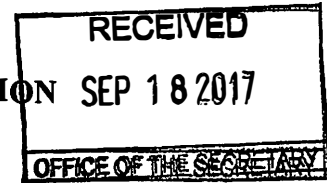


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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



SECURITIES EXCHANGE ACT OF 1934
Release No. 80983 / June 20, 2017

Admin. Proc. File No. 3-17906

In the Matter of

ABN AMRO Clearing Chicago LLC

**REPLY BRIEF ADDRESSING STANDARD OF REVIEW TO BE
APPLIED BY CBOE BOARD OF DIRECTORS IN REVIEWING INITIAL
DETERMINATIONS BY BUSINESS CONDUCT COMMITTEE**

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CERTIFICATE OF COMPLIANCE

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I. Introduction

In comparing the Exchange's Brief to ABN AMRO's Brief, it is striking how much the parties agree upon, *i.e.*, the Exchange Act does not require a specific standard of review of BCC decisions, and the "clearly erroneous" standard of Board review is consistent with the Act and with the SEC's scheme of enforcement and review. The parties also agree that the "clearly erroneous" standard of review is *supposed* to be highly deferential, overturning fact findings only if unsupported by substantial evidence or contrary to the clear weight of the evidence. The parties agree that, if the "clearly erroneous" standard is properly applied, the rights of respondents are protected and the objectives of vigorous enforcement are met.

However, the parties disagree on several key points. ABN AMRO believes that the *de novo* standard of review better serves the enforcement and review scheme contemplated by the Exchange Act; the Exchange avoids that issue. The Exchange assumes that the Board understood and applied the "clearly erroneous" standard in this case, however, the record is quite clear that the Board neither understood nor applied the "clearly erroneous" standard of review. ABN AMRO believes that the current paradigm of Board review, promulgated almost a half-century ago, no longer serves as an adequate appellate review of BCC decisions. Just as the Exchange incorrectly assumes that the Board understood and applied the "clearly erroneous" standard of review, the Exchange likewise assumes that the current model of Board review is adequate in today's market environment. These assumptions are incorrect.

ABN AMRO strongly believes that, in the event that the Commission determines that the Board failed to apply the proper standard of review, the case should be reversed without further proceedings. The Exchange does not oppose this argument, instead taking no position. ABN

AMRO believes that the Exchange's Brief ("CBOE Brief") serves to highlight the failings of the Board and the need for the SEC to reverse the Board's decision and terminate this matter at this stage.

II. The *De Novo* Standard Of Review Is The Superior Standard of Appellate Review By The Board

The Exchange points out that the "clearly erroneous" standard of review has been the avowed standard of Board review for decades, and that the *de novo* standard is not reasonably implied from CBOE Rule 17.10(b). It is certainly the standard of review that the Board purported to apply in this case, and it is the standard of review that ABN AMRO expected to be applied. Indeed, as a matter of right, ABN AMRO was *entitled* to the benefit of the deferential "clearly erroneous" standard of review in this case, because the Exchange had frequently served notice that this was the standard of review applicable to all BCC cases.

However, ABN AMRO contends that the pivotal question should be: what standard of review will best serve the Exchange Act's enforcement and review scheme and best enhance the SEC's adjudicative role? For its part, ABN AMRO believes that the *de novo* standard, if properly applied, will better advance the objectives of the Exchange Act and will greatly enhance the appellate process and the SEC's role therein.

III. The Exchange Brief Highlights The Board's Failure To Comprehend And Apply The "Clearly Erroneous" Standard Of Review

Throughout its Brief, the Exchange repeatedly – and correctly – describes the "clearly erroneous" standard of review as a "deferential" standard. (CBOE Brief at 1, 6, 7) The Exchange accurately summarizes the extent to which the Board must defer to the BCC's fact findings:

***Under this [“clearly erroneous”] 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.” (CBOE Brief at 4)

Thus, the Board must accept all fact findings supported by substantial evidence. As ABN AMRO has pointed out, the “clearly erroneous” standard also requires the Board to accept undisputed and un rebutted findings of fact, and precludes the Board from simply substituting its own judgment for that of the BCC. (ABN Brief at 12)

As ABN AMRO has pointed out, however, the Board did precisely the opposite. Indeed, the Board rejected virtually every one of the BCC’s 19 findings of fact that favored ABN AMRO without mentioning them or explaining the basis for the Board’s rejection of these fact findings. It is obvious that the Board’s review could not have been less deferential.

The Commission will search the Board decision in vain for mention of virtually any of the fact findings favorable to ABN AMRO, even though the Board effectively rejected them. The Exchange itself has admitted that the Board is required to provide a detailed explanation of its decision:

***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.” [citation omitted.]

The Board’s review process more than satisfied this requirement. Both the BCC and the Board issued written opinions setting out relevant facts and detailing the bases for their decisions. . . . In reversing [the BCC] decision, the Board issued a seventeen-page decision setting forth the procedural history, relevant facts, applicable law, and rules violated. . . . These comprehensive

explanations of the conduct underlying ABN AMRO's offense, the regulations violated and the appropriate sanctions satisfy § 78f(d)(1). (CBOE Brief at 11-12)

Contrary to the Exchange's self-serving characterization, however, the Board decision most emphatically did *not* issue a decision "setting out the relevant facts and detailing the bases for [its] decision." The Board did *not* provide a "comprehensive explanation of the conduct underlying ABN AMRO's offense." For example, the Board decision never mentions the BCC's finding that it was impossible to monitor or observe COA messaging, the Board never mentions the BCC's finding that it was impossible to surveil for COA messages, or that no clearing firm or sponsoring firm can observe, monitor, identify, block or surveil for COA messages. It is difficult to conjure up a *less* detailed or comprehensive decision, or one more lacking in any factual basis.

The Board's failure to abide by the standard the Exchange itself has acknowledged is strongly suggestive of the fact that the Board does not comprehend the nature and scope of its obligations under the "clearly erroneous" standard of review – or, for that matter, under any standard of review. In ABN AMRO's view, this is a function of the current composition of the Board and the inability of the current Board to devote the time, energy and expertise that would have been taken for granted 40 years ago.

To extent that the Commission is dissatisfied with the CBOE appellate process but does not wish to alter the current Board review paradigm, then SEC rule-making is clearly warranted in order to ensure that the proper standard of review is in place, and is properly applied. In this respect, the Exchange and ABN AMRO are in agreement.

IV. The Board Decision Should Be Reversed Without Further Proceedings

In its Brief, the Exchange "does not express a position on the proper disposition of the matter in the event the Commission concludes that the Board should apply a different standard of

review.” For its part, ABN AMRO has expressed a strong view: the Board decision should be reversed and the matter concluded without further proceedings. ABN AMRO has set forth detailed arguments in support of its position. (ABN Brief at 7-8)

The CBOE Brief has provided additional bases for such an outcome. The Exchange has acknowledged the very deferential nature of the “clearly erroneous” standard of review, but the record makes clear that the Board did not provide anything remotely resembling a deferential review – quite the opposite. The CBOE Brief has also acknowledged the need for the Board to set forth the relevant facts, explain the bases for its rejection of fact findings along with a comprehensive explanation for the conduct underlying ABN AMRO’s supposed violation. However, the Board decision ignored or rejected numerous undisputed fact findings without acknowledging or explaining their rejection.

From the very beginning, the CBOE staff conducted an investigation that was so deficient that the BCC, in unprecedented fashion, felt compelled to express “extreme concern.” The BCC admonished the staff for its failings. The Board, of course, never expressed the slightest concern over this uniquely deficient investigation, or pred any explanation for its indifference.

The failure of the Board to abide by the standards that the Exchange itself has acknowledged further highlights the Board’s apparent inability to comprehend the nature and scope of its obligations in the appellate process. A “fair procedure” requires that the Board protect the rights of the Respondent, comply with appellate standards, and provide the Commission with detailed and cogent explanations for its decision. This is especially true where, as in this case, the Board engaged in a wholesale rejection of every substantive fact finding and legal conclusion of the BCC. The Board has failed to do so, and is not entitled to another opportunity to “get it right” at the expense of ABN AMRO.

V. Conclusion

We ask the Commission to place itself in the position of ABN AMRO in considering the appropriate standard of review in this case, but further, whether the standard that was used was applied appropriately. Necessarily as part of this, we also ask the Commission to place itself in the position of ABN AMRO in considering the proper disposition of this case, to review the development of this matter, and consider whether the conduct of the Exchange comports with the level of competence and professionalism that it expects of an SRO.

During the hearing itself, the Exchange never attempted to rebut any of the undisputed evidence of technological impossibility, or to challenge the undisputed evidence that defects and limitations of the CBOE's own FIX protocol and related technology, at least in part, rendered the disputed risk control impossible to devise or implement.

The Board decision is the unfortunate culmination of this misguided and mishandled proceeding. In the decision, the Board paid lip service to the deferential "clearly erroneous" standard of review, and inserted all the usual boilerplate language to that effect. The Board then proceeded to ignore undisputed facts, expressly reject unrebutted fact findings, and substitute its judgment for that of the BCC. Not feeling confined to the record or the evidence, the Board ruled that ABN AMRO should have "reached out" to the CBOE for a technological solution that, according to the undisputed evidence, is non-existent.

Throughout all of this, ABN has been forced to expend time, effort and expense to defend itself – first, during the inept investigation, then during the BCC hearing, throughout the Board review that was, at best, misguided, and at worst, negligent, and now, with respect to procedural matters. No matter which standard of review the SEC deems appropriate, the Board incorrectly applied the clearly erroneous standard in this case. Surely, the Commission expects more of the

CBOE and its staff. This case cannot be consistent with the level of competence and fairness that the Commission demands of every SRO. At this stage, the Exchange has had many opportunities to “get it right,” but has failed to do so. Indeed, the Exchange continues to insist that its staff and its Board carried out its responsibilities admirably. We submit that a fair and impartial review of this record must lead the Commission to the contrary conclusion, we request a reversal of the Board’s decision, and a conclusion to this matter.

Dated: September 15, 2017

Respectfully submitted,

ABN AMRO CLEARING CHICAGO, LLC

By: 

Stephen P. Bedell

Jason P. Britt

Foley & Lardner LLP

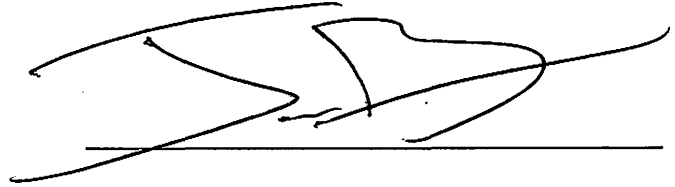
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I certify that the accompanying Reply Brief Addressing Standard of Review to Be Applied by CBOE Board of Directors in Reviewing Initial Determinations by Business Conduct Committee by ABN AMRO Clearing Chicago LLC contains 1,961 words, exclusive of pages containing the Table of Contents.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom, positioned above a solid horizontal line.

CERTIFICATE OF SERVICE

On September 15, 2017, I caused to be served the accompanying Reply Brief Addressing Standard of Review to Be Applied by CBOE Board of Directors in Reviewing Initial Determinations by Business Conduct Committee by ABN AMRO Clearing Chicago LLC on the following persons, through electronic mail, facsimile transmission, and U.S. Mail:

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I further caused to be filed the accompanying Reply Brief Addressing Standard of Review to Be Applied by CBOE Board of Directors in Reviewing Initial Determinations by Business Conduct Committee by ABN AMRO Clearing Chicago LLC by sending it to the following by facsimile and overnight delivery:

Eduardo Aleman
Assistant Secretary
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(703) 813-9793 (Fax)



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September 15, 2017

ADMINISTRATIVE PROCEEDING
FILE NO. 3-17906

Via Facsimile and Overnight Delivery

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

Dear Mr. Aleman:

Attached please find a copy of ABN AMRO Clearing Chicago, LLC's Reply Brief Addressing Standard of Review to Be Applied by CBOE Board of Directors in Reviewing Initial Determinations by Business Conduct Committee. Please contact me at (312) 832-4390, or Steve Bedell at (312) 832-4374, if you have any questions about or need any assistance with this filing.

Sincerely yours,

Jason P. Britt

Counsel for ABN AMRO Clearing Chicago, LLC

JPB

cc: Gary Dernelle (Via Facsimile, Email, and U.S. Mail)
Joanne Moffic-Silver (Via Facsimile, Email, and U.S. Mail)