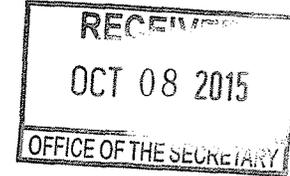


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October 7, 2015

***Via Physical Delivery***

Mr. Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

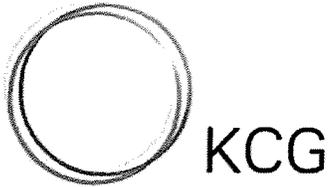
**Re: Statement in Opposition to the Order Approving OCC's Capital Plan  
File No. SR-OCC-2015-02**

KCG Holdings, Inc. ("KCG"), in response to the order of the Securities and Exchange Commission ("Commission") granting the Petitions for Review filed by KCG and other Petitioners,<sup>1</sup> submits this statement opposing the action taken by the Division of Trading and Markets ("Staff"), pursuant to delegated authority, in approving a proposed rule change by the Options Clearing Corporation ("OCC") to raise additional capital.<sup>2</sup> This statement summarizes the arguments set forth in detail in KCG's Petition for Review and alerts the Commission to relevant developments since the filing of that petition on March 20, 2015. KCG reserves the right to file a response if additional statements are submitted in this matter.

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<sup>1</sup> BATS Global Markets, Inc., BOX Market LLC, Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP, and KCG (collectively "Petitioners") each filed petitions for review in this matter.

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



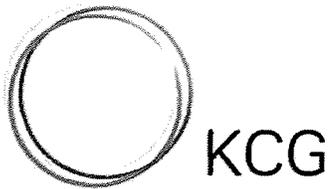
In issuing the Approval Order that authorized OCC's proposal to implement a plan to raise capital ("Plan") - despite widespread and universal opposition - the Staff permitted OCC to make a rule change that codifies an unnecessary and excessive cost structure for clearing members and investors and suppresses competition among the various options exchanges. KCG objects to the Approval Order and requests that the Commission set it aside because it conflicts with several sections of the Securities Exchange Act of 1934 ("Exchange Act") and contains material errors of fact and law. Finally, the capital infusion called for under the Plan is no longer necessary as OCC has achieved – or will soon achieve – the target capital level stated in the Plan.

\* \* \*

**The Plan Dramatically Alters the Role of OCC.** The Approval Order authorizes OCC to implement a capital raising plan that fundamentally transforms the function of OCC - from a nonprofit utility designed to operate for the benefit of clearing members, investors and the financial markets to a for-profit enterprise designed to maximize and prioritize dividend payments to a small and exclusive group of exchanges that own OCC.<sup>3</sup> This abandonment of OCC's non-profit market utility model in favor of a for-profit enterprise directly and significantly impacts OCC clearing members, public investors, and the various options exchanges that are not owners of OCC. OCC occupies a unique space in the options market as demonstrated by the following: (i) OCC's recognition as a market utility as evidenced by its designation as a Significantly Important Financial Market Utility ("SIFMU"); (ii) OCC's position as the sole options clearing house; and (iii)

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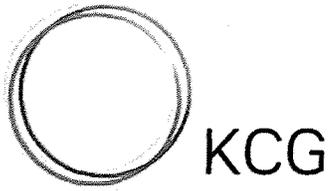
<sup>3</sup> OCC is owned by four exchange operators (CBOE, NYSE, NASDAQ, and ISE).



OCC's lack of competitive pressures with respect to setting fees arising from its monopoly position. Understanding these factors, the Commission should not permit OCC to be exploited by the four Stockholder Exchanges for their own benefit and to the detriment of the options market. The need to confirm OCC's role as a true financial market utility is especially critical at this time as it has become apparent that certain aspects of OCC governance and affairs – such as Exchange Owners' veto power over alternative capital plans, even where less expensive and more beneficial to OCC than the Plan proposed by the Exchange Owners, as well as their veto power over the issuance of equity that could dilute their OCC ownership interest - are concentrated in the hands of the Stockholder Exchanges who are clearly conflicted. This dynamic may be driving bad business decisions that are irreconcilable with OCC's role as a market utility.

**The Plan Harms OCC Clearing Members and Investors.** The Plan entitles the Stockholder Exchanges to receive annual dividends *in perpetuity* at above-market rates (estimated to be between 14% to 24% or higher). This element of the Plan has a direct and obvious impact on OCC clearing members and their customers because the excessive dividends will come from OCC's sole source of revenue, fees collected by OCC from its clearing members. Other features of the Plan also illustrate how its structure is designed to maximize and prioritize dividend payments to the Stockholder Exchanges and how these payments come at the expense of clearing members and options investors.

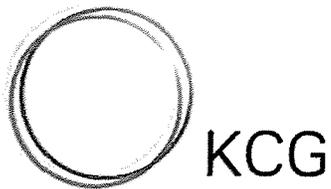
- The Plan reduces rebate payments back to OCC clearing members from excess fees paid by them from 100% to 50% and diverts the remaining 50% of excess fees paid by clearing members to fund the perpetual and excessive dividend payments slated for the Stockholder Exchanges.



- The Plan lacks a sunset provision or other mechanism designed to decrease the duration or amount of dividend payments over time.
- In calculating the amount of refund available to clearing members as a result of excess fees collected from them in 2014, the Plan removes \$72 million of excess fees as retained earnings and sets it aside towards increasing its capital. Although this is one avenue for OCC to increase capital, unlike the capital contributions to be made by the Stockholder Exchanges, however, this additional infusion of capital by members (and their customers) is not entitled to a dividend and will not be returned upon liquidation or dissolution.

These are some examples of the ways in which OCC's new for-profit structure designed to drive dividends to the Stockholder Exchanges appears incompatible with OCC's traditional role as a non-profit options market utility for the benefit of the general market.

**The Plan Fosters Unfair Competition Between Options Exchanges.** The Plan also impacts the various options exchanges, especially those remaining options exchanges that are not OCC owners. The Plan creates an un-level playing field between two groups of options exchange operators – the Stockholder Exchanges and the non-equity exchanges – as it allows dividends from clearing member fees to be used as subsidies by the Stockholder Exchanges as they compete in the options market against those exchanges that do not own equity.



**The Plan is Inconsistent with the Exchange Act.** Section 17A(b)(3)(D)<sup>4</sup> requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. The Approval Order ignored numerous concerns raised by Petitioners that the Plan's dividend structure created conflicts of interest for the Shareholder Exchanges that could influence clearing member fees. The Staff instead concluded that the SRO rule filing process would provide sufficient protection against inappropriate dividend-driven fee increases. The Staff's reliance on the SRO rule filing process was misplaced as OCC rule filings related to changes in clearing member fees will be submitted to the Commission (and decided) prior to Board determinations on dividend payments. Dividend determinations will be made much later in time and well after OCC makes a fee related rule filing with the Commission and collects fees from members, at which point there will be no opportunity for the Commission to revisit the prior fee filing and examine it for conflicts of interest or other concerns in light of the subsequent dividend payment. Accordingly the Staff erred in concluding the SRO rule filing process would provide adequate protection against dividend-driven fee increases.

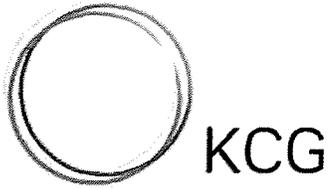
Section 17A(b)(3)(I)<sup>5</sup> provides that the rules of a registered clearing agency must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act and Section 3(f)<sup>6</sup> requires the Commission to

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<sup>4</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>5</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>6</sup> 15 U.S.C. § 78c(f)



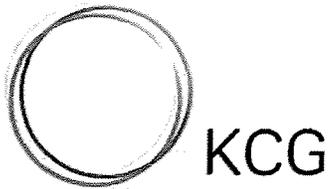
undertake a careful, reasoned assessment of the economic effects of a rule of an SRO and prohibits the Commission from imposing undue burdens on competition. Simply put, the Exchange Act obligates the Commission to conduct a careful and reasoned assessment of the economic effects of the Plan as well as its costs and benefits and, moreover, requires the Commission to scrutinize whether the Plan will promote or hinder competition.

As detailed in KCG's Petition for Review, the Approval Order makes clear that instead of performing a thoughtful and reasoned analysis of the economic effects of the Plan and its potential burden on competition, the Staff simply presumed the competitive burden to be "subjective" and unknowable.<sup>7</sup> In addition, the Approval Order also appears to indicate why the Staff may have considered a careful analysis to be unnecessary, likely because it had already concluded that any competitive burden, no matter how significant, to be necessary and appropriate. The Commission's obligations under the Exchange Act to conduct a careful and reasoned assessment prohibit such foregone conclusions. Finally, the Staff erred in deferring to the Board's "business judgment" on competition and economic effects instead of conducting its own independent analysis.

Similarly, the Staff erred in deferring to the judgment of the Board regarding the appropriateness of the dividend rate and policy in connection with the risk of the Stockholder Exchanges' equity investment. Specifically, the Staff found that "OCC has represented that the Board of Directors determined, in its exercise of business judgment

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<sup>7</sup> Approval Order at 13068.



... that the dividends were fair and in the best interests of OCC.”<sup>8</sup> In a situation such as this, where OCC has been designated a systemically important financial market utility and maintains a monopoly over options clearing, and the Stockholder Exchanges who stand to benefit exert an outsized voice on OCC’s Board, the Commission should not defer its responsibilities to determine the burden on competition by accepting the “business judgment of the Board” rationale offered by OCC.

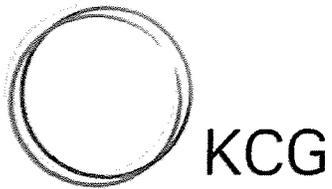
**OCC May Already Be At or Near the Target Capital Requirement.** By increasing OCC clearing member fees in 2014 and 2015, it appears OCC may have met - or be close to meeting - the \$247 million in target capital levels and thus the capital infusion called for under the Plan is no longer necessary. To avoid duplication of efforts, KCG is incorporating by reference the arguments on this point made by Petitioner SIG in its statement in opposition to the Approval Order.

\* \* \*

The Plan’s abandonment of OCC’s non-profit utility model in favor of a for-profit enterprise is not a necessary and unavoidable result of OCC’s need to increase capital to support its designation as a SIFMU. This transformation is the result of a consistent and conscious effort by the Stockholder Exchanges to lever and monetize for their sole benefit OCC’s need to increase capital in connection with its SIFMU designation. OCC’s monopoly position in the options market and its regulatory imperative to raise capital is being exploited to accomplish something otherwise prohibited by the Exchange Act –

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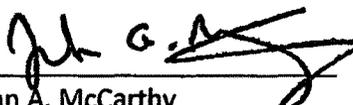
<sup>8</sup> Approval Order at 13068.



Commission approval of a rule change that codifies an excessive cost structure for OCC clearing members (and investors) and suppresses competition among the various options exchanges. The detrimental impact of OCC's Plan on the options markets will be enormous and long lasting and the Approval Order contains numerous errors of fact and law. Finally, the capital infusion called for under the Plan is no longer necessary as recent OCC fee increases paid by clearing members have achieved – or will soon achieve – the target capital level stated in the Plan.

For these reasons, KCG respectfully requests that the Commission set aside the Approval Order.

Respectfully Submitted,

  
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John A. McCarthy  
General Counsel