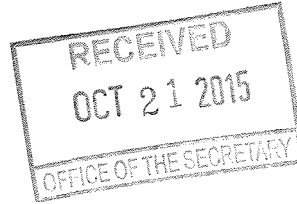


**Before the  
SECURITIES AND EXCHANGE COMMISSION**

\_\_\_\_\_) )  
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 ) )  
\_\_\_\_\_) )



**REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR ORAL  
ARGUMENT IN CONNECTION WITH THE COMMISSION'S REVIEW  
OF THE STAFF'S ORDER APPROVING OCC'S CAPITAL PLAN**

Susquehanna International Group, LLP, and its affiliated and related entities (collectively, "SIG"), respectfully submits this reply in further support of its motion pursuant to Rule 451<sup>1</sup> of the Rules of Practice for oral argument in connection with the Commission's 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>

OCC opposes oral argument by claiming it will cause "delay." But it is unclear how requesting oral argument on a single day could be construed as delay. Nor can OCC identify harm from any minimal delay associated with the scheduling of oral argument in view of its current enhanced (and materially increasing) capital position without the Plan. Indeed, OCC has never explained the reason for its wholesale reversal from its prior view that it could increase its

<sup>1</sup> 17 CFR § 201.451.

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

retained earnings over time, to its current view that saving money to meet its capital target is no longer acceptable.<sup>3</sup>

Moreover, any potential delay to fully develop the record is necessary to satisfy the Administrative Procedure Act's requirement for "reasoned decision-making" by the Commission.<sup>4</sup> Indeed, OCC does not dispute that its proposed Plan has been the subject of widespread and intense factual and legal disputes. Oral argument will give the Commissioners the opportunity to obtain a fuller explanation of the complex, disputed issues, and to examine counsel for the parties concerning those issues.<sup>5</sup>

The importance of the matter before the Commission weighs heavily in favor of conducting oral argument. As the Petitioners have demonstrated in their submissions, the adoption of OCC's proposed Plan would substantively transform the character of OCC, a monopoly SRO and the sole provider of essential clearing services for U.S. options markets. Moreover, the Plan would result in a wealth transfer of \$1 billion in cumulative dividends alone over the next 24 years to its exchange owners (another billion dollars would be paid out over the following 12 years), while harming public investors who the Commission is tasked with

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<sup>3</sup> See Letter from James E. Brown, Executive Vice President, General Counsel and Secretary, OCC (May 27, 2014), at 13-14.

<sup>4</sup> See *NetCoalition v. S.E.C.*, 615 F.3d 525 (D.C. Cir. 2010).

<sup>5</sup> Despite OCC's suggestion to the contrary, oral argument is not "routinely denied" by the Commission, and in fact it has been granted in multiple instances by the Commission in recent years. See, e.g., ZPR Investment, Management, Inc., Investment Advisors Act Release No. 4216, 2015 WL 5996438 (October 5, 2015); Raymond J. Lucia Companies, Inc., Securities Exchange Act Release No. 75011, 2015 WL 3826727 (May 20, 2015); Timbervest, LLC, Investment Advisors Act Release No. 4076, 2015 WL 1955669 (May 1, 2015); Gregg Lorenzo, Securities Exchange Act Release No. 74364, 2015 WL 763998 (February 24, 2015); John P. Flannery, Securities Exchange Act Release No. 72059, 2014 WL 1710249 (April 30, 2014); Absolute Potential, Inc., Securities Exchange Act Release No. 70792, 2013 WL 5835473 (October 31, 2013).

protecting.<sup>6</sup> Given the enormous implications, this is precisely the type of case in which the Commission should take advantage of the opportunity to fully explore the issues through oral argument.

OCC's opposition further contends that the "record is complete and it is time for the Commission to decide the matter."<sup>7</sup> But OCC's most recent submission demonstrates that the record is continuing to evolve in significant ways, a fact that further militates in favor of oral argument. The Commission ordered that statements supporting or opposing the Staff's Approval Order be submitted by October 7, 2015.<sup>8</sup> Yet, less than a week ago, OCC submitted to the Commission a Declaration by its Executive Chairman Craig Donohue in opposition to Petitioners' motion for an order referring this matter to a hearing officer. Drawn out of OCC only in response to the Affidavit of Joel Greenberg, the Donohue Declaration provides never before seen, relevant information about potential alternatives to OCC's proposed plan. As Petitioners have described in their reply submission on the pending referral motion, that new information is incomplete, and the record concerning alternative plans should be developed further through discovery and in an evidentiary hearing before a hearing officer.

In any event, the information in the Donohue Declaration was not previously disclosed and thus not addressed in the statements filed by the parties on October 7, 2015, the deadline set by the Commission. The issues raised in this new disclosure (and any additional information

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<sup>6</sup> See SIG Reply Brief to Mot. to Refer to Hearing Officer at 3 n.7, 15.

<sup>7</sup> In its opposition, OCC also contends that "[a]s in other matters in which oral argument has been denied . . . 'there is no prejudice to the [movant] in denying [its] request for oral argument.'" See OCC Opp. at 3 (quoting D.E. Wine Investments, Inc., Securities Exchange Act Release No. 43929, 2001 WL 98581 (February 6, 2001); Cleantech Innovations, Inc., Securities Exchange Act Release No. 69968, 2013 WL 3477086 (July 11, 2013)). However, OCC fails to mention that in each of the cases it cites, there was no prejudice resulting from the denial of oral argument because the movant prevailed in the case.

<sup>8</sup> Securities Exchange Act Release No. 75885 (September 10, 2015), 80 FR 55700 (September 16, 2015).

developed through the requested discovery and referral to a hearing officer) would thus appropriately be addressed at oral argument because Petitioners did not have a prior opportunity to address this new information. The new issues raised by the Donohue Declaration include the following:

- (1) Whether the details of CBOE's less costly capital proposal were ever provided to OCC's Board, and if not, why. The Donohue Declaration states that the CBOE proposal "was discussed by the Advisory Group,"<sup>9</sup> but it does not discuss whether the proposal was ever considered by OCC's Board.
- (2) The basis utilized by the "Advisory Group" to establish the economic terms of the Capital Plan. The Donohue Declaration states that "[t]he Advisory Group developed . . . the capital plan ultimately adopted by the Board,"<sup>10</sup> but it does not discuss any factors or considerations taken into account the by the Advisory Group in doing so. Moreover, the Donohue Declaration is contradicted by OCC's own prior statement that "the Stockholder Exchanges developed" the Plan,<sup>11</sup> not the "Advisory Group," as Donohue stated.
- (3) Given that the Advisory Group was capable of formulating a purportedly compliant plan to raise liquid net assets "funded by equity," why no steps were undertaken to work with CBOE to enable its plan to so qualify. The Donohue Declaration merely states that CBOE's plan "was never developed beyond [the concept] stage [because it] . . . would not have qualified as liquid net assets 'funded by equity.'"<sup>12</sup>

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<sup>9</sup> See Declaration of Craig S. Donahue ¶ 6.

<sup>10</sup> *Id.* ¶ 7.

<sup>11</sup> See Letter from James Brown, EVP and General Counsel, OCC (February 23, 2015) at 6-7 (letter in response to market maker firms).

<sup>12</sup> See Declaration of Craig S. Donahue ¶ 6.

- (4) Whether the specific details of CBOE’s proposal were communicated to OCC. The Donohue Declaration suggests that CBOE’s proposal was “never fully developed” because “key lending terms, including but not limited to an interest rate, were never attached to it . . . .”<sup>13</sup> But the Affidavit of Joel Greenberg submitted by Petitioners reflects that CBOE’s proposal contained sufficient details to serve as a viable alternative to the proposed Plan, including a more competitive cost to OCC (8% to 9% annually).<sup>14</sup>
- (5) Whether other capital raising alternatives were reviewed by OCC’s Advisory Board. The Donohue Declaration states that the Advisory Group presented only two alternative plans to OCC’s Board. But it fails to indicate what other alternatives were presented to the Advisory Group, or explain why those alternatives were rejected.

These new issues would appropriately be addressed at oral argument, preferably after the record has been further developed through discovery and referral to a hearing officer.

In addition, as explained in Petitioners’ reply memorandum on their referral motion, OCC’s argument that its proposed Plan was the only viable alternative is based on flawed interpretations of proposed Rule 17Ad-22. This raises multiple legal questions that are appropriately addressed at oral argument to aid the Commission in its review, including: What types of funding should be considered “equity” for purposes of Rule 17Ad-22(e)(15)? Does the operational risk that OCC quantified as \$226 million need to be funded by equity based on proposed rule 17Ad-22(e)(17)? Is a commitment to provide Replenishment Capital necessary to satisfy Rule 17Ad-22(e)(15)(iii)’s “viable plan” requirement?

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<sup>13</sup> *Id.*

<sup>14</sup> See Affidavit of Joel Greenberg ¶¶ 8-12.

The factual and legal questions referred to above represent just a small fraction of the outstanding issues that the Commission should address during oral argument before deciding whether to approve a dramatic change in the operation of an organization that is the backbone of the U.S. options market. While many of the outstanding questions necessitate a referral to a hearing officer and pre-hearing discovery, oral argument after an evidentiary hearing would significantly aid the Commission's decisional process by allowing the parties to address these and other issues raised by the evidentiary hearing. Accordingly, SIG respectfully requests that its motion for oral argument be granted.

Respectfully submitted,



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