UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

Admin. Proc. File No. 3-17906

In the Matter of

ABN AMRO Clearing Chicago LLC

ORDER REQUESTING BRIEFS

ABN AMRO Clearing Chicago LLC has applied for review of disciplinary action taken by the Chicago Board Options Exchange, Inc. and C2 Options Exchange, Inc. (collectively, "CBOE").[1] In its application for review, ABN AMRO asserts, *inter alia*, that CBOE's Board of Directors "improperly reviewed [its] Business Conduct Committee ('BCC') decision under the *de novo* standard of review rather than the 'clearly erroneous' standard of review." The Commission defers briefing on the other issues raised by ABN AMRO and, as set forth herein, directs that the parties submit briefs limited to the issue of the appropriate standard of review to be applied by CBOE with respect to initial determinations made by the BCC hearing panel.

I. Background

This disciplinary proceeding arose from allegations that ABN AMRO violated various CBOE rules as well as Rule 15c-3 of the Exchange Act—the Commission's "Market Access Rule." Following CBOE Rule 17.6, a hearing was held before a panel of three public members of the BCC. The BCC found that CBOE's Regulatory Division ("CBOE Regulation") failed to establish by a preponderance of the evidence that ABN AMRO violated the Market Access Rule. CBOE Regulation sought review of the BCC's decision with CBOE's Board.

The Board's July 2016 decision observed that the parties "disagreed as to the proper standard of review that the Board should apply with respect to the BCC's findings and conclusions."[2] CBOE Regulation argued that the Board "should apply a *de novo* standard to all

---

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

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

of the BCC's determinations," while ABN AMRO argued that a "clearly erroneous" standard should apply. The Board agreed with ABN AMRO, and concluded that the "clearly erroneous" standard of review applied to all BCC determinations, whether characterized as findings of fact, "questions of law[,] or mixed questions of law and fact."[3] The Board recognized that the Exchange Act does not "prescribe a specific standard that a [registered securities association or self-regulatory organization (collectively, an "SRO")] must employ when reviewing an [internal] appeal of a disciplinary action."[4] Nor did the Board's decision cite any Commission rule under the Exchange Act or CBOE rule approved by the Commission specifying a "clearly erroneous" standard of review. It nevertheless reasoned that the "Board has used the clearly erroneous standard for over twenty years when reviewing appeals of BCC decisions" and that "[i]n all those matters that were appealed to the SEC[,] the SEC decided the appeal without noting that applying a clearly erroneous standard was incorrect."[5]

The remainder of the Board's July 2016 decision went on to find "clearly erroneous" the BCC's findings and conclusions regarding the scope and interpretation of the Market Access Rule. The Board "therefore reverse[d] the BCC Decision" and found that CBOE Regulation had proven "that [ABN AMRO] violated Rule 15c3-5 . . . by failing to maintain risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements." It remanded the matter to the BCC for determination of sanctions, which the BCC fixed at a censure and fines totaling $55,000. In a subsequent February 2017 decision following remand, the Board stated that it would allow the BCC's sanctions determination to stand unless it was "arbitrary, capricious, or a clear abuse of discretion."[6] The Board stated that although it "might have decided the determination of sanctions differently . . . in the first instance," it was unable to conclude that the BCC had abused its discretion, and so sustained the monetary sanctions imposed by the BCC.[7]

II. Discussion

As the Board's July 2016 decision acknowledged, the Commission has never addressed the appropriate standard of review for CBOE's Board to apply in appeals of BCC determinations.[8] The issue is therefore an open one in this context—a "*sub silentio* holding is

---

3 *Id*. at 8.

4 *Id*.

5 *Id*. The Board has adhered to its determination that a clearly erroneous standard should apply. *Lek Sec. Corp.*, CBOE File No. 15-0061, C2 File No. 15-0006, Decision No. 17 BD 01, at 2-3 (CBOE May 18, 2017).

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

7 *Id*. at 4.

8 In *Electronic Transaction Clearing, Inc.*, the applicant asserted, without elaboration or argument, that "in affirming the BCC's Decision [in that disciplinary proceeding], the Board incorrectly applied a 'clearly erroneous' standard to the BCC's findings of liability and an

(footnote continued . . .)

not binding precedent"[9]—and it is appropriate that the parties submit briefs directed at that threshold issue. The applicable standard of review may be raised *sua sponte*, and the parties cannot by agreement stipulate to one standard of review or another.[10]

The Board's application of a deferential "clearly erroneous" or "abuse of discretion" standard of review to BCC determinations differs from the standard of review applied by other reviewing bodies. Following a bench trial, federal appellate courts typically review questions of fact for clear error, questions of law *de novo*, and issues relating to sanctions for abuse of discretion.[11] The Commission reviews *de novo* whether an SRO's findings of violation are factually and legally supported, and independently determines whether an SRO's choice of sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[12] And it appears that a common practice among SROs is to review *de novo* the determinations made by a subordinate hearing panel or business conduct committee.[13] For example, the Commission has repeatedly observed that FINRA's "NAC [National Adjudicatory Council] reviews [its] Hearing Panel's decision *de novo* and has broad discretion to modify the

---

(. . . continued)
'arbitrary, capricious or abuse of discretion' standard to the BCC's sanctions determination." *See* Br. in Support at 11 n.12, Admin. Proc. File No. 3-16285 (Jan. 16, 2015). The Commission did not have occasion to decide the standard-of-review issue because it set aside the disputed findings of violations and remanded for consideration of sanctions. *Electronic Transaction Clearing, Inc.*, Exchange Act Release No. 78093, 2016 WL 3345702 (June 16, 2016).

9 *See, e.g.*, *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988); *accord Webster v. Fall*, 266 U.S. 507, 511 (1925).

10 *See, e.g.*, *United States v. Duhon*, 541 F.3d 391, 396 n.2 (5th Cir. 2008); *Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006).

11 *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Miller v. Fenton*, 474 U.S. 104, 112-14 (1985); Fed. R. Civ. P. 52(a)(6).

12 *See, e.g.*, *Joseph Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *5 n.14, 7 (June 2, 2016); *Mitchell Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *6, 13 (May 27, 2015); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131, at *7, 9 (Dec. 11, 2014); *see also* 15 U.S.C. § 78s(e)(2) (providing that a sanction will be sustained unless the Commission finds that the sanction imposes an unnecessary or inappropriate "burden on competition" or that it is "excessive or oppressive").

13 *See, e.g.*, *Conrad C. Lysiak*, Exchange Act Release No. 33245, 1993 WL 492888, at *4 (Nov. 24, 1993) (NASD); *Brian Adair*, Exchange Act Release No. 29469, 1991 WL 284937, at *2 & n.6 (July 23, 1991) (Pacific Stock Exchange); *Irwin Schloss*, Exchange Act Release No. 16934, 1980 WL 267730, at *4 (June 26, 1980) (New York Stock Exchange); *see also Daniel Turov*, Exchange Act Release No. 31649, 1992 WL 394575, at *3-4 (Dec. 23, 1992) (similar). *But see* Nasdaq PHLX Rule 960.9(b) (providing for deferential standard of review).

Hearing Panel's decisions and sanctions."[14] The Commission noted the breadth of the governing SRO rule—which provided that the NAC could "affirm, dismiss, modify, or reverse" the findings below—in recognizing the reviewing body's "plenary," *de novo* authority with respect to the review of hearing panel decisions.[15]

As a result, the Commission asks that the parties address the following questions:

- Does the Exchange Act, any rule thereunder, or any approved CBOE rule or rule filing specify or discuss the standard of review that the Board should apply to BCC decisions?

- Exchange Act Rule 19b-4(c) provides that a "stated policy, practice, or interpretation of the [SRO] shall be deemed to be a proposed rule change" for which Commission approval must generally be sought "unless (1) it is reasonably and fairly implied by an existing rule of the [SRO] or (2) it is concerned solely with the administration of the [SRO]."[16] A "procedure[] for resolving or determining the rights or obligations of members" is not a rule concerned solely with the SRO's administration.[17] Does the Board's application of a deferential standard of review to BCC determinations constitute a "rule" of the CBOE? If so, is it "reasonably and fairly implied" by the text of an approved rule, such as CBOE Rule 17.10(b), which provides that the "Board may affirm, reverse or modify, in whole or in part, the decision of the BCC" and that "[s]uch modification may include an increase or decrease of the sanction"? Does any other exception to the rule filing and approval requirement apply?

- The Commission has emphasized that an SRO must "comply with, and enforce its members' compliance with, the federal securities laws and

---

[14] *E.g.*, *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 WL 4336702, at *13 n.34 (Sept. 16, 2011); *Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *7 & n.22 (May 3, 2011).

[15] *E.g.*, *Vincent M. Uberti*, Exchange Act Release No. 58917, 2008 WL 4826021, at *5 (Nov. 7, 2008) (citing NASD Rule 9348, which is materially identical to FINRA Rule 9348); *see also Gary Roth*, Exchange Act Release No. 37221, 1996 WL 262486, at *3 & n.7 (May 16, 1996).

[16] Exchange Act Rule 19b-4(c), 17 C.F.R. § 240.19b-4(c); *see also Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 67566, at *3-4 (Jan. 14, 2004); *Meyer Blinder*, Exchange Act Release No. 31095, 1992 WL 216702, at *7 (Aug. 26, 1992).

[17] *Filings by Self-Regulatory Organizations of Proposed Rule Changes and Other Materials with the Commission*, Exchange Act Release No. 17258, 1980 WL 25646, at *14 n.79 (Oct. 30, 1980).

rules, as well as its own rules."[18] "'[S]uccessful self-regulation relies on sufficiently vigorous rule enforcement against members on the part of the SRO,'"[19] and an SRO violates the Exchange Act "when it fails 'to be vigilant in surveilling for, evaluating, and effectively addressing issues that could involve violations' of Commission rules and its own rules."[20] Is the Board's application of a deferential standard of review to the BCC's rulings consistent with the Exchange Act's requirement that SROs enforce compliance by their members and associated persons with the securities laws, absent a "reasonable justification or excuse" for failing to do so?[21]

- The Exchange Act provides that an SRO's determination to impose a disciplinary sanction must be "supported by a statement setting forth" the "act or practice in which [the member or associated person] has been found to have engaged[,]" the "specific provision . . . [the act or omission] is deemed to violate," and the "sanction imposed and the reasons therefor."[22] It is the SRO's own final decision, not the decision of a hearing panel or other subordinate body, that "is subject to Commission review."[23] The SRO must clearly articulate in *its* decision the "basis on which it is upholding liability and explain how its findings of violation inform the sanctions imposed," because the Commission is "unable to

---

[18] *See, e.g.*, *Chicago Bd. Options Exch., Inc.*, Exchange Act Release No. 69726, 2013 WL 2540903, at *1 (June 11, 2013) (settled proceeding); *Kent M. Houston*, Exchange Act Release No. 66014, 2011 WL 6392264, at *8 (Dec. 20, 2011).

[19] *Chicago Bd. Options Exch., Inc.*, 2013 WL 2540903, at *2 (quoting *Concept Release Concerning Self-Regulation*, 69 Fed. Reg. 71256, 71259 (Dec. 8, 2004)).

[20] *Id.* at *17 (quoting *Chicago Stock Exch., Inc.*, Exchange Act Release No. 48566, 2003 WL 22245922, at *8 (Sept. 30, 2003) (settled proceeding)); *see also San Francisco Mining Exch.*, Exchange Act Release No. 7870, 1966 WL 83450, at *7-8 (Apr. 22, 1966).

[21] Exchange Act Sections 6(b)(1), 15A(b)(2), and 19(g)(1), 15 U.S.C. §§ 78f(b)(1), 78o-3(b)(2), 78s(g)(1); *see generally Order Approving Proposed Rule Change*, 52 Fed. Reg. 10,433, 10,433, 1987 WL 755658, at *1 (Apr. 1, 1987) (approving rule change designed to "ensure that erroneous BCC decisions" not to initiate disciplinary proceedings "can be reviewed [by CBOE's Board] and, where appropriate, remanded for a new hearing").

[22] Exchange Act Sections 6(d)(1), 15A(h)(1), 15 U.S.C. §§ 78f(d)(1), 78o-3(h)(1).

[23] *E.g.*, *Morton Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *8 & n.27 (Nov. 8, 2007); *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006) (citing Exchange Act Section 19(e), 15 U.S.C. § 78s(e), which governs Commission review of a "final disciplinary sanction imposed by a self-regulatory association").

discharge [its] review function" when the SRO's "decision is unclear."[24] Is the Board's deferential standard of review—which may leave in place BCC rulings that the Board determines are erroneous but not clearly so[25]—consistent with the scheme governing Commission review of SRO disciplinary sanctions under the Exchange Act?

- The Exchange Act requires SROs to provide a "fair procedure" for the discipline of members or associated persons.[26] Although the formal "requirements of constitutional due process do not apply to [SRO] proceedings," the statutory fair-procedure mandate gives rise to certain "'due-process-like'" requirements.[27] In addressing claims of procedural impropriety at the hearing panel or business conduct committee level, the Commission has pointed to the "availability of double *de novo* review"—that is, an SRO's "*de novo* review of the record followed by [the Commission's] independent decision as to the validity of the [SRO's] charges and sanctions"—as an important safeguard against possible unfairness.[28] To what extent would the reasoning in these decisions apply when the hearing panel or business conduct committee's rulings are reviewed deferentially by the SRO?

---

[24] *Kimberly Springsteen-Abbott*, Exchange Act Release No. 80360, 2017 WL 1206062, at *5 (Mar. 31, 2017) (remanding for additional proceedings where the SRO's decision "stated that it was affirming the Hearing Panel's findings of violation, [but] it misstated those findings").

[25] *Cf. First Heritage Inv. Co.*, Exchange Act Release No. 33484, 1994 WL 17098, at *5 n.29 (Jan. 14, 1994).

[26] Exchange Act Sections 6(b)(7) and 15A(b)(8), 15 U.S.C. §§ 78f(b)(7), 78o-3(b)(8).

[27] *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *6 n.35 (July 27, 2015) (quoting *D'Alessio v. SEC*, 380 F.3d 112, 121 (2d Cir. 2004)); *see also Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010); *Walter T. Newman*, Exchange Act Release No. 18932, 1982 WL 524718, at *2 n.5 (Aug. 4, 1982) (noting that "Congress prescribed only . . . procedures basic to 'fundamental standards of due process'").

[28] *Sumner B. Cotzin*, Exchange Act Release No. 10850, 1974 WL 162969, at *4 & n.19 (June 12, 1974); *see, e.g., Ronald Earl Smits*, Exchange Act Release No. 30787, 1992 WL 139352, at *3-4 (June 8, 1992); *Thomas P. Reynolds Sec., Ltd.*, Exchange Act Release No. 29689, 1991 WL 292140, at *4-5 (Sept. 16, 1991); *cf. Order Approving Proposed Rule Change*, Exchange Act Release No. 21838, 1985 WL 545580, at *4-5 (Mar. 12, 1985).

- In the event that the Commission determines that the Board should have applied a different standard of review, what disposition of ABN AMRO's application for review is appropriate?[29]

At this time, the Commission does not desire briefing on whether the Board in practice employed a different standard of review than the one it purported to apply.

Accordingly, it is ORDERED that the parties shall file simultaneous briefs (not to exceed 5,000 words in length) by July 21, 2017 addressing the above questions and any other matters that the parties may believe pertinent to resolution of the standard-of-review issue. It is further ORDERED that any non-party with an interest in the issue—*e.g.*, another SRO or a CBOE member or person associated with a CBOE member who is or may be subject to a CBOE disciplinary proceeding—may file a motion for leave to file an *amicus* brief pursuant to Rule of Practice 210(d), accompanied by the proposed *amicus* brief (likewise not to exceed 5,000 words in length), by August 11, 2017.[30] It is further ORDERED that the parties may file simultaneous reply briefs (not to exceed 2,000 words in length) by August 25, 2017.

This order is not to be construed as expressing any view as to the Commission's resolution of these issues or the review proceeding generally.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

---

[29] *See generally* Exchange Act 19(e), 15 U.S.C. § 78s(e); *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982); *Chen v. GAO*, 821 F.2d 732, 741 n.13 (D.C. Cir. 1987); *cf. United States v. Saucedo-Patino*, 358 F.3d 790, 792-93 (11th Cir. 2004); *Reddy v. CFTC*, 191 F.3d 109, 128-29 (2d Cir. 1999); *United States v. Mejia*, 844 F.2d 209, 211 (5th Cir. 1988).

[30] 17 C.F.R. § 201.210(d); *see also BDO China Dahua CPA Co.*, Exchange Act Release No. 72753, 2014 WL 3827605 (Aug. 4, 2014).