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UNITED STATES OF AMERICA
 Before the
 SECURITIES AND EXCHANGE COMMISSION
 April 30, 2007

In the Matter of	:	
	:	
ANTHONY C. SNELL and	:	ORDER PARTIALLY GRANTING
CHARLES E. LECROY	:	RESPONDENTS' MOTION TO
	:	STRIKE
	:	

On February 22, 2007, Respondents moved to strike from the Division of Enforcement's (Division) Posthearing Brief and from the Division's Proposed Findings of Fact and Conclusions of Law all references to an April 2002 transaction involving the Philadelphia International Airport (Motion to Strike). On February 28, 2007, the Division opposed Respondents' motion (Opposition). On March 5, 2007, Respondents replied to the Division's Opposition.

Background

The Order Instituting Proceedings (OIP) twice addresses Ronald A. White's (White) involvement with financing at the Philadelphia International Airport. In OIP ¶ I.I.C.5, it alleges that J.P. Morgan Securities, Inc. (JPM), "enlisted White's **legal** assistance on one **bond** issue involving Philadelphia International Airport which closed in April 2002. [JPM] paid White for his **legal** services on this offering" (emphasis added). In OIP ¶ I.I.C.7, it alleges that "White advocated for [JPM] to be included in a **swap** transaction involving the Philadelphia Airport, which closed in 2002" (emphasis added).

From the outset, it was unclear if the OIP was identifying one or two Airport financing transactions. It was also unclear whether the allegations, if proven, would demonstrate a violation of Municipal Securities Rulemaking Board (MSRB) Rule G-38. During the October 31, 2006, prehearing conference, at pages 8-10, I attempted to simplify and clarify this issue. See Rule 221(c)(1) of the Rules of Practice of the Securities and Exchange Commission. In a November 3, 2006, Order, I urged the Division to include in its prehearing brief a complete list of all municipal securities transactions subject to the jurisdiction of the MSRB it would actually put in issue for the hearing. The Division's prehearing brief did not identify either Airport transaction.

Nonetheless, the Division's posthearing pleadings argue that the Airport transaction—which it now identifies as a single deal with multiple components—is a basis for finding that Respondents violated MSRB Rule G-38.

Discussion

Respondents claim that they have been prejudiced by the Division's eleventh-hour change of position. Without actually admitting that it has done anything wrong, the Division's Opposition concedes that Respondents are at least partially right:

Consistent with its pre-hearing position, the Division does not seek a ruling that Respondents' payments to White for his direct or indirect communications with the City of Philadelphia to secure the Airport transaction for [JPM] violates Rule G-38 of the [MSRB]. However, the facts surrounding the Airport transaction, as well as its similarity to [two other] proposals, are relevant to the issues now before this Court.

Opposition at 1-2 n.1. The Division repeats this point in its Posthearing Reply Brief, filed March 5, 2007, at 20 n.26.

By failing to identify the April 2002 Airport transaction in its prehearing brief, the Division abandoned the opportunity to argue that White's conduct with respect to this transaction: (a) involved "municipal securities business" within the jurisdiction of the MSRB; or (b) involved anything other than legal work that is covered by the exclusion from the definition of a "consultant" in the applicable version of MSRB Rule G-38(a)(i)(B). The hearing was conducted, and the record developed, on that basis. The Division is bound by its prehearing concessions.

I will grant Respondents' Motion to Strike, in part. I strike the Division's Proposed Finding of Fact # 288(d). I will give no further consideration to the argument in the Division's Posthearing Brief at 8, 11, 13-14 that Respondents violated MSRB Rule G-38 in connection with the April 2002 Airport transaction.

I will deny Respondents' alternate request to reopen the record to present additional evidence about the structure of the Airport transaction.

SO ORDERED.


James T. Kelly
Administrative Law Judge