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TO:	FROM:
US SECURITIES AND EXCHANGE COMMISSION	**Joseph C. Lombard, esq.**
COMPANY:	DATE: 4/9/2015
FAX NUMBER: **202.772.9324**	TOTAL NO. OF PAGES, INCLUDING COVER: **31**
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: **SR-OCC-2015-02-Securites Exchange Act Release No. 34-74452 Opposition to Motion to Lift Stay**	YOUR REFERENCE NUMBER: **30320.0001**

☐ URGENT X FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Please see attached.

4813-5609-4755, v. 1

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April 9, 2015

VIA HAND DELIVERY
Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

RE: SR-OCC-2015-02, Securities Exchange Act Release No. 34-74452
Opposition to Motion to Lift Stay

Dear Mr. Fields,

As counsel for Susquehanna International Group, LLP ("SIG"), please find enclosed the original and three copies of SIG's Opposition to the Motion of Options Clearing Corporation ("OCC") to Lift Stay in relation to the above-captioned matter. Also enclosed, please find a Certificate of Service, facsimile confirmation sheet, and Certificate of Compliance.

Any questions concerning this matter can be directed to me. My contact information appears above.

Very truly yours,

Joseph C. Lombard

cc: Chair Mary Jo White, SEC
Commissioner Luis A. Aguilar, SEC
Commissioner Daniel M. Gallagher, SEC
Commissioner Kara M. Stein, SEC
Commissioner Michael S. Piwowar, SEC
Stephen Luparello, Director, Division of Trading and Markets, SEC

CERTIFICATE OF SERVICE

I, Joseph C. Lombard, counsel for Susquehanna International Group, LLP, hereby certify that on April 9, 2015, I served copies of the attached Brief in Opposition to OCC's Motion to Lift the Automatic Stay and Certificate of Compliance 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: April 9, 2015

Joseph C. Lombard

CERTIFICATE OF COMPLIANCE

I, Joseph C. Lombard, counsel to SIG, hereby certify that the foregoing opposition complies with the word count limitations 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 opposition includes 6,820 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

Dated: April 9, 2015

Joseph C. Lombard

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 Group, LLP and Susquehanna International Group, LLP	)	

SUSQUEHANNA INTERNATIONAL GROUP, LLP'S OPPOSITION TO OCC'S MOTION TO LIFT THE AUTOMATIC STAY

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Pursuant to Rule 154 of the Rules of Practice of the Securities and Exchange Commission ("SEC" or the "Commission"), Susquehanna International Group, LLP, and its affiliated and related entities (collectively, "SIG") hereby submit their opposition to the motion of Options Clearing Corporation ("OCC") to lift the automatic stay, in effect pursuant to Rule 431(e) of the Rules of Practice, of the Division of Trading and Market Staff's (the "Staff") March 6, 2015 Order issued pursuant to delegated authority approving OCC's proposed capital plan (the "Capital Plan").

Preliminary Statement

The automatic stay provision of Rule 431(e) of the Rules of Practice preserves the status quo while the Commission determines whether to review an action undertaken by the SEC Staff pursuant to delegated authority that has been challenged by an aggrieved party. OCC's Motion to Lift Stay seeks to obtain a result nowhere provided for in the Rules of Practice – to eliminate a Rule 431(e) automatic stay. The Rules do not authorize either the filing of an opposition to a petition for review, or any other means by which a self-regulatory organization ("SRO") can circumvent the automatic stay of a challenged, delegated approval of a rule proposal.

More troubling than the filing of the motion, however, are OCC's arguments made therein. OCC uses the cover of its motion to lift the automatic stay to launch (faulty) merits-based arguments while the Commission is in the process of deciding whether to grant review of the Staff action. OCC's motion is thus an improper effort to supplant the full decision-making process and to influence the Commission before it decides whether to review the Staff's approval of the Capital Plan.

Not only are OCC's merits-based arguments improper, but OCC misstates the standard of review by attempting to shift the burden onto Petitioners to justify the stay. OCC clearly has the

burden to demonstrate why the stay should be lifted, as does any movant that demands extraordinary equitable relief not provided for by rule or statute. OCC cannot meet this burden. Contrary to OCC's repeated and unfounded assertions, the automatic stay does not pose imminent, irreparable harm to OCC or the marketplace. OCC's capital base is at a historically high level and is continuing to increase under its current fee structure. Importantly, OCC has never had more than a *de minimis* deficit or loss from general business activities in its more than 40 years of existence, even during recent periods of historic market stress and upheaval. And Rule 17Ad-22(e)(15) – which OCC purports to address with the Capital Plan – remains proposed, not yet adopted. Finally, other than delaying the implementation of the proposed Capital Plan, OCC has cited no specific risk or threat to its general business activities posed by the continuation of the automatic stay.

In any event, the automatic stay is not causing substantial harm to any person, but rather protecting the Commission's review process as it was intended to do. While OCC argues that lifting the stay is necessary to allow it to lower its current fee structure and refund monies to its clearing members and market participants, in fact, these parties, ironically, are among the Petitioners seeking to maintain the automatic stay and prevent the Capital Plan from being implemented.

The automatic stay also directly serves the public interest. If the stay were lifted, OCC would have free reign to immediately implement the Capital Plan before the Commission could review it, notwithstanding widespread objections from a diverse group of market participants. And once implemented, the Plan could not be easily undone, undermining the Commission's ability to address critical flaws in the proposed rule change. Accordingly, continuation of the automatic stay would allow the Commission to conduct a meaningful review consistent with the

framework of the Securities Exchange Act of 1934 (the "Exchange Act"), and would thus protect investors and serve the public interest.

Finally, while Petitioners have acknowledged OCC's need to raise capital, the manner and degree of that effort remains in sharp dispute. The Petitioners' submissions demonstrate that there remain fundamental policy and structural issues that the Commission should address, including:

- The Staff failed to adequately consider that the Capital Plan materially alters OCC's status as a public utility and creates an inherent conflict between the marketplace's interest in maintaining lower fees and the Stockholder Exchanges' financial benefit from a higher cost structure;
- The Stockholder Exchanges' returns under the Capital Plan are materially unreasonable, and substantially less costly alternatives were (and remain) available in the market if OCC's Board had made an effort to obtain competitive financing.
- OCC's refusal to consider adopting the Payer Asset approach offered during the comment period, under which the Stockholder Exchanges would forgo the exorbitant returns they would receive if OCC demutualizes. (Accumulated funds in OCC's capital reserve account, under the Payer Asset approach, would be rebated to clearing members.) OCC continues to dismiss the Payer Asset (or similar) approach while asserting that the Stockholder Exchanges do not stand to benefit from the capital reserve account. OCC is senselessly ignoring an easy opportunity to significantly mitigate Petitioners' concerns; and

- Because of the Stockholder Exchanges' inherent financial conflict of interest, OCC Board approval of the Capital Plan violated OCC's own governing documents.

Procedural Background

On March 6, 2015, the Staff, pursuant to delegated authority, issued an order approving OCC's proposed rule change implementing the Capital Plan (the "Staff Order"). The Staff approved the Capital Plan despite unanimous opposition from commenters representing diverse interests, including several major options exchanges and large market makers. No exchange, market maker, public investor, or other market participant submitted a comment in favor of the Capital Plan. To the contrary, a significant number of participants from the options community universally voiced the concern, through the comment process, that implementing the Capital Plan would be detrimental to the options market.

Notwithstanding the intense and uniform opposition to the Capital Plan expressed during the comment process and the high likelihood that one or more commenters would file a petition for Commission review of the Staff's Order, OCC *immediately* began implementing the Capital Plan. OCC initiated this preemptive effort during the five-day period allowed under the Rules of Practice to file a notice of intent to petition for Commission review, which triggers the automatic stay.[1] On March 12-13, 2015, SIG and other market participants filed timely notices of intention to petition for review of the Staff Order under Rule 430(b)(1) of the Rules of Practice, triggering the automatic stay of the Staff Order. On April 2, 2015, nearly three weeks after the automatic stay went into effect, OCC filed the instant motion seeking an order lifting the automatic stay.

[1] OCC Br. at 4 (describing initial steps taken by OCC to implement the plan, including the contribution of additional capital by the Stockholder Exchanges).

The Applicable Standards for Lifting an Automatic Stay

OCC relies on an erroneous standard to argue that the automatic stay imposed by the Rules of Practice should be lifted. Under Rule 431(e), actions taken pursuant to delegated authority are automatically stayed upon the filing with the Commission of a notice of intent to petition for review, and the automatic stay is effective "until the Commission orders otherwise." The automatic stay provision makes good administrative sense in that it presumptively maintains the status quo pending Commission determination of whether to review delegated staff action that aggrieved parties have challenged through the petition process. The presumption also aligns precisely with the Exchange Act's intent because challenged actions are more likely to involve "major matters of policy and planning."[2] The procedural framework provides for prompt and effective Commission oversight of authority delegated to the Staff, embodying recognition that it is the Commission, its members appointed by the President and confirmed by the Senate, that determines major policy matters.

Not surprisingly, the Rules of Practice do not specifically provide for motions to lift the automatic stay provided by Rule 431(e). Nor do they articulate the standards that would be applicable to such motions. OCC attempts to exploit that void by improperly reaching for the standard that applies to motions to *impose* a stay of the effect of actions taken by *the Commission*

[2] Under Section 4A of the Exchange Act, added in 1962, the Commission was permitted to delegate its responsibilities as long as certain prerequisites were met, including the Commission's right to review the delegated action. *See* Pub. L. No. 87-592, § 1, 76 Stat. 394 (1962); *see also* Pub L. 100-181, Title III, § 308(a), 101 Stat. 1254 (1987). The purpose of such delegation was to allow the Commission to focus on "major matters of policy and planning confronting it." H.R. Rep. No. 87-2045 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2150, 2151.

pending *judicial* review. This circumstance, obviously, differs starkly from an automatic stay of challenged actions taken pursuant to delegated authority pending Commission review.[3]

Unlike a stay pending judicial review, extraordinary relief where the movant bears the burden of showing a strong likelihood of success on the merits and irreparable harm before it can be ordered, the stay of Rule 431(e) is an administrative pause – activated *automatically*, explicit in the Rules of Practice, and embedded in their structure. It arises directly from Exchange Act-mandated limits on Commission delegation and maintains the status quo following a challenge to delegated action to afford the Commission the opportunity to review and address any important policy implications before the action is implemented. If the Commission decides to hear OCC's motion to lift the automatic stay, despite the lack of provision for such motion under the Rules of Practice, it is movant OCC's burden to show that the automatic stay should, for some extraordinary reason, be lifted. In effect, OCC's argument to the contrary asks the Commission to divest itself of a review power that the Exchange Act requires it to maintain.

Importantly, in the few situations where the Commission has considered the automatic stay provision of Rule 431(e), it has *not* adopted the standards OCC attempts to impose here. In 2009, the Commission rejected a motion to lift the automatic stay of the effect of an order approving a rule change to establish a new order type, concluding that petitioner CBOE had "raised important policy issues that warrant Commission consideration," and left the automatic

[3] OCC Br. at 5 n.9 (citing Am. Petroleum Inst., Release No. 68197, 2012 WL 5462858 (Nov. 8, 2012) (motion for stay pending judicial review of Rule 13q-1's effective date and related amendments approved by the Commission); Marshall Spiegel, Release No. 52611, 2005 WL 2673495 (Oct. 14, 2005) (motion for stay pending judicial review of CBOE proposed rule changes)).

stay in place pending full Commission review.[4] In a very different case that OCC cites, *Institutional Networks Corp.*,[5] the Commission decided *sua sponte* to issue an order lifting the automatic stay of a delegated approval that constituted the *sixth* in a series of approvals of an NASD Pilot Program that had been operational for eighteen months.[6] There, the Commission lifted the automatic stay because it determined that continuing it would have interrupted the flow of information through the Pilot Program, and that such interruption was not in the public interest and had the potential to harm investors and disrupt the markets. The contrast with the instant situation is clear. OCC's Capital Plan sets forth a comprehensive, new framework for dividends, fees, and rebates that has not yet been fully implemented, and has not previously been considered or approved by the Commission in any capacity.[7] Accordingly, continuing the stay will prevent the harm that would occur if the Capital Plan is implemented and the Commission determines it should be reversed or modified.

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[4] Chicago Board Options Exchange, Inc., Release No. 60988, 2009 WL 3802460 (Nov. 12, 2009).

[5] Institutional Networks Corp., Release No. 25039, 1987 WL 756090 (October 15, 1987).

[6] *See* Securities Exchange Act Release No. 24979 (October 2, 1987), 52 FR 37684, 37684 n. 6 (Oct. 8, 1987).

[7] OCC's brief repeatedly points to the "no objection" notice to the Capital Plan that the Commission issued in connection with OCC's advance notice filing under the Payment, Clearing and Settlement Supervision Act of 2010. *See* OCC Br. at 2, 3-4, 7. Despite OCC's apparent attempt to infuse that "no objection" notice with significance, it is not relevant to the current proceeding. Advance Notice filings by clearing agencies pursuant to Rule 19b-4(n) deal exclusively with "the level of risks presented by a designated clearing agency" and do not require findings by the Commission as to the protection of investors, undue burdens on competition, or unfair discrimination, *i.e.*, the requirements of Section 17A(b)(3) of the Exchange Act that are currently at issue before the SEC.

Argument

THE AUTOMATIC STAY PROVIDED BY THE RULES OF PRACTICE SHOULD NOT BE LIFTED

The comprehensive change that would result from implementing the Capital Plan and the undisputed significance of the Plan for the financial markets make this a compelling case for Commission review of the Staff Order and preserving the status quo during the pendency of that review. OCC's motion to lift the automatic stay seeks to challenge the "merits" of the Capital Plan, but these arguments are premature. In any event, OCC has the burden of proof to demonstrate why the automatic stay should be lifted, and it has not met that burden. Moreover, as described below, OCC's various assertions in support of lifting the stay are demonstrably false, including that it is suffering irreparable harm from not being able to implement the plan. Likewise, the Commission should reject OCC's various erroneous (and premature) arguments concerning the "merits" of the plan.

A. OCC's Challenges to the Merits of the Petitions Are Premature

The Rules of Practice do not allow for filing an opposition to a petition for the Commission to review action taken pursuant to delegated authority. OCC has subverted the Rules by submitting the instant motion to lift the automatic stay, using it to delve into the merits of the petitions and submit counterarguments. In effect, OCC seeks to graft an incongruous, dispositive pre-review motion to dismiss mechanism onto the process for petitions for review of action taken by delegated authority, conjuring up new burdens, standards, and opportunities to be heard that are not present in the language or logic of the Rules of Practice. OCC does this by asserting that Petitioners need to show a strong likelihood of success on the merits of their claims to continue the automatic stay, but as demonstrated above, OCC uses an inapplicable standard, and its arguments concerning "likelihood of success on the merits" are not relevant to the instant

motion. OCC's arguments on the merits are therefore premature, especially considering that the Rules of Practice contain an explicit procedure for the filing of statements in support of or in opposition to action made by delegated authority once the Commission acts on the petition. If the Commission grants the petition for review of the Staff's action, all parties' arguments on the merits can be addressed in the comment process expressly provided for by Rule 431(d). OCC's premature merits arguments in its brief should be disregarded, as they are improper at this stage of the proceedings.

B. OCC's Motion Should Be Denied In Light of the Importance of the Issues Implicated by OCC's Proposed Capital Plan, Which OCC Concedes

OCC argues that implementing its proposed Capital Plan is "key" to its ability to address its capital needs going forward, and "[t]he financial stability, integrity and capacity of OCC to operate effectively are of critical importance to the securities markets and our financial system generally."[8] As detailed in the petitions of SIG and others, the proposed Capital Plan implicates important policy issues because it essentially changes the character of OCC from a non-profit public utility to a for-profit entity, and it does so by creating an inherent conflict between maintaining low costs that benefit the marketplace and an increasing operating budget that would financially benefit the Stockholder Exchanges. Further, the cost of the Capital Plan is excessive by any reasonable measure and will be borne by those who pay OCC clearing fees – clearing firms, who pay directly, and others to whom fees are passed on, including market-makers and the investing public.[9] One thing all parties agree on is that the proposed Capital Plan presents critically important issues for the options markets.

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[8] OCC Br. at 5; *see also id.* at 3 (failure to implement the Plan could "compromise the stability of OCC, the equity options industry, and, potentially, our economic systems").

[9] SIG Petition at 23.

Moreover, OCC has operated efficiently and safely in line with its budgets and revenues for the past 40 years, which further militates in favor of maintaining the status quo during the relatively short period of time for the Commission to review the serious challenges to the Capital Plan that raise important policy issues. When OCC instead speaks of a "pressing need" to implement the plan for reserve capital purposes, it fails to mention that the capital in reserve at OCC (as of today) is already at least six-fold larger than it was at the end of 2013.

The critical impact of the proposed Capital Plan and the issues presented by the petitions for Commission review are dispositive here. In the only reported SEC decision addressing a motion to lift a Rule 431(e) automatic stay, the Commission denied the motion in light of the importance of the issues that the petitioner had raised that warranted Commission consideration.[10] For the same reason, the instant motion should be denied, and the automatic stay continued pending Commission review.

C. OCC Fails to Demonstrate Any Imminent Irreparable Injury to Itself or the Financial Markets from Continuing the Stay Pending Commission Review

1. OCC's Financial Condition Is Strong

OCC attempts to dislodge the automatic stay by creating a fictional urgency based solely on conclusory statements and circular arguments that are ungrounded in fact. OCC essentially argues that the imminent irreparable harm of staying the Capital Plan is that it cannot implement the Capital Plan. Beyond this logical fallacy, OCC offers no meaningful data, projections, or analysis to ground its purported concerns with regard to capital adequacy.

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[10] Chicago Board Options Exchange, Inc., Release No. 60988, 2009 WL 3802460, at *2 (Nov. 12, 2009) ("[T]he Commission's decision on CBOE's Petition could have a wide effect on the other markets and their participants. The Commission believes that CBOE has raised important policy issues that warrant Commission consideration prior to allowing use of the QCC order on ISE or similar order types on other exchanges. It is therefore ORDERED, that ISE's Motion to Lift the Automatic Stay is hereby denied . . . .").

In fact, OCC's financial condition contradicts OCC's claim of urgent need for additional capital during the pendency of the Commission's review. OCC maintains a strong AA+ credit rating from Standard & Poor's.[11] Moreover, given its unique position as a government-sanctioned monopoly, OCC has no competition in the marketplace that could undermine its strong financial condition. Remarkably, OCC has never had more than a *de minimis* deficit or loss in its more than 40 years of existence and has routinely operated with a cash reserve of less than 20% over its annual budget.[12] Indeed, OCC did not suffer an operating loss during the 2008 financial crisis, the country's worst since the Great Depression. The United States' economic recovery is in its sixth year, and current macroeconomic conditions do not indicate any unusual threats to OCC's financial condition.

In addition, as discussed more fully below, the issues that arise with respect to clearing firm defaults should not be confused with the issues of OCC's general business risk. OCC clearing firms transact billions of dollars in options trades every day and have already committed billions of dollars to OCC's Clearing Fund for the safe processing of those trades. It is beyond the pale to suggest that OCC is not already well-situated, and well-supported by these clearing firms, to deal with any operational or business issues that could potentially arise at OCC that might otherwise interfere with the routine business of OCC in processing those trades.

It is also beyond dispute that OCC maintains a healthy balance sheet with currently available capital that is sufficient to satisfy its short-term capital needs. OCC has projected that

[11] *See* Standard & Poor's Rating Services, Full Analysis of Options Clearing Corporation (March 28, 2014), *available at* http://www.optionsclearing.com/components/docs/about/sp_rating.pdf.

[12] Not only has OCC never had more than a *de minimis* deficit or loss, beginning since 1997, OCC has been able to issue significant annual clearing fee rebates of $21.5 million, $13.8 million, $21.6 million, $43.3 million, $26.7 million, $14.1 million, $33.1 million, $47.4 million, $49.6 million, $45.2 million, $58.7 million, $64.7 million, $57.9 million, $38.4 million, $79.6 million, $50.1 million, and $47.0 million, and a proposed refund of $33.3 million for 2014.

its 2015 expenses will be $234 million, and therefore, six months of its projected expenses (or the "Baseline Capital Amount") would be $117 million. As recently as December 31, 2013, OCC had capital of $25 million. However, due to last year's fee increase, at the end of 2014, OCC had shareholder equity of approximately $130 million, a $105 million increase and well in excess of its historical capital levels.[13] Additionally, when considering OCC's first quarter 2015 excess revenues and simply extrapolating last year's numbers, OCC's current capital reserve account is likely approximately $170 million.

With current capital at approximately *six* times levels from just a few years ago, and growing by millions of dollars every week, OCC has far more than enough capital to cover six months of operating expenses, as well as provide an additional buffer to protect against unexpected, and unlikely, operating losses resulting from the unspecified "economic shocks" OCC purports to be concerned about in its brief.[14] Given OCC's current capital level compared to historic levels, its consistent lack of any operating losses even during the most turbulent economic conditions and its inability to specify any particular imminent financial risk, OCC has failed to substantiate in any way or to any degree its assertions of imminent irreparable injury to itself or the financial markets from continuing the stay pending Commission review.

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[13] In its 2014 annual report, OCC reports shareholder equity of $97 million; however, this includes, as a liability, the proposed clearing fee rebate of $33.3 million. If OCC allocated this proposed rebate to the capital reserve account, then shareholder equity would stand at $130 million.

[14] OCC Br. at 1. As SIG explained in its Petition, the Capital plan sets OCC's revenue at 33% above its operating costs, so there is already a 33% buffer built into OCC's budget. Accordingly, OCC's expenses would have to increase – or its revenues would have to decrease (or some combination) – by more than 33% for operating losses to even occur, i.e., by $105.3 million based on 2014's figures.

2. OCC Complies With its Current "Obligations"

OCC further contends, again offering no supporting data, projections, or analysis, that the automatic 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")."[15] But OCC's designation as a SIFMU by the Financial Stability Oversight Council ("FSOC") occurred in July 2012. OCC points to no recent specific event or circumstance that has caused its almost three-year old SIFMU designation to become an urgent, unmet need to raise additional capital. Nor has OCC offered any explanation of exactly what capital must be raised as a result of "its obligations as a SIFMU" and why, other than vague references to new hires and consultants, which some of the fee increases of 2014 were meant to address. Instead, it would appear that the only provisions that would impose mandatory obligations on OCC are those that the Commission has yet to adopt.

Although the Federal Reserve Board finalized revisions to its risk management standards for SIFMUs in October 2014, OCC is required only to comply with standards imposed by the SEC, its primary supervisor, and the SEC has not finalized the heightened risk management requirements applicable to "Covered Clearing Agencies." OCC cannot plausibly assert "ongoing harm" from the automatic stay based on its asserted inability to comply with *proposed* increased capital requirements expected to be imposed by the Commission in the future.[16] It is self-evident that being unable to comply with proposed but not yet enacted requirements is not "ongoing harm." In fact, the Staff specifically disclaimed reliance on those proposed requirements in

[15] OCC Br. at 3.

[16] *Id.* at 1.

considering whether to approve the proposed Capital Plan.[17]

It is equally important to be precise about the risks that the Capital Plan is intended to cover. The Capital Plan is *not* meant to address risks arising from clearing member defaults. Instead, the Capital Plan and proposed Rule 17Ad-22(e)(15) seek to cover "general business risk."[18] The Commission describes general business risk as declining revenues or increases in expenses that exceed revenues, leading to a charge against the clearing agency's capital. Such losses arise from "poor execution of business strategy, negative cash flows, or unexpected and/or excessively large operating expenses."[19] As detailed in Section 1 above, OCC has a remarkable 40-year history of not incurring negative cash flows or losses and has a substantial capital reserve well in excess of both historic levels and six months of projected operating expenses.

On the other hand, the OCC Clearing Fund serves to address very different risks. The Clearing Fund and the procedures to establish its size are designed to ensure that OCC maintains adequate financial resources to protect against losses arising from the default of an OCC Clearing Member or Clearing Member Group. In its Proposal and follow up comments, however, OCC repeatedly conflates the risks addressed by the Capital Plan and the Clearing Fund, confusing the public into believing that the Capital Plan is designed to address a broader set of risks. OCC's brief on this motion makes the same error.

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[17] *See* Securities Exchange Act Release No. 74452 (Mar. 6, 2015), 80 FR 13058, 13058 n.3 (Mar. 12, 2015) ("Approval Order").

[18] *See* Securities Exchange Act Release No. 71699 (Mar. 12, 2014)), 79 FR 29507, 29548 (May 22, 2014).

[19] *Id.*

Currently valued at $8.3 billion,[20] the size of the OCC Clearing Fund reflects the magnitude of the risk it addresses, and OCC apparently has experienced no discernible difficulty in achieving massive, near instantaneous increases in the size of the Clearing Fund.[21] Significantly, OCC recently filed a proposed rule change to allow it to issue intra-day margin calls and/or intra-month increases of the Clearing Fund when needed.[22] If implemented, OCC could react quickly to any perceived shortcomings in the Clearing Fund's ability to sustain default losses, requiring Clearing Members to meet the call for additional Clearing Fund assets within two business days.

OCC claims that the "financial system will suffer irreparable harm as long as the automatic stay remains in place, as OCC will be in a weaker position to deal with any unexpected financial crises." But the capital reserve account is not designed to absorb the losses from clearing member defaults. That is what the Clearing Fund is designed to protect against. Instead, the capital reserve account is meant to absorb losses when operating costs exceed revenues. Such a situation has never occurred in the history of OCC – even during the most recent financial crisis – and therefore, OCC's claim that "the financial system will suffer irreparable harm" as a result of the automatic stay is unfounded.

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[20] *See* OCC 2014 Annual Report, *available at* http://www.optionsclearing.com/components/docs/about/annual-reports/occ_2014_annual_report.pdf.

[21] *See* Securities Exchange Act Release No. 73579 (Nov. 12, 2014), 79 FR 68747 (Nov. 18, 2014) (SR-OCC-2014-807). In October 2014, OCC determined that the financial resources needed to cover potential losses arising from a default by the Clearing Member presenting the largest exposure could have exceeded the available financial resources. OCC then increased the Clearing Fund by $1.8 billion in less than half a month through Clearing Member contributions.

[22] *See* Securities Exchange Act Release No. 74603 (Mar. 27, 2015), 80 FR 17808 (Apr. 2, 2015) (SR-OCC-2015-009).

OCC also argues that implementing the Capital Plan would give OCC "the ability to comply with" the international standards Principle 15 of the Principles for Financial Market Infrastructure.[23] As a threshold matter, OCC cannot be bound by foreign standards that the Commission has not expressly approved or adopted, and thus OCC's compliance with Principle 15 is not mandatory, and any non-compliance could not be "ongoing harm." In any event, OCC currently complies with Principle 15. Contrary to OCC's suggestions, Principle 15 does not mandate capital sufficient to address every worst case scenario. It merely requires OCC to have a plan to raise additional equity, if needed; it does not quantify the amount, and certainly does not require a replenishment amount equal to the Plan's proposed Baseline Capital Requirement of $117 million.[24] Contrary to OCC's claims, the automatic stay is not preventing OCC's compliance with Principle 15.

Putting aside the not yet implemented Commission requirements and the non-binding international standards of Principle 15, OCC fails to identify any regulatory requirement it is obligated to satisfy through immediate implementation of the Capital Plan. If OCC is relying on informal guidance concerning its capital requirements from FSOC or some other government entity, it should plainly so state to inform commenters and the Commission and allow them to consider that analysis. Although it is easy to assert that "sooner is better" with respect to OCC's capital, there are serious consequences resulting from implementing an ill-conceived plan that raises capital at excessive rates and produces a substantial wealth transfer to the five Stockholder Exchanges at the expense of the investing public.

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[23] OCC Br. at 1.

[24] *See* Principles for financial market infrastructures (April 2012), *available at* http://www.bis.org/cpmi/publ/d101a.pdf. Specifically Key Consideration 5 of Principle 15 provides that "[a]n FMI should maintain a viable plan for raising additional equity should its equity fall close to or below the amount needed."

D. OCC's Challenges to the Merits of the Petitions Are Erroneous

As stated in Section A above, OCC's arguments relating to the "merits" of the Petition are premature. In any event, OCC's arguments are based on erroneous contentions and ignore key arguments by Petitioners, as set forth below.

1. OCC Cannot Refute that the Stockholder Exchanges' Return on Capital Is Excessive

OCC claims that the table in SIG's Petition – showing that the Stockholder Exchanges will receive a total return on their investment of 20-35% in the next seven years – is based on incorrect assumptions. OCC is wrong.

First, OCC objects to SIG's ascribing value to the capital reserve account. But the capital reserve account is indisputably an OCC asset, and the increased value of that account – which is funded exclusively through OCC fees paid by clearing members and market participants – inures to the Stockholder Exchanges. If OCC takes on additional investors in the future, the Stockholder Exchanges would monetize the value of the capital reserve account. Given the recent history of monetization of financial market utilities like exchanges (including the Stockholder Exchanges here), this is a realistic scenario. If the Stockholder Exchanges did not intend to realize any such value, they would have agreed to the Payer Asset approach offered during the comment period. Under that approach, the reserve account would be held in escrow for emergencies, and if no emergency arises, the escrowed amount (including appreciation) would be rebated to clearing members if the Stockholder Exchanges seek to demutualize OCC.

Second, OCC argues that the compound annual growth rate for its expenses between 2015 and 2022 that SIG should have used is 2.3%, not 8.0%. SIG's 8% calculation is based on OCC's projections in its proposal for the Capital Plan, which set a $117 million Baseline Capital

Requirement for 2015 that "would not exceed" $200 million by 2022.[25] An increase from $117 million to $200 million from 2015 to 2022 equals an 8.0% annual growth rate. OCC now claims, however, that notwithstanding its representation that the Baseline Capital Requirement would "not exceed" $200 million by 2022, $200 million is "not an expected level" for the Baseline Capital Requirement; instead, it merely sets a cap. But using OCC's new projected 2.3% compound annual growth rate, OCC's Baseline Capital Requirement would only be $137 million by 2022 – approximately 31% below the $200 million "not to exceed" amount – and would "not exceed" $200 million until 2039. At best, OCC was being ultra-conservative in its "not to exceed" statement. At worst, it was trying to lead the Commission to believe that it would have close to $200 million of Replenishment Capital by 2022, even though its own projections show it would have only $137 million by that time and would not reach the $200 million level for another **17 years**.

Moreover, when OCC increased fees by 70% last year, it stated that OCC's annual expenses increased by approximately 9% between 2012 and 2013, and that it "currently projects a greater increase in expenses in 2014." OCC cannot have it both ways: it cannot represent that its expenses are increasing at 9% to justify its 70% fee increase, but then state that its expenses are increasing at a rate of only 2.3% to support its efforts to secure the Capital Plan by minimizing Stockholder Exchanges' return.

[25] *See* Approval Order at 13060. The Baseline Capital Requirement represents six months of operating expenses, and therefore, its growth rate can be used as a proxy for calculating the compound annual growth rate for OCC's expenses.

Notwithstanding OCC's meritless assumptions – which, solely for argument's sake, are included in the revised table below[26] – OCC now concedes that the Stockholder Exchanges will receive a 17.5% - 20% annual return on their $150 million investment over the next 10 years.[27] Moreover, it is important to consider the associated tax burden depicted below, which options market participants would have to bear if the Capital Plan were implemented to allow OCC to pay the Stockholder Exchanges the excessive dividends.

[26] The table does not include the 12% tax the Stockholder Exchanges will have to pay on the dividends since such tax is irrelevant for determining the rate of return.

[27] This rate of return is based on OCC's estimate that its post-tax dividend distribution for the next 10 years will be $22 - $30 million per year. *See* OCC Br. at 8.

Table 1: Returns on Stockholder Exchanges' Capital Contribution Using OCC's New Expense Growth Rate and Tax Rate Assumptions
(Dollars in millions)

	2015	2016	2017	2018	2019	2020	2021	2022
Expenses	$234.00	$239.38	$244.89	$250.52	$256.28	$262.18	$268.21	$274.38
Six Months Minimum Capital (Baseline Capital Amount)	$117.00	$119.69	$122.44	$125.26	$128.14	$131.09	$134.10	$137.19
Business Risk Buffer	$78.00	$79.79	$81.63	$83.51	$85.43	$87.39	$89.40	$91.46
Margin Cap. Adj.	$2.69	$2.75	$2.82	$2.88	$2.95	$3.02	$3.08	$3.16
Reinvestment Rate	1.79%	1.84%	1.88%	1.92%	1.96%	2.01%	2.06%	2.10%
Amount Refunded to Clearing Firms	$37.65	$38.52	$39.41	$40.31	$41.24	$42.19	$43.16	$44.15
Pre-Tax Income	$40.35	$41.27	$42.22	$43.19	$44.19	$45.20	$46.24	$47.31
Income Taxes (@ 35%)	$14.12	$14.45	$14.78	$15.12	$15.47	$15.82	$16.19	$16.56
After-Tax Income	$26.22	$26.83	$27.44	$28.08	$28.72	$29.38	$30.06	$30.75
Funds Available for Dividend	$23.53	$24.07	$24.63	$25.20	$25.77	$26.37	$26.97	$27.59
Dividend Rate	15.69%	16.05%	16.42%	16.80%	17.18%	17.58%	17.98%	18.40%
Total Return	17.48%	17.89%	18.30%	18.72%	19.15%	19.59%	20.04%	20.50%

2. <u>OCC Failed to Address Arguments Contained in the Petitions for Review</u>

OCC's brief also ignores key arguments set forth in the petitions for review. Specifically, OCC does not specifically address Petitioners' contentions that the Staff Order does not contain substantive discussion of the availability of alternatives to the Capital Plan that were more equitable and did not unduly burden competition. Indeed, although OCC continues to assert that it considered "several potential alternatives," it still fails to provide *any* details concerning those alternatives or the reasons they were rejected. Nor does OCC dispute that one or more of the

Stockholder Exchanges either vetoed or threatened to veto any capital-raising plan that involved less expensive proposals. OCC is also silent on SIG's proposal to provide, alone or as part of a group, capital for a far lower, reasonable rate of return, and to structure the same as a loan to the Stockholder Exchanges so they may contribute such monies to OCC as equity.

E. It Is In the Public Interest to Stay Implementation of the Capital Plan Because It Will Increase Costs to Public Investors

Continuing the automatic stay of the implementation of the Capital Plan is in the public interest. OCC's motion ignores the arguments set forth in the various petitions that the Plan will increase costs to market participants and investors. Specifically, by cutting clearing members' rebates to fund the dividends, clearing costs would be higher than they would be with a better alternative plan, with the increase being passed along to investors and other market participants. Options market makers will also need to quote wider to account for the higher net fees resulting from the Capital Plan, which will result in worse prices for public investors and other market participants and lead to higher costs of liquidity, less customer interest, less effective hedging, and poorer risk management. Given these harms, it is telling that the Staff did not make any findings as to whether the Capital Plan would "protect investors and the public interest," even though this fundamental requirement lies at the heart of the Exchange Act. The public interest, and in particular protection of investors from increased fees, warrants Commission review and a stay pending that review.

F. Lifting the Stay and Permitting OCC To Immediately Change Its Fundamental Structure Would Preclude Meaningful Commission Review Because the Plan Would Become a *Fait Accompli*

Lifting the automatic stay pending Commission review would permit OCC to immediately implement the Capital Plan, rendering it a *fait accompli* before the Commission has an opportunity to review the Staff's approval of the Plan by delegated authority. The

Commission should not acquiesce in undermining its own review. Indeed, lifting the automatic stay in this matter is the functional equivalent of a decision on the merits in OCC's favor before the merits have even been reached by the Commission.

In light of the undisputed importance of the issues of the Capital Plan described above and the fundamental change it would produce, the Commission should have a meaningful opportunity to review and act on the proposed Capital Plan in accordance with the mandate of the Exchange Act.

Conclusion

The Commission has long been clear in its concerns about the owners of an SRO leveraging its delegated authority for their own commercial benefit,[28] the risk of which is magnified where, as here, SRO ownership is concentrated.[29] The Commission has similarly stressed the critical role of public directors in protecting market participants from the efforts of other market participants who seek to use SRO processes to achieve systematic advantages.[30] In light of the excessive returns that the concentrated group of Stockholder Exchanges would reap at the expense of the investing public, these concerns are squarely implicated by the Capital Plan that was approved by the Staff via delegated authority. The Commission should be afforded the

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[28] *See* Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020, 8051 (Jan. 26, 2001) ("[T]he Act authorizes the Commission to oversee SRO functions to address the inherent conflicts of the self-regulatory model, and to attempt to ensure that an SRO does not secure advantages as a commercial entity by virtue of its regulatory authority.").

[29] *See* Securities Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550, 3552 (Jan. 23, 2006 ("As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.").

[30] *Id.* at 3553 ("[P]ublic representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process.").

opportunity to gather the relevant facts, meaningfully review the Capital Plan, and act accordingly while the status quo is maintained. The motion to lift the automatic stay should therefore be denied in its entirety.

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