

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56741 / November 5, 2007

Admin. Proc. File No. 3-12443

In the Matter of the Application of
SISUNG SECURITIES CORPORATION
and
LAWRENCE J. SISUNG, JR.
For Review of Disciplinary Action Taken By
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Violation of Municipal Securities Rulemaking Board Rules

Alleged Violation of "Pay-to-Play" Prohibitions

Recordkeeping and Reporting Violations

NASD member firm and firm's president appeal findings that they engaged in municipal securities business with an issuer within two years of contributions to an official of such issuer, solicited contributions to an official of an issuer with which the firm was engaging in or seeking municipal securities business, and failed to record or report contributions. Held, findings of violation and sanctions imposed sustained in part and set aside in part.

APPEARANCES:

Thomas K. Potter, III, of Burr & Forman, LLP, for Sisung Securities Corporation and Lawrence J. Sisung, Jr.

Marc Menchel, Alan Lawhead, and Gary J. Dernelle, for NASD.

Appeal filed: September 27, 2006
Last brief received: January 3, 2007

Sisung Securities Corporation ("SSC"), an NASD member firm, and Lawrence J. Sisung, Jr. ("Sisung"), SSC's president, appeal from NASD disciplinary action. 1/ NASD found that SSC violated Municipal Securities Rulemaking Board ("MSRB") Rules G-37(b), 2/ G-37(c), 3/ G-37(e), 4/ G-8, 5/ and G-9, 6/ and that Sisung violated, or was responsible for SSC's violations of, MSRB Rules G-37(c), G-8, and G-9. 7/ NASD fined SSC \$20,000 for its violations of Rules G-37(b) and (c), fined Sisung \$20,000 for his violations of Rule G-37(c), fined SSC and Sisung \$10,000, jointly and severally, for the violations of Rules G-8 and G-9, and fined SSC \$10,000

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- 1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend its Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56148 (July 26, 2007), SEC Docket . Because the disciplinary action here was taken before that date, we continue to use the designation NASD.
- 2/ Rule G-37(b) provides that no "broker, dealer, or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by," among others, "any municipal finance professional associated with such broker, dealer, or municipal securities dealer."
- 3/ Rule G-37(c) prohibits a broker, dealer, municipal securities dealer, or associated municipal finance professional from soliciting any person to make any contribution, or coordinating any contributions, to an official of an issuer with which the broker, dealer, or municipal securities dealer is engaging in or pursuing municipal securities business.
- 4/ Rule G-37(e) provides that each broker, dealer, or municipal securities dealer shall report to the MSRB contributions to officials of issuers made by, among others, each municipal finance professional associated with such broker, dealer, or municipal securities dealer.
- 5/ Rule G-8 requires that every broker, dealer, or municipal securities dealer shall make and keep current, among other records, records reflecting "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional."
- 6/ Rule G-9 requires that every broker, dealer, or municipal securities dealer preserve records required to be kept by Rule G-8 for a period of not less than six years.
- 7/ NASD dismissed an allegation that SSC and Sisung violated MSRB Rule G-37(d). Rule G-37(d) prohibits any act, direct or indirect, through or by any other person or means, "which would result in a violation of sections (b) or (c) of this rule." A violation of Rule G-37(d) requires "a showing of culpable intent." Blount v. SEC, 61 F.3d 938, 948 (D.C. Cir. 1995). The conduct must be undertaken "as a means to circumvent" the requirements of Rules G-37(b) and (c). Id. NASD found no evidence Applicants engaged in conduct "in order to circumvent the proscriptions set forth in MSRB Rule G-37."

for its violations of Rule G-37(e). As discussed below, we sustain in part and set aside in part NASD's findings of violation. We base our findings on an independent review of the record.

II.

MSRB Rule G-37, the so-called "pay-to-play" rule, 8/ "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" by "provid[ing] specific prohibitions to help ensure that underwriter selection is based on expertise, not on the amount of money given to a particular candidate for office." 9/ Rule G-37 provides "substantial benefit to the industry and the investing public by reducing the direct connection between political contributions to issuer officials and the awarding of municipal securities business." 10/

NASD found that Applicants violated Rule G-37 by engaging in municipal securities business with Louisiana political subdivisions within two years of contributions to members of the Louisiana Bond Commission (the "Bond Commission"). 11/ NASD also found that Applicants violated related recordkeeping and reporting requirements by failing to record and report contributions to Bond Commission members as well as contributions to other Louisiana political officials. The facts of the case are largely undisputed.

8/ Order Approving Proposed Rule Change, Exchange Act Rel. No. 33868 (Apr. 7, 1994), 56 SEC Docket 1176 (hereinafter "Rule G-37 Order"). "Pay-to-play" practices include "a variety of ethically questionable practices" dealers use "to secure underwriting contracts." Blount, 61 F.3d at 939. "[T]hese practices substantially undermine the integrity of the municipal securities market." Rule G-37 Order, 56 SEC Docket at 1176. Rule G-37 "seeks to end 'pay to play' abuses in municipal securities underwritings." Id. at 1180.

9/ Morgan Stanley, 53 S.E.C. 379, 381 (1997) (quoting Rule G-37 Order, 56 SEC Docket at 1183). We have observed that, "[i]f underwriter selection is swayed by political contributions or influence, underwriters may be chosen based on their history of contributions or political contacts, rather than their expertise or competence." Rule G-37 Order, 56 SEC Docket at 1181. Rule G-37 therefore "further[s] merit-based competition between municipal securities dealers." Id. at 1182.

10/ Order Granting Approval of Proposed Rule Change, Exchange Act Rel. No. 47814 (May 8, 2003), 80 SEC Docket 494, 495 (hereinafter "May 2003 Order"). We have stated that Rule G-37 is intended to "make[] clear to municipal securities dealers and to officials of issuers that 'pay to play' practices should no longer be employed to obtain municipal securities business." Rule G-37 Order, 56 SEC Docket at 1182.

11/ The Louisiana Constitution defines a "political subdivision" as a "parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions." La. Const. art. VI, § 44.

Between at least February 27, 1998 and October 22, 2001, Sisung controlled, in addition to SSC, UPC, a "business and real-estate development and consulting firm," and SIMS, a registered investment adviser with approximately \$1 billion under management. 12/ SSC and UPC shared an office suite, and SIMS had an office adjacent to SSC and UPC. During this period, UPC and SIMS made thirty-nine contributions, by checks drawn on their accounts and signed or authorized by Sisung, to Louisiana elected officials. According to Sisung, UPC and SIMS made the contributions to further their own, rather than SSC's, legislative agendas. 13/

Sisung delivered each contribution to the official or the official's representative personally at campaign events for the elected official. The recipients' campaign finance reports list UPC and SIMS as the contributors. Applicants admit that SSC did not record the thirty-nine contributions in its books and records or report the thirty-nine contributions to the MSRB, but contend, without dispute by NASD, that UPC and SIMS recorded the thirty-nine contributions on their own books and records.

Fourteen of the thirty-nine contributions went to the state treasurer, secretary of state, president of the state Senate, and certain members of the Louisiana state legislature. 14/ Each of these officials, by virtue of the offices they held, served ex officio on the Bond Commission. 15/

12/ UPC refers to both United Properties Corporation ("United Properties") and United Professionals Company, LLC ("United Professionals"). United Properties existed until March 21, 2000, when United Properties merged with United Professionals, with United Professionals as the surviving entity. SIMS refers to both Sisung Investment Management Services, Inc., ("SIMS Inc.") and Sisung Investment Management Services, LLC ("SIMS LLC"). SIMS Inc. existed until March 21, 2000, when SIMS Inc. merged with SIMS LLC, with SIMS LLC as the surviving entity.

13/ In investigative testimony, Sisung testified that UPC "makes contributions to legislators who are both senators and representatives who enact legislation and take positions which affect the business opportunities of UPC." Sisung also testified that SIMS contributes to individuals who "take[] positions and pursue[] the positions of business as it pertains to SIMS, as it relates to legislation that is going to be drawn up by the legislators." Lane Sisung, SSC's in-house counsel and Sisung's son, testified that a legislator's position as an ex officio member of the Bond Commission "had absolutely nothing to do" with UPC's or SIMS's contributions. NASD did not introduce evidence demonstrating that the contributions were not made to further the interests of UPC and SIMS.

14/ Local elected officials, such as mayors, councilmen, aldermen, sheriffs, and school board members, received the remaining twenty-five contributions.

15/ The members of the Bond Commission include the governor, lieutenant governor, state treasurer, secretary of state, attorney general, president of the Senate, speaker of the House of Representatives, Senate Finance Committee chairman, Senate Revenue and

(continued...)

The Louisiana Constitution requires the Bond Commission's prior written approval before any bonds may be issued or sold by the state or by any political subdivision. All state general obligation bonds are issued and sold by the Bond Commission. Although the Bond Commission does not issue political subdivision bonds -- which are issued by the political subdivisions themselves -- under Louisiana statute the Bond Commission receives applications for bond issues from Louisiana political subdivisions and must "either approve[] or disapprove[] the application or defer[] action on the application for further discussion." 16/

Sisung testified that, after UPC and SIMS made the contributions, he consulted outside counsel regarding the effect of the contributions on SSC's ability to conduct business with the Bond Commission. Counsel advised Sisung "that contributions by [UPC] and SIMS to the campaigns of various State legislators and others serving ex officio on the [Bond Commission] might preclude SSC from conducting municipal securities business with the [Bond Commission] in its capacity as issuer, but did not preclude municipal securities business with . . . political subdivision issuers." Sisung testified that, after receiving the advice of his counsel, SSC did not conduct municipal securities business with the Bond Commission itself. SSC did, however, conduct municipal securities business with political subdivision issuers. From March 1, 1998 through December 1, 2002, SSC served as underwriter or financial adviser on twenty-one negotiated municipal bond issues of Louisiana political subdivisions. 17/

III.

Engaging in Municipal Securities Business Within Two Years of Contributions

NASD found that SSC violated MSRB Rule G-37(b) by engaging in municipal securities business with the Louisiana political subdivisions within two years of the contributions made by

15/ (...continued)
Fiscal Affairs Committee chairman, House Ways and Means Committee chairman, House Appropriations Committee chairman, commissioner of administration, and two members of the legislature -- one to be appointed by the president of the Senate and one to be appointed by the speaker of the House of Representatives. All members are thus first elected to a position that qualifies them for membership on the Bond Commission, except the commissioner of administration, who is appointed to that post by the governor. All Bond Commission members may enable another person to serve in their stead by proxy.

16/ La. Admin. Code tit. 71, Part III, § 101(D).

17/ Under Rule G-37(g)(vii), municipal securities business includes acting as an underwriter or financial adviser with respect to a negotiated primary offering of municipal securities.

UPC and SIMS to state elected officials who were members of the Bond Commission. ^{18/} Rule G-37(b) provides that no broker, dealer, or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by, among others, any municipal finance professional associated with such broker, dealer, or municipal securities dealer. We agree with NASD that the contributions at issue here were made by a municipal finance professional, Sisung, who was associated with a municipal securities dealer, SSC. ^{19/} Although Applicants argued before NASD, as they contend here, that Rule G-37(b) does not cover the contributions at issue in this case because the contributions were made by UPC and SIMS rather than Sisung, NASD found that "Sisung's imprimatur of each of the fourteen contributions made to Bond Commission members created, at a minimum, the appearance and perception that the contributions were being given by him." Thus, NASD found the contributions "attributable to Sisung for purposes of Rule G-37(b)." We consider NASD's analysis persuasive because interpretive guidance issued by the MSRB, which NASD found "decisive," provides that where, as here, a municipal finance professional signs or authorizes checks and delivers such contributions to an official personally, the contributions should be attributed to the municipal finance professional. ^{20/}

We therefore need to determine whether the contributions attributable to Sisung, a municipal finance professional, were made to an "official of an issuer," as defined in Rule G-37, with whom SSC engaged in municipal securities business. Rule G-37(g)(vi) defines "official of an issuer" as any person who was, at the time of the contribution, an incumbent or candidate

(A) 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, or

^{18/} As noted, NASD also found that SSC and Sisung violated Rule G-37(c) by soliciting the contributions. As discussed below, our analysis regarding NASD's findings related to Rule G-37(b) is applicable to the findings related to Rule G-37(c).

^{19/} A municipal finance professional includes, among others, "any associated person . . . who solicits municipal securities business." Rule G-37(g)(iv). Applicants stipulated that Sisung was a municipal finance professional as defined in Rule G-37(g)(iv).

^{20/} See Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G-37, MSRB Man. (CCH) ¶ 3681, at 5420 (Feb. 16, 1996) (stating that if "a municipal finance professional signs a check, whether the check was drawn on 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"); Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the MSRB Relating to Interpretation of Rule G-37, Exchange Act Rel. No. 36857 (Feb. 16, 1996), 61 SEC Docket 953, 954 (stating the MSRB's view that "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").

municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or 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. 21/

NASD acknowledged that Bond Commission members did not qualify as issuer officials under subsection (A) of the rule because they did not hold an "elective office of the issuer" of the bond offerings involved. 22/ NASD found, however, that Bond Commission members came within the language of subsection (B) because they "possess[ed] 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." 23/ In reaching this conclusion, NASD determined that it was "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.'" 24/

We acknowledge that the language of subsection (B) could be subject to different interpretations. Nevertheless, we believe that the more appropriate interpretation is that, to be an official of an issuer for purposes of subsection (B), a person must be an incumbent or candidate for an office with the authority to appoint another person who (a) is responsible for the hiring of a broker, dealer, or municipal securities dealer, or (b) can influence the outcome of the hiring of a broker, dealer, or municipal securities dealer. Thus, an official covered by this part of the Rule must have the identified appointing authority, that is, the power to appoint a person who has responsibility for or influence over the selection of a municipal securities dealer. The ability of

21/ Rule G-37(g)(vi) (emphasis added).

22/ NASD noted that 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." We agree with NASD that Bond Commission members do not satisfy subsection (A) of the rule with respect to offerings issued by political subdivisions.

23/ NASD acknowledged that SSC "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." It nonetheless found that Bond Commission members possessed the requisite authority over the awarding of municipal securities business by the political subdivision issuers with whom SSC did seek and conduct municipal securities business to render them officials of such issuers.

24/ NASD's Hearing Panel had dismissed the allegation that SSC violated Rule G-37(b) on the ground that, with respect to political subdivision issuers, Bond Commission members did not constitute "officials of such issuers" such that the contributions prohibited SSC from engaging in municipal securities business with the subdivisions.

the official to influence the selection is not itself sufficient. We believe that is the more natural reading of the language of subsection (B). It is consistent with the release adopting subsection (B), which stated that subsection (B) "addresses situations in which an elected official may appoint someone to an issuer position." ^{25/} It is also consistent with the structure of the preceding clause (A), which uses the identical phrase, "is directly or indirectly responsible for, or can influence the outcome of, the hiring," in its entirety to modify the word "office," while clause (B) uses that same phrase to modify the word "person" in the phrase "has the authority to appoint any person."

NASD's conclusion that Bond Commission members were issuer officials with respect to political subdivision issuers effectively read out of the definition the requirement that the elected official have the power to appoint a person with responsibility for or influence over the awarding of municipal securities business. We believe the language of subsection (B) requires the elected official to have such appointment authority and that, in the absence of such authority, Bond Commission members are not issuer officials of political subdivision issuers under the rule. ^{26/} Thus, the contributions at issue here did not subject SSC to a two-year ban on engaging in municipal securities business with Louisiana political subdivisions. The contributions also did not violate Rule G-37(c)'s prohibition against soliciting or coordinating contributions "to an official of an issuer" with which SSC was "engaging or seeking to engage in municipal securities business." We therefore set aside the findings that SSC violated Rule G-37(b), and that SSC and Sisung violated G-37(c), as well as the related sanctions.

^{25/} Exchange Act Rel. No. 37928 (Nov. 6, 1996), 63 SEC Docket 475, 478 (emphasis in original). "For example, a state may have certain issuing authorities whose boards of directors are appointed by the governor." Id. Subsection (A) does not render the governor an official of these issuing authorities, however, because "the governor, in this illustration, is not an incumbent or candidate for 'elective office of the issuer' (i.e., the state authority)." Thus, under subsection (A), a "contribution to the governor would not prohibit a dealer from engaging in business with the state authority." Id. Subsection (B) "was intended to include the governor as an official of the issuer [the state authority] in such circumstances." Id. Contributions to the governor would therefore prohibit a dealer from engaging in municipal securities business with the state authority under subsection (B) because the governor appointed the members of the board of directors of that issuer.

^{26/} NASD declined to adopt, and does not pursue before us, the argument advanced by its enforcement staff that the president of the Louisiana Senate, who received contributions and had the authority to appoint a member of the Bond Commission, see supra note 15, satisfied the requirements of subsection (B). According to NASD, it did not adopt this theory because the member appointed by the Senate president "possess[ed] no greater or lesser authority than the other members of the Bond Commission."

Although we are setting aside certain of NASD's findings of violations of Rule G-37, we wish to reemphasize our view that "Rule G-37 serves a compelling government interest" 27/ and "is essential to diminish pay-to-play practices in the municipal securities market." 28/ We also wish to express our concern about the potential for improper influence that the kinds of contributions at issue in this case present. Although the record here contains no evidence that the contributions actually influenced the awarding of municipal securities business, it is nevertheless conceivable to us that they could. We consequently encourage the MSRB to consider whether it may be appropriate to amend the rules at issue to address the kind of situation presented here. 29/

Violations of Recordkeeping and Reporting Requirements

NASD also found that SSC, acting through Sisung, violated MSRB Rules G-8 and G-9, and that SSC violated Rule G-37(e), by failing to record and report the thirty-nine contributions. 30/ Rule G-8 requires that every broker, dealer, or municipal securities dealer make and keep current, among others, records reflecting "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional." Rule G-9 requires that these records be preserved for a period of not less than six years. Rule G-37(e) requires that each broker, dealer, or municipal securities dealer report to the MSRB contributions to officials of issuers made by, among others, each municipal finance professional associated with the broker, dealer, or municipal securities dealer.

NASD found that SSC violated Rules G-8 and G-9, holding that "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" under Rule G-8(a)(xvi). NASD held Sisung responsible for these violations because Sisung was SSC's president and because he was responsible for the firm's books and records.

27/ Morgan Stanley, 53 S.E.C. at 381.

28/ May 2003 Order, 80 SEC Docket at 495.

29/ In making this observation, we are mindful of the limits the Constitution places on restrictions related to political speech. See Blount, 62 F.3d at 947 (upholding Rule G-37 against constitutional challenge based on finding that it restricts a "narrow range" of underwriter activities); Rule G-37 Order, 56 SEC Docket at 1183 (stating that Rule G-37 "minimizes any undue burdens on the protected speech" of municipal securities dealers and municipal finance professionals because it is "narrowly crafted in terms of the conduct it prohibits, the persons who are subject to the restriction, and the circumstances under which it is triggered"). We therefore recognize that the MSRB must be careful, in considering any amendment to the rule, to consider constitutional limitations.

30/ NASD's complaint did not charge Sisung with responsibility for SSC's violation of Rule G-37(e).

NASD found that SSC violated Rule G-37(e) on the ground that Rule G-37(e) "requires that a dealer report to the Board those contributions that are required to be recorded pursuant to MSRB Rule G-8(a)(xvi)" and thus "those contributions indirectly effected by a dealer's municipal finance professionals through affiliated entities."

We agree with NASD's findings of recordkeeping and reporting violations. Rules G-8 and G-9 require a dealer to record contributions made by affiliated companies where, as here, a municipal finance professional associated with the dealer directed the contributions. ^{31/} Rule G-37(e) requires that such contributions be reported to the MSRB. ^{32/} Rules G-8, G-9, and G-37(e) apply to any "official of an issuer" and are not restricted to officials of issuers with which the municipal securities dealer has engaged in municipal securities business. Applicants do not dispute that Bond Commission members constitute issuer officials with respect to municipal securities issued by the Bond Commission. Applicants also do not dispute that the recipients of the other twenty-five contributions, although not members of the Bond Commission, were also issuer officials and that, therefore, those contributions triggered recording and reporting obligations by SSC. As noted, SSC admittedly did not record the contributions in its books and records or report the contributions to the MSRB.

Applicants contend that SSC did not violate Rules G-8 and G-9 because "Rule G-8(b) allowed SSC to rely on the on-premises records maintained by UPC and SIMS without having to make extra copies to keep next to them." We agree with NASD's conclusion that Rules G-8 and G-9 required SSC's own records to contain information on the contributions. Although Rule G-8(b) states that a municipal securities dealer need not "maintain the books and records required by this rule in any given manner," the rule does not provide that they may be maintained by a different entity. The MSRB has stated in an interpretive letter, moreover, that a record "that can only be put together on request" from information maintained by another entity does not satisfy the requirements of the rule. ^{33/} Indeed, as NASD noted, NASD did not, and could not, discover the contributions through an examination of SSC's books and records. An NASD examiner discovered the contributions only by reviewing campaign finance reports. The failure to record contributions directed by a municipal finance professional associated with a municipal securities dealer in the dealer's own books and records thwarts the purpose of the recordkeeping

^{31/} Rule G-37 Order, 56 SEC Docket at 1180 (stating that Rule G-8 and G-9 do not require dealers to maintain a list of contributions by, among others, "affiliate companies," "unless the contributions were directed by persons or entities," such as a municipal finance professional -- which Sisung was -- "subject to . . . rule G-37") (emphasis added).

^{32/} See Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business, MSRB Man. (CCH) ¶ 3681, at 5430 (May 24, 1994) (stating that the contributions required to be reported include "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional").

^{33/} MSRB Man. (CCH) ¶ 3536.53, at 3671.

provisions "to facilitate compliance and examinations with the goal of promoting investor confidence in the integrity of the municipal securities market." 34/

Applicants contend further that "Rules G-8 and G-9 apply only to brokers, dealers and municipal securities dealers, but not to individual [municipal finance professionals]; thus, NASD erred by holding Sisung individually liable for their violation." Sisung, however, was SSC's president. We have held that the "president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties." 35/ The evidence established that Sisung did not delegate this responsibility but, in fact, was SSC's designated principal responsible for books and records. Under the circumstances, we agree with NASD's conclusion that Sisung was "responsible for the Firm's violations of MSRB Rules G-8 and G-9." 36/

Although MSRB Rule D-11 states that the terms broker, dealer, and municipal securities dealer "shall refer to and include their respective associated persons" unless a rule of the Board otherwise specifically provides, Applicants argue that Rule G-8(a)(xvi)(I) excludes associated persons from liability for a municipal securities dealer's failure to maintain the records required by Rules G-8 and G-9 because Rule G-8(a)(xvi)(I) states that the "[t]erms used in this paragraph (xvi) have the same meaning as in rule G-37," and rule G-37 states that "[t]he term broker, dealer, or municipal securities dealer . . . does not include its associated persons." Rule G-8(a)(xvi)(I), however, relates only to the type of information that must be maintained pursuant to paragraph (xvi). Rule G-8(a)(xvi)(I) does not contradict Rule D-11 or relieve associated persons with responsibility for the firm's books and records from complying with Rule G-8. 37/

Applicants also contend that "the contributions [effected through UPC and SIMS] need not have been reported" because "Rule G-37(e)'s reporting requirement sets out a specific list of those whose contributions must be reported" and does not include affiliated companies or

34/ Rule G-37 Order, 56 SEC Docket at 1176.

35/ Steven P. Sanders, 53 S.E.C. 889, 904 (1998); Kirk A. Knapp, 50 S.E.C. 858, 862 (1992).

36/ James Michael Brown, 50 S.E.C. 1322, 1325-26 (1992) (finding firm's president responsible for firm's failure to comply with recordkeeping requirements), aff'd, 21 F.3d 1124 (11th Cir. 1994) (Table); see also Mark James Hankoff, 48 S.E.C. 705, 707-08 (1987) (finding firm's president responsible for firm's recordkeeping violations); cf. SEC v. Softpoint, Inc., 958 F. Supp. 846, 866 (S.D.N.Y. 1997) ("As President of Softpoint, Stoecklein was responsible for the accuracy of Softpoint's books and records."), aff'd, 159 F.3d 1348 (2d Cir. 1998) (Table).

37/ Cf. Nicholas A. Codispoti, 48 S.E.C. 842, 844 n.8 (1987) ("The obligations imposed on dealers in municipal securities by the MSRB's rules are also applicable to associated persons.").

"contain the 'indirect' language found in Rule G-8(a)(xvi)." The MSRB, in question-and-answer guidance, however, has stated that the contributions which must be disclosed to the MSRB are those contributions "required to be recorded pursuant to rule G-8(a)(xvi)." ^{38/} As discussed, Rule G-8(a)(xvi) requires recording "contributions, direct or indirect, to officials of an issuer made by each municipal finance professional."

Although Applicants argue that the question-and-answer guidance "cannot supersede the language of the Rule itself," the MSRB filed this question-and-answer guidance with the Commission as a "proposed rule change to provide interpretative guidance concerning rule G-37." ^{39/} According to the MSRB, it filed the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Board." ^{40/} The Board stated that it "determined to publish this notice of interpretation which provides, in question-and-answer format, general guidance on rule G-37" in order "to assist the municipal securities industry and, in particular, brokers, dealers and municipal securities dealers in understanding and complying with the provisions of the rule." ^{41/} The MSRB filed this question-and-answer guidance with the Commission on May 24, 1994, and published this question-and-answer guidance in the June 1994 issue of the MSRB Reports, approximately two months after Rule G-37 became effective. ^{42/} The question-and-answer guidance, therefore, is a longstanding interpretation of the requirements of Rule G-37(e). ^{43/} We thus agree with NASD's conclusion that SSC "violated MSRB Rule G-37(e) by failing to report the relevant contributions to the Board."

^{38/} Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business, MSRB Man. (CCH) ¶ 3681, at 5430 (May 24, 1994).

^{39/} See Notice of Filing and Immediate Effectiveness of Proposed Rule Change, Exchange Act Rel. No. 34161 (Jun. 6, 1994), 56 SEC Docket 2679, 2679 & n.1 (hereinafter "June 1994 Notice") and MSRB Reports, Vol. 14, No. 3, at 16.

^{40/} June 1994 Notice, 56 SEC Docket at 2679.

^{41/} Id.

^{42/} See June 1994 Notice, 56 SEC Docket at 2679 n.1; MSRB Reports, Vol. 14, No. 3, at 16.

^{43/} See also MSRB Rule A-8(b) (stating that opinions and interpretations of rules of the MSRB rendered by the Board "shall represent the Board's intent in adopting the rules which are the subject of such opinions and interpretations").

IV.

Applicants claim that the Equal Access to Justice Act (the "EAJA") applies to this proceeding. Under the EAJA, 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 special circumstances make an award unjust." 44/ As relevant here, an "adversary adjudication" is an adjudication under Section 554 of the Administrative Procedure Act "in which the position of the United States is represented by counsel or otherwise." 45/ "It is beyond cavil that the NASD is not a government agency; it is a private, not-for-profit corporation." 46/ "[T]he Administrative Procedure Act does not apply to proceedings before the NASD." 47/ The position of the United States, moreover, is not represented in NASD proceedings. 48/ The EAJA thus does not apply here because, as we have stated, "the [EAJA] does not apply to proceedings before self-regulatory organizations." 49/

V.

Section 19(e)(2) of the Securities Exchange Act of 1934 requires that we sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 50/ As noted, we are unable to find violations of MSRB Rules G-37(b) or (c) on this record, and thus have set aside NASD's sanctions with respect to these alleged violations. With respect to the fines NASD imposed for the violations of Rules G-8, G-9, and G-37(e), which we sustain, we conclude that, on the facts of this case, those sanctions are not excessive or oppressive and appropriately protect investors and the public

44/ 5 U.S.C. § 504(a)(1).

45/ Id. § 504(b)(1)(C).

46/ United States v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000), abrogated on other grounds by United States v. Coppa, 267 F.3d 132 (2d Cir. 2001).

47/ First Choice Sec. Corp., 50 S.E.C. 1167, 1172 (1992).

48/ D.L. Cromwell Invs. v. NASD Regulation, 279 F.3d 155, 162 (2d Cir. 2002) ("[N]or does the government appoint [NASD] members or serve on any NASD board or committee."); Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999) (same).

49/ Equal Access to Justice Act Rules, Exchange Act Rel. No. 18349 (Dec. 18, 1981), 24 SEC Docket 436, 436.

50/ 15 U.S.C. § 78s(e)(2). Applicants do not claim, and the record does not show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

interest by deterring Applicants and other municipal securities dealers from engaging in similar misconduct in the future.

NASD imposed a \$10,000 fine, jointly and severally, on SSC and Sisung for the violations of Rules G-8 and G-9 and a \$10,000 fine on SSC for the violations of Rule G-37(e). The Sanction Guideline for Rule G-8 recommends a monetary fine of \$1,000 to \$10,000 or, in egregious cases, \$10,000 to \$100,000, as well as, in appropriate cases, a suspension, bar, or expulsion. ^{51/} No separate guideline exists for violations of Rule G-9. NASD thus "impose[d] a unitary sanction for violations of both rules" using the guideline for Rule G-8. NASD found "the absence of culpable intent, the aberrant nature of the Firm's misconduct, and the Firm's regulatory cooperation to be mitigative" in imposing the \$10,000 fine and in declining to impose additional sanctions. The Sanction Guideline for Rule G-37(e) recommends a monetary fine of \$1,000 to \$5,000 for a failure to report and, in egregious cases, a suspension. ^{52/} NASD "impose[d] a monetary sanction above the range recommended in lieu of a suspension of the Firm."

Applicants do not address the sanctions in their briefs, and we believe, with consideration for the public interest and the protection of investors, that the fines that NASD imposed are not excessive or oppressive. Exchange Act Section 15A(b)(7) authorizes NASD to impose fines, among other sanctions, in response to violations of the rules of the MSRB. ^{53/} As noted with respect to the Commission's authority to impose civil money penalties in its own enforcement actions, the ability to impose fines for securities law violations "greatly increase[s] deterrence, while also providing . . . the flexibility to tailor a remedy to the gravity of a violation." ^{54/} Fines, therefore, may be appropriate to enable NASD, after finding that a specific firm violated

^{51/} NASD Sanction Guidelines 34 (2001 ed.). The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. *Id.* at 1. Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. *Id.* The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidelines for NASD Adjudicators -- which the Guidelines define as Hearing Panels and the National Adjudicatory Council. *Id.* Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

^{52/} *Id.* at 80.

^{53/} 15 U.S.C. § 78o-3(b)(7).

^{54/} H.R. Rep. No. 101-616, at 17 (1990), as reprinted in 1990 U.S.C.C.A.N. 1379, 1384.

the securities laws, to deter that firm -- and the responsible firm personnel -- from committing future violations without imposing sanctions unnecessary to remedy the misconduct. 55/

Applicants violated the MSRB's recordkeeping and reporting requirements. These requirements "facilitate enforcement of rule G-37's 'pay-to-play' restrictions and, independently, . . . function as a public disclosure mechanism to enhance the integrity of and public confidence in municipal securities underwritings." 56/ However, SSC and Sisung failed to record or report thirty-nine political contributions between 1998 and 2002. As noted above, NASD did not impose a suspension, expulsion, or bar. The fines imposed by NASD will encourage Applicants' compliance with the recordkeeping and reporting requirements that, as noted above, facilitate enforcement of Rule G-37 and enhance the integrity of and public confidence in municipal securities underwritings.

"The public interest requires that appropriate sanctions be imposed to secure compliance with the rules, regulations, and policies of both NASD and SEC," 57/ as well as, as here, those of the MSRB. The fines that NASD imposed here protect investors and the public interest by ensuring that Applicants, who remain in the municipal securities business, as well as others in the industry, take their responsibilities to record and report contributions seriously in the future. Under the circumstances, we find the relatively lenient sanctions that NASD imposed necessary in the public interest and for the protection of investors and neither excessive nor oppressive.

An appropriate order will issue. 58/

By the Commission (Chairman COX and Commissioners NAZARETH and CASEY);
Commissioner ATKINS not participating.

Nancy M. Morris
Secretary

55/ Situations exist where, for some firms, a censure may provide relatively little deterrence against future violations, but a suspension or expulsion of the firm's membership would impose hardship on the firm's customers, public shareholders, and innocent employees. Through the imposition of a fine, NASD can impose a sanction "more severe than a slap on the wrist" without the unwarranted adverse consequences of a suspension or expulsion. Cf. H.R. Rep. No. 101-616, at 18.

56/ Rule G-37 Order, 56 SEC Docket at 1180.

57/ Boruski v. SEC, 289 F.2d 738, 740 (2d Cir. 1961).

58/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56741 / November 5, 2007

Admin. Proc. File No. 3-12443

In the Matter of the Application of
SISUNG SECURITIES CORPORATION
and
LAWRENCE J. SISUNG, JR.
For Review of Disciplinary Action Taken By
NASD

ORDER SUSTAINING IN PART AND SETTING ASIDE IN PART DISCIPLINARY
ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that NASD's findings that Sisung Securities Corporation and Lawrence J. Sisung, Jr. violated Rules G-37(b) and (c) of the Municipal Securities Rulemaking Board be, and they hereby are, set aside; and it is further

ORDERED that the sanctions imposed for these findings of violation be, and they hereby are, set aside; and it is further

ORDERED that NASD's findings that Sisung Securities Corporation violated Rules G-8, G-9, and Rule G-37(e) of the Municipal Securities Rulemaking Board, and that Lawrence J. Sisung, Jr. was responsible for the violations of Rules G-8 and G-9, and the sanctions imposed by NASD for these violations be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary