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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 Statement in Opposition to the Order  
Approving OCC's Capital Plan

Dear Mr. Fields:

Petitioner Susquehanna International Group, LLP, and its affiliated and related entities, hereby file the enclosed Statement in Opposition to the Order Approving OCC's Capital Plan. The original and three copies are enclosed.

The enclosed Statement in Opposition has 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 Statement in Opposition to the Order Approving OCC's Capital Plan 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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Dated: October 7, 2015



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Joseph C. Lombard

Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Petitions of: )  
BATS Global Markets, Inc. )  
BOX Options Exchange LLC )  
KCG Holdings, Inc. )  
Miami International Securities Exchange )  
Group, LLP and )  
Susquehanna International Group, LLP )

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File No. SR-OCC-2015-02

**SUSQUEHANNA INTERNATIONAL GROUP, LLP'S STATEMENT  
IN OPPOSITION TO THE ORDER APPROVING OCC'S CAPITAL PLAN**

## Table of Contents

PRELIMINARY STATEMENT .....	1
ARGUMENT.....	5
I.    THE PROPOSED PLAN HAS BEEN RENDERED MOOT BY RECENT DEVELOPMENTS, SETS UNJUSTIFIED CAPITAL TARGETS, AND REQUIRES UNCONSCIONABLE DIVIDEND PAYMENTS TO THE STOCKHOLDER EXCHANGES .....	5
A.    The Proposed Plan Is Moot Because the Target Capital Requirement Will Nearly Be Achieved By Year-End or Shortly Thereafter .....	5
B.    The Plan’s Proposed Capital Levels Are Unsupported.....	9
C.    It Is Irrational For OCC To Pay The Stockholder Exchanges Exorbitant Dividends for Capital Contributions That Are Unnecessary .....	13
II.   THE PROPOSED PLAN IS A PRETENSE FOR THE STOCKHOLDER EXCHANGES TO MONETIZE OCC’S CLEARING MONOPOLY AND SRO STATUS .....	14
A.    From 1973 to 2013, OCC Operated as a Low-Cost Utility .....	14
B.    The Plan Would Radically Change OCC, Abandoning Member Control in Favor of a For-Profit Enterprise Operating For The Stockholder Exchanges’ Benefit.....	15
III.  THE PLAN WAS PRODUCED BY A CONFLICT-RIDDEN PROCESS THAT DECOUPLES THE INTERESTS OF OCC FROM ITS MEMBERS AND THE PUBLIC .....	16
A.    OCC’S Background as a Member-Controlled Public Utility .....	17
B.    The Stockholder Exchanges Abused Their Veto Rights.....	20
C.    The Stockholder Exchanges Have Effectively Usurped Control of OCC From Clearing Members And Embarked on a Course to Demutualize OCC .....	23
IV.  IMPLEMENTING THE PLAN WILL RESULT IN HIGHER OPTION TRANSACTION COSTS TO THE INDUSTRY AND THE PUBLIC.....	24
V.    THE APPROVAL ORDER SHOULD BE REVERSED .....	25
CONCLUSION.....	27

## Table of Authorities

### Cases

<i>Business Roundtable v. SEC</i> , 647 F.3d 1144 (D.C. Cir. 2011).....	24
<i>International Ladies' Garment Workers' Union v. Donovan</i> , 722 F.2d 795 (D.C. Cir. 1983) ....	25
<i>Kristin Brooks Hope Center v. FCC</i> , 626 F.3d 586 (D.C. Cir. 2010) .....	10, 24
<i>Motor Vehicle Mfrs. Ass'n of US v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	25
<i>NetCoalition v. S.E.C.</i> , 615 F.3d 525 (D.C. Cir. 2010). .....	24
<i>Timpinaro v. SEC</i> , 2 F.3d 453, 459 (D.C. Cir. 1993) .....	24

### Other Authorities

Letter from James E. Brown, General Counsel, OCC (February 23, 2015).....	3, 20
Letter from James E. Brown, General Counsel, OCC (May 15, 2014) (letter regarding SR-OCC-2014-05).....	4, 9
OCC 2014 Annual Report, <i>available at</i> <a href="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</a> .....	11, 14
Standard & Poor's Rating Services, Ratings Direct, Options Clearing Corp., May 20, 2015, <i>available at</i> <a href="http://www.optionsclearing.com/components/docs/about/sp_rating.pdf">http://www.optionsclearing.com/components/docs/about/sp_rating.pdf</a> .....	11

### Rules

17 CFR § 201.431.....	1
-----------------------	---

### SEC Release

Securities Exchange Act Release No. 30328 (January 31, 1992), 57 FR 4784 (February 7, 1992) .....	19
Securities Exchange Act Release No. 36684 (January 5, 1995), 61 FR 1195 (January 17, 1996) .....	17, 18
Securities Exchange Act Release No. 46469 (September 6, 2002), 67 FR 58093 (September 13, 2002) .....	20, 21
Securities Exchange Act Release No. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010).....	22
Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) .....	17
Securities Exchange Act Release No. 70076 (July 30, 2013), 78 FR 47449 (August 5, 2013). ..	19
Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR-OCC-2015-02).....	1, 6, 9, 10
Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02).....	1, 5
Securities Exchange Act Release No. 75885 (September 10, 2015), 80 FR 55700 (September 16, 2015). .....	1

Pursuant to Rule 431<sup>1</sup> of the Rules of Practice of the Securities and Exchange Commission (“SEC” or the “Commission”) and the Commission’s September 10, 2015 Order Granting Petitions for Review and Scheduling Filing of Statements,<sup>2</sup> Susquehanna International Group, LLP, and its affiliated and related entities (collectively, “SIG”), submit this statement in opposition to the action of the Division of Trading and Markets on March 6, 2015 (the “Approval Order”),<sup>3</sup> approving, pursuant to delegated authority, a capital plan (the “Plan”) proposed by the Options Clearing Corporation (“OCC”).

The Commission exercised its discretion to grant the multiple petitions for review of the Approval Order after industry participants, including several major options exchanges and large market making firms, unanimously opposed the Plan as detrimental to the options markets and public investors, and in contravention of the Securities Exchange Act of 1934 (the “Exchange Act”). For the reasons described below, the Commission should reverse the Approval Order.

### **Preliminary Statement**

The Plan is unnecessary and should be rejected by the Commission because, among other deficiencies, it is inconsistent with the protection of investors and therefore the Exchange Act.<sup>4</sup> The Plan’s stated purpose is to strengthen OCC financially. However, since OCC first proposed the Plan in January 2015,<sup>5</sup> trading fee increases initially implemented in April 2014 have

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<sup>1</sup> 17 CFR § 201.431.

<sup>2</sup> Securities Exchange Act Release No. 75885 (September 10, 2015), 80 FR 55700 (September 16, 2015).

<sup>3</sup> Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02)

<sup>4</sup> As described below, the Commission must engage in a review that is not “arbitrary and capricious” and that includes “reasoned decision-making,” which reaches a result that is “logical and rational” and considers alternatives. *See infra* pp. 24-25, nn. 51-55.

<sup>5</sup> Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR-OCC-2015-02).

continued unabated. As a result, OCC will nearly achieve its own inflated "Target Capital Requirement" by year-end 2015 or shortly thereafter without accepting a single dollar from its five exchange stockholders (the "Stockholder Exchanges"). Further, either through an inexpensive line of credit or its demonstrated ability to raise fees when additional capital is needed, OCC already has access to sufficient "Replenishment Capital," if needed. Consequently, adopting the Plan that replaces OCC's current in-hand capital with outside capital costing over 20% on average annually over the next ten years (and over 30% in years to come) unnecessarily increases OCC's costs and does nothing to strengthen OCC financially.<sup>6</sup> The Plan therefore fails to serve its stated purpose.

It is critical that the Commission understand the Plan is intended to address only OCC's purported risk of increased expenses from its operations. This "operational" risk should not be confused with risks arising from potential losses due to the default of an OCC clearing member or member group. OCC is already protected against such default risks by a separate \$8.3 billion fund. While the default risks would likely be elevated during a period of market volatility, such volatility would not likely impact the operational risks that the Plan is designed to address.

OCC's continued and vigorous efforts to pursue the Plan – even though it is unnecessary and weakens rather than strengthens OCC – demonstrate that its *real* objective is generating extraordinary returns for the Stockholder Exchanges. Toward this end, OCC seeks to monetize its dual status as (i) the monopoly provider of essential clearing services for exchange-listed options in the United States, and (ii) a self-regulatory organization ("SRO") vested with delegated governmental authority. Perhaps most perniciously, the Plan would have the effect of aligning the Stockholder Exchanges' investment return with OCC's *expenses*. That is, as OCC's

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<sup>6</sup> Rates of return were calculated based on an assumed 5% annual increase to the operating budget, which is less than OCC's historical 6.5% annual rate of increase.

expenses *increase*, the Stockholder Exchanges' investment returns incongruously *grow*, to the detriment of the industry and the investing public.

The Plan should be rejected not only because it is wholly unnecessary at this point and would increase transaction costs paid by the public, but also because it will distort competition among industry participants. The Plan's implementation would radically change the manner in which OCC has operated for decades, transforming it from a utility operating for the benefit of its members and the public to a for-profit enterprise operating for the financial benefit of the Stockholder Exchanges. Specifically, it would negate the member control of a clearing agency, which the Commission has recognized as critical to counteracting the potential negative effects of a monopoly and the inherent pricing power it would otherwise wield.<sup>7</sup>

The Commission's intervention to protect the public interest is particularly important because the Plan is the product of a conflicted Board approval process that was manipulated by the Stockholder Exchanges. At least one significantly less expensive alternative capital raising plan available to OCC was vetoed (or effectively vetoed) by one or more Stockholder Exchanges, precluding OCC's Board from even considering it. This veto by the owners of a monopoly SRO was clearly abusive of the public interest and should not be sustained. Moreover, due to alleged time pressure from the SEC staff alluded to by OCC to approve a plan to raise capital, no other proposals were even considered.<sup>8</sup>

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<sup>7</sup> See *infra* n. 39.

<sup>8</sup> Letter from James E. Brown, General Counsel, OCC (February 23, 2015), at 6 n.10. In addition, the Chief Executive Officer of NASDAQ OMX Group, one of the Stockholder Exchanges, publicly stated on a quarterly earnings call that the Plan arose from "the strong push by the regulators to bring better balance sheet" to OCC, further noting that the Plan "represented a good return to Nasdaq shareholders." R. Greifeld, CEO, Nasdaq OMX Group, Q1 2015 Earnings Call (Apr. 23, 2015); see also Affidavit of Joel Greenberg, dated October 7, 2015 ("Greenberg Aff.") ¶¶ 8-15, submitted in support of Petitioners' motion for an order (1) adducing additional evidence before a hearing officer, and (2) directing discovery prior to the hearing.



If the Approval Order is affirmed, the Commission will ratify the conflict of interest embedded in the Plan and the conflicted process by which the Plan was approved. Allowing the Approval Order to stand would also cement unnecessary increases in options transaction costs to be paid by the public, sanction the overriding of member control of a clearing agency, and unleash the market power of a full-fledged monopoly. Indeed, any OCC fees promulgated pursuant to the Plan would be *per se* unreasonable, as they would by definition include a surcharge levied to finance the exorbitant dividends payable to the Stockholder Exchanges under the Plan.<sup>9</sup> Such a result would fail to protect investors from overreaching rooted in market power, fail to ensure fair competition in the options marketplace, and fail to ensure that this SRO serves the public interest. For these reasons and those set forth below, we respectfully submit that the Commission should reverse the Approval Order.

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<sup>9</sup> The Approval Order erred when it dismissed commenters' concerns about OCC fees, noting that fee changes must be submitted for Commission review. This position misses the point because, under the Plan, OCC fee changes would be formulaic based on OCC's estimated annual budgets plus a buffer amount. Fees will stem from conflicted budget estimates that are incentivized to be overly high, as the more OCC overestimates its operating budget under the Plan, the greater the pool of money available for Stockholder Exchange dividends. OCC's approach seeks to exploit the Commission's understandable reluctance, when reviewing proposed fee changes, to scrutinize the underlying budget decisions upon which the proposed fee changes rest. Indeed, OCC self-servingly cautions that "it would be inappropriate for the SEC to conduct, a line item review of OCC's operating budget." See Letter from James E. Brown, General Counsel, OCC (May 15, 2014), at 4 (letter regarding SR-OCC-2014-05) ("OCC May 15 Letter"). The limited, future review that the Commission will undertake of fees produced by a manipulated, conflict-ridden budget framework cannot justify a refusal by the Commission to examine the framework itself.

## ARGUMENT

### **I. THE PROPOSED PLAN HAS BEEN RENDERED MOOT BY RECENT DEVELOPMENTS, SETS UNJUSTIFIED CAPITAL TARGETS, AND REQUIRES UNCONSCIONABLE DIVIDEND PAYMENTS TO THE STOCKHOLDER EXCHANGES**

#### **A. The Proposed Plan Is Moot Because the Target Capital Requirement Will Nearly Be Achieved By Year-End or Shortly Thereafter**

Events have rendered moot the Plan's stated purpose of strengthening OCC through a substantial capital infusion. Through increased fees, OCC has raised an extraordinary amount of capital in 2014 and 2015, nearly reaching its target capital levels and leaving OCC with an unprecedented surplus of funds. The Plan that OCC proposed back in January 2015 is thus wholly unnecessary, and ill-advised in light of its significant cost.

OCC claims a Target Capital Requirement for its 2015 infrastructure operating needs of \$247 million.<sup>10</sup> Under the Plan, the targeted capital amount would be obtained in part from a contribution of \$150 million by the Stockholder Exchanges.<sup>11</sup> In return, the Stockholder Exchanges would receive a return from OCC estimated to be in the range of 20% on average for the next ten years (and over 30% in years to come).<sup>12</sup> As described below, however, OCC will likely surpass its inflated objective of \$247 million within six months *without* implementing the Plan and without obligating OCC to pay high dividends to the Stockholder Exchanges.

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<sup>10</sup> Approval Order, 80 FR at 13059. The Target Capital Requirement is made up of a Baseline Capital Requirement of \$117 million, equal to six months of operating expenses, and a \$130 million Target Capital Buffer. However, OCC's claim that it needs a \$130 million buffer is not rational in light of OCC's financial history; it has never had anything other than a *de minimis* loss in more than 40 years.

<sup>11</sup> The Stockholder Exchanges would also provide a \$117 million line of credit for Replenishment Capital, if needed.

<sup>12</sup> Although OCC has disputed SIG's previous assumptions in these calculations, OCC has acknowledged that the Stockholder Exchanges' returns on their \$150 million would be in the range of 14.7-20% over the next ten years. OCC Motion to Lift Automatic Stay, at 8. SIG believes OCC's estimates do not accurately take into consideration the growth in OCC's budget and, therefore, its budget buffer. Regardless, even using OCC's purported estimates, the returns are unconscionable.

OCC increased its fees by more than 70% in the aggregate effective April 1, 2014. Primarily as a result of that increase, OCC shareholders' equity grew from \$25 million on December 31, 2013, to \$97 million one year later.<sup>13</sup> In addition, OCC's cash on-hand increased by an additional \$33.3 million during 2014 as reflected in the "Refundable Clearing Fees" line of its balance sheet, dated as of December 31, 2014. Including these accrued refunds, OCC's available capital increased by approximately \$105 million during 2014, resulting in OCC having approximately \$130 million of capital at the end of that year.

The 70% fee increase remains in effect today. As a result, based on publicly available information and reasonable projections, OCC's capital has continued its dramatic increase during 2015. At the current rate of option volume and fees, OCC will accumulate approximately \$335 million in revenue for 2015. Remarkably, given the 22% increase in 2014, OCC has projected that expenses will climb an *additional* \$37 million to \$234 million for 2015.<sup>14</sup> Nonetheless, this would still leave approximately \$100 million in operating income for the year. After taxes, a full 50% of this windfall would accrue to the benefit of the Stockholder Exchanges either in the form of a dividend or as a credit to their capital accounts.

Thus, the Stockholder Exchanges stand to benefit from both sides of the ledger in 2015 if the Plan is implemented – sky-high dividend rates on their virtually risk-free capital contributions and credits to their OCC capital accounts from inflated transaction fee revenues. Already it appears that OCC is leaning towards higher budgets and bigger dividends, which is exactly what market participants fear going forward – that the Stockholder Exchanges' designees

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<sup>13</sup> This remarkable fee increase and the absence of any resulting diminution in volume leave little doubt as to OCC's monopoly pricing power. *See infra* n. 39.

<sup>14</sup> *See* Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171, 5173 (January 30, 2015) (SR-OCC-2015-02).

on the OCC Board have little incentive to control costs because the Stockholder Exchanges will be rewarded with bigger dividends and capital accounts for bigger budgets.<sup>15</sup> After all, it is the clearing members and their customers that pay over 95% of OCC expenses through their transaction fees.

High option volumes and OCC fees will make it likely that OCC will have capital on-hand of over \$200 million by the end of 2015 if rebates and dividends are not paid for 2014 and 2015. Thus, OCC will have an extraordinary current cash surplus—the critical question is what it chooses to do with it. The simplest and best approach to prudently address its capital obligations would be to: (1) eliminate the Plan; (2) not pay rebates to clearing members for 2014 or 2015; (3) maintain the balance as capital in the form of retained earnings; and (4) reduce fees to pre-April 2014 levels once the Target Capital Requirement level is met. The most inefficient and unfair thing OCC could do at this time would be to disburse a significant percentage of those on-hand funds in the form of rebates and dividends. Doing so would *weaken* OCC's capital position, exactly the opposite of what the Plan was designed to achieve.

As noted above, OCC's available capital – its shareholders' equity plus accrued but unpaid refunds – will surpass OCC's \$247 million target capital requirement within the next six-months without implementing the Plan.<sup>16</sup> OCC's own figures are consistent with these projections. In one of the few recent data points that OCC provided, it acknowledged its

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<sup>15</sup> Perversely, the exorbitant expected return on investment would increase as expenses increase because the capital reserve account and the dividend to Stockholder Exchanges would grow as expenses increase. The capital reserve account represents six months of operating costs. Therefore, as costs increase, the capital reserve account automatically increases by a like amount. Further, the dividend paid to Stockholder Exchanges is tied to expenses by virtue of the Business Risk Buffer. As expenses increase, the Business Risk Buffer and operating profits increase, which causes taxes and dividends to increase. The conflict-ridden incentives bear emphasis—*the Stockholder Exchanges' return on their OCC investment increases as OCC's expenses increase.*

<sup>16</sup> See *supra* p. 2.

shareholders' equity had increased to \$149,613,874 as of August 31, 2015,<sup>17</sup> a six-fold increase from year-end 2013. At that rate, OCC's shareholders' equity will grow to more than \$175 million by year-end – a figure that, when aggregated with OCC's estimated \$66.6 million of accrued and unpaid rebates, is extremely close to the \$247 million target.

The amount of capital amassed at OCC over 2014 and 2015 means that the Plan's proposed \$150 million contribution from the Stockholder Exchanges is no longer needed. Based on OCC's stated capital level at the end of August 2015, the \$150 million contribution contemplated by the Plan would increase OCC's capital level to well over \$300 million – and exceed by over \$50 million the target capital requirement set forth in the Plan. The Commission cannot rationally approve a Plan that, based on OCC's own capital figures, is not necessary to achieve OCC's own capital target.

Finally, while the above analysis is based on reasonable projections from publicly available data, OCC has failed to provide current, comprehensive information regarding its finances. This information should be exposed for public comment and made part of the record for the Commission's review.<sup>18</sup> In considering the Plan's merits, including the seminal question of whether the Plan is needed to achieve its stated objective of raising sufficient capital for OCC, the Commission cannot rationally analyze the Plan without obtaining *current* financial data concerning OCC's net income and balance sheet.

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<sup>17</sup> OCC's Opposition to Motion to Reinstitute Stay, at 11.

<sup>18</sup> SIG and other petitioners have contemporaneously filed a motion before the Commission for a hearing before a hearing officer to obtain this and other critical information that OCC has failed to disclose. *See infra* n. 49.

## **B. The Plan's Proposed Capital Levels Are Unsupported**

The Plan should be rejected not just because OCC's Target Capital Requirement will be met by early 2016 without implementing the Plan, but also because that target capital level itself is demonstrably inflated. SIG does not contest the desirability of strengthening OCC's capital position compared to historical levels of approximately \$25 million. However, the levels proposed in the Plan exceed any reasonable measure of capital adequacy. It is estimated that if OCC forgoes paying rebates temporarily, it will have approximately \$250 million in capital within the next six months, which is *ten times OCC's historical capital levels* that have been more than sufficient during economic downturns, including the financial crisis in 2007-08.<sup>19</sup> OCC has not justified (nor could it) the extraordinary increases in target capital that the Plan proposes.<sup>20</sup> As discussed below, OCC's request for these inflated levels is explainable only by the monetization campaign upon which the Stockholder Exchanges have embarked.

OCC claims that its proposed targets are necessary based on analysis and a report prepared by an unspecified outside consultant. Although OCC vaguely states that the report's analysis was "comprehensive," OCC does not identify the data analyzed, the time period, the methodology used, or the assumptions made.<sup>21</sup> Knowing the industry's serious concerns about the Plan, OCC has nonetheless chosen not to disclose the outside consultant's report. Instead, OCC asks the Commission and the industry simply to accept the report's conclusions (and OCC's characterization thereof) on faith.

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<sup>19</sup> Even using OCC's figure, its shareholders' equity as of August 31, 2015 (which does not include the rebates it holds) is six times OCC's historic levels.

<sup>20</sup> Indeed, as recently as May of 2014 (a mere 8 months before OCC proposed the Plan), OCC stated that its own computations agreed with Commission estimates that OCC needed approximately \$68 million to comply with proposed Rule 17Ad-22(e)(15). *See* OCC May 15 Letter, at 3.

<sup>21</sup> Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171, 5172-73 (January 30, 2015) (SR-OCC-2015-02).

According to OCC, its undisclosed outside consultant engaged in a “comprehensive” analysis “across risk types, including credit, market, pension, operational and business risk.” OCC said that the report concluded that OCC could manage business risk “to zero” by adjusting the levels of fees and refunds and by adopting a “Business Risk Buffer of 25%” when setting fees.<sup>22</sup> The report concluded that other risks, such as counterparty risk and on-balance sheet credit and market risk, were “immaterial” to its analysis because OCC could address those risks without using additional capital. The undisclosed report thus determined the additional capital needs were required solely due to pension and undefined “operational” risks – but OCC has proffered no explanation why adjusting fee and refund levels could not address these needs. After all, during just 2014 and 2015, enhanced fees will have generated additional capital estimated to be more than \$200 million.

The report allegedly quantified OCC’s “operational” risk at \$226 million, and pension risk at \$21 million, resulting in the Target Capital Requirement of \$247 million.<sup>23</sup> It remains a mystery how operational costs (typically rents, salaries, infrastructure and the like) could balloon<sup>24</sup> to the point that they could require \$221 million in additional capital, far beyond

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<sup>22</sup> The OCC states that the Business Risk Buffer is calculated by establishing an annual revenue target equal to the amount obtained by dividing the expected operating expenses by .75 and then subtracting the expected operating expenses from this revenue target. In common parlance, the Plan seeks to establish revenues at 33% higher than budgeted expenses (a fact that OCC repeatedly obfuscates by misleadingly describing it as a 25% buffer). At most, half of the excess will be refunded to clearing members, which consistent with OCC’s historical practice, is removed for purposes of calculating operating margin. In reality, however, less than half of the excess will be refunded to clearing members due to the Plan’s required margin capital adjustment.

<sup>23</sup> Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171, 5172-73 (January 30, 2015) (SR-OCC-2015-02).

<sup>24</sup> OCC previously stated that the increase in the operating budget of roughly \$70 million was related to 51 new employees and 46 new consultants. Without any other explanation for increases in costs, the compensation for these 97 new positions would have to average more than \$700,000 per person to account for the change.

historical norms over OCC's forty years of business.<sup>25</sup> No reasoned analysis of the Plan can be conducted without an examination of the consultant's report, its methodology, and its underlying assumptions.<sup>26</sup>

The operational risks that the Plan is intended to address should not be confused with the risks arising from potential losses due to the default of an OCC clearing member or clearing member group. OCC clearing members have committed billions of dollars to OCC's Clearing Fund for the safe processing and guarantee of option trades. Specifically, OCC maintains a separate \$8.3 billion fund<sup>27</sup> to address risks of clearing member defaults, which could arise during a period of market volatility. In contrast, market volatility would not have a significant impact on the cost of OCC's operations, which is what the Plan is designed to address.

Nor should the Plan be approved because of some purported benefit flowing from the Stockholder Exchanges' commitment to provide a separate \$117 million line of credit in "Replenishment Capital," if needed. Indeed, the Replenishment Capital commitment is an empty gesture because OCC has offered no plausible scenario in which it will be needed."<sup>28</sup> OCC has operated for 40 years with capital levels typically less than \$25 million, with no need for

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<sup>25</sup> Moreover, the \$247 million figure conflicts with OCC's statement that its maximum recovery costs would be \$100 million and projected wind-down costs would be \$73 million. *Id.* at 5173.

<sup>26</sup> See *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (D.C. Cir. 2010) ("When evaluating agency action that is alleged to be arbitrary or capricious under 5 U.S.C. § 706(2)(A), our primary task is to ensure that **the agency** has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (emphasis added).

<sup>27</sup> See OCC 2014 Annual Report, 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).

<sup>28</sup> In the most recent research report analyzing OCC's financial condition, independent analysts at Standard & Poor's confirm this strength concluding that "OCC has an 'excellent' business risk profile and 'minimal' financial risk," assessing OCC's liquidity position as "exceptional." Standard & Poor's Rating Services, Ratings Direct, Options Clearing Corp., May 20, 2015, at 7, available at [http://www.optionsclearing.com/components/docs/about/sp\\_rating.pdf](http://www.optionsclearing.com/components/docs/about/sp_rating.pdf).



replenishment capital, and it has now accumulated surplus capital approaching \$250 million. There is no realistic scenario under which additional “Replenishment Capital” would become necessary to cover operating expenses. If additional funds were needed to meet unexpected expenses, OCC could easily obtain an inexpensive line of credit or simply increase fees as it did in April 2014. In any event, the Stockholder Exchanges would no doubt provide any needed capital without a contractual commitment because their primary businesses are unavoidably dependent on a properly functioning OCC.

Finally, there is nothing in currently enacted or proposed Commission rules (or any other applicable standard) that requires the Plan’s enactment. While OCC has repeatedly trumpeted the importance of the Plan in purportedly satisfying its obligations as a SIFMU (systemically important financial market utility),<sup>29</sup> this is a sleight of hand designed to exploit lingering fears of systemic risk to rationalize the unnecessary and ill-conceived Plan. For capital-raising purposes, OCC’s designation as a SIFMU has potential significance only because it means that OCC would become subject to proposed Rule 17Ad-22(e)(15) if it were enacted.<sup>30</sup> The proposed rule has not been enacted, but even if it were, it would not justify the capital levels the Plan proposes. Further, although the proposed rule’s stated purpose is to financially strengthen OCC, implementing the Plan simply to replace what is currently cost-free capital to OCC with capital

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<sup>29</sup> See OCC Applauds SEC Decision to Discontinue Stay and Proceed with Review of Capital Plan (September 11, 2015), available at [http://www.optionsclearing.com/about/newsroom/releases/2015/09\\_11.jsp](http://www.optionsclearing.com/about/newsroom/releases/2015/09_11.jsp).

<sup>30</sup> The Staff specifically disclaimed reliance on the proposed but not yet enacted rule in considering whether to approve the proposed Capital Plan. Approval Order, 80 FR at 13067 n. 84. In addition, OCC relied on the vague language of Principle 15 of the Principles for Financial Market Infrastructure to justify the capital levels in its proposed Plan. 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 suggests a need to “comply.” Notably, like proposed Rule 17Ad-22(e)(15), Principle 15 is concerned with reducing “general business risk,” which OCC’s own consultant concluded that OCC could manage “to zero” through management of fees and rebates.

costing on average over 20% annually over the next ten years (and eventually over 30% in years to come) is the antithesis of strengthening OCC.

To the extent that OCC approved the Plan as the result of alleged pressure from the Staff to move rapidly to address concerns about capital,<sup>31</sup> such claimed pressure was not a legitimate basis for approving the Plan because it was not grounded in any rule or regulatory requirement or even the anticipated requirements of the proposed rule. Specifically, there is nothing in the proposed rule requiring or lending support for OCC's proposed additional "Target Capital Buffer" of \$130 million or the proposed \$117 million of Replenishment Capital. Moreover, proposed Rule 17Ad-22(e)(15) relates only to raising capital for "general business risk," which OCC's own consultant concluded could be managed to zero based on fee and rebate adjustments. A separate proposed rule, Rule 17Ad-22(e)(17), addresses operational risk (with which the Plan is concerned), but it contains no capital raising or equity requirement. In short, OCC's desire for such large sums is not legitimately based upon any rule or regulatory requirement.

**C. It Is Irrational For OCC To Pay The Stockholder Exchanges Exorbitant Dividends for Capital Contributions That Are Unnecessary**

If the proposed Plan is implemented, OCC would effectively be exchanging on-hand capital that is "cost-free" to OCC, accumulated through increased trading fees, for a capital infusion from the Stockholder Exchanges that would require OCC to make annual dividend payments in the estimated range of, on average, over 20% annually for the next ten years (and eventually over 30% in years to come). There is simply no rational basis for OCC to exchange cost-free capital for capital on which it must pay a dividend, let alone such an exorbitant dividend. The Plan makes no economic sense on its own terms, particularly where OCC has not

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<sup>31</sup> See *supra* p. 3; Greenberg Aff. ¶ 15.

justified the need for its inflated Target Capital Requirement, no rules or regulations require additional capital to be raised, and OCC will soon have generated sufficient capital to meet its target.

## **II. THE PROPOSED PLAN IS A PRETENSE FOR THE STOCKHOLDER EXCHANGES TO MONETIZE OCC'S CLEARING MONOPOLY AND SRO STATUS**

The Plan is rooted not in capital needs but in greed – the Stockholder Exchanges' desire to monetize OCC's monopoly SRO status. This is demonstrated by comparing three components of OCC's financial structure as they have operated historically versus how they would operate under the Plan: (1) the relative monetary contributions to OCC by members and Stockholder Exchanges; (2) the distribution of OCC's profits; and (3) the relationship between OCC's revenues and expenses. The Plan's break with OCC's member-centric history is unmistakable, and as discussed in Section IV, its departure from the interests of the industry and the public needs no illustration.

### **A. From 1973 to 2013, OCC Operated as a Low-Cost Utility**

Following its founding in 1973, OCC operated for over 40 years as a utility, a low-cost provider of options clearing services for the benefit of its members and the public. While exchanges contributed seed money, clearing members were the principal contributors to OCC's development.

First, OCC's development was funded almost exclusively by clearing member fees. From just 1997 to 2014, OCC collected *over \$2.3 billion in clearing fees* from clearing members.

In contrast, the Stockholder Exchanges contributed a total of only \$2,659,999 from the time of OCC's founding until the end of last year.<sup>32</sup>

Second, OCC historically operated as a break-even utility by refunding excess revenues over operating expenses to its clearing members. Since 1974, clearing members received cumulative refunds and discounts exceeding \$2 billion. Stockholder Exchanges, in contrast, have never received any distributions or "dividends" of OCC's retained earnings.

Third, from 1997 to 2013, OCC maintained a thin average operating margin of approximately 6% after refunding excess revenue to clearing members.<sup>33</sup> Any funds remaining after clearing member rebates were used to cover miscellaneous expenses and slowly grow the capital reserve account; they were *not* distributed to the Stockholder Exchanges as that would contravene OCC's industry utility purpose and the monopoly it was granted in consideration of that purpose.

**B. The Plan Would Radically Change OCC, Abandoning Member Control in Favor of a For-Profit Enterprise Operating For The Stockholder Exchanges' Benefit**

The Plan would represent a dramatically new operating paradigm for OCC, as reflected by the way the Plan would impact the three considerations above.

First, after clearing members have provided essentially all of the critical funding – \$2.3 billion over just the past 16 years – for OCC's development and operation, the Stockholder Exchanges would be making a one-time capital contribution of \$150 million. This figure represents only 6.5% of the clearing members' contributions from 1997 to 2014. In return for

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<sup>32</sup> See OCC 2014 Annual Report, at 24 (listing paid-in capital as \$2,059,999 and common stock value at \$600,000).

<sup>33</sup> From 1997 to 2013, OCC's total expenses grew by an average annual growth rate of 6.38%, almost in step with the annual growth of OCC's revenues, which increased at an average rate of 6.51%.

this relatively minor and unnecessary contribution, the Stockholder Exchanges stand to extract for themselves outsized dividends and the full benefits of OCC's monopoly SRO status.

Second, clearing member rebates would be cut under the Plan; instead, OCC's profits would be paid in significant part to the Stockholder Exchanges as dividends and to the Internal Revenue Service as taxes on the income necessary to fund the dividends, an inefficient use of industry funds. More specifically, excess revenue, rather than being rebated to the marketplace that generated it, would be subject to income tax, with the balance either flowing to the Stockholder Exchanges as dividends or accruing as retained earnings, increasing the Stockholder Exchanges' equity interest in OCC. At most, clearing members would receive only half of the excess revenue under the Plan.

Finally, the Plan's proposed "Business Risk Buffer" would create an unprecedented operating margin for OCC and, for the first time, OCC would have significant retained earnings at year-end. OCC's statement that the Business Risk Buffer's target margin (25%) is below OCC's 10-year historical *pre-refund* average buffer (31%) is a red herring. OCC has historically rebated virtually the entire buffer back to the clearing members. Under the Plan, however, a full 50% of this balance will instead be used to line the pockets of the Stockholder Exchanges.

### **III. THE PLAN WAS PRODUCED BY A CONFLICT-RIDDEN PROCESS THAT DECOUPLES THE INTERESTS OF OCC FROM ITS MEMBERS AND THE PUBLIC**

To achieve their extraordinary financial windfall, at least one of the Stockholder Exchanges manipulated the process by which OCC's Board approved the Plan, in particular by wielding its veto (or the threat thereof) to prevent the Board from considering a more economically sensible financing alternative that could have displaced its self-interested proposal.

As reflected above, the Stockholder Exchanges' conduct represents a radical departure from how OCC was governed for decades in the interests of its members and the public. During this formative period, the Stockholder Exchanges were "owners" of OCC only in the most technical sense. They acted instead as custodians of the monopoly clearing utility while OCC's financial operations were driven by its members. In pushing the Plan through the Board to benefit their own financial interests, the Stockholder Exchanges abandoned their custodial role, and overrode any semblance of the member control of OCC and its financial direction that has been a feature of OCC since its formation.

**A. OCC'S Background as a Member-Controlled Public Utility**

To appreciate the fundamental paradigm shift that the Stockholder Exchanges seek to impose through the Plan, it is important to understand the historical development of OCC's position as a monopoly SRO, and the critical importance to the public of OCC's control by its clearing members. When options began trading on the Chicago Board Options Exchange ("CBOE") in 1973, OCC was CBOE's clearing facility. A few years later, when the American Stock Exchange ("AMEX") and the Philadelphia Stock Exchange ("Phlx") became options exchanges, the SEC allowed them to decide whether they wanted multiple clearing agents or one central clearing agent. At the time, the exchanges were non-profit and member-driven. The members of the respective markets, with the SEC's approval, decided that OCC would be the only central clearing agent for listed options. All parties understood they were creating a monopoly, but this was considered acceptable because it was understood that OCC would operate for the benefit of members and the public as a low-cost utility.<sup>34</sup>

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<sup>34</sup> See *infra* nn. 35-38.

Importantly, OCC's dual status – as a monopoly and as an SRO vested by the Commission with delegated governmental authority to impose rules on its members – creates a potential danger to the industry and the public. OCC has both the market power to set options clearing prices without regard to competitive constraints, and the ability to impose binding rules (such as the Plan) on its members.

The Commission has recognized explicitly OCC's monopoly status<sup>35</sup> and noted the “potential negative effects of a monopoly,” while at the same time stressing that the regulatory framework and structure of the clearing industry provide “ample means” for avoiding such negative effects.<sup>36</sup> Specifically, in addressing concerns in 1996 surrounding the withdrawal of competitors to NSCC and DTC from the clearance and settlement business, the Commission made clear that user and member control of monopoly clearing agencies is critical to addressing the hazards they present:

NSCC and DTC not only provide services at costs reviewed by their *user comprised boards* of directors and subject to public notice and comment, NSCC provides monthly discounts and DTC provides annual rebates to their participants in the event that any fees collected have not been expended. The Commission believes existing regulations and *member control* have provided and will continue to provide the appropriate mechanisms to monitor the operations of DTC and NSCC.<sup>37</sup>

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<sup>35</sup> See Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220, 66265 (November 2, 2012) (“The market for CCP services in the United States tends to be segmented by financial instrument, with clearing agencies often specializing in particular instruments. As such, some market segments may have characteristics of *natural monopolies capable of being sustained despite the presence of competitors* with the potential to enter the market segment in question. For example, in the United States, following a period of consolidation facilitated by the introduction of Section 17A of the Exchange Act, only one CCP currently processes transactions in U.S.-listed equities and only one CCP processes transactions in exchange-traded options.”) (emphasis added).

<sup>36</sup> See Securities Exchange Act Release No. 36684 (January 5, 1995), 61 FR 1195, 1197 (January 17, 1996).

<sup>37</sup> *Id.* (emphasis added).

In stressing the necessary and protective role of regulation, the Commission noted that it would monitor pricing and other developments closely and that it would “not hesitate to use its authority under the Act to address future competitive concerns.”<sup>38</sup>

The structural importance of member control of monopoly clearing agencies is two-fold. First, it aligns the interests of the clearing agency with those who use its services and thereby counteracts the monopoly’s incentive to overcharge for its services. Second, and more fundamentally, because it must be assumed that any clearing fees will be passed on to downstream consumers, member control protects the investing public from a monopoly clearing agency’s pricing power.<sup>39</sup> Member control, in other words, ensures that the clearing agency will price its services – as to which, by definition, there is no alternative – as an industry utility, cooperative, or mutualized entity.

During OCC’s first 42 years of existence, clearing members were the pivotal participants at OCC in setting policy and transaction fee levels.<sup>40</sup> Members have supplied the direction (and, as detailed above, the funding) that developed OCC into the backbone of the options markets that it is today.

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<sup>38</sup> *Id.*

<sup>39</sup> OCC’s pricing power is demonstrated by the fact that although clearing fees increased by 70% from 2013 to 2014, the total options contracts cleared by OCC in 2014 increased by 4%. The inelasticity of the demand for its clearing services means that OCC has the ability to set fees at ever-increasing levels without fear of competitive pressures driving customers away.

<sup>40</sup> The importance of this orientation was confirmed in 1992 when the Commission approved OCC’s revision to the formula for determining the number of Member Directors on the OCC Board. Specifically, the proposal was designed to ensure that Member Directors would constitute a majority of the Board, regardless of the number of Exchange Directors and Public Directors. *See* Securities Exchange Act Release No. 30328 (January 31, 1992), 57 FR 4784 (February 7, 1992). Notably, member control of at least half OCC’s Board would remain in place until January 2014. *See* Securities Exchange Act Release No. 70076 (July 30, 2013), 78 FR 47449 (August 5, 2013).



### **B. The Stockholder Exchanges Abused Their Veto Rights**

In 2014, OCC's orientation changed. The Stockholder Exchanges embarked on an effort to monetize OCC's monopoly SRO status through implementation of the Plan, which would end the more than forty-year alignment of interests between OCC, on the one hand, and its members and the public, on the other. Under the Plan, OCC would instead operate as a profit-driven enterprise for the benefit of the Stockholder Exchanges.

OCC's Board approved the Plan through a conflicted process where the Stockholder Exchanges limited what was presented to OCC's Board. SIG has proffered evidence indicating that at least one of the Stockholder Exchanges vetoed (or threatened to veto) an alternative capital plan that was significantly less expensive to OCC than the Plan. As explained in the affidavit of a SIG Managing Director and Chief Legal Officer (which affidavit has been submitted in support of the Petitioners' 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), CBOE offered to provide OCC with a capital infusion at an annual rate of return of 8% to 9% that would only be in place for 2 to 2.5 years,<sup>41</sup> as opposed to the Plan's dividends to the Stockholder Exchanges in perpetuity, providing them with returns in the range of 20% for the next ten years, and over 30% in years to come. Notwithstanding the far superior terms of the CBOE proposal, one or more of the other Stockholder Exchanges vetoed, or threatened to veto, CBOE's proposal because they wanted OCC to adopt the proposed Plan that generated a high return for the Stockholder Exchanges.

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<sup>41</sup> See Greenberg Aff. ¶¶ 8-14.

Indeed, in its February 23, 2015 letter to the Commission, OCC acknowledged that each of the five Stockholder Exchanges had the power (and at least one was inclined) to veto any alternative plan that was not financially rewarding to them:

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. 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.<sup>42</sup>

Notably, the Commission warned about the potential for such an abusive use of veto power when it approved a proposal to limit the number of Stockholder Exchanges in 2002. Specifically, the Commission worried, "[e]xpanding the number of stockholders with veto rights increases the likelihood that *a single stockholder might block action that is in the best interests of OCC and its other stockholders.*"<sup>43</sup> With OCC's approval of the Plan, the Commission's concerns have come to fruition: at least one of the Stockholder Exchanges successfully threatened use of their veto rights to prevent the introduction of competing capital-raising plans that were in OCC's best interests.

To date, OCC has not denied the Petitioners' contention that the Stockholder Exchanges blocked the OCC Board from considering less expensive alternatives to the Plan. OCC instead has vaguely suggested that it considered alternatives to the Plan,<sup>44</sup> declining to identify any

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<sup>42</sup> Letter from James E. Brown, General Counsel, OCC (February 23, 2015), at 6 n.10.

<sup>43</sup> See Securities Exchange Act Release No. 46469 (September 6, 2002), 67 FR 58093, 58094 (September 13, 2002) (emphasis added).

<sup>44</sup> *Id.*

details concerning any alternatives or why any specific alternative was not selected. Besides the CBOE plan, there is little doubt that other market participants, including SIG, were willing to offer OCC capital on more favorable terms than those provided for in the Plan. Nor is there any evidence that OCC did any type of customary "market check" or otherwise analyzed alternatives to the Plan that would provide OCC with lower cost capital.<sup>45</sup> To the contrary, the currently available evidence shows that one or more of the Stockholder Exchanges exploited their veto power, rooted in their anti-dilution rights, and manipulated the process so that the only capital plan proposed for a vote was the Plan that would effectively demutualize OCC and pay them and the other Stockholder Exchanges above-market returns.

In sum, the Board approval process was contaminated because the Stockholder Exchanges exerted control over the process while at the same time obtaining significant financial benefits from the Plan. The conflict of interest could not be more stark. Moreover, the five directors of OCC who are designated by the Stockholder Exchanges all failed to recuse themselves from the deliberations or the vote on the Capital Plan, despite the obvious conflict of interest.<sup>46</sup> If the Commission accepts OCC's Plan without diligent scrutiny, it will be blessing OCC's conflicted governance process in which the directors of an SRO abandoned their duties to the OCC and the industry, and ratifying the inherent conflict of interest embedded in the Plan.<sup>47</sup>

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<sup>45</sup> The motion filed by SIG and other industry participants to adduce evidence seeks information on this subject, among many others.

<sup>46</sup> This was a clear violation of OCC's conflict of interest policy in light of the inherent self-interest. Moreover, there is no indication that the Public directors on the Board met to discuss the issue separately from the directors appointed by the Stockholder Exchanges. The Public directors were disinterested, and thus most likely to argue and vote for a Plan that was in the best interest of both OCC and the options trading industry.

<sup>47</sup> Moreover, the scrutiny that the Commission must provide requires obtaining critical information that OCC has failed to disclose, including: OCC's current financial information that will reveal whether the Plan is necessary to reach OCC's capital target; the underlying consultant's report containing the analysis

**C. The Stockholder Exchanges Have Effectively Usurped Control of OCC From Clearing Members And Embarked on a Course to Demutualize OCC**

Through the threat of their veto power and the conflicted governance process described above, the Stockholder Exchanges have effectively usurped control of OCC from clearing members, thereby embarking upon OCC's stealth demutualization. The Stockholder Exchanges know that the explicit conversion of a member-controlled SRO to for-profit status would raise profound statutory and policy questions and that a transparent and direct effort to shed OCC's member-controlled utility status would attract intense regulatory review.<sup>48</sup> Moreover, despite a steady stream of demutualizations by U.S. options and equity exchanges over the past fifteen years, the conversion of OCC from member-controlled to for-profit status would be wholly unprecedented given its combined monopoly and SRO status. Accordingly, the Commission should not permit the Stockholder Exchanges to embark on the stealth demutualization of OCC that they have so clearly mapped out. After all, as the Commission has recognized, member control is one of the twin protectors of investors against the market power of a clearing monopoly, the other being effective Commission monitoring of clearing agency competitive concerns. The approval of the Plan has left the public wholly unguarded, and it should accordingly be reversed.

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purportedly justifying OCC's capital target figure; and the details concerning any alternative, more favorable capital-raising plans that OCC failed to consider or were rejected due to the veto power of the Stockholder Exchanges. Accordingly, SIG and other industry participants have contemporaneously filed a motion under Rule 452 of the Commission's Rules of Practice to otherwise adduce this necessary information.

<sup>48</sup> When CBOE sought to demutualize in August 26, 2008, it was not until twenty months later that CBOE's proposal was approved by the Commission. *See* Securities Exchange Act Release No. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010).

#### IV. IMPLEMENTING THE PLAN WILL RESULT IN HIGHER OPTION TRANSACTION COSTS TO THE INDUSTRY AND THE PUBLIC

The Commission should also reject the Plan on the fundamental ground that it unfairly burdens other industry participants and is harmful to the investing public. Specifically, OCC's Plan would increase clearing costs and cut clearing members' rebates solely to fund the exorbitant dividends to the Stockholder Exchanges.<sup>49</sup> The resulting increase in clearing costs would no doubt be passed on to investors and other market participants, at least in significant part. Options market makers will need to quote wider spreads to cover the higher fees flowing from the Plan, which will result in higher transaction prices for the public and other market participants. The cost of providing liquidity to the market, in other words, will increase, which means there will be less of it, along with less customer interest, less effective hedging, and less effective risk management.

Each of these detrimental effects and their impact on the public follow from inflated budget estimates and the surcharge that the Plan's Business Risk Buffer layers onto OCC fees. Notwithstanding the harmful impact on public investors, there is nothing in the administrative record indicating that OCC or the Staff conducted any analysis quantifying the costs that would be borne by investors as a result of the Plan – or that they engaged in any cost-benefit analysis whatsoever. Without such analysis, and without adducing the necessary factual record to conduct such analysis, approval of the Plan would be arbitrary and capricious, and therefore unlawful.<sup>50</sup>

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<sup>49</sup> It is also important to note that in conjunction with the Plan's proposal, OCC expenses have also begun to increase: by 22% from 2013 to 2014, and by another projected 20% in 2015.

<sup>50</sup> See *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (rejecting proposed rule where Commission acted in "arbitrary" manner by engaging in cost-benefit analysis that ignored data and that was internally inconsistent); *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993) (holding that the

## V. THE APPROVAL ORDER SHOULD BE REVERSED

Under the Administrative Procedures Act, the Commission has an obligation to engage in “reasoned decision-making.”<sup>51</sup> As the D.C. Circuit Court of Appeals stated in *NetCoalition*, “[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.”<sup>52</sup> The Commission must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>53</sup> Significantly, the Commission has been found to have a unique obligation to consider the effect of a new rule upon “efficiency, competition, and capital formation” and failure to apprise itself of the economic consequences of a proposed regulation makes promulgation of the rule “arbitrary and capricious.”<sup>54</sup>

In approving the proposed Plan, the Staff merely accepted OCC’s conclusory assertion that the Plan was needed to adequately capitalize OCC, without providing any separate analysis. That assertion was inadequately supported by OCC when made and, within the year, it has turned out to be demonstrably false. Indeed, it is now plain that OCC will be close to reaching its capital target within six months without implementing the Plan. At this stage, the Plan is

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necessary 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>51</sup> *NetCoalition v. S.E.C.*, 615 F.3d 525 (D.C. Cir. 2010).

<sup>52</sup> *Id.* at 538-39 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)); see also *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586, 588 (D.C. Cir. 2010) (“When evaluating agency action that is alleged to be arbitrary or capricious under 5 U.S.C. § 706(2)(A), our primary task is to ensure that the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”).

<sup>53</sup> 615 F.3d 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)).

<sup>54</sup> See *Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

wholly unnecessary, and there is no rational basis for implementing it, especially considering that it will require OCC to pay extraordinary dividends to the Stockholder Exchanges for a \$150 million capital contribution that it does not need. Even if additional capital were needed, it is irrational and abusive to adopt the Plan without properly considering alternative, less-costly plans.<sup>55</sup>

The Staff erroneously concluded in the Approval Order that the Plan did not violate the Exchange Act. The Plan will unduly burden competition by unfairly discriminating in favor of the Stockholder Exchanges, whose windfall payouts will ultimately be subsidized by public customers. Implementing the Plan would violate the requirement of Section 17A(b)(3)(I) that the rules of a registered clearing agency not provide any burden on competition not necessary or appropriate in furtherance of the Exchange Act. It is neither “necessary” nor “appropriate” to burden competition in the options industry with a plan that is not needed and has not been justified by OCC.<sup>56</sup> Most egregiously, the Plan will fundamentally change the character of OCC to a for-profit enterprise operating for the financial benefit of the Stockholder Exchanges exploiting OCC’s monopoly status.

For these same reasons, and because the Plan effectively demutualizes OCC and provides the Stockholder Exchanges with an unwarranted financial windfall at the expense of investors, the Plan also violates the requirement of Section 17A(b)(3)(D) that the rules of a registered

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<sup>55</sup> See *Motor Vehicle Mfrs. Ass'n of US v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding NHTSA rescission of standard was arbitrary and capricious for failing to consider modifying standard to include technological alternative); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983) (finding failure of Secretary of Labor to consider alternatives and to explain why such alternatives were not chosen was arbitrary and capricious).

<sup>56</sup> Moreover, it is not possible to determine whether a particular burden is necessary or appropriate without considering the less burdensome alternatives available to OCC. This is particularly significant in the instant case due to OCC’s unique monopoly position.

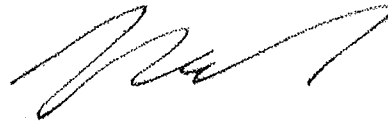
clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants, and the requirement of Section 17A(b)(3)(F) that the rules of a registered clearing agency be designed to, among other things, "protect investors and the public interest."

**Conclusion**

Based on the foregoing, the Approval Order should be reversed.

Dated: October 7, 2015

Respectfully submitted on behalf of  
Susquehanna International Group, LLP,



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