

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Sisung Securities Corporation
New Orleans, LA,

and

Lawrence J. Sisung Jr.
Gretna, LA,

Respondents.

DECISION

Complaint No. C05030036

Dated: August 28, 2006

**Held, Hearing Panel’s findings affirmed, in part, and reversed, in part.
Sanctions modified consistent with the findings set forth herein.**

Appearances

For the Complainant: Mark P. Dauer, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondents: Thomas K. Potter, Esq., Stacie M. Hollis, Esq.

Decision

The following is not in controversy. Over a period spanning four years, Lawrence J. Sisung Jr. (“Sisung”), the president and sole owner of Sisung Securities Corporation (“Sisung Securities” or “the Firm”), directed political contributions to various state and local officials, including sitting members of the Louisiana State Bond Commission (“Bond Commission” or “Commission”), through two affiliated entities of the Firm.

Within two years of these contributions, Sisung Securities served as an underwriter or financial advisor for 21 political subdivision bond issues approved by the Bond Commission pursuant to statutory authority.

In accordance with NASD Procedural Rule 9311(a), the Department of Enforcement (“Enforcement”) appeals a Hearing Panel’s November 19, 2004 decision dismissing allegations that Sisung’s contributions and subsequent municipal securities business by Sisung Securities violated the prohibitions set forth in Municipal Securities Rulemaking Board (“the Board” or “MSRB”) Rules G-37(b), (c), and (d).

Sisung and Sisung Securities cross-appeal. Pursuant to NASD Procedural Rule 9311(d), the respondents seek to set aside findings set forth in the Hearing Panel’s decision that they violated MSRB Rules G-8, G-9, and G-37(e), by failing to record and report to the Board the political contributions directed by Sisung.

After a thorough review of the record, we reverse, in part, and affirm, in part, the Hearing Panel’s findings. We also, consistent with the findings set forth in our decision, modify the sanctions imposed by the Hearing Panel.

I. Background

A. The Respondents and the Entities Controlled by Sisung

Sisung Securities, located in New Orleans, Louisiana, is an NASD member broker-dealer.¹ At all times relevant to the events at issue in this case, Sisung Securities was a “municipal securities dealer” as that term is defined in Section 3(a)(30) of the Securities Exchange Act of 1934 (“Exchange Act”).

Sisung entered the securities industry in 1984 as a direct participation programs limited representative of a former NASD member. Since forming Sisung Securities in 1989, he has been associated with the Firm as a general securities representative and principal, a financial and operations principal, a municipal securities principal, and a government securities representative and principal. When the events at issue in this case unfolded, Sisung was a “municipal finance professional” or “MFP” as that term is defined in MSRB Rule G-37(g)(iv).

Sisung is also the founder of United Properties Corporation (“UPC”), a Louisiana corporation. Sisung was the president and sole shareholder of United Properties until March 2000, when the firm merged into United Professionals Company, LLC (“UPC”), a Louisiana limited liability company. From March until April 2000, Sisung was the sole owner of United Professionals. Since April 2000, Sisung has remained the majority

¹ Sisung Securities is a small firm employing approximately 10 registered representatives.

owner of the firm and, as such, has continued to control the operations of United Professionals.² UPC is not a broker, dealer, or municipal securities dealer. UPC engages in a variety of real estate and other business development projects. To further these interests, and in support of beneficial legislative initiatives, Sisung asserts that he directed UPC campaign contributions to certain statewide elected officials.

From February 1998 to March 2000, Sisung was also the sole shareholder and president of Sisung Investment Management Services, Inc. (“SIMS”), a Louisiana corporation and registered investment adviser. In March 2000, this entity was merged into Sisung Investment Management Services, LLC (“SIMS”), a Louisiana limited liability company and registered investment adviser, of which Sisung is the sole and controlling owner.³ Like UPC, SIMS is not a broker, dealer, or municipal securities dealer. Sisung asserts that SIMS has made political contributions to certain statewide officials that sit on the boards of pension funds for which SIMS would like to serve as an investment adviser.⁴

B. Procedural Background

On July 11, 2003, Enforcement filed a five-cause complaint in this matter. The first cause of the complaint alleged that Sisung Securities, from March 1, 1998, to December 1, 2002, engaged in municipal securities business that violated MSRB Rules G-37(b) and G-17 by participating as underwriter or financial advisor for political subdivision debt issues approved by the Bond Commission, members of which received campaign contributions from UPC and SIMS.

The second cause of the complaint alleged that, from February 27, 1998, to June 6, 2001, Sisung Securities and Sisung violated MSRB Rules G-37(d) and G-17 by intentionally circumventing the prohibitions of MSRB Rule G-37(b) through the campaign contributions of UPC and SIMS to Bond Commission members.

The third cause of the complaint alleged that, during the same period of time alleged in cause two, the respondents violated MSRB Rules G-37(c) and G-17 by soliciting and coordinating contributions to members of the Bond Commission at a time when Sisung Securities was engaging or seeking to engage in municipal securities

² We refer to United Properties and United Professionals together as “UPC” throughout this decision.

³ We refer to Sisung Investment Management Services, Inc., and Sisung Investment Management Services, LLC, together as “SIMS” throughout this decision.

⁴ Sisung Securities and UPC share an office suite. SIMS is located in an office suite adjacent to Sisung Securities and UPC on the same floor of the office building in which all three entities reside.

business with Louisiana political subdivisions whose debt was required to be approved by the Commission.

The fourth cause of Enforcement's complaint alleged that Sisung Securities failed to report 39 political contributions directed by Sisung through UPC and SIMS to numerous statewide and local officials, including 14 political contributions to members of the Bond Commission, in violation of MSRB Rules G-37(e) and G-17.

Finally, the fifth cause of the complaint alleged that Sisung Securities, acting through Sisung, violated MSRB Rules G-8, G-9, and G-17 by failing to keep and preserve accurate records showing all political contributions effected by Sisung through UPC and SIMS.

The respondents filed an answer in which they denied engaging in any practices that violated MSRB rules. In their defense before the Hearing Panel, the respondents asserted that the case should be dismissed in its entirety because the Board's rules did not reach contributions made by the affiliated entities of Sisung Securities.

The Hearing Panel held a two-day hearing during which it heard testimony from six witnesses, including Sisung. On November 19, 2004, the Hearing Panel issued a decision finding the respondents not liable for the alleged violations of MSRB Rules G-37(b), (c) and (d). The Hearing Panel, however, found that Sisung Securities failed to report political contributions effected by Sisung through UPC and SIMS, in violation of MSRB Rule G-37(e). The Hearing Panel also found that Sisung Securities, acting through Sisung, failed to make and preserve records of such political contributions, in violation of MSRB Rules G-8 and G-9.⁵ For its reporting violations, the Hearing Panel imposed upon the Firm a \$10,000 fine. The respondents were also jointly and severally ordered to pay a fine of \$10,000 for the Firm's recordkeeping failures.

Enforcement's timely appeal and respondents' timely cross-appeal followed. On appeal, Enforcement asserts that the Hearing Panel's decision that Sisung Securities was not prohibited, under MSRB Rule G-37(b), from engaging in municipal securities business with political subdivisions whose issues were approved by Bond Commission members is wrong and must be reversed. Enforcement also asserts that the Hearing Panel erred in finding that the respondents did not violate MSRB Rule G-37(c) and (d) by soliciting contributions from UPC and SIMS and attempting thereby to avoid the proscriptions on municipal securities business set forth in MSRB Rule G-37(d).

The respondents request that we uphold the Hearing Panel's decision with respect to MSRB Rules G-37(b), (c), and (d). They assert that political contributions made by the affiliated entities of Sisung Securities cannot in this case trigger any MSRB Rule

⁵ The Hearing Panel's decision, without comment, makes no findings concerning the respondents' alleged violations of MSRB Rule G-17.

G-37 proscriptions, that Bond Commission members are not issuer officials for purposes of the rule, and that there otherwise is no evidence of any intent to circumvent the Board's rules. The respondents further request that we reverse and dismiss the remainder of the Hearing Panel's findings.⁶

II. Facts

Despite a voluminous record, the facts in this case are largely undisputed. The legal conclusions to be drawn from these facts, however, are a matter of significant contention between the parties.

A. The Louisiana State Bond Commission

There are 14 members of the Bond Commission: the governor, the lieutenant governor, the president of the Senate, the speaker of the House of Representatives, the state treasurer, the secretary of state, the attorney general, the Senate Finance Committee chairman, the Senate Revenue and Fiscal Affairs Committee chairman, the House Ways and Means Committee chairman, the House Appropriations Committee chairman, two members of the legislature appointed by the president of the Senate and the speaker of the House of Representatives, and the commissioner of administration.⁷ La. Rev. Stat. Ann. § 39:1401(A). The state treasurer serves as the Commission's chairman. *Id.* All members of the Commission sit *ex officio*.⁸ *Id.*

⁶ In addition to the opening and reply briefs that each party was permitted to file in accordance with NASD Procedural Rule 9347, the parties sought leave to make additional filings before the NAC subcommittee ("Subcommittee") empanelled to consider this matter. Respondents sought leave to file a supplemental reply brief and Enforcement requested that the NAC take official notice of a regulatory filing made by Sisung Securities with the Board. After permitting the respective opposing parties an opportunity to comment and respond to these filings, the Subcommittee ordered that they be made a part of the record in this matter under NASD Procedural Rule 9346(a). We affirm that decision.

⁷ Persons designated by statute may represent members at meetings of the Bond Commission. La. Rev. Stat. Ann. § 39:1401(B). For example, the governor's executive secretary or executive counsel may represent the governor, and the first assistant state treasurer may represent the state treasurer. *Id.* Testimony at the hearing below also indicated that Commission members may give proxies to other specified individuals to vote in their stead.

⁸ Members are thus first elected to posts that directly or indirectly qualify them for membership on the Commission, except for the commissioner of administration, who is appointed to that post by the governor.

The Commission's authority over municipal securities issued by and within the state of Louisiana is pervasive.⁹ Its prior written approval is required for all "bonds or other obligations . . . issued or sold by the state, directly or through any state board, agency, or commission, or by any political subdivision of the state." La. Const. art. VII, § 8(b); *see also* La. Admin. Code tit. 71, pt. III, § 101(C).

With respect to general obligation debt of the state, the Bond Commission is the issuer. La. Rev. Stat. Ann. § 39:1402(A). It is also charged with the sale of all other bonds, of whatever type, issued by the state and its boards, departments, commissions, authorities, and agencies. La. Rev. Stat. Ann. § 39:1403(A). In the case of these bond issues, the Commission, in consultation with the board, department, commission, authority or agency with responsibility for issuing the bonds, is authorized to select bond counsel and other consultants, including the underwriters and financial advisors for the issue.¹⁰ La. Rev. Stat. Ann. § 39:1403(B); La. Admin. Code tit. 71, pt. III, § 1301(A).

The duties of the Bond Commission also require that it approve applications from political subdivisions to issue bonds and incur debt, and such applications include information concerning the financial professionals involved in handling the issues.¹¹ La. Rev. Stat. Ann. § 39:1410.60; La. Admin. Code tit. 71, pt. III, §§ 101(D), 1301(B). The Commission reviews these applications for compliance with constitutional and statutory requirements and for feasibility, including the ability to repay any debt incurred. La. Admin. Code tit. 71, pt. III, § 101(D). If the applications submitted by political subdivisions are in order, they are placed on the Bond Commission's agenda for consideration at a regular or special meeting. *Id.* At such meetings, the Commission may approve or disapprove the application, or defer action on the application for further discussion.¹² *Id.*

⁹ Section 3(a)(29) of the Exchange Act defines the term "municipal securities." There is no dispute that the debt issues that are the subject of controversy in this case were of municipal securities.

¹⁰ For revenue bonds of state agencies and public trust bonds for the benefit of the state, the appointment of underwriters and financial advisors must be approved by the Commission prior to consummation or entered into subject to the approval or ratification of the Commission. La. Admin. Code tit. 71, pt. III, § 103(T)(7).

¹¹ These political subdivisions include parishes, municipalities, public boards, political or public corporations, subdivisions, taxing districts, and other political subdivisions created by the constitution and laws of the state. La. Rev. Stat. Ann. § 39:1410.60(A).

¹² The Bond Commission approves most political subdivision debt in a global manner. A member of the Commission may, however, have an application removed for individual consideration. Revenue bonds issued by political subdivisions, which

Unlike bonds issued on behalf of the state, the Bond Commission is not responsible for selecting the financial professionals, including the underwriter and financial advisor, for debt issued by political subdivisions. However, “[i]n order to insure the integrity of the structure of the financing team which the [C]ommission is charged with the responsibility of . . . approving for handling bond issues,” “details of any arrangements for compensation of all of the financial professionals in the transaction (including any joint accounts or fee-splitting agreements) and the method used to calculate the fees to be earned must be provided to the [C]ommission in the [political subdivision’s] written application.”¹³ La. Admin. Code tit. 71, pt. III, § 1301(C) & (C)(4)(a).

The Bond Commission’s “*consent and approval*” is required for any and all political subdivision issues. La. Rev. Stat. Ann. § 39:1410.60(A) (emphasis added). Failure to obtain the Commission’s consent and approval nullifies and voids such debt and subjects individuals associated with the issue to criminal sanctions. La. Rev. Stat. Ann. § 39:1410.63.

B. The Contributions

Between February 27, 1998, and October 22, 2001, Sisung effected 39 political contributions to incumbent statewide and local elected officials.¹⁴ Although these contributions were made with funds drawn upon UPC and SIMS accounts, Sisung personally signed or authorized each of the checks constituting the contributions. It was Sisung’s practice to personally deliver each contribution to the elected official or the official’s campaign surrogate.

[cont’d]

represent negotiated sales, generally garner close, individual attention by Bond Commission members.

¹³ The terms and existence of all joint accounts or any other fee-splitting arrangements by and between financial professionals must be reported to and approved by the Bond Commission. La. Admin. Code tit. 71, pt. III, §1301(C)(1). Failure to do so may result in a firm’s disqualification and penalties. La. Admin. Code tit. 71, pt. III, §1301(C)(3).

¹⁴ MSRB Rule G-37(g)(i) defines the term “contribution” to mean any gift, subscription, loan, advance, or deposit of money or anything of value, made for the purpose of influencing an election for office, for payment of debt incurred in any such election, or for transition or inaugural expenses incurred by a successful candidate for state or local office. In this case, there is no dispute that the contributions effected by Sisung were “contributions” for purpose of MSRB Rule G-37.

Of the 39 contributions at issue in this case, 14 were made to incumbent statewide executive and legislative officials. Each of these officials was also a sitting member of the Bond Commission at the time of the contribution. In total, these 14 contributions amounted to \$16,900.¹⁵

These contributions included:

- A \$400 contribution on February 27, 1998, to Fox McKeithen, the incumbent secretary of state.
- Two contributions, on June 8, 1999, and November 17, 1999, to incumbent state senator Jon Johnson totaling \$5,500.
- A July 27, 1998 contribution of \$1,000 to the incumbent state treasurer Ken Duncan.
- Four contributions, between October 9, 1999, and April 11, 2001, to incumbent state senator John Hainkel totaling \$3,000.¹⁶
- Two contributions, on May 11, 2000, and September 17, 2001, to the incumbent state treasurer John Kennedy totaling \$5,500.
- Two \$250 contributions, on May 11, 2000, and April 23, 2001, to Bryant Hammett, an incumbent state representative.
- Two contributions, on June 6 and 28, 2001, to incumbent state senator Paulette Irons totaling \$1,000.

In addition to the 14 contributions to incumbent state officials and members of the Bond Commission, Sisung also effected an additional 25 political contributions, totaling \$27,825, to elected officials of Louisiana political subdivisions.¹⁷

Sisung Securities made and preserved no records of the contributions Sisung effected through UPC and SIMS. The Firm also did not report any of the contributions to the Board.

¹⁵ Sisung signed the checks for 11 of these contributions and authorized the other three.

¹⁶ At the time the final three contributions to Hainkel were effected by Sisung, this individual was also the president of the state Senate.

¹⁷ Each of the 39 political contributions at issue in this case is identified in Exhibit B to the complaint issued by Enforcement in this case. Sisung was not eligible to vote for any of the individuals who were the beneficiaries of political contributions in amounts of \$250 or less.

C. Sisung Securities' Municipal Securities Business

From March 1, 1998, through December 1, 2002, Sisung Securities conducted municipal securities business with respect to 21 Louisiana political subdivision negotiated bond issues.¹⁸ These bond issues, each of which was approved by the Bond Commission by unanimous vote, generated fees for Sisung Securities totaling \$2,184,548.

These issues and Sisung Securities' role in each included:

- \$2,400,000 Board of Trustees for State Colleges and Universities, State of Louisiana, Revenue Refunding Bonds issued on March 1, 1998, with Sisung Securities acting as co-underwriter.
- \$7,690,000 Board of Trustees for State Colleges and Universities, State of Louisiana, Revenue Bonds issued on June 1, 1998, with Sisung Securities acting as co-underwriter.
- \$8,650,000 Hammond-Tangipahoa Home Mortgage Authority Revenue Bonds issued on May 1, 1998, with Sisung Securities acting as co-underwriter.
- \$50,000,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued January 27, 1999, with Sisung Securities acting as co-underwriter.
- \$15,000,000 Greater New Orleans Expressway Commission Revenue Bonds issued on June 16, 1999, with Sisung Securities acting as co-underwriter.
- \$4,395,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued on October 28, 1999, with Sisung Securities acting as co-underwriter.
- \$5,615,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue and Revenue Refunding Bonds issued on February 22, 2000, with Sisung Securities acting as financial advisor.
- \$48,360,000 Parish of Jefferson Home Mortgage Authority Revenue and Revenue Refunding Bonds issued on June 22, 2000, with Sisung Securities acting as co-financial advisor.
- \$110,000,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued on June 23, 2000, with Sisung Securities acting as co-underwriter.

¹⁸ The term "municipal securities business" includes certain dealer activities such as the purchase of a primary offering of municipal securities on other than a competitive basis, that is, acting as a managing underwriter or as a syndicate member in negotiated underwritings, or acting as a financial advisor, consultant, placement agent, or remarketing agent on negotiated underwritings. MSRB Rule G-37(g)(vii).

- \$100,000,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued on August 24, 2000, with Sisung Securities acting as co-underwriter.
- \$10,000,000 Parish of Jefferson, Sub-District No. 1 of Consolidated Recreation and Community Center, and Playground District No. 2 General Obligation Bonds issued on October 1, 2000, with Sisung Securities acting as financial advisor.
- \$14,940,000 Parish of Jefferson Home Mortgage Authority Revenue Refunding Bonds issued on November 15, 2000, with Sisung Securities acting as co-financial advisor.
- \$20,000,000 Parish of Jefferson Home Mortgage Authority Revenue Refunding Bonds issued on January 10, 2001, with Sisung Securities acting as co-financial advisor.
- \$2,110,000 Board of Supervisors for the University of Louisiana System Auxiliary Revenue Refunding Bonds issued on May 30, 2001, with Sisung Securities acting as co-underwriter.
- \$21,120,000 Calcasieu Parish Public Trust Authority University Student Lease Revenue Bonds issued on May 22, 2001, with Sisung Securities acting as co-underwriter.
- \$125,000,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued on June 28, 2001, with Sisung Securities acting as co-underwriter.
- \$31,750,000 Parish of Jefferson Home Mortgage Authority Revenue and Revenue Refunding Bonds issued on June 27, 2001, with Sisung Securities acting as co-financial advisor.
- \$9,135,000 Louisiana Local Government Environmental Facilities and Community Development Authority Revenue Bonds issued on August 9, 2001, with Sisung Securities acting as co-financial advisor.
- \$2,900,000 North Webster Parish Industrial District Industrial Revenue Bonds issued on September 5, 2001, with Sisung Securities acting as underwriter.
- \$60,000,000 Jefferson Sale Tax District, Parish of Jefferson, Special Sale Tax Revenue Bonds issued on December 6, 2001, with Sisung Securities acting as co-financial advisor.
- \$22,412,082 Louisiana Local Government Environmental Facilities and Community Development Authority Qualified Zone Academy Bonds issued on December 31, 2001, with Sisung Securities acting as co-underwriter.

None of these issues concerned bonds of the state and its boards, departments, commissions, authorities, and agencies, which are required to be issued or sold by the Bond Commission in accordance with La. Rev. Stat. Ann. §§ 39:1402-1403. Instead, during the period of time relevant to Enforcement's complaint, Sisung Securities did not seek or conduct any municipal securities business concerning bond issues for which the Bond Commission possessed the authority to select the financial professionals.

Sisung testified that the Firm chose to forego conducting municipal securities business on behalf of the Bond Commission beginning in 1996. Sisung believed that by doing so, UPC could engage in the Louisiana legislative process by making contributions to officials who were also Bond Commission members. Sisung had concluded that contributions of this nature might trigger prohibitions set forth in MSRB Rule G-37 and preclude the Firm from conducting municipal securities business for bonds issued or sold by the Commission on behalf of the state and its boards, departments, commissions, authorities, and agencies.

Sisung and the Firm subsequently sought the advice of counsel. Sisung requested an opinion from counsel as to whether contributions made by UPC to Bond Commission members would trigger MSRB Rule G-37 proscriptions with respect to municipal securities business conducted by Sisung Securities for bonds issued by political subdivisions within the state. Sisung received an oral opinion from its legal counsel sometime in 1997 that contributions to sitting Bond Commission members by UPC would not preclude the Firm from acting as an underwriter or financial advisor on political subdivision bond issues.

This oral opinion was purportedly substantiated in the form of a redacted June 27, 1996 opinion letter given to the Firm that counsel had prepared for a client other than Sisung Securities.¹⁹ In the redacted opinion letter, however, counsel was asked only to address the issue of whether a contribution by a municipal finance professional to the Louisiana state treasurer, a member of the Bond Commission, would preclude an unnamed firm from engaging in municipal securities business with the state of Louisiana or political subdivisions within the context of MSRB Rule G-37. In the redacted letter, counsel concluded that the state treasurer was an “official of an issuer,” as that term is defined in MSRB Rule G-37(g)(vi), and contributions to him would trigger MSRB Rule G-37(b) prohibitions for any bonds issued or sold by the Bond Commission on behalf of the state and its boards, departments, commissions, authorities, and agencies. The redacted opinion letter, however, concluded that contributions to the state treasurer would not preclude the unnamed client from engaging in municipal securities business with Louisiana political subdivisions because the state treasurer was not an issuer official with respect to these issues.

The Firm’s outside counsel did not provide the Firm with any advice concerning whether contributions made by the Firm’s affiliates to members of the Bond Commission were required to be recorded and reported by Sisung Securities. Instead, Sisung shortly thereafter consulted with the Firm’s in-house counsel, Robert Lane Sisung, who advised

¹⁹ Sisung Securities could not produce a copy of this redacted opinion letter from the Firm’s records. Instead, a copy was provided to Enforcement by the Firm’s counsel. Counsel, however, could not produce a record of the letter having been sent to Sisung or the Firm, or any billing records evidencing that counsel rendered legal advice on this matter to the Firm.

the Firm that it was not responsible for reporting any contributions effected through the Firm's affiliates.

III. Discussion

This case involves political contributions effected by Sisung, through two entities that he controlled, to Bond Commission members who possessed statutory authority to approve or disapprove municipal bond issues for which Sisung Securities acted as an underwriter or financial advisor. The issues before us are whether these contributions, contributions to other elected officials, and the subsequent municipal securities business in which the Firm engaged, caused the respondents to violate certain of the provisions of MSRB Rules G-37, G-8, and G-9.

As an initial matter, we note that, pursuant to Section 15B(b)(2) of the Exchange Act, the Board is charged with exclusive authority to promulgate rules related to the municipal securities industry. NASD's role in this arena, as set forth in Section 15A(b)(7) of the Exchange Act, is mainly to enforce the compliance of NASD members and their associated persons with the rules promulgated by the Board.

Our role here is thus the function of giving meaning and content to the inert words of the Board's rules to meet a specific situation. In the course of adjudicating disciplinary actions involving alleged violations of Board rules by our members, we possess the ability to make such interpretations necessary to resolve the specific issues before us. *Dist. Bus. Conduct Comm. v. Podesta & Co.*, Complaint No. C8A960040, 1998 NASD Discip. LEXIS 27, at *12 n.12 (NAC Mar. 23, 1998). In doing so, we start with the plain language and meaning of the Board's rules. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the [adjudicator's] sole function . . . is to enforce it according to its terms."); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (same). Nonetheless, where an absolutely literal reading of these rules may not be reconciled with their clear purpose, a less literal construction must be considered. *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971); *see also Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129 (D.C. Cir. 1999) ("Courts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme."). In such a case, the Board's drafting intentions will control. *Ron Pair Enter.*, 489 U.S. at 242. As in all cases involving the federal securities laws, the Board's rules will be construed broadly to effectuate their remedial purpose. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002) ("[W]e have explained that the [Exchange Act] should be construed not technically and restrictively, but flexibly to effectuate its remedial purpose.") (internal quotations omitted); *Meyer Blinder*, 53 S.E.C. 250, 257-58 (1997) ("[T]he securities laws should be interpreted broadly in a manner that is consistent with the statutory language and furthers the purposes of the statutes.").

The adoption of MSRB Rule G-37 encapsulated a "comprehensive scheme" consisting of several separate components: a proscription on business activities triggered by certain political contributions, limitations on the solicitation and coordination of

political contributions, and recordkeeping and disclosure duties. *Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business* (“G-37 Approval Order”), Exchange Act Rel. No. 33868, 1994 SEC LEXIS 1023, at *14 (Apr. 7, 1994). The rule “was enacted for several reasons, among them to ensure that the high standards and integrity of the municipal securities industry are maintained and to remove any appearance that decisions by municipalities in awarding negotiated underwriting business might have been influenced by political contributions.”²⁰ *Fifth Third Sec., Inc.*, Exchange Act Rel. No. 46087, 2002 SEC LEXIS 1573, at *6 (June 18, 2002) (*Order Instituting Public Administrative Proceedings, Making Findings, Ordering Respondent to Cease and Desist, and Imposing Remedial Sanctions*). As a “broad prophylactic measure,” Rule G-37 aims to ensure that municipal securities firms compete, and are perceived as competing, for business on the basis of merit rather than association with their political contributions. *Id.*, at *8 & n.4.

A. Political Contributions and Prohibitions Under MSRB Rule G-37(b)

MSRB Rule G-37(b) provides 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: (A) the broker, dealer or municipal securities dealer; (B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional.”²¹ The rule does not ban political contributions but, instead, prohibits a dealer from engaging in municipal securities business with an issuer after certain contributions are made to an “official of such issuer.” *Rule G-37 Filing Procedures and Amendments Approved for Political Contributions and Prohibitions on Municipal Securities Business* (“G-37 Procedures Approved”), MSRB Man. (CCH) ¶ 10,631, at 11,271 (Apr. 25, 1994). A municipal securities dealer thus may not provide any of the various services encompassed by the term municipal securities business within two years

²⁰ The stated purposes and intent of MSRB Rule G-37 are to ensure that high standards and integrity are maintained in the municipal securities industry, to prevent fraud and manipulation, to promote just and equitable principles of trade, to perfect a free and open market, and to protect the investing public by prohibiting brokers and dealers and municipal securities dealers from engaging in municipal securities business with issuers if certain political contributions have been made to officials of such issuers, and by requiring the disclosure of certain political contributions to allow public scrutiny. MSRB Rule G-37(a).

²¹ MSRB Rule G-37(b) exempts contributions by a municipal finance professional of up to \$250 per election for those candidates for which the municipal securities professional is entitled to vote. None of the contributions at issue in this case fell within this exemption.

after the dealer, any dealer-controlled PAC, or any municipal finance professional of the dealer “made” contributions to certain issuer officials. *Id.* The barrier created by Rule G-37(b) removes the opportunity for dealers to benefit from contributions made in close proximity to the awarding of municipal securities business. *Morgan Stanley & Co.*, 53 S.E.C. 379, 381 (1997).

In this case, there is no dispute that Sisung was instrumental in 14 political contributions being made to seven sitting members of the Bond Commission from February 1998 to September 2001. There also exists no quarrel over the fact that Sisung Securities engaged in “municipal securities business” by serving as either underwriter or financial advisor on 21 negotiated political subdivision bond issues during the period of March 1998 to December 2001. Consequently, the parties do not dispute that Sisung Securities, in the case of each of the 21 negotiated bond issues in which it participated, engaged in municipal securities business within a two-year period of contributions having been effected by Sisung through entities that he controlled.

With respect to the violations of MSRB Rule G-37(b) alleged in the first cause of Enforcement’s complaint, this case thus centers upon two matters of controversy. First, whether contributions from UPC and SIMS to members of the Bond Commission can be deemed to have been “made” by Sisung, a municipal finance professional of Sisung Securities. And, second, whether the Commission members to whom Sisung directed contributions were issuer officials for purposes of political subdivision bond issues.

1. The Contributions Were “Made” by Sisung

The Hearing Panel found that the 14 political contributions to Bond Commission members, effected by Sisung through UPC and SIMS, were attributable to Sisung as a municipal finance professional of Sisung Securities.²² We agree.

²² Enforcement asserts that although the Hearing Panel correctly attributed the contributions to Sisung for purposes of Rule G-37, the Hearing Panel erred by rejecting an alternative argument that the contributions were attributable to Sisung merely because he controlled the affiliated entities. In *FAIC Securities, Inc.*, the respondent submitted an offer of settlement, which the SEC accepted, without admitting or denying the findings contained within the order. See 52 S.E.C. 694 (1996) (*Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions*). The SEC’s findings stated that respondent’s municipal finance professionals directed political contributions by affiliated companies of respondent that they controlled to candidates for office who could influence the awarding of municipal securities business by the State of Florida and Dade County. *Id.* at 697. As a result of these contributions, and the respondent’s subsequent selection to participate in negotiated underwritings by the state and county, the SEC found, among other things, that respondent violated MSRB Rule G-37(b). *Id.* at 698. Given the SEC’s order in *FAIC*, Enforcement champions the proposition that the contemporaneous construction of laws by those charged with their execution should be followed even though it was applied in cases settled by consent rather than in litigation. See *E.I.*

In interpretative guidance issued concerning MSRB Rule G-37, the Board has addressed the implications of contributions effected by municipal finance professionals on behalf of other persons.²³ See *Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business (“G-37 Q&A”)*, MSRB Manual (CCH) ¶3681, at 5420 (Q&A II.20 Feb. 16, 1996). In responding to a question concerning a contribution made to an issuer official by a check drawn upon an account of which a municipal finance professional is a joint owner, the Board concluded that “[i]f a municipal finance professional signs a check, whether the check was drawn upon a joint account or not, and submits it as a contribution to an issuer official, then the municipal finance professional is deemed to have made the full contribution.” *Id.*

“The Board is of the view that, in these and similar situations, *if a municipal finance professional has his or her name associated with a contribution, then this creates, at the very least, the appearance* that the contribution is being given by the municipal finance professional.” *1996 G-37 Interpretative Order*, 1996 SEC LEXIS 388, at *6 (emphasis added). Consequently, the Board found it appropriate to attribute such a contribution to the municipal finance professional for purposes of triggering the two-year ban on municipal securities business set forth in Rule G-37(b). *Id.* at *6-7.

[cont’d]

DuPont De Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959). While we are respectful of this principle, we find it provides stolid guidance here. The SEC’s findings in *FAIC* are conclusory in nature, based upon a bare-boned recitation of facts, and are not in our view a contemporaneous construction of MSRB Rule G-37 that operates as a mandate for our consideration. While the SEC’s decision in *FAIC* is informative, given the fact that it was not accompanied by an opinion stating the SEC’s views on the issues raised therein, it is of no value as precedent. See *Carl L. Shipley*, 45 S.E.C. 589, 591 (1974) (stating that cases in which a non-adjudicative order is issued are not to be confused with cases of precedent in which a remedial order is accompanied by an opinion reflecting the SEC’s deliberation and analysis). Moreover, given our findings herein, we need not otherwise address Enforcement’s alternative argument.

²³ The Board, in order to assist the municipal securities industry and dealers with their compliance efforts, has from time to time published interpretative guidance in the form of question-and-answer and other notices addressing public inquiries made concerning the application of its rules. See, e.g., *Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the MSRB Relating to Interpretation of Rule G-37 (“1996 G-37 Interpretative Order”)*, Exchange Act Rel. No. 36857, 1996 SEC LEXIS 388, at *3 (Feb. 16, 1996). Such interpretative guidance represents the Board’s intent in adopting the rules that are the subject of the Board’s guidance. MSRB Rule A-8(b). As such they are submitted to and approved by the SEC as proposed rule changes. See, e.g., *1996 G-37 Interpretative Order*, 1996 SEC LEXIS 388, at *1-2.

We find the Board's guidance decisive on the issue before us. The avowed purpose of MSRB Rule G-37 is to eradicate both real and perceived conflicts of interest and we, like the Board, will read the term "made" broadly with that end in view. There is no dispute that Sisung signed 11 of the checks used to make contributions from the accounts of UPC and SIMS. With respect to each of the 14 contributions that he effected, Sisung also personally attended functions for Bond Commission members and hand-delivered the contributions to the members or their campaign officials. Sisung's imprimatur of each of the 14 contributions made to Bond Commission members created, at a minimum, the appearance and perception that the contributions were being given by him. As a result, we find that each of the 14 contributions effected on behalf of UPC and SIMS are attributable to Sisung for purposes of Rule G-37(b).²⁴

2. Bond Commission Members Are Issuer Officials

We turn next to the issue of whether Bond Commission members were issuer officials with respect to political subdivision debt approved by the Commission, such that Sisung's contributions to these officials triggered the two-year ban on municipal securities business contained in MSRB Rule G-37(b). Enforcement argues on appeal that the Hearing Panel erred in concluding that Bond Commission incumbents are not "officials of such issuer" with respect to debt issued by Louisiana political subdivisions but approved by the Bond Commission. We agree and reverse the Hearing Panel's contrary findings.

²⁴ On appeal, the respondents argue that MSRB Rule G-37 does not by its plain language cover contributions made by the affiliates of a municipal securities dealer. While this may, given the facts of a particular case, be true, such an argument ignores the important role that Sisung, a municipal finance professional of Sisung Securities, played in directing each of the 14 contributions made to members of the Bond Commission. Indeed, we note that the position that the respondents espouse on appeal does not comport with the decisions made by the Firm prior to this litigation. At the hearing below, Sisung testified that he concluded, based upon counsel's advice, that contributions made by him through UPC to any member of the Bond Commission would trigger the proscriptions set forth in MSRB Rule G-37(b) with respect to municipal securities business conducted for bonds issued or sold by the Commission on behalf of the state or its boards, departments, commissions, authorities, and agencies. The respondents therefore implicitly recognized that certain contributions directed by Sisung using the funds of the Firm's affiliates could trigger Rule G-37(b) prohibitions.

MSRB Rule G-37 defines the phrase “official of such issuer.”²⁵ MSRB Rule G-37(g)(vi). This phrase encompasses “an incumbent, candidate or successful candidate”²⁶ for two types of political office. *Id.* The phrase first includes any person who was at the time of the contribution an incumbent or candidate for an “elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer.” MSRB Rule G-37(g)(vi)(A). The phrase alternatively includes those who were at the time of contribution an incumbent “for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.” MSRB Rule G-37(g)(vi)(B).

a. Bond Commission Members Hold an Elective Office

The substitute definitions of the phrase “official of such issuer” first require that a person be either an incumbent of or candidate for an “elective office.” Members of the Bond Commission, however, are not elected to their seats. Instead, they serve *ex officio* after election to certain statewide executive and legislative offices that either directly or indirectly confer Commission membership. La. Rev. Stat. Ann. § 39:1401.

Certain state executive officers -- the governor, lieutenant governor, state treasurer, secretary of state, and attorney general -- are automatically conferred membership on the Bond Commission by virtue of election to their respective offices. Thus, a vote for an incumbent or candidate for one of these offices is in essence a vote to confer Commission membership upon that official. We therefore find that Sisung’s four contributions to one incumbent secretary of state and two incumbent state treasurers were to individuals holding an “elective office.”²⁷

The legislative members of the Bond Commission, however, are several steps away from their membership at the time of candidacy or election. These individuals -- the president of the Senate, the Speaker of the House of Representatives, the Senate Finance Committee chairman, the Senate Revenue and Fiscal Affairs Committee chairman, the House Ways and Means Committee chairman, the House Appropriations

²⁵ The phrases “official of such issuer” and “official of an issuer” are used and defined synonymously in MSRB Rule G-37. MSRB Rule G-37(g)(vi). We thus use the phrases interchangeably in this decision.

²⁶ The definition also encompasses any election committee for an incumbent, candidate, or successful candidate. MSRB Rule G-37(g)(vi).

²⁷ We note that these four contributions alone were sufficient to prevent Sisung Securities from engaging in any one of the 21 political subdivision bond issues in which it participated as underwriter or financial advisor.

Committee chairman, and two legislators appointed to the Commission by the president of the Senate and the speaker of the House -- become members of the Bond Commission only by virtue of their election to the state legislature, followed by later appointment to the Commission or selection to certain legislative leadership positions that confer membership.

There is no dispute, however, that the contributions at issue in this case, including those to certain legislators, were all to sitting members of the Bond Commission when they were made. The legislative members of the Commission receiving contributions from Sisung possessed the very statutory authority with respect to state and political subdivision issues as was possessed by either the secretary of state or the state treasurers receiving contributions from Sisung. To find in this case that the secretary of state and the state treasurer are elective officials for purposes of MSRB Rule G-37, but that the incumbent legislative members of the Bond Commission are not, would lead to an incongruous conclusion that we find would be inconsistent with the purposes ascribed to the rule.²⁸ See, e.g., *Blount v. SEC*, 61 F.3d 938, 947 (D.C. Cir. 1995) (“Rule G-37 constrains relations only between the two potential parties to a quid pro quo: the underwriters and their municipal finance professionals on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other.”). We thus read the phrase “elective office” flexibly in finding that each of the

²⁸ On appeal to the NAC, the respondents highlight that there are no elected members of the Bond Commission when urging us to uphold the Hearing Panel’s findings regarding the status of Commission members with respect to political subdivision issues. We note, again, that respondents’ arguments on appeal cannot be squared with the conclusions that the Firm reached prior to this litigation. At the hearing below, Sisung testified that, based upon counsel’s advice, members of the Bond Commission, including the state treasurer, were issuer officials with respect to bonds issued or sold by the Commission on behalf of the state and its boards, departments, commissions, authorities, and agencies, despite the fact that they serve on the Commission *ex officio*. Indeed, the unreasonableness of the respondents’ position on appeal is abundantly evident. If Bond Commission members are not elective officers with respect to the issues of political subdivisions, then this leads to the conclusion also that members of the Commission do not hold an “elective office of the issuer,” and thus are not “officials of such issuer,” with respect to bonds issued or sold by the Commission on behalf of the state and its departments, even though the Commission possesses the clear responsibility and authority to select the financial professionals for such issues. Respondents readily concede this is not an appropriate outcome, and thus it is not one that we will sanction. See *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004) (“[W]e are not required to interpret a statute in a formalistic manner when such an interpretation would produce a result contrary to the statute’s purpose or lead to unreasonable results.”).

Bond Commission members that received contributions from Sisung, including the legislative members, held an elective office for purposes of MSRB Rule G-37.²⁹

b. Bond Commission Members Are Issuer Officials with Respect to Political Subdivision Issues

Having found that Commission members hold an elective office, we must now decide whether these officers possess the requisite responsibility or influence to be deemed issuer officials under Rule G-37. The first definition of “official of such issuer” includes incumbents or candidates “for elective office *of the issuer*” which office possesses the direct or indirect responsibility for, or influence over the outcome of, the hiring of dealers for municipal securities business “*by the issuer.*” MSRB Rule G-37(g)(vi)(A) (emphasis added). There is no dispute that the Bond Commission members that received contributions from Sisung were not elected officials of the political subdivision issuers for which Sisung Securities conducted municipal securities business. Relying solely upon the plain language used by the Board, it therefore does not appear that Bond Commission members are issuer officials with respect to political subdivision debt under the definition set forth in MSRB Rule G-37(g)(vi)(A).

Alternatively, the phrase “official of such issuer” covers a broader swath of officials as it also covers incumbents and candidates “*for elective office of a state or of any political subdivision*, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business *by an issuer.*” MSRB Rule G-37(g)(vi)(B) (emphasis added). We conclude that Bond Commission members meet this alternative definition.

While the plain language of Rule G-37 is an important guide, the Board’s “manifest intent” will prevail over a strict construction of the rule’s letters. *See Ron Pair Enter.*, 489 U.S. at 242; *United States v. Stewart*, 104 F.3d 1377, 1388 (D.C. Cir. 1997) (“While the plain language of the statute is an important guide, manifest intent prevails over the letter.”) (internal quotations omitted); *Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc.*, 746 F.2d 126, 134 (2d Cir. 1984) (“We have been instructed that when the plain meaning of statutory language leads to absurd or futile results, we should look beyond the words to the purpose and, indeed, that we should do this even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole.”) (internal quotations omitted); *see also United Mine Workers of Am. v. United States*, 562 F.2d 1260, 1264-65 (D.C. Cir. 1977) (resorting to the legislative history of a statute necessary where two alternative

²⁹ Our decision is limited to the facts presented in this case, and we therefore do not concern ourselves with the question of whether a Louisiana legislator who is not a sitting member of the Bond Commission may be deemed an “official of an issuer” under MSRB Rule G-37.

readings of the statute were found to exist after applying the rule of the last antecedent). Rule G-37 was intended to eradicate both real and perceived conflicts of interest that arise when municipal securities dealers and their professionals make political contributions to officials who can influence the awarding of municipal securities business.³⁰ See *G-37 Approval Order*, at *14; *id.* at *30 (“The mere perception of political influence in underwriter selection diminishes investor confidence.”). In the Board’s view, “[p]olitical contributions create a potential conflict of interest for issuers, or at the very least the appearance of a conflict, when dealers make contributions to officials responsible for, or capable of influencing the outcome of, the awarding of municipal securities business and then are awarded business by these officials.” *Comments Requested Concerning Draft Rule G-37, Concerning Political Contributions in the Municipal Securities Market* (“*Rule G-37 Comments Requested*”), MSRB Man. (CCH) ¶ 10,620, at 11,235 (Aug. 26, 1993).

The phrase “official of such issuer” was defined with the elimination of these conflicts, whether real or perceived, as a backdrop. Thus, as originally proposed by the Board, the phrase was defined to mean “any person who was, at the time of the contribution, an incumbent or candidate for any elective office of the issuer . . . which is directly or indirectly responsible for, or can influence the outcome of, the awarding of municipal securities business.” *Id.* at 11,238. The Board stated that this definition “includes any issuer official or candidate . . . who has influence over the awarding of municipal securities business so that contributions to certain state-wide executives or legislative officials (e.g., governors) would be included within the proposed rule change’s prohibition on engaging in municipal securities business.” *Proposal Filed Concerning Political Contributions and Prohibitions on Municipal Securities Business* (“*Rule G-37 Proposal*”), MSRB Man. (CCH) ¶ 10,622, at 11,242 (Jan. 12, 1994). The Board emphasized that it wished “to sever *any* connection between contributions and municipal securities business.” *Id.* (emphasis added).

In its adopting notice, the Board reiterated that the definition of the phrase “official of such issuer” was intended to cover statewide and legislative officials with influence over the awarding of municipal securities business.³¹ *G-37 Procedures*

³⁰ MSRB Rule G-37 is a response to damaging “pay-to-play” practices, which both the Commission and the Board found to adversely affect investor confidence in the municipal securities markets. *G-37 Approval Order*, 1994 SEC LEXIS 1023, at *1, *30. The term “pay-to-play” is defined by the Board as “an inappropriate practice whereby a market participant is expected to make political contributions to elected officials in order to be considered for selection to provide underwriting or other services.” MSRB Glossary.

³¹ As adopted, the definition of the term “official of an issuer” was slightly modified to cover “any person who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of the issuer . . . which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer

Approved, MSRB Man. (CCH) ¶ 10,631, at 11,271. The SEC, in its order approving the Board's adoption of Rule G-37, stated that the adopted definition of the phrase "official of an issuer," includes "any issuer official, incumbent or candidate . . . who has influence over the awarding of municipal securities business." *G-37 Approval Order*, 1994 SEC LEXS 1023, at *15. Thus, the SEC concluded, "contributions to certain state-wide executive and legislative officials will affect the eligibility of the firm to engage in municipal securities business." *Id.* at *17.

The Board continued to be concerned that the definition of the phrase "official of an issuer" did not clearly express its intent that the phrase cover "any state or local official or candidate . . . who has influence over the awarding of municipal securities business, including certain state-wide executive or legislative officials."³² *Proposal Concerning Political Contributions and Prohibitions on Municipal Securities Business ("Proposed Amendments to Definitions")*, MSRB Man. (CCH) ¶ 10,696, at 11,422 (Aug. 6, 1996). The Board used the "example" of the governor with authority to appoint an individual to the board of directors of an issuing authority.³³ *Id.* To clarify the definition's reach, the Board thus revised the alternative definition of the term to include "any elective office of a state or of any political subdivisions, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the

[cont'd]

or municipal securities dealer for municipal securities business." *G-37 Procedures Approved*, MSRB Man. (CCH) ¶ 10,631, at 11,276.

³² Shortly after adopting Rule G-37, the Board amended the definition of the term "official of such issuer." *Amendments Filed and Approved Relating to Political Contributions and Prohibition on Municipal Securities Business ("G-37 Amendment Approved")*, MSRB Man. (CCH) ¶ 10,635, at 11,288 (June 3, 1994). The Board expressed concern that because the adopted definition focused upon an "elective office of the issuer" it did not clearly cover certain other statewide officials, including, by way of example, a governor with the power to appoint persons to the board of directors of an issuing authority. *Id.* at 11,290. The Board therefore amended the definition of the phrase "official of an issuer" to "clarify its intent," adding that the phrase also covered any incumbent or candidate "for any elective office of a state or of any political subdivision, which office has authority to appoint any official(s) of an issuer, as defined [in the original definition of the term]." *Id.*

³³ The use of the words "for example" indicates that the phrase "official of such issuer" includes, but is not limited to, a governor with appointment powers. *Cf. KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1165 n.74 (2001) ("By the use of the introductory words "for example" our rule made it clear that relationships which would prevent an accountant from being independent in fact include, but are not limited to, the relationships set forth in the rule.") (internal quotations omitted).

outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.”³⁴ *Id.*

Having studied both the text and history of Rule G-37, we conclude that the Board intended the definition of the phrase “official of such issuer” to cover broadly those statewide and local elective officers involved in matters of municipal finance and who, either directly or indirectly, possess the legal authority to influence the awarding of municipal securities business.³⁵ *See, e.g., G-37 Approval Order*, 1994 SEC LEXIS 1023, at *16; *accord Rule G-37 Proposal*, MSRB Man. (CCH) ¶ 10,622, at 11,242. We also find that Bond Commission members possess the requisite authority to influence the outcome of the hiring of a dealer or financial advisor for municipal securities business by a political subdivision issuer. The Board has instructed that our focus must be upon “the scope of authority of the particular *office* at issue” to determine whether influence over the awarding of municipal securities business is present to make someone an “official of an issuer.” *G-37 Q&A*, MSRB Man. (CCH) ¶ 3681, at 5429 (Q&A IV.22 May 24, 1994). The Bond Commission’s statutory authority is expansive. Although the Bond Commission does not, in the first instance, select or hire the underwriters or financial advisors for political subdivision bond issues, the Commission can influence the outcome of subdivision hiring decisions through the statutory authority to approve or disapprove political subdivision issues. Simply put, the ability to approve or disapprove a particular

³⁴ The Board’s amendment was approved by the SEC, leaving us with the alternative definitions of the phrase “official of such issuer” that exist to this day.

³⁵ The Hearing Panel read the alternative definition of “official of an issuer” to apply only to an incumbent or candidate for any elective statewide or political subdivision office “which office has authority to appoint any person’ to an issuer position with the requisite influence.” Thus, under this rendering of the definition, those elected officials that do not possess the power to appoint someone of responsibility or influence to an issuer position would not be covered by Rule G-37’s alternative definition of the phrase “official of such issuer.” We conclude that it is not necessary for statewide executive and legislative officials to possess the power to appoint someone to a political subdivision’s issuing body to be considered an “official of such issuer.” It would be an absurd result indeed if we were to conclude that members of the Bond Commission are not an “official of such issuer” because they do not possess the authority to appoint someone to an issuing body with the very same authority and influence that Bond Commission members themselves possess. *See Stewart*, 104 F.3d at 1388 (“Where competing interpretations of a statute are available, courts will not attribute to Congress the intent to bring about an anomalous result.”); *see also Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003) (“We do not look past the plain meaning unless it produces a result demonstrably at odds with the intentions of its drafters, or an outcome so bizarre that Congress could not have intended it.”) (internal quotations and citations omitted).

issue is the ability to approve or disapprove the hiring selections made by the political subdivision issuer.³⁶

The respondents would have us believe that the Bond Commission's role in political subdivision bond issues is at best passive. This view of the Commission ignores the broad statutory authority that has been granted to the Commission and the Commission's own view of its role in subdivision issues. The Commission's administrative rules speak of its desire to "insure the integrity of the structure of the financing team" selected by political subdivision issuers, by reviewing the details of all compensation arrangements for all of the financial professionals associated with a particular transaction. La. Admin. Code tit. 71, pt. III, § 1301(C) & (C)(4)(a). Indeed, with respect to the bond issues of public trusts, the Bond Commission's role in the selection of financial professionals for trust bond issues is explicit.³⁷ The Commission is required to approve or ratify all contracts concerning the appointment of financial advisors or underwriters for a public trust debt issue.³⁸ La. Adm. Code tit. 71, pt. III, § 127(E)(5)(g).

³⁶ Enforcement asserts that Bond Commission members possessed the requisite appointment authority necessary to make such members "officials of an issuer" under Rule G-37. Enforcement's arguments rest upon the premise that a Commission member's ability to request that certain persons represent the member at meetings of the Bond Commission constitutes the power to appoint members to the Commission. *See* La. Rev. Stat. Ann. §39:1401. We disagree. By granting a proxy, Bond Commission members are requesting only that another be allowed to act in the member's place, possessing only those statutory powers that the Commission member itself possesses. The power to appoint, by contrast, necessarily includes the power to fill an office, at which time the appointed person would exercise certain powers independent of the appointing official's. We thus do not equate the power to request that another act by proxy with the power to appoint members to the Commission. We also recognize that the president of the Senate and the speaker of the House of Representatives each possess the authority to appoint one member of the Bond Commission. Because the legislators appointed by these individuals, however, possess no greater or lesser authority than the other members of the Bond Commission, we have focused upon the statutory power of the Commission to influence the hiring of dealers for municipal securities business for political subdivision issues in reaching a conclusion as to whether they are issuer officials for purposes of MSRB Rule G-37(b).

³⁷ The public trust issues in which Sisung Securities participated as an underwriter or financial advisor include those of the Hammond-Tangipahoa Home Mortgage Authority, the Parish of Jefferson Home Mortgage Authority, and the Calcasieu Parish Public Trust Authority. These three issuers were responsible for six of the 21 issues at the center of the controversy in this case.

³⁸ The Bond Commission is involved in the development of public trust bond issues from their inception and must preliminarily authorize or disapprove an issuer's plan to

In dismissing cause one of the complaint, the Hearing Panel concluded that because it could find no public record evidencing a Commission member's approval or disapproval of a particular issue based upon the financial professionals involved, the Bond Commission does not influence the hiring of municipal securities dealers. We believe this evidentiary analysis was misguided. MSRB Rule G-37 "seeks to insulate the municipal securities industry from the *potentially corrupting influence* of political contributions that are made in close proximity to the awarding of municipal securities business." *Morgan Stanley*, 53 S.E.C. at 381 (emphasis added). Thus, "no smoking gun is needed where . . . the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic."³⁹ *Blount*, 61 F.3d at 945.

In sum, we find that Sisung, a municipal finance professional of Sisung Securities, made contributions to Bond Commission members. We also find that members of the Commission were "officials of an issuer" with respect to the political subdivision issues they approved for purposes of triggering the two-year prohibition of conducting municipal securities business. By participating as underwriter or financial advisor for 21 political subdivision issues approved by the Bond Commission, within two years of Sisung's contributions, we find that Sisung Securities violated MSRB Rule G-37(b) and reverse the Hearing Panel's findings to the contrary.⁴⁰

[cont'd]

proceed with a particular project. La. Adm. Code tit. 71, pt. III, § 127(E)(5). The Bond Commission is also the "seller" of public trust bonds. *Id.*

³⁹ It is a familiar rule of legal interpretation that undefined words in a given law or rule should be given their common or ordinary meaning. *Metro Leasing & Dev. Corp. v. Comm. of Internal Revenue*, 376 F.3d 1015, 1022 (9th Cir. 2004). "Influence" is commonly defined to mean "a power that is indirectly or intangibly affecting a person or event." Webster's II New College Dictionary 569 (2001). As the court in *Blount* stated in the context of MSRB Rule G-37, "[w]hile the risk of corruption is obvious and substantial, actors in this field are presumably shrewd enough to structure their relations rather indirectly -- indeed, the phrase 'pay to play' suggests that a contribution brings the donor merely a chance to be seriously considered, not the assurance of a contract." *Blount*, 61 F.3d at 945. Thus, finding a violation of Rule G-37(b) does not require evidence of a quid pro quo. *Fifth Third*, 2002 SEC LEXIS 1573, at *8 n.4; *Podesta & Co.*, 1998 NASD Discip. LEXIS 27, at *10 n.9.

⁴⁰ In its complaint, Enforcement alleged that each of the causes set forth also resulted in a violation of MSRB Rule G-17. Rule G-17 states that "[i]n the conduct of its municipal securities activities, each broker, dealer, and any municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." Enforcement asserts that MSRB Rule G-17 is analogous to NASD Conduct Rule 2110, which provides that a "member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

[Footnote continued on next page]

B. Indirect Violations Under MSRB Rule G-37(d)

The second cause of Enforcement's complaint alleged that Sisung and Sisung Securities violated MSRB Rule G-37(d) by directing that UPC and SIMS make political contributions to members of the Bond Commission in order for the respondents to circumvent the prohibitions on conducting municipal securities business set forth in MSRB Rule G-37(b). We affirm the Hearing Panel's findings dismissing this cause of complaint.

MSRB Rule G-37(d) prohibits a dealer or any municipal financial professional from doing any act indirectly that would result in a violation of Rule G-37 if done directly by the dealer or municipal finance professional.⁴¹ The Board intended Rule G-37(d) to prohibit firms and individuals subject to Rule G-37 from using other persons or entities as conduits in order to circumvent the rule. *G-37 Procedures Approved*, MSRB Man. (CCH) ¶ 10,631, at 11, 272.

Unlike other provisions of Rule G-37, however, scienter is a required element of proof for finding a violation of Rule G-37(d). *See Blount*, 61 F.3d at 948 (stating that Rule G-37(d) requires a showing of "culpable intent"); *Podesta*, 1998 NASD Discip. LEXIS 27, at *24 ("a showing of intent is required under subsection (d)"). The rule restricts political contributions only when they are intended as "end-runs around the direct contribution limitations" contained within Rule G-37. *Blount*, 61 F.3d at 948.

We agree with the Hearing Panel that, based upon the record before us, Enforcement failed to provide evidence that respondents effected political contributions through UPC and SIMS in order to circumvent the proscriptions set forth in MSRB Rule

[cont'd]

A violation of an SEC or NASD rule or regulation is inconsistent with just and equitable principles of trade and constitutes a violation of NASD Conduct Rule 2110. *See, e.g., Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999). MSRB Rule G-17, however, is an antifraud prohibition and imposes affirmative disclosure obligations for dealers. *Notice of Filing of Proposed Rule Change Relating to Rule G-17*, Exchange Act Rel. No. 45361, 2002 SEC LEXIS 304, at *1-2 (Jan. 30, 2002). In this respect, MSRB Rule G-17 has been analogized to Section 17(a) of the Securities Act of 1933, *SEC v. Fitzgerald*, 135 F. Supp. 2d 992, 1027 (N.D. Cal. 2001), and requires a showing of at least negligence to establish a violation. We thus find that MSRB Rule G-17 is not a true analogue to NASD Rule 2110 in this context, and we do not impose liability for a violation of MSRB Rule G-17 stemming from the violation of another Board rule.

⁴¹ Rule G-37(d) provides in full 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."

G-37. Although Enforcement asserts that the Firm's failure to record and report the contributions through UPC and SIMS is evidence of the respondents' culpable intent, we conclude that this evidence, standing alone, is insufficient to establish a violation of MSRB Rule G-37(d) by a preponderance of the evidence. We therefore affirm the Hearing Panel's decision to dismiss the second cause of Enforcement's complaint.

C. Solicitations and Contributions Under MSRB Rule G-37(c)

In its third cause of complaint, Enforcement alleged that the respondents violated MSRB Rule G-37(c) by soliciting and coordinating contributions from UPC and SIMS to members of the Bond Commission, at a time when Sisung Securities was engaging or seeking to engage in municipal securities business with Louisiana political subdivisions. The Hearing Panel found that because the contributions at issue in this case were attributable to Sisung as a municipal finance professional of Sisung Securities for purposes of MSRB Rule G-37(b), Sisung and the Firm could not also be found to have solicited contributions from UPC and SIMS in violation of MSRB Rule G-37(c). We disagree and reverse the Hearing Panel's findings.

At the time of the events in this case, MSRB Rule G-37(c) provided that “[n]o broker, dealer or municipal securities dealer or any municipal finance professional of the broker, dealer or municipal securities dealer shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.”⁴² Under the rule, a dealer or municipal finance professional is prohibited from soliciting associated persons, family members of associated persons, consultants, lobbyists, attorneys, other dealer affiliates, their employees or PACs, as well as any other person or entity, to make or coordinate contributions to an official of an issuer with which the dealer engages or is seeking to engage in municipal securities business.⁴³ *G-37 Procedures Approved*, MSRB Man. (CCH) ¶ 10,631 at 11,272 (“Rule G-37 also would prohibit a dealer and any municipal finance professional from soliciting the parties described above, as well as any other person or entity.”). Rule G-37(c) thus prevents dealers and municipal finance professionals “from engaging in municipal securities business with issuers if they engage in any kind of fund-raising activities for officials of issuers that may influence the

⁴² Unlike MSRB Rule G-37(b), a violation of Rule G-37(c) does not trigger a two-year ban on engaging in municipal securities business with an issuer. MSRB Man. (CCH) ¶ 3681 at 5439 (MSRB Interpretation Nov. 7, 1994).

⁴³ The phrase “seeking to engage in municipal securities business” is meant to include dealer activities such as responding to requests for proposals, making presentations of public finance capabilities, and any other soliciting of business with issuer officials. *G-37 Procedures Approved*, MSRB Man. (CCH) ¶ 10,631 at 11,272 n.11.

underwriter selection process.” *G-37 Approval Order*, 1994 SEC LEXIS 1023, at *20-21.

The Board recently amended Rule G-37(c). Specifically, the Board, among other things, amended the rule to state that the term “person” includes any affiliated entity of a dealer.⁴⁴ *SEC Approves Amendments to Rule G-37(c), Concerning Solicitation and Coordination of Payments to Political Parties, and Question and Answer Guidance on Supervisory Procedures Related to Rule G-37(d), on Indirect Violations (“G-37(c) Amendments Approved”)*, MSRB Notice 2005-50 (Sept. 26, 2005), available at <http://www.msrb.org/msrb1/archive/2005/2005-50.asp>. “This clarification [was] intended to alert dealers and MFPs that influencing the disbursement decisions of affiliated entities or PACs may constitute a direct violation of Rule G-37(c), as amended, if the dealer or MFP solicits the affiliated entity or PAC to make or coordinate contributions to an official of an issuer or a political party of a state or locality where the dealer is engaging or is seeking to engage in municipal securities business.”⁴⁵ *Notice of Filing of Proposed Rule Change Concerning Solicitation and Coordination of Payments to Parties*, Exchange Act Rel. No. 52235, 2005 SEC LEXIS 2060, at *3 (Aug. 10, 2005) (emphasis added).

⁴⁴ As amended, Rule G-37(c) provides, in pertinent part, that “[n]o broker, dealer or municipal securities dealer or any municipal finance professional of the broker, dealer or municipal securities dealer shall solicit any person, including but not limited to any affiliated entity of the broker, dealer or municipal securities dealer, or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.” MSRB Rule G-37(c)(i) (as amended).

⁴⁵ Consistent with the Board’s notice, we view the Board’s recent amendments to represent a clarification, not a change, of the law. See *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (“A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been.”); see also *Hickey v. Great W. Mortgage Corp.*, 1995 U.S. Dist. LEXIS 6989, at *7-8 (N.D. Ill. 1995) (“new language does not necessarily imply new substance”). This case does not, therefore, raise any issue concerning the retroactive application of a law. *Pope*, 998 F.3d at 483 (“[A] rule changing the law is retroactively applied to events prior to its promulgation only if, at the very least, Congress expressly authorized retroactive rulemaking and the agency clearly intended that the rule have retroactive effect.”) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *Piamba Cortes v. American Airlines*, 177 F.3d 1272, 1283 (11th Cir. 1999) (“Concerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law.”).

There is no dispute that the 14 contributions to sitting members of the Bond Commission at issue in this case were made from funds supplied by UPC and SIMS, affiliated entities of Sisung Securities that are controlled by Sisung, a municipal finance professional of the Firm. By influencing the disbursement decisions of UPC and SIMS, Sisung and Sisung Securities surely “solicited” the funds. Because these solicitations occurred at a time that Sisung Securities was engaging or seeking to engage in municipal securities business with political subdivisions whose debt issues necessarily required Bond Commission approval, we hold that Sisung and Sisung Securities violated MSRB Rule G-37(c).⁴⁶

D. Recordkeeping and Reporting Violations Under MSRB Rules G-8, G-9 and G-37(e)

The fifth cause of Enforcement’s complaint alleged that Sisung Securities, acting through Sisung, failed to keep and preserve a record of the political contributions of the Firm and its municipal finance professionals, in violation of MSRB Rules G-8 and G-9. Enforcement also alleged in its fourth cause of complaint that Sisung Securities violated MSRB Rule G-37(e) by failing to report to the Board the political contributions effected by Sisung. We affirm the Hearing Panel’s findings that the respondents are liable for violations of the foregoing rules.

MSRB Rule G-8 requires, among other things, that a municipal securities dealer make and keep current records reflecting the “direct or indirect” contributions and payments made by the dealer, its municipal finance professionals and non-MFP executive officers, and any PAC controlled by the dealer or any of its municipal finance professionals, to officials of an issuer or political parties of states and political subdivisions. MSRB Rule G-8(a)(xvi)(E)-(F). These records must identify the contributor, the contribution amount, and the recipient of such contribution, for each contribution made during the current year, with separate listings of such identifying information required for the previous two calendar years.⁴⁷ *Id.* Pursuant to MSRB Rule G-9(a), all such records must be preserved by the dealer for a period of not less than six years. MSRB Rule G-9(a)(viii).

In turn, Rule G-37(e) requires, in pertinent part, that dealers report to the Board, on a quarterly basis, contributions to officials of issuers and political parties of states and political subdivisions made by the dealer, the dealer’s municipal finance professionals,

⁴⁶ Given the unique facts of this case, we find no inconsistency in concluding that Sisung “made” contributions under Rule G-37(b) and “solicited” such contributions from UPC and SIMS for purposes of Rule G-37(c).

⁴⁷ In limited circumstances, not at issue here, a dealer need only maintain separate listings of contributions made during the six-month period preceding the current year. MSRB Rule G-8(a)(xvi)(E)-(F).

each non-MFP executive officer of the dealer, and each PAC controlled by the dealer or by any of its municipal finance professionals.⁴⁸ MSRB Rule G-37(e)(i)(A). Such reports are required to include, among other things, the name and title of each official of an issuer and political party receiving contributions during each calendar quarter, as well as the contribution or payment amounts for each contributor category.⁴⁹ *Id.* MSRB Rules G-8, G-9, and G-37(e) were, among other purposes, designed to keep relevant information readily available in order to facilitate compliance examinations of municipal securities dealers “with the goal of promoting investor confidence in the integrity of the municipal securities market.” *G-37 Approval Order*, 1994 SEC LEXIS 1023, at *4-5.

The respondents do not dispute that Sisung Securities did not maintain and preserve records reflecting the 39 contributions effected by Sisung to Bond Commission members or other officials of Louisiana political subdivisions from February 27, 1998, to October 22, 2001. The parties also stipulate that Sisung Securities did not report to the Board any of the 39 relevant political contributions.

Respondents assert on appeal, however, that Sisung Securities was not required to maintain records of contributions that Sisung effected through affiliated entities of the Firm and thus was not required to report such contributions to the Board. These assertions are without merit.

MSRB Rule G-8 requires that a record be made of both the direct and indirect contributions made by the persons and entities covered by the rule, including a dealer’s municipal finance professionals. MSRB Rule G-8(a)(xvi)(E)-(F). Thus, contributions by any person or entity, including an affiliated company of the dealer or its employees, that are directed by a dealer or its municipal finance professionals must be reflected in the dealer’s books and records. *G-37 Approval Order*, 1994 SEC LEXIS 1023, at *25.

MSRB Rule G-37(e) for its part requires that a dealer report to the Board those contributions that are required to be recorded pursuant to MSRB Rule G-8(a)(xvi). *G-37 Q&A*, MSRB Man. ¶ 3681 at 5429 (Q&A VI.6 May 24, 1994). Thus, co-existent with MSRB Rule G-8(a)(xvi), Rule G-37(e) requires a dealer to report those contributions indirectly effected by a dealer’s municipal finance professionals through affiliated entities. *Id.*; *see also G-37 Approval Order*, 1994 SEC LEXIS 1023, at *22 & n.48.

⁴⁸ Rules G-8 and G-37(e) also require that dealers maintain a record of and disclose to the Board certain other information, including the issuers with which the dealer has engaged in municipal securities business. *See, e.g.*, MSRB Rule G-8(a)(xvi)(D); MSRB Rule G-37(e)(i)(B). Enforcement did not allege in its complaint that Sisung Securities failed to maintain a record of or report to the Board the municipal securities business in which it engaged during the relevant periods.

⁴⁹ Like MSRB Rule G-37(b), both MSRB Rules G-8 and G-37(e) contain de minimis exceptions that are not at issue in this case.

We have found that the 14 contributions effected by Sisung to members of the Commission were made to officials of an issuer by a municipal finance professional of Sisung Securities.⁵⁰ We also find that Sisung in this case directed that each of the 39 contributions at issue be made from funds of UPC and SIMS. Sisung, a municipal finance professional of the Firm, either personally signed or authorized each of the checks drawn upon funds from the accounts of UPC and SIMS, companies that he controlled, to make contributions to Bond Commission members and other elected officials of Louisiana political subdivisions.⁵¹

We conclude, therefore, that by failing to maintain and preserve records of these contributions Sisung Securities violated MSRB Rules G-8 and G-9.⁵² We also find that

⁵⁰ The respondents do not dispute that Bond Commission members are “officials of an issuer” with respect to municipal securities issued by the Commission. MSRB Rules G-8(a)(xvi) and G-37(e), unlike MSRB Rule G-37(b), do not restrict their respective requirements to “officials of an issuer” with which a dealer has engaged in municipal securities business. Indeed, we note again the inconsistency in the facts presented in the hearing below and the respondents’ assertions now on appeal. Having concluded, upon counsel’s advice, that contributions directed by Sisung through affiliates of the Firm would prevent Sisung Securities from conducting municipal securities business with the Bond Commission, the Firm should have also reached the obvious conclusion that the Firm would need to make a record of the contributions and report them to the Board in accordance with MSRB Rules G-8 and G-37(e).

⁵¹ It is unclear, based upon the record before us, whether the 25 contributions made by Sisung to officials of political subdivisions were to individuals or entities covered by the contribution recordkeeping and reporting requirements of MSRB Rules G-8 and G-37(e). The parties, however, stipulate that had each of the 39 contributions at issue in this case been made by a municipal finance professional, the municipal securities dealer with whom such municipal finance professional was associated would be required to report the contributions to the Board. Although the respondents subsequently withdrew this stipulation as to a small subset of the 39 contributions effected, it does not change the fact that the respondents agree that the 25 contributions to local officials were to persons that triggered the recordkeeping and reporting requirements of MSRB Rules G-8 and G-37(e).

⁵² Respondents alternatively argue on appeal that the necessary records of Sisung’s contributions were maintained by UPC and SIMS, and thus were readily available to NASD examiners upon request. A record, however, that can only be constructed by a regulated entity from information maintained by another entity upon the request of NASD is entirely insufficient for purposes of Rule G-8. MSRB Man. (CCH) ¶ 3536.53 at 3671 (MSRB Interpretation Apr. 27, 1982). The recordkeeping requirements imposed by MSRB Rule G-8 are those of the regulated dealer, which must maintain records that provide an adequate basis for audit. MSRB Rule G-8(b). Indeed, to understand the untenable nature of the respondents’ argument, we need only look to the facts of this case. Sisung’s political contributions did not (and would not) come to light in an

Sisung Securities violated MSRB Rule G-37(e) by failing to report the relevant contributions to the Board.

Sisung was president of the Firm and responsible for the Firm's books and records during the period Sisung Securities failed to make and preserve records of Sisung's contributions to Bond Commission members and other local officials. We therefore also find Sisung responsible for the Firm's violations of MSRB Rules G-8 and G-9.⁵³ See *James Michael Brown*, 50 S.E.C. 1322, 1325-26 (1992) (finding firm's president responsible for firm's failure to comply with recordkeeping and reporting requirements where he was fully aware that firm was not maintaining required books and records); *Mark James Hankoff*, 48 S.E.C. 705, 707-08 (1987) (finding the president of a brokerage firm responsible for his firm's compliance with certain net capital, customer protection, recordkeeping and reporting requirements).

E. Respondents' Constitutional and Other Arguments

The respondents have emphasized throughout these proceedings that MSRB Rule G-37 was "narrowly drawn" to avoid unconstitutional infringements of First Amendment protections. They therefore argue that a finding that the respondents violated Rule G-37, which in their view would necessarily rest upon an "expansive interpretation" of the rule, may render the rule unconstitutional as applied. The respondents further assert that any finding here of a violation of MSRB Rule G-37 constitutes prohibited "rulemaking by enforcement," resting upon an interpretation of the rule that was not reasonably foreseeable under the rule's language and thus raises Fifth Amendment due process concerns. We do not credit these arguments.

Contrary to the respondents' assertions, this case does not involve any unresolved First Amendment issues. MSRB Rule G-37 has already withstood strict scrutiny. In

[cont'd]

examination of Sisung Securities' books and records. Instead, NASD examiners only fortuitously discovered information concerning the contributions from public records of the Bond Commission.

⁵³ The respondents argue on appeal that the Hearing Panel erred by finding Sisung responsible for the Firm's recordkeeping and reporting violations because MSRB Rules G-8 and G-9 do not by their terms apply to an associated person of the Firm. They assert that, under Rule G-8(a)(xvi)(I), the terms used in MSRB Rule G-37, which excludes associated persons from the definition of the terms "broker, dealer, or municipal securities dealer," apply with equal meaning to the terms used in Rule G-8. Respondents' argument, however, is in error. MSRB Rule G-8(a)(xvi)(I) only applies Rule G-37's terms for purposes of subsection (xvi) of Rule G-8(a). Thus, it is entirely appropriate to hold Sisung responsible for violating Rules G-8 and G-9 under MSRB Rule D-11, which generally extends liability for violations of the Board's rules to a firm's associated persons.

Blount, the court concluded that the interests encompassed by MSRB Rule G-37, namely protecting investors in municipal bonds from fraud and protecting underwriters of municipal bonds from unfair and corrupt market practices, served a compelling interest. 61 F.3d at 944. Noting that the scope of pernicious practices can never be reliably ascertained, the court further concluded that the link between eliminating pay-to-play practices and the SEC's goals of perfecting a free market and promoting just and equitable principles of trade was self-evident. *Id.* at 945. Finally, the court found that Rule G-37 was closely drawn by constraining relations only between two potential parties to a quid pro quo: "the underwriters and their municipal finance employees on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other." *Id.* at 947.

Our findings here are consistent with the closely drawn proscriptions enumerated in MSRB Rule G-37. Our decision cannot be viewed as restricting municipal finance professionals from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fund raising events. *See Blount*, 61 F.3d at 948. Although the respondents assert that Enforcement seeks to make any contributions by any dealer affiliate, to any Louisiana legislator who might one day serve on the Bond Commission, a violation of Rule G-37, our findings here are not subject to such extravagant description. Instead, consistent with the court's resolution in *Blount*, our conclusion that the respondents violated certain aspects of MSRB Rule G-37 concern only the political contributions attributable to Sisung, a municipal finance professional of Sisung Securities, on the one hand, and sitting members of the Bond Commission, who might influence the award of municipal securities business, on the other. *See id.* at 947.

Our findings also do not implicate any due process concerns. Pursuant to Section 15A(b)(7) of the Exchange Act, NASD is charged with enforcing the compliance of NASD members and their associated persons with the rules promulgated by the Board. Consistent with our responsibilities under the Exchange Act, we have made interpretations necessary to resolve the specific issues before us.⁵⁴ *See Dist. Bus. Conduct Comm. v. Podesta & Co.*, 1998 NASD Discip. LEXIS 27, at *12 n.12. Our conclusions, however, do not establish any new standards of conduct such that our actions can be considered a "rule change." *See SIG Specialists, Inc.*, Exchange Act Rel. No. 51867, 2005 SEC LEXIS 1428, at *21 (June 17, 2005) ("we do not view this case as involving the kind of 'new standard of conduct' that would implicate the Exchange Act's rule change requirements"); *Stratton Oakmont, Inc.*, 52 S.E.C. 1170, 1174-75 (1997) ("NASD's application of Article III, Section 1 to Stratton's actions did not establish a

⁵⁴ This case does not implicate any issues concerning NASD's status as a private actor. *See, e.g., D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 161 (2d Cir. 2002) (holding that NASD is a private actor and noting that "even heavily-regulated private entities generally are held not to be state actors"); *Desiderio v. NASD*, 191 F.3d 198, 206-07 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001) (finding that NASD is not a state actor, and constitutional requirements generally do not apply to it).

new standard of conduct to which the Association's members must adhere"); *cf.* Exchange Act Rule 19b-4 ("A stated policy, practice, or interpretation of the self-regulatory organization shall be deemed to be a proposed rule change unless . . . it is reasonably and fairly implied by an existing rule of the self-regulatory organization."). It remains under MSRB Rule G-37 that municipal finance professionals may not contribute to elected officials with the authority to influence the outcome of hiring for the municipal securities business of an issuer, may not solicit contributions to issuer officials while such officials are engaging or seeking to engage issuer officials in municipal securities business, and that the dealers of such professionals must report to the Board both the direct and indirect contributions of their municipal finance professionals.

The respondents also cannot claim that the application of MSRB Rule G-37 to the facts of this case was not reasonably foreseeable. *See Blount*, 61 F.3d at 948-49 (*citing General Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995)). The respondents, if they were acting in good faith, would have been able to identify the standards by which the Board expected them to conform, by reviewing MSRB Rule G-37 and the public statements issued by the Board concerning that rule. *See General Elec. Co.*, 53 F.3d at 1329 ("[W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation."). Rules and regulations "need not achieve 'meticulous specificity' and may instead embody 'flexibility and reasonable breadth.'" *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (citation omitted). They satisfy due process "as long as a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objective the regulations are meant to achieve, has fair warning of what the regulations require." *Id.*; accord *Edward John McCarthy*, Exchange Act Rel. No. 48554, 2003 SEC LEXIS 2292, at *31 n.22 (Sept. 26, 2003) ("Due process requires that the laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.") (internal quotations omitted); *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *30 (NAC June 2, 2000) (holding that objections under the Due Process clause "may be overcome in a case where reasonable persons would know that their conduct is at risk"). In reaching conclusions concerning the application of MSRB Rule G-37 to the respondents' conduct, we have relied upon the text of MSRB Rule G-37, the Board's stated purpose in adopting the rule, and any other guidance or interpretative notices that the Board has issued concerning the rule's reach. As we have noted several times in our discussion above, with this information, the respondents, before embarking on the conduct that resulted in Enforcement's complaint in this matter, reached many of the same conclusions that we reach in this decision concerning the scope of MSRB Rule G-37 and its application when contributions have been effected by municipal finance professionals through dealer affiliates to officials, such as the members of the Bond Commission, who sit in an *ex officio* capacity. Because the respondents had fair notice of what MSRB Rule G-37 required they cannot now claim that they did not have sufficient notice of the conduct prohibited by the rule.

IV. Sanctions

The Hearing Panel fined respondents, jointly and severally, \$10,000 for their violations of MSRB Rules G-8 and G-9. The Hearing Panel also imposed a \$10,000 fine upon Sisung Securities for violating MSRB Rule G-37(e). We affirm the sanctions imposed by the Hearing Panel but find it appropriate to impose additional sanctions in light of our decision finding respondents liable for violations of MSRB Rules G-37(b) and (c).

A. Violations of MSRB Rules G-37(b) and (c)

The NASD Sanction Guidelines (“Guidelines”) for engaging in prohibited municipal securities business under MSRB Rule G-37 recommend monetary sanctions of \$10,000 to \$50,000 for a member firm’s violations and \$10,000 to \$50,000 for an individual’s violations.⁵⁵ In cases involving several prohibited municipal underwritings or reckless conduct on the part of the firm, the Guidelines further instruct that we consider suspending the firm from engaging in municipal securities business with prohibited issuers for up to two years beyond the time proscribed by Rule G-37.⁵⁶

First, for purposes of imposing sanctions with respect to violations of MSRB Rules G-37(b) and (c), we find it appropriate to aggregate the Firm’s violations of these rules. They result from a single systemic cause, namely the making or solicitation of contributions to members of the Bond Commission at a time when Sisung Securities was participating as underwriter or financial advisor for political subdivision debt issues approved by the Bond Commission.⁵⁷

Second, the Guidelines instruct us to consider numerous principal considerations for violations of MSRB Rule G-37.⁵⁸ The Guidelines direct that we consider the position in the Firm of the person making the contributions and whether the Firm knew or should

⁵⁵ *NASD Sanction Guidelines* 27 (2001 ed.).

⁵⁶ *Id.* In egregious cases, the Guidelines instruct us to consider prohibiting the firm from engaging in any future business with prohibited issuers. *Id.* With respect to individuals, we may consider suspending the responsible individual from acting as a municipal principal for a period of time, or, in egregious cases, barring the individual in any or all principal capacities. *Id.*

⁵⁷ *Guidelines*, at 6 (General Principles Applicable to All Sanction Determinations, No. 4). The NASD Sanction Guidelines do not provide a specific guideline for violations of MSRB Rule G-37(c). As a result of our decision to aggregate the Firm’s violations of MSRB Rule G-37(b) and (c), however, we consult the guidelines for violations of MSRB Rule G-37(b) in imposing an appropriate monetary sanction in this case.

⁵⁸ *Guidelines*, at 27.

have known about the contributions.⁵⁹ Sisung, the president of Sisung Securities and a government securities principal of the Firm, effected the contributions at issue. As a result, the Firm clearly knew of the contributions despite their occurring through affiliated entities.

The Guidelines further direct that we consider the position of the official to whom the contributions were made, the relative size of the contributions made, and the nature of the prohibited municipal securities business in which respondent engaged.⁶⁰ We have found that Sisung's contributions were made to Bond Commission members with statutory authority to approve or disapprove the negotiated municipal securities issues of political subdivisions for which Sisung Securities had been hired to act as either underwriter or financial adviser.

In their totality, however, we do not find these factors aggravating in this case. Sisung, on behalf of the Firm, made reasonable efforts to ascertain the limit of the proscriptions set forth in MSRB Rule G-37 by consulting competent legal counsel.⁶¹ Thereafter, Sisung and the Firm consciously attempted to structure the Firm's municipal securities business in a manner that they concluded, albeit erroneously, would not trigger Rule G-37 proscriptions on doing business. Moreover, the municipal securities business in which Sisung Securities engaged was with Louisiana political subdivisions, which were directly responsible for the selection of financial professionals for their debt offerings. The contributions effected by Sisung, on the other hand, were made to Bond Commission members that could only influence the selection of underwriters and financial advisors indirectly.

Third, there is no evidence in this case of an attempt to intentionally circumvent the proscriptions of MSRB Rule G-37 but more simply of a failure to comprehend the broad prophylactic nature of this rule.⁶² In this respect, Sisung Securities cooperated fully with NASD in connection with its investigation and examination of these matters.⁶³

Nonetheless, a minimal sanction is not in our view appropriate. We note here the large number and more than de minimis size of most of the contributions.⁶⁴ We also find

⁵⁹ *Id.* (Principal Considerations in Determining Sanctions, Nos. 1, 4-5).

⁶⁰ *Id.* (Principal Considerations in Determining Sanctions, Nos. 2, 3).

⁶¹ *See Guidelines*, at 9 (Principal Considerations in Determining Sanctions, No. 7).

⁶² *See Guidelines*, at 10 (Principal Considerations in Determining Sanctions, No. 13).

⁶³ *Id.* (Principal Considerations in Determining Sanctions, No. 12).

⁶⁴ *Guidelines*, at 27 (Principal Considerations in Determining Sanctions, No. 5).

troubling the lengthy period over which Sisung Securities' prohibited transactions occurred and the fact that there is no indication that the violative actions would have ceased if they had not been discovered by NASD staff.⁶⁵

We therefore impose upon the Firm a fine of \$20,000 for its violations of MSRB Rules G-37(b) and (c). We also impose upon Sisung a fine of \$20,000 for his solicitation of contributions in violation of MSRB Rule G-37(c).⁶⁶ These sanctions represent an appropriate balance between the aggravating and mitigating factors present in this case, and are significant enough to prevent and discourage future misconduct.

B. Recordkeeping and Reporting Violations Under MSRB Rules G-8, G-9, and G-37(e)

The Guidelines for violations of MSRB Rule G-8 call for a monetary fine of \$1,000 to \$10,000.⁶⁷ The Guidelines further recommend, in egregious cases, a fine of \$10,000 to \$100,000.⁶⁸ The Hearing Panel did not find the respondents' misconduct in this respect egregious and imposed upon them a joint and several fine of \$10,000. We disagree with the Hearing Panel's conclusion that the respondents' misconduct was not egregious, but we do not modify the fine imposed.

The Guidelines instruct us to consider as the primary consideration in determining sanctions for these violations the nature and materiality of the missing information.⁶⁹ The records that Sisung Securities failed to make and preserve are central to the successful implementation of MSRB Rule G-37. *See G-37 Approval Order*, 1994 SEC LEXIS 1023, at *4-5 (stating that dealers are required "to maintain records and to disclose aggregate information to facilitate compliance and examinations with the goal of promoting investor confidence in the integrity of the municipal securities market").

⁶⁵ *See Guidelines*, at 9-10 (Principal Considerations in Determining Sanctions, Nos. 3, 18).

⁶⁶ We note that such fines represent a departure from the recommendation in the Guidelines that we consider fining the firm and responsible individual in an amount equal to their respective financial benefit. *Guidelines*, at 27 n.2-3. In this respect, we find the absence of culpable intent, the aberrant nature of the Firm's misconduct, and the Firm's regulatory cooperation to be mitigative. *See Podesta & Co.*, 1998 NASD Discip. LEXIS 27, at *36.

⁶⁷ *Guidelines*, at 34 (Recordkeeping Violations).

⁶⁸ *Id.*

⁶⁹ *Id.* (Principal Consideration in Determining Sanctions, No. 1).

Moreover, we do not believe it was reasonable for the Firm to rely upon in-house counsel's opinion that Sisung Securities need not record and report the contributions effected by Sisung through affiliated entities of the Firm. Having concluded, upon receiving outside counsel's advice, that contributions directed by Sisung through affiliates of the Firm would prevent Sisung Securities from conducting municipal securities business with the Bond Commission, the Firm should have also reached the obvious conclusion that the Firm would need to make a record of the contributions and report them to the Board in accordance with the Board's rules.

We do find, however, the absence of culpable intent, the aberrant nature of the Firm's misconduct, and the Firm's regulatory cooperation to be mitigative.⁷⁰ We thus do not believe that an additional sanction beyond the fine imposed by the Hearing Panel, which is at the low end of the monetary sanctions recommended for egregious cases, is appropriate in this case.⁷¹ Accordingly, Sisung and Sisung Securities are fined \$10,000, jointly and severally, for the Firm's recordkeeping failures under MSRB Rules G-8 and G-9.⁷²

The Guidelines for reporting failures under MSRB Rule G-37(e) recommend a fine of \$1,000 to \$5,000.⁷³ The relevant principal consideration for a Rule G-37 reporting failure is whether the violation involved failing to report political contributions or failing to report participation in an underwriting.⁷⁴ Here, the Firm's reporting failures related only to the 39 political contributions effected by Sisung. This failure, however, was not insubstantial. The reporting requirements of MSRB Rule G-37(e) are intended to facilitate the public's scrutiny of political contributions made by dealers engaging in municipal securities business. *See G-37 Approval Order*, 1994 SEC LEXIS 1023, at *21-22. In adopting Rule G-37(e), the Board was of the belief that such disclosures were necessary to "assure investors" that dealers do not engage in municipal securities business with issuers that have received contributions from the dealer and its municipal

⁷⁰ *See Guidelines*, at 10 (Principal Considerations in Determining Sanctions Nos. 12, 13, 16).

⁷¹ The Guidelines permit, in appropriate cases, a moderate suspension of a firm and any responsible individuals or, in egregious cases, a lengthy suspension or expulsion from membership or a bar from associating with an NASD member. *Guidelines*, at 34. We do not believe that such additional sanctions are appropriate in this case.

⁷² There are no separate Guidelines for violations of MSRB Rule G-9. Given that Rule G-9 concerns the preservation of records required by Rule G-8, we will impose a unitary sanction for violations of both rules using the Guidelines set forth for Rule G-8 violations.

⁷³ *Guidelines*, at 80.

⁷⁴ *Id.*

finance professionals and to provide regulators with information necessary to detect and correct efforts to circumvent the requirements of Rule G-37. *Rule G-37 Approval*, MSRB Man. (CCH) ¶ 10,622, at 11,245. By failing to report to the Board the political contributions made by Sisung through affiliated entities of the Firm, Sisung Securities undermined the basic regulatory concepts upon which Rule G-37 is premised. We therefore affirm the Hearing Panel’s imposition of a \$10,000 fine upon Sisung Securities for its violations of MSRB Rule G-37(e).⁷⁵

C. EAJA Fees

Before the Hearing Panel, the respondents submitted an application for fees under the Equal Access to Justice Act (“EAJA” or “the Act”). 5 U.S.C. § 504; 17 C.F.R. § 201.31. EAJA has no application in proceedings before the NASD.

EAJA provides that an “agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that other circumstances make an award unjust.” 5 U.S.C. § 504(a)(1). An “adversary adjudication” is defined as an adjudication “in which the position of the United States is represented by counsel.” 5 U.S.C. § 504(b)(1)(C).⁷⁶

NASD is not an agency of the United States. NASD is a national securities association registered with the SEC under the Maloney Act of 1938, 15 U.S.C. § 78o-3, *et seq.* “NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee.” *Desiderio v. NASD*, 191 F.3d at 206.

In drafting rules of practice concerning EAJA applications, the SEC explicitly stated that “the Act does not apply to proceedings before self-regulatory organizations, to

⁷⁵ The Guidelines for Rule G-37(e) violations permit, in egregious cases, suspending the firm from engaging in all municipal underwriting activities for up to 30 days and suspending a responsible individual in any or all capacities for up to 60 business days. *Id.* Although we find the recordkeeping and reporting violations in this case egregious, we impose a monetary sanction above the range recommended in lieu of a suspension of the Firm.

⁷⁶ The SEC’s rules of practice similarly provide that EAJA “applies to adversary adjudications conducted by the [SEC]. These are on the record adjudications under 5 U.S.C. 554 in which the position of an Office or Division of the [SEC] as a party . . . is presented by an attorney or other representative who enters an appearance and participates in the proceeding.” 17 C.F.R. § 201.33.

review thereof by the [SEC], or to [SEC] investigations.” *Equal Access to Justice Act Rules*, File No. S7-917, 1981 SEC LEXIS 79, at *6 (Dec. 18, 1981). Accordingly, the respondents may not assert a claim under EAJA.

V. Conclusion

We find that Sisung Securities violated MSRB Rule G-37(b) by engaging in municipal securities business with political subdivision issuers whose debt was approved by Bond Commission members that received political contributions effected by Sisung. We also find that Sisung and Sisung Securities violated MSRB Rule G-37(c) by soliciting such contributions from affiliates of the Firm.

We otherwise affirm the Hearing Panel’s findings. We conclude that Sisung and Sisung Securities did not violate MSRB Rule G-37(d). The respondents, however, did violate MSRB Rules G-8 and G-9 by failing to make and preserve records of Sisung’s contributions. By failing to report such contributions to the Board, Sisung Securities is also liable for violations of MSRB Rule G-37(e).

With respect to sanctions, we fine the Firm \$20,000 for its violations of MSRB Rules G-37(b) and (c).⁷⁷ We also fine Sisung \$20,000 for his solicitation of contributions in violation of MSRB Rule G-37(c). We further fine Sisung and Sisung Securities \$10,000, jointly and severally, for the Firm’s recordkeeping failures under MSRB Rules G-8 and G-9. Finally, we impose a fine of \$10,000 upon Sisung Securities for its violations of MSRB Rule G-37(e).

We affirm the hearing costs imposed by the Hearing Panel of \$2,815.20. We further impose appeal costs of \$1,387.60. All costs shall be born by the respondents jointly and severally.⁷⁸

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁷⁷ Pursuant to NASD Procedural Rule 8320, any member that 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.

⁷⁸ We also have considered and reject without discussion all other arguments of the parties.