February 19, 2015

Brent Fields
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

**RE: The Options Clearing Corporation Proposed Rule Change Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systemically Important Financial Market Utility; Exchange Act Release No. 74136, SR-OCC-2015-02**

Dear Mr. Fields:

BATS Global Markets, Inc. ("BATS") appreciates the opportunity to comment on the above-referenced proposal from the Options Clearing Corporation ("OCC") to raise capital in connection with its designation as a systemically important financial market utility (the "Proposal"). Since 2010, BATS has operated an options exchange ("BATS Options"), which currently executes approximately 8.5% of the total daily exchange-listed options contracts. Prior to launching, BATS Options, like all options exchanges, was required to become an OCC owner participant.[1] Historically, OCC exchange participants became owners of the OCC by making a capital contribution in exchange for an equity stake in the OCC. Within the last decade, the OCC ceased allowing equity participation for new options exchange owner participants and instead required them to become "owners" by becoming noteholders. Thus, although there are currently 12 options exchanges in the U.S., the equity owners of the OCC are limited to NYSE ARCA, NYSE MKT, the CBOE, the ISE, and NASDAQ PHLX. The remaining options exchanges – BATS Options, NASDAQ Options, NASDAQ BX, BOX, C2, Gemini, and MIAX, are non-equity note-holders of the OCC.

Currently, the OCC sets fees to its clearing members at a level that is designed to cover its operating expenses and maintain capital reserves as the OCC deems necessary to meet its obligations. As a non-profit industry utility, the OCC in turn refunds to its members annually any fees collected in excess of its operating expenses and capital obligations. Pursuant to the Proposal, the OCC would amend its by-laws and several governing documents to allow the OCC to raise significant new capital and pay dividends for the first time to its stockholder exchange participants. As planned under the Proposal, the existing OCC equity stockholders would contribute additional capital, and in exchange for that contribution, those equity stockholders would receive an annual dividend (subject to the OCC's compliance with its capital requirements) for so long as those exchanges continued to be equity stockholders. As a result of the dividend proposed to be paid to the equity owner exchanges, the amount of any refunds of

[1] See Exchange Act Release No. 61419 (January 26, 2010) (Order approving the rules governing the trading of exchange-listed options on BATS Options).

excess capital to clearing members will be reduced, and could be eliminated in certain circumstances.

While BATS does not take issue with the OCC's need to raise capital, BATS does object to the process the OCC has undertaken to meet those needs. In particular, BATS does not believe the OCC's rule filing comports with the requirements of the Exchange Act of 1934 ("Act"). BATS believes the OCC's Proposal fails to adequately address the potential burden on competition presented by its capital raising plan.[2] In addition, BATS objects to the OCC's request for accelerated effectiveness given the important policy issues at stake in the Proposal.

## I. Burden on Competition

The Proposal falls short in its analysis of the burden on competition, stating only:

> OCC does not believe that the proposed rule change would impose any burden on competition. OCC believes that the proposed rule change would not unfairly inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another user because the proposed changes relate to OCC's plan for raising and maintaining adequate capital from its owner exchanges, and therefore do not affect clearing members' or others' access to OCC's services or the nature of these services.[3]

While it is true that as between OCC clearing members, the Proposal does not disadvantage or favor any particular clearing member in relationship to other clearing members, the same cannot be said of the options exchanges that are required to be OCC owner participants. In this regard, the Proposal fails to analyze the competitive implications of the OCC's capital-raising plan on non-equity owner options exchanges that are neither being asked to contribute capital nor will consequently receive dividends from the OCC. To the extent the issue of disparate treatment between options exchanges is addressed at all, the OCC gives it short shrift noting only that "Stockholder Exchanges will benefit [by the Proposal] from the dividend return they receive and . . . Non-Stockholder Exchanges will also benefit by continuing to receive the OCC's clearing services for their products on the same basis as the presently do."[4]

The Proposal completely fails to address the competitive burden on non-equity owner exchanges that is presented by the OCC's plan to pay dividends, in perpetuity, to a select group of options exchanges. The stream of revenue flowing to this select group of stockholder options exchanges will be used to subsidize the cost of execution services those exchanges provide to their members and, hence, provide them with a competitive advantage over non-equity owner

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[2] See Rule 17A(b)(3)(I) under the Act, requiring that the rules of a clearing agency not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title".

[3] Exchange Act Release No. 74136 (January 26, 2015) at p. 31.

[4] Id. at pp. 18-19.

exchanges. The extent of this competitive advantage is unknown – other than the fact that the dividends will be paid in perpetuity, the dollar amounts associated with the dividends are redacted from the publicly-available filing. Without an understanding of the reasonableness of the planned return on the stockholder exchanges' capital investment, it is impossible for commenters to assess the extent of the competitive disadvantage.

Had the Proposal properly addressed this competitive burden, then the OCC should have been required to address the potential alternatives to its proposed capital-raising plan, such as raising capital from its clearing members, offering non-equity owner exchanges the opportunity to become stockholders and participate on a level playing field with respect to the receipt of dividends, or raising capital from other third party investors. In fact, had the OCC subjected its capital-raising needs to a competitive process, the OCC could have reduced the cost of raising capital in the first instance, which would ultimately benefit its clearing members through lower fees and/or higher refunds.

Instead, with no discussion of possible alternatives, the Proposal is presented as the only viable option, and the OCC makes several specious points in arguing that the Commission should approve it. First, the OCC alleges that its capital raising plan, with dividends paid to stockholder exchanges, better aligns with an industry utility model than the existing model under which excess fees are refunded to the OCC's clearing members. This cannot be true. The rationale for this allegation is simply that, according to the OCC, under the current model "possibly a significant portion – of those refunds are not passed through by the clearing members to their end user customers." Setting aside the puzzling juxtaposition of these two points, whether OCC refunds are explicitly passed back to customers in the form of rebates or implicitly passed back through fee reductions, BATS believes that it would be hard to argue that customers receive no benefit from OCC refunds to clearing members.[5] In any event, the OCC's plan to pay dividends to stockholder exchanges instead of paying refunds to OCC clearing members, the actual users of the OCC's services, does not reflect a better alignment with an industry utility model.

Second, the OCC alleges that the capital-raising plan, with dividends paid to for-profit stockholder exchanges, better aligns the interests of stockholder exchanges and clearing members with respect to expenses. Again, this is a puzzling statement that cannot possibly be true. Today the stockholder exchanges do not receive any dividends and their sole concern in connection with their relationship to the OCC is maintaining the viability of the OCC as a going concern with reasonable fees to clearing members. Under the capital-raising plan, the stockholder exchanges will, for the first time, be concerned about the OCC's profitability and those concerns will put pressure on clearing member fees. To address this argument, the OCC notes that any increase in actual operating expenses will cause a corresponding increase in the OCC's target capital requirements and, hence, may require additional replenishment capital from the stockholder exchanges. But, while true, that fact does not change the inherent dynamic of this radical new arrangement with the stockholder exchanges, a dynamic that will undoubtedly

[5] The market for the provision of options clearing broker services is a competitive one; a fact that seems to be lost on the OCC, which admittedly does not have experience operating under competitive dynamics.

put pressure on the OCC to increase its earnings to fund dividends. In addition, under the capital-raising plan, if the stockholder exchanges are required to contribute replenishment capital, repayment of that replenishment capital is given priority over any refunds to clearing members, and under certain circumstances the contribution of replenishment capital can cause the complete elimination of clearing member refunds.[6] Hence, the OCC's alleged alignment between the stockholder exchanges and the clearing members is simply fictional.

The OCC is not, however, blind to the potential misalignment of the interests of stockholders who receive dividends and the OCC's clearing member users when the OCC finds it convenient to acknowledge that misalignment. The OCC does this in the Proposal by contrasting the benefits of keeping the capital raise and dividend stream within the existing stockholder exchanges, which though for-profit companies, must be puritanical in their intentions as compared to the potentially sinister "demands of outside investors."[7] The implied threat appears to be that if the OCC opens up the capital raise to outside investors those investors would demand things that the existing for-profit stockholder exchanges will not. We are left to imagine the parade of horribles this may be, but presumably it would include obtaining the highest possible return on their capital investment, which as we explained in the last paragraph will be the demand of the stockholder exchanges as well (to the detriment of the OCC clearing members). At the very least, the OCC should be required to articulate what it believes the demands of outside investors would be, how they would differ from the demands of the existing for-profit stockholder exchanges, and why, on balance, accepting outside investment through a competitive process that could reduce the OCC's cost of capital (to the benefit of its clearing members) is worse than the current Proposal.[8]

## II. Request for Accelerated Effectiveness

The OCC has requested accelerated effectiveness of its Proposal to ensure that it is effective by February 27, 2015, just seven days after the expiration of the comment period. To support this request, the OCC argues that good cause exists for accelerated approval because it

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6 Exchange Act Release No. 74136 at p. 15 ("If, within 24 months of the issuance date of any Replenishment Capital, such Replenishment Capital has not been repaid in full or shareholders' equity has not been restored to the Target Capital Requirement, OCC would no longer pay refunds to clearing members, even if the Target Capital Requirement is restored and all Replenishment Capital is repaid at a later date.").

7 Id. at p. 18 ("Stockholder Exchanges will benefit from the dividend return they receive and, perhaps more importantly, they will be assured that OCC will be in a position to provide clearing services for their markets on an on-going basis within the same basic structure that has served these markets well since their inception and without the need to radically change the structure to address potential demands of outside equity investors.").

8 We recognize that the Act does not require the OCC to put forward the "best" possible plan; rather, the plan that it puts forward must simply comply with the Act regardless of whether there are better alternatives. Where, as here, however, the OCC has put forward a plan that raises significant competitive concerns, BATS believes the OCC must conduct an analysis of potential alternatives that would mitigate those competitive concerns.

"will allow OCC to strengthen its capital position . . . earlier than would otherwise be the case."[9] While axiomatic in the context of a proposal to raise capital, BATS submits that this reasoning fails to support the OCC's request for accelerated approval. BATS notes that the primary regulation necessitating the capital raise has not even been approved yet. Proposed Rule 17Ad-22(e)(15) under the Act, which the OCC cites in the Proposal as the regulation its capital plan is intended to comply with, is currently pending Commission action. As such, and given the significant policy issues raised, but not addressed, by the Proposal, BATS submits that the OCC's request for accelerated effectiveness should be denied.

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BATS appreciates the opportunity to comment on the Proposal. As discussed above, BATS believes the OCC's rule filing is deficient in its failure to analyze the competitive burden it places on non-equity owner exchanges and its failure to discuss the viability of alternative means to raise capital. BATS also believes the OCC has failed to present good cause for accelerated approval. BATS respectfully requests that the SEC disapprove the Proposal, or at a minimum, require the OCC to substantively amend its Proposal to address these concerns. Please feel free to contact me at (913) 815-7000 if you have any questions related to this matter.

Sincerely,

Eric Swanson
General Counsel & Secretary

Cc: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner
Stephen Luparello, Director, Division of Trading and Markets
Mr. Gary L. Goldsholle, Deputy Director, Division of Trading and Markets
David S. Shillman, Associate Director, Division of Trading and Markets

[9] SR-OCC-2015-02 at p 39.