

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 92499 / July 26, 2021

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  
CHICAGO BOARD OPTIONS EXCHANGE, INC.,  
AND C2 OPTIONS EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGES—REVIEW OF DISCIPLINARY  
PROCEEDING

National securities exchanges found that a member firm violated their rules and Rule 15c-3 under the Securities Exchange Act of 1934. *Held*, the findings of violations are *sustained* and the sanctions imposed are *cancelled*.

APPEARANCES:

*Thomas P. Krebs* and *Jason P. Britt*, Foley & Lardner, for ABN AMRO Clearing  
Chicago LLC

*Alan Lawhead* and *Gary Dernelle* of the Financial Industry Regulatory Authority, Inc.,  
for Chicago Board Options Exchange, Inc. and C2 Options Exchange, Inc.

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Last brief received: August 27, 2019

ABN AMRO Clearing Chicago LLC petitions for review of disciplinary action taken by the Chicago Board Options Exchange, Inc. (“CBOE”), and C2 Options Exchange, Inc. (“C2” and, collectively, “the Exchanges”).<sup>1</sup> The Exchanges found that ABN AMRO violated Rule 15c3-5 under the Securities Exchange Act of 1934 (the “Market Access Rule” or the “Rule”) and CBOE Rule 8.2 (which requires adherence to applicable laws) by failing to maintain controls reasonably designed to assure compliance with pre-order entry restrictions on complex order auction responses. We conclude that ABN AMRO violated those rules by not having controls reasonably designed to prevent its client from placing unauthorized trades, but also find that the sanctions imposed are excessive and should be cancelled because outreach by the Exchanges’ marketing department led to ABN AMRO’s client placing the unauthorized trades.

## I. Background

The Commission promulgated the Market Access Rule in 2010 to address concerns about whether broker-dealers were effectively controlling financial and regulatory risk that arose from providing clients with sponsored access to exchanges or alternative trading systems.<sup>2</sup> As relevant here, the Rule requires sponsors of market access to implement risk-management controls reasonably designed to prevent, on a pre-order entry basis, the entry of orders that do not comply with all regulatory requirements. The Rule provides that broker-dealers sponsoring market access cannot “simply rely on assurances from their customers that appropriate risk controls are in place.”<sup>3</sup> To comply with the Market Access Rule, a sponsor of market access must implement and apply “on a pre-trade basis” risk-management controls and supervisory procedures that are, except in limited situations not applicable here, under the sponsor’s “exclusive control.”<sup>4</sup> If a sponsor cannot implement risk-management controls that ensure compliance, the sponsor must limit the market access.

The relevant facts of this case are undisputed. ABN AMRO is a broker-dealer and a Trading Permit Holder (“TPH”) registered to do business on the Exchanges. A trading permit is a license issued by the Exchanges that permits the holder to access the exchange, without the assistance of a broker, for purposes of trading.<sup>5</sup>

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<sup>1</sup> *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 01.3 (Apr. 4, 2019). CBOE and C2 each brought separate disciplinary actions against ABN AMRO, which were subsequently consolidated. Unless otherwise noted, we refer to the actions taken in the consolidated case.

<sup>2</sup> *Risk Management Controls for Brokers or Dealers with Market Access*, Exchange Act Release No. 63241, 75 Fed. Reg. 69,792, 69,794 (Final Rule) (Nov. 15, 2010) (hereinafter “Adopting Release”).

<sup>3</sup> Adopting Release, 75 Fed. Reg. at 69,808.

<sup>4</sup> *Id.*

<sup>5</sup> *See* CBOE Rule 1.1; C2 Rule 1.1.

In May 2012, ABN AMRO entered into a Sponsored User Agreement with Simplex Investments, LLC. A sponsored user is a person or entity that is not a TPH and enters a contractual relationship with a TPH in order to access the Exchanges.<sup>6</sup> A Sponsored User Agreement requires the sponsored user to adhere to CBOE rules applicable to TPHs and makes the sponsoring TPH responsible for actions taken by the sponsored user.<sup>7</sup> Simplex was not a broker or TPH. Under the agreement, ABN AMRO would sponsor Simplex's access to the Exchanges.

**A. Simplex responded to complex order auctions in violation of the Exchanges' rules.**

In the course of onboarding Simplex, ABN AMRO considered and assessed Simplex's "business model, trading patterns, and strategy[,] and its stated trading strategies and intentions," including inquiring as to the types of trades in which Simplex planned to engage. At no point did Simplex indicate that it intended to trade in the Complex Order Auction ("COA") market. COAs are mechanisms that are designed to facilitate complex orders with multiple legs, and the Exchanges' rules limited which participants could respond to COA requests.<sup>8</sup> CBOE restricted COA responses in certain proprietary index products (the "Proprietary Products") to CBOE market-makers approved to trade in those products.<sup>9</sup> Relevant C2 rules at the time restricted all COA responses to market-makers.<sup>10</sup> Simplex's trading history revealed no prior COA activity.

Simplex did express a desire to engage in complex trades that did not involve COAs. Because ABN AMRO's usual risk-management system, AMG, did not enable firms to engage in complex trades, including COAs, ABN AMRO employed the widely used FIN risk-management system, which enabled complex order trading, to secure Simplex's business. The FIN system did not contain a mechanism for preventing firms like Simplex from responding to COAs.

Although the Exchanges' rules prohibited Simplex from responding to COAs because it was not a market-maker, the Exchanges' marketing department solicited Simplex's participation in the COA market in late December 2012. The Exchanges provided Simplex with log-in credentials and assisted Simplex in registering and enabling Simplex's responses to all COAs—including COAs to which Simplex was, by virtue of the Exchanges' rules, prohibited from responding. The record shows that the Exchanges' marketing and technical support departments were aware of Simplex's ongoing COA responses in early 2013, and that Simplex would have been unable to participate in the COA market absent the Exchanges' provision of log-in information.

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<sup>6</sup> See CBOE Rule 3.60; C2 Rule 3.60.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., CBOE Rule 6.53C(d) (2012); C2 Rule 6.13(c)(3) (2012).

<sup>9</sup> CBOE Regulatory Circular RG12-152 (Nov. 2, 2012), <https://cdn.cboe.com/resources/regulation/circulars/regulatory/RG12-152.pdf>; see also CBOE Rule 6.20A (2012).

<sup>10</sup> C2 Rule 6.13(c)(3). Effective March 1, 2013, C2 amended its rules to permit all TPHs to respond to COAs. See C2 Regulatory Circular RG13-008 (Feb. 8, 2013), <https://cdn.cboe.com/resources/regulation/circulars/regulatory/RG-C2-2013-008.pdf>.

Between January and March 2013, Simplex improperly responded to 514 COAs in the Proprietary Products on CBOE and 18,412 COAs on C2.<sup>11</sup> The record establishes that ABN AMRO was unaware that Simplex had engaged in any activity in violation of CBOE and C2 rules until CBOE began its investigation in October 2013. The record also contains no indication that Simplex was aware that its COA responses were improper.

The Exchanges' Divisions of Enforcement (collectively, "Enforcement") filed charges against ABN AMRO in February 2014. It alleged that ABN AMRO violated the Market Access Rule (and related exchange rules) by "fail[ing] to maintain market access controls . . . 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 a COA must hold a Market-Maker appointment[.]" Enforcement's theory was that ABN AMRO violated the Market Access Rule by failing to prevent Simplex from improperly responding to COA auctions.<sup>12</sup>

**B. A hearing panel dismissed the charges that ABN AMRO violated the Market Access Rule.**

In November 2015, a panel of the Exchanges' Business Conduct Committee ("BCC") held a hearing on the charges that ABN AMRO violated the Market Access Rule and subsequently dismissed the charges. The BCC found that the Exchanges' FIX protocol—the system by which TPHs transact with one another and communicate with the Exchanges themselves—lacked the capability to enable a sponsoring TPH like ABN AMRO to monitor its sponsored user's activity with the requisite particularity to determine whether the sponsored user was responding to a COA in a class of products for which doing so violated CBOE rules.

The FIX protocol could display whether a sponsored user was participating in an auction, but did not differentiate between various types of auctions and therefore could not identify whether a sponsored user was participating in a COA and, if so, the type of product being auctioned. Thus, although the Exchanges' rules permitted Simplex to participate in certain COA auctions and in a number of non-COA auction types, the FIX protocol could not tell ABN AMRO whether Simplex was engaged in permissible or impermissible auction activity.

The BCC also found that, even if FIX could have provided ABN AMRO with enough information to surveil Simplex's COA activity, it lacked the capability to enable ABN AMRO to block Simplex's COA responses. It allowed a sponsoring TPH to block trading activity on a per-product basis but not a per-trade basis. ABN AMRO could have blocked Simplex from conducting any trade (including permissible trades) of a product for which a COA response would have been impermissible, but could not have blocked only COA responses in those products.

The BCC found that the Exchanges' investigators and expert witnesses were unaware of these technological limitations when Enforcement made the decision to charge ABN AMRO.

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<sup>11</sup> C2 amended its rules with respect to COAs in March 2013. *See supra* note 10.

<sup>12</sup> Although ABN AMRO litigated these charges, it also settled charges that it violated the Exchanges' rules by failing to adequately supervise Simplex's trading activity.

Indeed, the BCC admonished the Exchanges' investigators for failing to ascertain whether ABN AMRO could have implemented the "COA block" that formed the basis of the charge that its controls were not reasonably designed to assure regulatory compliance.<sup>13</sup>

Several Enforcement witnesses testified before the BCC that, if a "COA block" was indeed infeasible, ABN AMRO could not reasonably continue to sponsor market access. But the BCC rejected the argument that ABN AMRO should have simply stopped sponsoring market access in the absence of an effective COA block on the ground that doing so would have been impractical "from either a compliance or business standpoint."

With respect to the Market Access Rule—which requires firms to implement risk management controls that are "reasonably designed" to prevent the entry of orders in violation of regulatory requirements—the BCC held that ABN AMRO's risk management controls were reasonably designed because ABN AMRO inquired about Simplex's trading history and strategies, and tailored its risk-management systems based on that information. The BCC reasoned that the FIN system (which could not block such orders) was reasonably designed to ensure that Simplex complied with the Exchanges' rules because ABN AMRO reasonably believed that Simplex would not respond to COAs. The BCC therefore found no violation.

**C. The Exchanges' Boards of Directors reversed the BCC, found a violation of the Market Access Rule, and imposed a censure and fines on ABN AMRO.**

The Exchanges' Boards of Directors (collectively, the "Board") concluded on appeal that ABN AMRO violated the Market Access Rule, reversed the BCC on that basis, and remanded to the BCC for a determination of sanctions. The BCC imposed a censure and fines of \$55,000, which the Board then sustained. On appeal of that decision, the Commission concluded that the Board had used the wrong standard of review, set aside the Board's disciplinary action, and remanded.<sup>14</sup> The Board, applying the correct standard of review, again reversed the BCC's dismissal of the charges, found that ABN AMRO violated the Market Access rule, and imposed sanctions.

The Board concluded that the broad scope of the Market Access Rule required ABN AMRO to implement controls to prevent Simplex from violating exchange rules concerning eligibility to respond to COAs. As a result, and contrary to the BCC, the Board rejected ABN AMRO's argument that a market access provider complies with the Rule by tailoring its risk-management protocols based on its understanding of its client's past and reasonably anticipated trading habits. The Board held that the requirement that controls be "reasonably designed" "provides a market access provider with some discretion in how to design controls to ensure compliance with regulatory requirements" but does not "allow market access providers to fail to implement any control whatsoever to ensure compliance with an Exchange rule."

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<sup>13</sup> The BCC also observed that the FIX system's specifications wrongly informed users that the trading system would automatically reject an attempt at an unauthorized auction response, but ABN AMRO was unaware that the FIX system purported to block ineligible COA responses.

<sup>14</sup> *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 83849, 2018 WL 3869452 (Aug. 15, 2018).

The Board did not reverse or otherwise disturb any of the BCC’s factual findings with respect to the feasibility of either surveilling or blocking Simplex’s COA activity; rather, the Board found that “contrary to [ABN AMRO’s] arguments and the BCC’s findings . . . it was not impossible for [ABN AMRO] to implement a control to ensure compliance with Exchange COA rules.” In the absence of a mechanism for monitoring or blocking the transactions at issue, the Board concluded that ABN AMRO had three options to ensure Simplex’s compliance with applicable rules: (1) routing Simplex’s trades through a risk management system like AMG that did not support complex trades (thus preventing Simplex from participating in any auctions), (2) “reaching out to the Exchange to determine a way to prevent Simplex from responding to COAs,” or (3) discontinuing its sponsored user relationship with Simplex. Because ABN AMRO continued to offer Simplex market access without implementing any such reasonably designed risk management control, the Board held that ABN AMRO violated the Market Access Rule. The Board imposed a censure and \$10,000 in fines. ABN AMRO now petitions the Commission for review of the Board’s decision.

## II. Analysis

In reviewing self-regulatory organization (“SRO”) disciplinary action under Section 19(e)(1) of the Securities Exchange Act of 1934, we must determine whether the applicant engaged in the conduct that the SRO found, whether such conduct violated the provisions the SRO found it to have violated, and whether those provisions are and were applied in a manner consistent with the purposes of the Exchange Act.<sup>15</sup> We apply a preponderance of the evidence standard to determine whether the SRO’s actions are supported by the record.<sup>16</sup>

The question before us is whether ABN AMRO failed to establish and maintain adequate risk-management controls as required by the Market Access Rule. The Market Access Rule provides, in pertinent part, that

- (b) A broker or dealer with market access, or that provides a customer . . . with access to an exchange or alternative trading system . . . 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 . . . .
- (c) The risk management controls . . . (2) shall be reasonably designed to ensure compliance with all regulatory requirements, including being reasonably designed to

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<sup>15</sup> See 15 U.S.C. § 78s(e)(1).

<sup>16</sup> *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at \*1, 9 (May 27, 2011) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of the evidence standard in SRO disciplinary proceedings)), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

- (i) Prevent the entry of orders unless there has been compliance with all regulatory requirements that must be satisfied on a pre-order entry basis[.]<sup>17</sup>

Here, ABN AMRO provided market access to its customer, Simplex, but failed to implement a risk-management control that was reasonably designed to prevent Simplex from responding to COAs on the Exchanges without complying with their pre-order entry requirements for COAs.

**A. The Exchanges' COA rules are "regulatory requirements" under the Market Access Rule.**

First, we conclude that ABN AMRO was required to implement reasonably designed controls to ensure Simplex's compliance with the COA rules at issue here because those rules are "regulatory requirements" as that term is used in the Market Access Rule. The Rule defines "regulatory requirements" as "all federal securities laws, rules, and regulations, and rules of self-regulatory organizations, that are applicable in connection with market access."<sup>18</sup> The Rule's relevant definition of "market access" encompasses both direct access to the market and the type of sponsored access that ABN AMRO granted Simplex here.<sup>19</sup>

The Adopting Release for the Market Access Rule also explained that "[r]egulatory 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 or [alternative trading system]."<sup>20</sup> Indeed, the Commission identified "exchange rules applicable to particular order types" as examples of requirements that must be satisfied on a pre-trade basis.<sup>21</sup> The Exchanges' rules governing eligibility to respond to COAs are "rules applicable to particular order types." We therefore agree with the Board that the exchange rules at issue here fall within the scope of "regulatory requirements" that must be addressed by risk management controls.<sup>22</sup>

**1. The fact that "regulatory requirements" include the exchange rules at issue here governing eligibility to respond to COAs is neither contrary to the purposes and objectives of the Market Access Rule nor unduly burdensome.**

ABN AMRO argues that the Board's reading of the phrase "all regulatory requirements" is "hyperliteral" and contrary to the purposes and objectives of the Market Access Rule because it would require ABN AMRO "to create all-encompassing risk controls for every conceivable potential violation of any and all rules, regardless of the customer's market venue, business

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<sup>17</sup> 17 C.F.R. § 240.15c3-5.

<sup>18</sup> *Id.* § 240.15c3-5(a)(2).

<sup>19</sup> *See id.* § 240.15c3-5(a)(1)(i); *see also* Adopting Release, 75 Fed. Reg. at 69,792.

<sup>20</sup> Adopting Release, 75 Fed. Reg. at 69,803.

<sup>21</sup> *Id.*

<sup>22</sup> *See Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141, 1145 (7th Cir. 2001) (applying a regulation "according to its plain meaning" where the regulation is unambiguous).

model and history, [and] trading patterns and strategy.” But, as explained above, the Rule’s definition of “regulatory requirements” specifically includes “*all . . . rules of self-regulatory organizations, that are applicable in connection with market access.*”<sup>23</sup> This language forecloses ABN AMRO’s argument that the exchange rules at issue are outside the scope of the Rule.

We also do not agree with ABN AMRO’s contention that the Board’s view that the term “regulatory requirements” encompasses the exchange rules at issue here is inconsistent with the purpose of the Rule. As the Commission explained in the Adopting Release, one concern that the Rule was designed to address was the provision of sponsored exchange access in the absence of “pre-trade risk controls.”<sup>24</sup> Although ABN AMRO employed the FIN risk-management system and required Simplex to route its market access through that system, the FIN system did not enable ABN AMRO to surveil and block the improper trades at issue here. ABN AMRO was therefore “unaware of the trading activity occurring under its market identifier and [had] no way to control it.”<sup>25</sup> The purpose of the Rule—which was at least in part to prevent unauthorized trades and ensure adequate monitoring of sponsored users—is furthered by applying it here.

We further do not agree that the Board’s understanding of the scope of the term “regulatory requirements” is unduly burdensome. Rather, the Rule limits the applicable “regulatory requirements” to rules and obligations “that are applicable in connection with market access.”<sup>26</sup> A sponsoring TPH therefore need not implement a risk-management control that addresses every hypothetical rule violation by a sponsored user, but it must adopt risk-management controls coextensive with the degree of market access it grants the sponsored user.

**2. The fact that “regulatory requirements” include the exchange rules at issue here does not impose new regulatory requirements on broker-dealers.**

ABN AMRO also argues that because the Commission did not intend the Market Access Rule to “substantively expand upon” broker-dealers’ “existing regulatory requirements,”<sup>27</sup> and because no Commission or exchange rule otherwise required ABN AMRO to block Simplex’s responses to COAs, the Market Access Rule could not create such a requirement; rather, ABN AMRO argues that the Exchanges must require a COA block through their rules.

ABN AMRO’s argument is contrary to the plain language of the Market Access Rule, which requires a sponsor of market access to have controls that are reasonably designed to ensure compliance with all regulatory requirements that arise in connection with market access.<sup>28</sup> The Market Access Rule requires that a sponsoring user implement controls to “prevent the entry of orders unless there has been compliance with all regulatory requirements that must be satisfied

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<sup>23</sup> 17 C.F.R. § 240.15c3-5(a)(2) (emphasis added).

<sup>24</sup> Adopting Release, 75 Fed. Reg. at 69,793.

<sup>25</sup> *Id.*

<sup>26</sup> 17 C.F.R. § 240.15c3-5(a)(2).

<sup>27</sup> Adopting Release, 75 Fed. Reg. at 69,797.

<sup>28</sup> 17 C.F.R. § 240.15c3-5(a)(2).



on a pre-order entry basis.”<sup>29</sup> Because the Exchanges’ COA eligibility requirements are just such rules as discussed above, the Market Access Rule required ABN AMRO to implement a control reasonably designed to ensure Simplex’s compliance with those rules.

ABN AMRO also misreads our prior statements concerning the Market Access Rule. Although ABN AMRO is correct that we stated the Market Access Rule would not create new underlying obligations for broker-dealers, ABN AMRO conflates underlying regulatory requirements (*i.e.*, the substantive exchange rules regarding eligibility to respond to COAs) with the Market Access Rule’s mandate that a broker-dealer providing market access must implement controls reasonably designed to ensure that its clients comply with those underlying obligations. As the Board correctly held, “the language in the adopting release was not intended to limit the scope of the plain language of the Market Access Rule, but rather explains how the Market Access Rule will interact with ‘existing regulatory requirements,’ including the Exchange rules governing participation in COAs.” The Market Access Rule did not place additional restrictions on who could respond to a COA. But it required ABN AMRO to implement systems reasonably designed to ensure that its market-access customers abided by those underlying rules.

ABN AMRO’s reliance on our staff’s responses to frequently asked questions (the “FAQs”) does not aid its argument.<sup>30</sup> The FAQs reiterated that “the term ‘regulatory requirements’ in Rule 15c3-5 references existing regulatory requirements applicable to broker-dealers in connection with market access.”<sup>31</sup> But they also addressed the following question:

Where a broker-dealer with market access has an arrangement with a broker-dealer customer, is the broker-dealer with market access required to implement risk management controls and supervisory procedures reasonably designed to ensure compliance with all regulatory requirements that are applicable in the connection with the market access provided to that broker-dealer customer?<sup>32</sup>

The FAQs answered: “Yes. Rule 15c3-5(c)(2)(i) requires a broker-dealer to implement risk management controls . . . that are reasonably designed to ensure compliance with all regulatory requirements.”<sup>33</sup> The Market Access Rule requires a broker-dealer to implement adequate “risk management controls and supervisory procedures” when it provides market access to a customer.

We therefore agree with the Board that the exchange rules at issue here are “regulatory requirements” within the meaning of the Market Access Rule and that ABN AMRO was required to implement controls reasonably designed to ensure Simplex’s compliance with those rules.

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<sup>29</sup> *Id.* § 240.15c3-5(c)(2)(i).

<sup>30</sup> *See* Responses to Frequently Asked Questions Concerning Risk Management Controls for Brokers or Dealers with Market Access, [https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm#\\_ftnref14](https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm#_ftnref14) (Apr. 15, 2014) (hereinafter, “FAQs”).

<sup>31</sup> FAQs, no. 9 n.14.

<sup>32</sup> FAQs, no. 9.

<sup>33</sup> *Id.*

**B. ABN AMRO’s risk-management controls were not reasonably designed to manage the risks of providing Simplex with market access to the Exchanges and to ensure compliance with the Exchanges’ rules governing COAs.**

We agree with the Board that ABN AMRO’s risk-management system was not reasonably designed to ensure that Simplex complied with the Exchange’s COA rules. The Market Access Rule requires that broker-dealers “establish, document, and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory, and other risks of” providing market access.<sup>34</sup> But the FIN system lacked the functionality to surveil and block Simplex’s COA activity to ensure Simplex was not responding to COAs improperly. Indeed, ABN AMRO admitted it was unaware the FIN system permitted Simplex to respond to COAs. Under these circumstances, ABN AMRO’s controls were not reasonably designed to manage the risks of providing Simplex with market access.

ABN AMRO argues that its onboarding of Simplex reasonably demonstrated that Simplex would not conduct COA transactions, thus satisfying its responsibility to implement controls to ensure that Simplex would not respond to COAs improperly. But while such onboarding due diligence is an important part of a broker-dealer’s regulatory controls, the Market Access Rule specifies that a firm must “[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.”<sup>35</sup> The Market Access Rule does not limit compliance to those regulatory requirements likely to be implicated by a client’s stated trading habits. A client could deviate from its stated trading habits for any number of reasons, and we adopted the Rule in part to reduce the risk of “the submission of erroneous orders.”<sup>36</sup> If a sponsor’s grant of market access includes the capability to enter orders that are prohibited by Commission or exchange rules, then the sponsor must implement measures reasonably designed to surveil the client’s trading activity and block any orders that would violate Commission or exchange rules.

The Adopting Release indicates that the Market Access Rule was partially motivated by providers of market access placing undue weight on their customers’ assurances of compliance. We were “concerned about circumstances where broker-dealers providing market access simply rely on assurances from their customers that appropriate risk controls are in place.”<sup>37</sup> To comply with the Market Access Rule, we stated that a sponsor of market access should “independently review, on an ongoing basis, the effectiveness of the reasonably designed controls or procedures allocated to a customer.”<sup>38</sup> As a result, it was not sufficient for ABN AMRO to rely on any assurances from Simplex that it would not engage in COA activity. ABN AMRO was required to have controls that, on an ongoing basis, ensured Simplex did not respond to COAs improperly.

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<sup>34</sup> 17 C.F.R. § 240.15c3-5(b).

<sup>35</sup> *Id.* § 240.15c3-5(c)(2)(i) (emphasis added).

<sup>36</sup> Adopting Release, 75 Fed. Reg. at 69,799.

<sup>37</sup> Adopting Release, 75 Fed. Reg. at 69,808.

<sup>38</sup> *Id.*

Relying on language in the Adopting Release, ABN AMRO argues that a market access provider can tailor its risk management protocols based upon its customers' trading habits. ABN AMRO is correct that the Rule permits a degree of tailoring; indeed, the Rule requires that risk-management protocols be reasonably designed based on the type and degree of market access granted.<sup>39</sup> But we have never given any indication that the Rule permits a market access sponsor to base its risk controls *solely* on its clients' representations and trading history.<sup>40</sup> Rather, "the proposed rule allows flexibility for the details of the controls and 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."<sup>41</sup> As discussed above, those goals include preventing orders that do not comply with all regulatory requirements. Managing risks by relying solely on a customer's assurances—without any means of verifying those assurances through market surveillance—is unreasonable and contrary both to the language of the Rule and its purposes.

The dissent argues that this action should be set aside in its entirety. Our disagreement with the dissent is with respect to liability. As discussed below, we agree that the sanctions in this case should be set aside. But we cannot agree with the dissent's view as to liability on this record.

The dissent disagrees that ABN AMRO violated the Market Access Rule by arguing that ABN AMRO conducted a "careful and thorough assessment" of the "needs and risks posed by granting Simplex sponsored access," and that ABN AMRO adopted the FIN system only after concluding that the system would allow Simplex to engage in permitted trades, "while still complying with its obligations under the Market Access Rule." But the record does not show that ABN AMRO ever made an assessment of the risks of granting Simplex sponsored access or of using the FIN system to facilitate that access. To the contrary, ABN AMRO's Chief Compliance Officer ("CCO") conceded that she never investigated whether the FIN system provided a means for preventing non-market-maker clients from performing functions limited to market-makers, like responding to COAs. ABN AMRO's own written supervisory procedures also required that any risk management system have the same functionality as the AMG system, which ABN AMRO acknowledged "effectively blocks [request for response] messages for COAs." Yet there is no evidence that ABN AMRO investigated whether the FIN system provided such functionality. The evidence showed only that the FIN system, unlike the AMG system, allowed Simplex to engage in complex trades—and thus allowed ABN AMRO to secure Simplex's business. And ABN AMRO's CCO admitted that the firm did not review the

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<sup>39</sup> *Id.* at 69,798 n.45.

<sup>40</sup> Although the Market Access Rule permits a sponsor of market access to allocate responsibility for risk-management controls to a client, the sponsor may only do so by written contract, where the client is a broker-dealer, and where the sponsor has a reasonable basis for determining that the client has better access to its trading information such that it can more effectively implement the specified controls and procedures. *See* 17 C.F.R. § 240.15c3-5(d)(1). Because Simplex was not a broker-dealer, that exception could not apply here.

<sup>41</sup> Adopting Release, 75 Fed. Reg. at 69,798.

Exchanges' rules governing market access to understand what was required before granting market access to firms like Simplex.

The dissent also argues that ABN AMRO “[took] into account . . . the Exchange’s representations that its FIX protocol would reject improper orders,” but there is no evidence of this either. Indeed, ABN AMRO does not claim that it was ever aware of the Exchanges’ representations about whether the FIX protocol could reject improper trades; ABN AMRO conceded before the Board that it “never explored the feasibility of COA messaging between the CBOE and Simplex via FIX protocol.” But even if ABN AMRO had read the FIX specifications and believed that the Exchanges would block any attempt by Simplex to participate in the relevant COA processes, such reliance on a risk-management system provided by the Exchanges would still have been unreasonable. We explained in the Adopting Release that a broker-dealer that provides market access may rely on an exchange’s risk-management systems only if the broker-dealer has performed “appropriate due diligence as to the[] effectiveness” of the systems, and “the broker-dealer can directly monitor their operation and has the exclusive ability to adjust the controls.”<sup>42</sup> There is no evidence here that ABN AMRO satisfied either condition with respect to the FIX protocol or any other system of the Exchanges that could be considered a risk-management control.

The dissent additionally suggests that ABN AMRO had “no reason to believe that Simplex intended to trade in the COA market,” but Simplex expressed a desire to engage in complex trades, of which COAs are a subset. It was unreasonable for ABN AMRO not to account for the risk that Simplex might still engage in prohibited COAs. Indeed, ABN AMRO’s CCO specifically acknowledged that clients do not always stick to their advertised trading strategies.

ABN AMRO’s violation therefore does not turn on a failure to account for the possibility that a client might change its business model or that an exchange might misrepresent its protocols or induce a firm’s clients into making improper trades. Its violation turns on ABN AMRO’s failure to account for *anything* beyond Simplex’s representations and trading history when assessing and mitigating the risk that Simplex could enter into improper orders. Instead of suggesting a careful and thorough assessment of the regulatory risks of granting Simplex market access, the evidence establishes that ABN AMRO’s primary concern was employing a risk-management system that would secure Simplex’s business. Indeed, multiple ABN AMRO witnesses acknowledged that a client’s conscious disregard for the Exchanges’ rules was a risk in ABN AMRO’s sponsored user business. Thus, on these facts, ABN AMRO’s controls were not reasonably designed to assure compliance with pre-order entry restrictions under the Rule.

**C. Any deficiencies in the Exchanges’ own systems did not absolve ABN AMRO of its responsibility to comply with the Market Access Rule.**

ABN AMRO argues that, because the Exchanges’ FIX interface did not permit surveillance or blocking of the particular COA activity at issue, compliance with the Rule was factually impossible and it is unreasonable to impose a technologically infeasible requirement on

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<sup>42</sup> Adopting Release, 75 Fed. Reg. at 69,810.

sponsoring TPHs. Although technological limitations may have prevented ABN AMRO from implementing a specific “COA block” or surveilling Simplex’s activities, those limitations did not make compliance with the Market Access Rule impossible. The Market Access Rule did not require ABN AMRO to implement a “COA block”; rather, it required ABN AMRO to have controls reasonably designed to ensure Simplex’s compliance with regulatory requirements. If ABN AMRO could not surveil and block Simplex’s market access, then compliance with the Market Access Rule required ABN AMRO to limit that grant of market access. As the Board found, ABN AMRO could have done so by either using the AMG risk management system (which would have effectively prevented Simplex from engaging in any complex trades, including COAs) or discontinuing its sponsored user relationship with Simplex altogether.

ABN AMRO argues that the record does not support the Board’s view that it had other means of complying with the Market Access Rule. With respect to the Board’s finding that Simplex could have used the AMG risk-management program, ABN AMRO argues there is no evidence in the record from which the Board could have concluded that AMG was a viable option for Simplex. But ABN AMRO was not relieved of its obligations under the Market Access Rule because attempting to comply could have resulted in losing Simplex’s business.

Nor did the Board err by holding that ABN AMRO could have terminated its sponsored-user relationship with Simplex to comply with the Market Access Rule. Numerous witnesses testified for Enforcement that it would not be “acceptable for ABN AMRO to have allowed Simplex access to the Exchange” without mechanisms reasonably designed to ensure compliance with regulatory requirements. In the absence of such mechanisms, these witnesses testified that “it’s appropriate not to do that business” and “perhaps ABN should not have done this business with Simplex in order to ensure that they could comply with all regulatory requirements.”

ABN AMRO asserts that “the discontinuation of sponsored access is not a ‘risk control’ as described by the Rule.” But a provider of market access that cannot implement a risk-management control to ensure compliance with a Commission or exchange rule must limit its grant of market access. As a result, a market-access provider must discontinue a business practice in the absence of a risk-management control suitable for a particular sponsored business.

We also do not agree with ABN AMRO that finding liability here means that every sponsor of access to the Exchanges is also guilty of violating the Market Access Rule due to deficiencies in the Exchanges’ FIX system. The reasonableness of the controls of other sponsors of market access would depend on the facts and circumstances of each case. We impose liability here because ABN AMRO did not take steps to implement any controls that were reasonably designed to ensure Simplex’s compliance with the Exchanges’ rules governing COA activity, regardless of any deficiencies of the Exchanges’ own system.<sup>43</sup>

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<sup>43</sup> See, e.g., *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at \*9 (Feb. 13, 2015) (“The responsibility for complying with regulatory requirements cannot be shifted to regulatory authorities.”); see also Adopting Release, 75 Fed. Reg. at 69,805 (emphasizing that a broker-dealer providing market access has “the direct and exclusive obligation to assure the effectiveness of” the reasonably designed risk management controls).

**D. The Market Access Rule is and was applied in a manner consistent with the purposes of the Exchange Act.**

We find that the Market Access Rule is and was applied in a manner consistent with the Exchange Act’s purposes of protecting investors and the public interest. The Market Access Rule is consistent with those purposes because it was crafted to “enhance market integrity and investor protection in the securities markets” by, in part, preventing unauthorized trades and ensuring adequate monitoring of sponsored users.<sup>44</sup> The Exchanges’ application of it was consistent with those purposes because the evidence shows that ABN AMRO failed to adopt and implement a system reasonably designed to surveil and block the improper trades at issue here.

We sustain the Board’s finding that ABN AMRO violated the Market Access Rule.

**E. ABN AMRO received fair notice and procedures.**

Before turning to the sanctions, we consider two due-process challenges that ABN AMRO raises to the Exchanges’ proceedings. First, ABN AMRO argues that it lacked regulatory notice that it was required to implement a reasonably designed risk-management protocol to prevent Simplex from engaging in the types of trades at issue here. Second, it claims that Enforcement impermissibly shifted its theory of the case after losing before the BCC.

First, ABN AMRO claims it lacked notice that its conduct violated the Market Access Rule. Specifically, it asserts that it lacked “ascertainable certainty” that permitting Simplex market access that encompasses access to prohibited trades violated the Market Access Rule, where a pre-trade “block” was infeasible. We do not agree.

“Due process requires . . . only that ‘laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”<sup>45</sup> “An existing rule does not have to address the precise circumstances of every intended application explicitly, particularly when it deliberately states a principle in broad terms.”<sup>46</sup> Instead, to determine whether a regulated party received fair notice of its obligations under a regulation, we ask whether the obligations at issue are “reasonably and fairly implied” by the rule in question.<sup>47</sup> The Market Access Rule requires providers of market access to implement risk-management controls reasonably designed to ensure compliance with all regulatory requirements on a pre-trade basis. Permitting access to the market in the absence of such controls violates the Rule. ABN AMRO’s obligations to have a reasonably designed risk-management control to prevent Simplex’s violation of the Exchanges’

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<sup>44</sup> Adopting Release, 75 Fed. Reg. at 69,794; *see also supra* notes 24–25 and accompanying text.

<sup>45</sup> *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 66 (2d Cir. 1999) (quoting *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996)).

<sup>46</sup> *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 83849, 2018 WL 3869452, at \*4 (Aug. 15, 2018) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

<sup>47</sup> *SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at \*5 (June 17, 2005).

rules, and to limit Simplex's market access if such a control was not possible, were reasonably and fairly implied from the plain terms of the Market Access Rule.

Second, ABN AMRO argues that Enforcement's theory of liability shifted after it lost before the BCC. ABN AMRO contends that Enforcement had argued before the BCC only that ABN AMRO's violation occurred because it failed to implement a "COA block" to prevent Simplex from responding to COAs. But after the BCC rejected that theory, and highlighted Enforcement's misunderstanding of the Exchanges' technological capabilities, ABN AMRO claims that Enforcement pivoted to focus on actions ABN AMRO should have taken in the absence of a "COA block." ABN AMRO argues this was a new factual basis for the charges and violated ABN AMRO's due-process rights. We disagree.

The Exchange Act requires the Exchanges to "bring specific charges," "notify" the respondent of the charges, and give the respondent "an opportunity to defend against" the charges.<sup>48</sup> Although "a complaint need not specify all details regarding a case against a respondent," in order for proceedings to be fair a respondent should "'underst[an]d the issue' and '[be] afforded full opportunity' to justify its conduct during the course of the litigation."<sup>49</sup>

Here, we are satisfied that ABN AMRO understood the issue and was afforded a full and fair opportunity to contest Enforcement's charges. As discussed above, Enforcement charged that ABN AMRO violated the Market Access Rule by failing to establish, document, and maintain a system of risk-management controls to ensure that Simplex complied with all regulatory requirements that must be met on a pre-order entry basis. And Enforcement did not focus exclusively on ABN AMRO's failure to implement a "COA block" before the BCC, as it also argued before the BCC that ABN AMRO should have taken actions to stop Simplex's improper COA responses even in the absence of a block.

Throughout the hearing before the BCC, Enforcement witnesses testified that ABN AMRO should have either used the AMG risk-management platform (which would have prevented the COA responses at issue) or discontinued its sponsored-user business. For example, a CBOE auditor testified that had ABN AMRO used its proprietary AMG risk-management system, "they would have already been in compliance with the COA rules." When later asked what ABN AMRO should have done in the event that "implementing a control was . . . impossible on the FIN" system, she responded that "[if] a control's not possible, I would question whether that business should be conducted with that customer. If you're not able to comply with all regulatory requirements or implement a proper control with respect to market access . . . , it's appropriate to not do that business[.]" Several other Enforcement witnesses similarly testified that, if a COA block was indeed impossible, ABN AMRO should have taken other steps, including the use of the AMG system or discontinuance of its market-access business, to ensure compliance with the Market Access Rule.

On this record, we find that ABN AMRO was not deprived of a fair procedure.

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<sup>48</sup> 15 U.S.C. § 78f(d)(1).

<sup>49</sup> *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at \*3 (July 1, 2008) (quoting *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979)).

### III. Sanctions

Exchange Act Section 19(e)(2) directs us to sustain the Board's sanctions unless we find, with due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.<sup>50</sup> As discussed above, the Board censured ABN AMRO and imposed \$10,000 in fines for its violation of the Market Access Rule. We consider these sanctions excessive on the facts of this case.

The outreach by the Exchanges' marketing department led to Simplex's participation in the COA market. It did so at a time when the Exchanges' rules restricted which market participants were eligible to respond to COAs. And despite its marketing department knowing in January 2013 that Simplex was actively trading COAs, the Exchanges never informed ABN AMRO that they had granted Simplex unfettered access to the COA market.

At the time ABN AMRO agreed to sponsor Simplex's market access, it believed that Simplex did not intend to participate in the COA market. Although this belief does not absolve ABN AMRO of liability for failing to have reasonably designed risk-management controls for the market access it sponsored, the fact that the actions of the Exchanges themselves led to Simplex deviating from the behavior that ABN AMRO expected is mitigating. The finding of violation here is based on ABN AMRO's inadequate controls, rather than Simplex's improper COA responses, but the Exchanges encouraged Simplex to engage in the very activities that the Exchanges then accused ABN AMRO of not doing enough to prevent. We are unaware of any Commission decision sustaining sanctions imposed in an SRO disciplinary action under similar circumstances.

Because the record contains mitigating facts rendering the sanctions excessive under the facts and circumstances of this particular case, we cancel them.

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners ROISMAN, LEE, and CRENSHAW; Commissioner PEIRCE dissenting).

Vanessa A. Countryman  
Secretary

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<sup>50</sup> 15 U.S.C. § 78s(e)(2). The record does not show, and ABN AMRO does not argue, that the Exchanges' sanctions impose an unnecessary or inappropriate burden on competition.



Commissioner PEIRCE, dissenting:

The Chicago Board Options Exchange and C2 Options Exchange (“the Exchanges”) found that ABN Amro Clearing Chicago LLC (“ABN Amro”) violated the Market Access Rule by failing to have policies and procedures in place to prevent its customer Simplex from participating in certain Complex Order Auctions (“COA”) that the Exchanges’ rules limited only to market makers, which Simplex was not. The Commission’s order today sustains this finding, holding that ABN Amro did not satisfy the Rule’s requirement that a broker-dealer have in place policies and procedures that are “reasonably designed to ensure compliance with all regulatory requirements,” including controls to prevent the placement of orders that would violate the rules of the exchange to which the broker-dealer or its customer has access.<sup>1</sup> As the Commission recognizes, however, the Exchanges’ own conduct in this matter is not blameless and, accordingly, the order cancels the monetary sanctions that the Exchanges imposed. Market access controls are important; nonetheless, because a preponderance of the evidence establishes that ABN Amro’s policies and procedures were reasonably designed to address the risks presented when it granted Simplex sponsored access to the Exchanges, I dissent.

As detailed in the Commission order and in the decisions issued by the Exchanges’ Business Conduct Committee (“BCC”) and the Boards of Directors, ABN Amro conducted extensive due diligence into Simplex’s trading history and future trading intentions before it entered the sponsored access agreement. ABN Amro carefully considered how it might allow Simplex to engage in certain permitted complex trades in which Simplex expressed an intention to engage while still complying with its obligations under the Market Access Rule and settled on a risk-management system, widely used in the industry, that it believed would do both. ABN Amro had no reason to believe that Simplex intended to trade in the COA market or that Simplex had ever been or intended to become a market maker. Moreover, the Exchanges acknowledged that, with respect to COA trading, a broker-dealer in ABN Amro’s position would not be able to distinguish between permitted (those not limited to market makers) and prohibited (those limited to market makers) orders. Additionally, the BCC found that, because the Exchanges’ own Financial Information eXchange (“FIX”) specifications indicated that the protocol would reject any improper COA responses, there was no reason for ABN Amro to believe that the Exchanges would accept such responses from Simplex. Finally, it appears that Simplex engaged in prohibited transactions only because the Exchanges’ marketing department actively solicited just these types of trades from Simplex and, without ABN Amro’s knowledge, facilitated Simplex’s access to the data necessary to engage in the transactions.

After considering the totality of this evidence, I am persuaded that ABN Amro did have in place policies and procedures reasonably designed to ensure compliance with regulatory requirements. The evidence does not support the Commission’s conclusion that ABN Amro’s policies and procedures here consisted of nothing more than the “due diligence” that ABN Amro performed before it granted Simplex sponsored access to the Exchanges; rather, ABN Amro assessed the needs and risks posed by granting Simplex sponsored access and, based on that careful and thorough assessment, elected to employ the widely used FIN risk management system. In light of that analysis by ABN Amro at the outset of its relationship with Simplex, and

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<sup>1</sup> Exchange Act rule 15c3-5(c)(2)(i) and (ii).

taking into account the limited data available to ABN Amro about orders being placed by its customers, the natural expectation—bolstered by the Exchange’s representations<sup>2</sup>--that its FIX protocol would reject improper orders, and ABN Amro’s reasonable expectation that the Exchanges would not induce its customers to participate in COA trades that would violate the Exchanges’ own rules, ABN Amro reasonably concluded that adopting the FIN risk management system would be sufficient to address the risks posed by granting Simplex sponsored access to the Exchanges.<sup>3</sup>

The Commission acknowledges that the rule does not require ABN Amro to “address[] every hypothetical rule violation by a sponsored user,” but that is exactly what the Commission appears to require: Regardless of the contemporary facts and circumstances, the Commission’s order announces, a broker-dealer’s risk management controls are not reasonably designed unless they take into account not only the risk that a customer has misrepresented its intended trading strategy, but also the risk that an exchange is going to work actively to promote non-compliance. Specifically, a broker-dealer needs to take into account the risk that an exchange will set up its own technology to facilitate impermissible behavior and that its own description of how its protocols work will be incorrect or otherwise misleading, and the risk that the exchange itself will induce a customer to participate in trades that violate the exchange’s own rules and provide it with access to the data necessary to do so. If we are requiring ABN Amro to account for these hypotheticals in designing its policies and procedures, under the Commission’s reasoning is there any hypothetical scenario ABN Amro could disregard? The Commission’s order expects too much of member firms—every foot fault will be punished—and too little of exchanges.

The Commission has recognized the Exchanges’ own failures in this matter by cancelling the sanctions that they imposed on ABN Amro but upholds the finding that ABN Amro violated the Exchanges’ rules and Exchange Act rule 15c3-5. The evidence, which here suggests that ABN Amro made every reasonable effort to comply with the relevant Exchange Act requirements and the rules of the Exchanges, warrants a stronger message to the Exchanges. A member such as ABN Amro is not acting unreasonably when it assumes that an exchange will conform its own technology to its own rules and provide it with accurate descriptions of how the exchange’s own protocols work. Nor is a broker-dealer acting unreasonably when it assumes that an exchange will seek to prevent its marketing department from undermining the exchange’s

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<sup>2</sup> ABN Amro explained that “CBOE Regulatory Circular RG12-152, which announced the modifications to the CBOE COA rules, implied that the CBOE would continue to control who could and could not access COAs, i.e., the CBOE noted, in part, that it would, ‘continue to permit COA responses only from CBOE Market-Makers with an appointment in the subject class.’”

<sup>3</sup> The Commission states that ABN Amro’s risk management approach was unreasonable because it “rel[ie]d solely on [Simplex’s] assurances.” As the record demonstrates, however, ABN Amro implemented a risk management approach that did more than rely on assurances from its customer, and this approach was reasonably designed to address the risks that ABN Amro reasonably concluded, in light of its due diligence (including these assurances) and the other facts and circumstances described above, that Simplex presented.

own rules. Throwing this case out entirely<sup>4</sup> would have sent a clear message to the Exchanges that we expect self-regulatory organizations to foster, not foil, compliance by their members with key regulatory obligations.

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<sup>4</sup> That ABN Amro already settled charges that it violated the Exchanges' rules by failing to adequately supervise Simplex's trading activity is an additional reason these charges for activity that spanned an approximately two-month period eight years ago are superfluous.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 92499 / July 26, 2021

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  
CHICAGO BOARD OPTIONS EXCHANGE, INC.,  
AND C2 OPTIONS EXCHANGE, INC.

ORDER SUSTAINING IN PART DISCIPLINARY ACTION TAKEN BY CHICAGO BOARD  
OPTIONS EXCHANGE, INC., AND C2 OPTIONS EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the finding of violation made by Chicago Board Options Exchange, Inc., and C2 Options Exchange, Inc. against ABN AMRO Clearing Chicago LLC is *sustained*; and it is further

ORDERED that the sanctions imposed by Chicago Board Options Exchange, Inc., and C2 Options Exchange, Inc., against ABN AMRO Clearing Chicago LLC are *cancelled*.

By the Commission.

Vanessa A. Countryman  
Secretary