SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 95083 / June 10, 2022

Admin. Proc. File No. 3-19182

In the Matter of the Application of

EQUITEC PROPRIETARY MARKETS, LLC

For Review of Disciplinary Action taken by

CBOE EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE — REVIEW OF DISCIPLINARY PROCEEDING

National securities exchange found that a member firm failed to implement and maintain risk-management controls reasonably designed to prevent the entry of orders that exceeded its capital threshold and failed to implement written supervisory procedures reasonably designed to ensure compliance with all regulatory requirements. *Held*, the findings of violation and imposition of sanctions are *sustained*.

APPEARANCES:

David J. Barclay, Equitec Proprietary Markets, LLC, for Equitec Proprietary Markets, LLC.

Alan Lawhead and *Andrew Love* of the Financial Industry Regulatory Authority, Inc., for Cboe Exchange, Inc.

Appeal filed: May 23, 2019
Last brief received: September 19, 2019

Equitec Proprietary Markets, LLC ("Equitec" or "the Firm"), a registered broker-dealer, appeals disciplinary action taken against it by the Cboe Exchange, Inc., f/k/a Chicago Board Options Exchange, Inc. ("Cboe").[1] Cboe found that Equitec violated Rule 15c3-5 under the Securities Exchange Act of 1934 (the "Market Access Rule" or the "Rule") and Cboe Rule 4.2 (which requires adherence to applicable laws) by failing to implement and maintain risk-management controls reasonably designed to prevent the entry of orders that exceeded its capital threshold and by failing to implement written supervisory procedures reasonably designed to ensure compliance with all regulatory requirements. For these violations, Cboe imposed a censure and $50,000 fine. We sustain Cboe's findings of violations and imposition of sanctions.

I. Background

The facts are uncontested. Equitec is a Trading Permit Holder registered to conduct a market maker and proprietary trading business on Cboe. A trading permit is a license that permits the holder to trade on the exchange without the assistance of a broker.[2]

A. The Market Access Rule and Equitec's Procedures

In July 2013, Cboe instituted a routine examination to gauge Equitec's compliance with the Market Access Rule. That rule is "designed to ensure that broker-dealers appropriately control the risks associated with market access, so as not to jeopardize their own financial condition, that of other market participants, the integrity of trading on the securities markets, and the stability of the financial system."[3] The Market Access Rule requires firms to implement financial risk management controls and supervisory procedures reasonably designed to limit the financial exposure of the broker-dealer that could arise as a result of market access, including "prevent[ing] the entry of orders that exceed appropriate pre-set . . . capital thresholds in the aggregate for . . . the broker-dealer."[4] The Rule also requires firms to implement risk-management controls and supervisory procedures 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."[5]

Equitec's risk-management controls in place from November 30, 2011 through April 8, 2015 were designed to limit "the maximum value of open orders" that Equitec could place as part of its proprietary trading. In order to accomplish this objective, Equitec set a limit—or

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1 In October 2017, during these proceedings, Chicago Board Options Exchange, Inc., changed its name to Cboe Exchange, Inc. *See* Cboe Options Regulatory Circular RG17-144 (Oct. 17, 2017).

2 *See* Cboe Rule 1.1.

3 Securities Exchange Act Release No. 63241, 75 Fed. Reg. 69,792 (Nov. 15, 2010) ("Adopting Release").

4 17 C.F.R. § 240.15c3-5(c)(1)(i).

5 *Id.* § 240.15c3-5(c)(2)(i).

"capital threshold"—for the amount of orders it could place as part of its proprietary trading. To avoid exceeding its limit, Equitec reduced the capital threshold by the amount of its open orders.

To use an example often repeated by the parties: if Equitec's capital threshold was $100 million, and it placed a $10 million order for its own account, the threshold would be decremented, or reduced, to $90 million.[6] If that order were to be cancelled, the order's value would be returned to the Firm's capital threshold (thus restoring it to $100 million). Both parties agree this was proper. But if the order were executed for Equitec's proprietary account (instead of cancelled), Equitec still returned the order's value to the Firm's capital threshold (restoring it to $100 million), despite the fact that Equitec had exposure in the amount of the executed order. The issue is whether this was reasonable under the Market Access Rule. Also at issue is whether Equitec's Written Supervisory Procedures ("WSP") were reasonably designed to ensure that the Firm complied with its risk-management obligations from October 18, 2012 through April 8, 2015.

B. The Procedural History

On June 2, 2015, Cboe issued a Statement of Charges against Equitec alleging violations of the Market Access Rule and Cboe Rule 4.2.[7] Cboe alleged that Equitec failed to establish risk-management procedures reasonably designed to prevent the entry of orders that exceeded the Firm's capital threshold. Cboe further alleged that Equitec's WSPs did not adequately specify procedures for preventing the entry of such orders and further failed to specify how information related to its capital threshold was disseminated to the Firm's on-floor market makers. Cboe also alleged that Equitec's WSPs improperly shifted the burden of compliance with regulatory requirements to individual users of its system, failed to specify a process through which the Firm's on-floor market makers were restricted from disseminating quotes or orders in securities in which they were restricted from trading, and failed to provide a process by which Equitec ensured that only authorized persons accessed the Firm's trading system.

After a two-day hearing, Cboe's Business Conduct Committee (the "BCC") held that Equitec's risk-management procedures were not reasonably designed to prevent orders that exceeded its capital threshold and that its WSPs failed to ensure compliance with applicable regulatory requirements. The BCC imposed a censure and $50,000 fine.

On appeal, Cboe's Board of Directors (the "Board") affirmed the BCC's decision, holding that Equitec violated the Market Access Rule and Rule 4.2 because the Firm's risk-

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[6] This example assumes that the threshold is discounted, dollar-for-dollar, by the total value of the order placed. In adopting the Market Access Rule, we explained that, where a firm's trading strategy predictably results in executions of only a small percentage of orders placed, "the credit or capital exposure assigned to those orders may be discounted, where appropriate, to account for the likelihood of actual execution." *See* Adopting Release, 75 Fed. Reg. at 69,792.

[7] *See* Cboe Rule 4.2 (2015) ("No Trading Permit Holder shall engage in conduct in violation of the Securities Exchange Act of 1934, as amended, [or] rules or regulations thereunder . . . ." In late 2019, Cboe restructured its rules, and the text of former Rule 4.2 is now codified at Cboe Rule 8.2. *See* Cboe Rule Filing SR-CBOE-2019-096 (Oct. 4, 2019).

management controls did not account for executed proprietary orders when calculating its capital threshold. The Board explained that Equitec's failure to do so frustrated the Market Access Rule's goal of systematically limiting broker-dealers' financial exposure. "Even after an order has been executed," the Board reasoned, "a firm still has risk exposure from that position." The Board also sustained the BCC's findings of violations regarding Equitec's WSPs, concluding that Equitec had waived any such challenges by not raising them on appeal. The Board affirmed the BCC's imposition of sanctions. Equitec now appeals 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 the applicant to have violated, and whether those provisions are and were applied in a manner consistent with the purposes of the Exchange Act.[8] We apply a preponderance of the evidence standard to determine whether the record supports the SRO's actions.[9] Here, there is no dispute about Equitec's conduct, and the record supports Cboe's factual findings. The only issues on appeal are whether Equitec's conduct violated the rules at issue, and whether those rules are and were applied in a manner consistent with the purposes of the Exchange Act.

A. Equitec violated the Market Access Rule, and Cboe Rule 4.2 by failing to account for executed proprietary orders in its capital threshold.

1. Equitec's failure to account for executed proprietary orders in its capital threshold rendered its controls not reasonably designed to limit its financial exposure.

As noted above, Equitec's market-access procedures flagged orders that exceeded pre-set capital thresholds. But in determining the pre-set thresholds, the procedures failed to include a decrement for the Firm's executed proprietary orders. We agree with Cboe that such procedures violated the Market Access Rule and Cboe Rule 4.2.

The Market Access Rule requires that firms maintain controls that "are reasonably designed to systematically limit the financial exposure of the broker or dealer that could arise as a result of market access."[10] The Rule requires that broker-dealers do so by "prevent[ing] the entry of orders that exceed appropriate pre-set credit or capital thresholds in the aggregate for . . . the broker or dealer."[11] It would be unreasonable for a broker-dealer like Equitec to automatically return the value of an executed proprietary order to its capital threshold.

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8 15 U.S.C. § 78s(e)(1).

9 *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).

10 17 C.F.R. § 204.15c3-5(c)(1).

11 *Id.* § 240.15c3-5(c)(1)(i).

For example, under Equitec's risk-management controls, a firm with a $100 million capital threshold that placed a $100 million order would first decrement $100 million from its capital threshold and then automatically restore that amount to its threshold upon execution of the order. The firm's capital threshold, which sets the maximum allowable dollar value of the orders the firm could place, then would be $100 million—even though the firm could have a $100 million position in its proprietary trading account, which would suggest its threshold might be $0. Under the firm's procedures, the firm could then place a second $100 million order, which it would again automatically restore to its capital threshold upon execution. The firm could thus have a $200 million position in its proprietary trading account—twice its initial capital threshold—while its procedures would place its threshold at $100 million for the purpose of determining whether the firm could place yet more orders. This example demonstrates that, rather than systematically limiting the Firm's financial exposure, Equitec's risk-management procedures potentially expanded its financial exposure without limit. We therefore find that Equitec's controls were not reasonably designed to reject orders that exceeded its capital threshold and thus violated the Market Access Rule and Cboe Rule 4.2.

2. Equitec needed to consider whether to include a decrement for executed orders.

a. Equitec did not have to include a decrement for every executed order, but it needed to consider whether a decrement was necessary.

Equitec argues that "decrementation of executions is not required or necessary" to accomplish the Market Access Rule's goal of limiting a broker-dealer's financial exposure that could arise from its market access. According to the Firm, only pending orders, rather than executed orders, create the risks addressed by the Market Access Rule. But the Market Access Rule requires a firm to consider the "aggregate" value of its orders when determining whether entry of additional orders will cause it to exceed its pre-set capital threshold.[12] A firm can only do so by looking at its entire financial exposure, which necessarily includes orders executed for a firm's own account. We agree with Equitec that not all executions may increase a firm's exposure and that some may even reduce it. For example, an order executed to close an existing position or to act as a hedge or offset may not increase the firm's exposure, but an order executed to establish a firm's position may increase its financial exposure significantly. The point is that a firm's risk-management system must consider them either way, which Equitec's system did not.

Equitec's risk-management controls did not differentiate between whether an execution opened or closed an existing position. Instead, the Firm automatically returned *all* executed trades to its capital threshold, regardless of whether the trade opened or closed a position. Nor does Equitec explain how it accounted for different types of executed trades. Equitec provides only broad, unsupported generalities about how the Firm had "a sophisticated risk system that takes into account hedges, offset and related positions." The Firm points, without record

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[12] Adopting Release, 75 Fed. Reg. at 69,802.

citation, to its risk-control system, which it describes only vaguely as what "was in the description of the Market Access controls submitted to [Cboe]."[13]

Equitec cites the testimony of its chief compliance officer to claim that the Firm's controls involved an overall assessment of the Firm's risk. But when asked about these systems during the hearing, the compliance officer testified that he was "not conversant enough to explain" them. And when asked if Equitec's different systems worked together to assess the Firm's risk, he replied "I believe so, but I can't opine because I'm not an expert in the system." This testimony does not establish that Equitec considered whether to include a decrement for different types of executed trades. Rather, the evidence in the record is that Equitec did not differentiate between whether an execution opened or closed an existing position and instead automatically returned all executed trades to its capital threshold.

b. Requiring Equitec to consider whether to include a decrement for executed orders is consistent with the Market Access Rule.

Equitec argues that it need not account for executed orders for purposes of its capital threshold because neither the Market Access Rule nor the proposing or adopting releases specify that executed orders must be decremented. Equitec relies on language in the Rule's proposing and adopting releases specifying that a broker-dealer's controls "should measure compliance with appropriate credit or capital thresholds on the basis of orders entered rather than executions obtained."[14] But Equitec misconstrues the Rule and accompanying releases.

The language in our proposing and adopting releases about measuring capital thresholds in terms of orders placed and not orders executed concerned the timing of when an order should be first decremented from a capital threshold, which is a separate question from whether the value of a trade can be subsequently returned to the threshold upon execution. The language at issue stemmed from our concern that "financial exposure through rapid order entry can be incurred very quickly in today's fast electronic markets."[15] Because of this, we rejected a proposal that firms be allowed to apply Market Access Rule controls "on a rolling intra-day or post-close basis, with compliance being calculated based on executed orders rather than orders routed but not yet executed."[16] Instead, we explained, "broker-dealers should monitor compliance with applicable credit or capital thresholds based on orders entered, including the potential financial exposure resulting from open orders not yet executed."[17]

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13 *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring that all exceptions to the findings or conclusions under Commission review "shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon").

14 Adopting Release, 75 Fed. Reg. at 69,801 (quoting Exchange Act Release No. 61379, 2010 WL 176432, at *13 (Jan. 19, 2010) (proposing the rule)).

15 *Id.* at 69,801.

16 *Id.*

17 *Id.*

We also recognized "that some active trading strategies predictably result in executions for only a small percentage of orders entered, and that requiring broker-dealers to assume that every order entered will be executed will, in some cases, significantly overestimate actual credit or capital exposures."[18] We therefore contemplated that, while risk-management controls should measure compliance based on orders entered, broker-dealers could "discount" the credit or capital exposure assigned to those orders "to account for the likelihood of actual execution as demonstrated by reasonable risk management models."[19] The need for broker-dealers to consider a decrement for orders entered but not yet executed, and the flexibility we provided broker-dealers in determining when they needed to include a decrement for such orders, does not mean that broker-dealers may always return the value of an executed order to its threshold.

No more helpful to Equitec is its citation to staff guidance regarding a broker-dealer's risk management controls that did not mention "executions," which Equitec interprets as meaning that the Commission must not have intended to require firms to consider executed orders for purposes of determining whether orders exceed their capital thresholds.[20] The "expressions of views offered to the public by the Commission's staff . . . do not necessarily reflect the views of the Commission [and] do not have the force of law."[21] In any case, the guidance simply reiterates that the Rule requires broker-dealers to implement "risk management controls . . . reasonably designed to systematically limit the financial exposure of the broker-dealer,"[22] which, as we have explained, must include consideration of executed trades.[23]

Equitec also suggests that, by requiring a firm to consider whether to decrement trades executed for a firm's own account, Cboe is improperly substituting the Market Access Rule for

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18 *Id*.

19 *Id.* (explaining that "[a]ny broker-dealer relying on risk management models to discount the exposure of outstanding orders should monitor the accuracy of its models on an ongoing basis and make appropriate adjustments to its method of calculating credit or capital exposures as warranted").

20 *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 (April 15, 2014) ("FAQ").

21 *Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 WL 3216542, at *11 n.76 (July 17, 2019) (quoting *Allen Douglas Sec., Inc*., Exchange Act Release No. 50513, 2004 WL 2297414, at *4 n.31 (Oct. 12, 2004)).

22 *See* FAQ, *supra* note 20.

23 Equitec notes that neither the staff guidance nor a memorandum produced by a law firm summarizing the Market Access Rule expressly states that a firm must decrement executed orders from its threshold under the Rule. But both of those sources simply summarize the Rule and our adopting release. As discussed above, without considering whether to include a decrement for executed orders a broker-dealer cannot ensure that it "prevent[s] the entry of orders that exceed appropriate pre-set credit or capital thresholds in the aggregate" in order to "systematically limit the financial exposure of the broker or dealer." 17 C.F.R. § 240.15c3-5(c)(1)(i).

the Net Capital Rule.[24] Equitec is generally correct that the Market Access Rule concerns preventing the harm that could arise from a firm's ability to place orders, while the Net Capital Rule concerns preventing the harm that could arise from a firm's lack of liquidity. But determining whether placing an order would present a financial risk to a firm can only be accomplished by looking at the firm's total financial exposure—which necessarily includes its underlying holdings, such as executed trades. That those executed trades may also be relevant to the Net Capital Rule does not render them irrelevant to the Market Access Rule.

3. Cboe's disciplinary action provided Equitec with fair procedures and notice.

Equitec argues that we should set aside the findings of violations because Cboe's allegedly "novel interpretation" of the Market Access Rule (1) failed to provide a fair procedure for disciplining Cboe members and (2) did not provide Equitec with fair notice of what could constitute a violation of the Rule. The record does not establish that Cboe failed to provide Equitec with a fair procedure for imposing discipline. Under the Exchange Act, national securities exchanges provide a "fair procedure" for disciplining their members by notifying members of specific charges and providing an opportunity to defend against such charges.[25] Cboe did this. It provided written notice of the charges against the firm and expressly alleged that Equitec violated the Market Access Rule by failing to consider both pending and executed orders in its capital threshold. It then conducted a two-day hearing before the BCC, where Equitec was represented by counsel and was able to present and cross-examine witnesses. After the BCC issued Equitec a written decision, Cboe provided a right of appeal to the Board, which allowed for additional briefing and then issued its own written decision.[26]

The record also does not establish that Cboe deprived Equitec of fair notice that a firm could violate the Market Access Rule by not considering whether to include a decrement for executed orders when calculating the firm's capital threshold. Due process requires that a person of ordinary intelligence is able to understand what is prohibited.[27] A rule does not have to address every intended application—particularly when it deliberately states a principle in broad

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[24] *See* Exchange Act Rule 15c3-1, 17 C.F.R. § 240.15c3-1. The Net Capital Rule requires broker-dealers "to maintain, at all times . . . a minimum level of highly liquid assets." *Keith D. Geary*, Exchange Act Release No. 80322, 2017 WL 1150793, at *1 (March 28, 2017).

[25] 15 U.S.C. §§ 78f(b)(7), 78f(d)(2). Equitec cites Exchange Act Rule 19b-4 for the proposition that SROs must "provide a 'fair procedure' for the discipline of its members or associated persons." But that rule provides that an SRO's interpretation of an existing SRO rule shall be deemed a proposed rule change if, among other things, "it is not reasonably and fairly implied by that rule." 17 C.F.R. § 240.19b-4(d). And Equitec does not argue that Cboe's disciplinary proceeding constituted an improper rule change. Nor does Equitec challenge Cboe's interpretation of one of its own rules, but rather Cboe's interpretation of an Exchange Act rule.

[26] *Cf. MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *5 (April 3, 2003) (finding that a national securities exchange provided a fair procedure by providing notice of proposed grounds for the exchange's denial of services and an opportunity to be heard).

[27] *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)).

terms.[28] Instead, we ask whether the obligations at issue are "reasonably and fairly implied" by the rule.[29] The Market Access Rule's requirement that broker-dealers "prevent the entry of orders that exceed appropriate pre-set credit or capital thresholds in the aggregate" in order to "systematically limit the financial exposure of the broker or dealer that could arise as a result of market access" reasonably and fairly implied that a firm could not determine whether an order would exceed pre-set capital thresholds without considering the firm's executed orders.

Equitec argues that Cboe "never published (formally or otherwise)" its interpretation of the Market Access Rule and reiterates its arguments that the Rule does not state explicitly that a firm must consider whether to include a decrement to its capital threshold for executed trades. According to Equitec, the releases' discussion regarding decrementing orders would lead a reasonable reader to conclude that the Commission was unconcerned with the effect of executions on a firm's capital threshold. But for the reasons discussed above, it is not reasonable to interpret that language as allowing a firm to automatically exclude all executed trades from its determination of whether placing an order presented a financial risk to the firm.

B. Equitec violated the Market Access Rule and Cboe Rule 4.2 by having inadequate WSPs.

As described above, the BCC found that Equitec's WSPs violated the Market Access Rule and Cboe Rule 4.2. On appeal, the Board concluded that Equitec abandoned its challenge to those findings, and affirmed them. Equitec does not challenge those findings on appeal to the Commission. Under the circumstances, we hold that Equitec has waived any arguments with respect to those findings of violations or the sanctions arising therefrom.[30] Nevertheless, consistent with our standard of review, we review Cboe's findings of violations.

The record supports Cboe's finding that Equitec's WSPs did not comply with the Market Access Rule because they did not adequately specify a process for preventing orders that exceeded Equitec's capital threshold. In adopting the Market Access Rule, we explained that reasonably designed controls for preventing the entry of orders that fail to comply with

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[28] *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)).

[29] *SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at *5 (June 17, 2005).

[30] *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule 450(b)] may, at the discretion of the Commission, be deemed to have been waived by the applicant."); *cf. Puffer v. Allstate Insurance Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("[A]rguments not raised to the district court are waived on appeal [and] even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law."); *Canady v. SEC*, 230 F.3d 362, 362–63 (D.C. Cir. 2000) (upholding Commission's conclusion that respondent "waived [a] defense by failing to argue it"); Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that, "except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived").

regulatory requirements must be done "on an automated, pre-trade basis."[31] Equitec's WSPs addressed only how the Firm would prevent the entry of orders that exceeded its capital threshold based on open, but not executed, orders. Equitec's WSPs also stated only that orders that exceeded Equitec's pre-set capital threshold would be flagged via e-mail warnings. The WSPs did not specify that such orders would be automatically rejected on a pre-trade basis. Equitec thus violated the Market Access Rule and Cboe Rule 4.2 by not having WSPs that sufficiently specified a process to prevent the entry of orders that exceeded its capital threshold.

The record also supports Cboe's finding that Equitec's WSPs failed to describe how the Firm's on-floor traders learned about amounts remaining in the Firm's capital threshold. Cboe explained below that a firm such as Equitec that has open outcry on-floor market makers must implement WSPs that indicate the manner by which those market makers learn of the firm's capital threshold. According to Cboe, firms could use staff meetings, e-mail, or phone calls to convey that information. But Equitec's WSPs contained no provision for how its on-floor market makers would be made aware of the Firm's risk profile or capital threshold. Because the WSPs thus lacked procedures reasonably designed to prevent the entry of orders that exceed pre-set capital thresholds, the Firm violated the Market Access Rule and Cboe Rule 4.2.

The record further supports Cboe's finding that Equitec's WSPs improperly shifted the burden of compliance to users of its trading systems. In requiring that a firm's risk-management controls and supervisory procedures be "reasonably designed to ensure compliance with all regulatory requirements,"[32] the Market Access Rule requires that those controls and procedures "be under the direct and exclusive control of the broker or dealer."[33] But Equitec's WSPs stated that users of the Firm's trading system—rather than the firm itself—were responsible "for ensuring compliance with all regulatory rules prior to order entry." Although a firm may allocate certain regulatory requirements to its customers by entering into an allocation agreement,[34] Equitec did not do so. By implementing and maintaining WSPs that shifted regulatory compliance to its users, Equitec violated the Market Access Rule and Cboe Rule 4.2.

The record also supports Cboe's finding that Equitec's WSPs failed to specify the process for preventing on-floor market makers from trading in securities that they were restricted from trading. The Market Access Rule requires firms to implement risk management controls and supervisory procedures reasonably designed to "prevent the entry of orders for securities for a broker, dealer, or customer, or other person, if such person is restricted from trading those securities."[35] Equitec's WSPs stated that "[e]ach trader understands that no one may enter an order in any security or option if the Firm is restricted from selling or buying that security," that "[t]he Compliance Officer will provide a list of all securities that the Firm is restricted from buying or selling," and that "[i]n the event of a restriction the Compliance Officer will inform the

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31 Adopting Release, 75 Fed. Reg. at 69,802.

32 17 C.F.R. § 240.15c3-5(c).

33 *Id.* § 240.15c3-5(d).

34 *Id.* § 240.15c3-5(d)(1).

35 *Id.* § 240.15c3-5(c)(2)(ii).

system help desk that such orders may not be placed by the Firm." However, these WSPs merely address securities that the *Firm* is restricted from trading. They are silent on how information about trading restrictions on individual on-floor traders are disseminated to Firm staff, including the traders themselves. We agree with Cboe that the WSPs needed to provide a method by which the Firm's on-floor traders learned which securities they were restricted from trading.

The Firm represented that it provided its traders with handheld devices that were programed to allow only approved trades. But these devices were only used to confirm trades *after* the trades were made in open outcry, and therefore did not constitute a pre-order-entry risk control. Because the Firm did not provide traders with information about what securities they themselves were restricted from trading in open outcry, and because the trader's handheld devices did not prevent the entry of restricted trades on a pre-order-entry basis, the Firm violated the Market Access Rule and Cboe Rule 4.2.

Finally, the record supports Cboe's finding that Equitec's WSPs failed to indicate how the Firm verified that only authorized persons used Equitec's trading systems. The Market Access Rule requires providers of market access to implement risk-management systems and supervisory procedures reasonably designed to "restrict access to trading systems and technology that provide market access to persons and accounts pre-approved by the broker or dealer."[36] Such controls and procedures should include "an effective process for vetting and approving persons at the broker-dealer or customer, as applicable, who will be permitted to use the trading systems or other technology."[37] Here, Equitec's WSPs specified that its trading system required a password and that only authorized persons could access the system. But the WSPs did not specify how the Firm determined whom to approve for access to its system or what criteria the Firm used to vet users before approving them. Equitec thus violated the Market Access Rule and Cboe Rule 4.2 by not having WSPs that included an effective process for vetting and approving persons who would be permitted to use its trading systems and technology.

C. The Market Access Rule and Cboe Rule 4.2 are, and were applied in a manner, consistent with the purposes of the Exchange Act.

We find that the Market Access Rule and Cboe Rule 4.2 are, and were 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 adopted to "enhance market integrity and investor protection in the securities market."[38] Cboe's application of the Rule to Equitec's conduct was consistent with those purposes because Equitec's failure to have reasonable controls to prevent orders that exceeded its pre-set capital thresholds and to have adequate WSPs increased the financial risk that could arise from the Firm's market access.[39]

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36 *Id.* § 240.15c3-5(c)(2)(iii).

37 Adopting Release, 75 Fed. Reg. at 69,804.

38 *Id*. at 69,794.

39 *See id*. at 69,799.

Cboe Rule 4.2 is also consistent with the Exchange Act's purposes because it reflects the mandate of Exchange Act Section 6(b)(5) that SRO rules "promote just and equitable principles of trade."[40] Cboe's application of that rule to Equitec's failure to implement and maintain reasonably designed procedures for systematically limiting the firm's financial exposure and reasonably designed WSPs furthered the objective of promoting just and equitable principles of trade.[41]

III. Sanctions

Exchange Act Section 19(e)(2) directs us to sustain Cboe'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.[42] We consider any aggravating or mitigating factors, as well as whether the sanctions serve remedial rather than punitive purposes.[43] We also consider Cboe's rules governing sanctions.[44]

Equitec does not challenge Cboe's imposition of a censure. We find the censure to be a remedial sanction and neither excessive nor oppressive. The censure will "serve to alert the public . . . of the unacceptability of [Equitec's] conduct."[45]

Equitec only challenges the $50,000 fine in its reply brief, where it argues that the fine was "not commensurate" with prior Cboe settlements involving Market Access Rule violations. Our Rules of Practice provide that, generally, "any argument raised for the first time in a reply

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40 15 U.S.C. § 78f(b)(5).

41 *Cf. Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 WL 1602630, at *10 (Apr. 2, 2018) (finding that application of FINRA rule requiring compliance with FINRA and Commission rules was consistent with just and equitable principles of trade).

42 15 U.S.C. § 78s(e)(2). The record does not show, and Equitec does not argue, that Cboe's sanctions impose an unnecessary or inappropriate burden on competition.

43 *See, e.g.*, *Saad v. SEC*, 718 F.3d 904, 912 (D.C. Cir. 2013) (citing *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007).

44 *Cf. Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *17 (Nov. 15, 2013) ("FINRA appropriately relied on, and gave proper weight to, the Guidelines' Principal Considerations in Determining Sanctions, which are applicable to all violations."). At the time of Cboe's decision in this matter, Cboe's sanctions considerations were codified at Cboe Rule 17.11. In late 2019, Cboe restructured its rules, and the text of former Rule 17.11 was codified at Cboe Rule 13.11. *See supra* note 7.

45 *Philip L. Spartis*, Exchange Act Release No. 64489, 2011 WL 1825026, at *13 (May 13, 2011) (affirming SRO's imposition of a censure); *cf. Investors Research Corp. v. SEC*, 628 F.2d 168, 174, 179 (D.C. Cir. 1980) (affirming a censure where it was "the lightest administrative sanction available" and the Commission determined in light of circumstances mitigating the violations "that its remedial purposes would be sufficiently advanced by censure").

brief shall be deemed to have been waived."[46] In any case, as directed by its rules,[47] Cboe considered prior disciplinary decisions involving other firms and identified three comparable cases in which it had imposed penalties equal to or greater than the $50,000 fine imposed here for similar violations of the Market Access Rule.[48]

Equitec identifies 15 different Cboe settlements involving violations of the Market Access Rule, with fines ranging from $7,500 to $30,000, and claims without further support or explanation that those cases involved firms that had "no controls at all" while Equitec's controls were merely "insufficient." These matters do not support Equitec's claim that "the only appropriate sanction . . . would be a Cautionary Action Letter or a fine at the low end . . . of that range." As discussed above, Cboe also entered into settlements in which it imposed either the same or a higher fine than it imposed on Equitec for comparable misconduct. We have repeatedly observed that "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases."[49] The record supports the $50,000 fine imposed here.[50]

In considering potential aggravating or mitigating factors, we find no mitigating factors. We find that aggravating that Equitec's violations were serious and extensive. The Market Access Rule was specifically designed to protect against "systemic risk" that "could potentially expose a broker or dealer to enormous financial burdens and disrupt the markets."[51] Equitec's numerous deficiencies in its WSPs and its complete exclusion of executed trades for purposes of its capital threshold exposed itself and potentially the market to just such systemic risks.

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46 Rule of Practice 450(b), 17 C.F.R. § 201.450(b); *see also, e.g.*, *Mendez v. Perla Dental*, 646 F.3d 420, 423-24 (7th Cir. 2011) ("[I]t is well-established that arguments raised for the first time in the reply brief are waived.").

47 Cboe Rule 17.1 (directing Cboe to consider "prior similar disciplinary decisions").

48 *Citadel Sec. LLC*, Cboe File No. 15-0064 (Oct. 20, 2015) (settled order) ($100,000 fine), https://cdn.cboe.com/resources/regulation/disciplinary/2015/Cboe-2015-0064.pdf; *Consol. Trading, LLC*, Cboe File No. 14-0145 (Dec. 29, 2014) (settled order) ($50,00 fine), https://cdn.cboe.com/resources/regulation/disciplinary/2014/Cboe-2014-0145.pdf; *Essex Radez, LLC*, Cboe File No. 15-0041 (May 25, 2016) (hearing panel decision) ($90,000 fine), https://cdn.cboe.com/resources/regulation/disciplinary/2016/Cboe-2015-0041.pdf.

49 *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 WL 4336702, at *13 (Sept. 16, 2011); *see also Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (stating that the "Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases" (citation omitted)).

50 *See Michael Lubin*, Exchange Act Release No. 45281, 2002 WL 54269, at *11 (Jan. 15, 2002) (rejecting applicant's challenge to Cboe's imposition of monetary sanctions where applicant claimed fine was inconsistent with other "smaller settlements").

51 Adopting Release, 75 Fed. Reg. at 69,817.

Further aggravating is Equitec's disciplinary history with respect to WSPs.[52] In 2005, Equitec settled with the Pacific Stock Exchange by paying a $2,000 fine after that exchange alleged that Equitec failing to have adequate WSPs. In 2007, Equitec settled with the American Stock Exchange by paying a $90,000 fine after the exchange alleged that Equitec failed to maintain adequate supervisory systems and WSPs. And in 2012, Cboe issued a letter of caution against Equitec based on deficiencies in the Firm's WSPs similar to those at issue here, such as failing to specify how Equitec determined credit and capital thresholds, failing to specify the manner by which Equitec would prevent the entry of orders for securities from traders who were restricted from trading those securities, and failing to specify that Equitec's financial and risk-management controls were under Equitec's direct and exclusive control. Under these circumstances, we find that the $50,000 fine is remedial and not excessive or oppressive.[53]

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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[52] *See* Cboe Rule 17.1 (directing Cboe to "consider a party's relevant disciplinary history"); *cf. Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 WL 2508169, at *5 (Oct. 11, 2005) (finding applicant's disciplinary history to be "a significant aggravating factor and an important consideration" when affirming SRO's imposition of fines).

[53] *Lek Sec. Corp.*, 2018 WL 1602630, at *12 n.47 (stating that the fine "will protect investors by impressing on LSC the importance of complying with FINRA rules in the future" and that the fact that the "deterrent effect of this fine serves the public interest and the protection of investors, without resort to a more serious sanction such as suspension or expulsion of LSC from FINRA membership, bolsters our conclusion that this fine is neither excessive nor oppressive").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95083 / June 10, 2022

Admin. Proc. File No. 3-19182

In the Matter of the Application of

EQUITEC PROPRIETARY MARKETS, LLC

For Review of Disciplinary Action taken by

CBOE EXCHANGE, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY CBOE

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

ORDERED that the disciplinary action taken by Cboe Exchange, Inc., against Equitec Proprietary Markets, LLC, is sustained.

By the Commission.

Vanessa A. Countryman
Secretary