

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 631/October 26, 2006

ADMINISTRATIVE PROCEEDING
File No. 3-12359

In the Matter of

ANTHONY C. SNELL and
CHARLES E. LECROY

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: ORDER DENYING RESPONDENTS'
: MOTION FOR PARTIAL SUMMARY
: DISPOSITION
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The Securities and Exchange Commission (Commission) instituted this proceeding against Anthony C. Snell (Snell) and Charles E. LeCroy (LeCroy) on July 7, 2006, pursuant to Sections 15(b)(6), 15B(c)(4), and 21C of the Securities Exchange Act of 1934 (Exchange Act). Snell and LeCroy (collectively, Respondents) jointly filed a timely Answer. The Commission's Division of Enforcement (Division) has made its investigative file available to Respondents for inspection and copying.

The Order Instituting Proceedings (OIP) seeks the imposition of three sanctions: associational bars, civil monetary penalties, and cease-and-desist orders. Based on Snell's and LeCroy's guilty pleas to two counts of wire fraud each, I previously granted partial summary disposition to the Division and imposed unqualified associational bars (Order of Oct. 18, 2006).

Respondents sought leave to file a motion for partial summary disposition on the ground that cease-and-desist orders cannot be imposed as a matter of law. See Rule 250(a) of the Commission's Rules of Practice. The Division did not oppose the request for leave to file, and I granted it (Order of Oct. 5, 2006).

Respondents have filed their motion for partial summary disposition. The Division has submitted its opposition, and Respondents have filed a reply. I now deny Respondents' motion.

Pursuant to Rule 250(b) of the Commission's Rules of Practice, I find that the following factual matters are undisputed.

Undisputed Background Facts

Among other things, the OIP alleges that Snell and LeCroy willfully violated Section 15B(c)(1) of the Exchange Act (OIP ¶ II.D.1). Section 15B(c)(1) prohibits brokers, dealers, and municipal securities dealers from effecting transactions in, or inducing or attempting to induce the purchase or sale of, any municipal security in contravention of any rule of the Municipal Securities Rulemaking Board (MSRB).

The OIP also alleges that Snell and LeCroy willfully violated MSRB Rule G-38 (OIP ¶ II.D.2).¹ If Snell and LeCroy willfully violated Section 15B(c)(1) and MSRB Rule G-38, then the OIP requires a determination of whether, pursuant to Section 21C of the Exchange Act, they should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-38 (OIP ¶ III.C).

In relevant part, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease-and-desist order against any person who “is violating, has violated, or is about to violate” any provision of the Exchange Act or “any rule or regulation thereunder.”

Two iterations of MSRB Rule G-38 are at issue in this proceeding (OIP ¶ II.C.1 & nn.1-2). The former version of Rule G-38, which was effective before August 29, 2005, required brokers, dealers, and municipal securities dealers to prepare written agreements memorializing their relationship with consultants and to disclose the consulting arrangements to the relevant issuers of municipal securities and to the MSRB. The current version of MSRB Rule G-38, effective on and after August 29, 2005, prohibits brokers, dealers, and municipal securities dealers from paying any persons not affiliated with the broker, dealer, or municipal securities dealer to solicit municipal securities business on its behalf.

The misconduct alleged in the OIP occurred while the former version of MSRB Rule G-38 was in effect. By the time the MSRB revised its Rule G-38, the purported consultant had died, and Snell and LeCroy had been fired from their positions and convicted of wire fraud.

The Commission’s Standard for Issuing Cease-and-Desist Orders

In KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-92 (2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), the Commission

¹ Section 15B(c)(1) of the Exchange Act does not refer to “violations” of MSRB rules, as the OIP does. Rather, it prohibits brokers, dealers, and municipal securities dealers from effecting municipal securities transactions “in contravention of” MSRB rules. The parties do not suggest that this distinction has any significance. See Black’s Law Dictionary 329 (7th ed. 1999) (defining “contravention” as “an act violating a legal . . . obligation”); cf. Section 17A(d)(1) of the Exchange Act (providing that no registered clearing agency or registered transfer agent shall engage in any activity “in contravention of” rules and regulations prescribed by the Commission or the appropriate self-regulatory organization).

addressed the standard for issuing cease-and-desist relief. It explained that “there must be some likelihood of future violations” whenever it issues a cease-and-desist order. Id. at 1185 (“If there is no possible risk of future violation, it is difficult to see the remedial purpose of a cease-and-desist order.”).

Although the Commission held that “some” risk of future violation is necessary, it also concluded that the risk need not be very great. Id. It determined that the necessary showing should be “significantly less than” what is required for an injunction and that, “[a]bsent evidence to the contrary,” a single past violation ordinarily suffices to raise a sufficient risk of future violations. Id. at 1185, 1191. However, “even in the ordinary case, issuance of a cease-and-desist order is [not] ‘automatic’ on a finding of past violation.” KPMG, 74 SEC Docket at 1360.

Along with the risk of future violations, the Commission considers the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent’s state of mind, the sincerity of the respondent’s assurances against future violations, the respondent’s recognition of the wrongful nature of his or her conduct, and the respondent’s opportunity to commit future violations. KPMG, 54 S.E.C. at 1192. In addition, the Commission considers whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceeding. Id. The Commission weighs these factors in light of the entire record, and no one factor is dispositive.

The United States Court of Appeals for the District of Columbia Circuit has insisted that the Commission adhere to the standards it announced in KPMG. See WHX Corp. v. SEC, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (rejecting the Commission’s explanation of the risk of future violations and vacating a cease-and-desist order).

The Parties’ Positions

Respondents emphasize that the MSRB Rule G-38 they are accused of violating is not the MSRB Rule G-38 in effect today. They argue that there is no danger of future violation of a rule that is no longer in effect. They also maintain that the current iteration of MSRB Rule G-38 is substantively different from the former iteration of MSRB Rule G-38.

The Division contends that injunctions and cease-and-desist orders can be granted under revised regulations in circumstances where the conduct in question violated a predecessor regulation. It maintains that the conduct at issue in this proceeding not only violated former MSRB Rule G-38, but also would violate the current MSRB Rule G-38.

Discussion

MSRB Rule G-38 is the only MSRB rule identified in the OIP. To establish that Respondents willfully violated Section 15B(c)(1) of the Exchange Act, the OIP requires the Division first to prove that Respondents willfully violated former MSRB Rule G-38. For present purposes, I assume that the Division, as the non-moving party, has done so. The issue for

decision is whether, as a matter of law, Respondents can be ordered to cease and desist from violating a rule that was vacated and replaced after the violation occurred.

Respondents assert that the current version of MSRB Rule G-38 “substantially amended” and “substantially broadened” the prior version of MSRB Rule G-38. If these assertions are true, then orders to cease and desist from violating the revised version of MSRB Rule G-38 would not be warranted. Cf. Agostini v. Felton, 521 U.S. 203, 215 (1997) (holding that vacation of an injunction is required when there has been a significant change either in factual conditions or in law); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992) (holding that a judgment should no longer have prospective application if a party can demonstrate a significant change in either factual conditions or the law); Gavin v. Branstad, 122 F.3d 1081, 1086 (8th Cir. 1997) (holding that, when Congress alters the substantive law on which an injunction is based, the injunction may be enforced only insofar as it conforms to the changed law); Protectoseal Co. v. Barancik, 23 F.3d 1184, 1187 (7th Cir. 1994) (same, collecting cases). However, Respondents have not presented undisputed evidence about the surrounding facts and circumstances (in the form of stipulations, admissions, or affidavits). I am essentially asked to supply my own analysis of the old and new Rules, and to grant the motion based on nothing more than argument of counsel.

The Division claims that the current version of MSRB Rule G-38 is “much narrower” than the former version of MSRB Rule G-38 (Prehearing Conference of Aug. 4, 2006, at 7). If the Division’s claim is true, then orders to cease-and-desist from violating the revised version of MSRB Rule G-38 could be warranted. In opposition to Respondents’ motion for partial summary disposition, the Division has pointed to proceedings in which parties who violated former Exchange Act Rule 10b-6 were prospectively enjoined (or ordered to cease-and-desist) from future violations of Rule 101 of Regulation M, the successor to Rule 10b-6. The rationale for these earlier decisions was unarticulated, but obvious: Rule 101 of Regulation M is narrower in all material respects than former Rule 10b-6. See Anti-manipulation Rules Concerning Securities Offerings, 63 SEC Docket 1374, 1394-95 (Dec. 20, 1996) (presenting the final Regulatory Flexibility Act analysis of Rule 101 of Regulation M).

As matters now stand, the sanctioning issue presents substantial questions of fact and law which cannot be resolved without further development of the factual record. In these circumstances, it would be inappropriate to grant Respondents’ motion for partial summary disposition prior to hearing.

Another factor also counsels against granting Respondents’ motion. If Respondents were to obtain partial summary disposition, a hearing would still be required to determine whether the Division can prove that the alleged violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-38 warrant the imposition of civil monetary penalties. That inquiry will likely involve testimony from the same witnesses and analysis of the same exhibits. As a result, granting partial summary disposition to Respondents would not reduce the cost of litigation or otherwise promote judicial economy.

Matters Remaining for Resolution

As the proponent of a rule or order (specifically, a cease-and-desist order), the Division will have the burden of proving that the current version of MSRB Rule G-38 is narrower than its predecessor. See 5 U.S.C. § 556(d).

KPMG, 54 S.E.C. at 1192, requires decision makers to consider the remedial function to be served by cease-and-desist orders in the context of the other sanctions sought in the proceeding, as well as the risk of future violations. I have already granted partial summary disposition to the Division and determined that both Respondents should be barred from association with any broker, dealer, or municipal securities dealer (Order of Oct. 18, 2006).² As a result, there appears to be some doubt that Snell and LeCroy could ever return to positions where they might violate Section 15B(c)(1) of the Exchange Act or either iteration of MSRB Rule G-38 in the future. At the hearing, the Division will have an opportunity to demonstrate why, in such circumstances, cease-and-desist orders are appropriate. Cf. Stephen J. Horning, 2006 SEC LEXIS 2082, at *77-78 (Sept. 19, 2006) (Initial Decision), review granted; Gregory M. Dearlove, CPA, 2006 SEC LEXIS 1684, at *182-84 (Jul. 27, 2006) (Initial Decision), review granted.

This Order is interlocutory in character. It is not an Initial Decision within the meaning of Rule 360(b) of the Commission's Rules of Practice. Cf. Fed. R. Civ. Pro. 56(d).

A telephonic prehearing conference will be held on October 31, 2006, at 9:30 a.m., E.S.T., to schedule a hearing on the unresolved issues. Respondents must identify their proposed fact witnesses, any proposed expert witnesses, and their proposed hearing exhibits no later than November 15, 2006. At that time, Respondents also must provide the specific information identified in Rules 222(a)(3)-(4) and 222(b) of the Commission's Rules of Practice. Expert witnesses will be required to submit their direct testimony in narrative form before the hearing. The due date for such submissions will be established at the telephonic prehearing conference.

SO ORDERED.

James T. Kelly
Administrative Law Judge

² Respondents mischaracterize the Order of October 18, 2006, as limiting the associational bars to fixed periods of ten years. The bars are unqualified, i.e., the Order did not find that there was a time period after which it would be appropriate to consider reentry. These are the most severe sanctions available under Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, and are sometimes colloquially (but imprecisely) referred to as "permanent bars." See Reuben D. Peters, 84 SEC Docket 3497, 3499-3500 (Feb. 22, 2005); Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000) (noting that the term "permanent bar" is "more than a bit of a misnomer").