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SECURITIES AND EXCHANGE COMMISSION

[File No. SR-OCC-2015-02]

Before the Securities and Exchange Commission

Securities Exchange Act of 1934

Release No. 81628 / September 14, 2017

In the Matter of The Options Clearing Corporation; **Corrected Order Denying Motion For Stay**

On February 11, 2016, the Commission issued an order (“Approval Order”) approving the Options Clearing Corporation’s (“OCC”) plan for raising additional capital (“Capital Plan” or “Plan”) to support its function as a systemically important financial market utility.¹ BOX Options Exchange LLC, KCG Holdings, Inc. (“KCG”), Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP (collectively “petitioners”)² filed a petition for review of the Approval Order in the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”), challenging the Commission’s Approval Order as inconsistent with the Exchange Act and lacking in the reasoned decisionmaking required by the Administrative Procedure Act.

After filing their petition for review, petitioners filed a motion for a stay in the D.C. Circuit asking the court to stay the Commission’s Approval Order pending the court’s review. The D.C. Circuit denied petitioners’ request for a stay.³

In ruling on the petition for review, the D.C. Circuit concluded that the Approval Order did not “represent the kind of reasoned decisionmaking required by either the Exchange Act or the Administrative Procedure Act,” and therefore remanded the case to the Commission for

¹ Exchange Act Release No. 77112 (Feb. 11, 2016), File No. SR-OCC-2015-02.

² BATS Global Markets, Inc. (“BATS”) was initially a petitioner, but later withdrew.

³ The petitioners had also opposed OCC’s motion to lift the automatic stay in place pending the Commission’s review of the Capital Plan. The Commission found, however, that it was “in the public interest to the lift the stay during the pendency of the Commission’s review.” Exchange Act Release No. 75886 at 2 (Sept. 10, 2015), File No. SR-OCC-2015-02. The Commission noted that it “believes that the concerns raised by Petitioners regarding potential monetary and competitive harm do not currently justify maintaining the stay during the pendency of the Commission’s review.” *Id.*

further proceedings.⁴ In so ruling, the court did not reach any of petitioners' arguments that the Plan was inconsistent with the substantive requirements of the Exchange Act, finding instead that the Commission's failure to make the required findings under the Act required a remand.⁵

The court also considered whether to vacate the Approval Order prior to remand, and decided not to vacate. As the court explained, "the SEC may be able to approve the Plan once again, after conducting a proper analysis on remand."⁶ Because both parties had assured the court that it would be possible to unwind the Capital Plan at a later time, and "no party contends that the task would be materially more difficult if done then rather than now," the court declined to vacate the Capital Plan and instead remanded the case "to give the SEC an opportunity to properly evaluate the Plan."⁷ The D.C. Circuit's mandate, which issued on August 18, 2017, returned the matter to the Commission for further proceedings.⁸

Petitioners⁹ now seek a partial stay of the Capital Plan—specifically, a stay of the dividend payments to be made to the shareholder exchanges under the Plan—while the Commission considers the Plan as directed by the D.C. Circuit. OCC opposes the motion.

In determining whether to grant a stay motion, the Commission typically considers whether (i) there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) any person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.¹⁰ The party seeking a stay has the burden of establishing that relief is warranted.¹¹ These factors weigh against granting petitioners' stay request.

First, with respect to likelihood of success on the merits, we note that the court did not address petitioners' arguments that the Plan was inconsistent with the Exchange Act. Rather, it remanded for the Commission to "properly evaluate the Plan."¹² By repeating their same arguments regarding consistency with the Act in support of a stay, petitioners are asking the Commission to opine on their likelihood of success before engaging in the further analysis directed by the court. We are not yet in a position to do so. Unlike the more typical situation in which the Commission addresses stay motions, here there is neither a full record nor a final

⁴ *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 443 (D.C. Cir. 2017).

⁵ *Id.* at 446.

⁶ *Id.* at 451.

⁷ *Id.*

⁸ By separate order of today's date, we are issuing a scheduling order governing the proceedings on remand.

⁹ Petitioner KCG has not joined the instant motion.

¹⁰ *Bernerd E. Young*, Exchange Act Release No. 78440, 2016 WL 4060106, at *1 (July 29, 2016); *see also* Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Exchange Act Release No. 33870, 1994 WL 17920, at *1 (Apr. 7, 1994).

¹¹ *Young*, Exchange Act Release No. 78440, 2016 WL 4060106, at *1.

¹² 866 F.3d at 451.

decision on which to base such an analysis. Thus, we do not view this factor as weighing in favor of the partial stay request.

Second, petitioners fail to establish that they will be irreparably harmed in the absence of a stay. To demonstrate irreparable harm, petitioners “must show an injury that is ‘both certain and great’ and ‘actual and not theoretical.’”¹³ “A stay ‘will not be granted [based on] something merely feared as liable to occur at some indefinite time.’”¹⁴ That “an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay.”¹⁵ Petitioners acknowledge that the monetary aspects of the Plan “are readily reversible”¹⁶ and that the court concluded that “the task of unwinding the Plan would be no more difficult if done after remand rather than immediately.”¹⁷ They nonetheless argue that “[a] stay of the dividend is needed to prevent distortion of the competitive landscape from continuing to harm competition.”¹⁸ But petitioners provide no evidence that competitors will be “driven from the marketplace” or that investors have “lost liquidity,” as petitioners claim.¹⁹ Thus, petitioners’ argument—which presumes they are correct on the merits regarding the Plan’s effect on competition—is too speculative at this stage to be the basis for relief. We also note that petitioners made these same arguments regarding competitive harm before the D.C. Circuit, yet the court did not stay or vacate the Plan.

Finally, petitioners have not demonstrated that the balance of harm to others in the absence of a stay and the public interest favors a stay. Petitioners argue that “a stay would injur[e] nobody,”²⁰ because they are asking only to stay the dividend component of the Plan. But even setting aside the impact on shareholder exchanges that are due the dividends under the Plan, petitioners’ claim that the dividend component of the plan can be isolated is overly simplistic. Under the Plan, “OCC would not be able to pay a refund on a particular date unless dividends

¹³ *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016) (quoting *Donald L. Koch*, Exchange Act Release No. 72443, 2014 WL 2800778, at *2 (June 20, 2014)); accord *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹⁴ *Akindemowo*, 2016 WL 3877888, at *2 (quoting *Koch*, 2014 WL 2800778, at *2); accord *Wis. Gas Co.*, 758 F.2d at 674.

¹⁵ *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004); see also *William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) (recognizing that “[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough” to constitute irreparable harm) (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

¹⁶ Mot. at 1.

¹⁷ Mot. at 16.

¹⁸ *Id.*

¹⁹ *Id.* Petitioners cite the acquisition of BATS by CBOE Holdings, Inc.—which, we note, closed on February 28, 2017—in support of their argument, stating that there has been consolidation in the exchange marketplace while the Capital Plan has been in effect. But they supply no evidence of a causal relationship between that acquisition and the Capital Plan or the dividends at issue.

²⁰ Mot. at 16.

were paid on the same date.”²¹ A stay of the dividends to the shareholders would thus have the effect of also staying the payment of refunds to OCC’s members.

Moreover, as discussed above, the court squarely considered whether to vacate the Plan or leave it in effect during the Commission’s reconsideration, and decided to leave the Plan, including the provisions with respect to dividends, in place. Petitioners’ request to stay that part of the Plan therefore, in fact, seeks a change in the status quo that we believe is unsupported at this time. Granting petitioners’ request would require piecemeal suspension of portions of the Plan, while leaving others in place, despite at least the possibility of having to reinstitute those provisions at a later date if the Commission, after conducting the required analysis on remand, should determine to approve the Plan. Indeed, the court implicitly rejected this type of partial stay when petitioners proposed it in a pre-decision letter to the court²² and the court remanded without entering such a stay. We believe, as the court did, that the better course is to leave the status quo in place while we conduct a further review of the entirety of the Plan.

Accordingly, we decline to impose the partial stay requested.

For the reasons stated above, it is hereby:

ORDERED that movants’ request for a partial stay of the Capital Plan while the Commission considers the Plan pursuant to the direction of the D.C. Circuit is DENIED.

By the Commission.

Brent J. Fields,
Secretary.

²¹ Exchange Act Release No. 74136 (Notice of Proposed Rule Change) at 15, File No. SR-OCC-2015-02.

²² See Fed. R. App. P. 28(j) letter from petitioners, dated April 17, 2017 (asking the court “at a minimum, to stay operation of the dividend component of the Plan during a remand”).

