BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 8, Complainant, vs. Podesta & Co. Chicago, Illinois, and Carol P. Foley Chicago, Illinois, Respondents.	DECISION Complaint No. C8A960040 District No. 8 Dated: March 23, 1998

Introduction

This matter was called for review pursuant to NASD Procedural Rule 9310.[1] We affirm in part and reverse in part the DBCC's findings. In relation to cause one of the complaint, we affirm the finding that Podesta & Co. ("the Firm") violated Rule G-37(b) of the Municipal Securities Rulemaking Board ("MSRB") when the Firm participated as an underwriter in a negotiated underwriting of certain bonds within two years of having made political contributions, totaling

[1] The National Business Conduct Committee ("NBCC") called this case for review to determine whether the sanctions imposed by the District Business Conduct Committee for District No. 8 ("DBCC") were appropriate in light of the relevant disciplinary rules and sanction guidelines. The matter was decided by the National Adjudicatory Council ("NAC"), which, as approved by the Securities and Exchange Commission ("SEC"), became the successor to the NBCC on January 16, 1998. See 62 Fed. Reg. 67927 (Dec. 30, 1997).

$175, to officials of the issuer. However, we reverse and dismiss the DBCC's findings that the Firm's President, majority shareholder and municipal finance professional, Carol P. Foley ("Foley"), violated MSRB Rules G-37(b) and (d), in her individual capacity, as a result of her participation in the aforementioned conduct.

We affirm the DBCC's findings under cause two of the complaint that the Firm violated MSRB Rule G-37(e) by failing to file Form G-37 reports with the MSRB within 30 calendar days of the end of the fourth quarter of 1994 and the first, second, third, and fourth quarters of 1995. We also affirm the DBCC's findings that both respondents violated MSRB Rule G-27, as alleged in cause three of the complaint, by failing to establish, maintain or enforce written supervisory procedures to prevent the occurrence of the conduct described above. In light of our findings, we censure the Firm and Foley, fine them $5,000, jointly and severally, for the violations under cause three, and impose DBCC hearing costs of $1,422.75, jointly and severally. Additionally, we fine the Firm $25,000 for violations under cause one and $1,250 for violations under cause two.

Background

The Firm, which became a member of the NASD on March 4, 1983, conducts a general securities business on a fully disclosed basis. Foley entered the securities industry as a general securities representative of another member firm in August 1985. On October 22, 1986, Foley became registered in such capacity with the Firm, and on March 22, 1990, she became registered with the Firm as a general securities principal. On May 29, 1991, she became registered as a municipal securities principal of the Firm. Foley is currently associated with the Firm in such capacities. Foley has also been the majority shareholder of the Firm since 1989, and she has been its President and Chief Executive Officer since 1992.

Facts

The facts in this case are essentially undisputed. Foley issued a check on the Firm's bank account for $75 to "Citizens for Frank Edward Gardner" on December 20, 1994 ("December 1994 Check"). Foley also issued a check on the Firm's bank account for $100 to "Committee to Elect Nancy Drew Sheehan" on January 13, 1995 ("January 1995 Check"). These checks constituted "contributions" as defined in MSRB Rule G-37(g)(i).[2] At the time of these

[2] MSRB Rule G-37(g)(i) provides as follows:

> The term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office; (B) for payment of debt incurred in connection with any such election; or (c) for transition or inaugural expenses incurred by the successful candidate for state or local office.

MSRB Rule G-37(g)(i). Respondents acknowledge that the December 1994 and January 1995

contributions, and during the entire period relevant to this action, Frank Edward Gardner ("Gardner") and Nancy Drew Sheehan ("Sheehan") were Commissioners of the Metropolitan Water Reclamation District of Greater Chicago ("MWRD").

On or about January 24, 1995, the Firm, acting through Foley, participated as an underwriter in a negotiated underwriting of $210,000,000 in General Obligation Capital Improvement Bonds and $30,000,000 in General Obligation Construction Working Cash Fund Bonds issued by the MWRD (collectively referred to as the "Bonds"). During all times relevant herein, the MWRD had authority to approve underwriters of the Bonds. The Firm received $78,106.40 for participating as an underwriter of the Bonds.[3]

In addition to the December 1994 and January 1995 checks written to Gardner and Sheehan, the Firm issued 13 checks to various elected officials during the calendar years 1994 and 1995, bringing the total number of reportable political contributions made by the Firm for that period to 15.[4]

The Firm failed to disclose, in a timely fashion, each of the contributions described above. The Firm did not file Form G-37 reports with the MSRB within 30 calendar days of the end of the fourth quarter of 1994 and the first, second, third, and fourth quarters of 1995. The Firm filed all

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checks constitute "contributions" under this provision.

[3] Much of the $78,106.40 that the Firm received constituted net profits. The Firm's only outside expense in relation to the underwriting was a payment of $7,810 to its clearing firm, ABN-AMRO Chicago Corporation ("Chicago Corp."), for the assumption of the risk of the underwriting.

[4] The Firm made contributions of $125, $40, and $250 to the "Richard M. Daley Campaign Committee" in January and February 1995. On February 14, 1995, the Firm issued a check to the "Thomas Fuller Campaign Fund" for $100. The Firm issued a check for $125 to the "Miriam Santos Campaign Fund" on March 22, 1995. On April 28, 1995, the Firm issued a check for $60 to the "Friends of Kathleen Therese Meany." On May 10, 1995, the Firm issued a check to "Citizens for Patricia Young" for $75. On May 17, 1995, the Firm issued a check to "Citizens for Gloria Majewski" for $60. On August 30, 1995, the Firm issued a check for $150 to "Committee to Elect Nancy D. Sheehan." The Firm issued a check for $50 to the "42nd Democratic Ward Organization" on September 6, 1995. On September 28, 1995, the Firm issued a check for $25 to "Citizens for Terrence O'Brien." On November 28, 1995, the Firm issued a check for $25 to the "Friends of Kathleen Therese Meany" and a check for $25 to the "Citizens for Thomas Fuller."

It is undisputed that all of these checks constituted reportable contributions under MSRB Rule G-37(e). There was no allegation in the complaint that any of these additional contributions were followed by underwriting activities in violation of Rule G-37(b)'s two-year prohibition.

of the Form G-37 reports with the MSRB on April 20, 1996, after the NASD examination -- held between March 28 and April 4, 1996 -- which ultimately led to the initiation of this action. Even when the reports were finally filed, however, at least one of the relevant checks (made payable to "Friends of Kathleen Therese Meany" for $60 on April 28, 1995) was not disclosed.

There is also no dispute that the Firm and Foley failed to establish, maintain or enforce written supervisory procedures to prevent the occurrences described above. The Firm and Foley admit that they relied on the policy and procedures manual of their clearing firm for their written supervisory procedures and that their copy of the manual did not contain any procedures with regard to MSRB Rule G-37.

While the Firm and Foley do not challenge these facts, they assert that they did not intend to violate the MSRB rules and that the activities described above resulted purely from a misunderstanding of the requirements of Rules G-27 and G-37. They also state that the contributions were not intended to influence the MWRD's selection of the Firm as an underwriter and that Foley mistakenly wrote the checks out of the Firm's checking account instead of her own. The Firm and Foley stress that they obtained a return of the contributions from Gardner and Sheehan after they became aware of the problems associated with the contributions.[5] In addition, they note that their reliance on the policy and procedures manual of their clearing firm led to some of their confusion over the exact requirements of Rule G-37. Finally, the Firm and Foley emphasize that they cooperated with the NASD district examiners and took immediate corrective action when they were apprised of the problems.

Discussion

As described above, the complaint in this matter asserted three separate, albeit related, causes of action. The first cause of action alleged that the Firm and Foley violated Rule G-37's "pay to play" provision by engaging in underwriting activities within two years of having made certain political contributions; the second cause of action alleged that the Firm violated the reporting requirements of Rule G-37; and the third cause of action alleged that the Firm and Foley violated Rule G-27 by failing to establish and maintain adequate written supervisory procedures. We will examine each of these causes of action in turn.

Cause One. The complaint alleged, and the DBCC found, that the Firm and Foley violated MSRB Rule G-37 by engaging in the acts described above. Neither the complaint nor the DBCC's decision delineated the exact subsections of Rule G-37 that were violated. The position of the regional counsel for NASD Regulation, Inc. ("Regional Counsel") on appeal, however, is that the Firm violated subsection (b) and Foley violated either subsection (b) or (d) of Rule G-37.[6]

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[5] Foley sought returns of the contributions that the Firm made to each of the other recipients as well. All but the "Miriam Santos Campaign Fund" and "42nd Democratic Ward Organization" contributions were returned.

[6] Regional Counsel was asked during oral argument which paragraph of Rule G-37

Because we believe that the allegations in the complaint provided the respondents with sufficient notice to allow them adequately to defend this matter, we will analyze both subsections (b) and (d) in relation to the first cause of action.[7]

Cause One - MSRB Rule G-37(b). Rule G-37(b) provides, in pertinent part, that "[n]o broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the broker, dealer or municipal securities dealer; [or] (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer. . . ." Under the facts of this case, the Firm violated Rule G-37(b).[8]

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the respondents were found to have violated. Regional Counsel responded that the violation occurred under Rule G-37(b). Both Regional Counsel and the attorney for respondents were then asked to address the issue of whether Rule G-37(b) can be applied to an individual -- e.g., an "associated person" or "municipal finance professional" -- in light of Rule G-37(g)(iii), discussed in greater detail infra. The parties to the action were also provided the opportunity to submit post-hearing briefs on this issue. The respondents chose not to file a brief. Regional Counsel filed a brief and stated, among other things, that because of the issue raised by the hearing panel, he was amending his response given at oral argument to include subsections (b) and (d) of Rule G-37 as the bases for the DBCC's finding that Foley violated the "pay to play" restrictions of Rule G-37.

[7] NASD Procedural Rule 9212(a) provides that a complaint "shall specify in reasonable detail the nature of the charges and the Rule, regulation or statutory provision allegedly violated." Here, the complaint, although not specifying the exact subsections of the rule that were alleged to have been violated, did put respondents on notice that they were alleged to have violated Rule G-37's "pay to play" prohibition. The complaint also contained the basic facts that allegedly supported the claim. Moreover, respondents have not argued, at any time during these proceedings, that they were provided insufficient notice of the allegations. Finally, we note that respondents were represented by counsel in this matter. Under these circumstances, respondents were provided sufficient notice of the allegations. See, e.g., In re Larry Ira Klein, Exchange Act Rel. No. 37835, at 14-15 & n.38 (Oct. 17, 1996) (rejecting respondent's claim that the complaint provided inadequate notice of the charges against him, in part, because respondent filed a lengthy answer and vigorously defended the charges at issue); In re Daniel Joseph Avant, Exchange Act Rel. No. 36423 (Oct. 26, 1995) (rejecting respondent's claim that he was not provided proper notice of the charge and finding that the language in the complaint was broad enough to encompass two related claims); In re Joseph H. O'Brien, 51 S.E.C. 1112, 1116 (1994) (dismissing respondent's claim that he was prejudiced by the NASD's complaint and emphasizing that the record showed that respondent was fully aware of the factual and legal bases for the proceeding and was able to prepare an adequate defense); In re James L. Owsley, 51 S.E.C. 524, 528 (1993) ("We recognize that, even if an administrative pleading is defective, the defect can be remedied if the record demonstrates that the respondent understood the issue and was afforded a sufficient opportunity to justify his conduct with respect thereto.").

[8] Rule G-37(b) provides a de minimis exception for contributions that do not exceed

The Firm made contributions to Gardner and Sheehan in December 1994 and January 1995 respectively. As Commissioners of the MWRD, Gardner and Sheehan were both "officials of the issuer" as that term is defined in Rule G-37(g)(vi). In January 1995, the Firm also acted as an underwriter for the Bonds issued by the MWRD. The Firm thus engaged in prohibited underwriting within two years of the contributions. No other evidence need be adduced in order to find that the Firm violated Rule G-37(b).[9]

The analysis regarding whether Foley also violated Rule G-37(b) -- because of her role in the aforementioned activities of the Firm[10] -- is markedly different due to the unique language used in certain of the MSRB rules. As noted above, Rule G-37(b) prohibits a "broker, dealer or municipal securities dealer" from acting as an underwriter within two years of having made contributions to an official of the issuer. Rule G-37(b) does not, on its face, seem to impose the same prohibition on "municipal finance professionals" or other "associated persons."

Of course, the omission of language indicating that a rule specifically applies to individuals -- e.g., "municipal finance professionals" or "associated persons" -- does not necessarily preclude the NASD from taking action against an individual responsible for violations of the rule. Such a result is permissible, under most circumstances, because of the broad definition of "broker" and "dealer" in MSRB Rule D-11, which states that, "[u]nless the context otherwise requires or a rule of the Board otherwise specifically provides, the terms 'broker,' dealer,' 'municipal securities broker,' 'municipal securities dealer,' and 'bank dealer' shall refer to and include their respective associated persons." The SEC has held, on numerous occasions, that the obligations and requirements imposed on brokers and dealers by the MSRB rules generally are applicable to "associated persons" pursuant to Rule D-11, notwithstanding that many of the rules address only the conduct of brokers and dealers.[11]

$250 when they are made by municipal finance professionals who are entitled to vote for the issuer official. This exception is not applicable here, however, because the contributions were made by the Firm, rather than a municipal finance professional.

[9] We note that Rule G-37 was "drafted and is applied as a broad prophylactic measure, and a violation does not require a particularized showing of an actual 'quid pro quo.'" In re Faic Sec., Inc., Exchange Act Rel. No. 36973 (Mar. 7, 1996) (Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions).

[10] Foley signed the December and January checks that were provided to Gardner and Sheehan by the Firm. Foley also acted as the contact person for the Firm's underwriting activities.

[11] See, e.g., Swink & Co. v. Hereth, 784 F.2d 866, 868 (8th Cir. 1986); In re Arthur W. Weisberg, 50 S.E.C. 643, 643 & n.1 (1991); In re David Arm, 50 S.E.C. 338, 338 & n.1 (1990) (same); In re Donald T. Sheldon, Admin. Proc. File No. 3-6626, 1988 SEC Lexis 2388, at * 35-36 n.28 (Dec. 2, 1988), aff'd, 51 S.E.C. 59 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995); In re Nicholas A. Codispoti, 48 S.E.C. 842, 844 & n.8 (1987).

Unlike most MSRB rules, however, Rule G-37(g)(iii) provides that the "term 'broker, dealer or municipal securities dealer' used in this rule [G-37] does not include its associated persons." Thus, subsection (g)(iii) appears to be a rule of the MSRB that specifically precludes the application of Rule D-11 in the context of actions brought under Rule G-37(b), making Rule G-37(b)'s prohibited-conduct provision inapplicable to individuals like Foley.

Because the MSRB is statutorily charged with exclusive authority to promulgate and interpret rules related to the municipal securities industry,[12] we requested that they provide us with their view on whether Rule G-37(b) can be applied to an individual -- e.g., an "associated person" or "municipal finance professional" -- in light of subsection (g)(iii). In an interpretive letter dated November 11, 1997 ("MSRB Staff Interpretive Letter"), the MSRB staff wrote that "the rule language makes clear the Board's intent that only a dealer can violate section (b) since the act that is prohibited is the undertaking by the dealer of certain business and the rule explicitly excludes individuals from the definition of dealer." MSRB Staff Interpretive Letter, supra, at 1.[13]

The NASD rules have a provision similar to MSRB Rule D-11. The Applicability section of the General Provisions chapter of the NASD rules provides that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules." NASD Rule 115(a). As with MSRB Rule D-11, the SEC has held that the NASD rules generally apply to "associated persons," whether or not specifically mentioned, because of Rule 115(a). See, e.g., In re Michael Ben Lavigne, 51 S.E.C. 1068, 1072 & n.25 (1994), aff'd, 78 F.3d 593 (9th Cir. 1996); In re James L. Owsley, 51 S.E.C. 524, 533 (1993); In re Wilshire Discount Sec., Inc., 51 S.E.C. 547, 550 n.11 (1993); In re Robert A. Amato, 51 S.E.C. 316, 320 n.18 (1993), aff'd, 18 F.3d 1281 (5th Cir.), cert. denied, 115 S. Ct. 316 (1994); In re Charles L. Campbell, 49 S.E.C. 1047, 1051 & n.12 (1989); In re Whiteside & Co., 49 S.E.C. 963, 965 & n.7 (1988); In re Safeco Sec., Inc., 45 S.E.C. 303, 304 & n.2 (1973).

[12] See Section 15B(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78o-4(b)(2). The NASD's role in the municipal securities industry is mainly to enforce compliance with the rules promulgated by the MSRB, including Rule G-37. Compare Section 15A(b)(7) of the Exchange Act, 15 U.S.C. §78o-3(b)(7) (authorizing the NASD to enforce the rules of the MSRB), with Section 15A(f) of the Exchange Act, 15 U.S.C.§ 78o-3(f) ("Nothing in subsection (b)(6) or (b)(11) of this section [dealing with the NASD's authority to promulgate its own rules] shall be construed to permit a registered securities association to make rules concerning any transaction by a registered broker or dealer in a municipal security."). See also Section 19(g) of the Exchange Act, 15 U.S.C. §78s(g). Obviously, in the course of adjudicating disciplinary actions involving alleged violations of MSRB rules, the NASD has the authority to make such interpretations as are necessary to resolve specific issues before it. However, in certain cases, as here, we seek to clarify further an issue by requesting an MSRB interpretation.

[13] The parties were provided copies of the MSRB Staff Interpretive Letter and they were allowed to submit briefs in reply thereto. Respondents filed a reply brief urging us to follow

The MSRB Staff's interpretation is controlling absent a clear showing that it is in conflict with the rule's language or purpose, or is otherwise unreasonable.

Regional Counsel, although not directly attacking the MSRB Staff's interpretation, does advance various theories in support of the DBCC's finding that Foley violated Rule G-37(b). Regional Counsel's first argument is that because the SEC has previously upheld disciplinary actions against individuals brought under rules that restrict conduct of only "brokers and dealers," it is permissible to bring a disciplinary action against an individual under Rule G-37(b). The difficulty with such an argument is that it fails to consider a key element in the equation; namely, the underlying basis for holding an individual responsible for violating a rule that speaks only to brokers, dealers, and municipal securities dealers. As mentioned above, in the municipal securities setting, MSRB Rule D-11 provides the NASD with the means of applying the MSRB rules to associated persons in situations where the rules address only brokers, dealers and municipal securities dealers. However, this provision applies to the MSRB rules only in a general sense, and its application may be limited by the express language of a particular rule, which is precisely what subsection (g)(iii) of Rule G-37 effectively accomplishes. Thus, the fact that the SEC has upheld previous enforcement actions against individuals under rules other than Rule G-37(b) does not, in light of the express language of subsection (g)(iii), convince us that to do so would be appropriate in this case.[14]

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the MSRB staff's interpretation of Rule G-37. Regional Counsel chose not to file a reply brief.

[14] Regional Counsel cites In re Franklin N. Wolf, Exchange Act Rel. No. 36523 (Nov. 29, 1995), as support for the theory that an individual can be held responsible under a rule addressed only to brokers and dealers. Regional Counsel asserts that in Wolf, an individual was held responsible for violating Section 15(c) of the Securities Exchange Act of 1934 and SEC Rule 15c2-6, even though those provisions do not contain definitions of "broker" or "dealer" that include associated persons. According to Regional Counsel, Wolf is, therefore, analogous to the current action, even considering Rule G-37(g)(iii).

We find Wolf inapposite. The individual in Wolf was not sanctioned directly for violating Section 15(c) of the Exchange Act and SEC Rule 15c2-6. The violation was actually premised on Article III, Section 1 of the NASD Rules of Fair Practice (now Conduct Rule 2110). In response to the individual's contention that only broker/dealers could be held liable under Section 15(c) and SEC Rule 15c2-6, the SEC emphasized that it was upholding the NASD's finding that he had violated Article III, Section 1 of the NASD rules as a result of his role in causing the firm to violate Section 15(c) and Rule 15c2-6. Wolf, supra, at 12 n.33. Article III, Section 1 (now Conduct Rule 2110) is applicable to "associated persons" pursuant to NASD Rule 115(a), which provides that the NASD rules shall apply to members and their associated persons. See supra note 11.

Moreover, neither Section 15(c) of the Exchange Act nor SEC Rule 15c2-6 expressly excludes "associated persons" from its coverage. A situation where a rule or statute does not specifically address "associated persons" is quite different from one where a rule not only

The second argument presented by Regional Counsel is that Rule G-37's history shows that subsection (g)(iii) was intended simply to limit those persons whose political donations would trigger the two-year prohibition on a firm's doing business with an issuer and, therefore, the prohibited-conduct provision of subsection (b) reaches individuals. Regional Counsel's position brings into play a fundamental canon of statutory construction: A rule's history should not be used as a vehicle to alter the rule's meaning where its express language is clear and unambiguous. See, e.g., Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'") (citations omitted); Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."). We find subsection (g)(iii) to be unambiguous. Even if it were not, Rule G-37's history would not provide Regional Counsel with any meaningful support.

The original version of Rule G-37 published for comment by the MSRB ("Draft Proposal") was considerably different from the present rule. The Draft Proposal stated that "[n]o broker, dealer or municipal securities dealer (including any political action committee associated with the broker, dealer or municipal securities dealer) shall make a contribution, directly or indirectly, to an official of an issuer of municipal securities for the purpose of obtaining or retaining the municipal securities business of such issuer." See MSRB Reports, Vol. 13, No.4, at 8 (Aug. 1993). This provision would have applied to "associated persons," because the Draft Proposal did not contain language similar to that used in current subsection (g)(iii).

The MSRB received a number of comments in response to the Draft Proposal expressing concern over the breadth of the rule and suggesting that the rule be limited to contributions made by dealers and by their officers and employees who participate in the process of obtaining or retaining municipal securities business. As a result of these and other comments, the rule was rewritten in essentially the form that it is found in today and submitted to the SEC for consideration and approval ("Proposed Rule").

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fails to include "associated persons," but also specifically excludes such persons from the rule's treatment, which is the case under Rule G-37. To apply Rule G-37(b)'s prohibited-conduct provision to an "associated person" in the face of subsection (g)(iii) would, in effect, nullify the latter subsection in large part. A tribunal should not interpret or apply one portion of a rule or statute in a manner that would vitiate another specific and applicable provision. See, e.g., United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101 (1st Cir. 1994) ("Since courts must strive to give effect to each subsection contained in a statute . . . , [courts should] refuse to follow a course that ineluctably produces judicial nullification of an entire . . . subsection."), cert. denied, 513 U.S. 1183 (1995).

The prohibited act and the intent requirement under the two versions were distinct. The prohibited act under subsection (b) of the Draft Proposal was the making of a contribution for the purpose of obtaining municipal securities business, whereas the prohibited act under subsection (b) of the Proposed Rule was engaging in underwriting within two years of having made a contribution to an official of the issuer, regardless of intent. The MSRB explained that it "determined to eliminate the intent element and replace it with an objective standard. . . . Instead of proposing a prohibition on making contributions, the [MSRB] has proposed a prohibition on engaging in municipal business with issuers under certain circumstances and for a limited time." 59 Fed. Reg. 3389, 3398 (Jan. 21, 1994).

The Proposed Rule also limited the types of persons or entities whose contributions are covered by the rule. The MSRB stated, "In response to commentators' concerns that the definition of 'associated person' was too broad and would result in costly and burdensome compliance with the rule, the [MSRB] determined to limit the prohibition section of the proposed rule to individuals defined as 'municipal finance professionals.'" Id. at 3401. The MSRB, therefore, confined the event that triggered the two-year prohibition on underwriting in the Proposed Rule to contributions made by (1) the broker, dealer or municipal securities dealer; (2) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (3) certain political action committees. Id.

In addition, the MSRB added subsection (g)(iii) to the Proposed Rule. The MSRB, however, provided little guidance on its rationale for including this subsection in the rule. Regional Counsel argues that, in light of Rule G-37's history, subsection (g)(iii) was only meant to limit those persons whose political donations would trigger the two-year prohibition on a firm's doing business with an issuer. We agree that adding subsection (g)(iii) has the effect of narrowing the types of persons whose contributions trigger the two-year ban, but we do not agree that the rule's history evidences the MSRB's intent to add the subsection only for that singular purpose.

Subsection (g)(iii) expressly states, without limitation, that the "term 'broker, dealer or municipal securities dealer' used in this rule [G-37] does not include its associated persons." Applying subsection (g)(iii) only to the portion of Rule G-37(b) that deals with the types of contributions that trigger the two-year ban, as suggested by Regional Counsel, without applying it to the portion that delineates whom the rule may be enforced against, would lead to an incongruous result: Subsection (g)(iii) would not apply and D-11 would apply to the first part of Rule G-37(b), while at the same time subpart (g)(iii) would apply and D-11 would not apply to

the second part of Rule G-37(b).[15] Nothing in the rule's history convinces us that the express language of subsection (g)(iii) should be given such an unusual interpretation.[16]

Moreover, we find it significant that the MSRB specifically included "municipal finance professionals" as persons covered by the prohibited-conduct provisions of subsections (c) and (d) of Rule G-37, but did not include such individuals in the prohibited-conduct provision of subsection (b). Neither the rule nor its history explains the MSRB's reason for this differential treatment. Nonetheless, absent evidence that such an omission was a scrivener's error (which has not been shown), we must presume that, at the time the rule was drafted, the MSRB intended to omit the terms "associated persons" and "municipal finance professionals" from the prohibited-

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[15] Rule G-37(b) would essentially read as follows: "No broker, dealer or municipal securities dealer [including its associated persons] shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the broker, dealer or municipal securities dealer [not including its associated persons, unless otherwise provided in this rule]; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer. . . ." MSRB Rule G-37(b) (alteration added).

[16] If the MSRB had intended the result advocated by Regional Counsel, it could have easily been accomplished through other means. The MSRB could have simply omitted the language used in subsection (g)(iii), while adding the phrase "not including its 'associated persons,' unless otherwise provided in this rule" at the end of G-37(b)(i). Thus, the rule would have read, "No broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the broker, dealer or municipal securities dealer [not including its 'associated persons,' unless otherwise provided in this rule]; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer. . . ." MSRB Rule G-37(b) (alteration added). This would have made Rule D-11 applicable to the first part of subsection (b) which, in turn, would have made Rule G-37(b)'s prohibited-conduct provision applicable to "associated persons." At the same time, this language would have ensured that contributions made by "associated persons" do not trigger the two-year ban on underwriting. Alternatively, the MSRB could have added the language of subsection (g)(iii) to the rule as long as it also added the term "municipal finance professional" to the first part of subsection (b), so that the rule would have read: "No broker, dealer or municipal securities dealer [or any municipal finance professional acting on behalf of, through, or in connection with such broker, dealer or municipal securities dealer] shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by. . . ." MSRB Rule G-37(b) (alteration added).

The MSRB, however, did not draft the rule using either of the methods described above. Instead, the MSRB specifically chose to add a broad provision that excluded "associated persons" from the definition of "broker, dealer or municipal securities dealer," while at the same time omitting the terms "associated persons" and "municipal finance professionals" from the prohibited-conduct provision of Rule G-37(b). Under these circumstances, we are wary of limiting the effect of subsection (g)(iii) in the manner sought by Regional Counsel.

conduct provision of subsection (b) for a reason. We simply cannot substitute our judgment for that of the rulemaking authority.

In brief, neither the rule's language nor its history convinces us that the MSRB staff's recent interpretation is unreasonable. We find the MSRB Staff Interpretive Letter to be highly persuasive and hold that Rule G-37(b)'s prohibited-conduct provision does not apply to individuals. Accordingly, we reverse and dismiss the DBCC's finding that Foley violated Rule G-37(b).

Cause One - MSRB Rule G-37(d). Regional Counsel argues that, even if subsection (b) is not applicable to individuals, Foley may still be found responsible for violating subsection (d) of Rule G-37. That subsection provides that "[n]o broker, dealer or municipal securities dealer or any municipal finance professional shall, directly or indirectly, through or by any other person or means, do any act which would result in a violation of sections (b) or (c) of this rule."

As with subsection (b), we requested guidance from the MSRB regarding the scope of subsection (d). Specifically, we asked whether Rule G-37(d) requires a showing that a municipal finance professional (or broker/dealer) acted with the intent to circumvent the requirements of subsection (b). The MSRB staff answered affirmatively, explaining that "this provision was intended to reach actions taken by the dealer or a municipal finance professional for the specific purpose of circumventing the rule." MSRB Interpretative Letter, supra, at 2. In accordance with the discussion above, we afford substantial deference to the MSRB staff's interpretation of subsection (d). Thus, absent evidence that the MSRB staff's interpretation is contrary to the rule's language or purpose, or is otherwise unreasonable, a showing of intent is required under subsection (d).[17] Resolution of this issue, moreover, is dispositive of the first cause of action in

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[17] Making a contribution in an attempt to circumvent subsection (b) has two consequences under Rule G-37(d). First, such action triggers the two-year ban on underwriting under subsection (b). Second, such action constitutes a violation of subsection (d) by the broker, dealer or municipal finance professional. As the MSRB explained:

> Section (d) of the rule prohibits municipal finance professionals (and dealers) from using any person or means to do, directly or indirectly, any act which would violate the rule. In other words, a municipal finance professional is prohibited from using a sales person (or any other person not otherwise subject to the rule) as a conduit to circumvent the rule. Thus, contributions made, directly or indirectly, by a municipal finance professional (or a dealer) to an issuer official will subject the dealer to the rule's two-year prohibition on municipal securities business with that issuer. In addition to triggering the prohibition, the municipal finance professional in this case has violated section (d) of the rule.

MSRB Reports, Vol. 14, No. 5, at 8 (Dec. 1994) (Answer to Question No. 5) (emphasis added).

relation to Foley because there has been no allegation, let alone any showing, that Foley acted with an intent to circumvent Rule G-37(b).

Regional Counsel suggests that Rule G-37(d)'s language does not require any showing that a municipal finance professional (or broker/dealer) attempted to circumvent the rule. That is, Regional Counsel maintains that Rule G-37(d) can be interpreted to read that no municipal finance professional "shall[] directly . . . do any act which would result in a violation" of Rule G-37(b). This reading, however, would significantly change the meaning of the rule, which states that no "municipal finance professional shall**,** directly or indirectly**,** through or by any other person or means**,** do any act which would result in a violation of sections (b) or (c) of this rule." The verb "shall do" is modified by two adverbial phrases: "directly or indirectly" and "through or by any other person or means." Regional Counsel's selective deletion of half of one phrase and all of another distorts the meaning of the rule, resulting in an essentially superfluous prohibition. Under Regional Counsel's interpretation, the only difference between subsections (b) and (d) is the addition of the term "municipal finance professional" to the latter subsection. This presupposes that the MSRB deliberately chose a convoluted means of broadening the scope of Rule G-37(b), rather than simply adding municipal finance professionals directly to the prohibited-conduct provision of Rule G-37(b).[18]

Regional Counsel's reading of the rule, moreover, is at odds both with the history and subsequent interpretations of the rule, which emphasize that subsection (d) was added to Rule G-37 to prohibit broker/dealers and municipal finance professionals from circumventing the requirements of Rules G-37(b) and (c). For instance, the MSRB, in its comments to the Proposed Rule, stated:

> [Subsection (d)] is intended to prohibit those parties subject to the proposed rule from using other persons or entities as conduits in order to circumvent the proposed rule. A dealer would violate the proposed rule by engaging in municipal securities business with an issuer after directing a person to make a contribution to an official of such issuer. For example, a violation would result if a dealer does business with an issuer after directing contributions by associated persons, family members of associated persons, consultants, lobbyists, attorneys, other dealer affiliates, their employees or PACs, or other persons or entities as a means to circumvent the rule. Finally, the dealer would violate the rule by doing business

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Subsection (d) also prohibits a broker, dealer or municipal finance professional from taking action in an attempt to circumvent the requirements of subsection (c). In general, subsection (c) prohibits brokers and dealers "from engaging in municipal securities business with issuers if they engage in any kind of fund-raising activities for officials of the issuers that may influence the underwriter selection process." 59 Fed. Reg. 17621, 17625 (April 13, 1994) (SEC Order Approving Rule Change).

[18] See supra note 16.

> with an issuer after providing money to any person or entity when the dealer knows that such money will be given to an official of an issuer who could not receive such a contribution directly from the dealer without triggering the rule's prohibition on business. For example, in certain instances, a local political party may be soliciting contributions for the purpose of supporting one issuer official. If this is the case, contributions made to the political party would result in these [sic] same prohibition on municipal securities business as would a contribution made directly to the issuer official.

59 Fed. Reg. 3389, 3392 (Jan. 21, 1994) (emphasis added). The SEC, in its order approving Rule G-37, similarly remarked that subsection (d) was "intended to prevent dealers from funneling funds or payments through other persons or entities to circumvent the proposal's requirements." 59 Fed. Reg. 17621, 17624 (April 13, 1994). Furthermore, from the time of the SEC approval of Rule G-37 until this proceeding, the MSRB has continuously and steadfastly interpreted this provision as requiring a showing that any other person or means were used as a conduit to circumvent the rule's requirements. See, e.g., MSRB Reports, Vol. 15, No. 2, at 4 (July 1995) (Answer to Question No. 4); MSRB Reports, Vol. 14, No. 5, at 8 (Dec.1994) (Answer to Question No. 5); MSRB Reports, Vol. 14, No. 3, at 13 (June 1994) (Answer to Question No. 5).

In Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1351 (1996), the United States Court of Appeals for the District of Columbia also embraced this notion. The court noted that, "[a]lthough the language of section (d) itself is very broad, the SEC has interpreted it as requiring a showing of culpable intent, that is, a demonstration that the conduct was undertaken 'as a means to circumvent' the requirements of (b) and (c)." Id. at 948. The court concluded that Rule G-37(d) "restricts such gifts and contributions only when they are intended as end-runs around the direct contribution limitations." Id. (emphasis added).

The language, history and subsequent interpretations of the rule thus indicate that subsection (d) applies only in those circumstances where a municipal finance professional (or broker/dealer) acts with the intent to circumvent the rule. Accordingly, we reject Regional Counsel's suggested reading of subsection (d) and follow instead the MSRB staff's interpretation. Because there is no evidence showing that Foley intended to circumvent the requirements of the rule, we reverse and dismiss the DBCC's finding that Foley violated Rule G-37(d).

Cause Two. The DBCC found that the Firm violated MSRB Rule G-37(e). Under Rule G-37(e), broker/dealers are required to submit to the MSRB "reports on contributions to officials of issuers and on payments to political parties of states and political subdivisions[,]" as well as on any municipal securities business in which the broker/dealer engaged, within 30 calendar days after the end of each calendar quarter. This subsection was intended both to assist enforcement of Rule G-37(b)'s "pay to play" restrictions and, independently, to function as a public disclosure mechanism to enhance the integrity of municipal securities underwritings. See 59 Fed. Reg. 17621, 17625 (April 13, 1994) (SEC Order Approving Rule Change). Thus, the purposes served by subsection (e) are distinct from, and not dependent on, the business disqualification or solicitation restriction provisions of subsections (b) and (c). Id.

In the current case, it is uncontested that the Firm made 15 political contributions during the period covering calendar years 1994 and 1995 and that the Firm participated as an underwriter in 1995. There is, moreover, no dispute that the Firm failed to file Form G-37 reports with the MSRB within 30 calendar days of the end of the fourth quarter of 1994 and the first, second, third, and fourth quarters of 1995. As a result, the Firm violated Rule G-37(e). The DBCC's finding to that effect is affirmed.

Cause Three. The DBCC held that the Firm and Foley violated MSRB Rule G-27. Rule G-27(a) imposes a general obligation to supervise and states that "[e]ach broker, dealer and municipal securities dealer ('dealer') shall supervise the conduct of its municipal securities business and the municipal securities activities of its associated persons to ensure compliance with [MSRB] rules. . . ." Rule G-27(c) deals specifically with written supervisory procedures and states that "[e]ach dealer shall adopt, maintain and enforce written supervisory procedures reasonably designed to ensure that the conduct of its municipal securities business and the municipal securities activities of its associated persons are in compliance as required in section (a) of this rule." Finally, Rule G-27(b) provides that "[e]ach dealer shall designate a municipal securities principal as responsible for its supervision under sections (a) and (c) of this rule. . . ."

Here, the complaint alleged that the Firm, acting through Foley, failed to establish, maintain or enforce written supervisory procedures to prevent the occurrence of the misconduct relating to Rule G-37 described above. The respondents admit that the Firm had no written procedures covering Rule G-37,[19] but they opine that this failure resulted from the fact that the policy and procedures manual of their clearing firm, which they adopted without change as their own, did not contain any information regarding Rule G-37.[20] The SEC, however, has repeatedly

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[19] In addition, Foley admits that she was the person who was responsible for ensuring that the Firm maintained proper written supervisory procedures.

[20] The respondents assert that it is customary for introducing brokers to rely entirely on the policy and procedures manuals of their clearing firms. We note that no evidence has been presented to substantiate such a claim. In any event, the fact that other broker/dealers in the industry may have adopted such manuals from their clearing firms without change does not mean that those manuals were similarly deficient. Even if they were, the SEC has emphasized, on several occasions and in various settings, that it is no defense to assert that others in the securities industry similarly failed to follow applicable rules and procedures. See, e.g., In re Barry C. Wilson, Exchange Act Rel. No.37867, at 6 n.15 (Oct. 25, 1996); In re Patricia H. Smith, Exchange Act Rel. No. 35898, at 4 n.8 (June 27, 1995); In re Bison Sec., Inc., 51 S.E.C. 327, 330 n.10 (1993); In re Donald T. Sheldon, 51 S.E.C. 59, 66 n.32 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995).

The respondents also claim that the NASD did not object to the Firm's use of this policy and procedures manual during previous examinations. This too provides respondents with no defense as the SEC has admonished that "a securities dealer cannot shift its compliance

held that respondents cannot shift their responsibility for compliance with applicable requirements to others. See, e.g., In re Bison Sec., Inc., 51 S.E.C. 327, 333 n.20 (1993) ("Applicants cannot shift their responsibility for compliance with our requirements to another securities firm.") (citing In re Lake Sec., Inc., 51 S.E.C. 19 (1992); In re Livada Sec. Co., 45 S.E.C. 598, 600 (1974)).[21] Accordingly, we affirm the DBCC's finding that the Firm and Foley violated MSRB Rule G-27 by failing to establish, maintain or enforce written supervisory procedures to prevent the occurrence of the Rule G-37 violations.

Sanctions

The DBCC determined that the Firm and Foley should be censured, fined $8,500, jointly and severally, and assessed costs of $1,422.75, jointly and severally.[22] After reviewing and considering the evidence and the NASD Sanction Guidelines ("Guidelines"), we impose modified sanctions as follows:

> Cause One - The Firm is fined $25,000. The sanctions imposed against Foley under cause one are dismissed.
>
> Cause Two - The Firm is fined $1,250.
>
> Cause Three - The Firm and Foley are fined $5,000, jointly and severally.

In addition, we affirm the DBCC's imposition of costs against the Firm and Foley of $1,422.75, jointly and severally. Finally, we uphold the DBCC's censure of the Firm and Foley.

The sanctions imposed for the Firm's violation of Rule G-37(e) under cause two of the complaint ($1,250) and for the respondents' violation of Rule G-27(c) under cause three of the complaint ($5,000, jointly and severally) are consistent with those recommended in the Guidelines.[23] The sanction imposed for the Firm's violation of Rule G-37(b) under cause one of

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responsibility to the NASD. A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." In re W.N. Whelen & Co., 50 S.E.C. 282, 284 (1990). See also In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995); In re Lowell H. Listrom & Co., 48 S.E.C. 360, 366 (1985); In re Melvin Zucker, 46 S.E.C. 731, 733 (1976).

[21] See also supra note 20 and cases cited therein.

[22] The DBCC did not apportion the fine to the various causes of action.

[23] The Guideline for reporting violations under Rule G-37(e) recommends imposition of a fine between $250 and $1,000 for an initial inadvertent violation and suggests that a larger fine would be appropriate for repeated or intentional violations. For the reasons discussed infra, we believe that a fine on the low end of the range recommended in the Guideline is appropriate and, therefore, we impose a $250 fine for each of the five quarters that the Firm should have but

the complaint ($25,000) represents a balance between the appropriateness of giving due weight to mitigating factors and the need to affirm the importance of adherence to the rule. With regard to the latter, we are compelled to take into account the Firm's failure to make even a reasonable attempt to ascertain the exact requirements of the rule. Moreover, there is no indication that the Firm's violative actions would have ceased if they had not been discovered during a routine NASD examination.

Nonetheless, we note that the $25,000 fine imposed against the Firm for violating Rule G-37(b) represents a departure from the recommendation in the Guidelines that a firm be fined in an amount equal to the gross profits that it received from engaging in prohibited underwriting, in this case $78,106.40. In determining the appropriate sanctions, we find that there are a number of factors present in this case that militate against imposing a $78,106.40 fine as suggested in the Guidelines.[24]

First, the evidence indicates that the violations were not a result of any intentional misconduct. We find the absence of culpable intent to be a mitigating factor in this case.[25]

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did not file Form G-37 reports, bringing the total fine for cause two to $1,250.

The Guideline for failing to establish and maintain adequate supervisory procedures recommends a fine of between $5,000 and $25,000 and suggests that the responsible individual, here Foley, should be suspended for 10 to 30 business days. We hold that a fine of $5,000 imposed against the respondents, jointly and severally, under cause three is sufficiently remedial under the circumstances of this case. Based on the mitigating factors discussed below, we do not believe that a suspension is warranted.

[24] The determination of appropriate sanctions in any case depends on several factors. The Guidelines provide a starting point but are not mandatory or determinative because each case presents its own unique set of circumstances, including possible mitigating or aggravating factors. It is well recognized that the appropriate sanctions depend upon the facts and circumstances of each particular case. See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Hiller v. SEC, 429 F.2d 856, 858-59 (2d Cir. 1970); In re Larry Ira Klein, Exchange Act Rel. No. 37835, at 15 n.41 (Oct. 17, 1996); In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 10 n.30 (Dec. 6, 1995); In re Klaus Langheinrich, 51 S.E.C. 1122, 1126 (1994). Moreover, as the SEC has often emphasized, the Guidelines "are not rules; they specifically are meant to be advisory, not mandatory, and are offered for consideration in a flexible manner to be determined by the circumstances of each case." In re Bison Sec., Inc., 51 S.E.C. 327, 334 (1993). See also Atlanta-One, Inc. v. SEC, 100 F.3d 105, 109 (9th Cir. 1996); In re Hattier, Sanford & Reynoir, Exchange Act Rel. No. 39543, at 9 n.17 (Jan. 13, 1998); In re Martin J. Cunnane, Exchange Act Rel. No. 39242, at 4 (Oct. 15, 1997).

[25] Although we find the absence of culpable intent to be relevant in our consideration of sanctions, we do not find respondents' lack of familiarity with Rule G-37 to be mitigative. Indeed, we are troubled by the extent of the respondents' lack of knowledge of Rule G-37 in light of the numerous official notices and extensive media coverage of the rule. For instance, the

Second, we consider as mitigating the fact that the contributions that triggered the two-year ban on the Firm's underwriting were for extremely small dollar amounts, totaling only $175.[26] Third, respondents do not have any past disciplinary history and, upon being informed of the violations discussed above, they fully cooperated with the NASD. In addition, after becoming aware of the problems, they acted promptly to prepare and file Form G-37 reports for the requisite quarters and to formulate adequate written supervisory procedures. They also contacted each official to whom contributions were made and asked that the contributions be returned. (All but two such contributions were returned.) We find these to be significant mitigating factors.[27]

MSRB provided notice of the Draft Proposal in August 1993. See MSRB Reports, Vol. 13, No. 4, at 5-9 (Aug. 1993). The SEC published notice of the Proposed Rule in January 1994, See 59 Fed. Reg. 3389 (Jan. 21, 1994), and it published notice of the final rule in April 1994. See 59 Fed. Reg. 17621 (April 13, 1994). Moreover, the NASD and the MSRB provided notice of the final rule to members in May 1994 and June 1994 respectively. See NASD Notice to Members 94-34, at 177-191 (May 1994) (providing notice of the SEC's approval of MSRB Rule G-37; emphasizing the rule's prohibitions; and attaching a copy of the approved rule); MSRB Reports, Vol. 14, No. 3, at 3-20 (June 1994) (reporting the SEC's approval of Rule G-37 and providing a detailed discussion of the rule's requirements). The MSRB also published interpretive statements on Rule G-37 in August and December 1994. See MSRB Reports, Vol. 14, No. 4, at 27-34 (Aug. 1994); MSRB Reports, Vol. 14, No. 5, at 7-8 (Dec. 1994). In fact, in her answer to the complaint in this matter, Foley stated that she had a general knowledge of "Rule G-37 through media and industry reports." Yet, the respondents appear not to have put forth any appreciable effort to ascertain the rule's specific requirements.

[26] The contributions at issue were for dollar amounts below the $250 de minimis threshold applicable to contributions by individual municipal finance professionals. Although the de minimis exception is not applicable here (because the Firm made the contributions, see supra note 8), the fact that the sum of the contributions fell beneath the de minimis threshold may be considered in determining sanctions.

[27] In addition to the mitigating factors set forth above, the Firm argues that the fine, if any, should be limited to the amount of the Firm's excess net capital. The Firm's position seems to be at odds with a long line of SEC decisions, which have consistently emphasized that the amount of a fine against a member firm does not have to be related to or limited by a firm's minimum required capital. See, e.g., In re First Heritage Investment Co., 51 S.E.C. 953, 959-960 (1994) (fine affirmed notwithstanding any potential impact on the firm's capital); In re F.B. Horner & Assoc., Inc., 50 S.E.C. 1063, 1068 (1992) ("[T]here is no reason why the amount of a fine must be related to or limited by a firm's net capital."), aff'd, 994 F.2d 61 (2d Cir. 1992); In re Matanky Sec. Corp., 50 S.E.C. 823, 825-26 (1991) ("[W]e see no reason why the amount of a fine must be related to or limited by a firm's minimum required capital."). We need not resolve this issue, however, as the fine we impose today is less than the Firm's excess net capital, rendering the respondents' argument moot.

The respondents also assert that we should uphold the DBCC's sanctions in this case because they are consistent with those imposed in a recent settled matter involving a

We do not consider as mitigating the respondents' claim that they reasonably relied on the policy and procedures manual of their clearing firm, which manual, unbeknownst to them, was deficient with regard to Rule G-37. It is incumbent upon members of the securities industry to ensure that they have adequate supervisory procedures. Had the respondents taken the time to establish and maintain such procedures, it is likely that the violative conduct involved here would never have occurred.

Conclusion

In summary, we affirm the DBCC's finding that the Firm violated MSRB Rule G-37(b). We reverse and dismiss the finding that Foley, in her individual capacity, violated Rules G-37(b) and (d). We affirm the finding that the Firm violated Rule G-37(e), as well as the finding that the Firm and Foley violated Rule G-27(c).[28] We impose the following sanctions: The Firm and Foley are censured; fined $5,000, jointly and severally; and assessed costs of $1,422.75, jointly and severally. In addition, the Firm is fined $26,250.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

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violation of Rule G-37, namely, In re Merchant Capital, AWC No. C05960025 (Aug. 19, 1996) (Letter of Acceptance, Waiver and Consent). As the SEC has emphasized, however, "reference to settled cases in [its] review of sanctions in litigated cases is inappropriate because the different considerations in settling a case may well result in lower sanctions than in a litigated action." In re Paul David Pack, 51 S.E.C. 1279, 1283 n.8 (1994). See also In re Prime Investors, Inc., Exchange Act Rel. No. 39359, at 3-4 (Nov. 26, 1997); In re David A. Gingras, 50 S.E.C. 1286, 1294 (1992).

[28] We have considered all of the arguments of the parties. Such arguments are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Direct: (202) 728-8381
Fax: (202) 728-8894

Joan C. Conley
Corporate Secretary

March 23, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Donald S. Weiss, Esq.
Bell, Boyd & Lloyd
Three First National Plaza
Chicago, Illinois

Re: Complaint No. C8A960040: Podesta & Co. and Carol P. Foley

Dear Mr. Weiss:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor.

You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW, Stop 6-9
Washington, DC 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Richard Schultz, Esq.