SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petitions of The Options Clearing Corporation	)	File No. SR-OCC-2015-02

OCC's BRIEF IN OPPOSITION TO MOTION FOR REFERRAL TO HEARING OFFICER AND DISCOVERY

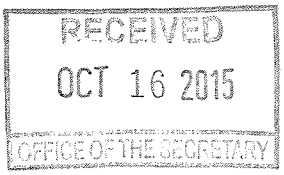


TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Pursuant to Rule 154 of the Commission's Rules of Practice, The Options Clearing Corporation ("OCC") hereby responds in opposition to the Motion of Petitioners BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP ("SIG") (collectively, "Petitioners") for an Order (1) Referring This Matter to a Hearing Officer for the Taking of Additional Evidence, and (2) Directing Discovery in Advance of the Hearing ("Motion").

INTRODUCTION

Petitioners' Motion is wholly without merit and reflects another attempt by Petitioners to misuse Commission procedure to delay the Commission's review and approval of OCC's Proposed Rule Change Concerning a Proposed Capital Plan ("Capital Plan"). Prompt affirmance of the Capital Plan is necessary without further delay for OCC to be capitalized at a prudent level for a systemically important financial market utility ("SIFMU")[1] and to proactively come into compliance with current and anticipated U.S. and international standards for central counterparties.

Petitioners bring their Motion under Commission Rule 452, but entirely fail to satisfy the requirements of that rule, which requires a movant to show, "with particularity," (1) that the additional evidence that the movant seeks to introduce is material and (2) that the movant had reasonable grounds for failure to adduce the evidence previously. Petitioners have not even

[1] The Financial Stability Oversight Council designated OCC as a SIFMU on July 18, 2012. *See* Financial Stability Oversight Council 2012 Annual Report, Appendix A, *available at* http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf. As stated previously, OCC is also registered with the Commodity Futures Trading Commission ("CFTC") as a derivatives clearing organization ("DCO") for its futures clearing business. The CFTC Staff has interpreted CFTC regulations governing systemically important DCOs ("SIDCOs"), and those DCOs who elect to be regulated as SIDCOs, to be harmonized with the Principles for Financial Market Infrastructures (PFMIs). *See* Staff Interpretation Regarding Consistency between Part 39 and The Principles for Financial Market Infrastructures, CFTC Memorandum No. 15-50 (Sept. 18, 2015). OCC may be required to elect to be regulated as a SIDCO for its futures clearing business in order to be recognized under EMIR, and such election would make it subject to requirements consistent with the PFMIs as a matter of law.

attempted to make the required showing, and instead merely raise a number of so-called "open issues" and "unanswered questions" about which they ask the Commission to compel discovery.

The relief Petitioners seek is inappropriate and unavailable under Rule 452. Petitioners have had several opportunities to develop the record in the rulemaking proceeding, and the Commission's Division of Trading and Markets staff ("Staff"), pursuant to delegated authority, ruled against them and issued an order approving OCC's Capital Plan ("Approval Order").[2] It is now time for the Commission, pursuant to its well-established procedures, to complete its review of the correctness of the Approval Order. The purpose of Rule 452 cannot be for parties like Petitioners, appealing a decision they lost, to obstruct Commission review by demanding comprehensive discovery and open-ended evidentiary hearings at this stage of the process—particularly where, as here, they never sought discovery or evidentiary hearings during the rulemaking proceeding prior to the Commission's ruling against them and, by their own admission, they have known of the statements on which they primarily rely to support their motion for at least six months.

As the Commission is aware, the financial markets operate in a rapidly changing environment in which it is critical for OCC to have access to adequate capital, a need addressed by the Capital Plan. As a responsible regulator, the Commission cannot and should not engage in the open-ended discovery and hearings that Petitioners now seek at this late stage. Petitioners have had ample opportunity to articulate their views on the Capital Plan, having filed no fewer than *twenty-nine* submissions totaling *over 270 pages*.[3] The Commission should conduct its

---

[2] 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 (Mar. 6, 2015), 80 Fed. Reg. 13058 (Mar. 12, 2015) ("Approval Order").

[3] Petitioners' filings related to the Capital Plan include the following: SIG Motion and Memorandum in Support of Motion for Oral Argument In Connection with the Commission's Review of the Staff's Order Approving OCC's

review of the Approval Order—*with the benefit of all information that Petitioners and others chose to submit when they had the opportunity to do so in comment letters, Petitions for Review, written statements, and otherwise.*

The record is robust, and Commission procedures provide that Commission review of the Approval Order is appropriate at this stage. Tellingly, at no time during the six-month pendency of the automatic stay of the Approval Order did Petitioners seek discovery to explore the issues they now raise, despite the fact that the conversation serving as the basis for the attached affidavit of Joel Greenberg, SIG's co-founder, Managing Director, and General Counsel ("Greenberg Affidavit"), occurred no later than March 2015. Petitioners' activities, which include filing no affirmative motions seeking supplementation of the record during the entire duration of the comment period, and then inundating the Commission with a "Motion to

---

Capital Plan, File No. SR-OCC-2015-02 (Oct. 7, 2015); BATS, BOX, KCG, MIAX, and SIG Motion and Memorandum in Support of Motion for an Order (1) Referring This Matter to a Hearing Officer for the Taking of Additional Evidence, and (2) Directing Discovery in Advance of the Hearing, SR-OCC-2015-02 (Oct. 7, 2015); SIG Statement in Opposition to the Order Approving OCC's Capital Plan, File No. SR-OCC-2015-02 (Oct. 7, 2015); BATS, BOX, and MIAX Statement in Opposition to Action Made By Delegated Authority, File No. SR-OCC-2015-02 (Oct. 7, 2015); KCG Statement in Opposition to the Order Approving OCC's Capital Plan, File No. SR-OCC-2015-02 (Oct. 7, 2015); BATS, BOX, KCG, MIAX, and SIG Motion and Memorandum in Further Support of Motion to Reinstitute Automatic Stay, File No. SR-OCC-2015-02 (Sept. 25, 2015); BATS, BOX, KCG, MIAX, and SIG Motion and Memorandum in Support of Motion to Reinstitute Automatic Stay, File No. SR-OCC-2015-02 (Sept. 15, 2015); KCG Response to Motion to Lift Automatic Stay, File No. SR-OCC-2015-02 (Apr. 9, 2015); SIG Opposition to OCC's Motion to Lift the Automatic Stay, File No. SR-OCC-2015-02 (Apr. 9, 2015); Response of BATS, BOX, and MIAX to Motion of the OCC to Lift Automatic Stay, File No. SR-OCC-2015-02 (Apr. 8, 2015); SIG Petition for Review, File No. SR-OCC-2015-02 (Mar. 20, 2015); MIAX Petition for Review, File No. SR-OCC-2015-02 (Mar. 20, 2015); BOX Petition for Review, File No. SR-OCC-2015-02 (Mar. 20, 2015); BATS Petition for Review, File No. SR-OCC-2015-02 (Mar. 16, 2015); BATS Notice of Intention to Petition for Review, File No. SR-OCC-2015-02 (Mar. 13, 2015); BOX Notice of Intention to Petition for Review, File No. SR-OCC-2015-02 (Mar. 13, 2015); KCG Notice of Intention to Petition for Review, File No. SR-OCC-2015-02 (Mar. 13, 2015); SIG Notice of Intention to Petition for Review, File No. SR-OCC-2015-02 (Mar. 13, 2015); MIAX Notice of Intention to Petition for Review, File No. SR-OCC-2015-02 (Mar. 12, 2015); SIG Second Comment Letter, File No. SR-OCC-2015-02 (Mar. 4, 2015); BATS Second Comment Letter, File No. SR-OCC-2015-02 (Mar. 3, 2015); BOX Second Comment Letter, File No. SR-OCC-2015-02 (Mar. 3, 2015); MIAX Second Comment Letter, File No. SR-OCC-2015-02 (Mar. 1, 2015); SIG Comment Letter, File No. SR-OCC-2015-02 (Feb. 27, 2015); KCG Comment Letter, File No. SR-OCC-2015-02 (Feb. 26, 2015); MIAX Comment Letter, File No. SR-OCC-2015-02 (Feb. 24, 2015); Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, SIG, Wolverine Trading Comment Letter, File No. SR-OCC-2015-02 (Feb. 20, 2015); BATS Comment Letter, File No. SR-OCC-2015-02 (Feb. 19, 2015); BOX Comment Letter, File No. SR-OCC-2015-02 (Feb. 19, 2015). This listing excludes filings exclusively by OCC and non-Petitioner Securities Industry and Financial Markets Association.

Reinstitute Automatic Stay"[4] five days after the Commission lifted it, in addition to the instant motion and SIG's Motion for Oral Argument[5]—betray their ultimate strategy: to delay and distract the Commission rather than allow the Commission to decide the matter before it. The Commission should not allow Petitioners to continue to delay its determination of this matter by introducing requests that could have been made months ago, in the obvious hope that such delay will deliver a fatal blow to the Capital Plan irrespective of its merits. The Commission should deny Petitioners' Motion and should proceed to affirm the Approval Order.

BACKGROUND

In December 2014 – January 2015, OCC submitted a proposed rule change and an advance notice filing to enable it to implement its Capital Plan.[6] On February 26, 2015, the Commission, acting directly and after soliciting and receiving comments from the public, including Petitioners, issued a notice of no objection to the advance notice filing ("No Objection Order"), finding that the Capital Plan was consistent with the objectives of the Payment, Clearing and Settlement Supervision Act.[7] The Commission also found in the No Objection Order that the Capital Plan contributes to reducing systemic risks and supporting the stability of the broader financial system.[8] On March 6, 2015, also after soliciting and receiving comment from the public, including Petitioners, the Staff, acting for the Commission pursuant to delegated

[4] *See* BATS, BOX, KCG, MIAX, and SIG Motion and Memorandum in Support of Motion to Reinstitute Automatic Stay, File No. SR-OCC-2015-02 (Sept. 15, 2015).
[5] SIG Motion and Memorandum in Support of Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan, File No. SR-OCC-2015-02 (Oct. 7, 2015).
[6] The background of this matter is described at length in several of OCC's most recent filings. *See, e.g.*, OCC Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan, File No. SR-OCC-2015-02, at 2-8 (Oct. 7, 2015); OCC Brief in Opposition to Motion to Reinstitute Automatic Stay, File No. SR-OCC-2015-02, at 3-4 (Sept. 22, 2015); OCC Motion to Lift Stay, File No. SR-OCC-2015-02, at 1 (Apr. 2, 2015). As a result, this brief discusses only those facts most relevant to the instant motion.
[7] *See* Notice of No Objection to Advance Notice Filing, Exchange Act Release No. 34-74387 (Feb. 26, 2015), 80 Fed. Reg. 12215 (Mar. 6, 2015) ("No Objection Order").
[8] *See id.* at 25.

authority, issued the Approval Order.[9] The Staff concluded that the Capital Plan is consistent with the requirements of the Securities Exchange Act of 1934 ("Exchange Act").[10]

During the comment periods, Petitioners had multiple opportunities to submit argument and evidence to the Commission while it considered OCC's proposed rulemaking. At no time during the comment periods that led to the No Objection Order or the Approval Order, however, did any of Petitioners file any motion under Rule 110 or otherwise to appoint a hearing officer to take evidence or issue subpoenas. Instead, Petitioners chose to submit their objections through the normal comment process based on the information available to them without subpoena or any other discovery method.

Although the Capital Plan received all necessary regulatory approvals by March 6, 2015, its implementation was automatically stayed shortly thereafter when Petitioners filed Notices of Intention to Petition for Review, followed by their Petitions for Review ("Petitions"). On April 2, 2015, OCC moved to lift the stay to enable it to proceed with implementation of its Capital Plan.[11] Upon review of OCC's motion to lift the stay and Petitioners' opposition thereto, the Commission ordered that the stay be lifted on September 10, 2015, finding:

> [I]t is in the public interest to lift the stay during the pendency of the Commission's review. Under the circumstances of this case, the Commission believes, on balance, that strengthening the capitalization of a systematically important clearing agency, such as OCC, is a compelling public interest.[12]

---

[9] *See* Approval Order.

[10] *See Id.* at 38 ("After carefully considering OCC's proposal, the comments received, and OCC's responses thereto, the Commission finds that OCC's proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, the Commission finds that the Capital Plan is consistent with the following provisions of the Act: (i) Section 17A(b)(3)(A); (ii) Section 17A(b)(3)(F); (iii) Section 17A(b)(3)(D); an d (iv) Section 17A(b)(3)(I)[.]" (citations omitted)).

[11] *See* OCC Motion to Lift Stay, File No. SR-OCC-2015-02 (Apr. 2, 2015).

[12] Order Discontinuing the Automatic Stay, Exchange Act Release No. 34-75886, at 2 (Sept. 10, 2015), 80 Fed. Reg. 55668 (Sept. 16, 2015).

The Commission also granted the Petitions for Review on September 10, 2015 and provided that the parties and other persons would be permitted to file written statements in support of or in opposition to the Approval Order by October 7, 2015.[13] Petitioners submitted written statements as permitted by the order granting review.

Now, more than *eight months* after the Commission issued its Notice of Filing of an Advance Notice soliciting the submission of "written data, views and arguments"[14] concerning the Capital Plan from any and all interested persons, and after both the Commission and the Staff ruled against them on the merits of the Capital Plan, Petitioners want to re-start the process by asking the Commission to refer the matter to a hearing officer and to compel full-blown discovery. OCC opposes the motion, and requests that the Commission promptly deny it.

ARGUMENT

Petitioners argue that the Commission should "refer this matter to a hearing officer for the taking of additional evidence and ... should explicitly direct the hearing officer to require OCC and other relevant entities and persons to produce relevant documents and information and appear for depositions in advance of the hearing."[15] Petitioners' request to adduce additional evidence fails for a simple reason: Petitioners have not satisfied the requirements of Rule 452. The Motion should therefore be promptly denied.

---

[13] Order Granting Petitions for Review and Scheduling Filing of Statements, Exchange Act Release No. 34-75885 (Sept. 10, 2015), 80 Fed. Reg. 55700 (Sept. 16, 2015).

[14] *See* Notice of Filing of an Advance Notice, Exchange Act Release No. 34-74202, at 26 (Feb. 4, 2015), 80 Fed. Reg. 7056 (Feb. 9, 2015).

[15] Petitioners' Memorandum in Support of Motion For An Order (1) Referring This Matter to a Hearing Officer for the Taking of Additional Evidence, and (2) Directing Discovery In Advance of the Hearing, File No. SR-OCC-2015-02, at 1 (Oct. 7, 2015) ("Petitioners' Memorandum").

I. Petitioners Have Not Satisfied the Requirements of Rule 452 And Are Not Entitled To Discovery or Referral to a Hearing Officer

Commission Rule of Practice 452 provides that a motion for leave to adduce additional evidence on appeal or review "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."[16] Petitioners fail to demonstrate with particularity the materiality of the evidence they seek to adduce, and fail to articulate any grounds at all—let alone reasonable grounds—for their failure to request or advance such evidence at an earlier stage. Each failure is fatal to the Motion and, as a result, the Motion should be denied.

As an initial matter, Petitioners suggest that a decision of the D.C. Circuit Court of Appeals in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), *superseded by statute on other grounds as stated in NetCoalition v. SEC*, 715 F.3d 342, 354 (D.C. Cir. 2013), and a related Commission decision under Rule 452,[17] dictate that the Commission should refer this matter to a hearing officer and should compel supplementation of the record. Petitioners miss the point in citing to cases in which courts observe that referral to a hearing officer is permissible. OCC does not dispute that the Commission has authority to allow the record to be supplemented under Rule 452, or that there have been cases where such supplementation was warranted. This case, however, is not such a situation.

In *NetCoalition*, for example, administrative and court proceedings lasted for over eight years, and the issue was whether a particular fee increase relating to access to a propriety "depth-of-book" product should be allowed: a comparatively non-urgent issue. By contrast, OCC's

---

[16] 17 C.F.R. § 201.452.

[17] *See* Order Establishing Procedures and Referring Applications For Review to Administrative Law Judge for Additional Proceedings, *In the Matter of the Application of Sec. Indus. & Fin. Markets Ass'n*, File Nos. 3-15350, 3-15351, Exchange Act Release No. 72182 (May 16, 2014).

Capital Plan presents a matter of immediate importance which cannot wait eight years—or even six more months. OCC requires more capital to satisfy its functions as a SIFMU and its anticipated regulatory obligations, as it has shown repeatedly, and it has proposed its Capital Plan to achieve that goal. Petitioners have had ample opportunity to add to the record, and the Staff approved the Capital Plan based on the record *that Petitioners themselves helped develop.* Regardless of whether additional evidence was appropriate in other cases based on their unique factual circumstances, Petitioners do not and cannot demonstrate any reason here for the Commission to exercise its authority under Rule 452 to require further development of the record.

A. Petitioners Have Failed to Identify Material Evidence With Particularity

Petitioners fail to satisfy the first requirement of Rule 452, which requires them to show with particularity that the evidence they seek to offer is material. Petitioners confuse the identification of *issues* germane to the Capital Plan with the identification of *evidence* as required by Rule 452.

Petitioners entirely fail to identify material evidence with particularity. Instead, Petitioners provide a veritable—but generalized—wish-list of sweeping discovery requests, including:

- "OCC should produce all documents and communications concerning its efforts to solicit capital proposals,"[18]
- "OCC should produce the agendas, presentations, board packages, and minutes in relation to any OCC Board meetings or other activities as which the Plan was discussed or considered,"[19]
- "Deposition testimony should be provided by one or more of OCC's Board members concerning the approval process,"[20]

[18] Petitioners' Memorandum, at 12.
[19] *Id.* at 15.

- "OCC should produce current financial statements,"[21] and
- "OCC should produce all documents and communications concerning any consultant who assisted OCC in calculating its capital requirements."[22]

Petitioners do not even attempt to argue that this information is material. For example, though Petitioners seek information about OCC analysts and make much of the fact that they include "unnamed consultant(s),"[23] Petitioners do not articulate why and how the specific identities of analysts are material. Because the materiality of the "evidence" Petitioners describe is not stated with particularity, the Motion fails for this reason alone.

Indeed, in place of identifying with particularity evidence to be offered, Petitioners identify various "open issues" and "unanswered questions" on which they seek to conduct discovery.[24] In this manner, Petitioners attempt to re-open decided issues by trying to change the record on which the issues were submitted and decided. This cannot be what Rule 452 contemplates. If Petitioners' application of Rule 452 were correct and a list of generalized grievances were all that was required for referral to a hearing officer and access to wide-ranging compelled discovery after a decision was issued and on review, every instance of Commission review could be met with calls for discovery by the losing party in a rulemaking proceeding. As a result, every rulemaking proceeding would lead to an open-ended process preventing the Commission from making the necessary decisions to bring closure to rulemaking proceedings.

As categorized by Petitioners, the "unanswered questions" and "open issues" purportedly requiring the Commission to re-open the record at this late stage are of three types. None of

---

[20] *Id.*
[21] *Id.* at 19.
[22] *Id.*
[23] *Id.* at 16.
[24] *Id.* at 4.

these meets the standard of material evidence under Rule 452. OCC notes below Petitioners' three categories of unanswered questions and open issues, together with an explanation of the reasons for which they fail to satisfy the materiality requirements of Rule 452:

Petitioners' First Question: "Did OCC Consider Less Expensive Alternatives to the Plan?"[25]

Petitioners' first point is merely a question that Petitioners wish to explore, not an identification of material evidence they seek to adduce, as required by Rule 452. Moreover, OCC has already answered this question by detailing alternatives considered by its Board and the reasoned basis for their rejection.[26] In any event, OCC's Board was entitled to evaluate the Capital Plan based on its business judgment and take into account factors not limited to cost. For example, the Capital Plan adopted by the Board includes not only an immediate infusion of capital by the Stockholder Exchanges, but also a continuing commitment to provide replenishment capital ("Replenishment Capital Commitment") by credit-worthy exchanges. Whether or not less expensive alternatives were considered, OCC's Board was entitled to make the judgment that, based on all relevant factors, including but not limited to bare expense, this Capital Plan would serve OCC's need for capital and current and future regulatory requirements. Thus, Petitioners' requested discovery on "less expensive alternatives" that were or were not considered is not material to the Commission's decision on whether to affirm the Approval Order.

In support of their argument that they should be permitted to conduct discovery on the consideration of other alternatives, Petitioners cite *Chamber of Commerce of U.S. v. S.E.C.*, 412 F.3d 133 (D.C. Cir. 2005). Petitioners quote the Court's conclusion that the Commission failed

---

[25] *Id.* at 9.

[26] *See, e.g.*, OCC Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan, File No. SR-OCC-2015-02, at 14-15 (Oct. 7, 2015).

to satisfy its statutory obligation to evaluate the economic implications of a rulemaking under its consideration, but omit that the Court based its determination in part on the fact that the Commission had specifically stated that it was without a "reliable basis for determining" the matter at issue but that it nonetheless approved the proposed rule.[27] Here, unlike *Chamber of Commerce*, the Staff had sufficient information on which to base its determination and it issued its Approval Order accordingly. In particular, the Approval Order stated that after considering the OCC's proposed rule and seventeen comment letters, "the Commission was not persuaded that [the] concerns [raised] render OCC's Capital Plan inconsistent with the Act."[28] In addition, the Staff concluded that, "[D]etermining accurate rates on the cost of capital is subjective. Absent available market prices for OCC's equity shares, OCC's Board of Directors must use its judgment to determine the appropriate or competitive rate of return and the dividend policy that appropriately reflects the risk of the Stockholder Exchanges' equity investment."[29] In other words, the Staff made a reasoned decision based on the evidence submitted by the parties, unlike in *Chamber of Commerce,* where the Commission itself stated that it did not have a reliable basis for its decision but nonetheless issued findings.

Petitioners' Second Question: "Was OCC's Board Approval Process Designed to Serve the Exchange Owners Instead of the Public Interest?"[30]

Petitioners' second point also does not describe *evidence* that Petitioners seek to offer, but again poses a *question* related to which they seek to compel discovery. But this issue has already been thoroughly briefed by the parties to this proceeding based on the facts they chose to submit for the record, and the public interest was considered in the Approval Order. Moreover,

---

[27] 412 F.3d 133, 143 (D.C. Cir. 2005).
[28] Approval Order, at 2, 38-39.
[29] *Id.* at 45.
[30] Petitioners' Memorandum, at 13.

the question is based on a flawed premise that the interests of the public and the Stockholder Exchanges are necessarily mutually exclusive. Because OCC has shown that the Capital Plan is in the public interest, it is not material whether it is *also* in the interest of the Stockholder Exchanges. OCC has nonetheless provided extensive information regarding the manner in which the dividends payable to the Stockholder Exchanges under the Capital Plan will be limited by the Dividend Policy, Fee Policy, and Refund Policy. Petitioners have had several opportunities to submit evidence on this point, and the discovery sought by Petitioners is wholly immaterial to the result that the Staff reached in the Approval Order.

Petitioners raise a number of points to argue that OCC's process in approving the Capital Plan was so flawed, it renders the Capital Plan itself inconsistent with the Exchange Act, and that the record must be supplemented in order to fully explore various aspects of the Board's vote. These points—raised already on a number of occasions by Petitioners in other filings—include whether the Staff adequately considered Board members' conflicts of interest, whether OCC's process was in accordance with its By-Laws and other corporate governance documents, and whether the number of public directors affected the integrity of the approval process. Petitioners also question whether OCC sought or received "any analysis or guidance … concerning the appropriateness or legality of the … Exchange Owners [Board members] not recusing themselves" and whether the public directors had sufficient opportunity "to discuss important matters … in a frank and open manner, free from the presence of management."[31]

As an initial matter, Petitioners' questions about whether there were Board conflicts and whether any Board member lacked adequate opportunity to "discuss important matters" are simply not material to the matter at hand: the Commission's review of the Approval Order.

[31] *Id.* at 13-14.

Petitioners do not even attempt to explain how or why the answers to these questions could potentially invalidate the Capital Plan according to OCC's By-Laws or other corporate governance documents, and these questions as posed are thus immaterial. OCC has already explained that conflicts were disclosed as permitted by applicable law.

Further, as OCC has repeatedly argued, Petitioners' arguments surrounding OCC's approval process of the Capital Plan are without merit. OCC has a Commission-approved governance process requiring unanimous consent on some issues, which Petitioners now characterizes as a "veto" right.[32] As a result, whether or not a Stockholder Exchange or its representative exercised a right or threatened to exercise a right under this Commission-approved process is not material to the statutory standards for approval of the Capital Plan by the Commission. Moreover, OCC has demonstrated that Petitioners were not entitled to notice under OCC's By-laws, which provide for the Executive Chairman to decide whether information is competitively significant so as to require advance notice to the non-Stockholder Exchanges, and, in any event, Petitioners have had ample opportunity to have their voices heard in the rulemaking process.[33] OCC has also addressed the conflict argument raised by Petitioners by explaining that the conflict was disclosed to the Board as required by Delaware law.[34] Petitioners' argument about Board vacancies is similarly without merit, as OCC has stated previously that it was specifically advised by outside governance counsel that the vacancies at issue did not prevent the Board from approving the Capital Plan, provided that the proposed rulemaking received the necessary vote of the directors "then in office."[35] Finally, Petitioners'

---

[32] *Id.* at 2-3.
[33] *See* Interpretation and Policy .01 to Article VII B of OCC's By-Laws; *see supra* n.3.
[34] *See, e.g.*, OCC Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan, File No. SR-OCC-2015-02, at 15 (Oct. 7, 2015)
[35] *See, e.g., id.* at 16; *see also* OCC By-Laws, Article XI, Section 1.

questions related to the approval process, like those about alternatives, are merely related topics that Petitioners seek to rehash, not particularized requests for material evidence.

Petitioners' Third Question: "Will OCC Effectively Achieve its Target Capital Requirement Within Six Months Without Implementing the Plan?"[36]

This issue has also been thoroughly briefed by the parties. OCC has provided information concerning its financial standing as of August 31, 2015, and has stated that it would not achieve the level of capital provided by the Capital Plan until 2017. Petitioners have disputed OCC's conclusions about its own financial standing by claiming that OCC could achieve the same results as the Capital Plan simply by retaining fees owed to clearing members as refunds, and by continuing to collect fees at current rates for some undefined time period. As OCC has previously observed, Petitioners' reasoning is critically flawed because, among other things, their calculations ignore taxes that would be due on retained fees.[37] Petitioners have also refused to acknowledge the value to OCC and to the investing public of the Stockholder Exchanges' Replenishment Capital Commitment, which ranges from $117 million to $200 million, and instead have claimed to be able to predict the future by saying that the Replenishment Capital Commitment is simply not important because it will never be needed.

All parties had the chance to make their estimates of OCC's future capital resources based on the evidence that has been submitted. The Commission cannot allow parties' attempted submissions of cumulative and immaterial evidence to prevent it from ever considering a record adequate for decision-making purposes. Further discovery would not result in any material evidence that would require re-opening of the record under Rule 452.

---

[36] Petitioners' Memorandum, at 15.

[37] *See* OCC Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan, File No. SR-OCC-2015-02, at 12 (Oct. 7, 2015).

B. Petitioners Fail to Demonstrate Any Grounds Whatsoever For Their Failure to Adduce Their Evidence Earlier

Petitioners' request to adduce further evidence fails for a second reason, independent of Petitioners' failure to demonstrate materiality with particularity. In addition to the materiality requirement, Rule 452 requires that a movant present, also "with particularity," the "reasonable grounds for [its] failure to adduce such evidence previously."[38] Petitioners fail to present any grounds for their failure to produce evidence earlier, let alone "reasonable grounds."

As discussed above, Petitioners present a list of questions—all of which have been previously raised and briefed at length in various submissions to the Commission—to suggest that there remain "fundamental questions concerning the process by which OCC proposed and approved the [Capital] Plan, and whether the [Capital] Plan is even necessary considering OCC's current capital level and its inflated Target Capital Requirement."[39] Petitioners wholly fail, however, to show why they neglected to seek this information earlier in the proceedings. Information that Petitioners now claim to find critical to the Commission's review, such as "an undisclosed report from an unnamed consultant,"[40] *has never before been the subject of a request for a hearing officer or a subpoena.* Petitioners' disinterest until the present moment, after the information they chose to submit in the rulemaking process did not convince the Staff to rule in their favor, undermines their current argument that they should be able to re-open the proceeding to seek discovery on these well-worn issues at this late stage. The Motion is a thinly-veiled attempt to hinder the Commission's review, not support it. The Commission should not allow Petitioners to misuse Commission rules and procedures to defeat a rulemaking simply by endlessly delaying it in order to avoid its review on the merits.

---

[38] 17 C.F.R. § 201.452.
[39] Petitioners' Memorandum, at 9.
[40] *Id.* at 16.

Recognizing the weakness of their arguments and their failure to satisfy the requirements of Rule 452, Petitioners try to bolster their argument that Commission should allow supplementation of the record by attaching the Greenberg Affidavit. The Greenberg Affidavit purports to detail an alternative to the Capital Plan that Mr. Greenberg states was proposed by the Chicago Board Options Exchange, Inc. ("CBOE") that Mr. Greenberg asserts would have been "much less expensive for OCC."[41]

The statements in the Greenberg Affidavit are not material to the issue of whether the Approval Order should be affirmed. As shown by the Declaration of Craig S. Donohue, the "alternative plan" referenced in the Greenberg Affidavit was neither a "plan" nor an "alternative." Rather it was merely a concept, referred to as a "Bridge Capital Facility," that was discussed by OCC's Ad Hoc Strategic Advisory Group ("Advisory Group"). The Advisory Group, which was made up of representatives of all categories of OCC directors, was formed in March 2014 to consider modifications to OCC's capital structure as part of raising capital and developing a long term viable capital plan. The Advisory Group ultimately developed and proposed to the Board the specific Capital Plan that the Board approved and submitted to the Commission.

Importantly, the Bridge Capital Facility was a concept that was never fully developed into a viable alternative, and for that reason it was never presented as a formal proposal to OCC's Board. The Greenberg Affidavit suggests that the Bridge Capital Facility concept was more fully developed than it actually was by alluding to an interest rate purportedly attached to it.[42] Because the Bridge Capital Facility was just a concept, however, key lending terms, including but not limited to an interest rate, were never attached to it.

---

[41] *Id.* (attaching Affidavit of Joel Greenberg, File No. SR-OCC-2015-02 (Oct. 7, 2015) ("Greenberg Affidavit").
[42] Greenberg Affidavit, at ¶ 10.

It bears emphasis that the Bridge Capital Facility would not have met the "funded by equity" requirement of proposed Commission Rule 17Ad-22(e)(15).[43] Because the Bridge Capital Facility did not provide for capital funded by equity, which is required under the Commission's proposed standards for covered clearing agencies and Principle 15 of the PFMIs, the Bridge Capital Facility concept could not have become the permanent plan.

Moreover, the Greenberg Affidavit only serves to demonstrate that Petitioners *could have but did not at any point* seek to introduce the evidence that is the subject of their latest motion. The Greenberg Affidavit is dated October 7, 2015, but purports to detail the substance of conversations "in or about late February or early March 2015." Petitioners cannot credibly contend that they have reasonable grounds for failure to offer this evidence previously when they have known of it for at least seven months.

It is further noteworthy that Petitioners have never before sought referral to a hearing officer. This strategic decision is particularly important given that Rule 110 specifically provides authority for the Commission to refer a matter to a hearing officer.[44] At no time prior to the issuance of the Approval Order, however, did any of the Petitioners invoke Rule 110 or otherwise seek referral to a hearing officer. Instead, Petitioners chose to rest on the evidence in the record and the evidence they and OCC submitted. The Commission should recognize that its rules are designed to permit flexibility to "serve the interests of justice" and avoid "prejudice to

[43] *See* Standards for Covered Clearing Agencies, Exchange Act Release No. 34-71699 (Mar. 12, 2014), 79 Fed. Reg. 29507 (May 22, 2014).
[44] *See* 17 C.F.R. § 201.110.

the parties to the proceeding,"[45] not to facilitate Petitioners' strategic delay tactics intended to divert the Commission from deciding the matter before it.

CONCLUSION

Petitioners' Motion is deficient on every front. Petitioners fail to meet the express requirements of Rule 452 that their motion state with particularity that the additional evidence at issue is material and that there exist reasonable grounds for their failure to adduce such evidence previously. These requirements exist to prevent exactly what Petitioners attempt here: endless delay in order to serve the Petitioners' self interests over the public interest. The Commission should deny the Motion and promptly affirm the Approval Order.

THE OPTIONS CLEARING CORPORATION

By: William J. Nissen

William J. Nissen
Steve Sexton
Kristen Rau
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000

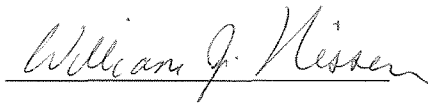
Dated: October 15, 2015

[45] *Id.* § 201.100(c) ("The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary.")

CERTIFICATE OF COMPLIANCE

I, William J. Nissen, counsel to The Options Clearing Corporation (OCC), hereby certify that the foregoing brief complies 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 includes 5,877 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

Dated: October 15, 2015



William J. Nissen

Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000
Facsimile: 312-853-7036

CERTIFICATE OF SERVICE

I, William J. Nissen, counsel to The Options Clearing Corporation, hereby certify that on October 15, 2015, I served copies of the attached OCC's Brief in Opposition to Motion for Referral to Hearing Officer and Discovery by way of facsimile at the numbers shown below and by Federal Express to the addresses shown below, including the original and three copies by Federal Express to the Secretary:

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

John A. McCarthy
General Counsel
KCG Holdings, Inc.
545 Washington Boulevard
Jersey City, NJ 07310
Facsimile: 201-557-8024

Lisa J. Fall
President
BOX Options Exchange LLC
101 Arch Street, Suite 610
Boston, MA 02110
Facsimile: 617-235-2253

Barbara J. Comly
Executive Vice President, General Counsel
& Corporate Secretary
MIAX
7 Roszel Road, Suite 5-A
Princeton, NJ 08540
Facsimile: 609-987-2201

Joseph C. Lombard
James P. Dombach
Murphy & McGonigle, P.C.
555 13th Street N.W.
Suite 410
Washington, DC 20004
Facsimile: 202-661-7053

Eric Swanson
General Counsel & Secretary
BATS Global Markets, Inc.
8050 Marshall Drive, Suite 120
Lenexa, KS 66124
Facsimile: 913-815-7119

Dated: October 15, 2015

William J. Nissen
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: 312-853-7000
Facsimile: 312-853-7036