NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. McLAUGHLIN, PIVEN, VOGEL SECURITIES, INC. (BD #7404) New York, NY and JAMES CECIL McLAUGHLIN (CRD #823224) New York, NY, Respondents.	:	Disciplinary Proceeding No. C02980073 **Amended Hearing Panel Decision**[1] Hearing Officer - Ellen B. Cohn September 1, 1999

Digest

The Department of Enforcement's Complaint alleges that McLaughlin, Piven, Vogel Securities, Inc. ("MPV" or the "Firm"), acting through James C. McLaughlin ("McLaughlin"), violated Municipal Securities Rulemaking Board (MSRB) Rule G-30 by charging retail customers excessive mark-ups and mark-downs, ranging from 3.07 % to 4.74 %, on 12 transactions involving the sale or purchase of municipal bonds. Respondents filed an Answer denying the substantive allegations in the Complaint and requested a hearing. The Hearing Panel found that MPV violated Rule G-30 by charging excessive mark-downs, ranging from 4.37 % to

[1] This Amended Hearing Panel Decision is issued to correct a typographical error in the Digest's recitation of the percentage of alleged excessive mark-ups and mark-downs. In all other respects, this Amended Hearing Panel Decision is identical to that issued on August 27, 1999.

4.74 %, on four of the transactions at issue. However, the Hearing Panel concluded that the Department of Enforcement failed to present any credible, objective evidence to demonstrate that the mark-ups and mark-downs below 4 % were excessive relative to industry practice. The Hearing Panel also dismissed the allegations against McLaughlin because, as pled, his liability is predicated upon finding that the mark-ups and mark-downs below the 4 % level were excessive. As for sanctions, the Hearing Panel censured McLaughlin, Piven, Vogel Securities, Inc., ordered it to pay restitution in the amount of $1,414, plus pre-judgment interest, and fined it $10,000.

Appearances

Joy H. Hansler, Esq., Senior Regional Attorney, Los Angeles, California, Jeffrey Stith, Esq., Senior Counsel, Washington, DC, Thomas B. Lawson, Chief Counsel, Washington, DC (Rory C. Flynn, Chief Litigation Counsel, Washington, DC, Of Counsel), for the Department of Enforcement.

Gerald J. Fields, Esq., Steven B. Carlin, Esq., and Mickee Hennessy, Esq., Battle Fowler LLP, New York, New York, for Respondents McLaughlin, Piven, Vogel Securities, Inc. and James C. McLaughlin.

DECISION

I. Introduction

On October 26, 1998, the Department of Enforcement (Enforcement) filed a one cause Complaint against MPV and McLaughlin alleging that: (a) in June 1996, MPV, acting through McLaughlin, charged excessive mark-ups, ranging from 3.89 % to 3.9 %, on four principal sales of municipal bonds to public customers; and (b) during the period from May 30 to June 20, 1996, MPV, acting through McLaughlin, charged excessive mark-downs, ranging from 3.07 % to

4.74 %, on eight principal purchases of municipal bonds from public customers.[2] According to the Complaint, McLaughlin was responsible for establishing the Firm's pricing policies for municipal securities and, therefore, responsible for the alleged excessive mark-ups and mark-downs. Based on the foregoing, Enforcement charged Respondents with violating MSRB Rule G-30. Respondents filed an Answer in which they denied the charges and requested a hearing.

A hearing in this proceeding was held on May 13 and May 14, 1999, before a Hearing Panel composed of an NASD Hearing Officer, and a current and former member of the District Committee for District 10.[3] At the hearing, Enforcement offered the testimony of Mr. Richard Maggipinto, who it proffered as an expert witness,[4] and four fact witnesses, including principals at the three so-called "blind brokers" or "bond brokers" (Titus & Donnelly LLC, R. W. Ellwood & Co., Inc., and Regional Brokers, Inc.) through which MPV re-sold the bonds that are the subject of Enforcement's excessive mark-down charges, and a special investigator employed at the District 2 Office of NASD Regulation, Inc. (Tr. 422.)[5] Enforcement also offered 26 exhibits,

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[2] The four retail sales and eight retail purchases at issue are set forth on Schedules A and B to the Complaint, respectively, and are identified by trade date, bond issue, and par value. Schedules A and B also include, for each transaction, the price paid or received by MPV, the price paid or received by MPV's customers, and Enforcement's mark-up or mark-down calculation.

[3] References to the transcript of the hearing are cited as "Tr. ___."

[4] Prior to the hearing, Respondents moved to preclude Enforcement from introducing testimony from Mr. Maggipinto arguing that he did not possess sufficient relevant experience to offer an expert opinion on the fairness and reasonableness of Respondents' pricing decisions or industry practice regarding mark-ups and mark-downs on the type of retail transactions involved in this proceeding. The Hearing Officer denied Respondents' motion. (See Order Following Final Pre-Hearing Conference, dated April 28, 1999.) At the hearing, Respondents again objected to the introduction of Mr. Maggipinto's testimony on these same grounds. (Tr. 148-50.) The Hearing Panel overruled Respondents' objection and Mr. Maggipinto's affidavit, which was executed on April 30, 1999, and served and filed on May 3, 1999, was received in evidence as his direct testimony. (Pursuant to the Hearing Officer's March 23 Order, Enforcement was required to introduce the direct testimony of any designated expert witness in the form of a sworn affidavit and to make the expert available at hearing for cross and re-direct examinations.) References to Mr. Maggipinto's affidavit are cited as "Maggipinto Aff. ¶ ___."

[5] Prior to the hearing, the Hearing Officer denied Respondents' motion to preclude Enforcement from offering the testimony of the principals of the "blind brokers," i.e., Nicholas Kroeper, William D. Grimes, and Anthony J. Boccella, and denied Respondents' motion to preclude Enforcement from offering the testimony of the special

25 of which were admitted in evidence.[6] Respondents offered the testimony of three witnesses, including McLaughlin, his brother, Mark McLaughlin, who, during all times relevant, worked on MPV's trading desk and was in charge of pricing the Firm's inventory (Tr. 344), and one witness for document authentication purposes. Respondents also offered seven exhibits[7], all of which were admitted in evidence without objection.[8] In addition, prior to the hearing, the Parties stipulated to certain relevant underlying facts. On June 22, 1999, the Parties filed post-hearing findings of fact and conclusions of law.

II. Findings of Fact

A. Background

1. The Respondents

Respondent MPV has been a member of the National Association of Securities Dealers, Inc. (NASD) since on or about May 24, 1977. MPV was, at all times relevant, and currently is a full service retail brokerage firm. (Stip. ¶ 1.) At the time of the transactions at issue, MPV was a

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investigator, Larry Lippold. (See Order Following Final Pre-Hearing Conference, dated April 28, 1999.) At the hearing, Respondents objected to the introduction of testimony from Messrs. Kroeper, Grimes, and Boccella, on grounds different from those that were the subject of their preclusion motion, and the Hearing Officer overruled Respondents' objection. (Tr. 44-53.)

[6] Eighteen of the exhibits offered by Enforcement had been pre-marked by the Parties as joint exhibits, i.e., JX 1-18, and seven of the other exhibits offered by Enforcement, i.e., CX 1-4 and CX 7-9, were admitted without objection. (Tr. 243-45). (CX 7, 8, and 9 are the documents attached to Mr. Maggipinto's affidavit as Exhibits A, B, and C, respectively.) Prior to the hearing, the Hearing Officer denied Respondents' motion to preclude Enforcement from introducing CX 2 and, at the hearing, sustained Respondents' objection to the admission of CX 5. (Tr. 427-40.) In addition, at the Final Pre-Hearing Conference, Enforcement decided to withdraw six of its proposed exhibits (which it originally had pre-marked as CX 5-7 and CX 9-11), and the Hearing Officer granted Respondents' motion to preclude Enforcement from introducing another exhibit (which Enforcement originally had pre-marked as CX 4). (See Order Following Final Pre-Hearing Conference, dated April 28, 1999.)

[7] RX 5, 12-13, 19-22.

[8] Prior to the hearing, the Hearing Officer determined, *sua sponte*, to preclude Respondents from offering two of their proposed exhibits, which Respondents had pre-marked as RX 4 and RX 24, and advised the Parties that Respondents' proposed exhibit RX 19 would be treated as a summary exhibit. Also, at the Hearing Officer's direction, Respondents withdrew proposed exhibits that were the same as or included in the Parties' joint exhibits. (See Order Following Final Pre-Hearing Conference, dated April 28, 1999.)

small firm with about $3.5 million in equity capital, five offices, and about 120 brokers. The Firm's municipal bond transactions generated approximately 25 percent of its income during the relevant period with the sale of "packaged" investment products accounting for the balance of its business. (Tr. 250-53.)[9] The average MPV customer account held about $100,000 to $150,000 in assets and the average size of a municipal bond trade was approximately $25,000. (Tr. 250-52.) MPV was not, at any time during the relevant period, a market maker in any of the 12 bonds involved in the subject transactions. (Stip. ¶ 7.)

Respondent McLaughlin has been associated with MPV as a General Securities Principal since 1977 and, since that date, also has functioned continuously as a Municipal Securities Principal. In or about November 1997, McLaughlin formally registered with the NASD as a Municipal Securities Principal. (Stip. ¶ 2; see also JX 2.) McLaughlin testified that he has never been sanctioned by the NASD or SEC (Tr. 250) and, according to the excerpt of McLaughlin's Central Registration Depository (CRD) record (which the Parties submitted as a joint exhibit), he has no disciplinary record. (JX 2.)

2. MPV's Pricing Policy

During all times relevant, McLaughlin was responsible for MPV's overall pricing policy pertaining to the purchase and sale of municipal bonds. (Stip. ¶ 2; see also Tr. 249, 281.) MPV's written policy, which was in effect at the time of the transactions at issue, required its sales representatives to comply with MSRB Rule G-30. (JX 18, p 7.) At that time, MPV also had in place an unwritten, internal policy prohibiting the Firm from charging mark-ups or mark-downs in excess of 3.9 %. (Tr. 276-77, 282-83, 346.)

[9] MPV now focuses almost exclusively on selling packaged investment products and conducts little municipal bond business. (Tr. 279-80; see also Tr. 419.)

McLaughlin established the 3.9 % ceiling for mark-ups and mark-downs based on consultation with and advice from outside counsel (Tr. 277, 283-88) and in response to a 1994 SEC examination in which SEC staff questioned the fairness of 37 (out of 100) municipal bond transactions in which MPV charged mark-ups in excess of 4 %. (Tr. 277-78; CX 2, p. 14.)[10] The SEC's examination report raised no questions or concerns about mark-ups or mark-downs below 4 % (CX 2, p. 14) and McLaughlin interpreted this to mean that mark-ups or mark-downs below the 4 % level would be permissible. (Tr. 288.) McLaughlin acknowledged that he made a conscious decision to set the Firm's ceiling at the maximum level he thought would withstand regulatory scrutiny, i.e., 3.9 %, and justified his decision to do so on the premise that MPV was entitled to "full profit," because it provided "full-service" to its customers. (Tr. 288.)[11]

B. The Transactions at Issue

1. The Four Retail Sales

With respect to the transactions that are the subject of Enforcement's excessive mark-up charges, there is no dispute as to the description of the bonds involved, the trade dates, the principal amounts involved, the prices MPV paid to acquire the bonds, and the prices the Firm charged its customers. Nor do Respondents dispute Enforcement's calculation of MPV's mark-ups on these transactions, which is based on the Firm's same-day costs to acquire the bonds in inter-dealer transactions.

On June 20, 1996, MPV sold Puerto Rico Public Buildings Authority 5¾ % bonds ("Puerto Rico bonds") with a par value of $15,000 to customers PR and JR, at a price of $99.016,

[10] The SEC's findings did not lead to the institution of any formal disciplinary proceedings against the Firm. (Tr. 278.)

[11] Subsequent to the institution of this proceeding, MPV amended its internal pricing policy to reduce the ceiling for mark-ups and mark-downs to below 3 %. (Tr. 280, 419.)

for a total cost[12] of $14,852. The bonds are due to mature on July 1, 2015. MPV acquired the bonds at a price of $95.30, for a total cost of $14,295. MPV charged the customers a mark-up of 3.9 % or $557 on the transaction. (Stip. ¶ 3; Complaint, Schedule A - Transaction 1; JX 6, pp. 1-2; CX 1.)

On June 25, 1996, MPV sold New York City General Obligation 5¾ % bonds ("New York City GO bonds") with a par value of $105,000 to customers MC and EC, at a price of $93.79, for a total cost of $98,480. The bonds are due to mature on February 1, 2020. MPV acquired the bonds at a price of $90.274, for a total cost of $94,788. MPV charged the customers a mark-up of 3.89 % or $3,692 on the transaction. (Stip. ¶ 3; Complaint, Schedule A - Transaction 2; JX 6, pp. 3-4; CX 1.)

On June 11, 1996, MPV sold California General Obligation 3.65 % bonds ("California GO bonds") with a par value of $25,000 to customers EB and EB, at a price of $85.995, for a total cost of $21,499.[13] The bonds are due to mature on November 1, 2008. The Firm acquired the bonds at a price of $82.768, for a total cost of $20,692. MPV charged the customers a mark-up of 3.9 % or $807 on the transaction. (Stip. ¶ 3; Complaint, Schedule A - Transaction 3; JX 7, pp. 1-2.)

On June 14, 1996, MPV sold Eaton Rapids Michigan Public Schools Building & Site MBIA 5½ % bonds ("Eaton Rapids bonds") with a par value of $25,000 to customer ML, at a price of $95.496, for a total cost of $23,874. The bonds are due to mature on May 1, 2020. MPV

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[12] All customer cost figures are exclusive of a $6 processing fee MPV charged; the processing fee also is not included in Enforcement's calculation of the mark-ups and mark-downs charged on transactions at issue.

[13] This amount does not include a $13.50 fee that MPV charged (in addition to the $6 processing fee), because the customer had requested bearer bonds only. (Maggipinto Aff. ¶ 10.)

acquired the bonds at a price of $91,912, for a total cost of $22,978. MPV charged the customer a mark-up of 3.9 % or $896 on the transaction. (Stip. ¶ 3; Complaint, Schedule A - Transaction 4; JX 7, pp. 3-4.)

Each of the foregoing transactions was solicited by MPV. (JX 6, pp. 1, 3; JX 7, pp. 1, 3.) With the exception of the New York City GO bonds, MPV acquired the bonds for sale to its retail customers directly from municipal bond dealers that listed offerings of the bonds in "The Blue List of Current Municipal and Corporate Offerings" (the "Blue List"). The time-stamp information on the relevant order tickets shows that the retail and inter-dealer transactions involving the Puerto Rico and New York City GO bonds were virtually simultaneous and that MPV received the customer order for the California GO bonds several hours before it purchased the bonds. (See JX 6, JX 7, pp. 1-2.)[14]

The bonds involved in each of the subject retail sales were investment grade, i.e., rated Baa and above by Moody's and rated BBB or above by Standard and Poor's (Stip. ¶ 3; Complaint, Schedule A; Maggipinto Aff. ¶¶ 10.d., 12-15) and were from large primary offerings. (Maggipinto Aff., ¶¶ 10.e., 12-15; CX 8.) Further, a review of the Blue List for the relevant dates indicates that, with the possible exception of the New York City GO bonds, the bonds involved in each of the transactions were readily available. (CX 9.)[15]

[14] There is insufficient information to make any conclusive finding pertaining to the relative timing of the retail and wholesale transactions involving the Eaton Rapids bonds. (See JX 4, p. 5.)

[15] Accordingly to the Blue List, on June 25, 1996, only $185,000 New York City GO bonds were offered for sale, with one broker offering $145,000 and the other broker offering $40,000. (Tr. 153; CX 9.) In addition, the Blue List, which is current as of the morning, may not necessarily reflect the availability of any particular bonds in the afternoon, when MPV sold the New York City GO bonds to the customers. (Tr. 154; JX 6, pp. 3-4.)

2. The Eight Retail Purchases

With respect to Enforcement's excessive mark-down charges, there is no dispute as to the description of the bonds involved, the trade dates, the principal amounts involved, the prices MPV paid to purchase the bonds, or the prices that MPV received when it re-sold the bonds. There also is no dispute that, on the same day MPV purchased the bonds, it re-sold them through so-called "blind brokers" or "brokers' brokers" on an "around time" bid wanted basis (Stip. ¶ 6), meaning that the broker was able to "work" the bonds in an effort to obtain all available bids for the day. Respondents do, however, dispute Enforcement's calculation of the mark-down on five of the eight transactions, i.e., three that occurred on May 30 and two that occurred on June 13, 1996, and assert that Enforcement overstated MPV's mark-downs on these transactions.

(a) The May 30 Transactions

MPV purchased from a retail customer, SDA, $25,000 in New York City Taxable 9.8 % bonds and $35,000 in New York City Taxable 10¾ % bonds for $103.32 and $108.120, respectively. The bonds are due to mature on August 15, 2004 and November 15, 2001, respectively. Both of these transactions were unsolicited. MPV re-sold the bonds in inter-dealer transactions to Titus & Donnelly, at a price of $106.825 and $113.5, respectively. Thus, on the sales of New York City Taxable bonds customer SDA received $25,830 and $37,842, respectively, while MPV received $26,706 and $39,725. (Stip. ¶ 5; Complaint, Schedule B - Transactions 1 and 2; JX 8.) The relevant order tickets show that MPV purchased the bonds from SDA at or before 1:31 p.m.[16] and re-sold the $25,000 and $35,000 lots at 3:05 p.m. and

[16] The order tickets show that they were faxed from MPV's Chicago office to its New York City office at 12:31 p.m. Central Time, i.e., 1:31 p.m. Eastern Time. The subsequent re-sales were effected from MPV's New York City Office.

3:09 p.m., respectively. (JX 8; CX 1.) Enforcement calculated, based on the prices at which MPV re-sold the bonds in the inter-dealer transactions, that the Firm charged the customer mark-downs of 3.28 % or $876 and 4.74 % or $1,883 on the retail purchases of New York City Taxable bonds. (CX 1.)

Also, on May 30, 1996, MPV purchased from retail customers, HA and HA, $30,000 in Virginia State Housing Development Authority 5¼ % bonds at a price of $84.330. The bonds are due to mature on July 1, 2023. This transaction was unsolicited. MPV re-sold the bonds in an inter-dealer transaction to Regional Brokers, at a price of $88.317. (JX 10, pp. 3-4.) Thus, on the sale of Virginia State Housing Development Authority bonds, the customers received $25,299, while MPV received $26,495. (Stip. ¶ 5; Complaint, Schedule B - Transaction 6; JX 10, pp. 3-4.) The relevant order tickets show that the Firm purchased the bonds at 11:57 a.m. and re-sold them at approximately 1:32 p.m. (JX 10, pp. 3-4; CX 1.) Enforcement calculated, based on the prices at which MPV re-sold the bonds in the inter-dealer transaction, that the Firm charged the customer a mark-down of 4.51 % or $1,196 on the retail purchase of these bonds. (CX 1.)

(b) The June 13 Transactions

MPV purchased $90,000 in Massachusetts State Health and Education Facility 5 % bonds and purchased $140,000 in North Carolina Eastern Municipal Power 4½ % bonds from customers EW and KW at $79.367 and $74.270, respectively. The bonds are due to mature on July 1, 2020 and January 1, 2024, respectively. Both of these transactions were unsolicited. MPV re-sold these bonds in inter-dealer transactions to Titus & Donnelly, at a price of $82.997 and $77.703, respectively. (Stip. ¶ 5; Complaint, Schedule B - Transactions 7 and 8; JX 11.)

Thus, on the sales of Massachusetts State Health and Education Facility bonds and North Carolina Eastern Municipal Power bonds, customers EW and KW received $71,430 and $103,978, respectively, while MPV received $74,697 and $108,784. The relevant order tickets show that the retail and wholesale transactions were effected simultaneously. (JX 11.)[17] Enforcement calculated, based on the prices at which MPV re-sold the bonds in the inter-dealer transactions, that the Firm charged the customers mark-downs of 4.37 % or $3,267 and 4. 42 % or $4,806 on the retail purchases of these bonds. (CX 1.)

(c) The Other Transactions

On June 10, 1996, MPV purchased from customers JF and RF $60,000 in New York State Thruway 6 % bonds, at a price of $93.003, resulting in total proceeds to the customers of $55,802. The bonds are due to mature on January 1, 2011. MPV re-sold these bonds in an inter-dealer transaction to Titus & Donnelly, at a price of $96.193, resulting in total proceeds to the Firm of $57,716. The relevant order tickets show that the retail and wholesale transactions were effected virtually simultaneously. MPV charged the customers a mark-down of 3.32 % or $1,914 on the transaction. (Stip. ¶ 5; Complaint, Schedule B - Transaction 3; JX 9, pp. 1-2; CX 1.)

On June 11, 1996, MPV purchased from customer HH $200,000 in New York City Water Authority 5½ % bonds, at a price of $86.923, resulting in total proceeds to the customer of $173,846. MPV re-sold these bonds in an inter-dealer transaction to R. W. Ellwood, at a price of $89.939, resulting in total proceeds to the Firm of $179,878. The relevant order tickets show that the retail and wholesale transactions were effected virtually simultaneously. MPV charged the

[17] MPV maintains, however, that the time-stamp information on the order tickets is inaccurate. See, infra, pp. 17-18.

customer a mark-down of 3.35 % or $6,032 on the transaction. (Stip. ¶ 5; Complaint, Schedule B - Transaction 4; JX 9, pp. 3-4; CX 1.)

On June 20, 1996, MPV purchased from customers CH and MH $65,000 in Puerto Rico Electric Power Revenue - Series O 5 % bonds, at a price of $85.346, resulting in total proceeds to the customer of $55,475. MPV re-sold these bonds in an inter-dealer transaction to R. W. Ellwood, at a price of $88.045, resulting in total proceeds to the Firm of $57,229. The relevant order tickets show that the retail and wholesale transactions were effected simultaneously. MPV charged the customer a mark-down of 3.07 % or $1,754 on the transaction. (Stip. ¶ 5; Complaint, Schedule B - Transaction 5; JX 10, pp. 1-2; CX 1.)

As is the case with respect to the transactions that are the subject of Enforcement's excessive mark-up claims, the bonds involved in the retail purchase transactions at issue were investment grade (Stip. ¶ 5; Complaint, Schedule B; Maggipinto Aff. ¶¶ 10.d., 19-26) and were from large primary offerings. (Maggipinto Aff. ¶¶ 10.e., 19-26; CX 8.) Further, the number of bids that the blind brokers received in response to MPV's bid wanted requests indicates that the bonds involved in these transactions were readily available: (1) eight bids were received on the New York City Taxable 9.8 % bonds; (2) seven bids were received on the New York City Taxable 10¾ % bonds; (3) 12 bids were received on the New York State Thruway 6 % bonds; (4) nine bids were received on the New York City Water Authority 5½ % bonds; (5) six bids were received on the Puerto Rico Electric Power 5 % bonds; (6) 10 bids were received on the Virginia State Housing Development Authority 5¼ % bonds; (7) three bids were received on the Massachusetts State Health and Education Facility 5 % bonds; and (8) five bids were received on the North Carolina Eastern Municipal Power 4½ % bonds. (Maggipinto Aff. ¶¶ 19-26; JX 13, 15,

17.) With respect to three of the transactions, i.e., those involving the New York City Water Authority bonds, Puerto Rico Electric Power bonds, and Virginia State Housing Authority bonds, MPV had "bids-in-hand" before it purchased the bonds from the retail customers. (Tr. 81-82, 88; JX 10, pp. 1, 4; JX 15; JX 17.)[18]

III. Discussion and Conclusions of Law

Rule G-30 requires that the retail prices charged for municipal securities – including any mark-down or mark-up – be "fair and reasonable, taking into consideration all relevant factors."[19] A mark-up or mark-down[20] is excessive when, in light of all the facts and circumstances in a given case, "it bears no reasonable relation to the prevailing market price." Grandon v. Merrill Lynch & Co., 147 F.2d at 190 (quoting Bank of Lexington & Trust Co. v. Vining Sparks Securities, Inc., 959 F.2d 606, 613 (6th Cir. 1992). See also, e.g., Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017, 1033 (4th Cir. 1997).

[18] MPV re-sold the bonds involved in the other purchase transactions to Titus & Donnelly, whose bid wanted records do not indicate when it communicated bids to MPV. (Tr. 68-71.)

[19] The Rule states:

> No broker, dealer or municipal securities dealer shall purchase municipal securities for its own account from a customer or sell municipal securities for its own account to a customer except at an aggregate price (including any mark-down or mark-up) that is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the broker, dealer or municipal securities dealer as to the fair market value of the securities at the time of the transaction and of any securities exchanged or traded in connection with the transaction, the expense involved in effecting the transaction, the fact that the broker, dealer, or municipal securities dealer is entitled to a profit, and the total dollar amount of the transaction.

[20] A mark-up is the difference between the price that a dealer, acting as a principal, charged to a customer and the prevailing market price of the security. See, e.g., Grandon v. Merrill Lynch & Co., 147 F.3d 184, 189 (2d Cir. 1998); SEC v. First Jersey Securities, Inc., 101 F.2 1450, 1469 (2d Cir. 1996), cert. denied, 118 S. Ct. 57 (1997). A mark-down is the difference between the price the dealer, acting as principal, paid to the customer and the prevailing market price for the security. The prevailing market price is the price at which dealers trade with one another, i.e., the current inter-dealer market.

A. Determination of Prevailing Market Price

The "key issue in cases involving allegations of unfair pricing" is the determination of the prevailing market price, which is the basis on which retail mark-ups and mark-downs are computed. In re Alstead, Dempsey & Co., Inc., 47 S.E.C. 1034, 1035 (1984). The SEC has consistently held that where a dealer is not a market maker, the best evidence of prevailing market price, absent countervailing evidence, is the dealer's contemporaneous cost. See, e.g., In re D.E. Wine Investments, Inc., Exchange Act Release No. 39517, 1998 SEC LEXIS 4, n.6, at *7 (Jan. 6, 1998) ("a dealer that is not a market maker must base its markups on the prices it pays in contemporaneous transactions to acquire the security, and must base its markdowns on the prices it charges in contemporaneous transactions to sell the security unless . . . there is 'countervailing evidence' of the prevailing market price"); In re F.B. Horner & Associates, Inc., 50 S.E.C. 1063 (1992), petition for review denied, 994 F.2d 61 (2d Cir. 1993). This standard, which has received judicial approval,[21] reflects the fact that prices paid for a security by a dealer in actual transactions closely related in time to its retail sales in the same security are normally a highly reliable indication of prevailing market price. In re LSCO Securities, Inc., 49 S.E.C. 1126, 1989 SEC LEXIS 781, at *4 (May 3, 1989). In this case, Enforcement calculated all of the mark-ups and mark-downs at issue based on MPV's contemporaneous inter-dealer transactions.

Respondents concede that where a dealer is not a market maker, contemporaneous inter-dealer transactions ordinarily provide reliable evidence of prevailing market price.[22] And, as

[21] See, e.g., Grandon v. Merrill Lynch & Co., 147 F.2d at 187; Barnett v. United States, 319 F.2d 340, 344 (8th Cir. 1963).

[22] Respondents' Proposed Findings of Fact and Conclusions of Law, p. 22.

noted above, they do not dispute that their contemporaneous costs accurately reflect the prevailing market price and are the proper basis for computing the mark-ups on the sales at issue and the mark-downs on three of the eight purchases at issue. However, with respect to the May 30 and June 13 transactions, Respondents assert that, due to a rise in bond market prices during the time MPV held the bonds, the Firm's same-day inter-dealer transactions are not a reliable basis for determining the current market for the bonds. Respondents bear the burden of overcoming the presumption that contemporaneous cost provides the best measure of the prevailing market price. See In re LSCO Securities, Inc., Exchange Act Release No. 26779, 1989 SEC LEXIS 481, at *4 (May 3, 1989); In re Charles Michael West, 47 S.E.C. 39, 42 (1979).

A transaction is considered "contemporaneous" if it occurs close enough in time to a later transaction that it would reasonably be expected to reflect the current market prices for the security. However, "[a] transaction would not be contemporaneous if it is followed by intervening changes in interest rates or other market events that reasonably would be expected to affect the market price."[23] In support of their claim that MPV's May 30 retail purchases and subsequent inter-dealer transactions were not contemporaneous, Respondents introduced evidence showing that, during the course of the day, the yield on the 30-year U.S. Treasury decreased by 13/32, with a corresponding increase in the price of the long bond. (RX 5; see also Tr. 226, 254, 256.)[24] Respondents did not, however, introduce any evidence to demonstrate that

[23] Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 by the National Association of Securities Dealers, Inc., Relating to the Application of NASD's Mark-Up Policy to Transactions in Government and Other Debt Securities, File No. SR-NASD 97-61, Exchange Act Release No. 34-40511, 63 FR 54169, 1998 SEC LEXIS 2156, at *8 (Sept. 30, 1998).

[24] Mark McLaughlin also testified that bond prices were weak in the morning of May 30, but increased in the afternoon. (Tr. 373.)

this small price movement in 30-year U.S. Treasury securities affected the price of the New York City Taxable bonds involved in two of the May 30 transactions or that it reasonably would be expected to impact bond transactions of the size involved here.[25] Moreover, they introduced no evidence showing the extent to which, if at all, the long bond increased in price during the 95 minute and 98 minute periods that MPV held the New York City Taxable bonds.

Respondents' reliance on the 13/32 increase in the price of the long bond as a basis to overcome the presumption in favor of the contemporaneous cost standard is even less availing with respect to the Virginia State Housing Development Authority bonds. They introduced no evidence to demonstrate any correlation in price or trading similarities between taxable 30-year U.S Treasury securities and the tax-exempt Virginia State bonds. Nor did they introduce any evidence to show the extent to which, if at all, the long bond increased in price during the 95 minutes that MPV held the Virginia State bonds; how a 13/32 increase in the price of the long bond affected the price of the Virginia State tax-exempt bonds; or that a 13/32 increase in the price of the long bond reasonably would be expected to impact the pricing of a $30,000 transaction.[26] Further, that the price of the bids for the Virginia State bonds increased during the

[25] Mr. Kroeper of Titus & Donnelly did not, contrary to Respondents' assertion, testify that such a change reasonably would be expected to increase the price of the bonds at issue in this proceeding. (Respondents' Proposed Findings of Fact and Conclusions of Law, ¶ 30.) He was not asked specifically what impact, if any, such a change would have on the specific bonds involved in the May 30 transactions, and testified only that a small increase in the price of the long bond could – but not necessarily would – result in higher priced bids. (Tr. 66-67.)

[26] The Hearing Panel notes, however, that in some cases yield curves for U.S. Treasury securities may constitute *bona fide* evidence of the best measure of prevailing market price sufficient to overcome the presumption in favor of the contemporaneous cost standard. See Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 by the National Association of Securities Dealers, Inc., Relating to the Application of NASD's Mark-Up Policy to Transactions in Government and Other Debt Securities, File No. SR-NASD 97-61, Exchange Act Release No. 34-40511, 63 FR 54169, 1998 SEC LEXIS 2156, at *22.

course of the day (JX 17) is not indicative of an upward market trend but, rather, was likely due to the fact that relatively small bond pieces, such as the $30,000 Virginia State bonds, often do not attract bidders until later in the day. (Tr. 89-90, 193-97.)

With respect to the June 13 transactions, Respondents claim that, notwithstanding the time-stamp information on the relevant order tickets, the retail and wholesale transactions were not effected simultaneously and that, during the time the Firm held the bonds, intervening market movements caused an increase in the price of the municipal bonds involved in these transactions. In support of the latter, Respondents introduced evidence showing that, during the course of the day, the price of 30-year U.S. Treasuries increased approximately 1 point (RX 12) and the prices of bond futures increased by a comparable amount. (RX 13; see also JX 4, p. 14; Tr. 387.)

Respondents bear a "heavy evidentiary burden when they attempt to impeach the accuracy of their own records." In re Voss & Co., Inc., 48 S.E.C. 39, 42 (1984) (where the SEC, in a case involving allegations of excessive mark-ups, rejected the respondents' argument that the time-stamp information on customer order tickets was inaccurate and should be disregarded for purposes of determining prevailing market price).[27] The Hearing Panel cannot conclude that Respondents satisfied this burden. There is no doubt that throughout the investigation that led to the institution of this proceeding Respondents consistently maintained that the time-stamp information on the customer order tickets is inaccurate. (JX 3, p. 11.) They offered no direct non-hearsay evidence to support this contention but, instead, relied on the written, unsworn statements of the Firm's Compliance Director, Ira A. Cohen (id.), and on the testimony of Mark

[27] Accord District Business Conduct Committee No. 7 v. Century Capital Corp., Complaint No. ATL 1076, 1990 NASD Discip. LEXIS 91, at *7-8, 14 (Bd. of Governors Dec. 4, 1990).

McLaughlin, who admittedly was not personally involved in the June 13 transactions. (Tr. 404-05.) He testified only that, as a general matter, because of the steps required to purchase a bond from a customer and the steps required to re-sell a bond after its purchase, the likelihood of simultaneous retail and wholesale transactions was "pretty slim." (Tr. 388-89.)

In any event, even assuming that the retail and wholesale transactions were not simultaneous, MPV introduced no evidence to establish when the Firm purchased the bonds from the customer other than the vague hearsay statements of Mr. Cohen that MPV's salesman confirmed the transaction to the customer sometime in the morning. (JX 3, p. 11.) The Hearing Panel, therefore, cannot determine whether the 30-year Treasury securities and municipal bond futures increased in price during the period MPV held the bonds involved in the June 13 transactions, much less analyze the impact that the price increases in the long bond and municipal bond futures may have had, if any, on the current market price of the bonds involved in the June 13 transactions.

Based on the foregoing, the Hearing Panel rejects Respondents' claim that Enforcement improperly calculated and overstated the mark-downs on the May 30 and June 13 transactions.

B. The Analysis of MPV's Pricing Decisions

The MSRB thus far has declined to adopt any specific numeric standard for the pricing of municipal securities that is comparable to the NASD's 5 % policy for mark-ups or mark-downs

on equity securities. See IM-2440.[28] While there is a justifiable concern that the adoption of a numeric standard might encourage broker-dealers to charge mark-ups and mark-downs as high as the specified figure, the lack of a benchmark places members in a difficult position when faced with pricing municipal securities in secondary market retail transactions. This is not to say, however, that the industry is without any guidance: "[i]t is well recognized that a significantly lower mark-up is customarily charged in the sale of debt securities than in transactions of the same size involving common stock . . . ." In re First Honolulu Securities, Inc., Exchange Act Release No. 32933, 1993 SEC LEXIS 2422, at *5 (Sept. 21, 1993). See also, e.g., In re Investment Planning, Inc., Exchange Act Release No. 32687, 1993 SEC LEXIS 1897, at *8 (July 28, 1993) (same); Zero Coupon Securities, Exchange Act Release No. 24368, 1987 SEC LEXIS 2005, at *11 (April 21, 1987) ("the percentage mark-up for debt securities historically has been less than the amount charged for equity securities"); In re Staten Securities Corp., 47 S.E.C. 766, 1982 SEC LEXIS at *3 (1982) ("As a general rule, markups on municipal bonds are significantly lower than those for equity securities.").

1. The Expert's Opinion

In support of its allegations that MPV unfairly priced the transactions at issue, Enforcement relied solely on the opinion of Mr. Maggipinto, its expert witness. Mr. Maggipinto concluded that the maximum allowable mark-up on the retail sales was 2.5 % to 3 % and that the

[28] In January 1980, in a Solicitation of Comments on Pricing Guidelines, the MSRB asked for public comment with respect to whether it would be appropriate to establish "benchmarks" in connection with MSRB Rule G-30. It suggested a lower benchmark (1 %) which would have been presumed to be fair and an upper benchmark (2½ %) which would have been given special scrutiny by regulators. After receiving comments, the MSRB issued a Report on Pricing in which it expressly declined to adopt a specific percentage guideline "in view of the heterogeneous nature of municipal securities transactions and municipal securities dealers." MSRB Interpretation of Rule G-30 (Sept. 26, 1980). The MSRB considered a specific benchmark "unworkable" considering the: (1) many differences in municipal securities transactions; (2) size of transactions; (3) quality and maturities of municipal securities; (4) nature of the services provided by municipal securities dealers; and (5) varying pricing policies of municipal

maximum allowable mark-down on the retail purchases was 1 % to 1.5 %. (Maggipinto Aff. ¶¶ 12-15, 19-26; CX 1.)

Although the Hearing Panel decided to receive Mr. Maggipinto's testimony over Respondents' objection, the Panel has determined that his opinion is entitled to little, if any, weight. While Maggipinto claimed he is "familiar with the usual and customary prices charged on municipals bonds purchased and sold" during the relevant period (Maggipinto Aff. ¶ 7), he admitted that, during the past 15 years, he has had limited experience selling municipal bonds to small individual customers and virtually no experience purchasing municipal bonds. (Tr. 97-99, 176.) Indeed, as is clear from his resume,[29] from August 1983 to date, Mr. Maggipinto has focused primarily on selling municipal securities to institutional customers, including broker-dealers, municipal bond funds, and money managers, and on underwriting and trading municipal bonds. (CX 6; See also Maggipinto Aff. ¶¶ 3-5; Tr. 98-99, 106.) The Hearing Panel also believes that his experience pricing municipal bonds for re-sale to the customers of Union Bank of California (Tr. 112), while he was employed as a trader at the bank, is not particularly helpful in assessing the fairness of the mark-ups and mark-downs charged by MPV. Because the size and nature of the bank's business differ dramatically from MPV's,[30] any comparison between its pricing decisions and MPV's would be at odds with the MSRB's conclusion that the heterogeneity of municipal securities dealers militates against adopting a specific numeric

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securities dealers in different areas. The MSRB did, however, specifically note that the NASD's 5 % mark-up policy does not apply to municipal securities, and the Hearing Panel has not applied the NASD's 5 % policy in this case.

[29] A copy of Mr. Maggipinto's resume is attached to his affidavit and was admitted in evidence as CX 6.

[30] Unlike MPV, the bank is a large, diversified financial institution that profited from an array of services it offered its depositors; indeed, less than 1 % of its revenues were derived from municipal bond transactions. (Tr. 114-16.) In 1996, the bank had $30 billion in assets, 248 branch offices, and approximately 10,000 employees. (Tr. 114-15.) Further, as Mr. Maggipinto admitted, it was "highly unlikely" that MPV could finance the acquisition of an inventory of bonds as cheaply as did the bank. (Tr. 118.)

benchmark for mark-ups and mark-downs. Mr. Maggipinto is employed currently at O'Connor Securities, which conducts minimal business in retail municipal securities transactions. (CX 6; Tr. 122.) At O'Connor Securities, Mr. Maggipinto is involved solely in underwriting new bond issues for resale to retail and institutional customers and trading bonds for the firm's propriety account: he admittedly has no direct involvement in retail transactions. (Maggipinto Aff. ¶ 5; Tr. 123.)[31]

Nor did Mr. Maggipinto, in connection with the preparation of his expert opinion, conduct any analysis or study to establish industry practice in pricing transactions such as those at issue. Given the absence of any objectively determined pricing figures and Mr. Maggipinto's lack of relevant experience, the Hearing Panel is unable to conclude that his opinion on the maximum allowable mark-ups and mark-downs accurately reflects the customary mark-ups and mark-downs charged for these securities in similar transactions.

Separate and apart from his lack of relevant experience and failure to conduct any study of industry practice, the Hearing Panel found certain of his testimony internally inconsistent and inconsistent with the guidance in Rule G-30. For example, although Mr. Maggipinto acknowledged that "there should be some type of lower markdown for a larger sized transaction" (Tr. 228), he also claimed that the maximum allowable mark-down would be the same whether a transaction involved $25,000 or $1 million in bonds. (Tr. 178-82.). The latter is patently at odds with the Rule, which lists the "total amount of the transaction" as a relevant factor, and the National Business Conduct Committee's guidance to member firms that "the size of a transaction

[31] Mr. Maggipinto claimed that the underwriting work he performs gives him an "inroad into the retail marketplace." (Tr. 123.) In fact, however, as Respondents noted, Rule G-30 is inapplicable to such transactions, in which bonds are sold to the public at a specific offering price that is set by in a prospectus.

is an important factor to consider in determining the mark-up or mark-down." District Business Conduct Committee No. 5 v. MMAR Group, Inc., Complaint No. C05940001 (NBCC Oct. 22, 1996).[32]

2. The Hearing Panel's Analysis

To determine the reasonableness of the mark-ups and mark-downs at issue, the Hearing Panel has considered, in addition to the non-exclusive list of factors set forth in Rule G-30, various factors that the SEC and National Business Conduct Committee have identified as relevant:

> (1) industry experience (the Commission has noted that is of particular importance in cases involving new products and has recommended consideration of maturity, order size, and availability); (2) market activity (the Commission has noted that an inactive market requires greater sales efforts and may justify a higher mark-up); (3) the amount of money involved and the size of the transaction (the Commission has noted that transactions involving large amounts of money should carry lower mark-ups); and (4) the nature of the firm's business (the Commission has stated that, in determining mark-ups, a firm may consider services provided to its customers beyond services that [a] typical broker/dealer generally provides, such as research, financial planning and counseling).

District Business Conduct Committee No. 7 v. International Trading Group, Inc., Complaint No. C07950058 (National Business Conduct Committee, July 2, 1998). Independent of Mr. Maggipinto's testimony, the Hearing Panel concludes that MPV charged excessive mark-downs on four of the transactions at issue, i.e., the May 30 purchases of $35,000 New York City Taxable bonds and $30,000 Virginia State Housing bonds, and the June 13 purchases of $90,000 Massachusetts State Health and Education Facility bonds and $140,000 North Carolina Eastern Municipal Power bonds. MPV's mark-downs on these transactions ranged between 4.37 % and

[32] Similarly, Mr. Maggipinto testified that, in his view, the maximum allowable mark-down would be the same irrespective of the whether the broker/dealer was a full-service or discount firm. (Tr. 183.)

4.74 % – well above the Firm's own internal pricing policy and above the range that prior decisions found or otherwise indicated may be excessive.[33] Indeed, the mark-downs MPV charged represent extraordinary charges in light of the nature of the transactions. Each transaction involved relatively liquid, investment grade bonds, and there is nothing in the record to indicate that MPV expended any exceptional efforts in effecting these transactions; to the contrary, each of the transactions was unsolicited. In addition, the timing of the retail purchases and subsequent sales indicate that the Firm had little, if any risk exposure, and with respect to the transaction involving the Virginia State Housing bonds, the Firm had a "bid-in-hand" before it even purchased the bonds from the customer, which also insulated the Firm from risk. Under these circumstances, MPV functioned as an intermediary and provided no liquidity to the inter-dealer market.[34] Moreover, the dollar amount of the transactions – which ranged from $30,000 to $140,000 – presented a substantial opportunity for MPV to derive compensation from relatively low mark-downs.

The Hearing Panel also rejects Respondents' claim that the level of services MPV provided its customers justified mark-downs of the magnitude charged. In this connection, Respondents offered testimony that MPV researched and tracked the products it offered, including reviewing the nature and security of the revenue sources used to pay the bondholders,

[33] In fact, almost three years prior to the transactions at issue, the SEC affirmed an NASD decision finding that mark-ups on municipal securities ranging from 4 % to 5.99 % were excessive. In re Investment Planning, Inc., Exchange Act Release No. 32687, 1993 SEC LEXIS 1897 (July 28, 1993). See also, e.g., In re Staten Securities Corp. Exchange Act Release No. 18628, 1992 SEC LEXIS 1920, at *4 (April 9, 1982) ("We note that markups on municipal securities are often as low as one or two percent in frequently traded issues . . . .").

[34] Cf. In re Kevin B. Waide, Exchange Act Release No. 30561, 1992 SEC LEXIS 827 (April 7, 1992) (holding that in a riskless principal transaction, which is the economic equivalent of an agency trade, the firm is adequately compensated by a mark-up over its cost for the limited role it serves).

annual reports, and current news items (Tr. 255, 263-64, 300, 303, 323, 344-45),[35] and provided substantial "hands-on" services to customers on an ongoing basis. (Tr. 314.) As to the latter, Respondents cited to the fact that MPV maintained a ten-person customer service department, independent of the sales representatives, that the Firm's customer service department also tracked specific developments on the bonds in customer accounts, and informed customers by letter and by telephone of any changes in the status of the bonds, such as bond calls. Respondents also pointed to the fact that although MPV cleared on a fully-disclosed basis, it employed additional back-office staff to support its clearing firm.[36] (Tr. 257-60, 262-63; see also Tr. 343-45, JX 3, pp. 8-10.)[37] The services provided by the Firm were not unusual or beyond that which a full-service retail brokerage firm typically would provide. The evidence simply does not establish any advantage that the customers obtained from MPV's services or advice that would justify the high mark-downs charged. Moreover, insofar as MPV provided services beyond that which a discount firm might offer, McLaughlin admitted that in establishing MPV's internal pricing policy – which set a 3.9 % ceiling for mark-ups and mark-downs – he took into consideration the nature of the services provided by the Firm.

However, with respect to the other eight transactions – where the mark-ups or mark-downs charged were below 4 % – the Hearing Panel concludes that, in the absence of any evidence of the customary mark-ups and mark-downs charged on the particular bonds involved

[35] For example, Mark McLaughlin testified that the Firm had performed "extra" research with respect to the New York City General Obligation bonds, including contacting the comptroller, and had determined that these bonds offered a "unique value" for a customer. (Tr. 351-52.)

[36] McLaughlin claimed that he is not aware of any similar firm that maintains a customer service department or supports its clearing firm in the same manner as did MPV.

[37] The Firm also provided a number of additional services to its customers free of charge, including a monthly investment catalogue, a credit card, and two stock transactions per year. (Tr. 260-61, 267.)

or similar types of securities,[38] it cannot find that the mark-ups and mark-downs charged on these transaction were excessive. This is not to say that the Hearing Panel believes there is a "safe harbor" for mark-ups or mark-downs on municipal bond transactions that are below 4 % or, for that matter, any other percentage. To the contrary, the Hearing Panel observes, as has the SEC and NASD on prior occasions, that mark-ups and mark-downs on municipal bond transactions below 4 % may well be unfair. See, e.g., In re Investment Planning, Inc., Exchange Act Release No. 32687, 1993 SEC LEXIS 1897, at *4; In re First Honolulu Securities, Inc., 51 S.E.C. 695, 1993 SEC LEXIS 2422, at *4. This may be particularly true, where, as here, the bonds involved in all of the transactions were investment grade and readily available, the Firm was not providing any liquidity to the market, the dollar amount and size of the transactions were sufficiently large to allow MPV to earn a profit, and the services MPV provides its customers were not extraordinary for a full-service brokerage firm.[39] Nor does the Hearing Panel believe, given the cautionary language in the SEC's decisions, that MPV lacked notice that mark-ups and mark-downs below 4 % may be considered excessive.

Moreover, the Hearing Panel is disturbed by the fact that McLaughlin adopted an internal pricing policy that set as a ceiling for mark-ups and mark-downs on municipal bond transactions the maximum percentage that he believed MPV could charge and still avoid regulatory scrutiny.

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[38] Enforcement suggests, relying on First Honolulu, 51 S.E.C. 695, 1993 SEC LEXIS 2422, at *14, that the burden of establishing a *prima facie* case of excessive mark-ups and mark-downs can be satisfied by presenting evidence that the transactions at issue existed, the size of the transactions, the nature of the securities, the Firm's contemporaneous costs, and the prices paid to or received by the retail customers. (Pre-Hearing Brief, pp. 4-5.) That certain evidence may be sufficient to establish a prima facie case and, therefore, adequate to defeat a motion for summary disposition, does not mean that the same evidence is sufficient to satisfy a preponderance of the evidence standard. Indeed, in First Honolulu, the SEC dismissed the allegations that mark-ups of less than 5 % on municipal bond transactions were excessive, noting that the NASD failed to "adduce expert testimony concerning the markups customarily charged customers" for the securities. (Emphasis added.) 1993 SEC LEXIS 2422, at *15 and *15, n.26.

[39] The Hearing Panel also notes that MPV is not entitled to a higher mark-up or mark-down because it emphasized a "buy and hold" philosophy and its customers may have engaged in infrequent trading.

However, because Enforcement failed to present credible, objective evidence to establish the customary charges on the types of transactions at issue, the Hearing Panel must dismiss Enforcement's allegations of unfair pricing pertaining to the other eight transactions at issue.[40]

C. McLaughlin's Liability

The Complaint alleges that McLaughlin is liable for the improper and excessive mark-ups and mark-downs charged by MPV, because he was responsible for establishing MPV's pricing policy. The Complaint does not more broadly allege that McLaughlin is liable for the Firm's violations of Rule G-30 by virtue of his position as a registered municipal securities principal at the Firm, or that he personally established or approved any of the mark-downs in excess of 4 %, which the Hearing Panel found to violate Rule G-30. Cf. In re First Honolulu Securities, Inc., Exchange Act Release No. 32933, 1993 SEC LEXIS 2422 (where the SEC concluded that the firm's former chairman and chief executive officer was liable for violations of Rule G-30 because he approved or personally set the prices on the transactions at issue.)[41] Because the Hearing Panel has not found improper the mark-ups and mark-downs that were consistent with the Firm's internal pricing policy and has dismissed those allegations, it follows that the allegations against McLaughlin likewise must be dismissed.

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[40] At the hearing, Respondents relied on an NASD "Survey of Markup Practices on Fixed Income Securities" (RX 19) to show that the prices MPV charged were fair and reasonable. The Hearing Panel notes that, in reaching its decision to dismiss the allegations pertaining to eight of the transactions, it did not rely on the survey.

[41] That Enforcement intended to predicate McLaughlin's liability on his role in establishing the Firm's pricing policy is further confirmed by statements it made in its post-hearing submission. See Complainant's Post-Hearing Findings of Fact and Conclusions of Law, pp. 21-22. In this connection, the Hearing Panel also notes that, although it may have been better practice for McLaughlin to reduce to writing the Firm's internal pricing policy, there is no allegation in the Complaint that the firm failed to maintain adequate written supervisory procedures.

IV. Sanctions

The NASD Sanction Guideline for excessive mark-ups and mark-downs recommends the imposition of a fine ranging between $5,000 and $100,000 plus, if restitution is not ordered, the gross amount of the excessive mark-ups or mark-downs.[42] This is not an egregious case. It involves four isolated violations of Rule G-30 and implicates excessive mark-downs totaling less than $1,500. On the other hand, that the SEC, two years prior to the transactions at issue, raised questions about the mark-ups MPV charged on numerous transactions, should have caused the Firm to be especially vigilant about its pricing practices.[43] The Hearing Panel also finds disturbing the Firm's willingness to charge the maximum mark-up and mark-down that it believed possible and still avoid regulatory scrutiny. Accordingly, the Hearing Panel concludes that it is appropriate to censure MPV and impose more than the minimum fine recommended in the Guideline.

The Hearing Panel also believes that, in addition to the imposition of a monetary fine, it is appropriate to require MPV to pay restitution to the customers who were overcharged. Restitution is a traditional equitable remedy designed to "restore the status quo where otherwise a . . . victim would unjustly suffer loss." In re David Joseph Dambro, 51 S.E.C. 513, 518 (1993). The NASD Sanction Guidelines generally recognize that, in cases where an identified individual has suffered a quantifiable loss as a result of a respondent's misconduct, it is fitting to order the respondent to pay restitution.[44] The Guidelines also suggest that, when ordering restitution,

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[42] NASD Sanction Guidelines 82 (2d ed. 1998). The Guideline also suggests that, in egregious cases, a firm be suspended with respect to any or all activities for up to two years or expelled.

[43] The NASD also found during a routine examination conducted in 1989 that, on two out of 50 transactions, MPV charged excessive mark-ups of 6.48 % and 7.99 %. (CX 3.)

[44] NASD Sanction Guidelines 6 (2d ed. 1998).

adjudicators may consider requiring the respondent to pay pre-judgment interest on the base amount, calculated pursuant to 26 U.S.C. § 6621(a)(2), i.e., the interest rate used by the Internal Revenue Service to determine interest due on underpaid taxes.[45] The Guidelines recommend that pre-judgment interest should be measured from the date of the occurrence of the violative activity that gave rise to the loss.

Although the Hearing Panel found that MPV violated Rule G-30 by charging mark-downs in excess of 4 %, because Enforcement failed to offer any reliable, objective evidence as to the appropriate percentage that should have been charged, the Hearing Panel has no choice but to order restitution only to the extent that the mark-downs exceeded 4 %.[46] Accordingly, the Hearing Panel directs MPV to pay restitution to certain of its customers, as are identified below, to the extent it charged these customers mark-downs in excess of 3.9 %, plus pre pre-judgment interest, calculated pursuant to 26 U.S.C. § 6621(a)(2), which shall run from the date of the retail transactions to the date of this decision.

V. Order

Therefore, having considered all of the evidence, McLaughlin, Piven, Vogel Securities, Inc. is censured, fined $10,000, and ordered to pay restitution in the amount of the total amount of $1,414, as follows: (a) $334 to customer SDA, representing the excess mark-down that MPV charged SDA on its May 30 purchase of $35,000 New York City Taxable 10¾ % bonds; (b) $163 to customers HA and HA, representing the excess mark-down that MPV charged them on its May 30 purchase of Virginia State Housing Authority 5¼ % bonds; and (c) $917 to customers

[45] Id., at 12. The Internal Revenue Service rate, which is adjusted each quarter, reflects market conditions, and thus approximates the time value of money for each quarter in which the customer lost the use of his or her funds.

[46] This should not be interpreted to mean that the Hearing Panel in any way condones the use of a 3.9 % ceiling for mark-ups and mark-downs on municipal bond transactions.

EW and KW, representing the excess mark-downs that MPV charged them on its purchases of Massachusetts State Health & Education Facility 5 % bonds and North Carolina Eastern Municipal Power 4½ % bonds, with of $354 and $563 in excess mark-ups attributable to each transaction respectively. MPV shall pay pre-judgment interest on the restitution amounts, which shall be calculated pursuant to 26 U.S.C. § 6621(a)(2), and shall run from the date of the retail transactions to the date of this decision. MPV also is ordered to pay costs in the amount of $2,851.50, which includes an administrative fee of $750 and hearing transcript costs of $2,101.50. These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action of the NASD.[47]

Hearing Panel.

By: _____
Ellen B. Cohn
Hearing Officer

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James C. McLaughlin (via certified and first class mail)

[47] The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.