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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

ABN AMRO Clearing Chicago, LLC

For Review of Disciplinary Action Taken by

Cboe Exchange, Inc., and Cboe C2 Exchange, Inc.

Admin. Proc. No. 3-17906r

CBOE's and C2's OPPOSITION TO ABN AMRO'S APPLICATION FOR REVIEW OF EXCHANGE ACTION

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August 12, 2019

FINRA

Financial Industry Regulatory Authority

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August 12, 2019

VIA MESSENGER

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of ABN AMRO Clearing Chicago, LLC; Administrative Proceeding No. 3-17906r

Dear Mr. Fields:

Enclosed please find the original and three copies of CBOE's and C2's Opposition to ABN AMRO's Application for Review of Exchange Action in the above-captioned matter.

Please contact me at (202) 728-8255 if you have any questions.

Very truly yours,

Gary Dernelle

cc: Stephen P. Bedell, Esq.
Nancy Espinosa

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I. INRODUCTION

ABN AMRO Clearing Chicago, LLC ("AACC"), appeals a consolidated decision of the Boards of Directors (together, the "Board") of Cboe Exchange, Inc. ("Cboe"), and Cboe C2 Exchange, Inc. ("C2") (together, the "Exchange"). The Board found that AACC provided its sponsored user, Simplex Investments, LLC ("Simplex"), access to the Exchange without knowing that the market access it provided included entrée to complex order auctions ("COAs") that the Exchange's rules did not allow for Simplex because it was not a registered market maker on the Exchange. Unaware that it provided this access to Simplex, AACC failed to consider or establish any controls necessary for it to ensure that Simplex complied with the Exchange's rules concerning COAs. In short, it effectively gave Simplex unfiltered access to COAs and had no mechanism in place to control it. As a result, Simplex used this access to respond impermissibly to thousands of COAs during a several-month period in early 2013.

As the Board found, AACC's lack of controls and procedures violated Rule 15c3-5 promulgated under the Securities and Exchange Act of 1934 ("Exchange Act"), and consequently, Cboe and C2 Rules 4.2, which require that the firm adhere to the federal securities laws. Exchange Act Rule 15c3-5 places on broker-dealers a direct and exclusive obligation to establish, document, and maintain risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements, which includes the rules of the Exchange that are related to the market access they provide to customers. Exchange Act Rule 15c3-5 further requires that these controls and procedures ensure that no orders are entered unless there has been compliance with all regulatory requirements that must be satisfied on a pre-order entry basis. Here, there is no dispute; AACC did not have the controls necessary for it to comply with the foregoing obligations and responsibilities. In fact, AACC failed to design or implement any controls or procedures to ensure that Simplex complied with the Exchange's rules concerning COAs. Because of AACC's failures, and without the firm's knowledge, Simplex improperly responded to thousands of COAs, in violation of Exchange rules.

The Commission should uphold all aspects of the Board's decision. The Board's decision rests on the unambiguous, express terms of Exchange Act Rule 15c3-5, and the undisputed evidence supports it fully. There is also no doubt that the Board's decision is consistent with the stated purposes and objectives of the rule and the Exchange Act. The market access that AACC provided Simplex involved the very types of market risks for which AACC was required to provide substantive intermediation with reasonably designed controls and procedures, yet it provided none.

AACC's attempts to evade responsibility, by effectively shifting to the Exchange responsibility for the firm's evident failures and by baselessly claiming impossibility, should be rejected. So too should AACC's arguments that the Exchange's action imposes new regulatory requirements on the firm, arguments that, if countenanced, would render its responsibilities under Exchange Act Rule 15c3-5 meaningless.

AACC's claims that it reasonably designed its controls given their knowledge of Simplex's intended trading are disingenuous; controls that do not exist are not reasonably designed. And contrary to AACC's numerous arguments, the Board's decision is free of any procedural shortcomings. The Exchange provided AACC with ample and fair notice of its disciplinary charges, and the firm had fair warning that it its actions could result in discipline for violating Exchange Act Rule 15c3-5.

For these reasons, the Exchange respectfully requests that the Commission affirm the Board's decision and the sanctions that the Board imposed. Accordingly, the Commission should dismiss the application for review.[1]

II. FACTS

A. AACC Sponsored Simplex's Exchange Access

AACC is a broker-dealer that provides clearing and execution services to other broker dealers and proprietary trading firms. RP 85, 113.[2] The firm was, at all relevant times, a

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[1] Section 19(e) of the Exchange Act establishes the standard for the Commission's review. *See* 15 U.S.C. § 78s(e). Section 19(e) directs the Commission to dismiss the application for review if it finds AACC engaged in the conduct the Exchange found, the conduct violated the rules specified in the Exchange's action, and the Exchange applied the federal securities laws and its rules in a manner that is consistent with the Exchange Act. *See* 15 U.S.C. § 78s(e)(1).

[2] References to pages of the certified record are cited as "RP."

Trading Permit Holder ("TPH") of the Exchange qualified to transact business with the public and as a clearing organization. RP 67-81, 83, 183, 187, 191, 195, 199.

Simplex is a proprietary trading firm. RP 135. It was not, at any point during the relevant period, a broker-dealer or a market maker appointed in any classes of options traded on the Exchange.[3] RP 114, 1102, 1203-04, 1220, 1662.

On May 29, 2012, AACC agreed to provide Simplex sponsored access to both Cboe and C2.[4] RP 89-91, 93-95, 114, 135. Under the terms of AACC's sponsored user agreements with Simplex, and pursuant to Exchange rules concerning sponsored access, AACC assumed responsibility for all actions taken by Simplex through the Exchange, including all orders Simplex entered and any executions resulting from such orders.[5] RP 89, 93. AACC also

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[3] A TPH only may register and receive an appointment to act as market maker under the Exchange's rules. *See* Cboe Rules, Chapter VIII (Market Makers, Trading Crowds and Modified Trading Systems); C2 Rules, Chapter 8 (Market-Makers). Because Simplex was a sponsored user of the Exchange, and not a TPH, it was not, and could not be, appointed to conduct business as a market maker in any options classes traded on Cboe and C2. AACC knew these facts well. RP 114, 134. Its assertion that it is not possible to monitor market-maker appointments is therefore irrelevant. *See* Opening Br. at 23-25. As the Board found, correctly, there were no market-maker appointments for AACC to monitor in this case. RP 2694.

[4] Sponsored access generally refers to an arrangement whereby a broker-dealer permits customers to enter orders into a trading center that bypass the broker-dealers trading system and are routed to the trading center directly by a third-party technology provider. *See Risk Management Controls for Brokers or Dealers with Market Access*, 75 Fed. Reg. 69792, 69793 (Nov. 15, 2010) (Final Rule Release); RP 1206.

[5] Cboe Rule 6.20A and C2 Rule 3.15, which establish the requirements for a TPH to provide access to a sponsored user, governed the relevant sponsored user agreements between AACC and Simplex. RP 145-47, 149-52. These rules require, among other things, that a TPH acknowledge, when entering into a sponsored user agreement, that it is responsible for all actions taken by its sponsored user, including all orders and executions resulting from the sponsored user's trading. *See* Cboe Rule 6.20A(b)(1)(ii)(B); C2 Rule 3.15(b)(1)(B). They further require the TPH to ensure its sponsored user's compliance with Exchange rules, to prevent the sponsored user's unauthorized use of Exchange systems, and to establish adequate procedures to monitor

Footnote continued on next page

assumed responsibility to implement reasonable procedures to ensure that Simplex, as the sponsored user, complied with all Exchange rules. RP 89, 93.

B. Complex Order Auctions

The Exchange provides several mechanisms for complex order trading, including COAs. COAs are automated Exchange auctions that send out requests for responses to fill eligible complex orders. *See* Cboe Rule 6.53C(d)(i); C2 Rule 6.13(c)(1).

Cboe Rule 6.53C and C2 Rule 6.13 determined the market participants permitted to respond to Exchange COAs during the relevant period.[6] *See* Cboe Rule 6.53C(d)(iii); C2 Rule 6.13(c)(3); RP 155-65, 167-77. Cboe Regulatory Notice RG12-152, issued pursuant to Cboe Rule 6.53C, limited the market participants eligible to respond to COAs involving proprietary index products traded on Cboe to market makers with an appointment in such options classes and TPHs that acted as agent for orders resting at the top of the book of complex orders. RP 179, 1106, 1212-13, 1219-20, 1505-06. Similarly, C2 Regulatory Notice RG13-008, issued pursuant to C2 Rule 6.13, limited the market participants eligible to respond to COAs involving any C2 options classes to market makers appointed in such options classes and TPHs acting as agent for orders resting at the top of the complex order book. RP 181, 1107, 1212-13, 1219-20, 1506-07. Hence, Exchange rules prohibited Simplex, which was not a market maker (or a TPH), to respond to COAs involving proprietary index products traded on Cboe or involving any options

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cont'd

the sponsored user's access to the Exchange. *See* Cboe Rule 6.20A(b)(1), (2); C2 Rule 3.15(b)(1), (2).

[6] Copies of these and other relevant Exchange rules in effect during the period at issue are included in the record. *See* RP 145-77.

classes traded on C2 during the relevant period. RP 1151-52, 1212-13, 1219-20, 1506-07, 1558-61.

C. AACC Allowed Simplex to Use a Third-Party System to Access the Exchange

AACC proposed that Simplex use AACC's proprietary market gateway and risk management system, "AMG," for its sponsored trading. RP 114, 115, 1580. AMG, however, did not support complex orders, which Simplex told AACC it intended to utilize in its trading.[7] RP 1464, 1539, 1544, 1580, 1544-45.

AACC therefore suggested that Simplex consider using a system of market access and risk protocols provided by a third party, Fundamental Interactions, Inc. RP 1579-82. AACC earlier approved this system, Fundamental Interactions, or "FIN," for use by another customer. RP 475-79, 1535, 1467-69. AACC's review of FIN, however, was "client agnostic." RP 1468-69. This means that, once AACC approved the system for one customer's use, AACC approved it for use by any other customer. *Id.*

Simplex used FIN as a market gateway and risk management protocol to engage in the sponsored market access that AACC agreed to provide. RP 114, 137, 1118-19, 1579. Because it had used FIN for another customer, AACC did not test FIN prior to implementing the system for Simplex. RP 1471, 1545, 1548. For example, AACC did not examine FIN to determine whether it allowed a sponsored user to participate in activities in which only market makers were permitted. RP 114, 138, 1121, 1230-31, 1471, 1545, 1548-49, 1587-88.

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[7] A complex order is an order involving the execution of two or more different options series in the same underlying security occurring at or near the same time. *See* Cboe Rule 6.53C(a)(1); C2 Rule 6.13(a)(1).

In this respect, AACC was unaware that Simplex could use FIN to see and respond to COAs.[8] RP 114, 139. Therefore, when it approved using the FIN system for Simplex's sponsored access to the Exchange, AACC did not implement any risk management controls or supervisory procedures to ensure that Simplex complied with Exchange rules concerning COAs, including by preventing Simplex from participating in COAs as a non-market maker. RP 114-15, 138-39, 1116, 1121-22, 1124-25, 1177, 1189, 1230, 1254, 1304, 1332-34, 1582-84, 1588.

D. Simplex Used the FIN System to Respond Impermissibly to Complex Order Auctions

From February 1, 2013, to March 31, 2013, Simplex used the FIN system to respond impermissibly to 514 COAs for proprietary index products traded on Cboe, options classes in which Simplex, a non-market maker, did not hold an appointment. RP 114, 139, 200. In addition, from January 1, 2013, to February 28, 2013, Simplex used the FIN system to respond impermissibly to 18,412 COAs in options classes traded on C2 for which Simplex was not an appointed market maker. RP 114, 139, 204. All along, AACC was not aware of Simplex's impermissible trading when it occurred and thus admits that it failed during this period to ensure that Simplex complied with the requirements of Cboe Rule 6.53C and C2 Rule 6.13. RP 134, 139, 200, 204, 1585.

III. PROCEDURAL BACKGROUND

The Exchange commenced disciplinary proceedings on December 4, 2014, when staff filed statements of charges on behalf of Cboe and C2 that alleged AACC engaged in misconduct that violated Exchange Act and Exchange rules. RP 183-85, 187-89. First, staff charged that

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[8] The customer for which AACC initially approved FIN did not engage in any complex order trading. RP 1471.

AACC violated Cboe Rule 6.53C and C2 Rule 6.13, by and through Cboe Rule 6.20A and C2 Rule 3.15, because Simplex, AACC's sponsored user, responded impermissibly to COAs involving options classes for which it was not a registered market maker, a pre-requisite for participating in such COAs. *Id.* Second, staff charged that AACC violated Cboe and C2 Rules 4.2 because, given Simplex's impermissible COA responses, AACC failed to implement a system of supervision to assure compliance with Exchange rules. *Id.* Finally, staff charged that AACC violated Exchange Act Rule 15c3-5, and accordingly, Cboe and C2 Rules 4.2, because AACC failed to establish, document, and maintain a system of risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements because it failed to establish controls and procedures necessary to prevent the entry of orders unless they complied with all regulatory requirements that must be satisfied on a pre-order entry basis. *Id.* Specifically, AACC failed to implement any risk management controls or supervisory procedures reasonably designed to ensure that Simplex, in connection with its sponsored market access, complied with all regulatory requirements—in this case, Exchange rules concerning COAs. *Id.* Notably, AACC did not have risk controls necessary to prevent Simplex, which was not a market marker, from submitting responses to COAs, in violation of the pre-order entry requirements of the Exchange's rules that state only market makers in the relevant options classes are allowed to respond. *Id.*

AACC filed answers denying these charges on January 9, 2015. RP 191-93, 195-97. AACC, however, later entered into settlements concerning two of the three claims contained in the Cboe and C2 statements of charges. RP 199-201, 203-05. AACC agreed to the entry of findings that it violated Cboe Rule 6.53C and C2 Rule 6.13 when Simplex improperly responded to COAs in options classes for which it was not a market maker. *Id.* AACC also agreed to the

entry of findings that it violated Cboe and C2 Rules 4.2 by failing to supervise AACC's associated persons. *Id.* For this misconduct, the Exchange imposed two censures—one for violating Cboe rules, and one for violating C2 rules— and fined the firm a total of $45,000 for the Cboe and C2 matters. *Id.* The Exchange's Business Conduct Committee ("BCC") accepted both settlements. *Id.*

The BCC thereafter held a three-day hearing on the remaining, disputed charges. RP 1054-1892. Specifically, the hearing was held to consider whether AACC violated Exchange Act Rule 15c3-5, and as a result, Cboe and C2 Rules 4.2, because the firm did not, as alleged, have a system of risk management controls and supervisory procedures reasonably designed to ensure compliance with Exchange rules concerning COAs. RP 1899. On December 14, 2015, the BCC issued a decision finding that staff failed to prove these claims by a preponderance of evidence and dismissed the matter. RP 1897-921.

On January 15, 2016, Exchange staff petitioned that the Board review the BCC's decision. RP 1938-65. The Board issued an initial decision on July 28, 2016, after a three-member appeal panel considered the petition for review. RP 2233-49. Applying a "clearly erroneous" standard of review, the Board overturned the BCC's decision and found that Exchange staff had proven by a preponderance of the evidence that AACC violated Exchange Act Rule 15c3-5, as well as Cboe and C2 Rules 4.2, as alleged in the statements of charges. RP 2240, 2248. After a remand to the BCC to determine sanctions, and AACC's appeal of the BCC's sanctions determination, the Board twice censured AACC and fined the firm a total of $55,000 for its misconduct in the Cboe and C2 matters. RP 2330-38, 2395-98.

AACC appealed this matter to the Commission. RP 2427-29. On August 15, 2018, after considering briefs filed by the parties about the appropriate standard of review the Board should

apply to BCC decisions, the Commission issued an opinion holding that the Board should not have applied a deferential standard of review. *See ABN AMRO Clearing Chicago, LLC*, Exchange Act Release No. 83849, 2018 SEC LEXIS 2004 (Aug. 15, 2018). The Commission, therefore, remanded the matter to the Exchange and instructed the Board to conduct a "de novo" review of the BCC's decision as to liability and, if necessary, impose disciplinary sanctions. *See id.* at *54.

On remand from the Commission, the Board ordered the parties to submit supplemental briefs about how this matter should be resolved under a de novo standard of review, which the parties filed on October 31, 2018. RP 2592-93, 2604-36, 2644-53. On April 4, 2019, the Board issued the consolidated decision that is the subject of AACC's current application for review. RP 2675-95.

After reviewing the record de novo, the Board found that Exchange staff proved by a preponderance of the evidence that AACC violated Exchange Act Rule 15c3-5, and consequently, Cboe and C2 Rules 4.2.[9] RP 2690. In considering whether AACC violated Rule 15c3-5, the Board found that Cboe Rule 6.53C and C2 Rule 6.13, the Exchange rules concerning COAs, were in fact regulatory requirements. RP 2685. The Board further found that the

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[9] AACC contends that the Board ignored numerous BCC findings of fact and conclusions of law when it rendered its decision. *See* Opening Br. at 8-12. A careful review of these so-called "findings" and "legal rulings," however, indicate that they represent little more than a laundry list of the factual and legal arguments that AACC has put forth repeatedly in defending against the Exchange's action. The Board considered these arguments fully and rejected them. RP 2682-90. Consistent with the Commission's remand opinion, the Board conducted a de novo review by exercising its own judgment as to the issues properly before it without deferring to the BCC's prior rulings. *See ABN AMRO Clearing Chicago,* 2018 SEC LEXIS 2004, at *54 ("On remand . . . the Board is to apply the ordinary understanding of de novo review–it should exercise its own judgment as to the resolution of issues properly before it and do so non-deferentially, without presuming the correctness of or giving special weight to the BCC's prior rulings.").

requirements of Cboe Rule 6.53C and C2 Rule 6.13 could only be satisfied on a pre-order entry basis because, if a market participant did not hold the required market-maker appointment prior to responding to a COA, that market participant would be in violation of Exchange rules. *Id.* Consequently, AACC was required under Exchange Act Rule 15c3-5 to implement reasonably designed risk management controls and supervisory procedures to ensure compliance with these requirements. *Id.*

AACC, the Board found, nevertheless did not have a reasonably designed system of risk management controls and supervisory procedures to ensure compliance with Exchange rules. RP 2687, 2690, 2695. AACC did not implement any risk management controls or supervisory procedures to ensure compliance with these rules on a pre-order entry basis, including controls necessary to prevent Simplex, which was not a market maker, from responding to COAs in option classes for which it did not hold the requisite appointment. RP 2686-90. For this misconduct, the Board again twice censured AACC and it fined the firm a total of $10,000.[10] RP 2695.

This appeal timely followed. RP 2700-01.

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[10] The Board's April 4, 2019 decision constitutes the final disciplinary action of the Exchange in this matter. *See* Cboe Rule 17.10(b); *see also* C2 Rules, Chapter 17 (incorporating by reference Chapter XVII of the Cboe rules, including Cboe Rule 17.10(b)). AACC nonetheless invokes repeatedly the BCC's decision in support of the arguments it raises in its opening brief. The BCC's decision has no bearing on the Commission's review of this matter. Instead, it is the decision of the Board, the final decision, which is subject to review by the Commission. *See* 15 U.S.C. § 78s(e); *cf. Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 n.17 (Nov. 8, 2006) ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review."). AACC's attempts to leverage the BCC's decision to support its appeal arguments are thus, inescapably, for naught.

IV. ARGUMENT

A. AACC Violated the Express Terms of Exchange Act Rule 15c3-5, and Consequently, Exchange Rules Requiring Adherence to the Federal Securities Laws

The Board found that AACC violated Exchange Act Rule 15c3-5, and thus, Cboe and C2 Rules 4.2, because it failed to establish, document, and maintain a system of risk management controls and supervisory procedures that was reasonably designed to ensure compliance with all regulatory requirements in connection with the market access it provided Simplex. The Board found that AACC failed to implement any risk management controls or supervisory procedures reasonably designed to ensure that Simplex, the firm's sponsored user, complied with Exchange rules concerning COAs, specifically, because AACC failed to implement pre-trade controls and procedures necessary to prevent Simplex, a non-market maker, from impermissibly responding to COAs as a non-market maker.

The Board's decision is consistent entirely with the unambiguous, express terms of Exchange Act Rule 15c3-5, and an ample record of undisputed facts supports it fully. Exchange Act Rule 15c3-5 provides, in relevant part, that "[a] broker or dealer with market access, or that provides a customer or any other person with access to an exchange . . . , shall establish, document, and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory, and other risks of this business activity." 17 C.F.R. § 240.15c3-5(b). "The risk management controls and supervisory procedures shall be reasonably designed to ensure compliance with all regulatory requirements, including being reasonably designed to . . . [p]revent the entry of orders unless there has been compliance with all regulatory requirements that must be satisfied on a pre-order entry basis." 17 C.F.R. § 240.15c3-5(c)(2). "Regulatory requirements," as Exchange Act Rule 15c3-5 defines

that phrase, comprises "all federal securities laws, rules and regulations, and rules of self-regulatory organizations, that are applicable in connection with market access."[11] 17 C.F.R. § 240.15c3-5(a)(2).

By its plain language, Exchange Act Rule 15c3-5 therefore demanded that AACC establish, document, and maintain a system of pre-trade regulatory risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements that arose in connection with the market access it provided to Simplex. These regulatory requirements included the rules of the Exchange, a self-regulatory organization, and in this case, given the unfiltered market access to COAs AACC provided to Simplex, the Exchange's rules concerning COAs—Cboe Rule 6.53C and C2 Rule 6.13—that can only be met on a pre-order entry basis.

As the undisputed evidence attests, AACC was simply unaware that the FIN system that it approved for Simplex's market access allowed Simplex the ability to see and respond to Exchange COAs, an auction process in which Simplex participated impermissibly thousands of times during the relevant period. AACC therefore never considered and did not establish any risk management controls or supervisory procedures to ensure that Simplex complied with the Exchange's rules concerning COAs.

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[11] Exchange Act Rule 15c3-5 further defines "market access" to mean "[a]ccess to trading in securities on an exchange or alternative trading system as a result of being a member or subscriber of the exchange or alternative trading system." 17 C.F.R. § 240.15c3-5(a)(1). This includes sponsored access that a broker-dealer provides to a customer. *See* 17 C.F.R. § 240.15c3-5(b); *see also* 75 Fed. Reg. at 69792 ("Rule 15c3-5 will require brokers or dealers with access to trading securities directly . . . , including those providing sponsored or direct market access to customers . . . , to establish, document, and maintain a system of risk management controls . . . .").

AACC thus did not establish, document, and maintain a system of risk management controls reasonably designed to manage the risks of its business activity. Conspicuously, AACC implemented no controls or procedures to ensure that Simplex complied with Exchange rules for COAs, including controls needed to prevent Simplex, on a pre-trade basis, from responding to COAs from which it was restricted in trading because it was not a market maker. AACC's failures are a sure violation of Exchange Act Rule 15c3-5.[12] They also establish that AACC violated Cboe and C2 Rules 4.2.[13]

B. The Exchange's Action and Board's Findings Are Consistent with the Purposes of the Exchange Act

The Commission adopted Exchange Act Rule 15c3-5 in furtherance Section 15(c)(3) of the Exchange Act.[14] The Commission deemed the rule necessary to strengthen the integrity of the securities markets and enhance investor protection by reducing the risks to broker-dealers,

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[12] The Exchange is unaware of any final, litigated decisions resulting from Commission action under Exchange Act Rule 15c3-5. The Exchange's action, however, is fully consistent with numerous Commission settlements arising from violations of the rule. *See, e.g., Latour Trading LLC*, Exchange Act Release No. 76209, 2015 SEC LEXIS 4061, at *37 (Sept. 30, 2015) (order instituting proceedings, making findings, and imposing sanctions where broker-dealer's pre-trade controls and procedures violated Exchange Act Rule 15c3-5(b) and (c)(2) because they were not reasonably designed to prevent the entry of orders that did not comply with Regulation NMS and exchange rules designed to prevent the display of locking and crossing quotes); *Wedbush Sec., Inc.*, Exchange Act Release No. 73652, 2014 SEC LEXIS 4463, at *23 (Nov. 20, 2014) (order instituting proceedings, making findings, and imposing sanctions where broker-dealer's controls and procedures violated Exchange Act Rule 15c3-5 because they were not reasonably designed to satisfy pre-trade regulatory requirements and, in fact, did not prevent customers from entering orders that violated Regulations SHO and NMS).

[13] Cboe Rule 4.2 provides, "No Trading Permit Holder shall engage in conduct in violation of the Securities Exchange Act of 1934, as amended, rules or regulations thereunder, the Bylaws or the Rules of the Exchange . . . , or any written interpretation thereof." The rules of C2 incorporate Cboe Rule 4.2 by reference. *See* C2 Rules, Chapter 4 (Business Conduct).

[14] Exchange Act Section 15(c)(3) authorizes the Commission to prescribe rules as are necessary in the public interest and for the protection of investors to provide safeguards as to the financial responsibility and related practices of broker-dealers. *See* 15 U.S.C. §78o(c)(3)(A).

the markets, and the financial system that arise from various market access agreements. *See* 75 Fed. Reg. at 69792, 69795. These risks are broad, and they include "financial, regulatory, and other risks, such as legal and operational risks, related to market access." *Id.* at 69795. The Commission stated that it was "particularly concerned" with the risks associated with sponsored access arrangements, the arrangement that was in place here, where a broker-dealer "may not utilize any pre-trade risk management controls" to make it aware of "the trading activity occurring under its market identifier and have no mechanism to control it." *Id.* at 69793.

The risks that the Commission specifically sought to address through Exchange Act Rule 15c3-5 include those associated with a failure to comply with the trading rules of an exchange. *See id.* Thus a broker-dealer, unequivocally, must establish, document, and maintain controls and procedures to ensure compliance with pre-trade requirements established by an exchange relating to special order types. *See id.* at 69797-98. For example, a broker-dealer must have controls to "prevent the entry of orders that the broker-dealer or customer is restricted from trading." *Id.* at 69795.

The Board's decision is consistent with the plain meaning and stated purpose of Exchange Act Rule 15c3-5, and it furthers the purposes of the Exchange Act. AACC was completely unaware of the risks that arose from the market access it provided to Simplex. It permitted Simplex to use the FIN system to access the Exchange, but it did not know this access allowed Simplex the ability to see and respond to COAs. AACC accordingly admits that it did not consider or implement any pre-trade controls or procedures necessary to ensure compliance with the Exchange's rules concerning COAs. Instead, AACC allowed Simplex to engage in unfiltered COA trading activity through AACC's market identifier, and AACC had no mechanism to control it. Simply put, the market access that AACC provided Simplex involved

the very types of market risks for which AACC was required to provide reasonable risk controls and supervisory procedures, but instead, AACC provided nothing.

C. AACC's Attempts to Disclaim Responsibility for Its Errors Fail

Despite the consistency of the Exchange's action and the Board's findings with the clear terms of Exchange Act Rule 15c3-5 and the rule's stated purpose, AACC nevertheless asserts several arguments in its opening brief that claim the Board overstepped in finding the firm liable for violating the rule. Each of these arguments is without merit, and the Commission should reject them all.

1. AACC's Blame-Shifting and Impossibility Claims Are Irrelevant and Incorrect

AACC avers that is not responsible for violating Exchange Act Rule 15c3-5 because the Exchange's messaging protocols made it "impossible" to design reasonable controls necessary for it to ensure compliance with Exchange rules concerning COAs. *See* Opening Br. at 26-30. The Board dismissed these arguments, RP 2687-88, and the Commission should promptly discard them as well.

First, AACC's claim of impossibility is legally irrelevant. Exchange Act Rule 15c3-5 placed on AACC the "direct and exclusive" responsibility to design and establish the risk management controls and supervisory procedures required by the rule. *See* 17 C.F.R. §240.15c3-5(d) ("The financial and regulatory risk management controls and supervisory procedures described in paragraph (c) of this section shall be under the *direct and exclusive* control of the broker or dealer . . . ." (emphasis added)); *see also* 75 Fed. Reg. at 69805 ("The Commission believes that . . . appropriate broker-dealer personnel must have the *direct and exclusive* obligation to assure the effectiveness of . . . the reasonably designed financial and regulatory risk management controls. . . . Accordingly, the broker-dealer with market access could not

delegate oversight of . . . its controls to a third party." (emphasis added)). The Exchange was not responsible for providing the tools necessary for AACC to establish any pre-trade risk management controls or procedures required under Exchange Act Rule 15c3-5. *See* 75 Fed. Reg. at 69799 (rejecting comments that market centers should be responsible for implementing certain pre-trade risk management controls). AACC therefore may not excuse its misconduct by, in effect, shifting to the Exchange the firm's direct responsibilities under the rule. *See, e.g.*, *Apex Fin. Corp.*, 47 S.E.C. 265, 267 (1980) ("We have repeatedly held that a broker-dealer cannot shift its responsibility for compliance with applicable requirements to regulatory authorities.").

Second, AACC's arguments that it would be impossible for it to comply with Exchange Act Rule 15c3-5's proscriptions are nothing more than an attempt to insert a blatant, after-the-fact pretext for its misconduct, which the Commission should reject. The responsibility for establishing the system of controls or procedures necessary to comply with the requirements of Exchange Act Rule 15c3-5 rested in the "first instance" with AACC, the broker-dealer that provided market access to Simplex. *See* 75 Fed. Reg. at 69799 ("The Commission continues to believe . . . that broker-dealers with market access should be responsible in the *first instance* for establishing and maintaining appropriate risk management controls under the Rule." (emphasis added)). As the undisputed evidence established, however, AACC did not, at any point prior to providing Simplex market access, investigate whether any controls were necessary for it to meet the requirements of Exchange Act Rule 15c3-5, in this case, by ensuring compliance with the Exchange's rules concerning COAs. The firm was frankly unaware of the fact that it provided Simplex the ability to see and respond to COAs. It thus never considered, and did not establish, document, and maintain, a system or risk controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements that must be complied with on a

pre-order entry basis. Undoubtedly, AACC may not rationalize away ex post the clear-cut failures that caused the firm to violate Exchange Act Rule 15c3-5 in the first instance.[15] *Cf. Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) ("Mistaking ex post explanation and justification for the necessary affirmative 'steps' to ensure compliance, IBP offers no evidence to show that it actively endeavored to ensure such compliance."); *cf. also Michael J. Marrie*, 56 S.E.C. 760, 784 (2003) ("Respondents' attempt to account for this discrepancy is nothing more than an after-the-fact justification for their failure to exercise the required degree of professional care.").

Finally, AACC's claim of impossibility has no legal or factual support. Exchange Act Rule 15c3-5 required AACC to effect the required controls and procedures on an automated, pre-trade basis—in other words, before orders are entered and routed to the exchange.[16] *See* 75 Fed. Reg. at 69804; *see also id.* at 69803 ("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 entered on an exchange . . . ."). Thus, testimony concerning the Exchange's messaging protocols represent entirely irrelevant facts.[17] Moreover, the impossibility argument is flawed because the

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[15] AACC's witnesses testified to the undisputed fact that the evidence they offered in support of AACC's arguments about the Exchange's messaging protocols derived entirely from information they obtained after the Exchange commenced a disciplinary action against the firm. RP 205-06, 207. As the Board found, "[AACC] concedes that it did not examine the FIX specifications regarding COAs during the relevant time period and therefore did not in fact rely on the specifications when attempting to meet its [Exchange Act Rule 15c3-5] responsibilities." RP 2688.

[16] Exchange Act Rule 15c3-5 requires that a broker-dealer implement all required controls on a "pre-trade basis." *Id.* at 69795. The rule prohibits any access to trading on an exchange where pre-trade controls are not applied. *Id.* at 69793 n.7.

[17] In its opening brief, AACC contends that the Board ignored the testimony of Exchange witnesses concerning the "impossibility" of complying with Exchange Act Rule 15c3-5. *See*

Footnote continued on next page

undisputed evidence shows that AACC had several, reasonable options available that could have been employed to avoid violating Exchange Act Rule 15c3-5. RP 2687. For example, AACC could have blocked or disabled Simplex's access to the "FIX tag 35=a" to prevent Simplex from receiving any auction activity data, which would include COA activity data.[18] RP 2687. Alternatively, AACC could have provided Simplex with market access using a risk management system, like AMG, that did not support complex order activity, which also would have prevented its customer's improper COA responses. RP 2687; RP 114-15, 1538-39, 1540-41, 1639-40. Finally, AACC could have chosen to terminate the sponsored user relationship with Simplex, which the firm ultimately did later. RP 2687; RP 114, 1510-11. That any such option might prove to AACC, with the obvious benefit of hindsight, impractical or overly restrictive is beside the point. *See* Opening Br. at 35-43. They simply highlight the fact that, given a choice between having no controls to ensure compliance with the Exchange's COA rules, and controls that would ensure compliance, albeit potentially ill fittingly, AACC chose the option of having no controls.

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Opening Br. at 47-48. As Exchange staff maintained, consistently, whether Exchange protocols made it possible to implement a risk management control is irrelevant to the legal issue of whether the control is required in the first instance. *See, e.g.*, RP 1957, 2172. The Board clearly agreed with Exchange staff, finding that the burden of complying with Exchange Act Rule 15c3-5 rests squarely with AACC. RP 2687-88. As each of the Exchange's witnesses testified, Exchange rules required AACC to have controls necessary to ensure compliance with the requirements for COAs, but the firm had none. RP 1094-95, 1229-30, 1331-34.

[18] Blocking or disabling "FIX tag 35=a" would effectively have prevented Simplex's responses to COAs, in that all Cboe and C2 auction messaging data was communicated over this particular FIX tag. RP 114-15, 1116, 1173, 1222-23, 1230-31, 1242-44, 1312-13, 1604-05, 1642-43.

2. The Exchange's Action Imposes No New Regulatory Requirements

AACC further argues that the Board's decision imposes new regulatory requirements on it that are outside the scope of Exchange Act Rule 15c3-5. *See* Opening Br. at 12-16. As the Board properly found, this argument too is without merit. RP 2684-85. The Commission should likewise discard it.

Exchange Act Rule 15c3-5 makes obvious that a broker-dealer must establish, document, and maintain a system of reasonably designed risk management controls and supervisory procedures necessary to ensure compliance with all regulatory requirements that must be met on a pre-order entry basis. *See* 17 C.F.R. § 240.15c3-5(a), (c); *see also* 75 Fed. Reg. at 69795, 69803. To sponsor Simplex's access, the rule therefore required AACC to implement reasonably designed controls that would ensure compliance with Exchange rules concerning COAs, including by preventing Simplex, a sponsored user that was not a market maker, from responding to COAs foreclosed to it. *See* 75 Fed. Reg. at 69803 ("Those where pre-trade compliance is required on an order-by-order basis include . . . various exchange rules applicable to particular order types . . . ."); *see also id.* at 69804 ("Under Rule 15c3-5(c)(2)(i), the broker-dealer's controls and procedures must be reasonably designed to prevent the entry of orders unless there has been compliance with all regulatory requirements that must be satisfied on a pre-order entry basis.").

AACC's assertion that no existing Exchange rule specifies the requirement to implement controls to ensure compliance with the Exchange's rules concerning COAs misses the point and purpose of Exchange Act Rule 15c3-5 entirely. *See* Opening Br. at 13. Rule 15c3-5 provides a controls-and-procedures framework that must be applied to existing regulatory requirements, which include Exchange rules, as they are written. Exchange Act Rule 15c3-5 cannot, and must

not, be read, as AACC now argues, to mean that a broker-dealer is liable under the rule only if it does not implement a control that has already been dictated by an Exchange rule. Such a reading of the rule would leave the broker-dealer's singular responsibility under the rule to design and establish controls and procedures meaningless and render superfluous and ineffectual the rule's very essence. *See FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975) ("The presumption against interpreting a statute in a way which renders it ineffective is hornbook law."); *see also optionsXpress, Inc.*, Exchange Act Release No. 78621, 2016 SEC LEXIS 2900, at *89 (Aug. 18, 2016) (rejecting an interpretation of Regulation SHO that would render its terms superfluous and leave the rule ineffectual).

3. AACC's Controls and Procedures Were Not Reasonably Designed

Finally, AACC contends that the Board erred in finding it liable under Exchange Act Rule 15c3-5 because, the firm claims, its risk management controls were reasonably designed in light of Simplex's known business model and historical trading. *See* Opening Br. at 16-22. The Board found these arguments to be unavailing, RP 2686-87, and the Commission should do the same.

AACC's arguments rest upon a fundamental misunderstanding of its responsibilities under Exchange Act Rule 15c3-5. The risk management controls and supervisory procedures that a broker-dealer is required to establish under Rule 15c3-5 spring not from a customer's trading habits and business plans but rather from the regulatory requirements that arise in connection with the market access that the broker-dealer provides to its customer. *See* 17 C.F.R. § 240.15c3-5(a)(2) ("regulatory requirements shall mean all federal securities laws, rules and regulations, and rules of self-regulatory organizations, *that are applicable in connection with market access*" (emphasis added)); *see also* 75 Fed. Reg. at 69803 ("the regulatory risk

management controls and supervisory procedures required under Rule 15c3-5(c)(2) must address those regulatory requirements *that flow from a broker-dealer having or providing access to trading securities on an exchange . . . .*" (emphasis added)). While Exchange Act Rule 15c3-5 affords broker-dealers "flexibility" to design the details of the controls and procedures required by application of the rule, the rule does not permit a broker-dealer to implement some controls necessary to comply with the regulatory requirements that arise in connection with market access, but not others, simply because the broker-dealer deems some controls unnecessary in light of a customer's stated business intentions. *See* 75 Fed. Reg. at 69798 ("[T]he Commission note[s] that the proposed rule allows flexibility for the details of the controls or procedures to vary from broker-dealer to broker-dealer, depending on the nature of the business and customer base, *so long as they are reasonably designed to achieve the goals articulated in the proposed rule*." (emphasis added)).

Consequently, AACC's claim that it reasonably designed its risk management controls and supervisory procedures is patently untrue. AACC was unaware that it provided Simplex entrée to Exchange COAs when it approved the FIN system for market access.[19] The firm therefore neither considered nor implemented any risk management controls or supervisory procedures to ensure that Simplex complied with all regulatory requirements that must be complied with on a pre-order entry basis. AACC admittedly had no controls that prevented Simplex from responding to COAs. It is axiomatic that controls that do not exist are not

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[19] When it adopted Exchange Act Rule 15c3-5, the Commission highlighted its explicit concern "about circumstances where broker-dealers providing market access simply rely on assurances from their customers that risk controls are in place." 75 Fed. Reg. at 69808. The Commission therefore required that a broker-dealer, when allowing market access through third-party technology, "perform appropriate due diligence to assure that reasonably designed controls and procedures are effective and otherwise consistent with the provisions of the Rule." *Id.* at 69804-05. As the undisputed facts attest, that did not happen in this case.

reasonably designed. *See, e.g., Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *56 (July 17, 2019) (finding FINRA member did not have reasonably designed procedures to achieve compliance with AML requirements because the member left in placeholders in lieu of specific written procedures); *Thaddeus J. North*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001, at *16 (Oct. 29, 2018) ("written supervisory procedures were not reasonably designed because they completely failed to specify even the most basic parameters"), *appeal docketed*, No. 18-1341 (D.C. Cir. Dec. 27, 2018).

AACC's meaning of "reasonably designed" would require the Commission to conclude that the Commission's use of the phrase "all regulatory requirements" in Exchange Act Rule 15c3-5 really means *some*. This represents a rewriting of the rule that the Commission should promptly reject. As the courts have ruled: "Presumably, the words 'all terms' do not mean 'some terms' . . . ." *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998); *cf. United States v. Townsend*, 630 F.3d 1003, 1010 (11th Cir. 2011) (noting that numerous courts have found that "'any' is a powerful and broad word, and that it does not mean 'some' or 'all but a few,' but instead means 'all'" (internal quotation marks and citations omitted)).

D. AACC's Procedural Arguments Lack Merit

AACC claims that the Board's decision rests on several procedural errors that warrant reversing the Exchange's action in this case. *See* Opening Br. at 43-50. The Board considered these arguments, or variations thereof, and it dismissed them all. RP 2688-89. The Commission should do the same.

1. The Exchange's Action Does Not Implicate Notions of Regulatory Due Process

First, AACC asserts that the Board's decision violates concepts of "regulatory due process" because the firm did not have fair notice that the Exchange could deem its conduct a violation of Exchange Act Rule 15c3-5. *See* Opening Br. at 43-45. It is mistaken.

Due process requires only that a person receive fair warning of prohibited conduct before receiving discipline for that conduct. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Due process requires that an NASD rule give fair warning of prohibited conduct before a person may be disciplined for that conduct."). AACC received fair warning of the prohibited conduct in which the Board found it engaged in this case.[20]

As the Board's decision confirms, its findings rest on the unambiguous, express terms of Exchange Rule 15c3-5. RP 2682-84. As the Board found, correctly, the rule naturally requires that a broker-dealer establish, document, and maintain risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements, which include the rules of the Exchange that are applicable in connection with the market access the broker-dealer provides to others. RP 2684. The controls and supervisory procedures necessary under Rule 15c3-5 include those needed to prevent the entry of orders unless there has been compliance with all pre-order regulatory requirements. RP 2684. Exchange Act Rule 15c3-5 thus required that AACC, because of the market access that the firm provided Simplex to the

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[20] The test for fair warning is an objective one. *See Gregory O. Trautman*, Exchange Act Release No. 61167, 2009 SEC LEXIS 4173, at *68 n.69 (Dec, 15, 2009) ("Due process requires . . . only that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (internal quotation marks and citation omitted)). AACC's assertion that its witnesses testified they had no notice of the conduct prohibited by Exchange Act Rule 15c3-5 is therefore of no moment to the firm's due process arguments. *See* Opening Br. at 44.

Exchange, "implement controls to ensure compliance with *all* Exchange rules, including those governing COAs." RP 2687 (emphasis in original).

As the Board concluded, however, the undisputed evidence proved that AACC "did not have in place a control to ensure compliance with the Exchange COA rules, and thus its system of controls were not 'reasonably designed' to prevent such violations." *Id.* The Board consequently found that AACC "did not maintain a system of risk management controls reasonably designed to ensure compliance with all regulatory requirements," a distinct violation of Exchange Act Rule 15c3-5. RP 2690. Given the Board's straightforward application of the rule to the uncontroversial record evidence, AACC's claim that the Exchange violated due process requirements in this case is without merit. *See Trautman*, 2009 SEC LEXIS 4173, at *68 n.69 ("Trautman, an experienced securities professional, cannot credibly claim lack of fair notice . . . .") (internal quotation marks and citation omitted)).

2. AACC Received Fair Notice of the Exchange's Charges

Second, AACC claims that it did not receive fair notice of the Exchange's charges because the Board's decision effectively permitted Exchange staff to substitute new charges against the firm. See Opening Br. at 45-47. The Board rightly dismissed this claim, RP 2688-89, and the Commission should do the same.

"[T]he standard [the Commission] use[s] for determining whether pleadings in [SRO proceedings] are sufficient is whether 'the respondent understood the issue and was afforded full opportunity to justify its conduct during the course of the litigation.'" *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *30-31 (Dec. 7, 2010) (quoting *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979) (internal quotations omitted)). Notice is thus sufficient in an Exchange disciplinary proceeding when the

respondent "is reasonably apprised of the issues in controversy and is not misled." *John M.E. Saad*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761, at *16 (May 26, 2010) (internal quotation omitted), *remanded on other grounds*, 718 F.3d 904 (D.C. Cir. 2013). The Exchange squarely met these standards here.

The express language of the statements of charges leaves no room for argument concerning the specific cause of the Exchange's action. RP 184, 188. As the Board correctly concluded, the Exchange's theory of liability "has always been that [AACC] failed to establish, document, and maintain a system of risk management controls that were reasonably designed to ensure compliance with all regulatory requirements that must be met on a pre-order entry basis, including Exchange rules prohibiting responding to COAs without the proper appointment." RP 2689. The gravamen of the Exchange's disciplinary claims was therefore apparent to AACC from the outset—the firm violated Exchange Act Rule 15c3-5 because AACC had no controls to ensure that Simplex, its sponsored user, complied with all regulatory requirements that must be complied with on a pre-order entry basis. RP 184, 189.

The Exchange provided AACC with fair notice of its allegations, and the Board properly found that it violated Exchange Act Rule 15c3-5, as alleged in the statements of charges. *See Lehl v. SEC*, 90 F.3d 1483, 1486-87 (10th Cir. 1996) (rejecting arguments that the SEC found the respondent liable for charging excessive and unfair prices when the complaint against him alleged he failed to disclose that the prices were excessive and unfair). The Exchange provided AACC, which benefited from counsel's representation throughout these proceedings, many opportunities to defend itself against the Exchange's core factual allegations. *See Saad*, 2010 SEC LEXIS 1761, at *16-17 ("Saad, who was represented by counsel since at least the time FINRA issued its complaint, had a full opportunity to defend himself against these factual

allegations . . . ."). The Exchange's charges were clear even to the firm and its witnesses, as they readily understood and admitted AACC simply had no controls to ensure that Simplex complied with the Exchange's rules concerning COAs, a clear violation of Exchange Act Rule 15c3-5, and consequently, Cboe and C2 Rules 4.2. RP 131, 133-43, 1548-49, 1582-84, 1587-90.

3. AACC's "Rulemaking Through Enforcement" Claim Fails

Finally, AACC avers that the Exchange's action constitutes rulemaking through enforcement. *See* Opening Br. at 49-50. The Commission should promptly reject this claim, just as the Board did in its decision. RP 2689.

The Board rightly dismissed AACC's oft-repeated claim that the Exchange's action effectively required AACC to prohibit all complex orders by Simplex or completely discontinue its sponsored access. RP 2689. Contrary to AACC's assertions, the Exchange did not argue, and the Board did not find, that Exchange Act Rule 15c3-5 required the firm to prohibit all complex orders or discontinue sponsored access in this case.[21] *See* Opening Br. at 49. AACC provides no reasonable explanation why the Exchange's actual position—that AACC did not, as Exchange Act Rule 15c3-5 explicitly requires, establish risk management controls reasonably designed to ensure that Simplex complied with the all regulatory requirements, including Exchange rules concerning COAs—required a rule filing. As we note above, the Exchange predicated its action against AACC on standards, established by the clear terms of Exchange Act Rule 15c3-5, of which the firm had ample notice. The firm's claim of "rulemaking by

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[21] Contrary to AACC's assertions, the Board's findings concerning the options available to the firm to ensure compliance with Exchange rules concerning COAs do not constitute new charges of misconduct. As the Board's decision makes abundantly clear, AACC did not adopt any controls, as it was required to do under Exchange Act Rule 15c3-5. RP 2686-90.

enforcement" is without merit.[22] *Cf. Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) ("The [Administrative Procedure Act] does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.").

E. The Sanctions Imposed on AACC are Appropriately Remedial

The Board imposed two censures on AACC, one each for the firm's violations of Cboe and C2 rules, and it fined the firm a total of $10,000 for both matters. RP 2695. The Board imposed these sanctions after considering Cboe Rule 17.11 and giving full weight to the "Principal Considerations in Determining Sanctions" that guide the Board's sanctions determinations in disciplinary actions. RP 2692. It also considered completely the parties' arguments concerning the mitigating and aggravating factors that should determine sanctions in this case. RP 2692-95.

As the Board found, the sanctions imposed on AACC serve to reinforce the firm's need to have controls that address the risks associated with its market access, and the market access it provides its customers, and they account for the detrimental effect that Simplex's impermissible involvement in large numbers of COAs could have had on the overall market. RP 2694. The fines thus will help secure AACC's future compliance with Exchange Act Rule 15c3-5 requirements. *See, e.g.*, *North*, 2018 SEC LEXIS 3001, at *42 ("We also recognize that the fine will help secure North's compliance with FINRA's rules governing written supervisory

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[22] AACC concludes its opening brief with a claim that the Board's decision creates "regulatory uncertainty." *See* Opening Br. at 50-52. This claim, however, is merely a repackaging of the firm's prior arguments. As the federal agency that adopted Exchange Act Rule 15c3-5, the Commission understands fully the meaning of the rule and its purpose, and the Commission is well positioned to review the Exchange's action in accordance with the standard of review established by Section 19(e) of the Exchange Act. AACC's citation to *Husky Trading, LLC*, which concerned the interpretation of another exchange's rules, is inapposite. *See* Exchange Act Release No. 60180, 2009 SEC LEXIS 2250, at *31-32 (June 26, 2009).

procedures in the future."). The censures ordered also serve a remedial purpose. *See, e.g., Salvatore Sodano*, Exchange Act Release No. 59141, 2008 SEC LEXIS 2845, at *12 (Dec. 22, 2008) (stating that a censure serves the remedial purpose of notifying the public of past misconduct).

AACC does not challenge the sanctions that the Board imposed. The Commission should affirm the sanctions as neither excessive nor oppressive.[23] *See Merrimac Corp. Sec.*, 2019 SEC LEXIS 1771, at *23 ("Merrimac and Nash do not challenge the sanctions imposed . . . . Under the circumstances, we find that the sanctions the NAC imposed for these violations were neither excessive nor oppressive.").

V. CONCLUSION

It is undisputed that AACC provided its customer, Simplex, access to the Exchange, including access to Exchange COAs. AACC, however, did not consider or establish any controls necessary to ensure compliance with all regulatory requirements that flowed from this market access. Specifically, the firm had no controls to ensure that Simplex complied with Exchange rules concerning COAs, including controls that would prevent Simplex, which was not a market maker, from responding to COAs from which it was restricted in trading. As the Board found, these failures violated Exchange Act Rule 15c3-5, and consequently also of Cboe and C2 Rules 4.2.

The Exchange's action is fully supported by the record evidence, and the Exchange carefully applied Exchange Act Rule 15c3-5 according to its express terms and purposes. The sanctions that the Board imposed on AACC are neither excessive nor oppressive, and they serve

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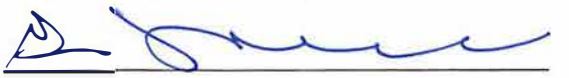
[23] *See* 15 U.S.C. § 78s(e)(2). The record does not show, nor has AACC ever claimed, that the sanctions in this case impose an unnecessary or inappropriate burden on competition. *See id.*

to remediate appropriately the firm's misconduct. Accordingly, the Commission should affirm the Board's decision and dismiss the application for review.

Respectfully submitted,



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August 12, 2019

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on this 12th day of August 2019, I caused the original and three copies of CBOE's and C2's Opposition to ABN AMRO's Application for Review of Exchange Action, in the matter of ABN AMRO Clearing Chicago, LLC, Administrative Proceeding No. 3-17906r, to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090

with additional copies served by email and via overnight FedEx on:

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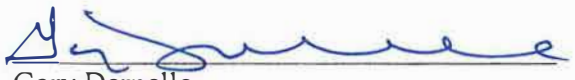
Different methods of service were used because courier service could not be provided to Mr. Bedell.

Respectfully submitted,



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