

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 83849 / August 15, 2018

Admin. Proc. File No. 3-17906

In the Matter of the Application of
ABN AMRO CLEARING CHICAGO LLC
For Review of Disciplinary Action Taken by
CHICAGO BOARD OPTIONS EXCHANGE, INC.,
AND C2 OPTIONS EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE—REVIEW OF DISCIPLINARY
PROCEEDINGS

National securities exchanges found that a member firm violated their rules and Rule 15c-3 under the Securities Exchange Act of 1934. *Held*, the findings of violations and assessment of sanctions are *set aside* and the matter is *remanded*.

APPEARANCES:

Stephen P. Bedell and *Jason P. Britt*, Foley & Lardner, for ABN AMRO Clearing
Chicago LLC

Joanne Moffic-Silver and *Gregory Hoogasian* for Chicago Board Options Exchange, Inc.
and C2 Options Exchange, Inc.

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ABN AMRO Clearing Chicago LLC filed applications for review of disciplinary action taken by the Chicago Board Options Exchange, Inc. and C2 Options Exchange, Inc. (collectively, “CBOE”).¹ The Commission requested briefing on the appropriate standard of review to be applied by CBOE’s Board of Directors with respect to initial determinations made by its Business Conduct Committee’s hearing panel (“BCC”).² We conclude that the Board incorrectly applied a clearly erroneous standard of review to the BCC’s findings of fact and conclusions of law and an abuse-of-discretion standard of review to the BCC’s sanctions determination. Deferential review is not, we believe, reasonably and fairly implied by any Commission-approved CBOE rule. We therefore set aside the disciplinary action and remand this matter to CBOE for the Board to conduct a de novo review of the BCC’s decision.

I. Background

This disciplinary proceeding arises from allegations that ABN AMRO violated Rule 15c-3 under the Securities Exchange Act of 1934 (“Market Access Rule”).³ In accordance with CBOE Rule 17.6, a panel of three public members of CBOE’s BCC held a hearing. The BCC panel then presented its findings to a majority of the BCC, which pursuant to CBOE Rule 17.9 issued a decision concluding that CBOE’s Regulatory Division (“CBOE Regulation”) failed to establish that ABN AMRO violated the Market Access Rule. CBOE Regulation then sought review of the BCC’s decision with CBOE’s Board pursuant to CBOE Rule 17.10.

CBOE Regulation and ABN AMRO “disagreed as to the proper standard of review that the Board should apply with respect to the BCC’s findings and conclusions.”⁴ CBOE Regulation argued that the Board should apply a de novo standard, while ABN AMRO argued that the Board should defer to the BCC. The Board agreed with ABN AMRO and concluded that it should apply the “clearly erroneous” standard of review to all BCC rulings, whether findings of fact, conclusions of law, or “mixed questions of law and fact.”⁵ In so holding, the Board recognized that the Exchange Act does not “prescribe a specific standard” that a self-regulatory organization (“SRO”) like CBOE “must employ when reviewing an [internal disciplinary] appeal.”⁶ Nonetheless, the Board had “used the clearly erroneous standard for over twenty years

¹ *In re ABN AMRO Clearing Chicago LLC*, CBOE File No. 14-0177, C2 File No. 14-0003, Star Nos. 20140438963, 20140439040, Decision No. 16 BD 01.2 (Feb. 16, 2017); *In re ABN AMRO Clearing Chicago LLC*, CBOE File No. 14-0177, C2 File No. 14-0003, Star Nos. 20140438963, 20140439040, Decision No. 16 BD 01 (July 28, 2016).

² *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 80983, 2017 WL 2645654 (June 20, 2017) (“*ABN AMRO* Briefing Order”) (directing the parties to file briefs limited to certain matters “pertinent to resolution of the standard-of-review issue”).

³ Allegations that ABN AMRO also violated CBOE’s rules were resolved by settlement.

⁴ *ABN AMRO Clearing Chicago LLC*, Decision No. 16 BD 01, at 7.

⁵ *Id.* at 8.

⁶ *Id.*

when reviewing” BCC decisions and “[i]n all those matters that were appealed to the SEC[,] the SEC decided the appeal without noting . . . a clearly erroneous standard was incorrect.”⁷

The Board determined that the BCC’s rulings were “clearly erroneous,” and concluded that ABN AMRO had violated the Market Access Rule. As a result, the Board remanded the matter to the BCC for determination of sanctions. The BCC imposed a censure and fines of \$55,000. After another appeal, the Board stated that it would allow the BCC’s sanctions to stand unless they were “arbitrary, capricious, or a clear abuse of discretion.”⁸ The Board stated that it “might have decided the determination of sanctions differently . . . in the first instance” but could not conclude that the BCC had abused its discretion, and so sustained the sanctions imposed.⁹

II. Analysis

The Commission has never addressed the appropriate standard of review for CBOE’s Board to apply in reviewing the BCC’s determinations.¹⁰ Both parties agree that nothing in the Exchange Act, the Commission’s rules under the Exchange Act, or CBOE’s Commission-approved rules explicitly specifies a deferential standard of review. Nonetheless, both parties take the position that the clearly erroneous standard should apply in light of the Board’s longstanding precedent; they differ as to whether the Board in practice applied that standard in this particular matter.¹¹ But we are not bound by the parties’ stipulation as to a deferential standard of review,¹² and we do not agree with them. As explained below, in light of the text, structure, and context of CBOE’s rules, the Board must conduct a de novo review of the BCC’s

⁷ *Id.*

⁸ *ABN AMRO Clearing Chicago LLC*, Decision No. 16 BD 01.2, at 2.

⁹ *Id.* at 4.

¹⁰ *See, e.g., Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) (explaining that a “*sub silentio* holding is not binding precedent”); *accord Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

¹¹ ABN AMRO argues in the alternative that if the Commission determines that a deferential standard of review is not fairly and reasonably implied by CBOE’s rules the Commission should dismiss the proceeding rather than remand to CBOE. As a secondary alternative position, ABN AMRO asserts that de novo review would be proper as long as the Board was directed to conduct a de novo review following certain additional procedures that ABN AMRO claims are required. We address these arguments *infra* at Sections II.B and II.C.

¹² *See, e.g., Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017) (“The court, not the parties, must determine the standard of review.”); *United States v. Duhon*, 541 F.3d 391, 396 n.2 (5th Cir. 2008) (stating that “no party has the power to control our standard of review”); *Reg’l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006) (similar).

rulings. Unless CBOE obtains Commission approval of a rule authorizing the Board to deferentially review the BCC's rulings, the Board must discontinue that practice.

A. The Board's use of a deferential standard of review constitutes an unfiled and unapproved SRO rule that cannot provide the basis for its action here.

Under Section 19(e)(1) of the Exchange Act, to sustain CBOE's disciplinary action against ABN AMRO we must find (1) that ABN AMRO engaged in the acts that CBOE found it to have engaged in; (2) that those acts violated the provisions CBOE found them to have violated; and (3) that CBOE's disciplinary action was imposed in a manner consistent with the purposes of the Exchange Act. Absent such findings, the Commission shall "set aside the sanction" and, "if appropriate, remand to" the SRO.¹³ We need not address the first two requirements because we find that CBOE did not act consistently with the purposes of the Exchange Act. Section 19(b)(1) of the Exchange Act generally requires an SRO's rules to be filed with and approved by the Commission.¹⁴ Unless an exception applies, an SRO cannot invoke a procedure in a disciplinary proceeding against a member or associated person that is premised upon an unfiled and unapproved rule.¹⁵ Otherwise, an SRO could implement and make effective a rule without complying with the process that the Exchange Act and our implementing regulations require. Here, nothing in CBOE's Commission-approved rules provides that the Board will employ a deferential standard of review in determining what disciplinary sanction to impose.

¹³ 15 U.S.C. § 78s(e)(1)(B).

¹⁴ Exchange Act Section 19(b), 15 U.S.C. § 78s(b). In limited situations, a rule may be effective upon filing unless suspended or abrogated. *See, e.g., id.* § 78s(b)(2)(D), (b)(3)(A), (b)(3)(C), (b)(4)(D). This opinion is not intended to address any of these situations.

¹⁵ *See, e.g., Warren B. Minton, Jr.*, Exchange Act Release No. 46709, 2002 WL 32140276, at *4 n.19 (Oct. 23, 2002) (holding that the NASD lacked authority to bind a respondent to a withdrawn offer of settlement because "NASD's rules did not prohibit withdrawal of settlement offers"); *David Turnipseed*, Exchange Act Release No. 24173, 1987 WL 757592, at *2 & n.6 (Mar. 4, 1987) (questioning whether SRO could refuse to allow a respondent to withdraw a settlement offer prior to acceptance "without amending the [SRO's] Code of Procedure pursuant to Section 19(b)"); *see also Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 67566, at *4-5 & n.28 (Jan. 14, 2004) (determining to "set aside the [SRO's] action based on the absence of any supporting rule"); *William Higgins*, Exchange Act Release No. 24429, 1987 WL 757509, at *14 (May 6, 1987) ("[W]e must set aside any SRO action that imposes a limitation on access when the action is not taken pursuant to a rule of the SRO."); *Letter from the Commission to the NYSE*, Exchange Act Release No. 13594, 1977 WL 175743, at *1 (June 3, 1977) ("Since the Policy was never published by the NYSE as a stated policy, practice, or interpretation, it does not have any binding effect on NYSE members or other persons[.]").

The Board’s practice of applying a clearly erroneous or abuse-of-discretion standard for reviewing BCC rulings constitutes a “rule” of the CBOE. The Exchange Act’s definition of an SRO “rule” embraces not only the formal constitution, articles of incorporation, bylaws, and rules of an SRO, but also any “stated policy, practice, or interpretation” of the SRO.¹⁶ This includes “[a]ny material aspect of the operation of the facilities of the [SRO]” or “[a]ny statement made generally available to [the SRO’s members] . . . that establishes or changes any standard, limit, or guideline with respect to: (i) the rights, obligations, or privileges of specified persons . . . or (ii) the meaning, administration, or enforcement of an existing rule.”¹⁷ These standards are intended to “make clear to self-regulatory organizations that they must file all significant regulatory actions for Commission review.”¹⁸

In two independent respects, the Board’s deferential standard of review falls within the definition of a rule of the CBOE. First, it establishes generally applicable standards that are integral to the “administration[] or enforcement” of CBOE’s rules (as well as the rules and regulations promulgated by the Commission) and to how CBOE enforces its members’ compliance with the securities laws. Second, it is fundamental to how CBOE carries out a “material aspect” of its operations—its disciplinary process.¹⁹ The deferential standard of review prevents the Board from correcting an erroneous—but not clearly erroneous—conclusion of law reached by the BCC.

We reach this conclusion notwithstanding CBOE’s insistence that a merely “erroneous view of the law” by the BCC would be corrected by the Board. That is not what the Board said in the decision under review: “[T]he Board has applied the *clearly erroneous standard* in prior appeals in interpreting SEC rules and *in deciding questions of law*.”²⁰ The Board also framed its analysis of the BCC’s legal conclusions in terms of the clear error standard by finding the

¹⁶ *Meyer Blinder*, Exchange Act Release No. 31095, 1992 WL 216702, at *7 & n.51 (Aug. 26, 1992) (quoting 15 U.S.C. § 78c(a)(27)).

¹⁷ Exchange Act Rule 19b-4(a)(6), 17 C.F.R. § 240.19b-4(a)(6).

¹⁸ *Filings by Self-Regulatory Organizations of Proposed Rule Changes and Other Materials with the Commission*, Exchange Act Release No. 17258, 1980 WL 25646, at *12 (Oct. 30, 1980).

¹⁹ Exchanges like CBOE are required to establish and implement a fair disciplinary procedure that gives effect to the requirements and obligations of the securities laws, our implementing rules and regulations, and the SRO’s own rules. *See, e.g.*, Exchange Act Section 6(b)(1), (b)(7), 15 U.S.C. § 78f(b)(1), (b)(7) (requiring that exchanges be organized to “enforce compliance . . . with the securities laws, the rules and regulations thereunder, the [SRO’s] rules” as well as “provide a fair procedure for the disciplining” of members and associated persons).

²⁰ *ABN AMRO Clearing Chicago LLC*, Decision No. 16 BD 01, at 7-8 (emphasis added); *see also Lek Sec. Corp.*, CBOE File No. 15-0061, Star No. 20150455672, Decision No. 17 BD 01, at 4 (May 18, 2017) (“[The member’s] argument on appeal concerning statutory construction does not cause the BCC’s findings to be ‘clearly erroneous.’”).

“BCC’s interpretation of the Market Access Rule” to be “clearly erroneous.”²¹ We take the Board at its word.²² The Board’s statements neither “purport[] to be, nor [are], a conclusion following from de novo review.”²³ And there can be little doubt that the use of a deferential standard of review will often be determinative to the outcome of a disciplinary proceeding.²⁴

Accordingly, the Board’s use of a deferential standard of review is a CBOE “rule.” Yet nothing in CBOE’s rules directs the Board to employ a deferential standard of review. So unless the Board’s practice comes within an exception to the requirement that its rules be filed with and approved by the Commission, it cannot be applied by CBOE in imposing disciplinary action.

As relevant here, Exchange Act Rule 19b-4(c) provides that Commission approval must be sought unless the policy or practice is (1) “reasonably and fairly implied” by an existing rule of the SRO or (2) concerned “solely with the administration” of the SRO and is “not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement” of an existing rule.²⁵ We are not persuaded that either of Rule 19b-4(c)’s exceptions applies.

1. The “reasonably and fairly implied” exception does not apply.

The Commission must determine whether a policy or practice falls within the “reasonably and fairly implied” exception on a case-by-case basis;²⁶ we do so by considering the rule’s text, structure, and meaning in context.²⁷ An existing rule does not have to address the precise circumstances of every intended application explicitly, particularly when it deliberately states a

²¹ *ABN AMRO Clearing Chicago LLC*, Decision No. 16 BD 01, at 10, 12.

²² Although we are not remanding on this basis, CBOE’s shifting view on what is entailed by the clearly erroneous standard introduces unwelcome ambiguity as to the basis for its findings of violations. *Cf., e.g., Kimberly Springsteen-Abbott*, Exchange Act Release No. 80360, 2017 WL 1206062 (Mar. 31, 2017) (remanding because of lack of clarity in SRO’s decision).

²³ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 236 (1991).

²⁴ *See, e.g., id.* 237-238 (explaining that the difference “between a rule of deference and . . . independent review” is “much more than a mere matter of degree”); *News-Press v. DHS*, 489 F.3d 1173, 1187 (11th Cir. 2007) (“In even moderately close cases, the standard of review may be dispositive”); *Am. Pub. Gas Ass’n v. FPC*, 567 F.2d 1016, 1063 (D.C. Cir. 1977) (“The standard of judicial review substantially determines . . . the outcome of the [appeal].”).

²⁵ 17 C.F.R. § 240.19b-4(c).

²⁶ *Filings by SROs*, 1980 WL 25646, at *13.

²⁷ *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (“Ordinary principles of statutory construction apply. In order to determine the scope of [a provision], we must examine the statute’s text in light of context, structure, and related statutory provisions.”).

principle in broad terms.²⁸ Nevertheless, for this exception to apply, it is not sufficient that the policy or practice sought to be employed would be a “logical outgrowth of” or “arguably relate to” an existing rule.²⁹ Moreover, the fact that an SRO, “for purposes of its internal operations, characterizes a stated policy, practice, or interpretation as reasonably and fairly implied does not mean the statement is reasonably and fairly implied for purposes of Rule 19b-4.”³⁰ Finally, the longstanding character of a practice is not dispositive of whether it is “reasonably and fairly” implied by an existing rule—an SRO cannot obtain *de facto* approval of an unfiled practice by openly stating it and consistently applying it.³¹

a. The relevant text of CBOE’s rules.

Here, the pertinent, Commission-approved SRO rule is CBOE Rule 17.10(b):

Unless the Board shall decide to open the record for the introduction of evidence or to hear argument, such review shall be based solely upon the record and the written exceptions filed by the parties. New issues may be raised by the Board; the parties to the hearing shall be given notice of and an opportunity to address any such new issues. The Board may affirm, reverse or modify, in whole or in part, the decision of the Business Conduct Committee. Such modification may include an increase or decrease of the sanction.

²⁸ See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (“Evaluating whether a rule’s application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway . . . in reaching outcomes in case-by-case determinations.”); accord *G.K. Scott & Co. v. SEC*, 56 F.3d 1531 (table), 1995 WL 364671, at *3 (D.C. Cir. 1995) (upholding “application of a standard of conduct already expressed” in a broadly stated substantive conduct rule).

²⁹ *Bloomberg L.P.*, 2004 WL 67566, at *4; see also *Filings by SROs*, 1980 WL 25646, at *13 (“extensive and specific limitations . . . that are not apparent from the face of the existing rule” would not be considered “reasonably and fairly implied” by it).

³⁰ *Filings by SROs*, 1980 WL 25646, at *13.

³¹ *Id.* at *13 & nn.76-77 (describing policies, practices, and interpretations that had been articulated and publicized by SROs, but that did not qualify for exception because they were not reasonably and fairly implied from the “face of [any] existing rule”); *William Higgins*, 1987 WL 757509, at *7, *9-10 (finding that “unwritten policy” prohibiting telephone links on the floor to non-members that existed for more than a decade was not reasonably and fairly implied from rules authorizing SRO to regulate member communications and transaction of business of floor); see also *Letter from the Commission to the New York Stock Exchange*, 1977 WL 175743, at *3 (finding that the NYSE’s “repeated denials of requests” from members for inter-exchange communications “over the years” did not *de facto* establish an existing rule).

We hold, consistently with our prior decisions, that the unqualified breadth of the rule’s “affirm, reverse or modify, in whole or in part” language contemplates the Board employing “plenary,” de novo review authority with respect to BCC decisions.³² The parties have not identified any other SRO whose rules define the reviewing body’s authority in similarly broad and unqualified language while in practice employing a deferential standard of review.³³

In analogous contexts, courts have interpreted similarly worded provisions to mean that the appellate administrative decisionmaker will perform de novo review. In *Vercillo v. CFTC*, the Seventh Circuit held that the agency properly applied a de novo standard of review to its ALJ’s decision where the regulation stated that it had the power to “affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision” before it.³⁴ In *Acura of Bellevue v. Reich*, the Ninth Circuit relied on a regulation providing that the ALJ could “affirm, deny, reverse, or modify, in whole or in part, the [Administrator’s prior] determination” to conclude that the “ALJ . . . has de novo review of the Administrator’s decision.”³⁵ And in *Universal Camera Corp. v. NLRB*, the Supreme Court reasoned that a statutory provision that presumptively gave a reviewing administrative agency “all the powers which it would have in making the initial decision”—that is, plenary, de novo review—was “intended to embody” an earlier proposal giving the agency the power to “affirm, reverse, modify, or set aside in whole or in part” the initial decision.³⁶ We see nothing “apparent from the face” of CBOE Rule 17.10(b)’s virtually identical language to support the Board’s use of a deferential standard of review.³⁷

³² See, e.g., *Vincent M. Uberti*, Exchange Act Release No. 58917, 2008 WL 4826021, at *5 (Nov. 7, 2008) (interpreting NASD Rule 9348, which provided that the relevant SRO body could on review “affirm, dismiss, modify, or reverse” the hearing panel’s findings, to confer “plenary authority in reviewing Hearing Panel decisions”); *Gary Roth*, Exchange Act Release No. 37221, 1996 WL 262486, at *3 & n.7 (May 16, 1996) (concluding that rule authorizing the NYSE’s Board “to ‘sustain, . . . modify, or reverse any [hearing panel] determination’” did “not require the Board to defer to a hearing panel”); see generally *Salve Regina Coll.*, 499 U.S. at 231 (equating “plenary review” with “review *de novo*”); *id.* at 240 (Rehnquist, C.J., dissenting) (same; contrasting “‘deferential review’” and “‘plenary,’ ‘independent,’ and ‘*de novo*’ review”).

³³ The rules of a few SROs provide for deferential review, but we are unaware of any SRO that defers to an internal disciplinary ruling without an explicit statement in its rules to that effect. See *infra* notes 46, 68 and accompanying text.

³⁴ *Vercillo v. CFTC*, 147 F.3d 548, 553 (7th Cir. 1998); accord *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1566, 1570 (11th Cir. 1995).

³⁵ *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1406-08 (9th Cir. 1996).

³⁶ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 & n.27 (1951).

³⁷ See *Filings by SROs*, 1980 WL 25646, at *13.

b. The relevant structure of CBOE’s rules.

CBOE’s use of the “affirm, reverse or modify” phrasing elsewhere in its rules bolsters our conclusion. Under CBOE Rule 17.6(a), the hearing panel may consist of “one or more members” of the BCC. Following the hearing, the panel is to issue a decision. When the hearing panel is not “composed of at least a majority of the members of the [BCC], its determination shall be automatically reviewed by a majority of the [BCC], which may affirm, reverse or modify in whole or in part”; the modification “may include an increase or decrease of the sanction.” Because CBOE Rule 2.1(b) provides that the BCC may act only through a majority of its members, it would be anomalous if CBOE Rule 17.9 permitted the BCC to defer to the determinations of a hearing panel that did not comprise a majority of the BCC. In other words, CBOE Rule 17.9 necessarily envisions *de novo* review by a BCC majority of the hearing panel’s rulings. Applying the “standard principle of statutory construction” that “identical words and phrases within the same statute should normally be given the same meaning,”³⁸ we conclude that the substantively identical “affirm, reverse or modify” language used in CBOE Rule 17.10(b) to describe the Board’s review of the BCC’s determination likewise calls for *de novo* review.

In other respects, too, the structure of CBOE’s rules supports our conclusion that the Board’s use of a deferential standard of review is not reasonably and fairly implied by an existing rule. A separate clause in CBOE Rule 17.10(b) gives the Board the authority to “decide to open the record for the introduction of evidence” that was not received by the BCC; the Board also may raise new issues *sua sponte*. The Board has interpreted this language in a predecessor version of CBOE’s rules to mean that the “Board *may* conduct a *de novo* review of the facts and conclusions reached” by the BCC if the “Board exercises its discretion to reopen the record.”³⁹ Otherwise, the “scope of review is confined to determining whether the BCC’s decision is not clearly erroneous.”⁴⁰ But there are no standards limiting the Board’s “discretion” to reopen the record. The Board, in effect, has reserved the right to not have a fixed standard of review. This is improper.⁴¹ Accordingly, CBOE Rule 17.10(b) as a whole must be understood as calling for application of a *de novo* standard of review irrespective of whether the Board has decided to reopen the record.

³⁸ *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see also Douglas v. Yates*, 535 F.3d 1316, 1320-21 (11th Cir. 2008) (“Similar language contained within the same section of a statute must be accorded a consistent meaning.”).

³⁹ *Paul Espenshade*, CBOE File No. 74-0071 at 8-9 (Aug. 4, 1975) (emphasis added) (discussing CBOE Rule 17.9(b) (1975)); *see also id.* at 10 n.37 (“Of course, if we were hearing the case *de novo*, we would not be bound by the prior actions of the [BCC].”).

⁴⁰ *Id.* at 9.

⁴¹ *Yepes-Prado v. INS*, 10 F.3d 1363, 1367 (9th Cir. 1993) (“[I]t is ‘irresponsible’ of the [agency] . . . to require those who appear before it to guess which standard of review it will apply (or even has applied) on a particular occasion.”); *Ortiz-Salas v. INS*, 992 F.2d 105, 107 (7th Cir. 1993) (describing as “astonishing[]” contention that the agency “has no fixed standard of review—sometimes it reviews . . . for abuse of discretion, sometimes it reviews . . . *de novo*”).

c. The relevant context of CBOE’s rules.

Finally, the context confirms the implausibility of inferring deferential review from CBOE Rule 17.10(b)’s “affirm, reverse or modify, in whole or in part” language. SRO rules (like statutes and regulations more generally) must be interpreted against a background of established, common-law adjudicatory principles.⁴² Viewed in this light, the Board’s application of a deferential standard of review to all BCC determinations differs considerably from the standard of review applied by other reviewing bodies.

Appellate review of an inferior court’s rulings on issues of law is invariably *de novo*, and so, generally, is review of mixed questions of fact and law where the resolution turns on interpreting a legal standard.⁴³ Indeed, the Supreme Court has explicitly rejected appellate deference to district courts’ determinations about the content of state law.⁴⁴ We similarly review *de novo* whether an SRO’s findings of violation are factually and legally supported, and we independently determine whether an SRO’s choice of sanction is excessive, oppressive, or imposes an unnecessary or inappropriate burden on competition.⁴⁵ It also appears that, as a common practice within SROs, the Board (or analogous body) reviews *de novo* the determinations made by a hearing panel or business conduct committee, at least where language similar to CBOE Rule 17.10(b) appears in the SRO’s Commission-approved rulebook.⁴⁶ We see no reason to ignore this context by inferring a deferential standard of review from the broad and unqualified language of CBOE Rule 17.10.

⁴² See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 109 (1991); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

⁴³ See, e.g., *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018); *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Salve Regina Coll.*, 499 U.S. at 231-33.

⁴⁴ *Salve Regina Coll.*, 499 U.S. at 238.

⁴⁵ See, e.g., *Joseph Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *5 n.14, 7 (June 2, 2016); *Mitchell Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *6, 13 (May 27, 2015); see also Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2); see generally *NASD v. SEC*, 431 F.3d 803, 809 (D.C. Cir. 2005) (noting that the Commission’s review of SRO disciplinary decisions is broadly similar to its “internal adjudicative structure[]” for review of ALJ decisions).

⁴⁶ See, e.g., *Conrad C. Lysiak*, Exchange Act Release No. 33245, 1993 WL 492888, at *4 (Nov. 24, 1993) (NASD); *Daniel M. Pecoraro*, Exchange Act Release No. 24980, 1987 WL 110280, at *4 n.13 (Oct. 2, 1987) (Pacific Stock Exchange); *Irwin Schloss*, Exchange Act Release No. 16934, 1980 WL 267730, at *4 (June 26, 1980) (New York Stock Exchange). The rules of two SROs—the Chicago Stock Exchange and the Philadelphia Stock Exchange—have provided for deferential review. See, e.g., Chx. Art. 12, Rule 5 (“The Judiciary Committee may not reverse, or modify, in whole or in part, the decision of the Hearing Officer . . . if the factual conclusions in the decision are supported by substantial evidence”); Nasdaq PHLX Rule 960.9(b) (2000) (similar).

2. The housekeeping exception does not apply.

The “concerned solely with the administration” exception of Rule 19b-4(c) is also not applicable. This exception is not “available for stated policies, practices, and interpretations with respect to the meaning, administration, or enforcement of an existing rule” of the SRO.⁴⁷ As discussed above, the standard of review is central to how CBOE administers and enforces all of its other rules. What is more, this exception is limited to “housekeeping matters,” and we have emphasized that it is not applicable to “procedures for resolving or determining the rights or obligations of members.”⁴⁸ The standard of review in a disciplinary matter against a member is, of course, a procedural matter, and a fundamental one at that.⁴⁹

3. No other considerations warrant excusing CBOE’s non-compliance with Exchange Act Section 19(b) and Exchange Act Rule 19b-4.

ABN AMRO and CBOE advance a variety of arguments to the contrary, but we do not find them persuasive. We conclude that: (i) procedural aspects of an SRO’s operations are not exempt from the Exchange Act’s rule-filing-and-approval requirement; (ii) there is no basis to defer to CBOE’s interpretation of its own rules; (iii) neither reasonable foreseeability nor fair notice is a substitute for the Exchange Act’s rule-filing-and-approval requirement; (iv) the practice of other SROs does not sustain CBOE’s action here; and (v) neither estoppel nor acquiescence can be used to obtain de facto Commission approval of an unfiled rule.

ABN AMRO asserts that only “standards of conduct”—i.e., those relating to the “substantive rights and obligations of market participants”—are subject to the Exchange Act’s requirement that SRO rules be filed with and approved by the Commission, and that changes in “any procedural aspect” of an SRO’s practices do not “warrant[] a rule-making submission.” Exchange Act Section 19(b) and Exchange Act Rule 19b-4 contradict this contention. They define an SRO rule in expansive, sweeping terms that include the standard of review.⁵⁰ CBOE itself has filed proposed rule changes with the Commission regarding its disciplinary process. It has filed such rule changes for procedural matters as routine as the number of additional submissions to follow a petition for review,⁵¹ the time frame for disposing of a review

⁴⁷ *Filings by SROs*, 1980 WL 25646, at *14.

⁴⁸ *Id.* at *14 n.79.

⁴⁹ *See, e.g., Kramer v. Cash Link Sys.*, 715 F.3d 1082, 1086 (8th Cir. 2013) (“[T]he standard of review is a procedural issue”); *Phillips v. Bowen*, 278 F.3d 103, 108 (2d Cir. 2002) (“As is so often the case, the standard of review plays a critical role in our assessment of the record.”).

⁵⁰ *See supra* notes 16-24 (collecting citations).

⁵¹ File No. SR-CBOE-96-49, 1996 WL 493299 (Aug. 29, 1996).

proceeding,⁵² the process for the Board to direct review of a BCC decision on its own motion,⁵³ and the submission of videotaped responses to a notice of investigation.⁵⁴ We therefore reject ABN AMRO's assertion that all "procedural aspects" of an SRO's disciplinary process are categorically exempt from Section 19(b)'s rule filing requirement.⁵⁵

ABN AMRO also contends we should defer to CBOE's understanding of its own rules,⁵⁶ which is that the Board's practice of deferential review is "reasonably and fairly implied" by CBOE Rule 17.10(b). But the Securities Acts Amendments Act of 1975 gave the Commission plenary authority over SRO rulemaking and disciplinary actions.⁵⁷ The Commission independently interprets an SRO's rules, and it is our construction of the SRO rule that governs. At any rate, CBOE does not argue that its interpretation of CBOE Rule 17.10 is entitled to deference.

CBOE, quoting from our release promulgating the relevant provisions of Exchange Act Rule 19b-4, asserts that interpretations "arising out of individual enforcement or disciplinary" proceedings are not required to be filed with and approved by the Commission.⁵⁸ But the rest of

⁵² File No. SR-CBOE-2004-82, 2005 WL 1074851 (Mar. 1, 2005).

⁵³ File No. SR-CBOE-2014-001, 2014 WL 265802 (Jan. 23, 2014).

⁵⁴ File No. SR-CBOE-96-47, 1996 WL 613151 (Oct. 22, 1996). SROs may seek approval out of an abundance of caution, rather than necessity. We do not hold that a rule filing was or was not required for every procedural change mentioned in the text, and such questions are not before us.

⁵⁵ ABN AMRO claims that "disciplinary hearing and appeal methods" cannot be deemed rules because matters like the "admission of evidence, the presentation of witnesses and the length and sequence of opening statements and closing arguments" are not explicitly the subject of any CBOE rule. The resolution of such interstitial procedural issues is reasonably and fairly implied by existing CBOE rules. *See, e.g.*, CBOE Rule 17.6(b)-(c) (conferring authority to "hear and decide all pre-hearing issues" and "otherwise regulate the conduct of the hearing").

⁵⁶ *See, e.g., Intercontinental Indus. v. Am. Stock Exch.*, 452 F.2d 935 (5th Cir. 1971) (stating, in a decision that predated the Securities Act Amendments of 1975, that a securities exchange "should be allowed broad discretion in the determination of [its rules'] meaning and application").

⁵⁷ Pub. L. No. 94-29, 89 Stat. 97; *NASD*, 431 F.3d at 806 ("The congressional scheme, in short, establishes a system in which the Commission not only closely supervises and approves the processes by which [an SRO] brings disciplinary action, but in which the Commission fully revisits the issue of liability, and can completely reject or modify [the SRO's] decision as it deems appropriate [An SRO's] authority to discipline its members for violations of federal securities law is entirely derivative . . . and the legal views of the [SRO] must yield to the Commission's view of the law.") (summarizing legislative history).

⁵⁸ *See Filings by SROs*, 1980 WL 25646, at *13.

the sentence makes clear that such case-by-case interpretations do not “have to be filed as proposed rule changes *if . . . reasonably and fairly implied by the existing rules.*”⁵⁹ As discussed above, we have concluded that is not the case here. CBOE is not seeking to apply an existing rule to the facts of a specific case; it is seeking to establish a generally applicable procedure for determining its members’ rights and obligations in *every* case.

CBOE, again quoting our adopting release, also asserts that no rule filing is required when a practice is “‘reasonably foreseeable’” to the affected parties and that such is the case here because the Board has for decades reviewed BCC determinations under a clearly erroneous or abuse-of-discretion standard.⁶⁰ But the quoted language in context states only that an unforeseeable interpretation would *not* satisfy the “reasonably and fairly implied” exception—not that any interpretation automatically comes within it once parties are aware of it.⁶¹ Otherwise, the requirement that SRO rules be filed with and approved by the Commission could be circumvented simply by announcing in advance (but not filing with the Commission or seeking Commission approval for) “specific implementing policies under general rules”—something that we expressly prohibited.⁶²

For similar reasons, we reject CBOE’s contention that no rule filing is required once members have “fair notice” of a policy or practice that the SRO will employ. We have sustained SRO disciplinary actions based on the application of broad, substantive prohibitions—such as a prohibition on conduct inconsistent with “just and equitable principles of trade”—without requiring that there be a rule describing the exact factual scenario. We have reasoned that such a rule can appropriately be the basis for disciplinary action as long as the violative nature of the specific underlying misconduct followed from “long-standing principles and prior decisions of the courts and this Commission,”⁶³ “common knowledge” about industry norms and custom,⁶⁴ or other clear sources of guidance.⁶⁵ Thus, when a respondent has fair notice, *and* the existing rule’s broadly articulated conduct requirement can “reasonably and fairly” be read to apply to the

⁵⁹ *Id.* (emphasis added).

⁶⁰ *See id.* at *13 n.76.

⁶¹ *Id.* (“The standard also would not be met by a stated policy, practice, or interpretation that implements a system if it affects the manner in which members or others do business or in which the system functions, in a way that is not reasonably foreseeable from the rule to which the stated policy, practice, or interpretation applies”).

⁶² *Id.* at *13 n.77.

⁶³ *E.F. Hutton & Co.*, Exchange Act Release No. 25887, 1988 WL 901859, at *4 & n.25 (July 6, 1988).

⁶⁴ *SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at *5 nn.26-27 (June 17, 2005); *see also Boyce Motor Lines v. United States*, 342 U.S. 337, 341 (1952) (“common experience”).

⁶⁵ *Heath v. SEC*, 586 F.3d 122, 141 (2d Cir. 2009).

particular facts, the Exchange Act’s rule-filing-and-approval requirement does not stand in the way of finding a violation.⁶⁶ We have not held, however, that “fair notice” is, standing alone, a substitute for the Exchange Act’s requirement that SRO rules be filed with and approved by the Commission,⁶⁷ let alone that an SRO may change its disciplinary procedures unilaterally just by notifying members of the changes in advance.

CBOE observes further that other SROs, such as the Philadelphia and Chicago Stock Exchanges, had or have internal rules that prescribe deferential standards of internal review. For instance, PHLX Rule 960.9(b)(ii) provided: “[T]he Board of Governors . . . shall decide to affirm, reverse or modify, in whole or in part the decision of the Business Conduct Committee The Board of Governors may not reverse[] or modify . . . if the factual conclusions in the decision are supported by substantial evidence.”⁶⁸

In our view, this observation cuts against CBOE’s position. CBOE’s Commission-approved rules include only a plenary grant of authority to the Board *without* language specifying a deferential standard of internal review or otherwise qualifying that authority. CBOE does not identify any SRO that defers to an internal disciplinary ruling without an explicit statement in its rules regarding deference. Although we agree that SROs have flexibility in designing rules and procedures, that authority is limited by both Exchange Act Rule 19b-4 as well as by the Commission’s task, in the context of reviewing SRO rule filings as well as resolving applications for review of disciplinary actions, of ensuring that SROs act in conformity with the securities laws and their own rules.⁶⁹ In sum, the Commission’s approval of deferential review provisions in *other* SROs’ rulebooks did not relieve *CBOE* of the need to itself seek and obtain the Commission’s approval if it, too, desired to employ a deferential standard of review.⁷⁰

⁶⁶ See, e.g., *SIG Specialists, Inc.*, 2005 WL 1421103, at *5 & n.26 (“[The] obligations . . . were reasonably and fairly implied by Exchange Rule 104.10 and, therefore, gave fair notice of what was required of Caterina under the circumstances.”); *E.F. Hutton & Co.*, 1988 WL 901859, at *4 & n.25; *accord G.K. Scott & Co.*, 1995 WL 364671, at *3.

⁶⁷ Thus, SROs cannot obtain *de facto* approval of “extensive and specific limitations . . . that are not apparent from the face of the existing rule” merely by announcing them ahead of time and consistently applying them, *Filings by SROs*, 1980 WL 25646, at *13 & nn.76-77, even if such limitations may arguably be logically related to an existing rule, *Bloomberg L.P.*, 2004 WL 67566, at *4.

⁶⁸ See, e.g., PHLX Rule 960.9(b)(ii) (2000); Chx. Art. 12, Rule 5.

⁶⁹ See Exchange Act Section 19(b)(2)(C), (e)(1)(A), 15 U.S.C. § 78s(b)(2)(C), (e)(1)(A).

⁷⁰ We express no view as to the outcome in the event an SRO now seeks Commission approval of a rule intended to provide for a deferential standard of review or an affected party in the context of seeking review of disciplinary action timely challenges the consistency with the Exchange Act of an existing rule providing for a deferential standard of review.

CBOE’s remaining arguments are variants on the theme of estoppel or approval by acquiescence. CBOE observes that the Board has used a deferential standard of review for decades, and that in those matters appealed to the Commission we have decided the appeal “without any suggestion that the deferential standards were improper.” But neither did the Commission hold that such deference by the Board was proper, and the parties concede that “*sub silentio* rulings are not controlling precedent.”⁷¹ We have already rejected the approval-by-acquiescence argument:

[The SRO] essentially seek[s] to establish, based on collateral proceedings, an implied Commission approval of what is at best an unwritten ‘policy’ . . . [W]e do not believe that such an implied ratification is appropriate Indeed, to uphold such an argument of implied ratification would substantially undermine the purposes of Section 19(b) of the Act which envisions that SRO rules would be published for public comment and scrutiny before they take effect.⁷²

B. We remand this matter to the Board for it to conduct a de novo review.

Section 19(e) of the Exchange Act provides that we must either find that CBOE’s disciplinary action was consistent with the purposes of the Exchange Act or we must “set aside the sanction imposed” and, “if appropriate, remand to” CBOE.⁷³ The Exchange Act requires that an SRO’s rules be filed with and approved by the Commission unless an exception applies. The Board’s use of a deferential standard of review constitutes the application of an unfiled and unapproved SRO rule without an available exception. Therefore, we cannot sustain the findings of violation on this record and we therefore set aside the sanction imposed.⁷⁴ In our view, a remand is also appropriate in instances, as here, when the incorrect standard of review has been

⁷¹ See *Wilson v. Sellers*, 138 S. Ct. 1188, 1196 (2018) (rejecting view that an appellate decision may “create[], through silence, a precedent that could be read as binding”); cf. *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000) (“Nor did [the body] issue any kind of opinion . . . that might have bound it, even as a matter of precedent, in a future adjudication.”).

⁷² *Higgins*, 1987 WL 757509, at *13; see generally *Fiero v. FINRA*, 660 F.3d 569, 578 (2d Cir. 2011) (finding that SRO rule change, which sought to invoke the “housekeeping” exception, was invalid and improperly promulgated more than 30 years after SRO proposed it); *Myriad Interactive Media, Inc.*, Exchange Act Release No. 75791, 2015 WL 5081238, at *9 (Aug. 28, 2015) (“[L]aches, waiver, estoppel, and acquiescence may not be interposed as defenses to the Commission’s administration of the securities laws.”).

⁷³ 15 U.S.C. § 78s(e)(1)(B).

⁷⁴ See *supra* notes 13-15 and accompanying text; see also *Kevin Murphy*, Exchange Act Release No. 79016, 2016 WL 5571633, at *4 (Sept. 30, 2016) (remanding where there was insufficient evidence SRO “complied with its service rules”).

applied below.⁷⁵ CBOE concedes that if we determine that the Board erred in reviewing the BCC’s ruling deferentially, we should remand the matter for consideration under the *de novo* standard of review.⁷⁶ We reject ABN AMRO’s contention that remanding (as opposed to setting aside the disciplinary action without further proceedings) is impermissibly retroactive or otherwise prejudicial.

The general rule is that when an inferior tribunal applied an incorrect standard of review, the appellate body will remand for application of the correct standard. In *Orenlas v. United States*, for example, the Supreme Court “remand[ed] the case to the Court of Appeals to review [the issue] *de novo*” after concluding that that court erred in “adopting its deferential standard of review.”⁷⁷ The Court likewise remanded, instead of reversing outright, after determining that *de novo* rather than deferential review was the correct standard in *Salve Regina College v. Russell*.⁷⁸ Vacatur and remand for application of the correct standard of review is also typical in the administrative agency context.⁷⁹

ABN AMRO does not dispute either that the Commission has the authority to remand for further proceedings or that the Commission could direct the Board to apply *de novo* review. ABN AMRO even concedes that a *de novo* standard of review “would most effectively advance the Exchange Act’s scheme of enforcement and review.” It challenges only our authority to direct CBOE to apply the *de novo* standard in this proceeding, urging that the Board’s previous precedent “*entitled* [it] to the benefit of the deferential ‘clearly erroneous’ standard of review.”

⁷⁵ This conclusion does not compel CBOE to revisit already terminated matters and afford them *de novo* reconsideration. Regardless of whether the standard of review may be waived by the parties in the context of an ongoing proceeding still subject to further review, *see supra* note 12, a party has no entitlement to reopen an already final proceeding on the basis of a belatedly raised procedural claim—even one premised on an alleged development in the law. *See, e.g., James B. Bean Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991); *Johnson v. Cain*, 2016 WL 3264250, at *1 (M.D. La. May 19, 2016); *Gordon Brent Pierce*, Exchange Act Release No. 77643, 2016 WL 1566396, at *3, 5 (Apr. 18, 2016), *petition for review dismissed*, No. 16-1185 (D.C. Cir. Nov. 7, 2016) (per curiam).

⁷⁶ We recognize that the Board may reach the same conclusion on remand after undertaking a *de novo* review. CBOE, however, does not argue that the Commission should apply a harmless-error analysis to sustain the disciplinary action under review, and the Exchange Act provides that if we find CBOE to have acted inconsistently with the Exchange Act we “shall, by order, set aside the sanction imposed . . . and, if appropriate, remand.” 15 U.S.C. § 78(e)(1)(B).

⁷⁷ 517 U.S. 690, 698-99 (1996).

⁷⁸ 499 U.S. at 240.

⁷⁹ *See, e.g., Dickinson v. Zurko*, 527 U.S. 150, 165 (1999); *Rosiles-Camarena v. Holder*, 735 F.3d 534, 539 (7th Cir. 2013); *Chen v. GAO*, 821 F.2d 732, 742 (D.C. Cir. 1987).

We disagree that CBOE’s use of a de novo standard of review on remand would implicate retroactivity concerns for two independent reasons. First, retroactivity concerns do not arise unless an agency has overruled or disavowed its own “controlling precedent upon which a party relied to its detriment.”⁸⁰ Here, our holding is one of first impression; the Commission had never previously addressed whether CBOE’s Board was correct to use a deferential standard of review or whether doing so was consistent with CBOE Rule 17.10.⁸¹ As a consequence, ABN AMRO’s situation is “no different from that of other parties who . . . later find out . . . that their interpretation [of a statute or regulation] was wrong.”⁸² Furthermore, ABN AMRO does not—and cannot—claim to have reasonably relied on the Board’s clearly erroneous standard of review in carrying out its underlying conduct.⁸³ ABN AMRO will have a full and fair opportunity to address the allegations against it on remand to the Board.⁸⁴

Second, even assuming a change in the controlling legal rule, the standard of review is a procedural rather than a substantive matter.⁸⁵ Our decision today merely changes “*who* within [CBOE] makes a particular decision,” but not the “legal consequences of [ABN AMRO’s]

⁸⁰ *May Capital Grp., LLC*, Exchange Act Release No. 54711, 2006 WL 3199183, at *2 (Nov. 6, 2006).

⁸¹ *See Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1246, 1251 (10th Cir. 1999) (rejecting argument that industry group’s longstanding legal interpretation should be “imputed to the [agency] as ‘well-established’ policy,” even though agency had established the group).

⁸² *May Capital Grp.*, 2006 WL 3199183, at *4 (quoting *Farmers Tel. Co.*, 184 F.3d at 1250).

⁸³ *Id.* at *3 (“No one’s settled expectations based on reliance . . . were disrupted.”); *see also Williams N. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (stating that “it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule”); *accord United States v. Martin*, 363 F.3d 25, 46 (1st Cir. 2004) (“[A]lteration of the appellate standard of review upsets no legitimate reliance interest by a defendant; it could not have induced alteration of the behavior that led to the crime.”) (quotation marks omitted).

⁸⁴ We expect that the Board will allow the parties to submit additional briefing and argument in light of our decision. *See* Exchange Act Sections 6(b)(7) and 15A(b)(8), 15 U.S.C. §§ 78f(b)(7), 78o-3(b)(8) (requiring that SROs provide a “fair procedure”).

⁸⁵ *E.g., United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003) (describing changes in appellate standard of review as “[p]rocedural innovations that don’t tinker with substance”); *see generally Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) (“Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.”).

completed” conduct.⁸⁶ Because the “degree of deference” speaks only to the allocation of decision-making authority, “rather than to the rights or obligations of the parties,” our holding may be applied in pending cases “without raising concerns that it is impermissibly retroactive.”⁸⁷

ABN AMRO’s remaining contentions lack merit. It argues that CBOE would be required to “undergo the rule-making process” before using the de novo standard of review. But, as explained above, the text, structure, and context of CBOE Rule 17.10(b) contemplate de novo review. Next, although ABN AMRO asserts that no provision in CBOE’s rules allows the *Board* to revisit the case at this juncture, Exchange Act Section 19(e)(1)(B) allows the *Commission* to remand the matter for further consideration. Finally, ABN AMRO claims that it would be “penalized” if forced to “endure yet another round of appeal.” However, ABN AMRO does not sustain any legally cognizable injury from having to participate in an adjudicatory process.⁸⁸

C. A de novo review requires that the Board exercise its own judgment as to the issues properly before it without deferring to the BCC’s prior rulings.

In remanding for the Board to engage in a de novo review, we clarify what is entailed by that standard. ABN AMRO asks the Commission to require that at least one member of each Board panel be an attorney; that “every member of the Board personally review the entire record;” that this review include the transcript of proceedings before the BCC hearing panel and “all exhibits, pleadings, briefs, and other filings”; and that the Board’s decision “address every finding of fact and conclusion of law” decided by the BCC and include a “detailed explanation”

⁸⁶ *Mallon*, 345 F.3d at 946 (change from deferential review to de novo review in the sentencing context); *see also Duncan v. State*, 152 U.S. 377, 382-83 (1894) (change in identity of appellate decisionmaker could be applied retroactivity).

⁸⁷ *Reddy v. CFTC*, 191 F.3d 109, 128 (2d Cir. 1999) (change from deferential review of sanctions to de novo review); *accord United States v. Mejia*, 844 F.2d 209, 211 (5th Cir. 1988).

⁸⁸ *See, e.g., Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987); *John Thomas Capital Mgmt.*, Exchange Act Release No. 31289, 2014 WL 5282156, at *4 (Oct. 16, 2014). “[T]he expense and annoyance of litigation is ‘part of the social burden of living under government.’” *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980). ABN AMRO’s claim of unfairness is additionally undermined because it voluntarily submitted to CBOE’s disciplinary jurisdiction in acquiring a trading permit. *See* CBOE Rules 3.1(a)(iii), 17.1. Furthermore, we recognize that “[a]n agency is . . . barred from applying a new rule in the adjudication in which it is announced if doing so would work a ‘manifest injustice.’” *Garvey v. NTSB*, 190 F.3d 571, 584 (D.C. Cir. 1999) (citation omitted). We recognize further that “our authority to remand proceedings to [the SRO] . . . to consider an increase in sanctions is circumscribed.” *Michael David Sweeney*, Exchange Act Release No. 29884, 1991 WL 716756, at *6 n.28 (Oct. 30, 1991) (stating that the Commission would not “order additional proceedings to determine whether prejudgment interest or other additional disgorgement should be ordered in this case”). As such, the Board’s ability to consider an increase in sanctions in this case is circumscribed.

of its basis for either accepting or rejecting them. ABN AMRO cites no authority for the proposition that a de novo review includes such requirements, and we have found none.

Due process requires that the Board be capable of rendering a neutral, detached, and independent judgment.⁸⁹ There is no requirement that the Board include attorneys to be able to do so. “[I]t has never been held that only a lawyer or judge” is qualified to make a “neutral and detached” decision.”⁹⁰ Indeed, even an “individual who does not meet the bar membership requirements . . . may be appointed and serve as a part-time magistrate judge.”⁹¹

The members of the Board also need not personally review the record.⁹² Absent a compelling showing of irregularity, there will be no occasion for scrutiny regarding the precise “manner in which [the decisionmakers gave] consideration to the record” or their mental or deliberative processes.⁹³ Like agency heads or judges, they are free to “utilize the services of subordinates” and to rely on others’ analyses and summaries in the course of reaching a sufficiently informed judgment about the matters in dispute.⁹⁴ Indeed, at least one court has held that board members need not “directly read *any*” of the record.⁹⁵

Nor is there any basis to require the Board to review the entire transcript and “all exhibits, pleadings, briefs, and other filings.” Like any reviewing tribunal, the Board is

⁸⁹ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972).

⁹⁰ *Shadwick*, 407 U.S. at 348-49; accord *Parham v. J.R.*, 442 U.S. 584, 607 (1979) (“Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer.”).

⁹¹ 28 U.S.C. § 631(b)(1).

⁹² See, e.g., *Nat’l Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1450 (D.C. Cir. 1984).

⁹³ *Pierce v. SEC*, 239 F.2d 160, 163 (9th Cir. 1956); see generally *United States v. Morgan*, 313 U.S. 409, 422 (1941) (“[I]t was not the function of the court to probe the mental processes of the Secretary[.]”); *Franklin Savings Ass’n v. Ryan*, 922 F.2d 209, 211-212 (4th Cir. 1991) (holding that questions that sought information about the mental processes by which [the agency head] arrived at his decision . . . [and] the advice given . . . by his subordinates” were “clearly improper and inadmissible” absent extraordinary evidence of impropriety”).

⁹⁴ *Pierce*, 239 F.2d at 163; see generally *Morgan v. United States*, 298 U.S. 468, 481 (1936); see also *J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 394 n.7 (2d Cir. 2000) (“Absent a showing to the contrary, it is presumed the agency considered all evidence in the record when making its determination.”).

⁹⁵ *Bates v. Sponberg*, 547 F.2d 325, 329, 332 (6th Cir. 1976) (emphasis added) (quoting Davis, 2 *Administrative Law* § 11.03 at 44-45 (1958) and collecting citations).

“not obliged to independently sift through the record,”⁹⁶ “address the transcript line-by-line,”⁹⁷ or “reinvent the wheel” to conduct *de novo* review.⁹⁸ The onus rests on the parties to identify with specificity the evidence and authority that supports their contentions.⁹⁹ There is no tension between reviewing *de novo* arguments that are timely presented and properly developed, and also giving effect to a party’s waiver or forfeiture as to arguments that are raised too late or that are too conclusory.¹⁰⁰

Finally, we do not agree that the Board must address every one of the BCC’s findings of fact or conclusions of law. “As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.”¹⁰¹ Sound administrative practice requires only a clear explication of reasons, which “may be long or short as the nature of the case and the novelty or complexity of the issues may require. A particular conclusion of law may render certain issues and findings immaterial, or vice versa.”¹⁰² Thus, the Board need not “expressly parse or

⁹⁶ *John Thomas Capital Mgmt.*, Exchange Act Release No. 74100, 2015 WL 242391, at *1 (Jan. 20, 2015); *see also, e.g., Sebock v. OPM*, 874 F.2d 801, 803 (Fed. Cir. 1989) (same).

⁹⁷ *LaCrosse v. CFTC*, 137 F.3d 925, 934 (7th Cir. 1998); *see also Attorney General’s Manual on the Administrative Procedure Act* at 84 n.5 (1947) (urging agencies to “abandon the notion that no matter how unspecified . . . the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions”).

⁹⁸ *Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996); *accord Delco Store No. 152, Inc. v. Woodward*, 175 F.3d 1014 (table), 1999 WL 169774, at *2 (4th Cir. 1999).

⁹⁹ *See, e.g., Greenlaw*, 554 U.S. 237, 244 (2008) (“[T]he parties . . . are responsible for advancing the facts and arguments entitling them to relief.”) (quotation marks omitted); *Singh v. Sessions*, 686 F. App’x 28, 30 (2d Cir. 2017) (argument that the hearing officer “failed to consider ‘the entire record’ [was] too generalized to preserve” the objection before the agency); *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 108 (D.C. Cir. 2000). Although the record as a whole is before the Board, and the Board *may* consider evidence that was not cited by the BCC or a party, the Board is not *required* to do so. *See* CBOE Rule 17.10(a)(1), (b).

¹⁰⁰ *See, e.g., United States v. Olano*, 507 U.S. 725, 731 (1994); *Jones v. Bagley*, 696 F.3d 475, 485 n.3 (6th Cir. 2012); *In re DBC*, 545 F.3d 1373, 1377, 1380 (Fed. Cir. 2008); *accord Attorney General’s Manual* at 85 (explaining that agencies may require that arguments on appeal “be supported by precise citation of the record or legal authorities”); CBOE Rule 17.10(a)(2) (“Any objections . . . not specified by written exception shall be considered to have been abandoned.”).

¹⁰¹ *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976).

¹⁰² *See Attorney General’s Manual* at 86; *Nesseim v. Mail Handlers Benefit Plan*, 995 F.2d 804, 807 (8th Cir. 1993) (stating that “mere brevity” is not problematic if the decision considers the material points raised and indicates the “determinative reason for the final action taken”).

refute on the record each . . . piece of evidence”¹⁰³ or “respond with specificity to each . . . exception[.]”¹⁰⁴ It is enough that the decision describes the Board’s reasoning and addresses the material points the parties raised.

On remand, therefore, the Board is to apply the ordinary understanding of de novo review—it should exercise its own judgment as to the resolution of issues properly before it and do so non-deferentially,¹⁰⁵ without presuming the correctness of or giving special weight to the BCC’s prior rulings.¹⁰⁶ And once it has done so, the Board should set forth its reasoning in a decision that otherwise complies with the Exchange Act’s requirements regarding the content of an SRO’s determination in the event that it decides to impose a disciplinary sanction.¹⁰⁷ This

¹⁰³ *Wang v. BIA*, 437 F.3d 270, 275 (2d Cir. 2006); *see also Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995) (stating that an ALJ “need not provide a complete written evaluation of every piece of testimony and evidence”) (citing *Carlson v. Shalala*, 999 F.2d 180, 181 (7th Cir. 1993)).

¹⁰⁴ *Pharaon v. Bd. of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998); *see also Springfield Television Corp. v. FCC*, 609 F.2d 1014, 1020 (1st Cir. 1979) (“The agency need not address every facet of an issue in scholarly depth, but must explain enough . . . to discern the agency’s path of decision.”).

¹⁰⁵ CBOE observes that the “tribunal hearing evidence first-hand . . . is better suited to make credibility determinations,” but there is no inconsistency between exercising plenary review and giving as much or as little weight as appropriate to demeanor-based credibility determinations. *See, e.g., FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364-65 (1955) (rejecting argument that hearing officer’s “findings based on demeanor of a witness” could be overruled only when clearly erroneous); *Universal Camera*, 340 U.S. at 492, 494 & n.27.

¹⁰⁶ *See, e.g., Salve Regina Coll.*, 499 U.S. at 235 & n.3, 238; *Wallace v. Tesoro Corp.*, 796 F.3d 468, 475 (5th Cir. 2015); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001); *Ocelot Oil Co. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988). The Board has the power to raise new issues upon giving notice; to affirm on any ground fairly supported by the record; and to articulate its view of the proper construction of governing law, even if not advanced by the parties. *See, e.g.,* CBOE Rule 17.10(b); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). But although the Board has the discretion to raise such issues *sua sponte*, it is not, however, required to do so. *See, e.g., Guzzo v. Cristofano*, 719 F.3d 100, 112 (2d Cir. 2013).

¹⁰⁷ *See* Exchange Act Sections 6(d)(1), 15A(h)(1), 15 U.S.C. §§ 78f(d)(1), 78o-3(h)(1) (stating that such a determination must be “supported by a statement setting forth” the “act or practice in which [the member or associated person] has been found to have engaged[,]” the “specific provision” violated, and the “sanction imposed and the reasons therefor”).

means, among other things, that the SRO must clearly explain the “basis on which it is upholding liability and explain how its findings of violation inform the sanctions imposed.”¹⁰⁸

* * *

Our decision today is a narrow one. We hold only that the Board’s use of a deferential standard of review in resolving appeals from the BCC constitutes an unfiled and unapproved rule change that cannot provide a basis for CBOE’s disciplinary action.

ABN AMRO devotes much of its briefs to arguing the merits of its appeal, as well as questioning whether changes in CBOE’s ownership structure have made CBOE’s internal disciplinary review process unfair. We do not express any view as to the underlying merits of the proceeding or as to ABN AMRO’s other arguments, without prejudice to their renewal before the Commission at a later juncture if properly exhausted before CBOE. Nor have we reached the other questions on which we requested additional briefing. For instance, we do not prejudge the outcome should an SRO seek Commission approval of a rule intended to expressly provide for a deferential standard of review as to subordinate hearing panel rulings.¹⁰⁹ Nor have we determined that all SROs must apply a uniform standard of review. All these issues we leave for another day.

By the Commission (Chairman CLAYTON and Commissioners STEIN, JACKSON and PEIRCE).

Brent J. Fields
Secretary

¹⁰⁸ *Springsteen-Abbott*, 2017 WL 1206062, at *5; *see also Frank L. Palumbo*, Exchange Act Release No. 36427, 1995 WL 630926, at *9 (Oct. 26, 1995) (same); *First Potomac Inv. Servs.*, Exchange Act Release No. 30282, 1992 WL 15628, at *2 (Jan. 23, 1992) (same).

¹⁰⁹ We asked the parties to address whether such a rule would be consistent with the Exchange Act’s requirement that SROs enforce compliance by their members with the securities laws, absent a “reasonable justification or excuse” for failing to do so; the Exchange Act’s scheme governing Commission review of SRO disciplinary sanctions; or the Exchange Act’s “fair procedure” mandate. *See ABN AMRO Briefing Order*, 2017 WL 2645654, at *3-4.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

Admin. Proc. File No. 3-17906

In the Matter of the Application of
ABN AMRO CLEARING CHICAGO LLC
For Review of Disciplinary Action Taken by
CHICAGO BOARD OPTIONS EXCHANGE, INC.,
AND C2 OPTIONS EXCHANGE, INC.

ORDER REMANDING PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by Chicago Board Options Exchange, Inc. and C2 Options Exchange, Inc. against ABN AMRO Clearing Chicago LLC is set aside; and it is further

ORDERED that the matter is remanded for further proceedings in accordance with said opinion.

By the Commission.

Brent J. Fields
Secretary