with the Manager (any such entity included in the term ''Manager''); (b) operates as an exchange-traded managed fund as described in the Reference Order; and (c) complies with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein (each such company or series and Initial Fund, a ''Fund'').[3]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general purposes of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

7. Applicants submit that for the reasons stated in the Reference Order: (1) With respect to the relief requested pursuant to section 6(c) of the Act, the relief is appropriate, in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act; (2) with respect to the relief request pursuant to section 17(b) of the Act, the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, are consistent with the policies of each registered investment company concerned and consistent with the general purposes of the Act; and (3) with respect to the relief requested pursuant to section 12(d)(1)(J) of the Act, the relief is consistent with the public interest and the protection of investors.

[3] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein.

By the Division of Investment Management, pursuant to delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2015–05596 Filed 3–11–15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–74452; File No. SR–OCC–2015–02]

Self-Regulatory Organizations; The Options Clearing Corporation; 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

March 6, 2015.

On January 14, 2015, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2015–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on January 30, 2015.[3] The Commission received seventeen comment letters on OCC's proposal from OCC and seven other commenters or groups.[4] This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4. OCC also filed proposals in this proposed rule change as an advance notice under Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Payment, Clearing and Settlement Supervision Act''). 12 U.S.C. 5465(e)(1). On February 26, 2015, the Commission issued a notice of no objection to the advance notice filing. *See* Exchange Act Release No. 74387 (February 26, 2015) (SR–OCC–2014–813).

[3] Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR–OCC–2015–02). As the Commission noted in the notice of filing of the proposed rule change, OCC stated that the purpose of this proposal is, in part, to facilitate compliance with proposed Commission rules and address Principle 15 of the Principles for Financial Market Infrastructures (''PFMIs''). The proposed Commission rules are pending. *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29508 (May 22, 2014) (S7–03–14). Therefore, the Commission has evaluated this proposed rule change under the Act and the rules currently in force thereunder. *See* Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR–OCC–2015–02).

[4] *See* Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc., (February 19, 2015) (''BATS Letter I''); Letter from Tony McCormick, Chief Executive Officer, BOX Options Exchange, (February 19, 2015) (''BOX Letter I''); Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading, (February 20, 2015) (''MM Letter''); Letter from Ellen Greene, Managing Director, Financial Services Operations, SIFMA, (February 20, 2015) (''SIFMA Letter''); Letter from James E. Brown, General Counsel, OCC, (February 23, 2015) (responding to BATS Letter and BOX Letter) (''OCC Letter I''); Letter from James E. Brown, General Counsel, OCC, (February 23, 2015) (responding to MM Letter) (''OCC Letter II''); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchange, LLC (February 24, 2015) (''MIAX Letter I''); Letter from James E. Brown, General Counsel, OCC, (February 24, 2015) (responding to SIFMA Letter) (''OCC Letter III''); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., (February 26, 2015) (''KCG Letter I''); Letter from Eric Swanson, General Counsel and Secretary, BATS Global Markets, Inc., (February 27, 2015) (''BATS Letter II''); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., (February 27, 2015) (''KCG Letter II''); Letter from Richard J. McDonald, Chief Regulatory Counsel, Susquehanna International Group, LLP, (February 27, 2015), (''SIG Letter I''); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchange, LLC (March 1, 2015) (''MIAX Letter II''); Letter from James E. Brown, General Counsel, OCC, (March 2, 2015) (''OCC Letter IV''); Letter from Eric Swanson, General Counsel and Secretary, BATS Global Markets, Inc. (March 3, 2015)(''BATS Letter III''); and Letter from Tony McCormick, Chief Executive Officer, BOX Options Exchange, (March 3, 2015) (''BOX Letter II''); Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, (March 4, 2015) (''SIG Letter II''). Since the proposal was filed as both an advance notice and proposed rule change, the Commission considered all comments received on the proposal, regardless of whether the comments were submitted to the proposed rule change or advance notice. *See* comments on the advance notice (File No. SR–OCC–2014–813), *http://www.sec.gov/comments/sr-occ-2014-813/occ2014813.shtml* and comments on the proposed rule change (File No. SR–OCC–2015–02), *http://www.sec.gov/comments/sr-occ-2015-02/occ201502.shtml*. In its evaluation of the proposed rule change, the Commission assessed whether the proposal was consistent with the requirements of the Act and the applicable rules and regulations thereunder.

I. Description

OCC is amending its By-Laws and other governing documents, and adopting certain policies, for the purpose of implementing a plan for raising additional capital (''Capital Plan'') under which the options exchanges that own equity in OCC (''Stockholder Exchanges'' or ''Stockholders'') will make an additional capital contribution and commit to replenishment capital (''Replenishment Capital'') in circumstances discussed below, and will receive, among other things, the right to receive dividends from OCC. In addition to the new capital contribution and Replenishment Capital commitment, the main features of the Capital Plan include: (i) A policy establishing OCC's clearing fees at a level that would be sufficient to cover OCC's estimated operating expenses plus a ''Business Risk Buffer'' as described below (''Fee Policy''), (ii) a policy establishing the amount of the annual refund to clearing members of OCC's fees (''Refund Policy''), and (iii) a policy for calculating the amount of dividends to be paid to the Stockholder Exchanges (''Dividend Policy''). OCC states that it intends to implement the Capital Plan on or after February 27, 2015, subject to all necessary regulatory approvals.

OCC states that it is implementing this Capital Plan, in part, to increase significantly its capital in connection with being designated systemically important by the Financial Stability Oversight Council pursuant to the Payment, Clearing and Settlement Supervision Act. The Capital Plan calls for an infusion of substantial additional equity capital by the Stockholder Exchanges to be made on or about February 27, 2015, subject to regulatory approval, that when added to retained earnings accumulated by OCC in 2014 will significantly increase OCC's capital levels as compared to historical levels. Additionally, the Capital Plan includes the Replenishment Capital commitment, which will provide OCC with access to additional equity contributions by the Stockholder Exchanges should OCC's equity fall close to or below the amount that OCC determines to be appropriate to support its business and manage business risk.

A. Background

OCC is a clearing agency registered with the Commission and is also a derivatives clearing organization (''DCO'') regulated in its capacity as such by the Commodity Futures Trading Commission. OCC is a Delaware business corporation and is owned equally by the Stockholder Exchanges—five national securities exchanges for which OCC provides clearing services.[5] In addition, OCC provides clearing services for seven other national securities exchanges that trade options (''Non-Stockholder Exchanges''). In its capacity as a DCO, OCC provides clearing services to four futures exchanges.

According to OCC, it has devoted substantial efforts during the past year to: (1) Develop a 5-year forward looking model of expenses; (2) quantify maximum recovery and wind-down costs under OCC's recovery and wind-down plan; (3) assess and quantify OCC's operational and business risks; (4) model projected capital accumulation taking into account varying assumptions concerning business conditions, fee levels, buffer margin levels and refunds; and (5) develop an effective mechanism that provides OCC access to replenishment capital in the event of losses. Incorporating the results of those efforts, the amendments to its By-Laws and other governing documents are intended to allow OCC to implement the Capital Plan and thereby provide OCC with the means to increase its shareholders' equity.

B. OCC's Projected Capital Requirement

As described in detail below, OCC will annually determine a target capital requirement consisting of (i) a baseline capital requirement equal to the greatest of (x) six months operating expenses for the following year, (y) the maximum cost of the recovery scenario from OCC's recovery and wind-down plan, and (z) the cost to OCC of winding down operations as set forth in the recovery and wind-down plan (''Baseline Capital Requirement''), plus (ii) a target capital buffer linked to plausible loss scenarios from operational risk, business risk and pension risk (''Target Capital Buffer'') (collectively, ''Target Capital Requirement''). OCC determined that for 2015, the appropriate Target Capital Requirement is $247 million, reflecting a Baseline Capital Requirement of $117 million, which is equal to six months of projected operating expenses, plus a Target Capital Buffer of $130 million. This Target Capital Buffer is designed to provide a significant capital cushion to offset potential business losses.

According to OCC, it had total shareholders' equity of approximately $25 million as of December 31, 2013.[6] OCC is adding additional capital of $222 million to meet its 2015 Target Capital Requirement. OCC determined that a viable plan for Replenishment Capital should provide for a replenishment capital amount that would give OCC access to additional capital as needed up to a maximum of the Baseline Capital Requirement (''Replenishment Capital Amount'').[7] Therefore, OCC's Capital Plan will include the following in order to provide OCC in 2015 with ready access to approximately $364 million in equity capital:

Baseline Capital Requirement	$117,000,000
Target Capital Buffer	130,000,000
Target Capital Requirement	247,000,000
Replenishment Capital Amount	117,000,000
Total OCC Capital Resources	364,000,000

C. Procedures Followed in Order To Determine Capital Requirement

According to OCC, various measures were used in determining the appropriate level of capital. An outside consultant conducted a ''bottom-up'' analysis of OCC's risks and quantified the appropriate amount of capital to be held against each risk. The analysis was comprehensive across risk types, including credit, market, pension, operational, and business risk. Based on internal operational risk scenarios and loss modeling at the 99% confidence level, OCC's operational risk was quantified at $226 million and pension risk at $21 million, resulting in the total Target Capital Requirement of $247 million. Business risk was addressed by taking into consideration OCC's ability to fully offset potential revenue volatility and manage business risk to zero by adjusting the levels at which fees and refunds are set and by adopting a Business Risk Buffer of 25% when setting fees. Other risks, such as counterparty risk and on-balance sheet credit and market risk, were considered to be immaterial for purposes of requiring additional capital based on means available to OCC to address those risks that did not require use of OCC's capital. As discussed in more detail below in the context of OCC's Fee Policy, the Business Risk Buffer of 25% can be achieved by setting OCC's fees at a level intended to achieve target annual revenue that will result in a 25% buffer for the year after paying all operating expenses.

Additionally, OCC determined that its maximum recovery costs will be $100 million and projected wind-down costs would be $73 million. OCC projected its expenses for 2015 will be $234 million, so that six months projected expenses are $234 million/2 = $117 million. The greater of recovery or wind-down costs, and six months of operating expenses is $117 million, and thus serves as OCC's Baseline Capital Requirement. According to OCC, it then computed the appropriate amount of a Target Capital Buffer from operational risk, business risk, and pension risk, resulting in a

[5] The Stockholder Exchanges are: Chicago Board Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ OMX PHLX LLC; NYSE MKT LLC; and NYSE Arca, Inc.

[6] *See* OCC 2013 Annual Report, Financial Statements, Statements of Financial Condition, available on OCC's Web site, *http://optionsclearing.com/components/docs/about/annual-reports/occ_2013_annual_report.pdf.*

[7] The obligation to provide Replenishment Capital will be capped at $200 million, which OCC projects will sufficiently account for increases in its capital requirements for the foreseeable future.

determination that the current Target Capital Buffer should be $130 million. Thus, the Target Capital Requirement will be $117 million + $130 million = $247 million.

D. Overview of, and Basis for, OCC's Proposal To Acquire Additional Equity Capital

According to OCC, in order to meet its Target Capital Requirement, and after consideration of alternatives, OCC's Board of Directors approved a proposal [8] from OCC's Stockholder Exchanges pursuant to which OCC would meet its Target Capital Requirement of $247 million in early 2015 as follows:

Shareholders' Equity as of 1/1/2014	$ 25,000,000
Shareholders Equity Accumulated Through Retained Earnings [9]	72,000,000
Additional Contribution from Stockholder Exchanges	150,000,000
Target Capital Requirement	247,000,000
Replenishment Capital Amount	117,000,000
Total OCC Capital Resources	364,000,000

The additional contribution by the Stockholder Exchanges will be made in respect of their Class B Common Stock on a *pro rata* basis.[10] The Stockholder Exchanges also have committed to provide additional equity capital up to the Replenishment Capital Amount, which is currently $117 million, in the event Replenishment Capital is needed. While the Replenishment Capital Amount will increase as the Baseline Capital Requirement increases, it will be capped at a total of $200 million that could be outstanding at any point in time. OCC estimates that the Baseline Capital Requirement will not exceed $200 million before 2022. If the limit is approached, OCC will revise the Capital Plan as needed to address future needs. In consideration for their capital contributions and replenishment commitments, the Stockholder Exchanges will receive dividends as described in the Dividend Policy discussed below for so long as they remain Stockholders and maintain their contributed capital and commitment to replenish capital up to the Replenishment Capital Amount, subject to the previously mentioned $200 million cap.

E. Fee, Refund, and Dividend Policies

Upon reaching the Target Capital Requirement, the Capital Plan and the proposed Fee Policy will require OCC to set its fees at a level that utilizes a Business Risk Buffer of 25%. The purpose of this Business Risk Buffer is to ensure that OCC accumulates sufficient capital to cover unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements. Furthermore, the Capital Plan requires OCC to maintain Fee, Refund, and Dividend Policies, described in more detail below, which are designed to ensure that OCC's shareholders' equity remains well above the Baseline Capital Requirement.

The required Business Risk Buffer target net income margin of 25% is below OCC's 10-year historical pre-refund average buffer of 31%. The target will remain 25% so long as OCC's shareholders' equity remains above the Target Capital Requirement amount. According to OCC, the projected reduction in net income margin from OCC's actual historical 10-year average of 31% to the new target of 25% reflects OCC's commitment to continue to operate as an industry utility and ensuring that market participants benefit from OCC's operational efficiencies in the future. This reduction will permit OCC to charge lower fees to market participants rather than maximize refunds to clearing members and dividend distributions to Stockholder Exchanges. According to OCC, it will review its fee schedule on a quarterly basis to manage revenue as closely to this target as possible. For example, if the Business Risk Buffer is materially above 25% after the first quarter of a particular year, OCC may decrease fees for the remainder of the year, and conversely if the Business Risk Buffer realized in practice is materially below 25% after the first quarter, OCC may increase fees for the remainder of the year.[11]

The Capital Plan will allow OCC to refund approximately $40 million from 2014 fees to clearing members in 2015 and to reduce fees in an amount to be determined by OCC's Board of Directors, effective in the second quarter of 2015. OCC will endeavor to provide clearing members with no less than 60-day notice in advance of when the changes to fee levels will become effective, particularly those that result in increases to fee levels. No dividends will be declared until December 2015, and no dividends will be paid until 2016.

Changes to the Fee, Refund, or Dividend Policies will require the affirmative vote of two-thirds of the directors then in office and approval of the shareholders of all of OCC's outstanding Class B Common Stock.[12] The formulas for determining the amount of refunds and dividends under the Refund and Dividend Policies, respectively, which are described in more detail below, assume that refunds are tax-deductible but dividends are not. The Refund and Dividend Policies each will provide that in the event that refunds payable under the Refund Policy are not tax deductible, the policies will be amended to restore the relative economic benefits between the recipients of the refunds and the Stockholder Exchanges.

1. Fee Policy

Under the Fee Policy, in setting fees each year, OCC will calculate an annual revenue target based on a forward twelve months expense forecast divided by the difference between one and the Business Risk Buffer of 25% (*i.e.,* OCC will divide the expense forecast by .75). Establishing a Business Risk Buffer at 25% will allow OCC to set fees, and to manage the risk that such fees may generate less revenue than expected due to lower-than-expected trading volume or other factors, or that expenses may be higher than projected. The Fee Policy also will include provisions from

[8] On December 18, 2014, OCC's Board of Directors voted to approve OCC's Capital Plan. At the time of the vote, OCC's Board of Directors was comprised of 18 directors—five Stockholder Exchanges, three public directors, one management director, and nine clearing member directors.

[9] According to OCC, ''the $72 million is after giving effect to the approximately $40 million refund'' expected to be made in early 2015 for activities in 2014. Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR–OCC–2015–02).

[10] The pro rata basis is based on the Stockholder Exchanges' interest in OCC. Currently, each Stockholder Exchange owns 20% of OCC.

[11] If OCC's fee schedule needs to be changed in order to achieve the 25% Business Risk Buffer, OCC will file a proposed rule change seeking approval of the revised fee schedule.

[12] Each Stockholder Exchange owns the same amount of Class A common stock and Class B common stock. Class B common stock is entitled to receive dividends, whereas Class A common stock is not. Class A common stock is entitled to vote for Member Directors, whereas Class B common stock is entitled to vote for the Management Director and Public Directors. Upon the liquidation of OCC, the assets available for distribution to shareholders will be distributed as follows: Holders of Class A common stock and Class B common stock will be first paid the par value of their shares. Next, each holder of Class B common stock will receive a distribution of $1 million. Next, an amount equal to OCC's shareholders' equity at December 31, 1998 of $22,902,094, minus the distributions described above, will be distributed to those holders who acquired their Class B common stock before December 31, 1998. Finally, any remaining shareholders' equity will be distributed equally to all holders of Class B common stock. For more information, *see* OCC's 2014 financial statements available at *http://www.theocc.com/components/docs/about/annual-reports/occ_2014_annual_report.pdf*.

existing Article IX, Section 9 of the By-Laws, which provide that the fee schedule also may include additional amounts necessary to (i) maintain such reserves as are deemed reasonably necessary by OCC's Board of Directors to provide facilities for the conduct of OCC's business and to conduct development and capital planning activities in connection with OCC's services to the options exchanges, clearing members, and the general public, and (ii) accumulate such additional surplus as the Board may deem advisable to permit OCC to meet its obligations to clearing members and the general public.

However, OCC states that these provisions will be invoked only in extraordinary circumstances and to the extent that the Board of Directors has determined that the required amount of such additional reserves or additional surplus will exceed the full amount that is expected to be accumulated through the Business Risk Buffer (prior to payment of refunds or dividends) so OCC's fees ordinarily will be based on its projected expenses and the Business Risk Buffer of 25%.

Under the Capital Plan, OCC will use the following formula to calculate its annual revenue target as follows: Annual Revenue Target = Forward 12 Months Expense Forecast/(1–.25). Because OCC's clearing fee schedules typically reflect different rates for different categories of transactions, fee projections will include projections as to relative volume in each such category. The clearing fee schedule therefore will be set to achieve a blended or average rate per contract that is projected to be sufficient, when multiplied by total projected contract volume, to achieve the Annual Revenue Target. Under extraordinary circumstances, OCC will add any amount determined to be necessary for additional reserves or surplus and divide the resulting number by the projected contract volume to determine the applicable average fee per cleared contract needed to achieve the additional amounts required. OCC will notify clearing members of the fees OCC determines it will apply for any particular period by describing the change in an information memorandum distributed to all clearing members and will file any change to its fee schedule with the Commission pursuant to its obligations under Section 19(b)(1) of the Act.[13]

2. Refund Policy

Under the Refund Policy, except at a time when Replenishment Capital is outstanding as described below, OCC will declare a refund to clearing members in December of each year, beginning in 2015, in an amount equal to 50% of the excess, if any, of (i) the pre-tax income for the year in which the refund is declared over (ii) the sum of (x) the amount of pre-tax income after the refund necessary to produce after-tax income for such year sufficient to maintain shareholders' equity at the Target Capital Requirement for the following year plus (y) the amount of pre-tax income after the refund necessary to fund any additional reserves or additional surplus not already included in the Target Capital Requirement. Such refund will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and federal laws and regulations. OCC will not be able to pay a refund on a particular date unless dividends are paid on the same date.

If Replenishment Capital has been contributed and remains outstanding, OCC will not pay refunds until such time as the Target Capital Requirement is restored through the accumulation of retained earnings. Refunds in accordance with the Refund Policy will resume once the Target Capital Requirement is restored and all Replenishment Capital is repaid in full, provided that the restoration of the Target Capital Requirement and the repayment of Replenishment Capital occurred within 24 months of the issuance date of the Replenishment Capital. If any Replenishment Capital has not been repaid in full or shareholders' equity has not been restored to the Target Capital Requirement within 24 months, OCC will no longer pay refunds to clearing members, even if the Target Capital Requirement is restored and all Replenishment Capital is repaid at a later date.

3. Dividend Policy

The Dividend Policy provides that, except at a time when Replenishment Capital is outstanding as described below, OCC will declare a dividend on its Class B Common Stock in December of each year in an aggregate amount equal to the excess, if any, of (i) after-tax income for the year, after application of the Refund Policy (unless the Refund Policy has been eliminated, in which case the refunds shall be deemed to be $0) over (ii) the sum of (A) the amount required to be retained in order to maintain total shareholders' equity at the Target Capital Requirement for the following year, plus (B) the amount of any additional reserves or additional surplus not already included in the Target Capital Requirement. Such dividend will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and federal laws and regulations. If Replenishment Capital has been contributed and remains outstanding, OCC will not pay dividends until such time as the Target Capital Requirement is restored.

F. Replenishment Capital Plan

OCC also is establishing a Replenishment Capital Plan whereby OCC's Stockholder Exchanges are obligated to provide on a *pro rata* basis[14] a committed amount of Replenishment Capital should OCC's total shareholders' equity fall below the ''hard trigger,'' described below. The aggregate committed amount for all five Stockholder Exchanges in the form of Replenishment Capital that could be accessed at any time will be capped at the excess of (i) the lesser of (A) the Baseline Capital Requirement, which is currently $117 million, at the time of the relevant funding or (B) $200 million, over (ii) amounts of outstanding Replenishment Capital (''Cap Formula''). The $200 million figure in the Cap Formula accounts for projected growth in the Baseline Capital Requirement for the foreseeable future.

The commitment to provide Replenishment Capital will not be limited by time, but rather only by the Cap Formula. Replenishment Capital will be called in whole or in part after the occurrence of a ''hard trigger'' event described below. If the Baseline Capital

[13] The Commission notes that future changes to OCC's fee schedule as well as future changes to the Fee Policy, Refund Policy, and Dividend Policy, are subject to Section 19(b)(1) of the Act and Section 806(e) of the Payment, Clearing, and Settlement Supervision Act, as applicable, both of which require OCC to submit appropriate regulatory filings with the Commission provide an opportunity for public comment, and require the Commission to review and ultimately disapprove, object to, or require modification or rescission, as applicable, if the changes do not meet regulatory requirements. *See* 15 U.S.C. 78s(b)(1); 12 U.S.C. 805(e); 17 CFR 240.19b–4(n).

[14] The pro rata basis is based on the Stockholder Exchanges' interest in OCC. Currently, each Stockholder Exchange owns 20% of OCC.

Requirement approaches or exceeds $200 million, OCC's Board of Directors may consider, as part of its regular, periodic review of the Replenishment Capital Plan, alternative arrangements to obtain replenishment capital in excess of the $200 million committed under the Replenishment Capital Plan. In addition, the Refund Policy and the Dividend Policy provide that, in the absence of obtaining any such alternative arrangements, the amount of the difference will be subtracted from amounts that would otherwise be available for the payment of refunds and dividends. Replenishment Capital contributed to OCC under the Replenishment Capital Plan will take the form of a new class of common stock (''Class C Common Stock'') of OCC to be issued to the Stockholder Exchanges solely in exchange for Replenishment Capital contributions.

The Replenishment Capital Plan is a component of OCC's overall Capital Plan. In implementing the Replenishment Capital Plan, OCC's management will monitor OCC's levels of shareholders' equity to identify certain triggers, or reduced capital levels, that might require action. OCC has identified two key triggers—a ''soft trigger'' and a ''hard trigger''—and proposes that OCC will take certain steps upon the occurrence of either.

The ''soft trigger'' for re-evaluating OCC's capital will occur if OCC's shareholders' equity falls below the sum of (i) the Baseline Capital Requirement and (ii) 75% of the Target Capital Buffer. The soft trigger will be a warning sign that OCC's capital has fallen to a level that requires attention and responsive action to prevent it from falling to unacceptable levels. Upon a breach of the soft trigger, OCC's senior management and OCC's Board of Directors will review alternatives to increasing capital, and take appropriate action as necessary, including increasing fees or decreasing expenses, to restore shareholders' equity to the Target Capital Requirement.

The ''hard trigger'' for making a mandatory Replenishment Capital call will occur if shareholders' equity falls below 125% of the Baseline Capital Requirement (''Hard Trigger Threshold''). OCC considers that a breach of the Hard Trigger Threshold is a sign that significant corrective action, with a more immediate impact than increasing fees or decreasing expenses, should be taken to increase OCC's capital, either as part of a recovery plan or a wind down plan for OCC's business. Based on current numbers, OCC's shareholders' equity will have to fall more than $100 million below the fully funded capital amount described above in order to breach the Hard Trigger Threshold. As a result, OCC views the breach of the Hard Trigger Threshold as unlikely and occurring only as a result of a significant, unexpected event. In the event of such breach, OCC's Board of Directors must determine whether to attempt a recovery, a wind-down of OCC's operations, or a sale or similar transaction, subject in each case to any necessary Stockholder consent. If the Board of Directors decides to wind-down OCC's operations, OCC will access the Replenishment Capital in an amount sufficient to fund the wind-down, as determined by the Board of Directors, and subject to the Cap Formula. If the Board of Directors decides to attempt a recovery of OCC's capital and business, OCC will access the Replenishment Capital in an amount sufficient to return shareholders' equity to an amount equal to $20 million above the Hard Trigger Threshold subject to the Cap Formula described above.

While Replenishment Capital is outstanding, no refunds or dividends will be paid and, if any Replenishment Capital remains outstanding for more than 24 months or the Target Capital Requirement is not restored during that period, changes to how OCC calculates refunds and dividends may be necessary (as described in more detail above in OCC's Refund Policy and Dividend Policy). In addition, while Replenishment Capital is outstanding, OCC first will utilize the entire amount of available funds to repurchase, on a *pro rata* basis from each Stockholder Exchange, to the extent permitted by applicable Delaware and federal law and regulations, outstanding shares of Class C Common Stock as soon as practicable after completion of the financial statements following the end of each calendar quarter at a price equal to the original amount paid for such shares, plus an additional ''gross up'' amount to compensate the Stockholder Exchanges for taxes on dividend income (if any) that they may have to recognize as a result of such repurchase.[15] For this purpose, ''Available Funds'' will equal, as of the end of any calendar quarter, the excess, if any, of (x) shareholders' equity over (y) the Minimum Replenishment Level. The ''Minimum Replenishment Level'' will mean $20 million above the Hard Trigger Threshold, so that OCC's shareholders' equity will remain at or above the Minimum Replenishment Level after giving effect to the repurchase. Furthermore, under the Dividend and Refund Policies, refunds and dividends will be suspended until such time as the Target Capital Requirement is restored.

G. Amendments to Governing Documents

In order to implement the Capital Plan, OCC is amending its By-Laws and Restated Certificate of Incorporation and amending and restating its Stockholders Agreement.

1. Amendments to By-Laws

OCC is amending its By-Laws in order to implement the Capital Plan. Specifically, OCC is amending the definition of Equity Exchange in Article I, Section 1 to take into account the potential ownership of Class C Common Stock by the Stockholder Exchanges.

Article II, Section 3 is being amended to change the definition of quorum such that a majority of outstanding common stock entitled to vote at a meeting of Stockholders either in person or by proxy will constitute a quorum for any such meeting of the Stockholders. In addition, OCC is amending Article II, Section 5 to allow for the potential issuance of Class C Common Stock, which will not have voting rights except as required by applicable law.

Article VIIA, Section 2, is being amended to (i) provide for the potential issuance of Class C Common Stock in consideration for Replenishment Capital provided by Stockholder Exchanges, (ii) permit, consistent with the amendments to the Stockholders Agreement, the transfer of shares of common stock to another Stockholder, and (iii) reflect the right of other Stockholders, consistent with the amendments to the Stockholders Agreement, to purchase the shares of common stock of another Stockholder. Article VIIA, Section 3, is amended to conform to the changes to Article VIIA, Section 2.

OCC is amending Article VIII, Section 5(d), to require that a Board decision to utilize OCC's retained earnings to compensate for a loss or deficiency to the Clearing Fund will require unanimous consent from the holders of Class A Common Stock and Class B Common Stock.[16] This amendment is intended to protect Stockholder Exchanges from an action taken without their consent that could increase their likelihood of being required to provide Replenishment Capital. Similarly, Article XI, Section 1 is amended to account for the possible issuance of the

[15] According to OCC, based on current federal tax rates, if the full amount of the payment is classified as a dividend and the recipient is entitled to a dividends received deduction, this gross up is estimated to be approximately 12% of the payment.

[16] *See supra* note 12.

non-voting Class C Common Stock consistent with the Restated Certificate of Incorporation as discussed below, and to require unanimous Stockholder approval for any future amendments to the new provision of Article VIII, Section 5(d) described above.

Article IX, Section 9, is being amended in three ways. First, the concept of the Business Risk Buffer will be incorporated into Article IX, Section 9(a). Second, Article IX, Section 9, is amended to provide that OCC only will add amounts for reserves and surpluses in addition to the Business Risk Buffer in extraordinary circumstances and only to the extent that the Board of Directors has determined that the required amount of additional reserves and surplus is expected to exceed the full amount that is anticipated to be accumulated through the Business Risk Buffer prior to payment of refunds and dividends. Third, Article IX, Section 9, is being amended to expressly reference the potential payment of dividends in accordance with the Dividend Policy.

2. Amendments to Restated Certificate of Incorporation

OCC is amending its Restated Certificate of Incorporation in order to implement the Capital Plan. Article IV is amended in multiple locations to (i) reduce the number of authorized shares of Class A Common Stock and Class B Common Stock to the number of shares currently outstanding, and the number of series of Class B Common Stock, to reflect the fact that there are only five Stockholder Exchanges, (ii) eliminate a provision under which additional shares of Class A Common Stock and Class B Common Stock could be authorized in certain circumstances without a separate vote of each series of Class B Common Stock, (iii) create Class C Common Stock as non-voting stock, (iv) set a par value for Class C Common Stock of $1,000 per share, (v) provide for distribution upon a liquidation or dissolution of OCC to holders of Class A, Class B, and Class C Common Stock, *pro rata* on a *pari passu* basis, the amount of the par value of their shares, and (vi) remove restrictions on the transfer of shares of Class B Common Stock to more than one entity in order to address the possible exercise by another Stockholder of its right of first refusal under the Amended and Restated Stockholders Agreement. Additionally, Article IV is amended to make clear that the prohibition on OCC's creating or issuing rights or options to purchase OCC stock set forth in Article IV will not restrict the ability of OCC to enter into the Replenishment Capital Plan. Finally, technical changes will be made to Article VI in connection with the creation of Class C Common Stock as non-voting stock.

3. Amendments to Stockholders Agreement

OCC is amending its Stockholders Agreement to make technical changes relating to the additional contributions of capital to be made by the Stockholder Exchanges under the Capital Plan and the potential issuance of Class C Common Shares. In part, the amendments to the Stockholders Agreement will provide Stockholders with a secondary right of refusal to be exercised if a Stockholder wished to sell its shares and OCC chose not to exercise its existing right of first refusal to purchase those shares. OCC considers this change necessary because after the additional contributions of capital by the Stockholder Exchanges under the Capital Plan, shares of Class B Common Stock will be significantly more valuable, making it less likely that OCC will be able to exercise its right of first refusal. OCC believes that providing the non-selling Stockholder Exchanges with a secondary right of first refusal will increase the chances that a selling Stockholder Exchange will find a purchaser for its shares from among OCC's existing owners. Because OCC's Stockholders Agreement already has been amended several other times, for convenience OCC is proposing to amend and restate the Stockholders Agreement to incorporate all previous amendments and the new amendments into a single comprehensive agreement.

Each of the amendments to the Stockholders Agreement is described below, in the order they appear in the agreement. OCC is making a technical amendment to Section 1 of the Stockholders Agreement to refer to the definitions of Class A Common Stock, Class B Common Stock, and Class C Common Stock in the Restated Certificate of Incorporation and By-Laws. OCC is amending Section 3 to delete an obsolete reference to a plan relating to OCC's original reorganization into a common clearing facility for all options exchanges.

OCC is amending Section 5(a) to add a reference to the procedures for Stockholder Exchanges to acquire shares pursuant to their secondary rights of first refusal in certain situations that will be set out in amended Section 10(e). OCC is amending Section 5(b) providing that the Stockholder Exchanges may not sell or transfer less than all of their shares without the consent of OCC. OCC seeks to prevent a partial sale by a Stockholder Exchange of a portion of its shares of Class A Common Stock, Class B Common Stock, or Class C Common Stock to avoid difficulties that could arise for OCC if, as a result of a partial sale, voting rights, dividend rights, and replenishment capital were spread across Stockholder Exchanges on a non *pro rata* basis. Section 5(b) will further clarify that if OCC consented to a partial sale, the Stockholder Exchanges' rights of first refusal still will apply, and that a Stockholder Exchange could sell shares of Class C Common Stock to OCC without selling its shares of Class A Common Stock and Class B Common Stock.

OCC is amending Section 6(a) to provide Stockholders, upon the non-exercise of OCC's right of first refusal, a secondary right of first refusal to purchase shares of other Stockholders in certain circumstances discussed above, and to establish procedures governing the exercise of this right. Section 6(b) is amended to explicitly state that OCC can assign its rights under the Stockholders Agreement to purchase shares of a Stockholder Exchange in the event of such Stockholder Exchange's bankruptcy or insolvency, and to create an exception from the right of first refusal for transfers to certain affiliates of a Stockholder that meet the exchange eligibility requirements set forth in the By-Laws. Section 6(c) is amended to make any transfer or encumbrance of shares in violation of the Stockholders Agreement, either voluntarily or by operation of law, void. Section 6(d) is amended to explicitly state that OCC can assign its rights under the Stockholders Agreement to repurchase shares of any Stockholder that ceases to be qualified to participate in OCC pursuant to the By-Laws. The revised Section 6(c) takes the place of current Section 6(e), which is deleted. Section 6(e) currently provides that such a pledge or transfer will automatically be deemed to create a transfer of the shares to OCC.

OCC is making conforming amendments to Section 6(f), Section 6(g), Section 7, and Section 8 to provide for the new Stockholder Exchange right of first refusal. OCC is deleting Section 9 to remove the right of Stockholders to require OCC to purchase their shares of stock.

OCC is amending Section 10(a) of the Stockholders Agreement to provide that the purchase price paid upon exercise of purchase rights by OCC or the Stockholder Exchanges will be equal to the lowest of (i) the book value of the shares to be purchased, (ii) the total capital contribution of the selling Stockholder and (iii) in the case of exercise of a right of first refusal, the price originally offered for such shares. OCC is making other technical amendments to Sections 10(a), 10(b) and 10(c) of the Stockholders Agreement concerning the purchase price formula, procedures, and timing for OCC's repurchase rights of shares (or, if applicable, the purchase of a Stockholder's shares by another Stockholder) pursuant to the terms of the Stockholders Agreement. Section 10(d) is amended such that any consideration to be paid by OCC upon the exercise of a right of first refusal will be subordinated to all other claims of all other creditors of OCC, and to prohibit OCC from declaring or paying any dividends, acquiring for value any shares of stock or distributing assets to any Stockholder Exchange, except with regard to required purchases or redemptions of shares of Class C Common Stock or payments of dividends in accordance with the Dividend Policy. OCC is amending current Section 10(e) by moving its provisions addressing the subordination of payments by OCC and non-payment of dividends under certain circumstances into Section 10(d) as discussed above. OCC proposes technical amendments to current Section 10(g) concerning the process under which OCC would acquire shares upon exercise of its right of first refusal and will redesignate Section 10(g) as Section 10(e). OCC also is moving technical provisions of the current Section 10(f) concerning the payment of such shares into Section 10(e). Section 10(f) will then be amended to address procedures for Stockholders that exercise their right of first refusal.

Section 11 of the Stockholders Agreement is being amended in order to make a Stockholder's right to transfer shares dependent upon the non-exercise of OCC's and other Stockholders' right of first refusal to the purchase of such Stockholder's shares. Additionally, Section 11 will be amended to provide that the transfer of a Stockholder's shares under that section will not be effective without the transferee's assuming the rights and obligations under the Stockholders Agreement, certain joinders to the Stockholders Agreement and other agreements between OCC and Stockholders.

Section 14(a) is being amended to make reference to the Stockholders Agreement. Section 14(b) will be amended to make a technical change relating to the legend on OCC's stock certificates. OCC is amending Section 15 to update the mailing addresses of the Stockholder Exchanges for written notices and formal communications. Section 16(c) is being amended to clarify that a Stockholder Exchange will be able to assign its rights under the Stockholders Agreement only to a party to whom it will be permitted to transfer its shares.

In addition, Section 16(c) is being amended to provide that OCC may only assign its repurchase rights under Section 6(b) or Section 6(d) of the Stockholders Agreement. OCC will be able to assign such rights with respect to all or a portion of the shares of stock owned by a Stockholder Exchange, and will be required to provide the non-selling Stockholder Exchanges with a right of first refusal in connection with any such contemplated assignment comparable to the secondary right of first refusal applicable with respect to a voluntary sale by a Stockholder Exchange and described above. Sections 16(f) and 16(g) is being amended to effectuate the amendment and restatement of the existing Stockholders Agreement.

II. Summary of Comment Letters

The Commission received seventeen comment letters in total.[17] Thirteen comment letters were received from seven commenters on OCC's proposal.[18] OCC submitted four letters responding to the issues raised by the commenters.[19] Four of the commenters generally supported OCC's need to raise additional capital [20] though all seven commenters opposed how the Capital Plan proposed to raise the additional capital.[21]

Four of the commenters set forth arguments that the OCC proposal is inconsistent with Section 17A(b)(3)(I) of the Act because it imposes a burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.[22] These commenters stated that the OCC proposal places the Stockholder Exchanges at a competitive advantage because they would be able to use dividend payments to offset operating costs, which would enable them to provide trading and execution services at lower prices than their non-Stockholder counterparts.[23] One commenter highlighted that, of the seven non-Stockholder Exchanges, only MIAX, BATS, and BOX are not affiliates of the Stockholder Exchanges.[24] Further, the same commenter offered that, should the subsidized fees be reduced to a level that could not be sustained by non-affiliated exchanges, the ability of such non-affiliated exchanges to provide services to investors and the public could be affected.[25] Additionally, two of the commenters stated that the extent of this competitive advantage was unknown, because the dollar amounts associated with dividend payments were redacted from the publicly-available filing.[26] One commenter argued that the Stockholder Exchanges would be able to subsidize the costs they provide to their members through an excessive rate of return (estimated at 16% to 18% or more).[27] This commenter noted that this rate is far above market rates, especially considering the commenter's view that the risk associated with the investment is low.[28] The commenter further argued that dividends are unlikely to be changed or discontinued because to do so would require the unanimous vote of the Stockholder Exchanges.[29]

In response, OCC expressly stated that the proposal would not impose any burden on competition.[30] OCC further stated that the dividend payments—if any are declared—should not be viewed simply as additional revenue for subsidizing the costs of services provided, but as fair compensation to the Stockholder Exchanges for their substantial capital contributions, limited ''upside'' and future risks under the Capital Plan.[31] OCC also stated that the Stockholder Exchanges are receiving only what the Board of Directors—with the assistance of financial advisors and in the exercise of its business judgment—considered to be fair and in the best interests of OCC, in light of the nature of the Stockholder Exchanges' capital investments and the risks inherent in their funded and unfunded capital commitments.[32] Additionally, OCC noted that its proposal sufficiently describe the considerations that went into setting the specific terms of the Capital Plan, including the Fee, Refund, and Dividend Policies.[33]

One commenter raised the issue that the OCC proposal is inconsistent with Section 17A(b)(3)(D) of the Act because the fees and charges under the proposal

[17] *See supra* note 4.

[18] *Id.*

[19] *Id.*

[20] *See* BOX Letter I; SIFMA Letter; MM Letter; and KCG Letter I.

[21] *See* BOX Letter I; SIFMA Letter; BATS Letter I and II; MM Letter; MIAX Letter I and II; KCG Letter I and II; and SIG Letters I and II.

[22] *See* BATS Letter I and II; BOX Letter I; MIAX Letter I and II; and MM Letter.

[23] *Id.*

[24] *See* MIAX Letter II.

[25] *Id.*

[26] *See* BATS Letter I and MIAX Letter I.

[27] *See* BATS Letter II.

[28] *Id.*

[29] *Id.*

[30] *See* OCC Letter I and IV.

[31] *Id.*

[32] *Id.*

[33] *See* OCC Letter I.

are neither equitable nor reasonable.[34] The commenter expressed concern that: (i) The Dividend Policy creates a conflict of interest for the Stockholder Exchanges that could influence future fees; [35] and (ii) OCC should not increase its budget ''without the ability of market participants, who ultimately finance OCC through transaction fees, to be assured that OCC (as the only clearing agency for U.S. listed options) continues to operate with the public marketplace foremost in mind.'' [36]

In response, OCC noted that any changes to its fee schedule require a rule filing with the Commission, subject to the applicable standards of the Act.[37] Further, OCC noted that change to the Refund, Dividend, and Fee Policies are all subject to Commission review and approval, and this process affords clearing members the opportunity to object to any changes in those policies.[38] Additionally, the annual budget is established by vote of a simple majority, which requires broad support of public and/or clearing member directors.[39]

Four commenters took issue with OCC's request for accelerated effectiveness.[40] One reason these commenters argued this request should be denied is because the Commission's proposed Regulation 17Ad–22(e)(15) is still under consideration and has yet to be adopted.[41] One letter stated that OCC already has the capital on hand to comply with the proposed regulation, so there is no urgency as portrayed in the OCC proposal and in OCC's responses to prior comments.[42] Further, the Capital Plan, they argue, presents several important policy issues that require additional time for debate and further details.[43] On March 2, 2015, OCC responded that this point was moot because an approval no longer requires acceleration given that the minimum period of 30 days from the date of the filing without acceleration has passed.[44]

Six commenters expressed concern that the Capital Plan converts OCC from a so-called traditional industry utility model to a for-profit model that maximizes returns for the Stockholder Exchanges.[45] Under this model, OCC set transaction fees to cover its operational costs plus some reasonable excess for unforeseen expenses or drops in revenue, and refunded the excess back to its members through rebates.[46] Under the proposal, refunds to members and their customers will be limited to 50% of the excess fees, with the remainder of after-tax income being designated as dividend payments for the Stockholder Exchanges.[47] In calculating the excess fees available for a refund, the proposal further reduces the amount available by deducting amounts needed to fund increases in OCC's capital requirements.[48] The commenters asserted that the approach thus abandons the industry utility model in favor of a profit-maximizing structure that prioritizes dividends and enhances the future returns of the Stockholder Exchanges at the expense of members and participants.[49]

In its response, OCC disagreed and contended that the proposal is consistent with the industry utility model because it effectively refunds 100% of the excess funds not paid to fund capital requirements or replenishment commitments of the Stockholder Exchanges.[50] Additionally, OCC asserted that it is a mischaracterization to describe the proposal as a departure from the industry utility model because the proposal allows for the Board of Directors to make adjustments to fees based on expenses, volumes, and revenues if projections for the remainder of the calendar year show that either: (i) Fee levels will be higher than projected or (ii) operating expenses are lower than budgeted, thereby allowing market participants to take advantage of lower fees.[51]

Six commenters stated that the OCC proposal failed to adequately discuss the viability of alternative means of raising capital,[52] such as raising capital from third-party investors, or from clearing members, which would offer non-equity owner exchanges the opportunity to become Stockholders so that they may also participate with respect to dividends.[53] Two commenters specified that they were not invited to participate in the proposal process, nor were they aware of the proposal until it was filed with the Commission.[54] One commenter stated that it would have offered to provide equity capital to the OCC at a rate of return significantly less than what the existing Stockholder Exchanges would receive under the proposed plan.[55] Another commenter suggested a specific alternative known as a ''Payer-Asset'' account, whereby excess fee revenue would be escrowed to a payer asset account that would not be an asset of the Stockholder Exchanges, but rather would be property of the market participants.[56] Excess fees from the account would be returned to market participants through rebates, and, in the event of the dissolution of OCC, the account would be distributed to the investors as opposed to the Stockholder

[34] *See* MM Letter.

[35] ''If the SEC allows the five owners to monetize OCC in this fashion, the conflicts of interest will diminish the prospect that OCC will perform efficiently to keep transaction fees low and operating expense under control. [. . .] Given the potential of the dividend to increase with the size of OCC's budget, we are concerned where transaction fees may go in the future.'' MM Letter at 13.

[36] *See* MM Letter at 5.

[37] *See* OCC Letter II. The Commission notes that future changes to OCC's fee schedule as well as future changes to the Fee Policy, Refund Policy, and Dividend Policy, are subject to Section 19(b)(1) of the Act and Section 806(e) of the Payment, Clearing, and Settlement Supervision Act, as applicable, both of which require OCC to submit appropriate regulatory filings with the Commission provide an opportunity for public comment, and require the Commission to review and ultimately disapprove, object to, or require modification or rescission, as applicable, if the changes do not meet regulatory requirements. *See* 15 U.S.C. 78s(b)(1); 12 U.S.C. 805(e); 17 CFR 240.19b–4(n).

[38] *Id.*

[39] *Id.* Five of the current 20 director positions on OCC's Board of Directors are held by representatives of the five Stockholder Exchanges: Chicago Board Options Exchange, Inc.; International Securities Exchange, LLC; NASDAQ OMX PHLX LLC; NYSE MKT LLC; and NYSE Arca, Inc.

[40] *See* BATS Letter I; MIAX Letter I and II; KCG Letter I; and SIG Letter I.

[41] *See* BATS Letter I; MIAX Letter I and II; KCG Letter I; and SIG Letter I. As the Commission noted in the notice of filing of the proposed rule change, OCC stated that the purpose of this proposal is, in part, to facilitate compliance with proposed Commission rules and address Principle 15 of the PFMIs. The proposed Commission rules are pending. *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29508 (May 22, 2014) (S7–03–14). Therefore, the Commission has evaluated this proposed rule change under the Act and the rules currently in force thereunder. *See* Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR–OCC–2015–02). *See also supra* note 3.

[42] *See* SIG Letter I. *See also supra* note 3.

[43] *See* MIAX Letter I and MM Letter. *See also supra* note 3.

[44] *See* OCC Letter IV. Pursuant to Section 19(b)(2)(C)(iii), the Commission may not approve a proposed rule change earlier than 30 days after the date of publication unless the Commission finds good cause for doing so and publishes the reason for the finding (referred to as ''accelerated'' approval). The Commission notes that the statutory time period for approval prior to the thirtieth day has passed. *See* 15 U.S.C. 78s(b)(2)(C)(iii).

[45] *See* SIFMA Letter; BATS Letter I; BOX Letter I; MM Letter; SIG Letter II; and KCG Letter I.

[46] *See* SIFMA Letter; BATS Letter I; MM Letter; and KCG Letter I.

[47] *See* SIFMA Letter and KCG Letter I.

[48] *Id.*

[49] *Id.;* BATS Letter I.

[50] *See* OCC Letter I.

[51] *See* OCC Letter II.

[52] *See* BATS Letter I and II; MIAX Letter I and II; MM Letter; SIFMA Letter; SIG Letter II; and KCG Letter I.

[53] *See* BATS Letter I and II; MIAX Letter I and II; MM Letter; SIFMA Letter; and KCG Letter I.

[54] *See* BATS Letter II and III; and BOX Letter II.

[55] *See* BATS Letter II.

[56] *See* MM Letter.

Exchanges.[57] Because of disputes regarding the process, one commenter suggested a 60-day hold on the approval, so that any party with a superior financial proposal may be given the opportunity to present such plan to OCC.[58]

OCC responded to these commenters by stating that the Board of Directors considered potential alternatives, engaging in a nearly year-long process in which it analyzed a wide range of alternative methods to increase capital before determining that the Capital Plan was the most viable and in the best interests of OCC.[59] OCC also stated that an escrow fund would not be an asset of OCC, and therefore may not constitute liquid net assets funded by equity.[60]

One commenter argued that the Replenishment Capital Plan is more of a loan than equity capital and that the Replenishment Capital Plan is structured such that the likelihood of it ever being called is very low.[61] That commenter also argued that the new reserve capital structure creates a conflict of interest in OCC's budget because it would unjustly enrich the five Stockholder Exchanges and create a conflict in the performance of their positions on OCC's Board of Directors.[62]

OCC countered the first contention by stating that the Replenishment Capital will be equity capital because: (i) It will be listed on the balance sheet as stockholders' equity; (ii) it will be funded in exchange for the issuance of Class C common stock; (iii) it will be treated as equity for tax purposes; and, most importantly, (iv) the holders of the Class C common stock will be subordinated to those creditors of OCC in the event of any bankruptcy or liquidation.[63] In addition, OCC stated that even though the Replenishment Capital is not intended to remain outstanding indefinitely, there is no legal requirement that it be repurchased and it is far from assured, given the circumstances under which it would be funded, that it ever would be repurchased.[64]

As to the assertion regarding conflicts, OCC responded that the proposal's terms require the ongoing participation and assent of the industry representatives on the Board of Directors.[65] Additionally, changes to each of the OCC Fee, Dividend, and Refund Policies all require an affirmative vote of two-thirds of the Board of Directors as well as the approval of each of the Stockholder Exchanges.[66] OCC further noted that in order to adopt an annual budget, there must be a majority vote of the Board of Directors, thus requiring support and approval from both public directors and member directors.[67]

Four commenters suggested that there were multiple governance issues involved with the Board of Directors' approval of the OCC proposal, including that OCC failed to follow its own By-Laws or internal policies.[68] For example, two commenters stated that, at the time of the vote, OCC only had three public directors instead of five as required by OCC By-Laws, and that the vacancies for these positions were not filled until after the vote on the Capital Plan.[69] Further, these same commenters took issue with whether the Capital Plan was approved by a ''majority,'' because of the nine clearing members, one did not attend, one abstained, four voted in favor, and three voted against.[70] These commenters argued that an abstention should be counted as a ''no'' vote, which would mean that a vote of the member directors was evenly split.[71] Two commenters contended that because this Capital Plan is a matter of competitive significance, OCC failed to follow its By-Laws as well as representations it made to the Commission in adopting those By-Laws, by not promptly informing non-Stockholder Exchanges of the Capital Plan.[72] These commenters raised the concern that had non-Stockholder Exchanges been promptly informed of this matter, they would have had a right by request to make presentations regarding the Capital Plan to the OCC Board of Directors or appropriate committee of the board.[73]

OCC responded that the proposed Capital Plan was properly approved in accordance with OCC's By-Laws.[74] Specifically, OCC articulated that its Capital Plan received the affirmative vote of two-thirds of the directors ''then in office,'' which is the relevant standard under OCC's By-Laws.[75]

Commenters further took issue with the vote approving the Capital Plan because interested directors generally recuse themselves from interested party transactions, and the five Stockholder Exchanges failed to recuse themselves from either the deliberations or the vote, despite having a significant economic interest in the outcome of the vote.[76] One commenter stated that the Stockholder Exchanges also should have recused themselves under OCC's own conflict of interest policy, and that their failure to do so should invalidate the vote approving the proposal.[77]

OCC responded that the approval of the Capital Plan did not require any of its directors to recuse themselves.[78] OCC cited to both its By-Laws and Delaware law to support its position. Specifically, OCC stated that under Delaware law, a decision is not improper simply because directors participating in the decision had an interest in the decision.[79] OCC noted that, in accordance with Delaware General Corporation Law, all material facts were disclosed and known to its Board of Directors prior to its good faith approval of the proposed Capital Plan.[80] OCC further stated that its Board of Directors satisfied OCC's By-Laws in approving the Capital Plan, namely the requirements set forth in Article XI, Section 1 of its By-Laws, which requires ''the affirmative vote of two-thirds majority of the directors then in office (and not less than a majority of the number of directors fixed by the By-Laws).'' [81]

In addition, three commenters suggested that because the Capital Plan raises significant issues, at a minimum, it should not be subject to delegation to Commission staff for approval, and instead should be referred for full review and consideration by the Commissioners.[82]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [83] directs the Commission to approve a proposed rule change of a self-regulatory organization if the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules

[57] *Id.*

[58] *See* MIAX Letter II.

[59] *See* OCC Letter I.

[60] *See* OCC Letter II.

[61] *See* MM Letter.

[62] *Id.*

[63] *See* OCC Letter II.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* MIAX Letter II; BATS Letter II and III; BOX Letter II; and SIG Letter I.

[69] *See* MIAX Letter II and BATS Letter II.

[70] *Id.*

[71] *Id.*

[72] *See* BATS Letter III and BOX Letter II.

[73] *Id.*

[74] *See* OCC Letter IV.

[75] *Id.*

[76] *See* MIAX Letter II; BATS Letter II; and SIG Letters I and II.

[77] *See* SIG Letter I.

[78] *See* OCC Letter IV.

[79] *See* OCC Letter IV (citing to Section 144, Delaware General Corporation Law).

[80] *Id.*

[81] *Id.*

[82] *See* BATS Letter II; KCG Letter II; and SIG Letter I.

[83] 15 U.S.C. 78s(b)(2)(C).

and regulations thereunder applicable to such organization.

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.[84] In particular, the Commission finds that the Capital Plan is consistent with the following provisions of the Act: (i) Section 17A(b)(3)(A); [85] (ii) Section 17A(b)(3)(F); [86] (iii) Section 17A(b)(3)(D); [87] and (iv) Section 17A(b)(3)(I),[88] as described below.

The Commission recognizes that commenters did not support the Capital Plan. The Commission, however, must approve a proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Act and the applicable rules and regulations thereunder. Although the commenters raised a number of substantive points, the Commission was not persuaded that these concerns render OCC's Capital Plan inconsistent with the Act and the applicable rules and regulations thereunder.

In particular, the Commission finds that the Capital Plan is consistent with Section 17A(b)(3)(A) of the Act,[89] which requires, in part, that a registered clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions, and to safeguard securities and funds in its custody and control, or for which it is responsible. OCC's proposed rule change is consistent with these requirements because the Capital Plan is designed to ensure that OCC can continue to promptly and accurately clear and settle securities transactions, and assure the safeguarding of securities and funds which are in the custody or control of OCC or for which it responsible even if it suffers significant operational losses. The Capital Plan is designed to provide OCC with sufficient capital and an ability to replenish capital in the event such capital falls below certain levels, which in turn further positions OCC to remain sufficiently capitalized at all times.

The Commission also finds that the Capital Plan is consistent with Section 17A(b)(3)(F) of the Act,[90] which requires, in part, that the rules of a registered clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. OCC's Capital Plan is consistent with these requirements because OCC is amending its By-Laws and other governing documents to adopt certain policies for the purpose of implementing the Capital Plan, which, as described above, is designed to ensure that OCC can continue to promptly and accurately clear and settle securities transactions, and assure the safeguarding of securities and funds which are in the custody or control of OCC or for which it is responsible even if it suffers significant operational losses.

In addition, the Commission finds that the Capital Plan is consistent with Section 17A(b)(3)(D) of the Act,[91] which requires that the rules of a registered clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. One commenter contended that the Capital Plan is inconsistent with this provision.[92] This commenter's concerns were focused on possible future fees.[93] Specifically, the commenter expressed concern that: (i) The Dividend Policy creates a conflict of interest for the Stockholder Exchanges that could influence future fees; [94] and (ii) OCC should not increase its budget "without the ability of market participants, who ultimately finance OCC through transaction fees, to be assured that OCC (as the only clearing agency for U.S. listed options) continues to operate with the public marketplace foremost in mind." [95] Neither of these concerns about possible future fees convinces the Commission that the Capital Plan is inconsistent with providing for the equitable allocation of reasonable dues, fees, and other charges among its participants.[96]

Future changes to OCC's fee schedule as well as future changes to the Fee Policy, Refund Policy, and Dividend Policy, are subject to Section 19(b)(1) of the Act [97] and Section 806(e) of the Payment, Clearing, and Settlement Supervision Act,[98] as applicable, both of which require OCC to (i) submit appropriate regulatory filings with the Commission,[99] (ii) provide an opportunity for public comment,[100] and (iii) require the Commission to review and ultimately disapprove,[101] object to,[102] or require modification or rescission,[103] as applicable, if these future proposed changes do not meet regulatory requirements. OCC recognizes this.[104]

Moreover, the Capital Plan is consistent with providing for the equitable allocation of reasonable dues, fees, and other charges among its participants in the following ways. The Fee Policy provides for the Business Risk Buffer, which is designed to ensure that fees will be sufficient to cover projected operating expenses. The Refund Policy and Dividend Policy both allow for refunds of fees or payment of dividends, respectively, only to the extent that the distribution of which would allow OCC to maintain shareholders' equity at the Target

[84] As the Commission noted in the notice of filing of the proposed rule change, OCC stated that the purpose of this proposal is, in part, to facilitate compliance with proposed Commission rules and address Principle 15 of the PFMIs. The proposed Commission rules are pending. *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29508 (May 22, 2014) (S7–03–14). As such, the possibility of future Commission rulemaking is immaterial to both OCC's justification for the Capital Plan and to our analysis. Therefore, the Commission has evaluated this proposed rule change under the Act and the rules currently in force thereunder. *See* Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR–OCC–2015–02).

[85] 15 U.S.C. 78q–1(b)(3)(A).

[86] 15 U.S.C. 78q–1(b)(3)(F).

[87] 15 U.S.C. 78q–1(b)(3)(D).

[88] 15 U.S.C. 78q–1(b)(3)(I).

[89] 15 U.S.C. 78q–1(b)(3)(A).

[90] 15 U.S.C. 78q–1(b)(3)(F).

[91] 15 U.S.C. 78q–1(b)(3)(D).

[92] *See* MM Letter at 13.

[93] *See* MM Letter.

[94] "If the SEC allows the five owners to monetize OCC in this fashion, the conflict of interest will diminish the prospect that OCC will perform efficiently to keep transaction fees low and operating expense under control. [. . .] Given the potential of the dividend to increase with the size of OCC's budget, we are concerned where transaction fees may go in the future." MM Letter at 13.

[95] MM Letter at 5.

[96] In order to address the concern that the conflict of interest will diminish the prospect that OCC will perform efficiently to keep transaction fees low and operation expenses under control, OCC stated in response that higher operating expenses will result in an increased Target Capital Requirement, which will require additional capital contributions to be withheld from both dividends and refunds. Thus, OCC argues, an increase in operating expenses results in larger cumulative capital contributions from the Stockholder Exchanges. If an increase in the Business Risk Buffer does result in an increase in dividends, the larger cumulative capital contributions will have the effect of reducing any increase in the rate of return that would otherwise result from the increase in dividends. *See* OCC Letter II. In addition, OCC also contends that it would be necessary for the exchange directors to obtain additional support either from public directors or member directors or a combination of the two in order to approve a budget with increased expenses. *See* OCC Letter I.

[97] 15 U.S.C. 78s(b)(1).

[98] 12 U.S.C. 805(e).

[99] *See* 15 U.S.C. 78s(b)(1); 12 U.S.C. 805(e); and 17 CFR 240.19b–4(n).

[100] *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4(n).

[101] *See* 15 U.S.C. 78s(b)(2)(C)(ii).

[102] *See* 12 U.S.C. 5465(e)(1)(F).

[103] *See* 12 U.S.C. 5465(e)(2)(D).

[104] *See* OCC Letter II at 11.

Capital Requirement. The Refund Policy and Dividend Policy also prohibit refunds and dividends when Class C Common Stock is outstanding under the Replenishment Capital Plan, and OCC is in the process of rebuilding its capital base. In addition, the Replenishment Capital Plan establishes a mandatory mechanism for the contribution of additional capital by OCC's Stockholder Exchanges in the event capital falls below desired levels. Together, these features of the Capital Plan help ensure that OCC maintains levels of capital sufficient to allow it to absorb substantial business losses and meet its ongoing obligations as a critical component of the national system for clearance and settlement, which in turn helps reduce OCC's overall level of risk, while also being consistent with Section 17A(b)(3)(D) of the Act.[105]

The Commission finds the Capital Plan is consistent with Section 17A(b)(3)(I) of the Act,[106] which requires that the rules of a registered clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission recognizes that four commenters set forth arguments that the Capital Plan is inconsistent with this provision because the Capital Plan does not address the competitive burden on non-Stockholder Exchanges.[107] More specifically, these commenters argue that the Capital Plan places the Stockholder Exchanges at a competitive advantage over the non-Stockholder Exchanges because they would be able to use dividend payments to offset operating costs, which would in turn enable them to provide trading and execution services at lower prices than their non-Stockholder counterparts.[108] Another commenter stated that the rate of return is excessive, far above market rates, and does not reflect the low risk of the investment.[109] As further discussed below, the Commission is not persuaded by these arguments.

As determined by OCC's Board of Directors, the Stockholder Exchanges have agreed to make a substantial equity contribution to ensure OCC has sufficient capital immediately and have agreed to commit to a replenishment capital contribution should OCC's capital fall below specified levels. OCC considers that the dividends are being paid to Stockholder Exchanges to compensate the Stockholder Exchanges for bearing the risk of the loss of their capital contributions, both in the near term and in the future, should OCC need to replenish those funds. These contributions and potential contributions are considerable and remain at risk when outstanding. As such, OCC considers the dividends not to be windfall profits or an extra refund, as some commenters contend, but rather a plan to direct cash flows to those entities that put their capital at risk. The Stockholder Exchanges are contributing their own capital, and bearing the risk of that contribution, as such, the dividends serve as compensation for bearing that risk.

Further, the cost of that capital investment and the rate of return that will be paid to the Stockholder Exchanges were determined to be fair and in the best interests of OCC by OCC's Board of Directors, which has representation from the Stockholder Exchanges, clearing members, and independent directors, and in consultation with outside financial advisors. OCC has represented that the Board of Directors determined, in its exercise of business judgment and in compliance with its governance provisions and its responsibilities under Delaware corporate laws, that the dividends were fair and in the best interests of OCC, particularly in light of the nature of the investment and the risks inherent in the funded and unfunded capital commitments by the Stockholder Exchanges.

We understand that in a perfect capital market, the dividend would compensate Stockholder Exchanges exactly for the risk borne by the capital contribution (*i.e.,* the rate of return exactly equals OCC's cost of capital). Further, we acknowledge that a dividend that does not accurately reflect the true risk of the investment may result in a burden on competition on one group versus another. The magnitude and incidence of the burden depends on whether the dividend payment is high or low relative to the true cost of the capital. OCC is a unique entity and not publicly traded. As such, determining 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.

Given the critical role OCC plays in the U.S. options market and its designation as a systemically important financial market utility, the Commission believes that it is both necessary and appropriate for OCC to obtain and retain sufficient capital to ensure its ongoing operations in the event of substantial business losses. While the precise magnitude and incidence of any burden that exists in this case is necessarily subjective, the Commission believes that, even if OCC's Capital Plan may result in some burden on competition, such a burden is necessary and appropriate in furtherance in the purposes of the Act given the importance of OCC's ongoing operations to the U.S. options market and the role of the Capital Plan in assuring its ability to facilitate the clearance and settlement of securities transactions in a wide range of market conditions. For these reasons, the Commission believes OCC's Capital Plan, as approved by its Board of Directors in the exercise of its business judgment, is consistent with OCC's obligations under Section 17A(b)(3)(I) of the Act.[110]

Several commenters raised concerns that OCC's Capital Plan was not approved in accordance with OCC's By-Laws due to vacancies on the Board, that certain Board directors (*i.e.,* Stockholder Exchanges) were ''interested parties'' and therefore should have recused themselves from any decision to approve or disapprove OCC's proposal, and OCC failed to promptly inform non-Stockholder Exchanges of the proposed change.[111] As indicated in OCC's response letter,[112] OCC represents that OCC and its Board of Directors have conducted its business in conformity with applicable state laws and its own By-Laws.[113] The Commission has no basis to dispute OCC's position on this matter. For these reasons, the Commission believes OCC's Capital Plan, as approved, is consistent with OCC's obligations under the Act.[114]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[115] and the rules and regulations thereunder.

[105] 15 U.S.C. 78q–1(b)(3)(D).

[106] 15 U.S.C. 78q–1(b)(3)(I).

[107] *See* BATS Letter I and II; BOX Letter I; MIAX Letter I and II; and MM Letter.

[108] *Id.*

[109] *See* BATS Letter II.

[110] 15 U.S.C. 78q–1(b)(3)(I).

[111] *See* MIAX Letter II; BATS Letter II and III; SIG Letter I; and BOX Letter II.

[112] *See* OCC Letter IV.

[113] *See* OCC Letter IV (citing to Section 144, Delaware General Corporation Law). Subsequently, OCC confirmed that OCC and its Board of Directors conducted its business in conformity with its By-Laws identified in the comment letters cited in note 111.

[114] 15 U.S.C. 78q–1(b)(3).

[115] In approving this proposed rule change, the Commission has considered the proposed rule's

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[116] that the proposed rule change (File No. SR–OCC–2015–02) be, and it hereby is, approved as of the date of this notice or the date of an order by the Commission authorizing OCC to implement OCC's advance notice proposal that is consistent with this proposed rule change (File No. SR–OCC–2014–813), whichever is later.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[117]

Jill M. Peterson,

Assistant Secretary.

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impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[116] 15 U.S.C. 78s(b)(2).

[117] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Driver Qualifications; Regulatory Guidance Concerning the Use of Computerized Employer Notification Systems for the Annual Inquiry and Review of Driving Records

AGENCY: Federal Motor Carrier Safety Administration.

ACTION: Notice of regulatory guidance.

SUMMARY: FMCSA provides regulatory guidance concerning the use of State-operated employer notification systems (ENS) for the annual inquiry and review of driving records required by 49 CFR 391.25. The guidance explains the use of State-operated ENS that provide motor carriers with a department of motor vehicle report for every State in which the driver held either an operator's license, a commercial driver's license (CDL), or permit when a driver is enrolled in the system. Many State driver licensing agencies (SDLAs) provide ENS that either automatically update requestors (push-system) on license status, crashes and convictions of laws or regulations governing the operation of motor vehicles or allow the requestor to regularly query the record (pull-system) for this information. The use of these systems to check the driving record, at least annually, satisfies the requirement for an annual review of each driver's record. This includes when a third-party is used to accumulate the records for a motor carrier. This revises the Agency guidance issued in 2003 that referenced to a specific third-party vendor.

DATES: This guidance is effective March 12, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas L. Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, 1200 New Jersey Ave. SE., Washington, DC 20590, Telephone 202–366–4325, Email: *MCPSD@dot.gov*.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Secretary of Transportation has statutory authority to set minimum standards for commercial motor vehicle safety. These minimum standards must ensure that: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely; (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators; and (5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation (49 U.S.C. 31136(a)(1)–(5), as amended). The Secretary also has broad power in carrying out motor carrier safety statutes and regulations to ''prescribe recordkeeping and reporting requirements'' and to ''perform other acts the Secretary considers appropriate'' (49 U.S.C. 31133(a)(8) and (10)).

The Administrator of FMCSA has been delegated authority under 49 CFR 1.87(f) to carry out the functions vested in the Secretary of Transportation by 49 U.S.C. chapter 311, subchapters I, III and IV, relating to commercial motor vehicle programs and safety regulation.

Background

On January 13, 2003, FMCSA issued a letter to a company providing regulatory guidance concerning the use of computerized employer notification systems for the annual inquiry and review of driving records required by 49 CFR 391.25. The guidance explained that the use of a specific third-party computerized ENS that provides motor carriers with a department of motor vehicle report for every State in which the driver held either an operator's license, a CDL, or permit when a driver is enrolled in the system, and provides an update anytime the State licensing agency enters new information about license status, crashes and convictions of laws or regulations governing the operation of motor vehicles satisfies the requirement for an annual review of each driver's record. However, the guidance referenced a specific vendor providing such services to the motor carrier industry.

The regulatory guidance issued to the specific company was subsequently posted to FMCSA's Web site as question #4 to 49 CFR 391.25 (See *http://www.fmcsa.dot.gov/regulations/title49/section/391.25?guidance*). The 2003 guidance reads as follows:

Question 4: Does the use of a third-party computerized system that provides motor carriers with a complete department of motor vehicle report for every State in which the driver held a commercial motor vehicle operator's license or permit when a driver is enrolled in the system, and then automatically provides an update anytime the State licensing agency enters new information on the driving record, satisfy the requirements of § 391.25?

Guidance: Yes. Since motor carriers would be provided with a complete department of motor vehicle report for every State in which the driver held a commercial motor vehicle operator's license or permit when a driver is enrolled in the system, and then provided with an update any time the State licensing agency enters new information on the driving record, the requirements of § 391.25(a) would be satisfied. When the motor carrier manager reviews the information on the driving record, and the License Monitor system records the identity of the manager who conducted the review, the requirements of § 391.25(b) and (c) would be satisfied.

With regard to the requirement that the response from each State agency, and a note identifying the person who performed the review, may be maintained in the driver's qualification files, motor carriers may satisfy the record keeping requirement by using computerized records in accordance with 49 CFR 390.31. Section [390.31] allows all records that do not require signatures to be maintained through the use of computer technology provided the motor carrier can produce, upon demand, a computer printout of the required data. Therefore, motor carriers using an automated computer system would not be required to maintain paper copies of the driving records, or a note identifying the person who performed the review, in each individual driver qualification file provided a computer printout can be produced upon demand of a Federal or State enforcement official.