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Municipal Securities Regulation & Enforcement

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The municipal securities market started the first half of 2021 strong against the backdrop of regulatory and enforcement actions, all while the remnants of COVID-19 continued to impact travel, commerce, and the economy.

The Municipal Securities Rulemaking Board (MSRB) released proposed rules that targeted, among other things, municipal advisors in an effort to require them to disclose more information in writing under a new draft MSRB Rule G-46, the compliance date of MSRB Rule G-32, and the Board's rulemaking procedures. The MSRB also released a number of notices requesting comment on rules relating to CUSIP requirements, fair dealing, Regulation Best Interest (Regulation BI), and margin rule requirements for municipal securities. The Financial Industry Regulatory Authority (FINRA) and the U.S. Securities and Exchange Commission (SEC) brought a number of enforcement actions relating to flippers, violations of fair dealing, quote violations, and recommending unsuitable securities for customers' accounts. Finally, the SEC released its 2021 examination priorities and took proactive steps in addressing the London Interbank Offered Rate (LIBOR) transition and the growing Environmental, Social, and Governance (ESG) trend in the municipal securities marketplace, which are discussed below.

Moreover, the SEC's examination priorities included a strongly worded message about the critical importance of internal compliance programs at regulated entities, highlighting the fact that a significant number of staff of registered firms are still working remotely. In connection with a statement about the importance of timely and accurate municipal issuer disclosure as a result of the significant effects of the pandemic on the finances and operations of many municipal issuers, the SEC stated it will examine the activities of broker-dealers and underwriters to assess whether they are meeting their respective obligations in relation to municipal issuer disclosure. Lastly, according to its examination priorities, the SEC plans to examine many areas in the municipal advisor space throughout 2021, including whether municipal advisors have met fiduciary obligations to municipal entity clients in regard to their disclosure of and management of conflicts of interest, and whether municipal advisors satisfied registration, qualification, CLE, and supervisory requirements.

On April 14, 2021, the United States Senate confirmed Gary Gensler as President Joe Biden's nomination to lead the SEC. Gensler, a former Goldman Sachs Group banker who also served as a professor of economics and management at MIT, served as Chair of the Commodity Futures and Trading Commission (CFTC) from 2009 to 2014, where he developed a reputation as a vocal and active regulator. While at the CFTC, Gensler implemented dramatic new swaps trading rules mandated by Congress

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following the 2007-2009 financial crisis. He also oversaw the prosecution of investment banks for rigging LIBOR, the benchmark for trillions of dollars in lending worldwide. Gensler's top enforcement deputy, Alex Oh, resigned her position as the SEC's Director of Enforcement days after she accepted the position. On June 29, 2021, Gurbir S. Grewal, who is currently serving as New Jersey Attorney General of the State of New Jersey, was appointed as the SEC's Director of Enforcement, effective July 26, 2021.

President Biden—like Gensler and other leaders, federal agencies, and self-regulatory organizations (SROs)—announced proactive steps to address climate change and ESG-related matters.

We summarize enforcement actions, MSRB rulemaking actions, and other municipal securities regulatory and enforcement developments for the first half of 2021 below. You can read our 2020 year-end municipal securities regulatory and enforcement newsletter here.

Enforcement Actions – Mid-Year Review

FINRA Fines Broker for Violating Firm's Trading Procedures

On February 18, 2021, a FINRA Hearing Panel (Hearing Panel) issued a decision against a broker-dealer for allegedly violating his firm's prearranged trading prohibition and circumventing its cross trade procedures by directing prearranged trades with intermediaries in order to facilitate and disguise cross trades. FINRA alleged that the broker sold two customers' positions in structured certificates of deposit (SCDs) and another customer's position in a municipal bond, without selling directly from one customer to another in compliance with his firm's cross trade procedures. Additionally, FINRA alleged that the broker did not sell the instruments to the market in bona fide transactions, and instead planned to sell them to the firm's other customers without it appearing as a cross trade. In its decision, the Hearing Panel found that the broker violated MSRB Rule G-17 on fair dealing in connection with the municipal bond trades. MSRB Rule G-17 provided that "[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practices." The Hearing Panel suspended the broker for 30 business days and fined him $30,000 plus court costs as a result of the misconduct.

SEC Charges Two Former Auditors for Improper Professional Conduct During Audit of Nonprofit College

On February 23, 2021, the SEC suspended two former auditors from practicing before the SEC in connection with settled charges against the two for improper professional conduct during the audit of a now defunct, nonprofit college. According to the SEC's orders, the two individuals approved and authorized the issuance of an unmodified audit opinion on the college's fiscal year-end financial statements, despite not having completed critical audit steps under Generally Accepted Auditing Standards (GAAS). Specifically, the SEC's orders found that the two individuals violated GAAS by, among other things, "failing to obtain sufficient appropriate audit evidence, properly prepare audit documentations, properly examine journal entries, adequately assess audit risk, and exercise due professional care and professional skepticism." This case is important for the municipal market, because municipal market participants must be able to rely on the integrity of auditors to perform proper audit procedures. Without admitting or denying the charges, the two individuals agreed to be suspended from appearing or practicing before the SEC as an accountant, and are permitted to apply for reinstatement after three years and one-year suspensions, respectively. Both orders can be found in their entirety here and here.

FINRA Fines Firm for Multiple Muni Violations

On March 10, 2021, a New York-based dealer agreed to pay $80,000 to FINRA—$25,000 of which relate to MSRB Rule violations—after failing to buy and sell municipal bonds at a fair and reasonable price for its customers in violation of Municipal Securities Rulemaking Board (MSRB) Rule G-30 on prices and commissions and Rule G-17 on fair dealing. FINRA also found that the broker-dealer violated MSRB Rule G-18 on best execution for failing to conduct reasonably designed annual reviews of its policies and procedures intended to result in the best available market prices for carrying out its customers'

transactions to assess whether its procedures were reasonably designed to achieve best execution. As a result of the Rule G-18 violation, the broker-dealer also violated Rule G-27 on supervision by not establishing and maintaining written supervisory procedures. The broker-dealer neither admitted nor denied the findings. In addition to paying the $25,000 fine for the MSRB Rule violations, the broker-dealer was censured, fined an additional $55,000 for violating various FINRA rules, and was ordered to pay $43,921.89 in restitution to affected customers. FINRA's order can be found here.

SEC Will Bar Two Unregistered Brokers for 'Flipping'

On March 12, 2021, the SEC instituted proceedings against an individual accused of operating as an unregistered broker as part of a flipping scheme the SEC charged in 2018. The SEC's full order can be found here. The individual was acting in concert with his wife, who committed fraud by providing false zip codes in order to get priority retail allocations of newly issued bonds. On February 12, 2021, they both were permanently barred from committing future violations of Section 15(a) of the Securities Exchange Act of 1934 (the Securities Exchange Act). According to the SEC's original complaint, the two individuals were alleged to have participated in thousands of transactions on behalf of a broker-dealer and improperly "flipped" bonds at a profit. "Flipping" is when a broker-dealer improperly obtains bonds intended for retail customers (i.e. during a retail order) in order to sell them at prearranged prices to other broker-dealers, who subsequently "flip" them to other broker-dealers at a profit. This action comes on the heels of multiple flipping actions against individual broker-dealers during the second half of 2020. A summary of those actions can be found in our 2020 Year-End Newsletter, found here.

Retired Broker Settles FINRA Charges for Making Unsuitable Recommendations of Securities

On March 25, 2021, FINRA settled charges with a former broker-dealer accused of making unsuitable recommendations to a customer in violation of MSRB Rule G-19. FINRA alleged that from February 2014 to August 2015, the former broker-dealer advised the customer to fill its account with risky investments in contradiction to the customer's conservative investment profile. At the time, the customer was a retired senior over 100 years old who served as a trustee for two conservative trust accounts. Despite the customer's conservative investment profile and the relatively volatile municipal bond market at the time, the customer's account consisted overwhelmingly of risky high-yield municipal bonds. The former broker-dealer, without admitting or denying the findings, consented to a three-month suspension from associating with any FINRA member firm in all capacities and a $5,000 fine. FINRA's full order can be found here.

FINRA Quote Violation Action Could Foreshadow More Ahead

On April 13, 2021, FINRA settled charges with a broker-dealer firm for violating MSRB Rule G-13 on quotations relating to municipal securities, MSRB Rule G-17 on fair dealing, and MSRB Rule G-27 on failing to reasonably supervise its municipal securities activities to ensure compliance with MSRB rules. According to the order, FINRA found that the broker-dealer firm engaged in a pattern and practice of distributing or publishing unsupported "throw-away" bids in multiple illiquid municipal securities that were not based on the firm's best judgment of the fair market value (FMV) of the securities. MSRB Rule G-13 prohibits dealers from distributing or publishing any municipal securities quotation unless the price stated in the quotation is based on the dealer's best judgment of the securities' FMV. On April 15, 2021, The Bond Buyer reported that FINRA did not find a case in its database in which it charged a firm for violating MSRB Rule G-13. Moreover, the Bond Buyer reported that FINRA's predecessor, the National Association of Securities Dealers (NASD), found only one matter dating back to 2003 in which NASD settled with a dealer representative after NASD found the dealer representative sold bonds at a set price without consulting the value of comparable bonds. Additionally, MSRB Rule G-17 states that municipal securities dealers "shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

FINRA also found that from October 2016 to October 2019, the broker-dealer firm had no written supervisory procedures that referenced MSRB Rule G-13, nor did it conduct any supervisory reviews designed to ensure compliance with MSRB Rule G-13. The lack of supervision created an environment "that allowed firm traders to

engage in a pattern and practice of distributing and publishing throw-away bids in multiple illiquid municipal securities" in violation of MSRB Rule G-27. FINRA's full order can be found here.

FINRA Fines Former Broker-Dealer for Violating Firm Policies on Discretionary Trading

On April 26, 2021, FINRA settled charges with a former broker-dealer who was alleged to have unfairly dealt with customers in violation of MSRB Rule G-17. According to the FINRA settlement order, the broker-dealer was terminated from his firm after exercising discretion in seven customer accounts despite the fact that the firm no longer permitted such discretionary trading. Exercising discretion in a customer's account after one's member firm has withdrawn such discretion is a violation of MSRB Rule G-17. The former-broker dealer, without admitting or denying the findings, consented to a 30-day calendar suspension from associating with any FINRA member in all capacities and a $5,000 fine ($1,000 of which pertains to the violation of MSRB Rule G-17). A full copy of FINRA's order can be found here.

FINRA-Registered Firm Fined for Violation of MSRB Rules

On June 14, 2021, FINRA settled charges with an investment bank, brokerage, and advisory firm on charges it violated numerous MSRB rules governing information reporting, recordkeeping, and supervision. FINRA found that the firm failed to "submit accurate minimum denominations and maximum interest rates to the MSRB's Short-Term Obligation Rate Transparency (SHORT) System, required by MSRB Rule G-34." Additionally, FINRA found that the firm failed to record in its books and records, the accurate maximum rates applicable at the time of certain interest rate resets as required by MSRB Rule G-8, and failed to establish and maintain a supervisory system, including a written supervisory system, reasonably designed to ensure compliance with the reporting requirements of MSRB Rule G-34, as required under MSRB Rule G-27. FINRA found that these violations occurred over a period of seven years, from April 2011 through May 4, 2018. Without admitting or denying the findings, the firm agreed to pay a $35,000 fine and to contact FINRA within thirty days to notify them that their supervisory system has been modified to comply with the MSRB rules. A full copy of FINRA's order can be found here.

FINRA Censures and Fines Large Member Firm for Supervisory Failure

On June 15, 2021, FINRA settled charges with a global investment bank and financial services firm for failing to establish and maintain a proper supervisory system. According to FINRA's findings, from June 2017 to February 2019, the firm failed to establish and maintain a supervisory system, including written supervisory procedures, reasonably designed to monitor its employees' outside brokerage accounts, in violation of FINRA Rules 3110(a), 3110(b), 3110(d), and 2010. Specifically, a FINRA examination of the firm alleged that the firm failed to maintain a system reasonably designed to ensure that employees uploaded their monthly account statements on a timely basis and, further, even when the statements were uploaded, that the firm's internal compliance teams had frequently failed to review them. The firm agreed to a censure and to pay a $350,000 fine. A full copy of FINRA's order can be found here.

MSRB and FINRA Rulemaking/Proposed Rulemaking – Mid-Year Review

MSRB Retires Interpretive Guidance for Dealers and Municipal Advisors

On February 11, 2021, the MSRB published a notice informing the municipal market that it will be retiring 15 pieces of guidance from the MSRB rulebook, as a part of its retrospective rule review (the Retrospective Rule Review). The MSRB stated that, in light of subsequent developments to the rules, "the MSRB believes that it would improve understanding of the rules and better facilitate compliance if interpretive guidance that is dated and no longer achieves its intended purposes is either clarified, amended, or retired." The guidance being retired dates from ten years old to nearly 45 years old. Among the guidance being retired is: (i) MSRB Rule G-23 guidance, dated July 30, 1981, regarding blanket issuer consents for a dealer to act as dealer and financial advisor with respect to the same issuance of municipal securities; (ii) MSRB Rule G-17 guidance, dated December 22, 1987, regarding the priority of orders for new issue securities;

and (iii) MSRB Rule G-14 guidance, dated December 10, 2004, regarding "list offering price" and the three-hour exception for real-time transaction reporting. The guidance was retired from the rulebook effective May 10, 2021.

MSRB Proposed Rule Change to Extend the Compliance Date of Amended Form G-32

On February 17, 2021, the MSRB filed a proposed rule change with the SEC to extend the March 31, 2021 compliance date of previously approved amendments to Form G-32 until August 2, 2021 in order to provide brokers, dealers, and municipal securities dealers additional time to "operationalize" compliance with the rule. The Rule G-32 amendments included amendments to Form G-32, which is applicable to dealers acting as underwriters in primary offerings of municipal securities designed to collect and report data elements through EMMA. According to the SEC approval order, "[a]mended Form G-32 is designed to ensure the MSRB receives information from underwriters to facilitate the MSRB's collection of market information to promote greater regulatory transparency in the municipal securities market." As COVID-19-related exemptions begin to expire, our Municipal Securities Regulation and Enforcement group is monitoring the timing of the proposed rule change and how it will affect the post-pandemic municipal securities market.

MSRB Abandons Plan to Abolish Municipal Advisor CUSIP Requirement

On February 27, 2019, the MSRB published a notice requesting comment on MSRB Rule G-34 Obligation of Municipal Advisors to Apply for CUSIP Numbers When Advising on Competitive Sales (the CUSIP Requirement). The CUSIP Requirement was approved by the SEC in 2017. Prior to the effective date of the 2017 MSRB Rule G-34 amendments, brokers, dealers, and municipal securities dealers acting as underwriters or as financial advisors to an issuer in a competitive sale of new issue municipal securities were subject to the CUSIP Requirement, but non-dealer municipal advisors were not. In July 2019, the MSRB decided to abandon the CUSIP Requirement that all municipal advisors, whether dealers or non-dealers, have to apply for a CUSIP number in competitive sales. Nearly a year later, the MSRB has again backtracked and has decided not to eliminate the CUSIP Requirement. At the MSRB's quarterly board meeting on April 21 and 22, 2021, Gail Marshall, MSRB chief regulatory officer, stated that the MSRB is "comfortable with the rule as it is written today," and "[t]o unring that bell would place a new burden on [municipal advisors]."

MSRB Temporarily Reduces Market Activity Fees by 40 Percent

On March 1, 2021, the MSRB filed a proposed rule change with the SEC to reduce the rates of assessment by 40% for certain underwriting, transaction, and technology fees (collectively, market activity fees) under MSRB Rule A-13. The MSRB projects that the reduction in fees paid by dealers will result in nearly $19 million in foregone revenue, which would effectively return this amount to firms who directly contributed to the MSRB's excess reserves position. The reduced assessments were effective as of April 1, 2021, and will last until September 30, 2022. A full text of the proposed rule change with the SEC can be found here.

MSRB Seeks Comment on Application of Regulation BI to Bank Dealers

Under the SEC's Regulation BI, which went into effect in June 2020, brokers are obligated to ensure a recommendation of securities is in a retail customer's best interest, and the broker has a duty of care and loyalty to the customer. On March 4, 2021, the MSRB published a request for comment on MSRB Rule G-19, on suitability of recommendations and transactions, that would require bank dealers to comply with Regulation BI when making recommendations of securities transactions or investment strategies involving municipal securities to retail customers. Under MSRB Rule D-8, a "bank dealer" means "a municipal securities dealer which is a bank or a separately identifiable department or division of a bank as defined in rule G-1 of the Board." A number of securities and advocacy groups have already spoken out against the proposed rule change. For example, the American Bankers Association in its comment stated that compliance costs for smaller banks would be too high to comply with the rule, since most dealer banks do not engage in trades with retail customers nor typically in amounts less than $100,000 par value. SIFMA also released a statement

asking for clarification on the proposed rule. Specifically, SIFMA argued that the harmonization of MSRB Rule G-19 and the SEC's Regulation BI could actually burden dealers by providing protections to institutional sophisticated municipal market professional (SMMP) customers who do not require them, which would be overly costly and unduly burdensome. The comment period on the draft rule ended on June 2, 2021.

FINRA Requests Comment on Proposed Amendments to the Margin Rule Regarding When Issued and Other Extended Settlements Transactions

On March 15, 2021, FINRA published a regulatory notice seeking a request for comment on proposed amendments to Rule 4210 (Margin Requirements) that would clarify and incorporate into the rule current interpretations regarding when issued and other extended settlement transactions, as well as provide relief to facilitate the application of the rule to these transactions. As related to municipal securities, FINRA stated in its release that "[municipal securities] present low risks relative to other non-equity offerings and proposes new exceptions to avoid disruptions in these markets." The proposed changes include an exception from the margin rule (and associated capital charges) when issued transactions in cash accounts in any municipal security scheduled to be issued by the 42nd calendar day after the trade date.

On May 14, 2021, the Bond Dealers of America (BDA) submitted a comment arguing that Rule 4210 "disadvantages regional and mid-size firms relative to bulge brackets because most mid-size firms do not have margin agreements in place, making collecting margins practically impossible." That same day, SIFMA also issued a comment on the rule, arguing in its comment that "requiring the collection of margin or, in certain cases, imposing a net capital charge in lieu of collecting such margin, could result in unnecessary additional costs to issuers." Moreover, SIFMA noted that, pursuant to FINRA rule 0150(b), FINRA's rule are "not intended to be, and shall not be constructed as, rules concerning transactions in municipal securities." Comments on the proposed amendment closed on May 14, 2021.

MSRB Requests Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46

On March 17, 2021, the MSRB published a notice requesting comment on new draft Rule G-46 that would codify interpretive guidance previously issued in May 2017 (the May 2017 Guidance). The May 2017 Guidance related to the obligations of "solicitor municipal advisors" under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities (the G-17 Excerpt for Solicitor Municipal Advisors) and was originally included in a larger notice regarding the application of MSRB rules to solicitor municipal advisors. The new draft rule G-46 would do three things: (1) codify key substantive requirements of the G-17 Excerpt for Solicitor Municipal Advisors; (2) remove certain obligations that, in retrospect, the MSRB believes may impose more burdens then benefits; and (3) incorporate certain additional changes that would better align the standards applicable to solicitor municipal advisors with those applicable to other regulated entities.

In comments submitted to the MSRB, many industry groups have raised questions about the explicit standard of conduct that actually applies to municipal securities advisors. SIFMA argued that the new rule as drafted could cause confusion and lack of awareness by solicitor municipal advisors because "the MSRB mentions the standard of conduct in the role and compensation disclosures and there is no mention that a fiduciary duty is not owed to solicitor municipal advisor clients and solicited entities." You can read SIFMA's entire comment on the draft rule here.

MSRB Request for Comment on Amendments to Rule G-10 Notification Requirements for Dealers

On May 14, 2021, the MSRB filed a request for comment on a draft amendment to MSRB Rule G-10, on investor and municipal advisory client education and protection, to clarify and better align the requirements for brokers, dealers, and municipal securities dealers to provide annual notifications to those customers who would be best served by receipt of the annual notifications. In 2017, the MSRB amended Rule G-10 in order to modernize and extend the rule's application to municipal advisors. Currently, Rule G-10 requires dealers and municipal

advisors to provide certain notifications to customers and municipal advisory clients, respectively, at least annually by December 31 each year. According to the request for comment, feedback from market participants has indicated that the current Rule G-10 would benefit from more clarity as to which customers should receive the annual notifications. During the 2017 rulemaking process, the MSRB stated that the term "customers," consistent with MSRB Rule D-9, included institutional customers as well as customers who invest in municipal fund securities. In its comment, the BDA supported the proposed rule change, because "the Rule as currently written requires disclosures specific to the MSRB and the municipal market to customers who have never and may never own or trade a municipal security" resulting in costly and unnecessary disclosures to customers who do not need the information.

In its comment, SIFMA suggested that the notification language "once every calendar year" be restated as "at least annually" or alternatively "at least once each year." SIFMA argued that the current rule creates confusion for broker-dealers. For example, the current MSRB Rule G-10 currently requires a disclosure to be sent to any to any customer for whom a municipal security was held by the broker-dealer during the calendar year. However, SIFMA argued that if annual disclosures were sent out in September, then certain customers who did not hold positions at that time would not have received the disclosure. The comment period ended on June 28, 2021.

MSRB Files Immediately Effective Rule Changes on Rulemaking Procedures

On May 19, 2021, the MSRB filed a notice of an immediately effective rule change with the SEC that makes certain changes to the MSRB's rulemaking procedures. MSRB Rule A-8 incorporates the requirements of Section 19 of the Securities Exchange Act and Rule 19b-4 thereunder, which describe the processes SROs must follow to file proposed rule changes with the SEC. The changes to Rule A-8 include removing the reference to "advisory opinions" in former Rule A-8(b), eliminating the potential for confusion about the meaning of the term without limiting the kinds of interpretive and other materials relating to rulemaking that the Board may issue. Additionally, section (c) of Rule A-8 was eliminated, which permitted the Board to approve minor changes to an MSRB form without a meeting.

Litigation Updates

Litigation Update – Harvey, Illinois Faces Renewed Scrutiny of 2014 SEC Consent Agreement

On January 13, 2021, a federal judge ordered the City of Harvey, Illinois, to rehire a consultant and prove the status of management reforms the city agreed to in a 2014 consent judgment that settled charges the Chicago suburb fraudulently used bond proceeds. The SEC brought the city back into court in October 2020 and asked the city to fully implement recommendations laid out by an independent consultant aimed at bolstering the "city's weak and ineffective system of internal controls." A March 2019 report by an accounting firm concluded the "internal control environment within the City of Harvey is still unreliable and informal and most likely will remain so unless forced by external regulatory bodies or a renewed commitment by the new administration to remediate undocumented controls and policies and procedures as a top priority in 2019." The City of Harvey was already subject to an agreement with bondholders as part of an effort to restructure its debt. You can read more about that agreement and the City of Harvey's alleged violations in our 2020 Year-End Newsletter, found here. On January 13, 2021, the United States District Court for the Northern District of Illinois, Eastern Division found that the City of Harvey violated the 2014 consent judgment and granted the SEC's motion to enforce the consent judgment. The SEC's full litigation release can be found here.

Litigation Update – SEC Wants SIFMA Case Dismissed

The SEC argued that the Securities Industry and Financial Markets Association (SIFMA) failed to give evidence that another exemptive order for municipal advisors will be created and has no standing to challenge the Temporary Conditional Exemption (the TCE) which expired at the end of 2020. The TCE allows non-dealer municipal advisors to solicit investors in certain private placements of municipal bonds. Although the TCE expired at the end of 2020, SIFMA argued that its lawsuit is not moot because the SEC could consider extending, reinstating, or revising the TCE. Dealer firms have argued the issue is important

because private placement activity is in their realm and that others wanting to engage in that business should properly register. You can read more about the TCE and the litigation between the SEC and SIFMA in our 2020 Year-End Newsletter, found here.

Litigation Update – SIFMA Files Amicus Brief in Flint Water Litigation

In our 2020 Mid-Year Newsletter, we discussed the litigation surrounding the Flint water crisis. On March 10, 2021, SIFMA filed an amicus brief in support of the defendants—a group of underwriters of bonds originally sold in 2014 to finance new water pipeline—in which it argued that the underwriters are not and cannot be liable for the actions of bond issuers merely by underwriting municipal bonds. Specifically, SIFMA argued that an underwriter cannot conspire to violate the Constitution by underwriting and purchasing municipal bonds, which was a key part of the complaint against them. The matter remains ongoing, and we are monitoring the outcome of the litigation. A copy of SIFMA's amicus brief can be found here.

Litigation Update – VRDO Litigation

As described in our 2020 Mid-Year Newsletter and 2020 Year-End Newsletter, lawsuits were filed in California, Illinois, Massachusetts, and New York (joined with suits filed by the cities of Philadelphia and Baltimore) alleging fraud by several investment banks acting as remarketing agents in the municipal variable rate demand obligation (VRDO) market.

In regard to the litigation in the State of New York, the court previously encouraged the parties to resolve the matters through the Neutral Evaluation Program (the NEP), an alternative dispute resolution system that seeks to provide an informal assessment of cases through the issuance of non-binding opinions. To this date, the parties have not chosen to resolve the litigation through the NEP, and the case remains ongoing.

On April 27, 2021, a judge in the Circuit Court of Cook County, Illinois, County Department, Law Division, denied the defendants' motion seeking to compel production of the Plaintiff's VRDO analyses. According to the Plaintiff in its filings, its principal developed a system of analyzing the VRDO rates, applied for and received a patent for the methodology, and applied the analysis to uncover the defendant's alleged misconduct. The case remains ongoing as of the denial of the defendants' Motion to Compel.

On May 11, 2021, the Massachusetts Supreme Judicial Court (the SJC) affirmed the dismissal of a Massachusetts False Claims Act (MFCA) suit on the grounds that it was barred by the MFCA's public disclosure bar. In affirming the dismissal, the SJC held that plaintiff's claims satisfied each prong of the MFCA's public disclosure bar, and declined to adopt the plaintiff's narrow interpretation of the statute.

On March 9, 2021, the State of California filed its seventh Amended Complaint in the Superior Court of California, again requesting a jury trial. Similar to its previous complaints, the plaintiff alleged that the defendants collude in a "robo-setting" scheme, which resulted in the State of California paying artificially high interest rates on VRDOs and hundreds of millions of dollars in VRDO-related overcharges. On June 1, 2021, a judge in the Superior Court for the State of California, San Francisco County, sustained the Defendant's demurrer without leave to amend, and on June 25, 2021, dismissed the action.

Litigation Update – Municipal Financial Firm Litigation

In February 2019, an independent specialty municipal finance company filed suit against a global investment manager, accusing it of trying to limit its access to capital and deals by threatening banks and broker-dealers with a loss of business. In April 2021 court filings, the plaintiff argued that previously un-submitted recordings by a global investment bank contradicted assertions made in the original defamation case, in which the Delaware Court of Chancery found that the plaintiff was subject to "threats and lies" to damage its business relationship. While the Delaware state court refused to rule on the plaintiff's antitrust claim, the plaintiff has since refiled it in the U.S. District Court for the Southern District of New York. The litigation in Delaware state court remains ongoing, with a trial set for March 2022.

Industry Updates

OMS Staff Statement on LIBOR Transition in the Municipal Securities Market

On January 8, 2021, staff at the SEC's Office of Municipal Securities (OMS) issued a statement (the OMS Statement) focusing on the impact of the discontinuation of LIBOR on the municipal securities market. In light of the expected December 31, 2021 discontinuation of LIBOR, the OMS Statement urged municipal obligors to consider a number of factors, including: (i) identifying existing contracts that extend past 2021 to identify LIBOR exposure; (ii) considering whether contracts entered into in the future should reference an alternative rate to LIBOR, such as the Secured Overnight Finance Rate (SOFR); and (iii) considering disclosure-related issues related to the LIBOR transition. The MSRB also issued a statement related to the duties of municipal advisors with respect to LIBOR exposure. The Government Finance Officers Association (GFOA) also released an advisory notice identifying specific policies and procedures necessary to minimize a government's exposure to potential risk in connection with the LIBOR transition. Similarly, the National Association of Bond Lawyers (NABL) held an online seminar to discuss compliance issues for making the transition. Our Public Finance and Municipal Securities Regulation and Enforcement teams are continuously monitoring the transition away from LIBOR and the impacts the transition is having on the municipal securities market.

MSRB Expected to Update its Mission Statement

At its first meeting of the year on January 27-28, 2021, the MSRB announced that it would be discussing a new mission statement and vision based on input from municipal market participants. Additionally, the MSRB announced that it is looking to revamp its strategic plan for the next three to five years.

SEC to Focus on ESG

Since the start of the new year, the SEC has signaled that it will focus heavily on climate and ESG issues. On February 1, 2021, acting SEC Chair Allison Herren Lee named Satyam Khanna as a senior policy advisor to climate change and ESG issues. On February 24, 2021, Acting Chair Lee directed the SEC's Division of Corporation Finance to scrutinize disclosures for adherence to the SEC's 2010 guidance on climate change-related disclosures. Acting Chair Lee's full statement can be found here. On March 3, 2021, the SEC Division of Examinations announced its 2021 examination priorities. At the forefront of these priorities was a focus on climate-related risks. The full release of the SEC's 2021 examination priorities can be found here, and an in-depth summary of how the priorities affect municipal securities and municipal advisors can be found in our legal alert here. On March 4, 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement. The Task Force will develop initiatives to proactively identify ESG-related misconduct, as well as employing SEC resources to identify potential violations. The SEC's full release can be found here, and an in-depth summary of the Task Force can be found in our legal alert here. Finally, on May 24, 2021, Acting Chair Lee delivered keynote remarks at the 2021 ESG Disclosure Priorities Event, whereby she addressed common misconceptions about materiality and current ESG disclosure in the municipal securities marketplace. Acting Chair Lee's full speech can be found here.

GFOA Offers Best Practice Disclosure Guide

On March 8, 2021, the GFOA released its first-ever best practice disclosure guide on ESG. The guide focuses on voluntary ESG disclosure in the primary market and encourages issuers to be transparent. Notably, the GFOA included specific examples of environmental factors that an issuer should consider disclosing, including climate change affecting agriculture, infrastructure, major industries, and its tax base, among other factors. Moreover, the guide encourages issuers to identify the primary environmental risks applicable to its government or its bond issuances, and then determine how those risks, if actualized, could impact its operations and financial position. The GFOA plans on releasing best practices for Social and Governance disclosures later this year.

NFMA Making a Push for Emergency Disclosure

On March 25, 2021, the National Federation of Municipal Analysts (NFMA) released a white paper on guidance and insights regarding emergency event disclosure affecting state and local governments. The white paper specifically

provides guidance to state and local governments, other types of municipal issuers, and borrowers accessing funding in the municipal marketplace on disclosure items important to investors regarding the effects of the COVID-19 pandemic on municipal issuer credit quality and liquidity. In the white paper, the NFMA recommended disclosing numerous items, including: (i) disclosure of amended budgets as a result of COVID-19 effects; (ii) disclosure of material declines in occupancy/use of residential, commercial, or government buildings and/or operations supporting municipal financings; and (iii) disclosure of cost-cutting and austerity measures, such as employee layoffs and/or employee furloughs. Comments to the white paper were due by April 30, 2021, and we are monitoring any supplemental releases from the NFMA on this matter.

Fixed Income Legal and Compliance Roundtable

On April 5, 2021, the BDA was joined by the SEC, FINRA, and MSRB for a Fixed Income Legal and Compliance Roundtable. Among the many topics discussed, those relating to the municipal securities market included: (i) an MSRB update on its work with FINRA and changes to supervisory Rule G-27; (ii) discussion of the MSRB's upcoming Retrospective Rule Review; (iii) discussion of the MSRB's plans to clarify the language of Rule G-10 dealing with investor and municipal advisory client education and protection, and (iv) the SEC's efforts to streamline its ESG-related materials with a new hyperlink on the SEC's homepage for all ESG and climate happenings ongoing at the SEC. Notably, OMS stated that it will continue to monitor ESG disclosure in the corporate disclosure space as a guide to what could potentially be discussed with municipal disclosures. OMS also noted the change by issuers in seeking guidance on COVID-19 disclosure instead of avoiding voluntary actions.

The BDA also hosted the Director of FINRA Enforcement to provide an update on FINRA enforcement actions. According to the Director, while formal actions decreased from 2015-2020, FINRA noted an increase in the last year, and the cases they bring are becoming more complicated than in the past. Additionally, there was a discussion of a FINRA action regarding MSRB Rule G-13, which requires certain published or distributed dealer quotations to represent bona fide bids or offers, and on which there is very little case law. FINRA noted that in situations where there is little precedent, they will look at new settlements or enforcement actions of an MSRB Rule that has not yet been broadly applied to try to determine if there is a common fact pattern.

SIFMA Collaborating on Shortening Settlement Times

On April 28, 2021, SIFMA announced that it has joined forces with the Investment Company Institute (ICI) and the Depository Trust & Clearing Corporation (DTCC) on efforts to accelerate the U.S. securities settlement cycle from T+2 (two business days after a trade is executed) to T+1 (one business day after a trade is executed). In its press release, SIFMA argued that reducing the settlement cycle will create greater efficiencies in the market and further protect investors by helping to reduce systemic risk, operational risk, liquidity needs, buy-side counterparty exposure, broker-to-broker counterparty risk, and thereby also reduce margin requirements and collateral requirements for broker-dealers. SIFMA announced that it, along with the ICI and DTCC, hope to complete an in-depth analysis by the end of Q3 2021, and then move on to developing a definitive time frame for moving to T+1.

Conclusion

The first half of 2021 saw increased municipal securities new issuance volume, and with it, an uptick in regulatory and enforcement activity compared to recent years. Congressional politics will likely play a role in how the regulatory and enforcement landscape unfolds in the second half of 2021, particularly in the area of climate change and other ESG disclosure.

With new Presidential Administration priorities, a new SEC Commissioner at the helm, changeover in the SEC's Division of Enforcement, and the COVID-19 pandemic winding down, it remains to be seen what priorities the SEC will continue to focus on in the second half of 2021. Until the COVID-19 pandemic passes, however, we expect that in the second half of 2021 the SEC will continue to focus on timely and meaningful disclosure, particularly as it relates to the continued impact of COVID-19 on the financial and operational conditions of issuers and obligated persons.

Finally, with the MSRB retiring a large amount of guidance and implementing new rules relating to supervision, fair dealing, and Regulation BI, we expect new issues to arise in the municipal securities market relating to interpretations and best practices based on the new regulatory regime. We are continuously monitoring developments related to any rule changes and developments into the second half of 2021.

Contacts

Kimberly D. Magrini
Public Finance
magrinik@ballardspahr.com
215.864.8365

William C. Rhodes
Public Finance
rhodes@ballardspahr.com
215.864.8534

Teri M. Guarnaccia
Team Co-Leader, Municipal Securities Regulation and Enforcement
guarnacciat@ballardspahr.com
410.528.5526

Andrew Miles
Public Finance
milesa@ballardspahr.com
612.371.3268

John C. Grugan
Team Co-Leader, Municipal Securities Regulation and Enforcement
gruganj@ballardspahr.com
215.864.8226

M. Norman Goldberger
Team Co-Leader, Municipal Securities Regulation and Enforcement
goldbergerm@ballardspahr.com
215.864.8850