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April 2, 2015

By Federal Express and Facsimile

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090
Facsimile: 202-772-9324

Re: Re: The Options Clearing Corporation ("OCC") Motion to Lift Stay and Brief in Support of Motion to Lift Stay, File No. SR-OCC-2015-02

Dear Mr. Fields:

The Options Clearing Corporation ("OCC") hereby files the enclosed Motion to Lift Stay and Brief in Support of Motion to Lift Stay. The original and four copies are enclosed. Please return a file stamped copy in the self-addressed stamped envelope.

The enclosed Motion to Lift Stay and Brief in Support of Motion to Lift Stay have been served by facsimile on each party of the proceeding in accordance with 17 C.F.R. § 201.150, and as reflected in the Certificate of Service attached to each.

Very truly yours,

William J. Nissen

WJN:sn

Enclosures

cc: Division of Trading and Markets *(by facsimile 202-772-927) (w/ encl.)*
Petitioners *(by facsimile) (w/ encl.)*

SECURITIES AND EXCHANGE COMMISSION

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

MOTION TO LIFT STAY

Pursuant to Rule 154[1] of the Rules of Practice, The Options Clearing Corporation ("OCC") hereby moves the Commission to lift the automatic stay that was triggered, pursuant to Rule 431(e)[2] of the Rules of Practice, by the Notices of Intention to Petition for Review of the Commission's March 6, 2015 Order.[3]

As explained in detail in the supporting brief, it is critical to OCC, and to the financial system generally, that the automatic stay be lifted to enable OCC to implement the Capital Plan that was the subject of the rulemaking approved by the Order. The automatic stay has abruptly stopped OCC from moving forward with implementation of the Capital Plan, to the serious detriment of the securities industry and the financial system. By preventing implementation, the stay is harming the securities markets, the participants in those markets, and the overall financial system by depriving them of the benefits of the Capital Plan, including increased equity capital held by OCC, immediate access to replenishment capital if needed, and reduced fees for participants. The Order approving OCC's Capital Plan was issued after the Commission itself

[1] 17 C.F.R. § 201.154.
[2] 17 C.F.R. § 201.431(e).
[3] SEC Order Approving 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. 34-74452, 80 Fed. Reg. 13058 (Mar. 12, 2015) (approving SR-OCC-2015-02) ("Order").

had issued a "no objection" notice to the Capital Plan pursuant to an advance notice filing under the Payment, Clearing, and Settlement Supervision Act of 2010. The Order reflects extensive review and analysis by the Commission's staff following a public comment period in which full consideration was given to the opposing views of the Petitioners. Due to the pressing need of OCC for a strengthened capital structure in order to meet its obligations as a systemically important financial market utility, and to be prepared to meet future Commission requirements and satisfy global standards for central counterparties, the Commission should not permit implementation of the Capital Plan to be further delayed. The stay should be promptly lifted so that OCC can proceed in accordance with the Order.

Wherefore, OCC prays for an order of the Commission lifting the automatic stay of the Commission's March 6, 2015 Order.

THE OPTIONS CLEARING CORPORATION

By: William J. Nissen

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Dated: April 2, 2015

CERTIFICATE OF SERVICE

I, William J. Nissen, counsel to The Options Clearing Corporation (OCC), hereby certify that on April 2, 2015, I served copies of the attached Motion to Lift Stay by way of facsimile on the parties and sent the original and three copies by Federal Express and by facsimile to the Secretary at the following addresses:

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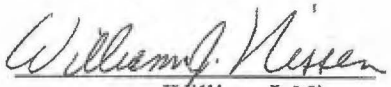
Dated: April 2, 2015



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SECURITIES AND EXCHANGE COMMISSION

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

BRIEF IN SUPPORT OF MOTION TO LIFT STAY

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On March 6, 2015, the Commission issued an Order approving a rule change that enabled The Options Clearing Corporation ("OCC") to implement its Capital Plan.[1] That Order, however, was automatically stayed on March 13, 2015 when notices of intent to seek review were filed. The stay is causing irreparable harm to OCC, the financial system and the public, because the stay is preventing OCC from strengthening its capital structure to satisfy its obligations as a systemically important financial market utility ("SIFMU").[2] As reflected in the comments filed by OCC in the rulemaking proceeding, OCC's Board and management have determined that OCC's capital is too low to meet its obligations as a SIFMU. The Capital Plan would significantly increase OCC's capital resources by providing an immediate infusion of substantial additional equity capital of $150 million, plus the availability of additional replenishment capital if needed. However, as long as the stay remains in effect, OCC cannot proceed to implement its Capital Plan, leaving it vulnerable to the types of economic shocks that the Capital Plan is designed to address.

The stay is causing additional ongoing harm by preventing OCC from accomplishing other objectives as well. Implementation of the Capital Plan would enable OCC to comply with proposed increased capital requirements that are expected to be imposed by the Commission.[3] The Capital Plan would also give OCC the ability to comply with the international standard reflected in Principle 15 of the Principles for Financial Market Infrastructure, which requires that a central counterparty such as OCC have sufficient liquid net assets, funded by equity, to cover

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[1] SEC Order Approving 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. 34-74452, 80 Fed. Reg. 13058 (Mar. 12, 2015) (approving SR-OCC-2015-02) ("Order").

[2] OCC has been designated as a systemically important financial market utility by the Financial Stability Oversight Council pursuant to the Payment, Clearing and Settlement Supervision Act.

[3] Standards for Covered Clearing Agencies, Exchange Act Release No. 34-71699, 79 Fed. Reg. 29508 (May 22, 2014).

potential business losses that may occur at any time without prior warning.[4] Finally, the stay is preventing OCC from implementing its new Fee Policy, which will provide lower fees to market participants, and from deciding on whether and when to pay the $33.3 million refund of 2014 fees approved by OCC's Board in December 2014.

The issuance of the Order was the last regulatory approval needed for OCC to begin implementing the Capital Plan. Before the Order was issued, OCC had made an advance notice filing under the Payment, Clearing, and Settlement Supervision Act of 2010, and the Commission had issued a notice of no objection, leaving the approval of the proposed rule change as the only remaining requirement.[5] The Order granted that approval, but was automatically stayed before the Capital Plan could be fully implemented. A lifting of the stay will permit full implementation, which will immediately strengthen OCC's capital structure with substantial additional equity capital, access to additional replenishment equity capital if needed, a "business risk buffer" amount to be covered by fees, and a lower fee structure for market participants. By preventing OCC from going forward with the Capital Plan, the automatic stay is harming the securities markets—and the financial system in general—by depriving them of the necessary protections, as well as the significant benefits, of the Capital Plan.

Our financial system will suffer irreparable harm as long as the automatic stay remains in place, as OCC will be in weaker position to deal with any unexpected financial crises than if the Capital Plan were fully implemented. The automatic stay was imposed without any determination by the Commission that a stay was appropriate. As explained below, when the factors governing the issuance of stays are considered, however, it is clear that the stay would not

[4] Principle 15, General Business Risk, Principles for Financial Market Infrastructures, Comm. on Payment and Settlement Sys. & Bd. of the Int'l Org. of Secs. Comm'ns (April 2012).
[5] *See* SEC Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387, 80 Fed. Reg. 12215 (Mar. 6, 2015) (relating to SR-OCC-2014-813).

have been ordered if it had been considered, and that it therefore should be lifted. Any continuation of the automatic stay would be baseless, hamper OCC's access to necessary replenishment capital, and compromise the stability of OCC, the U.S. equity options industry and, potentially, our economic systems.

Background

On January 24, 2015, OCC submitted its proposed rule change to enable it to implement its Capital Plan. OCC stated in its proposal that it intended to implement the Capital Plan on or after February 27, 2015, subject to regulatory approvals. Under the Capital Plan, the options exchanges owning equity in OCC ("Stockholder Exchanges") would each make a substantial additional contribution to OCC's current capital and commit to provide additional replenishment capital ("Replenishment Capital") under certain circumstances. In addition to the new capital contribution and the Replenishment Capital commitment, the Capital Plan includes (i) a policy establishing OCC's clearing fees at a level that would be sufficient to cover OCC's estimated operating expenses in addition to a "Business Risk Buffer" ("Fee Policy"), (ii) a policy establishing the amount of the annual refund of OCC's fees to clearing members ("Refund Policy"), and (iii) a policy for calculating the amount of dividends to be paid to the Stockholder Exchanges ("Dividend Policy"). OCC will annually determine a target capital requirement ("Target Capital Requirement") using a baseline capital requirement calculated by a formula, and a target capital buffer linked to plausible loss scenarios.

In addition to filing the proposed rule change, OCC filed the proposal for the Capital Plan with the Commission as an advance notice pursuant to the Payment, Clearing, and Settlement

Supervision Act of 2010. On February 26, 2015, the Commission issued a notice of no objection to the advance notice filing. In that notice, the Commission stated:

> Given that OCC has been designated as a systemically important financial market utility, OCC's ability to provide its clearing services if it suffers business losses contributes to reducing systemic risks and supporting the stability of the broader financial system. In so doing, OCC's Capital Plan is consistent with the objectives of Section 805(b) of the Payment, Clearing and Settlement Supervision Act, which are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.[6]

On March 6, 2015, the Commission's Division of Trading and Markets ("Staff") issued the Order pursuant to delegated authority, approving the rule change needed to implement the Capital Plan. Upon approval, the first steps of the Capital Plan were achieved by the immediate contribution of additional capital by the Stockholder Exchanges, and the amendment of OCC's Certificate of Incorporation, Stockholders Agreement, and By-Laws. OCC thereafter intended to continue to implement the other provisions of the Capital Plan and the associated Fee Policy and Refund Policy, which would provide a lower fee structure for market participants and the opportunity for a $33.3 million refund of 2014 fees.

On March 13, 2015, however, BATS Global Markets, Inc. ("BATS"), BOX Options Exchange LLC ("BOX"), KCG Holdings, Inc. ("KCG"), Miami International Securities Exchange, LLC ("MIAX"), and Susquehanna International Group, LLP ("SIG") (collectively, "Petitioners"), filed Notices of Intention to Petition for Review of the Order ("Notices") under Commission Rule of Practice 430(b)(1).[7] Under Rule 431(e), upon the filing of these Notices, the Order was automatically stayed, and OCC has therefore been prevented from further implementation of its Capital Plan and the Fee and Refund Policies, notwithstanding the

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[6] *Id.* at 12221.
[7] 17 C.F.R. § 201.430(b)(1).

Commission's no objection notice to the advance notice filing, which provided that implementation could begin as soon at the Order was issued.[8]

The Petitioners have all subsequently filed Petitions for Review ("Petitions"). The Petitions advance various objections to the Order, which were previously raised in comment letters and which the Staff thoroughly considered before rejecting them for sound reasons and issuing the Order. Nevertheless, until the Commission takes affirmative action to lift the stay, it remains in effect and prevents OCC from implementing its Capital Plan. As long as the automatic stay continues, it will deprive the securities markets and the financial system of the significant contribution the Capital Plan will make to enhancing OCC's economic safety and soundness, and financial stability, as recognized in the Commission's no objection notice.

Argument

The financial stability, integrity, and capacity of OCC to operate effectively are of critical importance to the securities markets and our financial system generally. Implementation of OCC's Capital Plan is key to OCC's ability to address its capital needs going forward, which are subject to increase as a result of its SIFMU designation, proposed new regulatory capital requirements and unpredictable business and operational risks. Lifting the automatic stay is necessary to give OCC the means to be prepared for these future needs, which could arise at any time.

The Commission has authority to lift the stay under Commission Rule 431(e). The factors that the Commission considers in determining whether to continue or lift a stay are well established.[9] These factors are: (1) whether there is a strong likelihood that a party will succeed

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[8] 17 C.F.R. § 201.431(e).

[9] *See, e.g.*, *see also In the Matter of Am. Petroleum Inst.*, Release No. 34-68197, 2012 WL 5462858, at *2 (S.E.C. Nov. 8, 2012); *In the Matter of the Application of Marshall Spiegel for Stays of Commission Orders Approving*

on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer imminent irreparable injury; (3) whether there will be substantial harm to any person if the stay were continued; and (4) whether the stay would likely serve the public interest.[10] Applying these factors, it is evident that the automatic stay should not be allowed to remain in effect.

1. Petitioners Do Not Have a Strong Likelihood of Success in Obtaining Review and Reversal of the Order

Petitioners do not have and cannot demonstrate a strong likelihood of success on their Petitions. The Staff thoroughly considered OCC's rule submission, and following review of seventeen detailed comment letters and responses, issued its forty-seven page Order approving the proposed rule change and finding that it "is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency."[11] The Order states the objections that were advanced by opponents of the proposed rule change, states OCC's responses to those objections, analyzes the objections in detail, and rejects the objections after full consideration. Indeed, the Order specifically notes that while the commenters raised a number of substantive points, the Staff was not persuaded that these concerns rendered OCC's Capital Plan inconsistent with the Securities Exchange Act of 1934 ("Act") and the applicable

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Proposed Rule Changes by the Chicago Bd. Options Exchange, Inc., Release No. 52611, 2005 WL 2673495, at *2 (S.E.C. Oct. 14, 2005); *Institutional Networks Corp.*, Release No. 25039, 1987 WL 756909, at *1 (S.E.C. Oct. 15, 1987) (considering whether automatic stay was "in the public interest and [had] the potential to harm" under previous version of Rule 431(e)).

[10] Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Release No. 33870, 1994 WL 117920, at *1 (S.E.C. Apr. 7, 1994) ("Order on Stay Guidelines").

[11] Order, at 38.

rules and regulations thereunder.[12] Simply put, the comments failed to persuade the Staff that it should withhold approval of the Capital Plan for any reason.

Furthermore, the Commission itself has reviewed OCC's Capital Plan in connection with OCC's advance notice filing, and has determined as follows that the Capital Plan will achieve important protections for OCC and the broader financial system:

> The Capital Plan will provide OCC with an immediate injection of capital and future committed capital to help ensure that it can continue to provide its clearing services if it suffers business losses as a result of a decline in revenues or otherwise. Given that OCC has been designated as a systemically important financial market utility, OCC's ability to provide its clearing services if it suffers business losses contributes to reducing systemic risks and supporting the stability of the broader financial system.[13]

The Petitioners' arguments in support of their Petitions largely restate arguments previously presented to, and rejected by, the Staff and the Commission. As a result, none of the arguments advanced in the Petitions presents a strong likelihood of success. *Cf. Bradford Nat'l Clearing Corp. v. Secs. & Exch. Comm'n*, 590 F.2d 1085, 1107 (D.C. Cir. Sept. 19, 1978) (noting the "broad authority" of the Commission in evaluating claims of anticompetitive impact).

a. Petitioners do not have a strong likelihood of success on their argument that the Capital Plan would impose an undue burden on competition.

The non-Stockholder Exchanges argue that the Capital Plan is inconsistent with Section 17A(b)(3)(I) of the Act on the ground that it would create an undue burden on competition. Their arguments are that the dividends to be paid to Stockholder Exchanges pursuant to the Capital Plan are (1) excessive and (2) create a burden on competition by allowing the Stockholder Exchanges to use dividend income to enhance their pricing power. Both arguments lack logical and economic substance.

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[12] *Id.* at 38-39.

[13] *See* SEC Notice of No Objection to Advance Notice Filing, *supra* n. 5.

The argument that the dividends will be excessive is refuted by the following:

- $150 million in capital will be contributed by the Stockholder Exchanges;
- There are future required incremental contributions to capital by the Stockholder Exchanges;
- The Stockholder Exchanges have Replenishment Capital commitments of up to $200 million;
- The Stockholder Exchanges are undertaking investment risks inherent in the capital contribution and Replenishment Capital commitments; and
- The Stockholder Exchanges' weighted average cost of capital and internal hurdle rates justify the dividends.

The argument that the Stockholder Exchanges will use dividends to enhance their pricing power lacks economic substance because the constrained dividend stream is minuscule in relation to total industry fee-based revenues. To illustrate:

- OCC estimates that total fee-based revenues in the U.S. options industry are $1.6 - $2 billion per annum[14];
- Current annual industry volume is approximately 4.5 billion, yielding an average per-side exchange fee of $.18 - $.20;
- The post-tax dividend distribution is estimated for the next 10 years to be in the $22 - $30 million range[15];
- As divided into 20% shares, this dividend gives an exchange with a 20-30%

[14] Market share was determined by actual OCC figures in 2013 and financial statements for one publicly traded financial exchange, which provide the most transparency of financial results. This data was then extrapolated to estimate the total fee-based revenues in the industry.

[15] Although OCC's models showed a lower range of potential dividend returns, the analysis assumes, for purposes of argument, that the range would be higher than what OCC's models show.

market share an absolute fee reduction ability, if 100% of the dividend is used to subsidize fees, of approximately 1.0%-1.5% ($0.0018-$0.003); and

- Further, when the Stockholder Exchanges' weighted average cost of capital is considered, the potential for price reduction is reduced to approximately 0.30%-0.90% ($0.00054-$0.0018).

Given the constrained dividend structure and the lost economics associated with required future incremental contributions to capital, refunds to clearing members, and taxes, the Stockholder Exchanges could achieve greater pricing power by simply using the same capital to increase market share through price competition. If a Stockholder Exchange with 20% market share invested $30 million (20% share of the $150 million) in reducing its own fees, it could reduce per-side fees by approximately $.01 or 5% in comparison to between only three-tenths and nine-tenths of one percent. Alternatively, a Stockholder Exchange could match the pricing power of the dividend by applying $30 million in "dividend matching" increments for a period of 7-10 years or longer, depending on the returns generated from investment reserves not yet applied to price competition.

OCC showed in the comment process that the dividend will reflect the risk-adjusted cost, as determined by OCC's Board in the exercise of its business judgment, of capital needed for OCC to fulfill its obligations as a SIFMU. Therefore the dividend will not be a burden on competition, but rather a cost of doing business, with OCC receiving the capital it needs, and the Stockholder Exchanges receiving compensation for making substantial capital contributions and Replenishment Capital commitments with commensurate equity investment risks. Dividends will be determined and paid to the Stockholder Exchanges only after OCC's capital needs are met, the amount of fees to be refunded is decided and taxes owed by OCC at the corporate level

have been accrued. The remainder, after retention by OCC of the Business Risk Buffer, which is also needed to protect OCC's capital position, would be reflected in reduced fees and/or fee refunds.

Concluding that the Capital Plan imposes no undue burden of competition, the Staff specifically observed that, even if there were some burden on competition, any such burden is both "necessary" and "appropriate" because of the importance of the Capital Plan in maintaining OCC's ability to perform its functions:

> Given the critical role that OCC plays in the U.S. options market and its designation as a systemically important financial market utility, the Commission believes that it is both necessary and appropriate for OCC to obtain and retain sufficient capital to ensure its ongoing operations in the event of substantial business losses. While the precise magnitude and incidence of any burden that exists in this case is necessarily subjective, the Commission believes that, even if OCC's Capital Plan may result in some burden on competition, such a burden is necessary and appropriate in furtherance in the purposes of the Act given the importance of OCC's ongoing operations to the U.S. options market and the role of the Capital Plan in assuring its ability to facilitate the clearance and settlement of securities transactions in a wide range of market conditions.[16]

Petitioners criticize the Staff for not being more specific about the magnitude of any competitive burden.[17] One Petition argues that the Staff's finding that the Capital Plan does not produce an undue burden on competition "is not supported by the record."[18] Petitioners themselves, however, did not provide specific evidence of the burden on competition in their comments. SIG's Petition now includes a table, not submitted in the comment process, which purports to show that the dividend would provide an "exorbitant rate of return" to the Stockholder Exchanges.[19] This table, however, is based on incorrect assumptions and faulty

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[16] Order, at 45.
[17] KCG Petition for Review of Exch. Release No. 74452, at 8 (Mar. 20, 2015) ("Petition"); *see also* BATS Petition, at 10-11 (Mar. 16, 2015); BOX Petition, at 13-14 (Mar. 20, 2015).
[18] MIAX Petition, at 10 (Mar. 20, 2015).
[19] SIG Petition, at 9-11 (Mar. 20, 2015).

analysis, and therefore should not be given any weight for the following reasons:

- Expense Growth Rate: SIG assumes an 8.0% compound annual growth rate for expenses from 2015 to 2022, which is far in excess of the 2.3% annual expense growth rate that OCC projected internally when developing the Capital Plan. SIG's incorrect assumption is based on a misinterpretation of OCC's statement that its Baseline Capital Requirement would not exceed $200 million before 2022. This statement only described a "not to exceed" level, and not an expected level.
- Rate of Return: In calculating the rate of return, SIG included the projected increase in OCC's book value over time. This is not a valid component of the rate of return, because the Stockholder Exchanges have no effective means to realize any value as a result of an increase in OCC's book value. OCC attributes no value to this increase in book value.
- Tax Rate: SIG assumes a 30% tax rate; OCC assumes a 35% tax rate.
- Dividend Tax: SIG does not take into account the 12% tax the Exchanges will have to pay on the dividends.

For these reasons, the Staff correctly concluded that, if there is any competitive burden, it is not undue and it is outweighed by the need for OCC to obtain and retain the capital that the Capital Plan will provide. The Staff's conclusion is therefore unlikely to be reversed by the Commission, and accordingly, Petitioners do not have a strong likelihood of success on their "undue burden on competition" argument.[20]

[20] *See Bradford Nat'l Clearing Corp.*, 590 F.2d at 1105 n.32 (noting that the Commission has no obligation "to justify that [the] actions [at issue] be the least anti-competitive manner of achieving a regulatory objective").

b. Petitioners do not have a strong likelihood of success on their argument that fees and charges would be inequitable and unreasonable.

Petitioners argue that fees and charges associated with the Capital Plan would be excessive and therefore inconsistent with Section 17A(b)(3)(D) of the Act, which requires the equitable allocation of dues, fees, and other charges. Two Petitioners argue that the dividend structure will unfairly influence the level of clearing member fees, and one says that the payment of the dividend and retention of "unnecessary and excessive capital" would reduce the amount that could otherwise be used for reduced fees.[21] But these arguments lack merit because there is a need for additional capital[22]—and there is a risk-adjusted cost for the additional capital—so it is necessary, not inequitable or unreasonable, for those costs to be reflected in the fees charged. Moreover, the alternative considered by OCC's Board, which would not have resulted in timely compliance, would have required a 162% increase (in addition to 2014's 66% increase) in fees to accumulate the necessary capital over time.

Future fees are required to be consistent with the Fee Policy approved by the Commission. OCC's Board, acting by itself or through a committee, will be required to follow this Fee Policy. Also, as explained in the comment process by OCC, any changes to its fee schedule must be filed with the Commission and could be summarily suspended if they are not consistent with the Fee Policy or if it otherwise appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. Similarly, any changes to OCC's Refund, Dividend, and Fee Policies would require a filing with the Commission, and would be subject to Commission

[21] SIG Petition, at 21; KCG Petition, at 7.

[22] The need for additional capital was acknowledged by four of the Petitioners in comment letters filed by them in the rulemaking process. *See* KCG Comment Letter, to Commission, at 2 (Feb. 26, 2015); SIG, et al., Comment Letter, to Commission, at 2 (Feb. 20, 2015); BATS Comment Letter, to Commission, at 2 (Feb. 19, 2015); BOX Comment Letter, to Commission, at 1 (Feb. 19, 2015).

review and approval after public comment. In addition, a majority of OCC's Board, which would necessarily include directors other than those associated with the Stockholder Exchanges, would be required to approve each year's budget. Petitioners argue that the requirement for fee changes to be filed with the Commission is insufficient protection.[23] But this is the process established by law for the review of fees, and the Staff correctly concluded that this process for Commission review and approval will ensure that any changes in fees or in the Fee Policy, Refund Policy, or Dividend Policy will meet regulatory requirements.[24]

The Staff specifically concluded that the Capital Plan was consistent with Section 17A(b)(3)(D) of the Act, and noted that the concerns expressed about possible future fees did not convince the Staff that the Capital Plan was inconsistent with providing for the equitable allocation of reasonable dues, fees, and other charges among its participants.[25] In support of this conclusion, the Staff also referred to OCC's explanation that the Stockholder Exchanges will have an incentive to keep fees low because higher operating expenses will result in an increased Target Capital Requirement, which in turn will require capital contributions to be withheld from both dividends and fee refunds.[26] In addition, the Staff concluded that various features of the Capital Plan would work together to ensure that fees would be as low as possible consistent with maintaining sufficient capital and covering projected operating costs.[27] These features include the Business Risk Buffer, which ensures that fees will be sufficient to cover projected operating expenses, and the Refund Policy and Dividend Policy, which permit refunds of fees and payment of dividends only to the extent that shareholders' equity is maintained at the Target Capital

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[23] KCG Petition, at 7; *see also* SIG Petition, at 5, 20-21.
[24] *See* Order, at 41-42.
[25] *See* Order, at 38, 40-41.
[26] *See* Order, at 41 n.96.
[27] *See* Order, at 42-43.

Requirement, and the prohibition of refunds and dividends when OCC is rebuilding its capital base after Replenishment Capital is posted.[28]

In its notice of no objection to the advance notice filing, the Commission found that fees will be reduced as a result of the Capital Plan:

> The reduction in buffer margin from OCC's 10-year average of 31% to 25% reflects OCC's commitment to operating as an industry utility and ensuring that market participants benefit as much as possible from OCC's operational efficiencies in the future. This reduction will permit OCC to charge lower fees to market participants rather than maximize refunds to clearing members and dividend distributions to Stockholder Exchanges.[29]

For the foregoing reasons, the Petitioners do not have a strong likelihood of success on their argument that fees and charges associated with the Capital Plan would be inequitable or unreasonable.

c. Petitioners do not have a strong likelihood of success on their argument that the Capital Plan should be disapproved on the ground that it is a departure from the industry utility model.

Petitioners argue that the Capital Plan improperly converts OCC from a traditional industry utility model to a for-profit model that maximizes returns for the Stockholder Exchanges.[30] In the comment process, OCC explained that because the proposal refunds 100% of the excess funds that are not required to be paid to fund capital requirements or replenishment commitments, it is consistent with the industry utility model. Moreover, as the Commission noted in its notice of no objection to the advance notice filing, the Capital Plan is based on a lower operating margin target of 25% versus 31%, and thus reduces fees charged in the first instance, as opposed to after-the-fact refunds where some customers will not receive a pass-

[28] *See id.*
[29] *See* SEC Notice of No Objection to Advance Notice Filing, *supra* n. 5.
[30] *See* KCG Petition, at 5.

through of the refund.[31] Finally, the argument that OCC is departing from an industry utility model would not provide a legal basis for disapproving the proposed rules, even if it were a valid observation, which OCC strongly believes that it is not. Accordingly, Petitioners do not have a strong likelihood of success on this argument.

d. Petitioners do not have a strong likelihood of success on their argument that the Capital Plan should be disapproved on the ground that alternative means of raising capital were not adequately considered.

Petitioners also argue that the Capital Plan fails to adequately consider the viability of alternative means of raising capital. In particular, Petitioners assert that the Order "does not consider the multiple and less-expensive alternative capital raising plans described by commenters" and that, as a result, "there is no basis for finding that the burden imposed by the Capital Plan is necessary or appropriate."[32] As explained by OCC in the comment process, OCC's Board considered several potential alternatives in a nearly year-long process, and determined that the Capital Plan was the most viable and in the best interests of OCC. Furthermore, OCC's range of alternatives was limited by existing shareholders' rights, together with the requirement that additional capital be "funded by equity." The rights of the Stockholder Exchanges included 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.

As the Staff noted in the Order, the Commission must approve a proposed rule change if it is consistent with the requirements of the Act and the applicable rules and regulations thereunder. Even if there were other alternatives in addition to those the Board considered and

[31] *See* SEC Notice of No Objection to Advance Notice Filing, *supra* n. 5.
[32] SIG Petition, at 14.

rejected, the Capital Plan is consistent with the legal requirements, and approval was proper.[33] The Petitioners do not have a strong likelihood of success on this argument.

e. Petitioners do not have a strong likelihood of success on their argument that the Capital Plan should be disapproved based on corporate governance issues.

Petitioners argue that the OCC Board's approval of the Capital Plan was not in accordance with OCC's corporate governance obligations. Specifically, the Petitioners argue that "the OCC failed to comply with the provisions of its By-Laws and Charter designed to prevent conflicts of interest and to give non-equity exchanges fair representation in the affairs of the OCC through the express notice of the type of action taken here and an opportunity to be heard."[34] The Petitioners' arguments, however, are unfounded. There was no material competitive consequence that required non-Stockholder Exchanges to be notified, because the non-Stockholder Exchanges would continue to receive clearing services on the same equal basis as they had in the past, with no obligation to contribute capital or make any Replenishment Capital commitment. OCC did not and does not believe that there is a material competitive consequence to the terms under which the Stockholder Exchanges agreed to undertake obligations of immediate and ongoing capital support to OCC, which they agreed to do reluctantly and only after other alternatives were found inadequate. There was also no conflict of interest that precluded the directors associated with the Stockholder Exchanges from voting on the Capital Plan rulemaking. Neither Delaware law, nor OCC's By-Laws, nor any other OCC governing document requires recusal of interested directors where directors on both sides of a question have potential conflicts of interest that are fully disclosed to the Board. Nor was the Board disabled from taking action, as Petitioners suggest, merely because there were recently

[33] *See Bradford Nat'l Clearing Corp*, 590 F.2d at 1105-06.
[34] MIAX Petition, at 5; *see also* BATS Petition, at 13-19; Box Petition, at 8.

created Board positions that had not yet been filled. In fact, OCC was advised by outside governance counsel that these vacancies did not prevent the Board from approving the Capital Plan, so long as the proposal received the necessary vote of the directors "then in office."[35] Thus, as OCC explained in the comment process, the Board's actions were in accordance with the requirements of applicable state laws and OCC's By-Laws. In view of the above, the Staff was correct when it concluded that it had no basis to dispute OCC's position that proper corporate governance procedures had been followed.[36] For these reasons, the Petitioners do not have a strong likelihood of success in obtaining reversal of the Order on the basis of their corporate governance arguments.

2. Petitioners Do Not Face Imminent Irreparable Injury Absent an Automatic Stay

Petitioners do not face imminent irreparable injury if the stay is lifted. The dividend payable to the Stockholder Exchanges, which is at the core of Petitioners' objections, will not be payable before 2016. Lifting of the automatic stay, moreover, will permit OCC to implement other aspects of the Capital Plan that will benefit the Petitioners and other market participants, such as a $33.3 million refund of 2014 fees and putting into place a new fee schedule, providing for an approximate 20% reduction in clearing fees going forward. Finally, the implementation of the Capital Plan will strengthen OCC's capital structure, which will benefit Petitioners as well as the general public. For these reasons, Petitioners cannot show that they will suffer any imminent irreparable harm if the stay is lifted.

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[35] *See* OCC By-Laws, Article XI, Section 1.
[36] Order, at 46.

3. OCC and the Financial System Will Suffer Substantial Harm if the Stay is Continued

In contrast to the lack of harm Petitioners would face from a lifting of the stay, OCC, the U.S. options industry, and the financial system as a whole will suffer significant harm in the event that the Commission does not lift the stay. As stated in the Order, OCC plays a critical role in the U.S. options market, and its designation as a SIFMU reflects its importance to the integrity of the financial system generally. If the stay persists, OCC will be unable to carry out its plan to maintain capital resources to address potential increased capital requirements that may be imposed by the Commission, and unexpected financial stresses that could occur at any time. The stay is thus causing substantial harm to OCC and the financial system generally, and it should be promptly lifted to permit the implementation of the Capital Plan to continue.

4. Continuation of the Stay Would Not Serve the Public Interest

The stay should be lifted because it is not in the public interest. Implementation of the Capital Plan should be allowed to proceed in order to provide a strong capital base for OCC to continue to perform its critical functions, and to cope with future increased capital requirements and unpredictable financial conditions. There is a significant public interest in a strong financial system, and the stay is interfering with OCC's well-designed and equitable plan for its future capital needs, which the Commission's Staff, pursuant to delegated authority, has already reviewed and approved, and to which the Commission has previously issued a notice of no objection.

Conclusion

The continuation of the automatic stay is causing significant harm to OCC and the financial system by preventing the further implementation of OCC's Capital Plan. The Petitioners do not have a strong likelihood of success in obtaining a reversal of the Staff's

thorough and well-reasoned Order, nor do they face imminent irreparable injury if the automatic stay is lifted. The public interest in sound securities markets and a stable financial system require that the stay be lifted. For these reasons, OCC respectfully requests that the Commission act promptly to lift the automatic stay.

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CERTIFICATE OF COMPLIANCE

I, William J. Nissen, counsel to The Options Clearing Corporation (OCC), hereby certify that the foregoing brief and contemporaneously-filed motion comply with the word count limitation provided in 17 C.F.R. § 201.154(c). Exclusive of the exempted portions of the brief, as provided by 17 C.F.R. § 201.154(c), the brief and motion together include 6,760 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I, William J. Nissen, counsel to The Options Clearing Corporation, hereby certify that on April 2, 2015, I served copies of the attached Brief in Support of Motion to Lift Stay and Certificate of Compliance by way of facsimile on the parties and sent the original and three copies by Federal Express and by facsimile to the Secretary at the following addresses:

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