UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
JULY 12, 2019

SECURITIES EXCHANGE ACT OF 1934
Release No. 86040/June 5, 2019

Admin. Proc. File No. 3-17906r

In the Matter of the Application of	)
ABN AMRO Clearing Chicago, LLC,	)
For Review of Disciplinary Action Taken by	)
CBOE	)

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW FILED BY ABN AMRO CLEARING CHICAGO, LLC

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I. INTRODUCTION

The CBOE Business Conduct Committee ("BCC") ruled against the Exchange on 19 factual and 12 legal grounds, and expressed "extreme concern" about the negligent investigation of the Exchange enforcement staff ("Regulation"). All of the BCC's findings of fact and conclusions of law relevant to this appeal were based upon *undisputed* evidence. On appeal, the Board reversed the BCC's Decision, but was only able to do so by improperly (a) ignoring or rejecting critical undisputed facts, (b) disregarding critical legal issues and (c) allowing Regulation, for the first time on appeal, to "contest" undisputed facts and raise new arguments that lacked any basis in the evidentiary record.

AACC believes that the Commission should share the BCC's "extreme concern," even if the Board does not. The Exchange charged ABN AMRO Clearing Chicago, LLC ("AACC"), with violating the Market Access Rule based upon its purported failure (a) to "assure" that its customer, Simplex Investments, LLC ("Simplex") held the requisite market maker appointments to trade Cboe and C2 index options ("Proprietary Products") and (b) to implement a pre-order entry risk control (i.e., a "block" of COA messaging) to prevent Simplex from improperly responding to COA auctions for those Products. [1] However, throughout the Hearing, Regulation was patently unaware that it was impossible for AACC to monitor market maker appointments or impose a COA block. The BCC dismissed the Charges on numerous grounds and admonished Regulation for its shoddy investigation.

On appeal, Regulation has discarded – indeed, ignored – its baseless allegations and arguments made at the Hearing, and has improperly substituted new allegation and arguments on appeal. Regulation's new allegations and arguments are equally baseless, and the Board erred in

[1] Simplex was not a CBOE or C2 market maker. The COA auction process for Proprietary Products was only permitted for CBOE and C2 market makers with an appointment in these classes.

allowing them and basing its decision on them. The Board's ruling is replete with procedural and substantive errors, and should be reversed.

II. PROCEDURAL BACKGROUND

A. History Of The Proceedings

This is a consolidated decision of the Board of Directors of Cboe Exchange, Inc. ("Cboe Options" or "Cboe") and Cboe C2 Exchange, Inc. ("C2") (collectively, "the Exchange").[2] This decision concerns two related disciplinary matters: Cboe Disciplinary Case 14-0177, and the C2 Disciplinary Case 14-0003. The following is a brief summary of the procedural history in this matter.[3]

On December 4, 2014, the Exchange issued to AACC a Statement of Charges in Cboe Disciplinary Case 14-0177 ("Cboe Charges"), and an Amended and Restated Statement of Charges in C2 Disciplinary Case 14-0003 ("C2 Charges").[4]

For purposes of this appeal, the Cboe Charges alleged violations of Cboe Rule 6.53C - *Complex Orders on the Hybrid System*, and SEC Rule 15c3-5 ("Market Access Rule" or "Rule") under the Securities Exchange Act of 1934 ("Exchange Act"). The C2 Charges alleged violations of C2 Rule 6.13 - *Complex Orders on the Hybrid System,* and the Market Access Rule. AACC filed Answers to the Charges on January 9, 2015.[5] All charges and alleged rule violations were based upon the same facts.

AACC eventually requested that the Exchange bifurcate these matters by settling the Exchange rule violations related to supervision, COAs, and sponsored users, and to proceed to a hearing solely on the charges related to Market Access Rule violations. The Exchange agreed.

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[2] The Boards of Cboe and C2 are collectively referred to as the "Board."

[3] Exchange exhibit references are listed as "Exch. Ex. [number]," and AACC exhibit references are listed as "AACC Ex. [number]."

[4] *See* AACC Ex. 16 (FINRA 183-86) and 17 (FINRA 187-90).

[5] (FINRA 191-93 and 195-97)

AACC settled the alleged violations of C2 Rules 3.15 – Sponsored Users, 4.2 – Adherence to Law, and 6.13 – Complex Order Execution for a $25,000 fine and censure and settled the alleged violations of CBOE Rules 4.2 – Adherence to Law, 6.20A – Sponsored Users, and 6.53C – Complex Orders on the Hybrid System for a $20,000 fine and a censure on May 7, 2015 and June 4, 2015 at CBOE and C2, respectively. (AACC Exhibits 18 and 19)

On June 4, 2015, pursuant to Exchange Rule 17.8, the BCC formally issued Amended and Restated Decisions Accepting Offer of Settlement under which the alleged violations of Cboe Rule 6.53C and C2 Rule 6.13 were settled for fines totaling $45,000. These fines related to the charges arising under the Exchange rules governing sponsored users whereby AACC was liable for the rule violations of its sponsored user, Simplex. For purposes of this appeal, the only relevant Charges that were not resolved by settlement related to alleged violations of the Market Access Rule on both Exchanges (collectively, "Charges").

From November 2 to 4, 2015, a BCC panel conducted a hearing on the Charges ("Hearing"). The BCC panel heard testimony from 10 witnesses and admitted 76 exhibits into evidence. On December 14, 2015, the BCC rendered a decision in favor of AACC on all charges and allegations ("BCC Decision")[6]. Significantly, all findings and conclusions relevant to this appeal were based on undisputed evidence, and the BCC repeatedly expressed "extreme concern" over Regulation's shoddy investigation.

On January 15, 2016, Regulation submitted a petition ("Petition") requesting that the Board conduct a review of the BCC Decision pursuant to Rule 17.10.[7]

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[6] (FINRA 1893-1921)

[7] This Rule and others in Chapter XVII of the Cboe Rules also apply to C2. Chapter 17 of the C2 Rules states that "[t]he rules contained in Cboe options Chapter XVII, as such rules may be in effect from time to time, apply to C2 and are incorporated into this chapter."

On July 28, 2016, the Board issued its initial decision in this matter. The Board found that the BCC's findings and conclusions were clearly erroneous and that AACC violated the Market Access Rule in both the Cboe and C2 cases.

The Board remanded the matter to the BCC for a determination of appropriate sanctions. On October 27, 2016, the BCC issued a decision finding that AACC should be sanctioned with a $25,000 fine as to the Cboe matter and a $30,000 fine as to the C2 matter, and a censure as to both matters. On February 16, 2017, the Board issued a decision upholding the BCC's sanctions decision.

AACC appealed the Board's decisions to the Securities and Exchange Commission ("SEC" or "Commission"). On August 15, 2018, the SEC issued a decision holding that the Board should have applied the *de novo* standard of review to the BCC's findings.[8] The SEC did not review the merits of the case at this stage, but only addressed the standard of review. The SEC remanded the matter to the Exchange for the Board to conduct a *de novo* review of the BCC Decision.

On October 31, 2018, pursuant to the Board's direction, Regulation and AACC submitted supplemental briefs to the Board addressing the merits of the case under a *de novo* standard of review. On April 4, 2019, the Board issued its final decision ("Board Decision" or "Decision"), upholding its original decision reversing the BCC Decision but reducing the collective sanctions from $45,000 to $10,000 in the aggregate.

B. Summary And Basis Of The Charges

The Charges arise from trading conducted by AACC's customer, Simplex, via the Complex Order Auction ("COA") mechanism. COA is a process by which market participants can submit

[8] *In re ABN AMRO Clearing Chicago LLC*, SEC Release No. 83849, Admin. Proc. File No. 3-17906 (Aug. 15, 2018).

automated responses to RFR messages to indicate their interest in complex orders that brokers have submitted to the Exchange. CBOE Rule 6.53C(d)(iii) and C2 Rule 6.13(c)(3) permitted the Exchanges to designate which market participants could respond to COAs.

During the relevant period, Simplex was entitled to enter complex orders for all Exchange option classes, including the Proprietary Products. Indeed, Simplex was even allowed to use COAs for the overwhelming majority of Exchange products.[9] However, Simplex was not an Exchange Market-Maker and therefore, pursuant to Exchange rules, was not permitted to respond to COAs in specified Proprietary Products ("Proprietary Products"). For portions of the January-March, 2013 period, Simplex improperly responded to COAs in the Proprietary Products on both Exchanges.

The Charges are quite specific. The Charges accuse AACC of violating the Market Access Rule and alleged very specific acts as the basis of the Charges: (a) that AACC failed to "assure" that Simplex held the requisite market maker appointments prior to responding to COAs for Proprietary Products and (b) that AACC failed to implement a pre-order entry risk control to prevent Simplex from responding to COAs in the absence of those market maker appointments. The Charges state:

> From on or about February 1, 2013 through on or about March 31, 2013, ABN AMRO violated CBOE Rule 4.2 and Rule 153c-5 under the Act, in that ABN AMRO failed to maintain market access controls for its sponsored user Simplex Investments, LLC ("Simplex"), that were ***reasonably designed to assure*** compliance with all regulatory requirements which must be met on a pre-order entry basis, specifically the requirement ***that responders to Complex Order Auctions ('COAs') hold a Market Maker appointment in the relevant options classes prior to responding to COAs.***[10]

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[9] (FINRA 129)

[10] (FINRA 183-86 and 187-90 at ¶ 9) With the exception of the different time periods cited by the CBOE and C2, both Wells letters contained the same allegations.

There can be no question that the Charges were explicitly based on these two very specific acts. In Regulation's opening statement, the Exchange's counsel specifically asserted at least nine (9) times that AACC had failed to implement a "specific control" which would have "prevented Simplex from improperly responding to COA auctions."[11] At least seven (7) more times in her opening statement, the Exchange's counsel was even more specific, alleging that AACC should have implemented this control on "the FIN system," a nationally recognized and widely used risk management system that was used for Simplex's sponsored access.[12] The Exchange's lead witnesses, Stephen McNamee[13] and Jessica Kelly,[14] testified to the same effect on at least eight (8) occasions during the Exchange's case-in-chief. In preparing and presenting its defense, AACC responded to these very specific allegations.

Significantly, the Charges do *not* allege that AACC should have precluded Simplex from trading complex orders of any kind; nor do the Charges suggest that AACC should have refrained from providing sponsored access to Simplex. The Exchange never presented such allegations or evidence as part of their case-in-chief, either.

C. Factual Background

There are a limited number of facts that are relevant to this appeal, and they are generally undisputed. In the interest of efficiency and avoiding unnecessary repetition, AACC will address relevant facts throughout this brief, as required to address various issues pertinent to this appeal.

[11] (FINRA 1063, 1064, 1065, 1066, 1067, 1068, 1070, 1072, 1073)
[12] (FINRA 1063, 1064, 1066, 1067, 1068, 1069, 1071)
[13] (FINRA 1093, 1124, 1129, 1130, 1131, 1174, 1183)
[14] (FINRA 1230, 1232, 1244, 1252, 1254)

III. THE BOARD IGNORED BCC FINDINGS AND CONCLUSIONS

In its Petition, Regulation raised two legal issues for appeal.[15] First, Regulation argued that the Market Access Rule requires risk controls for *all* regulatory requirements for every product and market, without regard to the customer's business model or trading history, patterns or strategy, and regardless of how remote the likelihood of a potential violation. Second, Regulation argued that the Market Access Rule required implementation of the disputed risk control, *i.e.*, a pre-order entry block of COA messaging, even though it was technologically impossible and unrelated to Simplex's disclosed business model and trading strategy. Regulation did not appeal or contest any fact findings.[16]

It is obvious that Regulation unwittingly based the Charges and its case presentation upon non-existent technology and baseless assumptions about risk control feasibility. It is apparent that Regulation did not do so intentionally, but rather out of ignorance based on a careless investigation. In presenting its case, Regulation had no idea that the risk control it was insisting upon was completely impossible from every technological perspective. By the end of the defense presentation, however, it had become clear that Regulation's entire case was baseless and ill-considered, and the BCC Decision ruled overwhelmingly in favor of AACC. The BCC expressed its dismay by repeatedly expressing "extreme concern" over Regulation's ignorance and sloppy investigation.

On this appeal, Regulation has discarded the allegations that formed the basis of its presentation at the Hearing. Put another way, Regulation ceased pursuing the baseless factual allegations that earned it a reprimand from the BCC. Rather, Regulation has ignored its prior presentation and has improperly raised new arguments and new allegations for the first time on

[15] (FINRA 1937-2020 at 1944-45, 1950-53)
[16] (FINRA 1945)

appeal, even though AACC never had an opportunity to defend them at the Hearing. For example, Regulation now implicitly concedes that the disputed pre-order entry risk control (i.e., a COA "block") is technologically impossible, but now argues that, in light of that fact, the Market Access Rule required AACC to preclude Simplex from entering complex orders of any kind or to discontinue providing sponsored access to Simplex. These allegations are equally baseless as the original allegations, but were never a part of the Charges or Regulation's case-in-chief and thus, should never have been allowed by the Board.

The evidentiary record was closed at the conclusion of the Hearing and has never been reopened by the Board. Pursuant to Cboe Rule 17.10(b), the Board's review must be based solely upon the record. In violation of this rule, the Board has not only allowed, but adopted, factual assertions by Regulation's counsel on appeal that were not part of the evidentiary record at the Hearing. The Decision should be reversed on that basis alone.

In addition, Cboe Rule 17.10(a)(1) states that "any objections to a decision not specified by written exception shall be considered to have been abandoned." Accordingly, the Exchange must be deemed to have abandoned every factual and legal issue not raised in its Petition. The undisputed findings of fact that have been thus abandoned by Regulation cannot properly be ignored, rejected or contested by the Board, but that is in fact what has happened in this case. This, too, is a basis for reversal.

A. The BCC Made 16 Critical Findings Of Fact In Favor of AACC.

The BCC made 16 critical and dispositive findings of fact in favor AACC that are relevant to this appeal. These findings of fact were undisputed at the Hearing (Decision at 6, n 26), though nearly all of these findings have been completely ignored by the Board.[17] AACC sets forth below

[17] BCC fact findings based on facts that were undisputed at the Hearing are denoted as "Undisputed At Hearing." BCC fact findings that were ignored by the Board in its Decision are denoted as "Ignored By Board On Appeal."

the pertinent BCC findings of fact in favor of the AACC, noting whether they were undisputed at the hearing and ignored by the Board in its Decision:

- No Exchange rule has ever required AACC to implement a block on the sending by non-Market Makers of COA responses in the Proprietary Products. (BCC Decision at 25) (FINRA 1921) **(Undisputed At Hearing)**

- There was no Exchange mechanism that would have permitted AACC (or any other clearing or sponsoring firm) to monitor whether Simplex (or any other trading firm) had any market maker appointments, and what they were. (BCC Decision at 16) (FINRA 1912) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- No commercially available order entry system allowed, or would allow, AACC to observe or monitor Exchange or Simplex auction messaging of any kind. (BCC Decision at 12-13, 14) (FINRA 1908-10) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- Due to limitations of the CBOE FIX protocol, even if Exchange auction messaging was observable, the CBOE FIX protocol specifications identified no tag or message associated with COA auctions, rendering COAs unidentifiable. (BCC Decision at 13, 14) (FINRA 1909-10)**(Undisputed At Hearing)(Ignored By Board On Appeal)**

- Due to limitations of the CBOE FIX protocol, it is impossible to identify or distinguish Simplex's permissible (i.e., HAL) from impermissible (i.e., COA) auction messages. (BCC Decision at 13)(FINRA 1909-10) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- Because a market participant who subscribes to receive CBOE market data must receive all of it or none of it, there was no way for AACC to block COA auction messaging; rather, AACC would be required to block *all* Exchange messaging and market data of any kind. (BCC Decision at 15)(FINRA 1910) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- The Exchange and OCC systems made it impossible for AACC to conduct post-trade surveillance for Simplex's COA trades. (BCC Decision at 14) (FINRA 1910)**(Undisputed At Hearing)(Ignored By Board On Appeal)**

- The Exchange investigators knew little to nothing about the relevant technology. (FINRA 1911)(BCC Decision at 15) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- The Exchange investigators did not engage in any analysis of the technological feasibility of instituting a block on COA responses for the

Proprietary Products. (BCC Decision at 15) (FINRA 1911)(**Undisputed At Hearing)(Ignored By Board On Appeal)**

- The Exchange investigators took no steps to learn about the technology. (BCC Decision at 16) (FINRA 1912) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- The Exchange's investigation of AACC was not complete and thorough. (BCC Decision at 16)(FINRA 1912)**(Ignored By Board On Appeal)**

- AACC takes its compliance obligations very seriously; and AACC has a serious commitment to proper regulation and a strong culture of compliance. (BCC Decision at 16, 18) (FINRA 1`912, 1914)**(Undisputed At Hearing)(Ignored By Board On Appeal)**

- AACC's on-boarding process for Simplex was thorough and detail-oriented. (BCC Decision at 17)(FINRA 1913)(**Undisputed At Hearing)(Ignored By The Board On Appeal**

- AACC engaged in a thorough certification of the FIN system prior to the Simplex on-boarding process. (BCC Decision at 17)(FINRA 1913) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

- AACC had no reason to believe that Simplex would engage in complex order activity that was limited to Market Makers, including responding to COAs. (BCC Decision at 19, 21) (FINRA 1915, 1917)**(Undisputed At Hearing)**

- It was impractical from a compliance or business standpoint for AACC to block all messaging activity, including permissible activity. (BCC Decision at 20)(FINRA 1916) **(Undisputed At Hearing)(Ignored By Board On Appeal)**

Facts and findings that were undisputed at the BCC Hearing, and not challenged in the Petition, cannot be attacked by Regulation or the Board for the first time in the appellate briefing, especially on the basis of Regulation's counsel's assertions which are unsupported by evidence. It is equally improper for Regulation and the Board to simply ignore dispositive, undisputed facts when those facts undermine the very basis of the Board's ruling.

B. The BCC Rendered 12 Conclusions Of Law In Favor Of AACC.

For the purposes of this appeal, the BCC also rendered 11 dispositive legal rulings in favor of AACC. These rulings were based upon the Commission's own guidance set forth in the Rule's Adopting Release:

- Pursuant to the Market Access Rule, an analysis of technology is central to the determination of whether AACC's risk controls were "reasonably designed." (BCC Decision at 11)(FINRA 1907)

- Pursuant to the Market Access Rule, a determination of whether risk controls are "reasonably designed" should take into consideration the customer's trading strategy. (BCC Decision at 18)(FINRA 1914)

- Pursuant to the Market Access Rule, risk controls may be flexibly designed and adapted to the specific circumstances at hand. (BCC Decision at 10)(FINRA 1906)

- Pursuant to the Market Access Rule, risk controls are to be "tailored to the nature of the trading" of the client firm based on past trading practices and stated future trading intentions. (BCC Decision at 20)(FINRA 1916)

- Pursuant to the Market Access Rule, a "reasonably designed" risk control does not require a sponsoring TPH to have in place blocks on improper trading activity as to which the sponsoring TPH had no reason to believe the sponsored user will engage. (BCC Decision at 21)(FINRA 1917)

- Pursuant to the Market Access Rule, a sponsoring TPH cannot be found guilty of a violation of the Rule for failing to block improper activity when there is no way for the firm to know of the improper activity. (Decision at 21)(FINRA 1917)

- Pursuant to the Market Access Rule, the requirement of a "reasonably designed" system of risk controls does not require a sponsoring TPH to have every possible risk management control in place for every possible circumstance. (BCC Decision at 21)(FINRA 1917)

- Pursuant to the Market Access Rule, a sponsoring TPH is not required to anticipate and block all possible impermissible behavior regardless of the likelihood that the sponsored user may engage in such behavior and regardless of any Exchange technological limitations. (BCC Decision at 21-22)(FINRA 1917-18)

- The Market Access Rule was not intended to expand upon regulatory requirements. (BCC Decision at 24)(FINRA 1920)

- The fact that a sponsored user committed a regulatory violation by improperly submitting COA responses does not automatically create a regulatory obligation on the part of the sponsoring TPH to institute a block of the ability to submit such responses. (BCC Decision at 24)(FINRA 1920)

- Since the Market Access Rule did not create any new regulatory obligations, and since there was no existing regulatory obligation to implement a block upon improper COA responses, then the Market Access Rule created no such regulatory requirement and requires no such block. (BCC Decision at 25)(FINRA 1921)

The Commission may affirm the Decision on the basis of any or all of these dispositive legal rulings by the BCC. *Small v. Endicott*, 998 F.2d 411, 414 (7th 1993) (*de novo* review).

IV. ARGUMENTS RELATING TO MARKET ACCESS RULE CHARGES

A. The Rule Must Be Harmoniously Interpreted In Its Entirety In Accordance With Its Purpose And Objective As Articulated By The Commission

The law requires the Board to construe the Market Access Rule in a harmonious fashion, giving meaningful weight to every provision consistent with the purpose of the Rule as articulated by the Commission. See *Barmes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999). Courts avoid a literalistic interpretation of the wording of a regulation if doing so would lead to absurd results. *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006). Finally, courts avoid interpreting a regulation in a way that renders a word or phrase redundant or meaningless. *United States v. Berkos,* 543 F.3d 444, 447 (7th Cir. 2015).

The Board did not comply with these basic rules of construction. For example, the Board applied a hyperliteral and overreaching interpretation of the phrase "all regulatory requirements" that does not harmonize with other provisions of the Rule and the Commission's Adopting Release. Specifically, the Board concluded that this phrase, in and of itself, created a new regulatory obligation on the part of AACC to prevent improper COA responses (via a "COA block") even though no such duty existed under Exchange rules. In doing so, the Board failed to properly consider the Adopting Release's stipulation that the Rule does *not* expand upon a broker dealer's

existing or underlying substantive obligations. Similarly, the Board concluded that the phrase "all regulatory requirements" required AACC to create all-encompassing risk controls for every conceivable potential violation of any and all rules regardless of the customer's market venue, business model and history, trading patterns and strategy. In doing so, the Board ignored the Rule's mandate that risk controls be *reasonably* designed and the Adopting Release's guidance to the effect that risk controls may be customized for each customer.

The Board's hyperliteral application of the phrase "all regulatory requirements," construed in isolation as described above, contains no limiting principle and leads to absurd results. Under the Board's ruling, for example, a market access provider would be required to implement risk controls for the entire array of options markets and options-related rules for a customer whose business model and trading is and always has been limited to foreign stocks and nothing else. In its Adopting Release, the Commission provided the limiting principle that a market access provider can tailor its risk controls to account for the customer's business model, trading strategy and so on. But the Board's literalistic interpretation of the phrase "all regulatory requirements," parsed in isolation, has essentially construed that limiting principle out of existence.

B. Exchange Rules Never Required AACC To Block Customers From Utilizing COA Mechanisms And The Market AccessRule Did Not Expand AACC' Underlying Regulatory Obligations

It is undisputed that no Exchange rule, interpretation or circular ever required AACC to block Simplex or any other customer from improperly utilizing COA mechanisms.[18] Indeed, the BCC correctly noted that the Exchange conceded this fact.[19] Relying on the Adopting Release, the BCC decided that the Exchange rules did not require AACC to block Simplex from sending

[18] (FINRA 1673-76)
[19] (BCC Decision at 24) (FINRA 1920; *see also* FINRA 1149, 1153, 1314, 1318)

improper COA responses, and the Market Access Rule did *not* create a new regulatory requirement to this effect.[20]

The Board reversed this ruling. The Board decided that, since the Rule required AACC to implement risk controls to ensure its customers' compliance with *all* regulatory requirements, therefore AACC had a new regulatory obligation to block COA messaging where none had previously existed. This flies in the face of the Adopting Release, where the Commission repeatedly stated that the Market Access Rule *did not expand* the existing regulatory requirements applicable to broker-dealers in connection with market access:

> Whether compliance is pre-trade or post-trade, however, Proposed **Rule 15c3-5(c)(2) would not impose new substantive regulatory requirements on the broker-dealer,** but rather establish a clear requirement that the broker-dealer have appropriate mechanisms in place that are reasonably designed to effectively with its existing regulatory requirements in an automatic high-speed trading environment.[21] (emphasis added)

In its Responses to Frequently Asked Questions Concerning Risk Management Controls for Brokers and Dealers With Market Access dated April 15, 2014 ("FAQs"), the SEC reiterated this principle:

> The Commission has emphasized that the term "regulatory requirements" in Rule 15c3-5 references existing regulatory requirements applicable to broker-dealers in connection with market access. The Commission noted, "**the Rule is intended neither to expand nor diminish the underlying substantive regulatory requirements otherwise applicable to broker-dealers.**" *Id.* At 69803, n. 93. (emphasis added)[22]

The Rule, of course, is focused on the regulatory requirements and risk management obligations of broker-dealers such as AACC. Although AACC is a broker-dealer, Simplex was

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[20] (BCC Decision at 24-25)(FINRA 1920-21)
[21] (Adopting Release, p. 43) (See also Adopting Release, pp. 14, 42)
[22] https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm

never a broker or dealer. Therefore, the Commission's guidance must mean that the Rule did not expand "the underlying substantive regulatory requirements otherwise applicable to" AACC, which is a broker-dealer. Here, there was *never* any underlying substantive regulatory requirement - in other words, no Exchange rule or interpretation - requiring AACC to prevent its customers' improper COA responses. The Commission has made clear that, where Exchange rules never imposed such an underlying regulatory requirement to that effect upon AACC, the Rule itself did not create such a regulatory requirement.

In its Decision, the Board mistakenly conflates two disparate issues: (1) whether an Exchange rule violation occurred and (2) whether AACC ever had an underlying substantive regulatory obligation to prevent such violations on the part of their customers. The Board has effectively decided that the Rule itself obligates broker-dealers such as AACC to guarantee compliance with "all regulatory requirements" *of their customers* despite the absence, in any given case, of an underlying substantive regulatory requirement *of the broker-dealer* to do so.

By virtue of its ruling, the Board drastically expands the regulatory obligations of AACC and other firms providing market access. The Board's ruling makes broker-dealers such as AACC the across-the-board guarantors of, and strictly liable for, *all* customers' compliance with *all* rules and regulations. The Board's ruling applies even where, on a case-by-case basis, there is no underlying substantive regulatory requirement (i.e., Exchange rule) requiring the broker-dealer to ensure its customers' compliance with a specific Exchange rule.

The Board's ruling is problematic from a public policy perspective as well. The Board's ruling has the effect of overriding the Exchange rules and imposing regulatory obligations on broker-dealers such as AACC where the Exchange regulators have chosen not to do so. In this respect, the Board has effectively nullified the Exchanges' regulatory policy choices and ignored

the Commission's own pronouncement that the Rule *does not expand* the underlying substantive regulatory obligations of broker dealers. By rejecting the Board's draconian approach, the Commission will maintain the regulatory discretion traditionally delegated to the Exchanges and restore the traditional regulatory balance between the Exchanges and the Commission.

C. Pursuant To The Market Access Rule AACC Properly Tailored Its Risk Controls In Accordance With Simplex's Business Model and Strategy.

In its Decision, the Board ruled that AACC should have implemented risk controls for "all regulatory requirements" regardless of Simplex's history, markets, products, business model, trading patterns or strategy:

> In other words, "reasonably designed" provides a market access provider with some discretion in how to design controls to *ensure* compliance with regulatory requirements. It does not, however, allow market access providers to fail to implement any control whatsoever to ensure compliance with an Exchange rule. (Decision at 13)

By ruling that firms providing market access must create all-encompassing risk controls for *all* regulatory requirements for *all* customers regardless of the customer's history, markets, products, business model, trading patterns or strategy, the Board overreached. The Board's position directly contradicts the guidance of the Commission, which expressly stated that the Rule allows for regulatory risk controls "tailored to the particular nature of the market access, the arrangement between the market participants and the market venue, and the client's trading strategy."[23] The Board has effectively applied the "one size fits all" standard for determining Rule compliance that the Commission has already rejected.[24]

Furthermore, the Board's ruling is based on circular reasoning and creates a vague and unworkable standard. In reaching its Decision, the Board improperly relied upon Regulation's

[23] (Adopting Release, p. 24 n. 48) (FINRA 283-412)
[24] (Adopting Release, p. 24 n. 47) (FINRA 283-412)

argument that the Rule's reference to "reasonably designed" risk controls only allows the customization of the so-called "details" of the risk controls. Because this argument was made for the first time on appeal, the Board should not have considered it. More importantly, this vague "details" precept finds no basis – indeed, is never mentioned - in the Rule or SEC or Exchange guidance, and neither Regulation nor the Board ever explain what constitutes the so-called "details" of a risk control. Regulation's vague "details" standard is unworkable and fails to provide a broker-dealer with the ascertainable certainty required for compliance with regulatory due process.

For all intents and purposes, the Board adopted Regulation's "details" standard, but simply used different words. Instead of using the word "details" in describing the restrictions on reasonable design, the Board substituted the phrase "some discretion." More specifically, the Board ruled that a broker-dealer merely has "*some discretion* in how to design controls . . ." (Decision at 13) (emphasis added) But broker-dealers would always have to apply "some discretion" in designing their risk control-related technology, based upon numerous technical factors completely unrelated to their customers' business model or trading strategy. The Commission's explicit support for the "tailoring" of risk controls based on the customer's business model, market venues, trading patterns and strategy (as set forth in the Adopting Release), are hollow if the Board's interpretation is accepted. Finally, the Board's "some discretion" standard, like Regulation's "details" standard, is unacceptably vague. How much discretion is "some" discretion? What are the permissible bases and objects for the exercise of this discretion, and what standards should be used to assess its propriety? The Board's "some discretion" standard has never been the subject of regulatory guidance, is unacceptably vague and violates regulatory due process.

Most significantly, the Board also erred in concluding that AACC should have known that Simplex would be trading COAs for Proprietary Products and therefore should not have allowed Simplex to place any complex orders at all. In this regard, the Board's ruling improperly contradicted the undisputed evidence and misapplied the Rule. In order to address this aspect of the Board's ruling, AACC will provide a succinct summary of the undisputed facts surrounding the onboarding of Simplex as a customer.

At the outset, it is important to note that the BCC found that AACC has a strong culture of compliance and a serious commitment to proper regulation.[25] The BCC also found that AACC conducted a thorough and detail-oriented onboarding process for Simplex.[26] Regulation did not dispute these findings. However, neither of these findings were even mentioned by the Board.

Following the Commission's guidance, as a matter of policy AACC tailors and customizes its risk controls based upon the nature of the customer, the customer's historic trading patterns and anticipated trading strategy, and the relevant markets.[27] At the time that Simplex was being on-boarded, AACC conducted a thorough assessment of Simplex's business model, trading patterns and strategy and its stated trading intentions. AACC tailored its risk management controls to Simplex's historic and anticipated trading strategies and intentions.[28]

Simplex is a high-frequency and latency-sensitive trading firm, but it was not a broker-dealer or an Exchange market maker during the relevant period. At all times relevant, it was necessary to be an Exchange market maker in order to use COAs for Proprietary Products. However, Simplex had *never* engaged in market-maker activity and gave *no* indication that it

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[25] (BCC Decision at 16, 18) (FINRA 1912, 1914)
[26] (BCC Decision at 17) (FINRA 1913)
[27] (FINRA 1460-65, 1473-74, 1574-75)
[28] (FINRA 1460-65, 1473-74, 1574-75)

intended to become an Exchange market maker or engage in market making activity in the future.[29] Indeed, AACC was not even offering market maker services to Simplex.[30] All these facts were entirely undisputed.

During the onboarding process Simplex expressed its desire to trade complex orders. Under Exchange rules, Simplex was permitted to execute complex orders for *all* products - including Proprietary Products.[31] At the same time, because Simplex was not an Exchange market maker, it was not allowed to use COAs when trading complex orders for the Proprietary Products. Aside from this narrow exception, i.e., COA auctions for Proprietary Products, no category of complex orders was off-limits for Simplex.[32] For these reasons, AACC concluded that the FIN risk control solution – which allowed the entry of complex orders - was appropriate for Simplex's stated and apparent trading needs and intentions, and tested and tailored the system's regulatory risk controls around those needs.[33] Once again, these facts are undisputed and, for the most part, ignored by the Board.

The FIN risk control solution is provided by Fundamental Interactions, a highly regarded vendor in the options industry.[34] The FIN risk control solution continues to be highly regarded and widely used throughout the industry.[35] In 2012, AACC certified the FIN risk control solution for its customers, and Simplex used the FIN risk control solution to access the CBOE's FIX protocol interface.[36] This, too, is undisputed.

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[29] (FINRA 1473-74-1548-49, 1582-90)
[30] (FINRA 114, 1473-74, 1584)
[31] (FINRA 129-30)
[32] (FINRA 129-30)
[33] (FINRA 1460-65, 1473-75, 1574-75, 1915, 1917)
[34] (FINRA 1598)
[35] (FINRA 1598)
[36] (FINRA 1598)

Based on this undisputed evidence, the BCC found that AACC had no reasonable basis to believe that Simplex was going to become an Exchange market maker or attempt to use COAs to execute complex orders for Proprietary Products.[37] The BCC also found that, by allowing Simplex to use the FIN risk control solution, AACC had implemented a reasonably designed and properly tailored risk management system for Simplex.[38] This is an eminently reasonable conclusion in light of these undisputed facts: (a) Simplex had never been a market maker, (b) Simplex had given no indication that it intended to become a market maker and engage in market maker activity in the future, and (c) AACC was not offering market maker services to Simplex. This is also perfectly compliant with the Commission's pronouncement that regulatory risk controls may be "tailored to . . . the client's trading strategy."[39]

The Board, however, rejected the BCC's findings and ruled that AACC's use of the FIN risk control solution for Simplex's trading was a violation of the Rule's requirement that risk control systems be "reasonably designed" to ensure compliance with all regulatory requirements. The crux of the Board's ruling is that the use of the FIN system was improper because it allowed Simplex to enter complex orders, and thus Simplex might theoretically have tried to execute complex orders for Proprietary Products by means of the COA auction mechanism. Specifically, the Board ruled that "AACC did have reason to believe that Simplex might respond to COAs . . . during AACC's onboarding of Simplex, Simplex identified complex order trading as one of its planned activities." (Decision at 14)

The notion that, despite having never engaged in market maker activity in the past and having given no indication of doing so in the future, Simplex might conceivably have tried to

[37] (BCC Decision at 19, 21) (FINRA 1915-1917)
[38] (BCC Decision at 19, 21) (FINRA 1915-1917)
[39] (Adopting Release, p. 24 n. 48)(FINRA 283-412)

engage in activity which was restricted to Exchange market makers, can only be characterized as extremely speculative, to say the least. On a much more realistic and practical level, Simplex was permitted to engage in a very wide array of legitimate complex order trading in numerous products, and was also permitted to use the HAL auction mechanism to execute its orders. Put simply, Simplex had never used COAs and had no need for COAs in order to trade complex orders. Moreover, Simplex gave no indication that it intended to become an Exchange market maker (which was required for the use of COAs for Proprietary Products). That is one of the reasons why AACC did not offer market maker services to Simplex. If the hallmark of risk control design is "reasonableness," AACC's use of the FIN system was reasonable based on Simplex's history, strategy and representations.

The Board's ruling was improper for another reason. By ruling that AACC should not have allowed Simplex to use the FIN risk control solution because it allowed Simplex to enter complex orders, the Board has accepted Regulation's argument that AACC had no right, as a matter of law, to rely upon Simplex's representation[40] to the effect that it did not intend to act as an Exchange market maker (which would allow the use of COAs for Proprietary Products).[41] In other words, the Board ruled that AACC was required to implement risk controls for "all regulatory requirements" - including a block to prevent Simplex's conceivable use of COAs for Proprietary Products - despite Simplex's representations that its business model, trading strategy and intentions did not include market maker activity (and, thus, the use of COAs for Proprietary Products).

The Board's ruling is inconsistent with Commission guidance and with common sense. If a firm cannot rely whatsoever on its customer's representations, then how can any firm customize or tailor its risk controls to its customer's stated trading strategy or intentions, as the Commission

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[40] (FINRA 2171-72)
[41] (FINRA 1464-1475)

has encouraged?[42] Indeed, how can a firm even permissibly adjust the "details" of, or exercise "some discretion" over, its risk controls if none of the customer's representations can be relied upon? If the Board's conclusion is accepted by the Commission, market access providers will have no alternative but to apply a comprehensive, all-encompassing, "one size fits all" set of risk controls for every customer because, according to the Board, reliance on customers' representations as to its business model and intended trading strategy is forbidden. This flies in the face of the Commission's guidance endorsing customization of risk controls and eschewing a "one size fits all" approach. The Board's ruling also renders the onboarding process virtually pointless for the purpose of designing a reasonable risk management system on a customer-by-customer basis.

Even if the Decision is viewed as allowing a broker-dealer to account for its customer's business model and strategy in the onboarding process, the Board's ruling is still contrary to Commission guidance. The Board has clearly dictated that, despite Simplex's representations in the onboarding process that it did not intend to become an Exchange market maker, AACC should have implemented risk controls designed to address every hypothetical illicit market maker activity that Simplex might possibly attempt to engage in (including the use of COAs for Proprietary Products). According to the Board, therefore, market access providers may exercise "some discretion" (whatever that means) in developing risk controls risk controls so long as those risk controls are also designed to prevent every possible rule violation regardless of the customer's strategy. Once again, this is not a "tailoring" of risk controls; rather, this is the one-size-fits-all approach that the Commission has sensibly rejected.

[42] (Adopting Release at 24 n. 48) (FINRA 283-412)

D. Firms Providing Market Access Cannot Ascertain Or Monitor Market Maker Appointments Even Though The Charges Are Directly Premised on That Critical Allegation

The Charges allege that AACC violated the Rule based upon two very specific acts: (a) failing to "assure" that Simplex possessed the requisite Exchange market maker appointments prior to responding to COA auctions for the Proprietary Products and (b) failing to implement a pre-order entry risk control to prevent such improper COA responses:[43]

> From on or about February 1, 2013 through on or about March 31, 2013, ABN AMRO violated CBOE Rule 4.2 and Rule 153c-5 under the Act, in that ABN AMRO failed to maintain market access controls for its sponsored user Simplex Investments, LLC ("Simplex"), that were ***reasonably designed to assure*** compliance with all regulatory requirements which must be met on a pre-order entry basis, specifically the requirement ***that responders to Complex Order Auctions ('COAs') hold a Market Maker appointment in the relevant options classes prior to responding to COAs.***[44] (AACC Exhibits 14 and 15 at 1)

Thus, the Charges are directly premised on the supposed ability of AACC to ascertain and monitor the market maker appointments of Simplex (or any other customer, for that matter) as they change from day to day. In issuing these Charges, Regulation clearly assumed that it is possible for a clearing firm or market access provider such as AACC to ascertain or monitor market maker appointments, when in fact the Exchange's systems make it technologically impossible.

In its Decision, the Board inexplicably relies upon the same false assumption that market access providers are able to monitor the market maker appointments of its customers:

> "If a firm does not have the proper appointments in place prior to responding to a COA, the firm would be in violation of Exchange rules from the moment it routes a response to a COA. Since Simplex did not satisfy these requirements, AACC was required to implement controls. " (Decision at 11)

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[43] Statements of Charges, ¶¶ 7-9, 13. (FINRA 183-86 and 187-90)

[44] With the exception of the different time periods cited by the CBOE and C2, both Wells letters contained the same allegations.

However, the Board never explains how AACC would be capable of ascertaining that Simplex "did not have the proper appointments in place." The Board never explains how a market access provider such as AACC could have monitored the current and ever-changing market maker appointments (or lack thereof) of its customers, including Simplex. We will never know, and for a very simple reason. Although it was required to conduct a *de novo* review of the entire record, the Board completely ignored the undisputed evidence that it is impossible for market access providers such as AACC to ascertain or monitor market maker appointments.

The *undisputed* evidence is that AACC cannot access the Exchange market maker portal which records, reflects and updates market maker appointments for Exchange products.[45] Only market makers can access the portal, and they can add to or remove their market maker appointments on a daily basis without prior notice.[46] It is impossible for a clearing firm or market access provider such as AACC to monitor those appointments as they change from day to day.[47] Exchange staff admitted that they "had no idea" how a market access provider can obtain information reflecting current (or even historical) market maker appointments.[48] Regulation could not rebut this undisputed evidence, and did not even try.[49]

It is truly remarkable that, in its Decision, the Board deliberately ignored the undisputed fact that it was technologically impossible for AACC or other market access providers to ascertain or monitor market maker appointments. The Board's unwillingness to address these undisputed facts is especially troubling, given that AACC's purported failure to "assure" that Simplex held the necessary market maker appointments for the Proprietary Products is a specific act upon which

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[45] (FINRA 1655-56)
[46] (FINRA 1655-58)
[47] (FINRA 1656-58)
[48] (FINRA 1657)
[49] (BCC Decision at 16, n. 98) (FINRA 1912 n. 98)

the Charges were based. By asserting that AACC failed in its responsibility to "assure" that Simplex held the necessary market maker appointments for Proprietary Products and, at the same time, disregarding the undisputed impossibility of doing so, the Board was improperly ignoring, rejecting and/or contesting an undisputed fact which is essential to the defense of the Charges were based.

AACC wishes to stress that, when Simplex was being on-boarded, AACC did, in fact, inquire as to Simplex's history, intentions and trading strategies. AACC was not offering market maker services to Simplex, and Simplex gave no indication that it had any intention of becoming an Exchange market maker (which is a prerequisite for the use of COAs for Proprietary Products). In light of its inability to access the Exchange's market maker portal, AACC did what any reasonable clearing or sponsoring firm would do in order to confirm the customer's intentions as to market making: it asked Simplex, the customer. Since AACC had no access to the Exchange market maker portal, this is the only way that AACC could ascertain whether a customer intends to become a market maker and engage in market maker activity.

From a regulatory perspective, Regulation has compounded the problem created by the inaccessibility of the market maker portal by making the unprecedented allegation that, as a matter of law, the Rule does not permit AACC to rely upon any of Simplex's representations regarding its business model and trading strategy in establishing risk controls for Simplex's sponsored access.[50] To the contrary, Regulation has argued, and the Board has agreed, that AACC was required to *independently* assure that Simplex possessed all necessary, up -to-date market maker appointments.[51] Indisputably, however, this was impossible for AACC and every other market

[50] (FINRA 2171-72) (Exchange: "a broker-dealer cannot safely reply upon customers to be forthcoming" and thus "AACC's lack of knowledge about Simplex's intentions and activities cannot be an excuse.")

[51] Statement of Charges, ¶¶ 7-9, 13. (FINRA 183-86 and 187-90) In every dictionary, "assure" means to "ensure" or "guarantee."

access provider, because they cannot access that information, which can and does change on a daily basis.

If AACC cannot access the market maker portal and cannot rely upon customer representations, how can the Board expect AACC to obtain information as to its customers' market maker appointments and thus "assure" that the customers hold the necessary appointments? We do not know because the Board has deliberately ignored the entire issue and all related undisputed facts. This cannot constitute a proper *de novo* review, and warrants reversal.

E. The Market Access Rule Does Not Require Implementation of Impossible Pre-Order Entry Risk Controls

The Board relies upon the Adopting Release as support for its conclusion that AACC was obligated to prevent the entry of COA messages by Simplex:

> "The SEC states in the Adopting Release that regulatory requirements that must be satisfied on a pre-trade basis are those requirements that can effectively be complied with only before an order is routed . . ." (Decision at 11)

The Board insists that this language requires AACC and other market access providers to implement a pre-order entry risk control to block COA messaging regardless of the impossibility of doing so.[52] However, the Board ignores the SEC's own limiting principle to the effect that a pre-order entry risk control is required only if it "can effectively be complied with . . ." Regulation's subject matter expert, Jessica Kelly, confirmed this limiting principle and testified that a market access provider must implement a risk control only "if they can do so on a pre-order entry basis." Ms. Kelly was not alone: all of the Exchange's witnesses admitted what common

[52] The Board has ruled that, if the required risk control is impossible to implement, as AACC has demonstrated, then AACC should either prohibit the entry of complex orders or discontinue providing market access.

sense dictates: that the Rule does not require the impossible.[53] The Board ignored all of this testimony.

The Exchange witnesses' admissions are perfectly consistent with judicial precedent. The Supreme Court has uniformly rejected any literal interpretation of a statute or regulation's wording if it leads to absurd or irrational results. *See In re Trans Alaska Pipeline Cases*, 436 U.S. 631, 643 (1978). As a matter of law, it must always be presumed that regulators do not require the impossible, and regulations should not be construed to require the impossible. *See, e.g., Brady v. City of Denver*, 508 P.2d 1254, 1256 (1973); *Midland Psychiatric Associates, Inc. v. U.S.*, 145 F.3d 1000 (W.D. MO. 1997).

It is undisputed that it is impossible to detect, monitor or block COA messaging. Since the law does not allow the Rule to be construed as requiring the impossible, there is no basis in the law for the Board's ruling. And because the Exchange witnesses themselves have disavowed any such interpretation, there was no basis in the evidentiary record for the Board to rule otherwise.

1. Regulation Demonstrated Ignorance Of The Key Technology

The BCC found that Regulation's investigators "knew little about the relevant technology ... and took no steps to learn."[54] The Exchange witnesses admitted that they had no technology expertise but failed to consult any of the Exchange technology staff at any time.[55]

Throughout the presentation of its case-in-chief, proceeding in complete ignorance, Regulation repeatedly insisted that AACC should have implemented a "COA block" on the FIN system so as to prevent Simplex from improperly responding to COA auctions. Under cross-examination, the Exchange witnesses, however, admitted that they were unaware that COA

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[53] (FINRA 1158-59, 1210, 13540)
[54] (BCC Decision at 15-16) (FINRA 1911-12)
[55] (FINRA 1159-1162, 1163, 1297-98, 1360-62)

messaging is impossible to detect, monitor or block COA messaging.[56] All of this is undisputed. Regulation's ignorance drew a stern rebuke from the BCC.[57]

In sharp contrast, AACC presented multiple witnesses with extensive technology expertise who provided thorough and unrebutted testimony that it is impossible to implement a pre-order entry risk control to prevent improper COA responses. All of AACC's evidence as to the impossibility of the risk control in question, set forth in detail below, is undisputed. Neither Regulation nor the Board can contest or reject these undisputed facts.

2. It Is Undisputed That The Risk Control In Question Is Impossible

It is undisputed that it is impossible for any market access provider such as AACC to observe or detect Exchange auction messaging, including the COA messages exchanged between the Exchange and Simplex.[58] There is no commercially available order entry or risk management system anywhere in the United States which would allow a clearing firm or other market access provider to detect, monitor or block any type of auction message.[59] Though Regulation was ignorant of these facts during its case presentation, it never attempted to rebut them.[60]

Further, even if auction messaging could be observed (and it could not), the Exchange FIX protocol made it impossible to identify a COA auction message.[61] The COA mechanism required participants to communicate by means of messages that use key value pairs which includes a tag and a denotation of the value of that tag.[62] In the CBOE FIX Protocol Specifications Volume 3B

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[56] (FINRA 1162-63, 1297, 1362)
[57] (BCC Decision at 15-16) (FINRA 1911-12)
[58] (FINRA 1611-12)
[59] (FINRA 1611-12, 1616, 1629, 1651-1654)
[60] Exchange witness Stephanie Marrin, who has no technology expertise but gave final approval for this enforcement proceeding, testified that AACC had a "responsibility to see any and all messages" and should have been "visibly monitoring" messages sent by Simplex to the Exchange. (FINRA 1341, 1360) Without question, Ms. Marrin was completely unaware that it was impossible for AACC to "see" or "monitor" the auction messages from Simplex to the Exchange.
[61] (FINRA 1631-32)
[62] (FINRA 1602)

("Volume 3B") (AACC Exhibit 40)[63], the CBOE provides a dictionary which identifies and defines the full universe of tags and tag values for all types of auction messages.[64] In the CBOE FIX Protocol Specifications, the full universe of auction message tags denote HAL, SAL or AIM auctions; there is no reference to COA messaging, COA tags or COA values.[65] All the foregoing facts are undisputed.

Significantly, Simplex was allowed to use HAL auctions, and did so.[66] Impermissible COA auction messages were indistinguishable from permissible HAL auction messages.[67] Therefore, if AACC was able to observe Simplex auction messages, it would have had no reason to believe the messages were related to anything other than permissible HAL auctions. These facts are completely undisputed.

3. It Is Impossible To Block COA Messages

Furthermore, it is impossible for AACC or any other market access provider to prevent impermissible COA orders or messages by blocking any *portion* of the market data and message feed from the Exchange - for example, all COA messages or all auction messages generally.[68] To the contrary, Exchange auction messaging and market data is an "all or nothing" proposition; that is, a firm must accept all Exchange messaging and market data, or none at all.[69] There is no option in between. This was explicitly confirmed by the Exchange technical staff.[70] Indeed, Exchange staff admitted that even the Exchange itself cannot block individual messages or market data traffic.[71] This testimony was unrebutted and undisputed at the Hearing.

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[63] (FINRA 677-764)
[64] (FINRA 1602-04)
[65] (FINRA 1604, 1617-22)
[66] (FINRA 1619)
[67] (BCC Decision at 13-15)(FINRA 1619, 1909-11)
[68] (FINRA 1631-34)
[69] (FINRA 1631-34, 1652-54)
[70] (FINRA 1650-54)
[71] (FINRA 1653-54)

By insisting that AACC is required to block improper COA messaging, Regulation has effectively argued that AACC must block absolutely *all* auction message and market data traffic between the Exchange and Simplex (since individual COA messages cannot be blocked). In other words, Regulation's draconian solution to the problem created largely by the Exchange's technology is to simply cut off Simplex and similar customers from *all* market data or from market access generally in order to guard against the possibility, however remote, that even a single improper COA message might possibly get through. This does not constitute a "reasonably designed" system of controls.

4. It Is Impossible To Conduct Post-Trade Surveillance To Detect COAs

Post-trade surveillance is an essential element of a reasonably designed risk management program. Section (c)(2)(iv) of the Rule states that a firm must implement "risk management controls and supervisory procedures" that are "reasonably designed" to "assure that appropriate surveillance personnel receive immediate post-trade execution reports that result from market access." If a market access provider does, in fact, have the ability to prevent improper COA responses, then it is reasonable to expect that it should conduct post-trade surveillance to assure that no improper COA trades were, in fact, executed by its customer(s).

However, it is impossible to detect COA auction activity through post-trade surveillance.[72] It is undisputed that, when the Exchanges and OCC issue trade reports to AACC and other firms, they do not include tags which would indicate that a trade was either (a) part of a complex order or (b) executed via a COA auction mechanism.[73] As a result, the BCC found that it is impossible to detect the utilization of COA auctions through post-trade surveillance.[74]

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[72] (FINRA 1371-72, 1644)

[73] Exchange witness Stephanie Marrin, who recommended that charges be brought against AACC, was entirely unaware that it is impossible to conduct post-trade surveillance for COAs. (FINRA 1354-55)

[74] (Decision at 12-14)(FINRA 1908-10)

As it did on a number of other critical issues, the Board deliberately ignored the surveillance issue entirely, and ignored the undisputed fact that post-trade surveillance of COA activity is impossible. To say the least, it is incongruous that the Board has ruled that AACC and other market access providers must prevent improper COA responses even though it is undisputed that market access providers have no way of surveilling so as to ensure that improper COA trades are, in fact, being prevented.

Taken together, the Board has ignored the impossibility of (a) ascertaining or monitoring market maker appointments, (b) observing or blocking COA messages and (c) surveilling for improper COA executions. It is difficult to imagine three facts more "inconvenient" to the prosecution, or more critical to the defense, of the Charges, yet the Board has completely ignored them. A proper *de novo* review requires the Board to review the entire record, but the Board has ignored critical undisputed facts that eviscerate the viability of the Charges. This cannot constitute a proper *de novo* review, and these facts warrant reversal.

5. If The Exchange's Unprecedented Interpretation Is Accepted, All Firms Providing Market Access Have Violated The Rule For The Same Reason: Technological Impossibility

The Rule prescribes risk management requirements that apply to every broker-dealer that acts as a market access provider, and that impact every customer with market access[75] The Board's interpretation of the Rule, if upheld, will serve as precedent for other cases involving the application of the Rule. Accordingly, it is fitting that the Commission should consider the broader implications of the Decision.

According to the Board, AACC had the duty either (a) to implement a pre-order entry risk control to prevent Simplex's improper COA responses (which cannot be done without blocking

[75] (FINRA 1206, 1331)

all market data) or (b) to completely prevent the entry of any complex orders of any kind (in the case of AACC, by using its AMG system that does not support complex orders). In these respects, the Board's ruling applies to every firm providing market access to the Exchange and every non-market maker customer with market access. At the risk of stating the obvious, AACC is not the only firm providing market access to the Exchange and Simplex is not the only non-market maker customer trading complex orders at the Exchange. Consequently, if the Commission accepts the Board's unprecedented application of the Rule, all firms providing market access to the Exchange for non-market maker customers have violated, or will violate, the Rule for the same reasons that AACC has supposedly violated it: the sheer technological impossibility of ascertaining market maker appointments, preventing improper COA responses on a pre-order entry basis and surveilling for improper COA responses on a past-trade basis.[76]

This conclusion flows ineluctably from the undisputed fact that, in every relevant respect, the Board's novel interpretation is in direct conflict with the technological reality at the Exchange. For example, the Charges allege that AACC should have "assured" that Simplex hold the necessary market maker appointments prior to allowing Simplex to respond to COAs for Proprietary Products. In truth, however, market access providers are unable to access market maker appointment information from the Exchange portal.[77] The Charges also allege that AACC was required, on a pre-order entry basis, to prevent Simplex from improperly responding to COA messages, but as a matter of fact it is impossible for clearing firms to detect COAs or to block COAs or other auction messages without terminating all market data. Regulation witnesses testified that AACC should conduct post-trade surveillance for improper COA trades, but as a

[76] However, no market access provider other than AACC has been prosecuted by the Exchange for doing so.

[77] And, according to the Exchange, clearing firms cannot rely on their customers' representations as to their current market maker appointments. (FINRA 2171-72).

matter of fact, Exchange and OCC trade reporting makes it impossible to identify trades as part of a complex order or a COA. The foregoing facts are equally true for all market access providers and their non-market maker customers.

Regulation was ignorant of all the foregoing undisputed facts when presenting its case-in-chief. On appeal, Regulation has attempted to resurrect its case by arguing that AACC, for all intents and purposes, could have prevented improper COA messaging simply by precluding Simplex from entering any complex orders of any kind. The Board notes that, since AACC's AMG system did not support complex orders, AACC could and should have accomplished this goal by requiring Simplex to use the AMG system rather than the FIN system. However, this standard would have to apply to all other Exchange market access providers and their non-market maker customers because they are equally subject to the Rule, as interpreted by the Board, and are equally confronted with the same technological barriers as AACC.

Therefore, if the Decision is upheld as binding precedent, *every* Exchange market access provider would have to prevent the entry of any complex orders by non-market maker customers, or in the alternative, discontinue providing Exchange market access for non-market maker customers due to the impossibility of implementing any of the disputed risk controls. And to take it one step further, every Exchange market access provider who has been allowing non-market maker customers to place complex orders at the Exchange, has been in violation of the Rule. Since every market access provider is subject to the same Rule and hobbled by the same technological limitations, this is the ineluctable consequence of the Board's ruling.

6. The Board's Finding That The Disputed Risk Control Is "Not Impossible" Is Both Procedurally And Substantively Improper

The Board rejected the BCC's finding that it was impossible to implement a pre-order entry COA block, but in doing so the Board improperly dodged or rejected facts that were undisputed at

the Hearing and accepted new arguments on appeal without supporting evidence. The Board found that the prevention of COA messaging was "not impossible" because (a) AACC could and should have used its AMG system and thereby prevented the entry of complex orders entirely, (b) AACC should have "reached out" to the Exchange for a solution, or, in the alternative, (c) AACC could have discontinued providing market access. (Decision at 13-14) AACC will address these rulings in order.

At the outset, however, AACC is compelled to address the procedural violations committed by the Board in entering this ruling. The Exchange Act of 1934, 15 U.S.C. §78f(d), requires the Exchange to make "specific charges" and Exchange Rule 17.4(b) requires the Statement of Charges to "specify the facts" upon which these specific charges are based. The Charges and the Exchange's case-in-chief were based on two very specific facts: (a) AACC's failure to "assure" that Simplex held market maker appointments for the Proprietary Products prior to Simplex's use of COAs for those Products and (b) AACC's failure to implement a *pre-order entry risk control* to prevent Simplex from improperly responding to COAs for Proprietary Products. In its defense case-in-chief, AACC presented undisputed evidence that it is impossible for Exchange market access providers to monitor market maker appointments or to implement the disputed pre-order entry risk control.

The Board ignored all of these undisputed facts. Without discussing the actual evidence of impossibility of the disputed pre-order entry risk control, the Board found that "it was not impossible to implement a control." Specifically, the Board ruled:

> Contrary to AACC's arguments and the BCC's findings, the Board finds that it was not impossible to implement a control to ensure compliance with Exchange COA rules . . . AACC could have provided Simplex with market access using a risk management system that did not support auction activity, thereby preventing COA responses. Indeed, AACC's proprietary risk management

> system, AMG, which AACC used for its other direct market access clients, does not support any auction activity and would thus "effectively block" responses to COAs. AACC could also have reached out to the Exchange to determine a way to prevent Simplex from responding to COAs. Finally, AACC could have discontinued the Sponsored User business. . . (Decision at 13-14)

In rendering this ruling, the Board accepted Regulation's appeal arguments chapter and verse. In accepting Regulation's appeal arguments, however, the Board improperly allowed Regulation to level new allegations and to specify new violative acts that were not set forth in the Charges, and to make new arguments for the first time on appeal, without supporting evidence in the evidentiary record. AACC will address in order the Board's three grounds for rejecting the BCC's findings of impossibility.

(i.) The Board's Finding That AACC Should Have Used The AMG System For Simplex Are Erroneous and Procedurally Improper

On this appeal, in belated recognition that it is impossible to implement the disputed pre-order entry risk control (i.e., COA block), Regulation levelled a new argument that has nothing to do with implementing a *pre-order entry* risk control for COA responses. Instead, on appeal Regulation argued, and the Board agreed, that AACC violated the Rule by allowing Simplex to enter any complex orders of any kind for any product. More specifically, Regulation argued, and the Board agreed, that AACC violated the Rule by failing to require Simplex to access the market via its proprietary AMG system, which did not support complex orders of any kind.[78]

As a threshold matter, it is worth noting that the Board carefully word-smithed its ruling by referring to the use of the AMG system, not as a "risk control" within the meaning of the Rule, but rather as some sort of generic "control." Accordingly, it is unclear whether the Board is in fact ruling that the use of the AMG system and the preclusion of all complex orders is actually a

[78] (Decision at 13-14)

"risk control" as required by the Rule, or some other type of "control" required by some other, unidentified rule or regulation.

Moreover, in its ruling the Board made two critical factual errors. First, the Board erroneously stated that the AMG system "does not support auction activity." This is incorrect. Rather, the AMG system does not support complex order activity. This is important because complex orders can be executed without using an auction mechanism. Therefore, if a customer uses the AMG system, he cannot enter any complex orders of any kind in any product or market, whether by means of an auction or otherwise. The Board committed an additional error by stating that AACC uses AMG for its "*other* direct market access ["DMA"] clients," thereby suggesting that Simplex was a DMA client (emphasis added). This is incorrect, as will be explained below.

The AMG system was used exclusively for direct market access ("DMA") customers and, as stated above, did not support complex orders of any kind. According to the Board, this would have obviated the COA problem by rendering complex orders, and thus COAs, irrelevant.[79] In effect, the Board concluded that AACC should not have allowed Simplex or other non-market maker customers having market access to place any type of complex order (due to the impossibility of blocking potentially illicit COA messaging on a pre-order entry basis). These new assertions are improper, baseless and unfair for a number of reasons.

First, the Exchange never charged AACC with improperly allowing Simplex to place any type of complex orders. At the Hearing, moreover, the BCC Panel specifically ruled that Exchange witnesses were not allowed to speculate as to the suitability of the *AMG* system for Simplex's trading activity on the ground that it was "irrelevant" to the Charges, *i.e.,* the alleged failure to

[79] (Decision at 13)

implement a COA block on the *FIN* system.[80] The BCC Panel was correct, since AACC never had an opportunity to prepare for and defend against that charge at the Hearing.

Second, the Board's AMG-related ruling is without evidentiary basis. Regulation bore the burden of proving more than the simple fact that the AMG system did not support complex orders. Rather, Regulation was required to prove that the AMG system was actually viable for use by Simplex in the first place. This is a critical issue because it was undisputed that the AMG system was used exclusively for AACC's DMA customers,[81] and that the DMA order flow and business model is "completely different"[82] from that of a sponsored user such as Simplex, which is a high-frequency, latency-sensitive type of customer. Both Regulation and the Board have *assumed* that AMG was a viable platform for Simplex, but Regulation never investigated that question or introduced any evidence to that effect. Further, the Chair barred Ms. Kelly from speculating as to the basis for AACC's decision *not* to use AMG for Simplex, reasoning that such testimony was "irrelevant."[83] In any event, Ms. Kelly was forced to concede that she did not know the reason why the AMG system was not used for Simplex, and so any further testimony on that topic by Ms. Kelly would have been mere guesswork.[84] There is simply no evidence in the record regarding the viability of the AMG system for Simplex. Therefore, the Board has no factual basis whatsoever for concluding the AACC could, much less should, have used the AMG system for Simplex.[85]

Finally, the entire premise of the Board's conclusion is baseless. The Board has effectively ruled that, due to the impossibility of blocking or surveilling for potentially improper COA

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[80] (FINRA 1225-28)
[81] (FINRA 1464-75)
[82] (FINRA 1478, 1114-15, 1171, 1206)
[83] (FINRA 1225-28)
[84] (FINRA 1224-25)
[85] It is true that Simplex's desire to trade complex orders rendered the AMG system an undesirable option from the outset. However, that does not mean that AMG was a viable platform for Simplex in any other respect. Regulation never offered evidence to this effect and the Board cannot assume it.

responses, all firms providing Exchange market access (like AACC) should require their non-Exchange market maker customers with market access (like Simplex and similarly situated customers) to use systems like AMG, which do not support complex orders of any kind. Put simply, this means that, due to the impossibility of a COA block, complex orders must be banned for all non-market maker customers having market access, according to the Board. Neither the Exchange nor the SEC has ever issued a regulatory interpretation that would have put the marketplace on notice of such a radical restriction.

ii. The Board Incorrectly Ruled That AACC Could Have Implemented A Proper Risk Control By "Reaching Out To The Exchange"

In casting about for reasons to find AACC liable, Regulation argued for the first time on appeal that AACC should have "reached out" to the Exchange staff to determine a way to prevent Simplex from responding to COAs.[86] As a threshold matter, there is no "reaching out" requirement in the Rule and neither Regulation nor the Board have cited to any such requirement. In addition, the Charges make no "reaching out" allegation. If the Charges had included a "reaching out" allegation, AACC witnesses could have provided ample testimony of AACC's numerous, unsuccessful attempts to gain clarity or assistance from the Exchange staff with regard to market maker appointments, COA blocks and the like. However, AACC never had a reason to present all its available evidence to this effect because Regulation never made the "reaching out" allegation or argument in the first place – at least, not until the appeal.

Moreover, the Board incorrectly refers to "reaching out" as a way for AACC "to implement a control to ensure compliance with Exchange COA rules." The Board specifically found that AACC could have "reached out to the Exchange to determine a way to prevent Simplex from responding to COAs." (Decision at 13) But "reaching out" is not a risk control or a control in any

[86] (FINRA 1353-54)

sense; rather, it is merely an attempt to discover whether a theoretical control might possibly be devised.

In this respect, the Board's reasoning is fallacious. AACC presented *undisputed* evidence that the disputed pre-order entry risk control is literally impossible. By contrast, Regulation did not present an iota of evidence at the Hearing suggesting that they had the slightest idea of how to prevent Simplex from responding to COAs on a pre-order entry basis. Therefore, "reaching out" could not have rendered possible the impossible, and there is not a shred of evidence to the contrary.[87] Accordingly, there was zero factual basis for the Board's finding. There is also no legal basis for the ruling: the law does not require meaningless acts, idle gestures or exercises in futility. *Telemark Dev. Grp., Inc. v. Mengelt*, 313 F.3d 972 (7th Circ. 2002).

Finally, AACC's witnesses testified that they were in regular contact with regulators with respect to compliance with the Rule, and were given no indication that the Exchange required a COA block in the first place.[88] AACC's Al Spera did, in fact, reach out to the Exchange seeking guidance on these issues, and was told that there was no solution. Indeed, the Exchange confirmed "there is no way" for AACC to block COA or other auction messages and they "had no idea" how AACC could monitor market maker appointments.[89]

The "reaching out" that should have been a focus of the Board, but rather, was brushed aside by the Board, involved the Exchange's ex parte solicitation of Simplex to participate in COA's. More specifically, AACC presented unrebutted evidence that Cboe representatives solicited and encouraged Simplex to trade COAs. And once again the Exchange has improperly

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[87] By contending that AACC should have "reached out" to determine a way to block impermissible COA responses, Regulation and the Board itself implicitly challenge the undisputed fact that the COA block is impossible. This is an improper, "backdoor" effort to challenge, without any basis in the record, the *undisputed* fact that the COA block was impossible to implement.

[88] (FINRA 1447, 1451-52, 1454-55)

[89] (FINRA 1652-54) Although this conversation took place in 2015, there is not a shred of evidence that the Exchange staff's answer would have been different in 2013 – quite to the contrary.

"spun" or ignored critical undisputed facts. Ms. Tyrichtrova provided unrebutted testimony regarding the Cboe's solicitation:

> [Simplex was] approached by Cboe people with this new business opportunity that now the COA responses will not be limited to the market makers and this could be new business for both Simplex and obviously the Exchange.
>
> No one informed AACC of this solicitation.

Simplex's impermissible COA use began immediately after receiving this COA log-in capability on January 10, 2013. In thanking the Exchange staff, Simplex affirmed that "I hope to be interacting with Cboe COA on a very regular basis going forward." And so they did.

Significantly, the Exchange never called any witnesses to rebut Ms. Tyrichtrova's testimony, or to explain why Exchange staff provided Simplex with unrestricted COA log-in capability or failed to notify AACC, Simplex's sponsoring member, of this fact. Simplex was only persuaded to depart from its original trading strategy and use COAs for Proprietary Products because of the Exchange's misguided marketing and undisclosed furnishing of COA log-in capability, not because AACC's on-boarding process and risk control system failed to reasonably anticipate Simplex's plans.

iii. The Board Erred In Deciding That The Rule Required AACC To Cease Providing Sponsored Access

In rejecting the BCC's finding that the disputed pre-order entry risk control (i.e., the COA block) was impossible, the Board ruled that "it was not impossible for AACC to implement a control to ensure compliance with Exchange COA rules." And the third so-called "control" that the Board described was: the discontinuance of Simplex's sponsored access business.

AACC was never charged with wrongfully allowing Simplex to have sponsored access in the first place, and never had an opportunity to defend that charge. Nevertheless, on appeal, Regulation argued, and the Board agreed, that AACC's real fault lies in the fact that, if it could not

preclude Simplex from entering any complex orders and could not "reach out" to the Exchange for a solution, then AACC should not have provided sponsored access at all. This is a new allegation on appeal, and as such is procedurally improper for the reasons set forth above. However, there are also substantive reasons why this argument must fail on *de novo* review.

First, there is no factual or legal support for this argument in the evidentiary record, in Regulation's briefing or in the Decision. The Board did not cite a single rule, interpretation or circular that provided notification that (a) the Rule requires implementation of pre-order entry risk controls for all regulatory requirements regardless of impossibility, and that (b) if it turns out that a specific pre-order entry risk control is, in fact, impossible to implement, then the sponsoring firm must cease providing market access entirely. On direct examination, Ms. Kelly, the Exchange's subject matter expert on the Rule, was asked to opine whether, in these circumstances, AACC should have ceased providing sponsored access. Ms. Kelly could only conjecture that "If a control's not possible, I would *question* whether that business should be conducted. . ." and "*perhaps* ABN should not have done this business . . ."[90] Ms. Kelly was obviously unsure of the Rule's requirements and Exchange policy in these unique circumstances.

Second, a total discontinuance of sponsored access is outside the scope of the Rule. The Rule requires the implementation of a "reasonably designed" system of risk controls and prescribes the required categories of risk controls.[91] The Board ruled that, although the COA block was impossible, a so-called "control" was nevertheless available to AACC in the guise of the discontinuance of its sponsored access business. However, the discontinuation of sponsored

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[90] (FINRA 1236, 1299-1300) (emphasis is added)

[91] AACC had implemented a system of controls reasonably designed to prevent market access violations during all time periods relevant to this matter. AACC's Rule procedures had been examined numerous times by the Cboe since the time the Rule was enacted (including during the time period from the end of 2012 through early 2013) and AACC was never advised by the Cboe nor made aware of any material deficiencies in its procedures. (FINRA) AACC takes this to mean that its procedures, as viewed by the Cboe, were, in fact, reasonably designed to meet the requirements of the Rule.

access is not a "risk control" as described by the Rule - in fact, it is not even a "control."[92] The Board cannot sanction AACC with failing to discontinue sponsored access as though the termination of the sponsored access business is a "risk control" required by the Rule. The Rule simply does not prescribe complete termination of market access in the event a risk control is impossible for any market access provider to implement.[93]

Third, the Board's ruling leads to absurd results. Once again, the Board's ruling will not be limited to AACC, or to Simplex, or to sponsored access. Rather, the Board's ruling will serve as precedent for all market access providers and their non-market maker customers with Exchange market access. At the risk of repetition, the undisputed facts are that it is impossible for *any* market access provider to detect, block or surveil COAs, or to know if its customers have maintained the Exchange market maker appointments necessary to use COAs for Proprietary Products. Therefore, the Board's ruling, if upheld, serves as precedent for the proposition that, since the Rule requires a pre-order entry risk control to prevent improper COA responses, and since a COA block is technologically impossible for *any* market access provider to implement for *any* non-market maker customer, then every market access provider at the Exchange must (a) cease allowing any complex orders for non-market maker customers or (b) discontinue providing marker access to all non-market maker customers because they might improperly respond to COAs, however remote the possibility. This is absurd.

Finally, Cboe Rule 6.20A, and its related rule filings and releases, endorse sponsored access as beneficial to market depth and liquidity and consistent with every pertinent securities statute and regulation. The CBOE has endorsed and marketed sponsored access for years. But if

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[92] Furthermore, it is disingenuous to use the word "control" to suggest that the discontinuance of sponsored access is a type of "risk control" as enumerated in, or contemplated by, the Rule.

[93] This is not surprising since the Rule cannot be interpreted as requiring the impossible.

the Commission accepts the Board's argument, then every sponsoring firm was required to discontinue sponsored access for non-market maker customers.[94] (Since every firm was equally incapable of complying with the Exchange's novel interpretation). The Board should reject the Exchange's novel interpretation of the Rule because it brings the Rule into direct conflict with, and materially undermines, Cboe Rule 6.20A. *U.S. v. Gordon*, 961 F.3d 426 (3d Cir. 1992) (do not interpret one law so as to effectively nullify another). This is especially true here, where the SEC expressly approved of sponsored access as set forth in Rule 6.20A.

V. DUE PROCESS AND PROCEDURAL ARGUMENTS

A. The Exchange Violated Regulatory Due Process

Faced with undisputed evidence that the disputed COA block is impossible, the Board ruled that (a) AACC should have precluded Simplex from entering complex orders by allowing Simplex to access the market only through the AMG system (which does not support complex orders), or, in the alternative, (b) AACC should not have provided sponsor access at all. The Commission will search in vain for any regulatory notice that supports these findings.

SEC and Exchange regulatory filings and interpretive releases have never provided guidance to broker-dealers faced with a situation where a hypothetical pre-order entry risk control (such as a COA block) is *not* required by Exchange rules themselves *and* is *impossible* for any firm to implement for any customer. On a more specific level, neither the SEC nor the Exchange ever gave notice that the Rule requires firms providing market access (a) to constantly monitor market maker appointments even though the Exchange market maker portal renders that impossible, (b) to implement a pre-order entry COA block even though it is impossible or, in the

[94] By definition, sponsored access does not apply to Exchange market makers. The only customers who might improperly use COAs for Proprietary Products are non-Exchange market makers, and they are likely sponsored users.

alternative, (c) to prevent customers from entering complex orders or cease providing market access entirely.

Due process requires regulators to provide fair warning of what constitutes prohibited conduct, and a vague rule denies due process by imposing standards so indeterminate that it is impossible to ascertain what will result in sanctions. *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006); *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993). A party has fair notice only if the regulator's public statements allow the firm to determine with "ascertainable certainty" the standards to which the regulator expects the party to conform. *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). This principle is consistent with a long line of cases recognizing that, in an enforcement proceeding, "a regulation cannot be construed to mean what an agency intended but did not adequately express" because "statutes and regulations which allow monetary penalties against those who violate them . . . must give an [accused] ... fair warning of the conduct [they] ... prohibit[ ] or require[ ]." *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156-57 (D.C. Cir. 1986) (Scalia, J.) (citations omitted).

AACC's witnesses testified that they had received no notice from the Exchange of the Rule interpretation it is advocating in this proceeding.[95] The utter lack of any published notice addressing the standard of conduct required of market access providers in the event that a COA block proves to be impossible, should not be surprising. Throughout their case-in-chief, Regulation clearly assumed that a COA block was, in fact, feasible.[96]

Certainly, there is no evidentiary basis to support the conclusion that AACC was given "fair warning" and "ascertainable certainty" regarding the proper course of action for AACC in light of the impossibility of monitoring market maker appointments and implementing a pre-order

[95] (FINRA 1447, 1451-52, 1454-55)
[96] (BCC Decision at 15-16) (FINRA 1911-12)

entry COA block. Common sense and legal precedent would dictate that, if any hypothetical risk control is impossible from every perspective, then it is not required, and the Exchange witnesses admitted as much. In this case, where the disputed risk control, unbeknownst to Regulation, was impossible and where Regulation's witnesses admitted that a Rule violation cannot be premised on failure to implement an impossible control, it strains credulity to believe that AACC was ever given "ascertainable certainty" as to the course of action that the Board now mandates.

B. The Exchange Violated AACC's Procedural Rights

It is a bedrock principle that a respondent in a BCC proceeding is entitled to a fair procedure and must be put on reasonable notice of the charges against it so that it has an adequate opportunity to prepare its defense. For this reason, Cboe Rule 17.4(b) requires that a statement of charges "set forth the provisions" of rules or regulations which the respondent has violated, and "specify the acts" by which the respondent has violated them.[97]

The Charges alleged very specific acts which formed the basis of the alleged Rule violation: (a) that AACC failed, on a pre-order entry basis, to "assure" that Simplex "held appointments" in the Proprietary Products prior to responding to COA auctions for those Products, and (b) that AACC failed to implement a pre-order entry risk control that prevented improper COA responses by Simplex.[98] During its case-in-chief, Regulation was completely unaware that it is impossible for AACC (and other firms providing market access) to monitor market maker appointments and implement a pre-order entry COA block. Regulations simply presumed that these factual allegations were feasible and never presented any evidence to demonstrate the feasibility of the disputed controls. Regulation's case-in-chief, was built on false assumptions and a sloppy investigation.

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[97] *See also* 15 U.S.C. §78f(d) (requiring "specific charges" and "opportunity to defend").

[98] Statement of Charges ¶¶ 6 and 13. (FINRA)

In sharp contrast, during its defense case-in-chief, AACC presented undisputed evidence that it was impossible for AACC to monitor market maker appointments, to monitor or block COA messaging or to conduct post-trade surveillance for COA activity. Regulation never presented a single rebuttal witness.

On appeal, Regulation has pivoted from its original, unsupportable Charges and effectively substituted new charges against AACC. Regulation now alleges that, in light of the impossibility of the COA block, AACC (a) should never have allowed Simplex to enter any complex orders (by requiring it to use the AMG system) or, alternatively, (b) should never have engaged in the sponsored access business in the first place. The Board improperly accepted these assertions even though they were not set forth in the Charges and were made for the first time on appeal. To make matters worse, the Board deliberately ignored the original fact allegations set forth in the Charges that AACC should have "assured" that Simplex held the necessary market maker appointments and imposed a pre-order entry COA block. These were the allegations that AACC defended, and the undisputed evidence proved that both controls are technologically impossible.

In its Decision, the Board has attempted to circumvent this problem by mischaracterizing the issue and thereby avoiding AACC's argument:

> AACC argues that . . . Regulation has improperly shifted its theory of liability to be that AACC should have required Simplex to trade through its AMG system or never engaged in sponsored access in the first place. . . .The Board finds that Regulation has not impermissibly shifted its theory of liability, which has always been that AACC failed to establish . . . a system of risk controls that were reasonably designed to ensure compliance with all regulatory requirements that must be met on a pre-order entry basis . . . (Decision at 14-15)

AACC is not complaining of a so-called "shifting theory of liability," which AACC has never mentioned. Rather, AACC is complaining that the Exchange has violated Exchange Rule 17.4(b), which requires the Exchange to "specify the acts" which form the basis of the Charges.

In other words, AACC is complaining, not about shifting the legal theory of liability of the Charges, but about switching the factual basis of the Charges. On appeal, Regulation and the Board assiduously ignore the original facts which formed the basis of the Charges (e.g., AACC's failure to "assure" that Simplex held the necessary market maker appointments and to implement a pre-order entry COA block). Similarly, Regulation and the Board ignores the fact that the Charges never alleged, as a factual basis for the alleged Rule violation, that AACC failed to prevent Simplex from entering any complex orders by utilizing the AMG system, or to discontinue sponsored access entirely. On appeal, Regulation has substituted this new factual basis for the Charges because it is now apparent that the original factual basis for the Charges were baseless. And the Board has improperly allowed this substitution.

AACC prepared to defend the Charges on the basis of the legal and factual allegations set forth therein, and did so. Although AACC is confident it would have prevailed, it never had an opportunity to defend the allegations that it should have prohibited complex orders by using only the AMG system, or ceasing providing market access entirely. Rule 17.4(b) exists to prevent this type of unfair procedure.

C. Board Improperly Ignored Exchange Admissions That AACC Cannot Violate The Market Access Rule If The Disputed Risk Control Is Impossible

During the Hearing, every Regulation witness conceded that AACC could not have violated the Rule if the disputed pre-order entry risk control (i.e., the COA block) was, in fact, impossible to implement. These Exchange admissions eviscerate the core of the Exchange's case, and are binding upon the Exchange. *Samuels v. Hood Yacht Sys. Corp.*, 70 F.3d 150, 152-53 (1st Cir. 1995)(a party's admissions against interest is generally binding).

Stunningly, the Board has ignored these key admissions by Regulation witnesses on the most critical issue in the case. On direct examination, the Exchange's subject matter expert with

respect to the Rule, Jessica Kelly, explained that the Rule required AACC to implement a risk control *only if it was possible to do so on* a pre-order entry basis:

> "***A broker-dealer that has or provides market access must ensure compliance with regulatory requirements including federal securities laws, Exchange rules and/or federal rules *if they can do so* on a pre-order entry basis."[99]

The Exchange's other two witnesses testified to the same effect. The Exchange's lead investigator, attorney Stephen McNamee, admitted that, if a risk control is impossible, then the absence of that impossible risk control cannot mean that the firm failed to have a reasonably designed risk control system:

> Q: "Can it be that ABN AMRO did not have a reasonably designed system simply by virtue of not having a control in place that was physically and technologically impossible to have?
> A: I guess if it was impossible, then no."[100]

The Exchange's Deputy Chief Regulatory Officer, Stephanie Marrin, made the same admission:

> Q: "***[W]ould it be reasonable for the Exchange to say . . . we insist that you put in that regulatory control that is unfeasible or impossible, go do it. Is that reasonable?
> A: If it's impossible to do, I would say it's not reasonable."[101]

The Board did not afford a "fair procedure" or conduct a proper *de novo* review when its ruling ignored and contradicted Regulation's multiple admissions against interest on the central issue.

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[99] (FINRA 1210) (emphasis added).
[100] (FINRA 1158-59)
[101] (FINRA 1354)

D. The Exchange Has Sidestepped Required Rule-Making And Engaged In Selective Prosecution

For the first time on appeal, Regulation is arguing that the Rule required AACC to prohibit all complex orders by Simplex or completely discontinue sponsored access due to the impossibility of the COA block. However, this interpretation has never been published and is a radical change in the standard of conduct required of sponsoring firms and market access providers that is not fairly and reasonably implied from the language of the Rule or any Exchange rules.[102] As such, SEC Rule 19b-4 required the Exchange to submit its proposed interpretation to the SEC for approval in the form of a rule-making proposal.[103] Their failure to do so requires reversal by the Commission.

Regulation's failure to provide prior notice to the marketplace of its current Rule interpretation, coupled with its newly minted fact allegations and legal arguments, is not indicative of thoughtful policy deliberation. Rather, it suggests short-sighted litigation expediency. After losing their ill-considered enforcement proceeding and being admonished by the BCC, Regulation "pivoted" to a new allegation on appeal: that AACC should not have allowed Simplex to enter any complex orders at all due to the impossibility of blocking improper COA messages. However, all similarly situated Exchange market access providers suffer from the same technological limitations (i.e., the inability to detect or block COAs). Yet, research has failed to disclose *any* case where another firm has been charged in similar fashion by Regulation. The utter lack of published interpretive circulars and similar prosecutions confirm that Regulation's arguments on appeal are driven by sheer expediency and a win-at-all-costs approach on the part of Regulation. The Board

[102] Indeed, even Ms. Kelly, the Exchange's subject matter expert, was unsure of the proper standard of conduct in this type of circumstance. (FINRA 1236, 1299-1300)

[103] *See* Section 19(b) of the '34 Act and SEC Rule 19b-4.

should not have enabled this conduct by allowing Regulation to raise new facts and arguments for the first time on appeal.

VI. REGULATORY UNCERTAINTY REQUIRES REVERSAL OF DECISION

In this case, regulatory ignorance, uncertainty and confusion at every level requires reversal of the Board Decision. First, Regulation was completely ignorant of the key technology, unaware that a COA block was impossible to implement, and provided no guidance for this type of scenario. Second, Ms. Marrin, Exchange Deputy Chief Regulatory Officer, when asked whether the COA block (regardless of its impossibility) was required under the provisions of the Rule, equivocated, stating "not necessarily."[104] Yet throughout this proceeding, Regulation counsel has continued to insist that it "is evident from the plain language" of the Rule that the COA block is required. (Reply at 24). Obviously, Ms. Marrin disagrees with her own counsel as to how "plain" this language is. Third, all Regulation witnesses admitted that AACC could not be deemed in violation of the Rule by failing to implement an impossible risk control; nevertheless, the Regulation continues to pursue that very claim. Fourth, Regulation witnesses admitted that, under the terms of Rule 6.53, a market access provider does not have a duty to block improper COA messages, but nevertheless asserted that the Rule created such a duty.[105] This conflicts with the SEC Adopting Release, which expressly states that the Rule "does not expand" a market access provider's "underlying substantive regulatory obligations", but merely requires risk controls addressing "its existing underlying substantive regulatory requirements."[106] The Exchange has never published regulatory guidance clarifying and reconciling these apparently conflicting interpretations. Fifth, Regulation's counsel argues that, if a COA block is impossible to implement, then AACC should

[104] (FINRA 1332)
[105] (FINRA 1155-56, 1314-17)
[106] https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm

have known that it was required to discontinue sponsored access. However, Regulation's subject matter expert, Jessica Kelly, could only "question" whether that was the appropriate step, and suggested that "perhaps" that was the proper approach. Here again, Regulation's counsel cannot seem to agree with their own regulatory staff as to what was, and was not, required. Sixth, the Charges allege that AACC should have "assured" that Simplex held the necessary market maker appointments, but the undisputed evidence, confirmed by Exchange technical staff, is that it is impossible for market access providers such as AACC to access the Exchange portal that contains that information. Finally, the BCC and the Board themselves have radically disagreed on every fundamental issue in this case. The BCC rendered 16 fact findings and 12 legal conclusions in favor of AACC, while the Board either reversed or ignored the BCC on every issue. When the BCC and the Board are completely at odds and Regulation witnesses and counsel disagree amongst themselves and with AACC's highly credentialed and vastly more experienced witnesses, it is quite apparent that confusion abounds with respect to the interpretation of the Rule in this setting.

Certainly, Regulation's treatment of these issues, and the Exchange's allegations and admissions in this proceeding, are confusing, contradictory, shifting and muddled, to say the least. One cannot pretend that, prior to this proceeding, AACC and other firms were provided with "ascertainable certainty" as to Regulation's interpretation of the Rule, or the required standard of conduct, in this esoteric regulatory context. Indeed, one cannot even derive "ascertainable certainty" from Regulation's witnesses' own uncertain and conflicting testimony at the Hearing.

In light of this confusion and uncertainty, the BCC decision should be affirmed. The SEC set aside a PHLX decision based on the same reasoning:

> "We are concerned, however, that the disagreement among the witnesses testifying at the hearing, and among the Hearing Panel members, indicates that some level of uncertainty may have existed during the Relevant Period concerning the correct interpretation of

> PHLX's rules. These circumstances raise a question whether, during the Relevant Period, Applicants were properly on notice that their conduct was violative. While the proper application of PHLX rules is now clarified with the issuance of this opinion, under the circumstances of this case we believe that it is appropriate to set aside the PHLX's action."

Opinion of the Securities and Exchange Commission
In the Matter of Husky Trading LLC, et al., SEC File No. 3-13096, p. 14

In the interest of fairness and due process, given the esoteric and unprecedented regulatory issues and the evident confusion and disagreement between and among Exchange counsel, Exchange witnesses, AACC witnesses and BCC members, the Commission should reverse the Board Decision and affirm the BCC Decision.

VII. CONCLUSION

Regulation successfully misled the Board with smoke and mirrors. The Charges were never proven, and Regulation's ineptitude earned it an unprecedented scolding by the BCC. All of Regulation's current arguments and factual allegations were raised for the first time well after the Hearing, when they could not be subjected to challenge on the evidentiary record. The Board committed serious error by (a) ignoring the original facts set forth in the Charges as the basis for the Rule violation, (b) ignoring dispositive and unrebutted facts which require dismissal of the Charges, (c) ignoring the critical admissions against interest of every Regulation witness, (d) misinterpreting the Rule in a manner inconsistent with SEC guidance and standard rules of construction, (e) allowing Regulation to raise baseless new arguments and fact allegations for the first time on appeal.

What this case really boils down to is a simple matter of common sense and the basic tenets of fundamental fairness. The undisputed and unrebutted factual evidence presented at the Hearing demonstrated that: (i) the Exchange directly solicited AACC's client Simplex to participate in COAs without notifying AACC, Simplex's sponsoring member; (ii) the Exchange subsequently

enabled Simplex to participate in COAs without notifying AACC, Simplex's sponsoring member; (iii) AACC had no way to monitor market maker appointments or to surveil for COA activity; and (iv) AACC had no way to block COA activity due to the Exchange's market data feeds and messaging protocols, and not because of the systems AACC used.

Regulation would like you to believe that AACC violated the Rule when, in truth and in fact, it was not on notice about of any of the foregoing facts and impossibilities and had absolutely no way of knowing about any of it. This is not reasonable. Or Regulation would like you to believe that all Exchange market access providers should prevent their non-market maker customers from sending any complex or spread orders to the Exchange. That is not reasonable. The more believable and supportable allegation based on the facts in this case is that the Exchange itself has violated the Rule or has undermined the ability of AACC and other market access providers to comply with the Rule.

Regulation's current regulatory interpretations, described above and elsewhere in AACC's filings, are nothing more than convenient litigating positions or post hoc rationalizations offered up by the Exchange after it became apparent that the Charges were unprovable due to Regulation's mistaken assumptions and slipshod investigation. Given the ad hoc expediency that characterizes Regulation's new allegations, it is not surprising that these allegations are unsupported by the language of the Rule or any prior regulatory guidance. Nevertheless, Regulation, with the Board's acquiescence, plowed ahead with its new arguments even though its own witnesses contradicted or undercut Exchange counsel's arguments.[107]

Due to the shifting and unprecedented nature of Regulation's last-ditch appeal arguments, its ever-changing factual allegations and its conflicting testimony, it cannot be said that AACC

[107] See Sections V.C. and VI, supra.

had ascertainable certainty with respect to the Exchange's novel and draconian interpretation of the Rule or was given a fair opportunity at the Hearing to defend itself against the new allegations and charges advanced by the Exchange on this appeal.

It is even more difficult to explain the Board's one-sided handling of the appeal. The Board's unquestioning acceptance and adoption of Regulation's new arguments and allegations on appeal violates an array of procedural rules that are designed to protect respondents such as AACC. However, the Board's omission of dispositive and undisputed facts findings favorable to AACC, is much worse. One example will suffice to make the point: the Charges explicitly allege, as the key factual basis for the Charges, that AACC failed to "assure" that Simplex held the necessary market maker appointments prior to responding to COAs. Yet, at the Hearing the undisputed evidence established that it is impossible for AACC to obtain that information from the Exchange portal. Such a critical fact cannot be ignored. And yet, the Board ignored it. Depending on whether one views the Board's omission as negligent or deliberate, it raises serious questions about the competence or impartiality of the Board in conducting this *de novo* review. And this is just one example of many where the Board deliberately omitted critical undisputed facts favorable to AACC.

In light of the patent regulatory confusion and uncertainty, the lack of fair warning and due process by the Exchange, and the lack of a supporting facts and precedent for any of these charges and allegations, the Commission should reverse the Board's Decision and affirm the BCC Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen P. Bedell, an attorney, do hereby certify that on July 12, 2019, I caused a copy of the foregoing document, BRIEF IN SUPPORT OF APPLICATION FOR REVIEW FILED BY ABN AMRO CLEARING CHICAGO, LLC, to be served on the following person through email, facsimile transmission and FedEx delivery:

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A copy of the same was also filed with the Acting Secretary of the Securities and Exchange Commission.

/s/ Stephen P. Bedell