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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-17906

In re:

ABN AMRO Clearing Chicago LLC

REPLY BRIEF OF CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED AND C2 OPTIONS EXCHANGE, INCORPORATED

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED AND C2 OPTIONS EXCHANGE, INCORPORATED

By: _____
One of their counsel

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On behalf of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated (collectively, "CBOE"[1]), the Office of the General Counsel submits this reply brief in further response to the Commission's June 20, 2017 Order, and to address certain points raised in ABN AMRO's opening brief ("ABN AMRO Br.").

We first highlight the areas of agreement between CBOE and ABN AMRO on the Commission's questions in the Order. We next address the few matters on which CBOE and ABN AMRO have different positions, and conclude by noting which of ABN AMRO's arguments are irrelevant to the Commission's questions regarding the standard of review and should be addressed during merits briefing.

ABN AMRO Largely Agrees with CBOE as to the First Five Questions Posed by the Commission. ABN AMRO agrees with CBOE that the Act does not provide a specific standard of review that SROs must apply in appeals of hearing committee disciplinary decisions. (ABN AMRO Br. 1.) ABN AMRO also agrees that the Board was correct to apply a "clearly erroneous" standard of review in this matter, and that the standards of review applied by the Board comply with the Act. (*Id.* at 2, 4.) ABN AMRO further agrees that CBOE is not required to have a rule that provides the standards of review the Board applies in appeals of BCC disciplinary decisions. (*Id.* at 2-4.) Moreover, ABN AMRO agrees that "clearly erroneous" is the standard of review for liability most reasonably implied from CBOE Rule 17.10, in light of the Board's longstanding practices. (*Id.* at 3.)

The Commission Should Reject ABN AMRO's Unsupported Suggestion to Attach Numerous Unrelated Procedural Requirements to the Use of a De Novo Standard. ABN AMRO

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[1] All abbreviations and definitions previously used in CBOE's opening brief have the same meaning in this brief.

argues that if the Commission directs the Board to apply a *de novo* standard of review, the Commission should require a set of new review procedures—procedures that are not required by courts or the Commission and that ABN AMRO has made up out of whole cloth. ABN AMRO asks that the Commission require the Exchange to implement the following procedures: (1) that each panel reviewing a BCC decision be comprised of at least one attorney; (2) that each member of the panel must personally review the entire record on appeal, including all transcripts, exhibits, pleadings, and other filings; and (3) that the appellate decision must address every single finding of fact and conclusion of law upon which the original decision was based, regardless of the relevance to the issues raised on appeal. (*Id.* at 5-6.) ABN AMRO's proposal to condition a *de novo* standard of review on its onerous and unprecedented procedures should be rejected.

Although ABN AMRO characterizes its proposal for wholesale procedural changes as asking only that the Commission "provide specific guidance" to CBOE regarding the application of a *de novo* standard of review (*id.* at 5), the requirements that ABN AMRO seeks to graft onto Board review are wholly unrelated to what standard of review applies and would, under ABN AMRO's reasoning, presumably also apply to other SROs.

Moreover, CBOE is not aware of, and ABN AMRO has not cited, any authority to support ABN AMRO's unprecedented proposal. The set of procedures ABN AMRO proposes are not used by any tribunal—not federal or state courts, not the Commission, and not other SROs. Courts and administrative tribunals are not required to address every bit of evidence, finding of fact, and conclusion of law, nor must they explain the factual and legal basis for rejecting every proposed finding or argument. *See, e.g.*, *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("[S]tate courts are not required to address every jot and tittle of proof suggested to them, nor need they 'make detailed findings addressing all the evidence before [them].'" (citation omitted)); *Sims v.*

Barnhart, 309 F.3d 424, 429 (7th Cir. 2002) (administrative law judges "need not address every piece of evidence" in their decisions); *Schon-Ex LLC Member Org.*, NYSE Hearing Bd. Decision 06-167, 2006 WL 4659897, at *14 (Dec. 12, 2006) (noting generally that hearing officer "considered all of the parties' contentions" and has "rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed herein"); *Dep't of Enforcement v. John Carris Invs., LLC*, Disciplinary Proceeding No. 2011028647101, at *112 n.506 (FINRA Office of Hearing Officers Jan. 20, 2015) (same). Such a requirement also would eviscerate the established principle that a reviewing body need only address the arguments raised by the parties, and that arguments not raised are waived. *See Allen v. City of Chi.*, 865 F.3d 936, 943 (7th Cir. 2017); *see also United States v. Dunkel*, 927 F.2d 955 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

The Commission itself routinely notes in its reviews of SRO disciplinary decisions that it has "considered all of the parties' contentions" and has "rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed" in the opinion, rather than explicitly addressing each one. *See, e.g.*, *In re Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 WL 1862331, at *6 n.26 (May 9, 2017). And CBOE and other SROs have employed this same practice. *See, e.g.*, *In re ABN AMRO Clearing Chicago LLC*, CBOE Bd. Decision No. 16 BD 01, at *5 (July 28, 2016); *In re Dep't of Enforcement v. Hartley*, Complaint No. C01010009, at *13 n.23 (NASD Nat'l Adjudicatory Council Dec. 3, 2003).

ABN AMRO's proposed procedures also are entirely unnecessary because CBOE's disciplinary system already provides TPHs with a fair procedure. (*See* CBOE Br. 13-15.) CBOE provides layers of procedural protections for TPHs prior to and during any appeal, including notice and access to documents at the investigatory stage, an opportunity to submit a statement advocating

against charges, procedures for disposition via letter of consent or settlement, an initial probable cause determination by the BCC, and an evidentiary hearing replete with procedural rights. CBOE's disciplinary hearings are heard by the BCC, which is composed of industry and public members—advised by legal counsel—who "make their decisions in the light of their experience as technicians in the securities markets rather than as lay jurors or legalistic judges." *In re Sumner B. Cotzin*, Exchange Act Release No. 10850, 1974 WL 162969, at *4 (June 12, 1974) (citation omitted). As ABN AMRO concedes, the BCC members, with "decades of experience among them as Exchange members and options traders on the Exchange," have "the benefit of attending the original proceeding in-person and are [able] to assess the credibility of the witnesses and the import of the evidence as presented." (ABN AMRO Br. 9-10 & n.7.) In light of the ample procedural protections in place at CBOE, the careful consideration the BCC gives to the evidence, the BCC's ability to confer with legal counsel, and the fact that the Board itself is advised by legal counsel, requiring every panel to contain an attorney and to review each and every document and finding in the record regardless of relevance to the issues on appeal would be wasteful and unnecessary.

Finally, ABN AMRO's request that the Commission impose a myriad of specific procedural requirements upon CBOE's disciplinary system deprives CBOE of the broad discretion granted to it by the Act to design and implement its own disciplinary procedures. Congress has noted that the Act "says very little about the internal decision-making processes of the self-regulatory organizations," which makes sense, because SROs "differ as to their membership, regulatory responsibilities, and economic power" and thus it "would be difficult to prescribe a single 'proper' decision-making procedure appropriate to the circumstances of every self-regulatory organization." S. Rep. 94-75, 1975 WL 12347, at *28 (1975). ABN AMRO's proposal asks the Commission to micromanage procedures in an area where Congress and the Commission

have deliberately given SROs discretion to design processes that best suit their members and markets. *See In re Sumner B. Cotzin*, 1974 WL 162969, at *4 ("When Congress provided for self-regulatory associations of securities dealers . . . it clearly did not intend to create formalistic tribunals akin to the courts or even to this Commission.").

If the Commission Rules that the Board Should Apply a Different Standard of Review, the Matter Should Be Remanded to the CBOE Board for Further Proceedings. The Commission also should reject ABN AMRO's argument that, if the Commission concludes that the Board should apply a different standard of review, the Commission should not only reverse the Board's decision, but terminate the disciplinary proceedings in ABN AMRO's favor. ABN AMRO's suggestion that the proceedings should simply be brought to an end finds no support in the appellate practices of courts and administrative agencies. Appellate courts routinely remand for further proceedings when finding a lower court should have applied a different standard of review. *See Orenelas v. United States*, 517 U.S. 690, 700 (1996) (vacating judgment where court of appeals should have applied different standard of review and remanding for application of the standard); *Braxton v. Chem. Local 7-776*, 165 F.3d 31 (7th Cir. 1998) (reversing where district court should have applied different standard of review and remanding for application of the standard).

The Commission, too, reverses and remands SRO decisions where additional proceedings are necessary. *See, e.g.*, *In re Salvatore F. Sodano*, Exchange Act Release No. 59141, 2008 WL 5328801, at *7-8 (Dec. 22, 2008). Although ABN AMRO cites "the interest of equity and fairness" as warranting this result, ABN AMRO received a fair procedure for all the reasons CBOE explained in its opening brief (CBOE Br. 13-15), and ABN AMRO is the party who decided to appeal the Board's decision to the Commission in the first instance. It makes far better sense, if

the Commission concludes that the Board should apply a different standard of review, to remand the matter to the Board for consideration under the newly directed standard.

ABN AMRO's Other Arguments Are Beyond the Scope of the Order and Should Be Ignored. Although the Commission explicitly limited the scope of briefing to the appropriate standard of review that the Board should apply, ABN AMRO devotes much of its brief to arguing the merits of its appeal. Having answered the Commission's actual questions in a manner consistent with CBOE, ABN AMRO poses a strawman additional question—whether the way in which the Board applied the clearly erroneous standard of review was proper—to then argue the merits. (ABN AMRO Br. 11-15 & n.8.) ABN AMRO's arguments plainly are beyond the scope of the Order and should be ignored by the Commission. CBOE is prepared to move to merits briefing when the Commission so orders, and ABN's non-responsive arguments can be addressed at that time.

In conclusion, CBOE appreciates the opportunity to address the questions posed by the Commission in its Order. The Act allows SROs the discretion to determine which standard of review will be applied to hearing committee disciplinary decisions and does not require a rule providing the standard. Both CBOE and ABN AMRO agree that, here, the Board properly exercised that discretion in applying the "clearly erroneous" standard of review, which complies with the requirements of the Act. However, if the Commission is considering prescribing that SROs adopt a uniform standard of review, CBOE respectfully suggests that the Commission do so through a proposed regulation. This approach would provide the Commission with the benefit of the collective wisdom of industry experts and market participants other than the parties here, a benefit the Commission has not received here because no interested non-party filed an amicus brief in response to the Commission's invitation in the Order.

CERTIFICATION OF WORD COUNT

I, Joanne Moffic-Silver, certify that the text of the Reply Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated is under 2,000 words.

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STATEMENT OF TRANSMISSION VIA FACSIMILE

Pursuant to SEC Rule of Practice 152(d), I, Joanne Moffic-Silver, state that a copy of the Reply Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in the matter of the Application for Review of ABN AMRO Clearing Chicago LLC, Administrative Proceeding No. 3-17906 was transmitted to the Commission at facsimile number (703) 813-9793 on September 15, 2017.

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CERTIFICATE OF SERVICE

I, Joanne Moffic-Silver, certify that on this 15th day of September 2017, I caused a copy of the attached Reply Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in the matter of the Application for Review of ABN AMRO Clearing Chicago LLC, Administrative Proceeding No. 3-17906, to be served by Federal Express overnight delivery and fax on:

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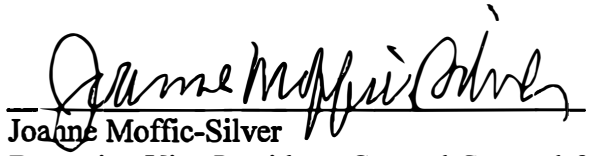

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RE: In the Matter of the Application of ABN AMRO Clearing Chicago LLC
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Dear Mr. Fields:

Enclosed please find the Reply Brief of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated in the above-captioned matter.

Please contact me at (312) 786-7462 if you have any questions.

Very truly yours,

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