Craig S. Donohue
Executive Chairman

July 15, 2016

The Honorable Jeb Hensarling
Chairman, House Financial Services Committee
2228 Rayburn House Office Building
Washington, DC 20515-4305

Re: Comments on Discussion Draft of Financial CHOICE Act of 2016 (the "Draft") to the Financial Services Committee (the "Committee") of the United States House of Representatives

Dear Chairman Hensarling,

The Options Clearing Corporation (OCC) appreciates this opportunity to provide the following initial comments on the Draft. OCC's role as a central counterparty (CCP) and systemically important financial market utility (SIFMU) puts us at the center of a number of the issues addressed in the Draft. The Draft is complex and makes extensive changes to the existing legal and regulatory structure, and we may have additional comments as we further review the potential impacts if legislation were adopted. We appreciate that the Committee will continue to carefully and thoroughly consider each aspect of this legislation as it moves forward, and we hope the Committee will consider OCC as a resource to provide further constructive input to the Committee as this process moves forward.

At this time, we would like to provide comments on two areas that are of particular interest to OCC: (1) Title VI and (2) repealing Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Specifically, OCC recommends that the Committee clarify that the provisions of Title VI that refer to "regulations" and "rules" are not intended to apply to rules of self-regulatory organizations. We also offer for the Committee's consideration a brief discussion of the potential unintended consequences of repealing Title VIII given the rules, regulations and market evolution currently in place based on provisions therein.

About OCC

OCC, founded in 1973, is the world's largest equity derivatives clearing organization. OCC is dedicated to promoting stability and financial integrity in the marketplaces that it serves by focusing on sound risk management principles. By acting as guarantor, OCC ensures that the obligations of the contracts it clears are fulfilled.

As the marketplace evolves, so do the clearing capabilities at OCC. Although OCC began as a clearinghouse for listed equity options, it has grown into a globally recognized entity

that clears a multitude of diverse and sophisticated products. OCC operates under the jurisdiction of both the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). As a registered clearing agency under SEC jurisdiction, OCC clears transactions for exchange-listed options, security futures and OTC options. As a registered derivatives clearing organization (DCO) under CFTC jurisdiction, OCC offers clearing and settlement services for transactions in futures and options on futures. OCC also provides central counterparty clearing and settlement services for securities lending transactions. In addition, OCC has been designated by the Financial Stability Oversight Council (FSOC) as a SIFMU under Title VIII of the Dodd-Frank Act (Title VIII).

As a SIFMU, OCC is also subject to oversight by the Board of Governors of the Federal Reserve System (the Board). OCC is a self-regulatory organization (SRO), which means OCC is not a part of the government, but is instead a private party with statutory authority to adopt rules governing the conduct of its members. As an SRO, OCC is subject to extensive oversight and regulation by the U.S. government, including the SEC and CFTC.

OCC's participant options exchanges are: BATS Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, EDGX Exchange, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, ISE Mercury, LLC, Miami International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, LLC, The NASDAQ Stock Market LLC, NYSE MKT LLC and NYSE Arca, Inc. OCC's clearing members serve both professional traders and public customers and comprise approximately 115 of the largest U.S. broker-dealers, futures commission merchants and non-U.S. securities firms.

OCC also serves other markets, including those trading commodity futures, commodity options and security futures. OCC clears futures contracts traded on CBOE Futures Exchange, LLC, ELX Futures, LP and Nasdaq Futures, Inc., as well as security futures contracts traded on OneChicago, LLC. In addition, OCC provides central counterparty services for two securities lending market structures, OCC's OTC Stock Loan Program and Automated Equity Finance Markets, Inc. (AQS), an automated marketplace for securities lending and borrowing.

Title VI of the Draft

Section 611 of the Draft would define the term "regulation" as "an agency statement of general applicability and future effect that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, including rules, orders of general applicability, interpretive releases, and other statements of general applicability that the agency intends to have the force and effect of law", subject to several specific exclusions. Section 611 would also define the term "agency" to include, among others, the CFTC, the SEC and Board. "Regulations," as defined in Section 611, would become subject to new requirements under Subtitle A of Title VI of the Draft.

Section 634 of the Draft would give the term "rule" the meaning given to that same term in 5 U.S.C § 551, subject to certain exclusions. "Rule" is defined in 5 U.S.C. § 551 as "the whole or a part of an agency statement of general or particular applicability and future effect

designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]" "Rules," as defined in Section 634, would become subject to new requirements under Subtitle B of Title VI of the Draft.

The processes by which administrative agencies go about implementing rules and regulations have generated increased attention since the Dodd-Frank Act was enacted. As a highly regulated entity that is at the center of markets for which it clears, OCC is keenly aware of and impacted by a large number of rules and regulations adopted by the SEC, the CFTC, the Board and other regulatory bodies. At this time, we are not expressing a view on the substance of Subtitles A or B of Title VI. We do not believe that the terms "regulation" (Section 611) or "rule" (Section 634) were intended by the Committee to capture rules of SROs, such as OCC. Instead, the Committee's focus appears to be on rules and regulations enacted by the administrative agencies themselves. However, as the process by which OCC adopts SRO rules may at times involve approval of those rules by the SEC, the CFTC or the Board, we believe the definitions in Section 611 and 634 could be misinterpreted in the future to cover the SRO rule-making process. We believe the possibility of misinterpretation would be eliminated via express carve-outs from the definitions in Sections 611 and 634 for SRO rules and the administrative processes through which SRO rules are adopted, including any approval of SRO rules by the administrative agencies, or via a statement in the Committee Report to that same effect. Alternatively, as those SRO rulemaking that are eligible for immediate effectiveness with the SEC under Section 19 of the Securities Exchange Act of 1934 or self-certification with the CFTC generally do not require agency action, and therefore could not be misinterpreted as being subject to the new requirements under Subtitle A of Title VI of the Draft, another possibility would be to expand and clarify the scope of SRO rulemakings eligible for immediate effectiveness or self-certification.

Repeal of Title VIII of the Dodd-Frank Act

Subtitle E of Title II of the Draft would repeal Title VIII of the Dodd-Frank Act. As a SIFMU, virtually every aspect of our operations are affected in some way by Title VIII. The impact of repealing Title VIII on OCC and on the markets OCC serves is potentially significant and certainly complex. Until we have had more opportunity to consider the implications of a Title VIII repeal, we do not want to express an overall view on whether the Committee should repeal Title VIII. However, in order to assist the Committee in making this determination, we would like to raise several specific issues, as described below.

A number of regulations have been promulgated by the CFTC, the SEC and the Board pursuant to authority granted by Congress pursuant to Title VIII of the Dodd-Frank Act, including under Section 810 of the Dodd-Frank Act. The Draft would not only repeal Title VIII itself (including Section 810), but would also "restore and revive" provisions of law amended by Title VIII as if Title VIII had never been enacted. We find this "restore and revise" provision to be ambiguous and urge the Committee to clarify the intent of this language. Title VIII of the Dodd-Frank Act is entirely a stand-alone law – it did not amend any other provision of law.

However, the CFTC, the SEC and the Board have promulgated administrative regulations pursuant to authority granted under Title VIII. What would be the status of those existing regulations if the Draft were enacted in its current form? Also, there are certain terms that are defined in Section 803 of Title VIII of the Dodd-Frank Act that are cross-referenced in other regulations. If the defined terms themselves are repealed, what happens to those other regulations? It would seem that the status of those other regulations would be called into question.

OCC is in the process of seeking to be recognized by the European Securities and Markets Authority (ESMA) as a "qualifying central counterparty" or QCCP. Status as a QCCP is important to OCC, as EU-based OCC clearing members that are subject to the Basel III capital requirements will be subject to less advantageous capital treatment with respect to funds held by a non-QCCP. In fact, such treatment may be sufficiently adverse to such clearing members to render it uneconomic for them to clear through CCPs that are not QCCPs. The relevant Basel III requirements are currently scheduled to go into effect in December of 2016, after having been previously delayed on several occasions. This issue is not unique to OCC, in that other CCPs that have sought or obtained QCCP status in Europe would have the same business concerns here as OCC.

Repeal of Title VIII may, at least in the short term, make it impossible for U.S.-based CCPs, such as OCC, to be recognized as QCCPs by ESMA. ESMA will only grant QCCP status to a CCP if it determines that the CCP is prudentially supervised by a regulator that has established regulations that are consistent with the so-called "principles for financial market infrastructures" (PFMIs).[1] The SEC has proposed standards for covered clearing agencies (the Proposed CCA Rules),[2] which, once finalized, will apply to OCC, and the CFTC has adopted its Part 39, Subpart C rules (the Subpart C Rules),[3] with which OCC is in the process of electing to comply. The Proposed CCA Rules and Subpart C Rules are intended to incorporate the PFMIs and have been promulgated/proposed under authority granted to the SEC and CFTC under Title VIII of the Dodd-Frank Act.[4] If Title VIII of the Dodd-Frank Act is repealed, it is unclear how U.S.-based CCPs would be able to obtain QCCP status in Europe. This would put such U.S. CCPs at a substantial competitive disadvantage to CCPs in Europe and elsewhere, and would also be highly disadvantageous to European banks.

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[1] The PFMIs were issued in April 2012 by the Committee on Payment and Settlement Systems (now known as the Committee on Payments and Market Infrastructures) of the Bank for International Settlements and the Technical Committee of the International Organization of Securities Commissioners and are available at http://www.bis.org/cpmi/publ/d101a.pdf.

[2] 79 FR 29508 (May 22, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-05-22/pdf/R1-2014-05806.pdf.

[3] 17 CFR 39.30-42.

[4] Section 805 directs the SEC and CFTC to prescribe risk management requirements for SIFMUs that incorporate "relevant international standards and existing prudential requirements."

If Title VIII is repealed, a similar issue would be raised under the U.S. implementations of Basel III, because banking organizations that are subject to those implementations are also entitled to more favorable capital treatment with respect to their exposures to QCCPs.[5] In the U.S., the definition of "QCCP" specifically includes a "designated financial market utility" (DFMU) as defined in Title VIII of the Dodd-Frank Act. As a repeal of Title VIII would include the repeal of this defined term, absent some additional action by U.S. banking regulators, a repeal of Title VIII would result in substantially adverse capital treatment for U.S. banks that are OCC clearing members.

Furthermore, pursuant to Section 806(a) of Title VIII of the Dodd-Frank Act, the Board has recently authorized the Chicago Federal Reserve Bank (Chicago FRB) to establish and maintain an account for OCC as a DFMU.[6] Title VIII of the Dodd-Frank Act and the PFMIs encourage DFMUs to use central banks as depositories, because, among other things, they present low credit and liquidity risk to depositors. Moreover, use of central banks as depositories mitigates risk in the system as a whole, particularly contagion risk, as CCPs, like OCC, already depend on commercial banks (and their affiliates) for settlement and collateral services, liquidity resources, and critically, as members guaranteeing financial performance of their clients. For these reasons, OCC has been actively engaged in discussions with the Chicago FRB about how it will utilize Chicago FRB accounts. Repeal of Title VIII of the Dodd-Frank Act would impact efforts to open such accounts and potentially make accounts and services at the Chicago FRB unavailable to OCC.

We thank the Committee for this opportunity to provide comments on the Draft and its continued efforts. We look forward to an ongoing dialogue as we continue to analyze the Draft and the potential implications for OCC, equity options markets and other cleared derivatives markets.

Sincerely,

Craig S. Donohue
Executive Chairman

[5] *See, e.g.*, https://www.gpo.gov/fdsys/pkg/FR-2013-10-11/pdf/2013-21653.pdf.

[6] It is important to note that permitting a DFMU to establish an account at a Federal Reserve bank does not grant a DFMU discount and borrowing privileges from the Federal Reserve bank.