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April 10, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-10690

Re: File No. SR-OCC-2015-02: Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of a 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 Market Utility

and

File No. SR-OCC-2014-813; Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice, as modified by Amendment No. 1, Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systemically Important Market Utility

SIFMA[1] submits this comment letter in response to the Proposed Capital Plan in the above-referenced Notice of Filing of a Proposed Rule Change and Notice of Filing of an Advance Notice (together, the "Notices") filed by the Options Clearing Corporation ("OCC"). SIFMA recommends that the Securities and Exchange Commission (the "SEC" or the "Commission") reject the OCC Capital Plan, and this letter is an addendum to our previous comment letter (dated February 20, 2015[2]). The letter is also in response to the OCC's post-remand submission[3] to the SEC, which the OCC provided in support of the re-approval of the Proposed Capital Plan. In August 2017, the D.C. Circuit Court held that the original Order approving the Capital Plan was "arbitrary and capricious" and remanded the case to give the SEC an opportunity to properly evaluate the Proposed Capital Plan.[4]

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] SIFMA, Comment Letter to Notice of Filing of a Proposed Capital Plan for Raising Additional Capital (Sec. and Exch. Comm'n February 20, 2015), https://www.sec.gov/comments/sr-occ-2015-02/occ201502-4.pdf.

[3] Options Clearing Corp., Post-Remand Submission of a Proposed Capital Plan for Raising Additional Capital (Sec. and Exch. Comm'n October 13, 2017), (citing 15 U.S.C. 78q-1(b)(3)(I).).

[4] *Susquehanna Intl Group, LLP, et al. v. SEC,* 866 F.3d 442 (D.C. Cir. 2017).

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The OCC filed a Post-Remand Submission to the Commission in Support of the Re-Approval of the Proposed Capital Plan in response to the Exchange Act requirements identified by the D.C Circuit. The requirements were: (1) that a clearing agency's rules be "designed ... in general, to protect investors and the public interest;" (2) that a clearing agency's rules "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act; (3) that rules not be "designed to permit unfair discrimination ... among participants in the use of the clearing agency;" and (4) that a self-regulatory organization "comply with ... its own rules."[5] SIFMA contends that the Proposed Capital Plan does not comply with these requirements and that the Commission should disapprove the Capital Plan.

A. **The Capital Plan Marks OCC's Evolution into a For-Profit Entity, Designed to Benefit Its Shareholders.** Until recently, the OCC traditionally operated as a low-cost and non-profit utility, refunding distributable earnings to OCC Members through annual rebates. Additionally, throughout the first 40 years of its existence, the OCC always maintained an adequate capital position to cover any unforeseen operating costs. Notably, there was never an occasion where management needed to tap into Shareholder Equity to fund an unforeseen operational expense. In recent years, however, this approach towards low fees and prudent capital reserves changed dramatically.

   In 2012, the OCC was designated as a Systemically Important Financial Market Utility ("SIFMU") which required OCC to obtain and maintain increased levels of liquid net assets funded by equity. In response to the new requirement, in 2014, the OCC increased clearing fees by approximately 70%, in what would be the first of several steps ostensibly taken to fulfill the requirements of OCC's SIFMU designation. In 2015, the OCC adopted its Proposed Capital Plan, which increased Shareholders' Equity to an amount that was ten-fold the 2013 level. While SIFMA recognizes the regulatory obligations, which required OCC to increase Shareholders' Equity, the need for a 70% increase in fees and a ten-fold increase in Shareholder Equity was never clearly established. What has become clear, however, is that by connecting the purported need for such dramatic increases to regulatory requirements, and by imploring market participants to accept these needs as urgently necessary, the OCC was able to immediately implement its Capital Plan upon its filing with the Commission, resulting in a new stream of exorbitant dividends to its Shareholder Exchanges. Currently, as described below, the Shareholder Exchanges are benefiting financially from this plan at the expense of all other market participants, with no proper justification.

   While the SIFMU designation illustrates the OCC's vital role in the clearing and settlement process for U.S. listed-options and is a development that requires a certain level of funding, SIFMU–related regulatory costs do not substantiate the depth and degree of the OCC's new budgetary approach. Nonetheless, the OCC routinely refers to the SIFMU designation when announcing new fee increases, creating capital reserve amounts that are now collectively overfunding operations to an unreasonable degree resulting in oversized dividends to the Shareholder Exchanges. In other words, not only has the OCC been monetized at the expense of its clearing members and investors, it has occurred in the guise of regulation, using vague and poorly

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[5] 15 U.S.C. § 78q-1(b)(3)(F), (I); 15 U.S.C. § 78(g)(1).

substantiated reasons in its public filings relating to regulatory requirements and related expenses.

While the evolution of the OCC into a de facto for-profit company is recent, its previous role as a low-cost utility dates to its formative years. In 1975, the Commission approved the OCC to act as the guarantor for exchange-listed options. As a result, the Chicago Board Options Exchange, American Stock Exchange and the Philadelphia Stock Exchange became OCC Participant Exchanges, agreeing to match and clear U.S. exchange listed-options contracts exclusively through the OCC. Thus, the OCC was created to serve as a public utility for the listed options marketplace and was purposely created as a central clearing party ("CCP") for each of the listed-options exchanges. In earlier times, the exchanges operated as de-facto utilities by their owner broker-dealer member firms, prior to their conversion to for-profit entities[6]. More recently, following the exchanges' conversion from mutual organizations into for-profit entities, the OCC itself wash transformed and now reflects certain for-profit characteristics like its owners. Now, as a result, clearing members must be concerned that excessive revenue collections at OCC will not simply revert to refunds but will also, in roughly equal portions, divert into oversized dividends.

The value of refunding earnings to OCC Members was emphasized in 2014 by OCC Chairman Craig Donohue in his address at the Options Industry Conference: "it is our clearing members and their customers who receive pass through refunds who have benefited from OCC's strong financial performance."[7] However, the Proposed Capital Plan has the intent and effect of tactfully establishing a profit-generating scheme to capitalize on its utility status that effectively produces ever-increasing returns for the five Stockholder Exchanges. This effort is evidenced in part by the decision to cap the refund to Members at 50% of excess fees. As a result, the remaining post-tax earnings of the OCC, under the Proposed Capital Plan, is eligible for allocation as dividend payments to the Stockholder Exchanges. This profiteering issue is further exacerbated by the absence of checks and balances on 1) the amount or 2) duration of the dividends. Effectively, the result is an annual oversized dividend payable in perpetuity to the five Stockholder Exchanges.

The OCC contends that the Proposed Capital Plan neither alters its essential role as a market utility nor monetizes the OCC for its Stockholder Exchanges. The

[6] In 1976, the Pacific Exchange, Inc. became a participant exchange of the OCC, followed by the ISE in 2000. When the Boston Options Exchange ("BOX") debuted in 2004, it is noteworthy that it was the first U.S. listed-options exchange, which upon its launch, was not included as an OCC shareholder. In 2002, Nasdaq's shares began trading on the OTC Bulletin Board, followed by a listing on the Nasdaq Stock Market in 2005. Similarly, the New York Stock Exchange did a reverse takeover with Arca in 2006 (following their 2005 acquisition of the Pacific Stock Exchange), which resulted in it also becoming a publicly traded company. In 2010, CBOE also converted to a publicly-traded company as the wave of exchange conversions to for-profit, publicly traded companies continued. Ironically, the OCC began to operate like a for-profit company when they were designated a SIFMU, which was strictly driven by regulatory requirements. This culminated with the proposed Capital Plan in 2015.

[7] Craig Donohue, Executive Chairman, Options Clearing Corp., Remarks at the Options Industry Conference, Heightened Expectations for Systemically Important Clearing Houses: How OCC is Meeting the Challenge (May 1, 2014), http://www.optionsclearing.com/about/newsroom/releases/2014/05_01.jsp.

OCC elaborates that, "it will continue its practice of refunding a significant percentage of excess clearing fees to clearing members, thus preserving that aspect of OCC's industry 'utility' function."[8] This argument confuses the issue at hand. While the Proposed Capital Plan purports to maintain the OCC's role as a market utility, it clearly creates a new priority to pay dividends to its Shareholder Members, which is supported by the Plan's proposed 33% Business Risk Buffer (the "budget buffer") of estimated revenue over operating expenses. In fact, to call the refund of excess fees to Members "significant" misconstrues that there was no such prior restriction on the refunds returned to its Members. Simply asserting the preservation of certain utility-type functions does not negate the for-profit characteristics of the Proposed Capital Plan, especially the unchecked and biased nature of the dividend to Shareholder Members. Moreover, the "significant percentage" relates to the year-end 50% split of the budget buffer excess to be refunded to clearing members, which then allows OCC to dedicate the other 50% to the dividend. With current rates of budget growth so high that the budget buffer has doubled in size over just a few recent years and continues to grow, the dividend part of the split is destined to soon be far greater than the refund amounts of the past. Thus, OCC's claim about "preserving" a "significant percentage" of refunds to members is pure subterfuge.

It should be noted that there are other SROs with a similar SIFMU designation that have increased Shareholders' Equity (to comply with the new regulation) with little to no friction for clearing house members. The Depository Trust & Clearing Corporation ("DTCC") adopted the Clearing Agency Policy on Capital Requirements and the Clearing Agency Capital Replenishment Plan.[9] Unlike the OCC, the DTCC Capital Plan does not raise potentially excessive profit or anti-competitive concerns.[10]

Additionally, there are other provisions in the Proposed Capital Plan that reinforce a shift to maximizing and preserving the Stockholder Exchanges' returns rather than protecting the interests of the Members and their customers. The Proposed Capital Plan purports to reduce the "significant percentage of excess clearing fees"[11] by deducting amounts needed to fund increases in the OCC's capital requirements. But the cost to the industry to finance these purported funding needs has been increasingly excessive as the OCC's budget continues to balloon, pushing the dividend amount up annually. Indeed, the rate of return on the dividends is already at a staggering amount and is expected to grow into perpetuity as evidenced by the 22% and 17% returns, respectively in 2017 and 2016, on the 2015 cash infusion. These are extremely high rates of return that are rising and, apparently, will continue to rise under the Proposed Capital Plan. Moreover, not only do members not earn a return on the additional capital contribution derived from excess fees, none of it would be returned in the event of the potential liquidation of the OCC.[12] Also, if the Stockholder Exchanges'

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[8] Exchange Act Release No. 34-77112, File No. SR-OCC-2015-02 (February 11, 2016), https://www.sec.gov/rules/other/2016/34-77112.pdf
[9] Exchange Act Release No. 34-82432, File No. SR-DTC-2017-021(January 2, 2018), https://www.sec.gov/rules/sro/dtc/2018/34-82432.pdf
[10] It is also noteworthy that DTCC is owned by the clearing members as opposed to the participant exchanges.
[11] *See supra* note 6.
[12] Exchange Act Release No. 34-74136, File No. SR-OCC-2015-02 (January 26,2015), https://www.sec.gov/rules/sro/occ/2015/34-74136.pdf.

Replenishment Capital is called, no refunds are eligible to be paid to Members (and their customers) while any portion of that Replenishment Capital remains outstanding. Significantly, refunds are discontinued permanently if the Replenishment Capital remains outstanding for two years, regardless of whether it is repaid in the future. The mechanics of the Proposed Capital Plan clearly illustrate the OCC's goal to maximize and prioritize the dividends payable to Stockholder Exchanges while at the same time minimizing the risk to the Shareholder Exchanges, which puts it squarely at odds with its role as a low-cost market utility.

As recent developments have demonstrated, the OCC now asserts itself as motivated by profits. Throughout the process of adopting and defending its Capital Plan over recent years the OCC has publicly assured market participants that it views itself as a utility operating responsibly in its capacity for the benefit of market participants. On December 20, 2017, however, the OCC submitted a response in connection with the Remand that instead defends the profits from Proposed Capital Plan dividends in a much more pecuniary sense. Specifically, the OCC states:

> "...nothing in the Exchange Act prohibits Stockholder Exchanges from earning returns on their capital. Nothing in the Exchange Act regulates what shareholders can, and cannot earn, on investments in SRO's."[13]

This is a complete departure from previous assurances by the OCC that the dividends would be reasonable compensation for a capital contribution that it said was made necessary due to regulatory developments. With dividend rates of return now exceeding 20% and expected by some to exceed 30% shortly, it now appears that the OCC finds it necessary to justify its enormous dividend payouts as justifiable rewards under its exchange ownership structure. The OCC now implies in its explanation of the dividends that it has the right to lavishly reward the Shareholder Exchanges, even though the ever-increasing earnings returns are inconsistent for a low-cost industry utility.

As it undertakes its review of the Proposed Capital Plan, SIFMA asks the Commission that it establish a "rational connection between the facts found and the choice made."[14] Based on the facts hereto, the OCC has not provided substantial justification or rationale to explain the for-profit nature of the perpetual dividend to Shareholder Exchanges and its budgetary approach to regulatory costs. The OCC, as a self-regulatory organization, must ensure that its proposed rule change is "consistent with" provisions of the Exchange Act.[15] As illustrated in this comment letter, the OCC fails to meet any of the Exchange Act rules imposed on clearing agencies.[16] This can be attributed to the conflicted status OCC has as both a low-cost CCP and a for-profit entity, as the OCC's Proposed Capital Plan falls short in satisfying both its role as a clearing agency and as a public utility. In turn, if the Commission determines that the

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[13] Options Clearing Corp., Reply to Petitioner's Submission on Remand and in Further Support of the Re-Approval of the Capital Plan (Sec. and Exch. Comm'n December 20, 2017), https://www.sec.gov/comments/sr-occ-2015-02/occ201502-2827018-161702.pdf.
[14] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[15] 15 U.S.C. §§ 78s(b)(2)(C)(i); § 78s(b)(2)(C)(ii).
[16] *See supra* note 5.

OCC should continue operating as a low-cost CCP, the monetization of the OCC should be addressed since it conflicts with the Exchange Act rules governing CCPs.

B. **The Capital Plan Imposes an Unnecessary Burden on Competition by Setting the Target Capital Requirement Absent an Open, Competitive Process.** The OCC asserts that the Commission used a thorough analysis to determine that "the Capital Plan does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and is therefore consistent with Exchange Act Section 17A(b)(3)(I)."[17] However, the D.C. Circuit Court decision noted that the Proposed Capital Plan failed because "the Commission did not itself 'find[]' or 'determine,' … that the Plan met any of those requirements."[18]

Even if the Commission were to undergo such an analysis, the Proposed Capital Plan lacks a competitive offering process or transparent pricing data to support fairness of the proposal. Historically, the OCC was fashioned as an industry market utility designed to clear listed-options trades, regardless of the execution venue, while optimally serving *all* parties. Yet, the Proposed Capital Plan's capital mechanics demonstrate features that clearly favor the Shareholder Exchanges, which promotes anti-competitive behavior and burdens all other market participants, including the non-shareholder exchanges.

The OCC relies on three potential sources for capital: (i) contributions to the Target Capital Requirement; (ii) the capital provided from excess Member fees; and (iii) the commitment of Replenishment Capital. In return for their capital contribution to the Target Capital Requirement and the Replenishment Capital, the Stockholder Exchanges receive a perpetual dividend as discussed above in Subsection A. As stated in our 2015 letter, the minimal analysis that addressed the reasonableness, efficiency and fairness of these aspects of the Proposed Capital Plan notes that the policies:

> "effectively cap the dividends to be paid to the Stockholder Exchanges at a level that the Board (with the advice of outside financial experts) has determined results in a reasonable rate of return on contributed capital, particularly in comparison to the implied cost of capital to the clearing members and customers of instead pursuing an approach which required the accumulation of retained earnings through higher fees and no refunds for several years.[19]"

An inference to be drawn from this statement implies that an increase in capital will result in the eventual reduction in fees to the clearing members – a reasonable appeal that would help support the efficiency of the Plan. However, the numbers reflected in the past few years suggest that there is no correlation between the capital increase and fee reductions. In fact, the numbers suggest that both capital and

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[17] Options Clearing Corp., Post-Remand Submission of a Proposed Capital Plan for Raising Additional Capital (Sec. and Exch. Comm'n October 13, 2017), (citing 15 U.S.C. 78q-1(b)(3)(I).), https://www.sec.gov/comments/sr-occ-2015-02/occ201502-2641873-161290.pdf.
[18] *Susquehanna Intl Group, LLP, et al. v. SEC,* 866 F.3d 442 (D.C. Cir. 2017).
[19] Exchange Act Release No. 34-74202, File No. SR-OCC-2014-813 (February 4, 2015), https://www.sec.gov/rules/sro/occ-an/2015/34-74202.pdf

fees have risen dramatically together, which correlates with a larger dividend windfall for the Stockholder Exchanges, and no comparable benefit for member firms who are contributing end-user fees.

In fact, OCC has once again determined that fees should be increased. On January 25, 2018, the OCC announced, "that a fee increase would be necessary to ensure that OCC can cover its operating expenses and maintain its business risk buffer as required under OCC's By-Laws."[20] The fee was set to become effective on March 1, 2018. However, on February 28, the SEC issued a suspension order blocking implementation of the fee and imposing a proceeding to determine whether to approve or disapprove the fee increase.[21] In allowing additional time for comments and analysis, the SEC has apparently not yet determined whether the fee increase satisfies requirements under the Act, including whether it provides for the equitable allocation of reasonable dues, fees and other charges among its participants.

By suspending the fee increase, the SEC highlights that more revenue leads to larger OCC budgets, which then increases the budget buffer and, ultimately, the dividend payments. In this connection, the budget buffer spread (i.e., the difference between annual revenue and operating expenses) performs a critical role that needs to be understood. The budget buffer was originally designed to supplement the OCC's operating budget in the event of volume decline or an increase in unexpected expenses. Through this causal nexus, the OCC has attempted to justify its seemingly high budget buffer to "control operating expenses" and meet "increased regulatory compliance costs and technology upgrades."[22] This incorrectly implies that the buffer is essential to keeping the OCC's operations afloat. Rather, the OCC's clearing members would immediately contribute funds if there ever was a threat of stalled operations due to a lack of capital.

Meanwhile, as previously mentioned, the budget buffer is growing exponentially under the Capital Plan. Given trending revenues for 2018, the industry is alarmed that the OCC may accumulate over $200 million of budget buffer by year-end. Clearly, the budget buffer is already a leveraging tool that is generating annual dividends for the Shareholders at a rate even faster than those discussed when the Capital Plan was proposed in 2015. This raises serious questions as to why the budget buffer is set at such a high level. Moreover, The OCC refers to a 25% buffer, but the actual appears to be 33% above operating expenses based on recent financial statements. It appears that the OCC uses 25% as the divisor into total revenue that includes the budget buffer itself as an operating expense. Thus, referring to the budget buffer as 25% is a mischaracterization of operating costs. To the extent this

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[20] Options Clearing Corp., Schedule of Fee Change, (Jan. 25, 2018) available at: https://www.theocc.com/webapps/infomemos?number=42522&date=201801&lastModifiedDate=01%2F25%2F2018+13%3A43%3A29

[21] Exchange Act Release No. 34-82793, File No. SR-OCC-018-004 (February 28, 2018), https://www.sec.gov/rules/sro/occ/2018/34-82793.pdf.

[22] Options Clearing Corp., Post-Remand Submission of a Proposed Capital Plan for Raising Additional Capital (Sec. and Exch. Comm'n October 13, 2017), https://www.sec.gov/comments/sr-occ-2015-02/occ201502-2641873-161290.pdf.

difference exists, it should not be dismissed as de minimis and should be fully explained by the OCC.

Thus, *if* a new fee is implemented that is excessive and unnecessary, a substantial amount of any overfunding will be turned into a dividend for the Shareholder Exchanges. Seemingly receptive to this concern, the Commission decided to suspend the scheduled fee increase as of February 28, 2018.[23] In fact, the Commission justified the suspension of the scheduled fee increase to determine, "that clearing agency rules provide for the equitable allocation of reasonable dues, fees and other charges among its participants."[24]

Even without the new increased revenue from the suspended fee proposal, if cleared volume continues to grow in 2018 at a rate around 40% over last year, the OCC may collect around $600 million in gross revenue for 2018. This is a staggering amount given that OCC gross revenue was only $200 million just five years ago.

The point of a larger budget and greater budget buffer, of course, is that dividend payments will generally rise as the budget grows larger. On March 1, 2018, the OCC announced the declaration of a nearly $80 million refund to clearing members for 2017.[25] In the OCC's recently publicized financial report for 2017, it stated that the 2017 dividend for its Shareholder Members is $32.5 million, which would be approximately a 22% return on investment of the initial $150 million capital contribution. A simple side by side comparison of the disparate returns reflects that the Proposed Capital Plan, by design, creates an unnecessary burden on competition by converting end-user fees into dividends for Stockholder Exchanges. Indeed, this 22% rate of return on the 2015 investment is far greater than what OCC projected when adopting the Capital Plan – and it has only been three years since adoption. At this rate, not only are 30% returns on the horizon, it appears that even higher rates of return are envisioned by OCC given its recent claims that there are no Exchange Act restrictions on the profits that Shareholder Exchanges can extract from their capital contribution to what is essentially a market utility.

As noted above, the budget buffer amount has calculated to approximately 33% of operating expenses in recent years, rather than the 25% inferred by OCC. But the story for 2017, and even more so in 2018, is that OCC has established a pattern of collecting much more in revenue than required to satisfy its targeted budget buffer above operating expenses. As the chart below shows, OCC collecting revenue more than 46% above operating costs in 2017, leading to its special refund of $25 million in addition to its regular dividend of $53 million. Given a very conservative 33% increase in volume for 2018 (i.e., the rate increase in the 1st quarter over last year was around 40%) and a 10% increase in expenses – and even without the requested new fee increase – the OCC appears headed on the path of collecting a revenue amount that would be 75% over budgeted operating expenses. The investment income value of this

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[23] Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change to Revise The Options Clearing Corporation's Schedule of Fees (February 28, 2018) available at: https://www.sec.gov/rules/sro/occ/2018/34-82793.pdf

[24] *Id.*

[25] https://www.theocc.com/about/newsroom/releases/2018/March-1-OCC-Declares-Nearly-80-Million-Clearing-Member-Refund-for-2017.jsp

excess is appreciable and clearing members losing the ability to use that revenue during the year is significant, but perhaps the most troubling concern is that excess revenue of these amounts reduces budgetary discipline and encourage wasteful spending by OCC (i.e., either spend the extra income or return it as a "special" dividend).

Note: the chart below uses approximations and projects gross revenue for 2018 using a 33% increase in OCC options volume while expenses reflect a 15% estimated increase.

Year	2016[26]	2017[27]	2018
Gross Revenue*	$ 329M	$ 438M	$ 536M
Expenses	$ 245M	$ 298M	$ 347M[28]
Budget Buffer	$ 82M	$ 99M	$ 116M
Excess Revenue Over Buffer	$ 2M	$ 41M	$ 73M
Refund	$ 46M	$ 53M regular 26M special	Estimated: $ 58M regular 58M special**
Dividend	$ 26M	$ 32M	Estimated: $ 46M

* Gross Revenue includes associated refunds to clearing members.
** Refunds are paid as 50% of budget buffer and additionally as special refunds for imbalances. The 2018 special refund is a rough estimate based on past performance percentage distributions.

This combination of the perpetual dividend and the fee schedule increase also presents an unnecessary burden on competition in the following hypothetical. If the fee increase moves forward, it would increase the fee by $0.004 per contract. With volumes at record levels in 2018, the impact of the fee increase would include increasing the width of quotes proportionally as market makers respond to the fee increase. With Stockholder Exchanges such as the PHLX (owned and operated by NASDAQ) and the Chicago Board Options Exchange receiving large dividends on the backend, they could be incentivized to lower their own processing fees to drive more volume away from other exchanges. This would leave other exchanges victim to higher end-user fees with less volume to make up for their lack of a dividend. The mechanics of the Proposed Capital Plan, whether examining the perpetual dividend, the budget buffer or the scheduled fee increase, clearly demonstrate an inefficient and unnecessarily burdensome relationship between the Stockholder Exchanges and the non-stockholder exchanges.

C. **The Capital Plan Permits Unfair Discrimination Against Non-Shareholder Exchanges in The Use of The Clearing Agency** The OCC contends that the Proposed Capital Plan does not interfere with the way participants "use" the clearing agency.

[26] Sourced from OCC Financial Statements.
[27] *Id.*
[28] Options Clearing Corp., Submission in Support of the Proposed Rule Change to Revise its Schedule of Fees (Sec. and Exch. Comm'n March 27, 2018), https://www.sec.gov/comments/sr-occ-2018-004/occ2018004-3343285-162091.pdf.

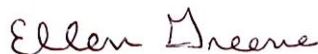
They note that "all clearing members receive equal treatment under the Capital Plan."[29] This assertion fails to consider that any equality that is met comes from diminishing the prospects of all market participants – even if on an equal basis. Also, the OCC omits to mention that the benefits from the Plan enjoyed by the Shareholder Exchanges come in part at the expense of non-Shareholder Exchanges, who are unable to benefit financially because they were not given an opportunity to become OCC Shareholder Exchanges at the time of their inception.

SIFMA fully supports the need for the OCC and other systemically important financial market utilities to be appropriately capitalized. SIFMA believes, however, that it is vital that the enhancements to the OCC's capital structure not detract from or destroy the OCC's successful history of operating as an industry utility for the benefit of the market participants who use and completely rely on the OCC's clearing services. As described in the Notices, the Proposed Capital Plan does just that and accordingly, should be rejected by the Commission. Instead, the OCC should engage in a public and transparent process to ensure that it is able to obtain and maintain necessary capital on terms and at prices that are fair, reasonable, and efficient.

SIFMA recognizes the requirements placed on the OCC as a SIFMU but finds the Proposed Capital Plan to be harmful to investors and the market place. Accordingly, for the reasons outlined above and in SIFMA's 2015 comment letter, the SEC should disapprove the Proposed Capital Plan.

Thank you for your consideration of our comments. If you have any questions or require further information, please contact me at (212) 313-1287 (egreene@sifma.org).

Sincerely,



Ellen Greene
Managing Director

cc: The Honorable Jay Clayton, Chair
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner

Brett Redfearn, Director, Division of Trading and Markets

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[29] Options Clearing Corp., Post-Remand Submission of a Proposed Capital Plan for Raising Additional Capital (Sec. and Exch. Comm'n October 13, 2017), https://www.sec.gov/comments/sr-occ-2015-02/occ201502-2641873-161290.pdf.