financial statements and financial information showing OCC’s year-to-date income and expenses and current available capital (including shareholders’ equity, accrued rebates, and accrued dividends);
- OCC should produce any analysis, models, or projections showing its anticipated net income and capital level (including shareholders’ equity, accrued rebates, and accrued dividends) for year-end 2015, and any projections concerning future expenses and budgets;
- OCC should produce all documents and communications concerning any consultant who assisted OCC in calculating its capital requirements, including any report or conclusions that any such consultant prepared; and
- Deposition testimony should be provided by one or more of OCC’s Board members and/or OCC senior managers concerning OCC’s capital requirements, current capital levels (including shareholders’ equity, accrued rebates, and accrued dividends), and projected net income and capital levels for year-end 2015.

Further discovery on this issue is critical to determining whether the Plan is necessary or appropriate. These questions must also be answered because there is a strong indication that the Plan was not designed to address OCC’s capital adequacy, but rather to produce a windfall return

to the Exchange Owners. Indeed, adopting the Plan, which will result in OCC distributing tens of millions of dollars and replacing what is to OCC cost-free capital with capital costing in the range of 20% for the next ten years (and over 30% in years to come) plus associated tax liability, is the *antithesis of strengthening OCC financially*. Commission scrutiny is called for not just because Petitioners have demonstrated that the proposed capital levels are inflated, but because the Exchange Owners have a manifest and conflicted interest in inflating them. That scrutiny should occur based on a fully developed factual record adequate to support the Commission's conclusions.

#### CONCLUSION

For all the foregoing reasons, Petitioners request that the Commission grant this motion and (1) refer this matter to a hearing officer for the taking of additional evidence, and (2) direct discovery in advance of the hearing.

Respectfully submitted,

/s/ Joseph C. Lombard

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*Counsel for Susquehanna International  
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Dated: October 7, 2015

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& Corporate Secretary

Miami International Securities Exchange,

LLC

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**Before the  
SECURITIES AND EXCHANGE COMMISSION**

	)	
In the Matter of the Petitions of:	)	File No. SR-OCC-2015-02
	)	
BATS Global Markets, Inc.	)	
BOX Options Exchange LLC	)	
KCG Holdings, Inc.	)	
Miami International Securities Exchange,	)	
LLC and	)	
Susquehanna International Group, LLP	)	
	)	

**AFFIDAVIT OF JOEL GREENBERG**

I, Joel Greenberg, state that:

1. I am a co-founder, Managing Director, and the Chief Legal Officer of Susquehanna International Group, LLP (“SIG”), one of the Petitioners in the referenced matter. I aver to the matters set forth herein based upon personal knowledge and to the best of my recollection.

2. The purpose of this affidavit is to place before the Commission certain information that is relevant to the Petitioners’ Motion for an Order (i) Referring this Matter to a Hearing Officer for the Taking of Additional Evidence, and (ii) Directing Discovery in Advance of the Hearing.

3. In or about late February or early March 2015, I had a telephone conversation with Edward T. Tilly, the Chief Executive Officer of Chicago Board Options Exchange, Inc. (“CBOE”). CBOE is one of the five stockholder exchanges (the “Exchange Owners”) that own an interest in Options Clearing Corporation (“OCC”).

4. I called Mr. Tilly during a SIG Management Committee meeting. Three other members of SIG's Management Committee were present during the call and listened to the conversation, which was on speaker phone.

5. I called Mr. Tilly to discuss OCC's proposed capital plan (the "Plan"). As I understood it, the Plan was formulated such that the five Exchange Owners would contribute approximately \$150 million in capital to OCC, so that OCC could achieve its "Target Capital Requirement" of \$247 million, and provide a line of credit for an additional approximately \$120 million. In return, the Plan called for the five Exchange Owners to receive annual dividends on their contributions.

6. I told Mr. Tilly that I did not agree with the proposed Plan because it appeared that the Plan would allow the Exchange Owners to, in effect, monetize OCC solely for their benefit without going through the necessary process of converting OCC from a not-for-profit utility to a for-profit entity.

7. I also said that the Plan would be expensive for OCC users based on the high annual return that OCC would pay, through dividends, to the Exchange Owners, and queried whether OCC had asked other market participants for alternative proposals with a lower rate of return.

8. Mr. Tilly responded that CBOE, in consultation with another member of OCC's Board of Directors, had proposed an alternative plan that would be much less expensive for OCC.

9. CBOE's proposal involved CBOE borrowing "\$100 million to \$150 million" from a major U.S. bank and, in turn, CBOE would provide OCC with a \$150 million capital infusion, "the amount necessary" for OCC to satisfy its Target Capital Requirement.

10. CBOE proposed to receive a return (8% to 9% annually, as Mr. Tilly later disclosed in a subsequent conversation (*see* ¶ 22 below)) for 2-2.5 years that would be significantly lower than the dividend rate that OCC would pay the Exchange Owners under the Plan. After 2-2.5 years, OCC would have repaid CBOE and “self-funded” the needed additional capital through the collection of the increased clearing fees that OCC put in place on or about April 1, 2014, and which remain in effect today.

11. We also discussed that under the contemplated CBOE plan, if necessary, OCC could obtain a line of credit from the market for an additional \$120 million to satisfy any replenishment capital over and above the approximate \$250 million that OCC would have available after receiving CBOE’s capital infusion; or “alternatively self-funding that amount” through fees in a fashion similar to how it could fund the “Target Capital Requirement.”

12. Mr. Tilly agreed that because it was unlikely that OCC would need to use any replenishment capital, that such a line of credit should be inexpensive.

13. Mr. Tilly said that the five Exchange Owners had to unanimously endorse any proposed capital plan before it could be submitted to OCC’s Board for a final vote. Accordingly, any one Exchange Owner could effectively veto any proposal and prevent it from being submitted to OCC’s Board for consideration.

14. Mr. Tilly explained that it was clear to him that because any one Exchange Owner could effectively veto CBOE’s proposal, OCC’s proposed Plan that paid each of the Exchange Owners a significant dividend in perpetuity would be put forward to the Board rather than CBOE’s plan.



15. I further understood that due to perceived time pressure from the SEC staff for OCC to approve a plan that involved raising capital, that the Plan would be the only one considered by OCC's Board.

16. I asked Mr. Tilly if I called the SEC Staff and reported the substance of our conversation to them, would he repeat that substance to the SEC Staff if the Staff called him. Mr. Tilly replied that he would.

17. Within a few days after I spoke with Mr. Tilly, Jerry O'Connell, SIG's Global Compliance Coordinator, and I called and spoke with two members of the SEC's Division of Trading and Markets. During the call, I relayed the substance of my prior conversation with Mr. Tilly, described above.

18. Specifically, I informed the SEC officials that CBOE had proposed a less expensive alternative to the Plan that had not been allowed to proceed to the OCC Board for consideration because it was effectively blocked.

19. I also stated that, as an alternative to OCC's proposed Plan, SIG (and perhaps other market participants) would be willing to loan to the Exchange Owners the funds necessary for OCC to meet the Target Capital Requirement, on much more favorable terms for OCC than provided for under the Plan. In turn, the Exchange Owners could contribute those funds to OCC, as well as provide a line of credit for "replenishment."

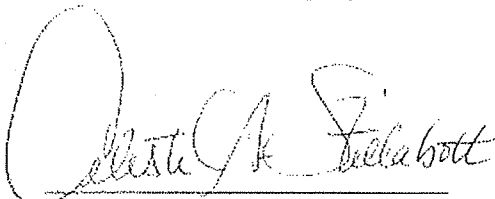
20. We also stated that the SEC had effectively granted OCC monopoly status as a not-for-profit utility, and that now, OCC, in our opinion, was apparently not considering less expensive, alternative capital proposals because of the Exchange Owners' conflicts of interest.

21. On September 28, 2015, I spoke with Mr. Tilly again as a courtesy to tell him that my conversation with him about the Plan would be referenced again<sup>1</sup> in filings made in this matter.

22. During the call, Mr. Tilly reiterated the substance of the conversation that we had on our call in or about late February or early March 2015. Mr. Tilly also stated that, under CBOE's alternative plan proposal, CBOE would have received from OCC an annual return of 8% or 9% for 2-2.5 years.

I declare under penalty of perjury that the foregoing is true and correct to the best of my recollection.

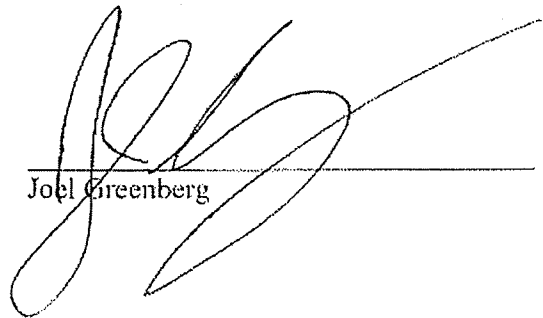
Executed on October 7, 2015



Notary Public

COMMONWEALTH OF PENNSYLVANIA

Notarial Seal  
Celeste A. Stellabott, Notary Public  
Lower Merion Twp., Montgomery County  
My Commission Expires Feb. 24, 2017  
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES



Joel Greenberg

4826-6963-7673

<sup>1</sup> See Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (March 4, 2015), at 2; SIG Petition for Review (March 20, 2015), at 3, 16-17; SIG Memorandum in Further Support of Motion to Reinstitute Automatic Stay (September 25, 2015), at 2 for previous references to the conversation.