Ballard Spahr LLP

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Municipal Securities Regulation & Enforcement

2023 YEAR IN REVIEW AND LOOK AHEAD

U.S. Securities and Exchange Commission (SEC) Chair Gary Gensler continued to pursue a robust municipal market rulemaking and enforcement agenda in 2023. The SEC aimed its enforcement efforts at municipal market intermediaries—so-called “gatekeepers,” such as underwriters, broker-dealers, municipal advisors, and auditors. Throughout the year, the SEC also continued charging firms with failing to meet the limited offered exemption requirements of Rule 15c2-12. In the municipal advisor space, the SEC brought charges against a municipal advisor for violating its fiduciary duty under Municipal Securities Rulemaking Board (MSRB) Rule G-42, specifically the municipal advisor’s duty of care. In addition, the SEC maintained its focus on individual liability for market participants alleged to have committed securities law violations.

On the regulatory front, the SEC announced its priorities and exam focus for 2024, which include a focus on solicitor municipal advisors meeting their new obligations under MSRB Rule G-46 and broker-dealers meeting their obligations under Regulation Best Interest (Reg BI.) Some market participants have raised concerns with the fast pace of the SEC’s rulemaking and perceived lack of expertise in certain areas of the municipal securities markets.

With respect to the MSRB, its 2023 focus centered on modernizing and updating its rules and guidance—including rules covering requalifications, recordkeeping, and uniform practices. For its part, FINRA initiated enforcement actions against broker-dealers for violations of the markup and markdown disclosure requirements of MSRB Rule G-15.

SEC and FINRA Enforcement Actions

SEC Charges Another Firm for Failure to Meet Requirements for Limited Offering Exemption

On July 18, 2023, the SEC announced an enforcement proceeding—its seventh in this space since 2022—against an underwriter for alleged violations of municipal bond offering disclosure requirements under Rule 15c2-12 of the Securities Exchange Act of 1934, as amended (the Rule). The Rule establishes certain requirements in connection with primary market and continuing disclosures to be provided to investors, unless an exemption applies.

Under the terms of the Rule, a limited offering exemption is available for offerings sold in $100,000 authorized denominations if the securities are sold to no more than 35 persons whom the underwriter reasonably believes (i) have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the investment (the sophisticated investor clause) and (ii) are not buying the securities for more than one account or with a view to distributing the securities (the investment purpose clause).

IN THIS ISSUE:

SEC and FINRA Enforcement Actions 1

MSRB Rulemaking 5

SEC Risk Alert and Rulemaking 6

Conclusion..8

The SEC alleged that during the course of 79 limited offerings from March 2018 to September 2022, the underwriter sold securities to broker-dealers and certain investment advisors without meeting the requirements of the limited offering exemption. Specifically, the SEC alleged that the underwriter lacked a sufficient basis to believe that the purchasers were buying for their own investment purposes. According to the SEC, in addition to violating the Rule, the underwriter also violated MSRB Rule G-27 for not adopting, maintaining, and enforcing written supervisory procedures reasonably designed to ensure compliance with the Rule.

Under the SEC's order, the underwriter must cease and desist from future violations of the Rule or MSRB Rule G-27. The underwriter also was ordered to pay disgorgement in the amount of $442,465.59, prejudgment interest in the amount of $67,506.09, and a civil penalty of $200,000.00. A copy of the order can be found here.

SEC Settles With California Municipal Advisor Over Breach of Fiduciary Duty

The SEC announced on September 25, 2023, that it settled claims against a registered municipal advisor and one of its principals for fiduciary duty violations under MSRB Rule G-42, including a duty of care. The duty of care requires that a municipal advisor possess the requisite knowledge and expertise to provide advice, make a reasonable inquiry relevant for a client to decide whether to proceed with a course of action, and have a reasonable basis for the advice given to client. The SEC's order found that between October 2018 and July 2019 the municipal advisor and its principal made several defective presentations to a California city concerning cost analyses for different financing options in connection with a community project.

According to the SEC, the presentations contained comparisons of several financing alternatives for the community project, including all-cash financing, all debt with varying maturity dates, and hybrid options using a combination of cash and debt with varying maturity dates. According to the SEC, the municipal advisor's model for calculating the net present value (NPV) of the various financing options contained erroneous assumptions that resulted in the 100-percent debt option with the longest maturity appearing to be the least expensive, which was not the case. The SEC found other financing options would have resulted in greater savings (in comparison with the all-debt and longest-maturity option) on a NPV basis.

The SEC's order found that the municipal advisor and its principal violated Section 15B(c)(1) of the Securities Exchange Act of 1934, and Rules G-17 and G-42(a)(ii) of the Municipal Securities Rulemaking Board. Without admitting or denying the findings, the municipal advisor and its principal agreed to settle the charges and cease and desist from future violations of those provisions. The municipal advisor agreed to pay a civil penalty of $60,000, disgorgement of $55,548.50, and prejudgment interest of $11,368.77. The firm's principal agreed to pay a civil penalty of $30,000.

SEC Announces Antifraud Settlement With Audit Firm and Its Principal Relating to School Board Audit

On September 29, 2023, the SEC announced the settlement of claims against a New Orleans-based audit firm and its principal. The SEC's complaint was filed in U.S. District Court for the Northern District of Georgia. In the complaint, the SEC alleged that the firm, through its principal, issued an auditor's report stating that it conducted the audit of the school board's fiscal year 2019 financial statements in accordance with Generally Accepted Audit Standards (GAAS). According to the SEC's complaint, the firm and its principal did not comply with GAAS and the school board's financial statements contained various errors, which needed to be corrected.

The complaint further alleged that due to the audit firm and its principal's misconduct, the school board unknowingly used the auditor's report, with the false statement that the audit had been performed in accordance with GAAS, to sell $120 million of bonds to an investor. The SEC's complaint indicates an investor bought the bonds while under the misimpression that the financial statements had been audited in accordance with GAAS.

Under Louisiana state law, local governmental entities are required to submit audited financial statements to the Louisiana Legislative Auditor within six months of the entity's fiscal year-end. The school board's 2019 financial statements were due by January 2, 2020. According to the SEC's complaint, the audit firm's principal signed the audit report on January 2, 2020, and backdated it to December 18, 2019.

The SEC's complaint further alleged that although the audit report was signed January 2, 2020, and submitted with audited financial statements to the Louisiana Legislative Auditor and MSRB's Electronic Municipal Market Access website (EMMA), the auditors continued to actively work on material aspects of the audit between December 18, 2019, and at least January 14, 2020. On January 9, 2020, employees of charter schools within the school board district identified errors in the audited financial statements, including an overstatement of revenues and expenses. The auditors subsequently revised the financial statements and identified and corrected other errors, including missing tables. According to the SEC's complaint, the audit firm and its principal did not revise the auditor's report, change the date on the report, or provide an additional date that was limited to the revision after identifying and correcting the errors in the financial statements.

The auditing firm and its principal agreed to a permanent injunction against future violations of Section 17(a)(2) and 17(a)(3) of the Securities Act of 1933. Additionally, the firm's principal agreed to a conduct-based injunction, which would prevent the principal from serving as the engagement manager, engagement partner, or engagement quality reviewer in connection with any audit of financial statements or audit report which the principal should reasonably expect to be submitted to EMMA. The audit firm agreed to a conduct-based injunction to prevent it from participating in the audit of financial statement, which the firm should reasonably expect to be submitted to EMMA. The firm and its principal agreed to be held jointly and severally liable to pay disgorgement and prejudgment interest totaling $12,826 and consented to pay civil penalties of $20,000 and $10,000, respectively.

FINRA Fines Municipal Securities Dealer for TRACE and RTRS Reporting Violations

On October 20, 2023, FINRA and Odeon Capital settled allegations by FINRA that the municipal securities dealer failed to timely report 640 trades to the Trade Reporting and Compliance Engine and incorrectly reported 130 internal trades as securitized products transactions in violation of FINRA Rules 3110 and 2010. FINRA also alleged that Odeon Financial failed to timely report 225 trades to the MSRB's Real-Time Transaction Reporting System and reported 3,250 internal transfers as municipal securities transactions in violation of MSRB Rule G-14. FINRA also alleged related supervisory procedure failures. Odeon Capital agreed to pay a $100,000 fine.

FINRA Fines Municipal Securities Dealer for Markup And Markdown Disclosure Violations

On October 29, 2023, FINRA and a broker-dealer settled allegations by FINRA that the broker-dealer failed to include markup, markdown, and other information on customer confirmations for municipal securities transactions in violation of MSRB Rule G-15; failed to comply with certain reporting requirements in violation of MSRB Rule G-14; and failed to establish and maintain sufficient supervisory procedures in violation of MSRB Rule G-27.

MSRB Rule G-15 requires that, at or before completing a municipal securities transaction, the dealer send the customer a written confirmation that includes the time of execution and also the dealer's markup or markdown for the transaction. FINRA alleged that in transactions between May 2018 and July 2021, the broker-dealer did not provide the required trade confirmation information to customers. According to FINRA, the broker-dealer included its markup or markdown only as a percentage of prevailing market price in 108 customer confirmations and did not include markdowns at all in 372 customer confirmations. Additionally, FINRA alleged that the broker-dealer did not provide execution times in 2,183 customer confirmations. Regarding MSRB Rule G-14 violations, FINRA alleged that the broker-dealer did not correctly apply non-transaction based compensation indicators to reports to the MSRB's Real-time Transaction Reporting System.

The broker-dealer agreed to pay a $50,000 fine. A copy of the FINRA Letter of Acceptance, Waiver, and Consent can be found here.

Former Mayor of Sterlington, Louisiana Agrees to Pay $35,000 Fine for His Role in Municipal Private Placements

On November 6, 2023, the district court entered a final judgment against the former Mayor of Sterlington, Louisiana in connection with fraud claims brought against

the former mayor concerning the mayor's role in the private placement of two municipal bond offerings.

In accordance with Louisiana law, the Town of Sterlington applied for written approval from the Louisiana State Bond Commission for two series of bonds in 2017 and 2018 totaling $5.8 million. The bonds were utility revenue bonds and purported to finance upgrades to the town's sewer system. The SEC alleged that the former mayor, in conjunction with the town's Texas-based municipal advisor submitted false financial projections that overstated the number of historical and projected sewer customers in order to mislead the Louisiana State Bond Commission as to the town's ability to cover debt service on the bonds. Additionally, the SEC charged the former mayor for failing to disclose that more than $3 million from one of the town's previous bond offerings, which was intended for sewer upgrades, was actually used to pay for sports complex improvements, town legal fees, and payroll.

LeeAnn Gaunt, the Chief of the SEC's Public Finance Abuse Unit, emphasized that investors had a right to know that the town had obtained approval of the bond offerings based on false projections and that it had misused proceeds from the prior bond offering. Ms. Gaunt also emphasized the need for financial advisors to comply with registration requirements before providing municipal advice, stating that the SEC will "vigorously pursue" firms that do not comply.

The settlement requires the former mayor to pay a $35,000 civil penalty and permanently bars him from participating in future municipal securities offerings. The municipal advisor firm agreed in August 2022 to a final judgment for its role in calculating the financial projections and for failing to register as a municipal advisor with the SEC, which required it to pay disgorgement of $26,303, prejudgment interest of $6,642.88, and a $200,000 civil penalty. The case represents a continuance of the SEC's general hesitation to bring enforcement actions directly against municipalities due to the negative impact such actions have on taxpayers. A copy of the final judgment can be found here.

SEC Settles With Former Head of Municipals of a New York Financial Advisory Firm

On December 7, 2023, the former managing director of the municipal bond division of a New York broker-dealer with more than $1 billion under management agreed to settle SEC claims accusing the director of disregarding his obligations as a broker-dealer and violating anti-fraud provisions concerning the recommendation of certain variable interest rate structured products (VRSPs).

The SEC claimed that the director made more than 140 recommendations of VRSPs to seven retail investors, and that the director "knew, was reckless in not knowing, or should have known" that the investments were unsuitable due to the investors' moderate risk tolerance. The director was accused of making material misrepresentations to the investors by failing to identify the unsuitability of the investments and falsely telling multiple customers that the VRSPs would pay at par when they reached maturity. Additionally, the managing director allegedly made unauthorized trades on the investors' accounts, collecting at least $1 million in compensation while customers incurred significant losses. The director did not admit or deny the allegations but agreed to be barred from the industry for 10 years.

The SEC concurrently settled an administrative proceeding against the financial advisory firm, alleging that 14 of its brokers had recommended VRSPs to 48 customers which, according to the SEC, were "unsuitable in light of the customers' financial situations and needs, as reflected by their risk tolerance, investment objectives, age, investment experience, liquidity needs, and investment time horizon." The firm was ordered to pay $221,135 in disgorgement and a $2,300,000 civil penalty. A former broker at the financial advisory firm also settled charges alleging that he made unsuitable recommendations of VRSPs to four customers and made materially false and misleading statements about the investments. The broker agreed to a 12-month ban on associating with investment companies, payment of disgorgement and prejudgment interest equal to $29,973, as well as a $25,000 civil penalty. A copy of the orders can be found here and here.

MSRB Rulemaking

Municipal Securities Rulemaking Board's (MSRB) Fiscal Year 2024 Priorities Include New Regulations, EMMA Updates

The MSRB has stated that its focus for fiscal year 2024 will be on market regulation, improving data for the municipal securities market, and working to update its technology platform. The MSRB will continue working toward implementation of its 2022-2025 strategic plan (Strategic Plan), first introduced in 2022.

As the MSRB continues to modernize its rule book, it has focused on making sure its rules are harmonized with other regulatory bodies, such as the SEC and FINRA. Additionally, the MSRB is planning on retiring approximately 20 percent of what it considers to be outdated interpretative guidance, much of which is more than 40 years old.

The MSRB recently requested comments to Rule G-12 regarding uniform practice. The rules would codify existing interpretative guidance on confirmation disclosure requirements for inter-dealer municipal securities transactions and reorganize the content of the text to align with Rule G-15 on confirmation, clearance, and settlement, as well as other uniform practice requirements. The draft amendments are not aimed at imposing any new burden on regulated entities, rather they seek to facilitate compliance and reduce unnecessary burdens. Some guidance will be partially retained, and in the future, published as consolidated FAQs. Rule G-12 has not been updated since 1995, partly because the vast majority of inter-dealer trades are eligible for automated comparison and thus are not subject to the provisions of Rule G-12.

The MSRB also plans to implement amendments to Rule G-14, which change the trade reporting window for dealers to one minute, an effort being made in close coordination with FINRA to ensure that time and trade reporting rules are harmonized.

The MSRB is supporting updates to its technology and data as part of its Strategic Plan, including strategies to launch a new EMMA system.

The MSRB will welcome a handful of new board members in fiscal year 2024, including Alexander Chilton, Managing Director and Head of Municipal Securities at Morgan Stanley; Michael Craft, Senior Credit Analyst at Genworth Financial; Pamela Frederick, Chief Financial Officer and Treasurer of the Battery Park City Authority; Wendell Gaertner, Senior Managing Director of Public Resources Advisory Group; and ChrisKendall, Managing Director of Fixed Income Trading at Charles Schwab. Additionally, former Ballard Spahr and SEC attorney Ernesto Lanza returned to the MSRB as Chief Regulatory and Policy Officer.

MSRB Received SEC Approval to Amend MSRB Rules G-3 and Rule G-8

On July 25, 2023, the MSRB filed proposed amendments to Rule G-3 regarding the requalification of municipal advisors by examination, as well as related amendments to Rule G-8 establishing related recordkeeping requirements. The MSRB received approval for the amendments on September 12, 2023.

The amendments to Rule G-3 establish a new, criteria-based exemption allowing municipal advisor representatives whose qualification has lapsed to requalify based on the criteria-based exemption, without having to retake the Series 50 exam. The amendments replace Rule G-3's current provisions providing for waivers from examination in extraordinary cases.

Previously, Rule G-3(d)(ii)(B) required any person who ceased to be associated with a municipal advisory for two or more years after having qualified as a municipal advisory representative to retake the Series 50 exam prior to being re-qualified, unless a waiver was granted. The amendments eliminate the waiver provisions, instead providing for an exemption based on nine specified conditions. In order to meet the exemption, individuals must have previously passed the Series 50 exam and maintained their qualification for at least three consecutive years while engaging in municipal advisory activities. Individuals have one year from the date of the lapse in qualification to requalify, and the individual must not have engaged in municipal advisory activities requiring qualification during their lapse period. The rule provides for a one-time exemption, meaning that if an individual's municipal advisory representative

qualification lapses again after obtaining the exemption, that individual would be required to requalify by retaking and passing the Series 50 exam. The amended Rule G-3 also requires certain continuing education to be completed, and compliance procedures to be reviewed, prior to the individual re-engaging in municipal advisory activities.

Additionally, new language was added to the rule to clarify questions pertaining to a lapse in qualification for an individual associated with a dually registered firm that is both a dealer and municipal advisor. Specifically, if an individual associated with such firm ceased to be engaged in activities requiring qualification as a municipal advisory representative and instead engaged only in municipal securities business on behalf of the firm for a period of two or more years, then that individual's municipal advisor representative qualification is considered to have lapsed, notwithstanding the fact that such person remains associated with a firm that is also a registered municipal advisor. Such persons would need either to requalify by examination or obtain the one-time exemption.

The amendments are part of the MSRB's strategic initiative to modernize its rule book, and what has become an industrywide continuing education transformation initiative for broker-dealers. The amendments are purported by the MSRB to promote greater flexibility for individuals seeking other career opportunities within the municipal securities industry by easing barriers to reentry. The MSRB indicated that it would publish a compliance resource for municipal advisors and dealers addressing the changes. The compliance date for Rule G-3 and G-8 was October 12, 2023.

SEC Risk Alert and Rulemaking

Municipal Market Participants Raise Concerns With Fast-Paced Regulation

SEC Chairman Gensler has faced increased criticism in recent months for what is considered by many to be an overly aggressive regulatory agenda. The securities industry has increasingly called for the SEC to give the market more time to process the slew of burdensome, and often overlapping, regulatory proposals.

In a November 2, 2023, U.S. House of Representatives Committee on Financial Services hearing focused on examining the SEC's agenda and its affect on the U.S. capital markets and investors, securities professionals described concerns with the volume and pace of the SEC's rulemaking over the past two years. According to the Agency Rule List published by the Office of Management and Budget, the SEC is on track to propose and finalize 63 new rules by the end of Chair Gensler's first four years in office, representing a dramatic increase in the pace of rulemaking under the previous chairs, Mary Jo White and Jay Clayton, who finalized 22 rules and 43 rules, respectively, during their terms. Additionally, of the number of rules proposed by the SEC over the last two years, only eight have a specific Congressional mandate.

Participants in the hearing raised concerns regarding the SEC's lack of expertise in municipal securities markets, including the role of municipal market professionals, and also requested that the SEC analyze how its various rule proposals work together in altering the regulatory framework as a whole.

In addition to rulemaking proposals, the SEC is proposing to implement updates to the current U.S. Basel III capital rules, introduced by the Federal Reserve, Office of the Comptroller of Currency, and the Federal Deposit Insurance Corporation, which could put an additional strain on market capacity.

While acknowledging the need for improved regulation in some areas, the securities industry voiced its concerns that the SEC is taking regulatory action without sufficient evidence of the need.

SEC Exams in Fiscal Year 2024 to Look at Solicitor Municipal Advisors and Regulation Best Interest

The SEC announced its 2024 examination priorities (2024 Exam Priorities) on October 16, 2023. Among the items on the list is examining solicitor municipal advisors. In its 2024 Exam Priorities, the SEC states "New MSRB Rule G-46, which becomes effective on March 1, 2024, is designed to establish the core standards of conduct for solicitor municipal advisors, which include disclosure of conflicts

of interest and documentation of client relationships, among other things. Examinations of solicitor municipal advisors during the second half of fiscal year 2024 will focus on compliance with new MSRB Rule G-46."

Rule G-46 establishes core standards of conduct for solicitor municipal advisors—municipal advisors who solicit municipal entities or obligated persons on behalf of a third party. Regulated entities must comply with the new rules that will become effective March 1, 2024. We discussed the SEC's approval of Rule G-46 in our 2023 Mid-Year Review under the heading "SEC Approves Creation of MSRB Rule G-46 for Solicitor Advisors."

While the SEC's examination of solicitor municipal advisors will be new in 2024, the SEC clarifies in its 2024 Exam Priorities that its examination program will continue to review municipal advisors generally. The SEC provides the following guidance to concerning such examinations: "Examinations will continue to review whether municipal advisors have met their fiduciary duty obligation to clients, particularly when providing advice regarding the pricing, method of sale, and structure of municipal securities. Examiners will review whether municipal advisors are complying with their obligations to document municipal advisory relationships and disclose conflicts of interest and requirements related to registration, professional qualification, continuing education, recordkeeping, and supervision."

The 2024 Exam Priorities include the examination of broker-dealers with a specific focus on Reg BI. The SEC adopted Reg BI in 2019, setting a new standard of conduct for broker-dealers when making a recommendation to retail customers of securities transactions or investments involving securities. Reg BI requires broker-dealers to act in a retail customer's best interest and not place its own interest (financial or other) ahead of the customer's interest. As described in the 2024 Exam Priorities, such obligation is satisfied only if the broker-dealer complies with the following: (1) providing certain required disclosure, before or at the time of the recommendation, about the recommendation and the relationship between the retail customer and the broker-dealer (Disclosure Obligation); (2) exercising reasonable diligence, care, and skill in making the recommendation (Care Obligation); (3) establishing, maintaining, and enforcing policies and procedures reasonably designed to address conflicts of interest (Conflict of Interest Obligation); and (4) establishing, maintaining, and enforcing policies and procedures reasonably designed to achieve compliance with Regulation Best Interest (Compliance Obligation).

In providing guidance on areas of focus, the SEC provides "[i]n reviewing whether broker-dealer recommendations are in customers' best interest, areas of particular interest will include: (1) recommendations with regard to products, investment strategies, and account types; (2) disclosures made to investors regarding conflicts of interest; (3) conflict mitigation practices; (4) processes for reviewing reasonably available alternatives; and (5) factors considered in light of the investor's investment profile, including investment goals and account characteristics."

The focus on products includes: (1) complex products, such as derivatives and leveraged ETFs; (2) high cost products, such as variable annuities; (3) illiquid products, such as nontraded REITs and private placements; (4) proprietary products; and (5) microcap securities.

SEC Adopts Final Rule Regarding Conflicted Transactions in Securitizations

On November 27, 2023, the SEC adopted a rule to address conflicts of interests in transactions involving asset-backed securities (ABS). An investigation following the 2008 financial crisis found that investment banks and other market professionals sold ABS to investors at the same time that they took positions against those products. The SEC's new rule prohibits securitized participants (i.e., professionals who underwrite, place, or sponsor securitized assets) from betting against the ABS they sell or facilitate the sale of for one year following the first sale of an ABS.

The new rule defines conflicted transactions as those involving the direct shorting of ABS, entering into a credit default swap referencing the underlying asset, or a transaction economically equivalent to either of those

activities. Further, there are certain exceptions to the final rule including (1) risk-mitigating hedging, (2) bona fide market making, and (3) certain liquidity commitments. A copy of the new Rule 192 can be found here. It will be important for broker-dealer firms that have both retail investment and underwriting businesses to implement policies and procedures to avoid any inadvertent trading in ABS on the retail side if those ABS were part of an underwriting by the same broker-dealer firm.

Conclusion

The SEC actions over the past year illustrate a focus on what Chair Gensler and others consider "gatekeepers" in the municipal market, including auditors and financial advisors. We expect that to continue as a priority for the SEC, particularly in light of the 2024 Exam Priorities around solicitor municipal advisors. Basel III and net capital rules and requirements will continue to garner attention within the municipal investment banking industry. While the MSRB has not been as active in 2023 with respect to rule amendments compared to years past, we can expect to continue to see revisions and updates to MSRB rules based on the MSRB's rule modernization initiative.

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