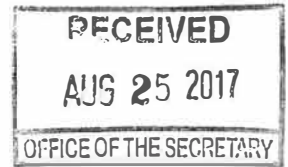


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



Admin. Proc. File No. 3-17906

_____)
In re:)
)
ABN AMRO Clearing Chicago LLC)
)
)
_____)

**BRIEF OF CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED AND C2
OPTIONS EXCHANGE, INCORPORATED IN RESPONSE TO JUNE 20, 2017 ORDER**

CHICAGO BOARD OPTIONS
EXCHANGE, INCORPORATED AND C2
OPTIONS EXCHANGE,
INCORPORATED

By: 
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INTRODUCTION

On behalf of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated (collectively, “CBOE”), the Office of the General Counsel submits this brief in response to the Commission’s June 20, 2017 Order (Release No. 80983) (“Order”). CBOE appreciates the opportunity to address the questions raised by the Commission and provide the additional information the Commission seeks.

The Securities Exchange Act of 1934 (“Act”) and rules thereunder do not provide a standard of review that self-regulatory organizations (“SROs”) must apply to decisions of disciplinary hearing panels. Instead, the Act provides SROs, as those closest to regulated markets, with authority to design procedures to discipline their members. CBOE has designed a comprehensive disciplinary system calibrated to vigorously enforce compliance and provide its Trading Permit Holders (“TPHs”) with a fair procedure. One component of this disciplinary system is the right of TPHs and the Regulatory Division to appeal Business Conduct Committee (“BCC”) decisions to CBOE’s Boards of Directors (collectively, “Board”). In reviewing BCC disciplinary decisions the Board applies deferential standards of review in the same way other exchanges do under similar standards the Commission has approved. *See* NASDAQ PHLX (“PHLX”) Rule 960.9(b)(ii); Chicago Stock Exchange (“CSX”) Article 12, Rule 5.

The Board’s decades-long application of deferential standards is reasonably and fairly implied by other CBOE rules providing the Board with broad authority to review BCC decisions, and does not require a rule filing. This approach is consistent with the one taken by the vast majority of securities SROs—seventeen other securities exchanges and the registered securities association have not codified a standard of review in their rules.

The Commission’s approval of deferential standards of review for other exchanges shows that CBOE’s deferential standards satisfy the Act’s requirements that an SRO enforce compliance

of its members, provide a statement of the basis for disciplinary action and sanctions, and provide members with a fair procedure.

This submission begins with an overview of the CBOE disciplinary system to provide context for an analysis of the Commission's questions in the Order and then proceeds to address those questions. Following the analysis, this submission concludes by suggesting that, if the Commission is considering prescribing that SROs adopt uniform standards of review, the Commission consider proposing a regulation through the notice and comment process, allowing it to benefit from industry input.

BACKGROUND

The Board's review of BCC decisions on appeal is a final step in CBOE enforcement matters and occurs after layers of investigation, review and hearing governed by procedures that strike an appropriate balance between vigorous enforcement and adequate TPH protections.

Investigation, Notice and Access, and Statement Opposing Action. Regulatory staff¹ investigate possible violations of federal law and CBOE rules where there is a reasonable basis to do so. Rule 17.2(a). If Regulatory staff finds reasonable grounds to believe a violation was committed, it submits a report of its findings to the BCC. Rule 17.2(c). The BCC is comprised of market participants and public members approved by the Board. Rule 2.1(a). Prior to submitting its report to the BCC, Regulatory staff must notify a TPH that is the subject of an investigation of the nature of the allegations and the provisions allegedly violated. Rule 17.2(d). The TPH is granted access to materials in CBOE's investigative file and may submit a statement to the BCC explaining why no disciplinary action should be taken. *Id.*

¹ Financial Industry Regulatory Authority ("FINRA") personnel perform certain regulatory services for CBOE under a regulatory services agreement.

Disposition by Letter of Consent. The TPH may seek to dispose of the matter through a letter of consent. Rule 17.3. The TPH has the opportunity to reach an agreement with Regulatory staff that sets forth stipulated facts and findings, violations committed and sanctions. *Id.* If agreement is reached, the BCC reviews the letter of consent and may either adopt the letter as its decision resolving the matter, or reject the letter and allow the matter to proceed. *Id.*

Probable Cause Determination and Settlement. If the matter is not resolved by a letter of consent, the BCC reviews Regulatory staff's recommendation and the TPH's statement to determine whether to institute formal disciplinary proceedings. Rule 17.4(a). If the BCC finds probable cause, it directs Regulatory staff to prepare a statement of charges. Rule 17.4(b). The charges are served upon the TPH, who may submit an answer. *Id.*; Rule 17.5. After being served, the TPH is given access to all documents in CBOE's investigative file, except Regulatory staff work product. Rule 17.4(c). Within 120 days, a TPH may submit a settlement offer. Rule 17.8.

Hearing Before the BCC. Where the matter is not settled, a merits hearing is held before a BCC panel. Rule 17.6. The hearing is replete with procedural protections, including the right to exchange documents and witness lists, the right to seek production of documents and witnesses from CBOE or other TPHs, the right to present evidence, and the right to counsel. Rule 17.6. Throughout the hearing and deliberation, the BCC is advised by independent counsel concerning legal questions. *See, e.g., In re ABN AMRO*, CBOE File No. 14-0177 (Dec. 14, 2015) (BCC decision identifying counsel).

Decision and Board Review. Following the hearing, the BCC issues a written decision, setting forth findings and imposing sanctions where appropriate. Rule 17.9. Either party may appeal to the Board, and the Board may review any BCC decision on its own initiative. Rule 17.10(a), (c).

CBOE's rules establish the broad power of the Board to review disciplinary decisions, providing that the Board "may affirm, reverse or modify, in whole or in part, the decision of the [BCC]." Rule 17.10(b); *see also* Exchange Act Release No. 15063, 1978 WL 195793, at *3 (Aug. 14, 1978). CBOE rules do not specify the standard of review the Board applies to BCC determinations, a practice consistent with seventeen other securities exchanges and the registered securities association. *See* Appendix A.

For over twenty years, the Board has exercised discretion under the broad authority Rule 17.10(b) provides to apply a "clearly erroneous" standard of review to BCC determinations of whether the Act or rules thereunder were violated. *See, e.g., In re Mark A. Esposito & J.A. Celentano Sec. Corp.*, CBOE Board Decision No. 94 BD 01 (Mar. 23, 1994). Under this standard, the Board overturns BCC findings if they are "based upon substantial error in proceedings or misapplication of law, or are unsupported by substantial evidence, or contrary to the clear weight of the evidence or induced by [an] erroneous view of the law." *In re ABN AMRO*, CBOE Board Decision No. 16 BD 01, at 7 (July 28, 2016) (*ABN AMRO I*). The Board also gives deference to BCC sanctions determinations, reversing only where a sanction is "arbitrary, capricious, or a clear abuse of discretion." *In re ABN AMRO*, CBOE Board Decision No. 16 BD 01.2, at 1 (Feb. 16, 2017) (*ABN AMRO II*). These standards are effectively identical to deferential standards of review that the Commission has approved for use at other exchanges. *See* Exchange Act Release No. 43584, 2000 WL 1728319, at *2 (Nov. 17, 2000) (approving PHLX Rule 960.9(b)(ii): "may not reverse, or modify, in whole or in part, the findings, conclusions and decision if the factual conclusions in the decision are supported by substantial evidence and such decision is not arbitrary, capricious or an abuse of discretion."); Exchange Act Release No. 34505, 1994 WL 440909, at *2, *4 (Aug. 9, 1994) (approving CSX Article 12, Rule 5: "may not reverse, or modify, in whole or in

part, the decision ... if the factual conclusions in the decision are supported by substantial evidence and such decision is not arbitrary, capricious or an abuse of discretion.”).

With this background in mind, we turn to the specific questions raised by the Order.

DISCUSSION

I. ! DOES THE EXCHANGE ACT, ANY RULE THEREUNDER, OR ANY APPROVED CBOE RULE OR RULE FILING SPECIFY OR DISCUSS THE STANDARD OF REVIEW THAT THE BOARD SHOULD APPLY TO BCC DECISIONS?

No Commission or CBOE rule provides the standards of review the Board applies to BCC decisions, though the standards the Board uses have been publicly known and consistent for over twenty years. Nor does the Act require an SRO to apply a particular standard of review. The Act instead provides more general requirements regarding disciplinary proceedings: An SRO’s rules must ensure that its “members and persons associated with its members shall be appropriately disciplined for violations” of the Act and the rules thereunder. 15 U.S.C. § 78f(b)(6). And, an SRO must “in general, provide a fair procedure for the disciplining of members and persons associated with members.” *Id.* § 78f(b)(7).

The Act provides only minimal specific requirements for an SRO’s disciplinary process. *See, e.g.*, 15 U.S.C. § 78f(d)(1) (SRO shall “bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record” and a disciplinary determination must be supported by a statement setting forth the act committed, provision violated, and sanction imposed and reasons therefor). Beyond its specific dictates, the Act leaves disciplinary system design and implementation to the SROs. *See* S. Rep. 94-75, 1975 WL 12347, at *28 (1975) (“The [] Act says very little about the internal decision-making processes of the self-regulatory organizations.”).

Allocation of rulemaking authority to the SROs is “based on the notion that regulation is most effective when it is done as closely as possible to the regulated activity.” *Fair Administration & Governance of Self-Regulatory Organizations*, Exchange Act Release No. 50699 (Dec. 8, 2004). Congress recognizes that because SROs “differ as to their membership, regulatory responsibilities, and economic power,” it “would be difficult to prescribe a single ‘proper’ decision-making procedure appropriate to the circumstances of every self-regulatory organization.” S. Rep. 94-75, at *29. The Act thus leaves primary responsibility for designing procedures to the SROs.

Pursuant to its discretion, CBOE employs the comprehensive disciplinary system described above. CBOE’s rules have been approved by the Commission, either when the Commission granted CBOE’s application for registration as an exchange or since that time through orders approving rule changes. *See, e.g., In re Chi. Bd. Options Exchange, Inc.*, Exchange Act Release No. 9985 (Feb. 1, 1973) (granting CBOE registration and approving its rules); *Chi. Bd. Options Exchange, Inc.*, Exchange Act Release No. 15204 (Oct. 2, 1978) (approving proposed rule changes). These rules provide TPHs with procedural protections throughout the disciplinary process, including the Board review of BCC disciplinary decisions pursuant to its broad powers.

II. IS THE BOARD’S APPLICATION OF A DEFERENTIAL STANDARD OF REVIEW “REASONABLY AND FAIRLY IMPLIED” BY THE TEXT OF AN APPROVED RULE?

The Board’s application of deferential standards of review is “reasonably and fairly implied” by CBOE rules and long-standing practices.

Rule 2.2 provides the Board with authority to review BCC decisions, subject to the standards provided in Chapter 17 of CBOE’s Rules. Under Rule 17.10(b), the Board “may affirm, reverse or modify, in whole or in part, the decision of the [BCC].” These rules spell out the Board’s power to review disciplinary matters and provide notice that the Board has broad discretion to determine procedures for hearing appeals. *See* Exchange Act Release No. 15063, at *3; *see also*

In re Positron Corp., Exchange Act Release No. 74216, 2015 WL 470454, at *6 & n.36 (Feb. 5, 2015) (“use of the permissive term ‘may’ vests FINRA with discretionary authority”). The Board exercises its discretion within the appeal process in several ways, including by determining the composition of panels that review BCC decisions, determining whether to grant oral argument, addressing motions submitted to the Board, deciding whether and how to request or accept additional briefing, and, for at least twenty-three years, reviewing BCC decisions with deference.

The Commission’s regulations generally require SRO rule filings for a “stated policy, practice, or interpretation,” 17 C.F.R. § 240.19b-4(c)(1), subject to exceptions that recognize “[a]n SRO cannot be required to adopt a multiplicity of rules relating to every possible” matter. *In re E.F. Hutton*, Exchange Act Release No. 25887, 1988 WL 901859, at *4 (July 6, 1998). Among other exceptions, the Commission does not require rule filings when an SRO’s policy or practice is “reasonably and fairly implied” by an existing SRO rule. 17 C.F.R. § 240.19b-4(c)(1). The Commission also has explained that no rule filing is required when a policy, practice or interpretation is “reasonably foreseeable” from the existing rule, or is an interpretation “arising out of individual enforcement or disciplinary proceedings,” *Filings by Self-Regulatory Organizations of Proposed Rule Changes and Other Materials with the Commission*, Exchange Act Release No. 17258, 1980 WL 25646, at *13 n.76 (Oct. 30, 1980), or is “based upon long-standing principles and prior decisions of the courts and th[e] Commission.” *In re E.F. Hutton*, 1988 WL 901859, at *4.

The Board’s discretion to review BCC determinations under deferential standards is reasonably and fairly implied by the broad power spelled out in CBOE Rule 17.10(b), and the use of these standards is reasonably foreseeable given their decades-long use in Board decisions, including those reviewed by the Commission on appeal. For over twenty years, the Board has

exercised its discretion to review BCC violation determinations under the “clearly erroneous” standard and sanctions determinations under an “arbitrary, capricious, or abuse of discretion” standard.² In those matters appealed to the Commission, the Commission decided the appeal without any suggestion that the deferential standards were improper or needed to be implemented via a rule filing.³ And while *sub silentio* rulings are not controlling precedent, CBOE and others regulated by the Commission appropriately look to its decisions to guide future actions. *Cf. In re E.F. Hutton*, 1988 WL 901859, at *4.

Indeed, in none of the matters appealed to the Commission has a TPH claimed it did not have notice that the Board would apply deferential standards of review. To the contrary, the use of these deferential standards has become common knowledge through the Board’s consistent application in its decisions, which are available on CBOE’s website and have put TPHs on notice that disciplinary appeals will be reviewed under these standards. Thus, no rule filing is required. *See id.*; Exchange Act Release No. 17258, at *13 n.76 (interpretation “arising out of individual enforcement or disciplinary proceedings” does not require rule filing); *In re SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at *5 (June 17, 2005) (rule filing unnecessary where policy was “common knowledge” and participants had “fair notice”); *In re*

² *See, e.g., In re Electronic Transaction Clearing, Inc.*, CBOE Board Decision No. 14 BD 01, at 3-4 (Mar. 4, 2014), *aff’d in part and rev’d in part*, Exchange Act Release No. 78093 (June 16, 2016); *In re David C. Ho*, CBOE Board Decision No. 05 BD 01, at 3 (Jan. 26, 2006), *aff’d*, Exchange Act Release No. 54481 (Sept. 22, 2006), *aff’d*, 2007 WL 1224027 (7th Cir. 2007) (unpublished); *In re Michael Lubin*, CBOE Board Decision 99 BD 01, at 2 (Mar. 6, 2000), *aff’d*, Exchange Act Release No. 45281 (Jan. 15, 2002); *In re William J. Murphy*, CBOE Board Decision No. 98 BD 01, at 2 (July 22, 1998), *aff’d*, Exchange Act Release No. 41804 (Aug. 27, 1999); *In re John F. Lebens*, CBOE Board Decision No. 94 BD 02, at 4 (Jan. 11, 1995), *aff’d*, Exchange Act Release No. 36691 (Jan. 5, 1996).

³ *Supra* n.2.

Dep't of Enforcement vs. Shvarts, 2000 WL 768524, at *8 (N.A.C. June 2, 2000) (where policy “involves no rule change . . . no rule-filing [i]s necessary”).

Other SROs' practices also show that the broad language spelling out the power to review BCC decisions—“may affirm, reverse or modify, in whole or in part”—reasonably and fairly implies the power to set a standard of review, and no additional rule filing to codify the standard is necessary. Of the twenty-one securities exchanges and the registered securities association, CBOE and eighteen others do not have a rule setting a standard of review for disciplinary appeals. Instead, consistent with the same language granting broad powers upon review, these SROs apply standards of review that have been established and communicated through written decisions in appeals. *See, e.g., In re Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 WL 4336702, at *13 n.34 (Sept. 16, 2011) (NASD, *de novo*); *ABN AMRO I*, at 8 (CBOE, clearly erroneous). This is appropriate given that SROs are not required to issue rule filings for interpretations “arising out of individual enforcement or disciplinary proceedings.” Exchange Act Release No. 17258, at *13.

It cannot be that the broad language of Rule 17.10(b) providing that the Board “may affirm, dismiss, modify, or reverse” requires or implies a *de novo* standard of review. Order at 4. This interpretation would create internal conflicts within rules that the Commission has previously approved. For example, PHLX has a rule that provides both a grant of plenary power similar to that at CBOE—“affirm, reverse or modify, in whole or in part”—*and* a deferential standard of review: “may not reverse, or modify, in whole or in part, the findings, conclusions and decision if the factual conclusions in the decision are supported by substantial evidence and such decision is not arbitrary, capricious or an abuse of discretion.” PHLX Rule 960.9(b)(ii); Exchange Act Release No. 43584, at *2 (approving rule).

Pursuant to the broad grant of power to the Board and the Board's long-standing practices, the Board's application of deferential standards of review is reasonably and fairly implied, reflected in its disciplinary decisions and does not require a rule filing.

III. , IS THE BOARD'S APPLICATION OF A DEFERENTIAL STANDARD OF REVIEW CONSISTENT WITH THE EXCHANGE ACT'S REQUIREMENT THAT SROs ENFORCE COMPLIANCE BY THEIR MEMBERS AND ASSOCIATED PERSONS WITH THE SECURITIES LAWS?

The Board's application of deferential standards of review is consistent with the Act's requirement that SROs enforce compliance with the securities laws, especially when viewed as a part of CBOE's enforcement program. *See* 15 U.S.C. § 78f(b)(1). CBOE is vigilant in surveilling and addressing possible violations of federal securities laws and related rules. In the first half of 2017, CBOE has concluded formal disciplinary actions against twenty TPHs, which compares favorably to the twenty disciplinary actions taken by the NYSE markets. *Compare* Disciplinary Information, *available at* <http://www.cboe.com/aboutcboe/legal-regulatory/disciplinary-info> (visited August 2, 2017), *with* Disciplinary Actions, *available at* <https://www.nyse.com/regulation/disciplinary-actions> (visited August 2, 2017).

If the Commission is concerned that an SRO using a deferential standard of review might result in lax enforcement decisions by a lower tribunal being allowed to stand, that concern is not an issue here. In theory, that scenario would be shown by a committee like CBOE's BCC routinely finding no violations and a reviewing body like the Board routinely affirming the decisions under a clearly erroneous standard. But that scenario is not reflected in what CBOE has done over the past decades. There have been 28 BCC decisions in contested matters since 1994, and the BCC found violations in 25 of them, over 89%. *See* Appendix B. Of the three in which no violation was found, only one has come to the Board on appeal—this very matter, in which the Board reversed the BCC's finding of no violation.

Finally, the Board's application of deferential standards is consistent with the deferential "abuse of discretion" standards of review that the Commission has approved. *See* PHLX Rule 960.9(b)(ii); CSX Article 12, Rule 5. The Commission has approved those rules as consistent with all of the requirements of 15 U.S.C. § 78f(b), including the requirement that an SRO enforce member compliance. Exchange Act Release No. 43584, at *2; Exchange Act Release No. 34505, at *2, *4. The Board's application of the "clearly erroneous" standard to determinations of violations and the "abuse of discretion" standard to sanctions therefore also complies with the Act.

IV. * IS THE BOARD'S DEFERENTIAL STANDARD OF REVIEW—WHICH MAY LEAVE IN PLACE BCC RULINGS THAT THE BOARD DETERMINES ARE ERRONEOUS BUT NOT CLEARLY SO—CONSISTENT WITH THE SCHEME GOVERNING COMMISSION REVIEW OF SRO DISCIPLINARY SANCTIONS UNDER THE EXCHANGE ACT?

The Board's application of deferential standards of review is consistent with the scheme governing the Commission's review of SRO disciplinary actions. When an SRO determines a disciplinary violation and sanction, there must be a statement setting forth: The act or practice the person was found to have committed; the specific provision this act or omission is deemed to violate; and the sanction imposed and reasons therefor. 15 U.S.C. § 78f(d)(1). This rule exists in part to ensure that the Commission can "discharge properly [its] review function." *In re Kimberly Springsteen*, Exchange Act Release No. 80360, 2017 WL 1206062, at *5 (Mar. 31, 2017).

The Board's review process more than satisfies this requirement. Both the BCC and the Board issue written opinions setting out relevant facts and detailing the bases for their decisions. In this matter, the record before the Commission contains over fifty pages of written decisions: The BCC issued a twenty-five-page decision finding no violation was proven. *See In re ABN AMRO*, CBOE File No. 14-0177 (Dec. 14, 2015). In reversing that decision, the Board issued a seventeen-page decision setting forth the procedural history, relevant facts, applicable law, and rules violated. *See ABN AMRO I*. Following the subsequent nine-page BCC decision on remand

to determine the appropriate sanction, CBOE File No. 14-0177 (Oct. 27, 2016), the Board issued a second decision detailing its review of and bases for affirming the BCC sanction decision. *See In re ABN AMRO II*. These comprehensive explanations of the conduct underlying ABN AMRO's offense, the regulations violated and the appropriate sanctions satisfy § 78f(d)(1).

If the concern is that a deferential standard of review could permit an erroneous—but not clearly erroneous—BCC determination to stand, thereby hampering the Commission's ability to discharge its review function, the Board's application of the clearly erroneous standard ensures the Commission can conduct the appropriate review. Under the “clearly erroneous” standard, the Board will not allow BCC determinations to stand if any one of these possible deficiencies exist: The Board will reverse where there is substantial error, a lack of substantial evidence, or a finding that is against the clear weight of the evidence or the product of a misapplication or erroneous view of the law. *See ABN AMRO I*, at 7.

The application of this standard to facts—that findings shall be reversed if “unsupported by substantial evidence, or contrary to the clear weight of the evidence”—is consistent with the standard used by federal appellate courts. *See* F.R.C.P. 52(a)(6) (“Findings of fact ... must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.”). This approach is rooted in the notion that a tribunal hearing evidence first-hand—like the BCC in this matter—is better suited to make credibility determinations. This standard also is consistent with those used by other SROs and approved by the Commission as satisfying the Act's requirements. *See* Exchange Act Release No. 34505, at *4 (approving CSX Article 12, Rule 5, which permits reversal where “the factual conclusions in the decision are [not] supported by substantial evidence”); Exchange Act Release No. 43584, at *2 (Nov. 17, 2000) (approving same language in PHLX Rule 960.9).

Moreover, under the clearly erroneous standard, the Board reverses errors that are “based on a ... misapplication of law” or “induced by [an] erroneous view of the law.” *ABN AMRO I*, at 7. This standard for reviewing legal issues is, again, substantively the same as the Commission-approved standards other SROs apply, which allow reversal only where the lower tribunal’s decision is “arbitrary, capricious or an abuse of discretion.” CSX Article 12, Rule 5; PHLX Rule 960.9(b)(ii). As with a clearly erroneous standard, a reviewing body employing an abuse of discretion standard reverses when a decision is “based on an erroneous view of the law.” *See, e.g., In re Mole*, 822 F.3d 798, 801-02 (5th Cir. 2016) (district court “abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence”); *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 235 (6th Cir. 2016) (same). The Commission has approved the CSX and PHLX standards of review, and if those effectively identical standards meet the requirements of § 78f(d)(1), the Board’s standard meets them too. *See* Exchange Act Release No. 34505, at *4; Exchange Act Release No. 43584, at *2.

V. (DOES THE BOARD’S REVIEW OF BCC DECISIONS DEFERENTIALLY VIOLATE THE EXCHANGE ACT REQUIREMENT THAT SROs PROVIDE A “FAIR PROCEDURE” FOR THE DISCIPLINE OF MEMBERS OR ASSOCIATED PERSONS?

The Board’s application of deferential standards of review, along with CBOE’s other disciplinary procedures, ensures that all TPHs receive “a fair procedure.” 15 U.S.C. § 78f(b)(7). The Act’s “fair procedure” provision gives rise to “due-process-like requirements,” but the full panoply of constitutional due process protections does not apply to SROs. *In re David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *6 n.35 (July 27, 2015). SROs must instead provide “only those procedures basic to ‘fundamental standards of due process.’” *In*

re Walter T. Newman, Exchange Act Release No. 18932, 1982 WL 524718, at *2 n.5 (Aug. 4, 1982) (citation omitted).

As discussed above, CBOE employs a disciplinary system with layers of procedural protections for TPHs, including notice and access to documents at the investigatory stage, an opportunity to submit a statement advocating against charges, procedures for disposition via letter of consent or settlement, an initial probable cause determination by the BCC, a hearing replete with procedural rights, and a right to appeal. *See supra* at pp. 2-4. Under this scheme, TPHs have at least three opportunities to present their case prior to Commission review—a written statement opposing charges, a hearing on the charges, and an appeal to the Board—the first two of which include reviews of the evidence akin to *de novo* reviews. As the Commission has held, these numerous protections and multiple layers of review provide TPHs with the “fair procedure” required by § 6(b)(7) of the Act. *See In re David C. Ho*, Exchange Act Release No. 54481, at 8 (“CBOE’s rules were approved by the Commission as providing ‘a fair procedure for the disciplining of members and persons associated with members’”). Moreover, TPHs are able to seek subsequent *de novo* review of any Board decision from the Commission. *See Mathis v. S.E.C.*, 671 F.3d 210, 215 (2d Cir. 2012).

The Board’s use of deferential standards of review adds to the fairness of CBOE’s procedures by deferring to factual findings of a tribunal best situated to make credibility determinations and by providing for reversal of legal errors. The BCC is comprised of market participants and public members with significant relevant experience, allowing charged parties the opportunity to try their case before a panel with extensive knowledge of industry rules and nuances. Congress recognized the critical role that hearing panels like the BCC play in a fair procedure: “When Congress provided for self-regulatory associations of securities dealers such as the NASD,

it clearly did not intend to create formalistic tribunals akin to the courts or even to this Commission. ... In such a program businessmen bring their knowledge of trade practices to bear on a case. They make their decisions in the light of their experience as technicians in the securities markets rather than as lay jurors or legalistic judges.” *In re Sumner B. Cotzin*, Exchange Act Release No. 10850, 1974 WL 162969, at *4 (June 12, 1974). It makes perfect sense, under these circumstances, for the Board to defer to the BCC’s findings.

Finally, as noted above, the Board’s deferential standards of review are effectively identical to the standards used by other SROs and approved by the Commission. *See* PHLX Rule 960.9(b)(ii); CSX Article 12, Rule 5. The Commission specifically found that these rules satisfy the requirement in § 78f(b)(7) that an SRO provide its members and other associated persons with a “fair procedure.” *See* Exchange Act Release No. 43584, at *2; Exchange Act Release No. 34505, at *2, *4. The Board’s application of deferential standards of review therefore also complies with § 78f(b)(7) of the Act.

VI. % IN THE EVENT THAT THE COMMISSION DETERMINES THAT THE BOARD SHOULD HAVE APPLIED A DIFFERENT STANDARD OF REVIEW, WHAT DISPOSITION OF ABN AMRO’S APPLICATION FOR REVIEW IS APPROPRIATE?

CBOE’s Office of the General Counsel does not express a position on the proper disposition of this matter in the event the Commission concludes that the Board should apply a different standard of review. If the Commission decides that the Board should have reviewed *de novo* and remands, the Board would promptly conduct a review under that standard to facilitate any additional Commission review.

However, CBOE respectfully suggests that if the Commission is considering whether to prescribe that SROs adopt a uniform standard of review or institute specific rules on the standard of review, the Commission should consider whether the manner to do so is through a proposed

regulation. This method would allow an additional opportunity for all interested parties to provide input through the notice and comment process, and thereby contribute to a high quality rulemaking process. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 547 (D.C. Cir. 1983) (notice and comment “improves the quality of agency rulemaking by ensuring that agency regulations will be” exposed to “diverse public comment,” and ensures “fairness to affected parties” (citations omitted)).

CONCLUSION

CBOE appreciates the opportunity to answer the Commission’s questions and address issues concerning SRO standards of review for appeals of disciplinary decisions. CBOE would be happy to provide any additional information necessary or useful and would be a willing and active participant if the Commission decides to analyze these issues, including whether SROs should apply a uniform standard of review, through the traditional notice and comment process. That process would allow the Commission to benefit from the collective wisdom of industry experts and market participants regarding any new rule’s potential implications.

BEFORE THE SECURITIES AND EXCHANGE COMMISSION
 IN THE MATTER OF ABN AMRO CLEARING CHICAGO LLC
 ADMIN. PROC. FILE NO. 3-17906

APPENDIX A

SELF-REGULATORY ORGANIZATION RULES PROVIDING A STANDARD OF REVIEW

SRO	Rule Providing Standard of Review
Bats BYX Exchange, Inc.	None.
Bats BZX Exchange, Inc.	None.
Bats EDGA Exchange, Inc.	None.
Bats EDGX Exchange, Inc.	None.
BOX Options Exchange LLC	None.
C2 Options Exchange, Incorporated	None.
Chicago Board Options Exchange, Incorporated	None.
Chicago Stock Exchange, Inc.	Article 12, Rule 5. Review: 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 and such decision is not arbitrary, capricious or an abuse of discretion.
FINRA	None.
Investors Exchange LLC	None.
Miami International Securities Exchange LLC	None.
MIAX PEARL, LLC	None.
NASDAQ BX, Inc.	None.
Nasdaq GEMX, LLC	None.
Nasdaq ISE, LLC	None.
Nasdaq MRX, LLC	None.
NASDAQ PHLX LLC	Rule 960.9 Review: The Board of Directors may not reverse, or modify, in whole or in part, the findings, conclusions and decision if the factual conclusions in the decision are supported by substantial evidence and such decision is not arbitrary, capricious or an abuse of discretion.
The NASDAQ Stock Market LLC	None.

New York Stock Exchange LLC	None.
NYSE Arca, Inc.	Rule 10.8 Review: The standard of review shall be de novo.
NYSE American LLC	None.
NYSE National, Inc.	None.

BEFORE THE SECURITIES AND EXCHANGE COMMISSION
 IN THE MATTER OF ABN AMRO CLEARING CHICAGO LLC
 ADMIN. PROC. FILE NO. 3-17906

APPENDIX B

CBOE BUSINESS CONDUCT COMMITTEE HEARING DECISIONS AND BOARD DECISIONS ISSUED SINCE 1994
 (<http://www.cboe.com/aboutcboe/legal-regulatory/disciplinary-info>)

	IN THE MATTER OF:	BCC FILE NUMBER	DATE OF BCC HEARING DECISION	VIOLATION FOUND?	APPEAL TO BOARD?	BOARD DECISION
1	EQUITEC PROPRIETARY MARKETS LLC	15-0035	APRIL 26, 2017	YES	YES	PENDING
2	LEK SECURITIES CORPORATION	15-0061	SEPTEMBER 28, 2016	YES	YES	AFFIRM, DECISION NO. 17 BD 01 (MAY 18, 2017)
3	DRW SECURITIES, LLC	15-0034	MAY 25, 2016	YES	NO	
4	ESSEXRADEZ, LLC	15-0041	MAY 25, 2016	YES	NO	
5	ABN AMRO CLEARING CHICAGO LLC	14-0177	DECEMBER 14, 2015	NO	YES	REVERSE, DECISION NO. 16 BD 01 (JULY 28, 2016)
6	BLUEFIN TRADING, LLC & SCOTT KRAMER	14-0180	DECEMBER 14, 2015	NO	NO	
7	RED CEDAR TRADING, LLC	14-0102	NOVEMBER 18, 2015	YES	YES	AFFIRM, DECISION NO. 15 BD 01 (FEBRUARY 17, 2016)
8	SPIDERROCK EXS, LLC	14-0105	NOVEMBER 18, 2015	YES	NO	
9	ELECTRONIC TRANSACTION CLEARING, INC, DAVID DICENSO, KEVIN MURPHY, AND HARVEY C. CLOYD, JR.	11-0009	MARCH 4, 2014	YES	YES	AFFIRM, DECISION NO. 14 BD 01 (OCTOBER 29, 2014)

10	DANIELS S. KIM & CUTLER GROUP, L.P.	05-0048	JANUARY 16, 2007	YES	NO	
11	REVN, INCORPORATE	05-0021	JULY 26, 2006	YES	NO	
12	TIMOTHY G. KELLER	05-0017	JULY 26, 2006	YES	NO	
13	JOHN REPERT	05-0013	JULY 26, 2006	YES	NO	
14	DAVID C-H HO	04-0014	AUGUST 17, 2005	YES	YES	AFFIRM, DECISION NO. 05 BD 01 (JANUARY 26, 2006)
15	MATTHEW H. MERRITT	00-0014	JUNE 14, 2001	YES	YES	AFFIRM, DECISION NO. 01 BD 03 (DECEMBER 6, 2001)
16	HARRY A. BRANDT, BRANDT TRADING, HOWARD P. WOERNER, SCOTT H. BRANDT, S.H. BRANDT INVESTMENTS, KENNETH W. FLAWS, JAMES W. GOTTSCHALK AND ROBERT B. HUTCHINSON	99-0042, 99- 0044, 99- 0045, 99- 0046	SEPTEMBER 13, 2000	NO	NO	
17	EUGENE F. RAIA	99-0007	MAY 17, 2000	YES	NO	
18	MICHAEL LUBIN	98-0045	SEPTEMBER 13, 1999	YES	YES	AFFIRM, DECISION NO. 99 BD 01 (MARCH 6, 2000)
19	SCOTT GOLDFARB	98-0009	FEBRUARY 18, 1999	YES	NO	
20	WILLIAM J. MURPHY	96-0067	FEBRUARY 12, 1998	YES	YES	AFFIRM, DECISION NO. 98 BD 01 (JULY 22, 1998)
21	DARRYL BEHM	96-0016	MARCH 27, 1997	YES	NO	

22	ROBERT LEWIN AND KL TRADING LP	SF96-0001	FEBRUARY 21, 1996	YES	YES	AFFIRM, DECISION NO. 96 BD 01 (SEPTEMBER 12, 1996)
23	DANIEL LUCAS	94-0031	MAY 26, 1995	YES	NO	
24	ANGEL VIGNOLA	94-0019	FEBRUARY 23, 1995	YES	NO	
25	JAMES LAZZARINI AND LAZZ CO	94-SF0004	JANUARY 10, 1995	YES	NO	
26	DAVID KALMIN	94-SF0004	NOVEMBER 1, 1994	YES	NO	
27	JOHN LEBENS	92-0097	AUGUST 31, 1994	YES	YES	AFFIRM, DECISION NO. 94 BD 02 (JANUARY 11, 1995)
28	MARK A. ESPOSITO AND J.A. CELENTANO SECURITIES CORP.	93-SF0001	JANUARY 10, 1994	YES	YES	AFFIRM, DECISION NO. 94 BD 01 (MARCH 23, 1994)

CERTIFICATION OF WORD COUNT

I, Joanne Moffic-Silver, certify that the text of the Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in Response to June 20, 2017 Order, from the Introduction through the Conclusion, including footnotes, is 4,986 words.



Joanne Moffic-Silver
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STATEMENT OF TRANSMISSION VIA FACSIMILE

Pursuant to SEC Rule of Practice 152(d), I, Joanne Moffic-Silver, state that a copy of the Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in Response to June 20, 2017 Order in the matter of the Application for Review of ABN AMRO Clearing Chicago LLC, Administrative Proceeding No. 3-17906 was transmitted to the Commission at facsimile number (703) 813-9793 on August 11, 2017.



Joanne Moffic-Silver

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CERTIFICATE OF SERVICE

I, Joanne Moffic-Silver, certify that on this 11th day of August 2017, I caused a copy of the attached Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in Response to June 20, 2017 Order in the matter of the Application for Review of ABN AMRO Clearing Chicago LLC. Administrative Proceeding No. 3-17906, to be served by Federal Express overnight delivery and fax on:

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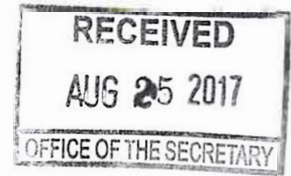
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August 11, 2017



VIA FAX AND OVERNIGHT MAIL

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
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Fax: (703) 813-9793

**RE: In the Matter of the Application of ABN AMRO Clearing Chicago LLC
Administrative Proceeding No. 3-17906**

Dear Mr. Fields:

Enclosed please find the Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in Response to June 20, 2017 Order in the above-captioned matter.

Please contact me at (312) 786-7462 if you have any questions.

Very truly yours,

Joanne Moffic-Silver