

Municipal Securities Regulation & Enforcement

A MUNICIPAL SECURITIES REGULATION AND ENFORCEMENT TEAM PUBLICATION

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The municipal securities market carried its momentum from the first half of 2021 into a strong finish for the year against the backdrop of continued regulatory and enforcement actions. Despite new variants of COVID-19 emerging, which continue to impact travel, commerce, and the economy, the municipal market continued its strong upward trajectory, spurred by continued low interest rates and the anticipated injection of federal funds to state and local issuers as part of the Infrastructure Investment and Jobs Act.

The Municipal Securities Rulemaking Board (MSRB) released proposed rules that targeted, among other things, draft compliance resources for brokers, dealers, municipal securities dealers, and municipal advisors in order to enhance its understanding of the existing regulatory standards applicable to regulated entities' supervision of conduct when pricing a new issuance of municipal securities. The MSRB also again extended regulatory relief on a temporary basis to brokers, dealers, and municipal securities dealers in light of the ongoing COVID-19 crisis and released its annual budget for Fiscal Year 2022. Environmental, Social, and Governance (ESG) continues to attract the attention of regulators, issuers, and investors. The U.S. Securities and Exchange Commission (SEC) maintained its focus on climate change disclosure and whether current disclosures adequately inform investors, the MSRB issued a request for information on ESG best practices, and the Government Finance Officers Association (GFOA) released a report on best practices related to the "S" factor of ESG disclosure following on its best practices report related to the "E" factor of ESG disclosure earlier in the year. The SEC approved MSRB rule changes to MSRB Rule G-10 on investor and municipal advisory client education and protection and MSRB Rule G-48 on transactions with sophisticated municipal market professionals (SMMPs).

The Financial Industry Regulatory Authority (FINRA) and the SEC brought a number of enforcement actions relating to flippers, violations of fair dealing rules, and recommending unsuitable securities for customers' accounts. The SEC additionally brought its first-ever action on MSRB Rule G-42 on the duties of municipal advisors. The SEC also released its 2021 enforcement statistics, which showed a seven percent increase in initiated enforcement actions brought, compared to 2020 (with public finance abuse amounting to about two percent of such enforcement actions), and released a staff statement on the continued London Interbank Offered Rate (LIBOR) transition.

The SEC experienced a transition in leadership that will impact how the municipal market will be regulated. On December 3, 2021, the SEC [announced](#) that Ernesto A. Lanza would serve as Acting Director of the SEC's Office

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of Municipal Securities, replacing Rebecca J. Olsen, who was named Deputy Chief for the Division of Enforcement's Public Finance Abuse Unit. Additionally, Mark Zehner retired as the chief of the SEC's Public Finance Abuse Unit at the end of November. Both Mr. Lanza and Ms. Olsen are former Ballard Spahr public finance lawyers.

We summarize enforcement actions, MSRB rulemaking actions, and other municipal securities regulatory and enforcement developments for the second half of 2021, below. You can read our 2021 mid-year municipal securities regulatory and enforcement newsletter [here](#).

Enforcement Actions – Year-End Review

FINRA Fines Financial Services Firm for Violating Supervisory Rules

On July 13, 2021, without admitting or denying the findings, an independent financial services firm agreed to a censure and payment of a \$750,000 fine (\$225,000 pertaining to MSRB Rule alleged violations) to settle FINRA charges that it violated numerous FINRA rules and MSRB Rule G-27. MSRB Rule G-27(b) requires municipal dealers to establish and maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations and MSRB Rules. MSRB Rule G-27(c) further requires each municipal dealer to adopt, maintain, and enforce written supervisory procedures that are reasonably designed to ensure that the conduct of municipal securities activities complies with MSRB Rules and the Exchange Act. FINRA alleged that from 2012-2019, the financial services firm failed to establish, maintain, and enforce a supervisory system, including written supervisory procedures (WSPs), reasonably designed to detect and prevent unsuitable short-term trading of mutual funds and municipal bonds in customer accounts and over-concentration of customer accounts in Puerto Rican bonds. A broker employed at the financial services firm employed a strategy of short-term trading of high-risk Puerto Rican bonds in 16 customer accounts, and concentrated five customer accounts in Puerto Rican bonds. FINRA alleged that despite the financial services firm being aware of the red flags raised in its internal monitoring system regarding these trades,

the financial services firm failed to conduct a continued heightened review of the broker's trading activity, in violation of MSRB Rule G-27. A full copy of FINRA's order can be found [here](#).

Former Mayor Receives \$75,000 Judgment for Pay-to-Play Scheme

On July 26, 2021, the U.S. District Court for the Northern District of Illinois entered a final consent judgment against the former mayor of Markham, Illinois, who was previously charged with securities fraud related to a \$5.5 million municipal bond offering by the city. In the civil proceeding, the SEC alleged that the former mayor engaged in a pay-to-play scheme by soliciting and receiving a \$75,000 bribe from a construction contractor, in exchange for awarding the contractor with a multi-million dollar city construction project. According to the complaint, the mayor assured the Markham City Council that he "did not 'make the deals,'" despite the fact that he had recently solicited and received the bribe. In the criminal case, the former mayor plead guilty to criminal charges and was sentenced to a prison term of 24 months and ordered to pay \$117,849.35 in disgorgement and prejudgment interest. The SEC's full litigation release can be found [here](#).

Underwriter and Former CEO Charged in Connection to Municipal Bond Tender Offer

On August 26, 2021, both an Arkansas-based broker-dealer and its former Chief Executive Officer (CEO) settled charges with the SEC for unfair dealing in connection with a municipal bond tender offer. The broker-dealer, at the direction of its then-CEO, recommended to a county in West Virginia that the county attempt to reduce the amount of its outstanding debt service expense through a tender offer of bonds originally issued in 2006. The broker-dealer and its then-CEO recommended that the county offer to pay bondholders a significantly higher price than the current market price of its outstanding bonds, which would incentivize bondholders to tender their bonds. The broker-dealer also recommended to the county that it fund its purchase of the tendered bonds through the sale of new, lower interest rate bonds that the broker-dealer would underwrite. When the broker-

dealer made this recommendation to the county, neither the broker-dealer nor its former CEO disclosed that the broker-dealer previously had acquired more than \$1 million of the county's outstanding bonds at market prices and then sold them to two customers. While the broker-dealer and the county were negotiating the terms of the tender offer, the broker-dealer purchased approximately \$4.8 million more of the county's outstanding bonds subject to the tender offer at market prices, and subsequently sold them to an affiliated entity and customers. Nearly all of the bonds the broker-dealer acquired, including those originally sold to customers, were eventually sold to the affiliated entity, which in turn tendered them back to the county at a price recommended by the broker-dealer. The SEC order found that broker-dealer failed to disclose to the county that the affiliated entity had acquired bonds to be tendered, and also failed to disclose the resulting conflict of interest created by the affiliate's financial interest in the tender offer.

Without admitting or denying the findings, both the broker-dealer and the former CEO agreed to orders finding that they willfully violated MSRB Rule G-17 on fair dealing and MSRB Rule G-27 on supervision. The broker-dealer was ordered to pay disgorgement and prejudgment interest of \$44,072 and a civil penalty of \$200,000, and the former CEO was ordered to pay disgorgement and prejudgment interest of \$46,481 and a civil penalty of \$100,000. The SEC's litigation release can be found [here](#), and the order against the broker-dealer and former CEO can be found [here](#) and [here](#), respectively.

SEC Charges Former Municipal Bond Salesperson with Placing Fraudulent Retail Orders

On August 31, 2021, the SEC settled charges for violation of SEC Rule 10b-5 and MSRB Rule G-11 on primary offering practices and MSRB Rule G-17 for fair dealing with a former registered municipal sales representative for fraudulently obtaining retail priority allocations of new issue municipal bonds for broker-dealers who were not entitled to such priority. The SEC found that the former registered representative falsely entered 106 retail allotments to multiple investment banks ahead of retail investors, earning approximately \$122,353 in commissions. Without admitting or denying the findings, the former registered

representative consented to a cease-and-desist order imposing a \$40,000 penalty and a bar from associating with any broker or dealer (with a right to apply for reentry after three years) for violations of MSRB Rule G-11(k) on primary offering practices and MSRB Rule G-17 on fair dealing. The full order can be found [here](#).

SEC Charges School District and Former Top Executive with Misleading Investors in Municipal Bond Offering

On September 16, 2021, the SEC charged a San Diego County school district and its former Chief Financial Officer (CFO) with misleading investors who purchased \$28 million in municipal bonds. According to the SEC's complaint against the former CFO and order against the school district, in April 2018 the former CFO and school district disclosed misleading budget projections to investors that indicated the district's revenues could cover its expenses and allow the district to end the fiscal year with a general fund balance of approximately \$19.5 million. At that time, however, the school district was engaged in significant deficit spending, and was on track to end the year with a negative \$7.2 million fund balance. These misleading projections were included in the bonds' offering documents, which also omitted the fact that the school district did not incorporate known expenses into the projections used for the certified budgets. The preliminary official statement and the official statement were also provided to a credit rating agency that rated the district's bonds. According to the SEC, the former CFO signed multiple certifications falsely attesting to the accuracy and completeness of the information included in the offering documents. Without admitting or denying the findings, the former CFO [agreed to settle](#) with the SEC for violations of Section 17(a)(3) of the Securities Act of 1933 (Securities Act) and to be enjoined from participating in any future municipal securities offerings, in addition to paying a \$28,000 penalty. The school district, without admitting or denying the findings, also [agreed to settle](#) with the SEC for violations of the prohibitions on making misleading statements and omissions to investors, as well as to the bonds' credit rating agency and other municipal industry professionals involved in the transaction, as set forth in Sections 17(a)(2) and (a)(3) of the Securities Act.

The court ordered the district to engage an independent financial consultant to evaluate its policies and procedures related to municipal securities disclosure.

SEC Charges Investment Bank, Municipal Market Officials in Flipping Scheme

On September 17, 2021, the SEC charged an investment bank and two employees with unfair dealing in municipal bond offerings. According to the SEC's order, over a nearly four-year period, the investment bank improperly allocated certain bonds intended for institutional customers and dealers to parties known as "flippers," who then resold or "flipped" the bonds to other broker-dealers at a profit. Additionally, the SEC order found that, in three other instances, the investment bank ignored an issuer's request to place the bonds with retail customers when it allocated them to flippers instead. Moreover, the order found that the investment bank improperly obtained bonds it did not underwrite for its own inventory by placing orders with flippers, which allowed the investment bank to circumvent the lower priority it would have been assigned had it attempted to place the orders directly with the underwriters. Without admitting or denying the findings, the SEC found that the investment bank violated MSRB Rule G-17 on fair dealing, MSRB Rule G-11 on primary offering practices, and MSRB Rule G-27 on supervision, in addition to related Securities Exchange Act of 1934, as amended (Exchange Act) provisions relating to prohibitions on acting as brokers without being registered with the SEC and prohibitions on violating MSRB rules. The investment bank was ordered to pay a \$150,000 penalty, disgorge profits of \$552,440, and pay prejudgment interest of \$160,886, and was censured. The full order against the investment bank can be found [here](#).

In related actions, two investment bank officials were charged with violating the same MSRB and Exchange Act rules, and, without admitting or denying the findings, were ordered to pay \$30,000 and \$25,000, respectively. The orders against the investment bank officials can be found [here](#) and [here](#).

SEC Brings First-Ever Actions Enforcing Rule on Duties of Municipal Advisors

On September 23, 2021, the SEC charged a municipal advisor and its two principals with violating their duties and engaging in unregistered municipal advisory activities in its first-ever case enforcing MSRB Rule G-42. Under MSRB Rule G-42, a municipal advisor is subject to a duty of loyalty and care to its municipal entity client. MSRB Rule G-42 also establishes certain disclosure requirements, including that a municipal advisor must, prior to or upon engaging in municipal advisor services, provide its client full and fair disclosure in writing of all material conflicts of interest, specifically including any fee-splitting arrangements involving the municipal advisor and any other provider of services to the client. MSRB Rule G-42 also prohibits a municipal advisor from making, or participating in, any fee-splitting arrangement with underwriters on any municipal securities transaction as to which it has provided or is providing advice.

The SEC's complaint alleges that the two individuals left their employment at an underwriting firm to establish a new municipal advisor firm focused on charter schools. According to the complaint, the two individuals entered into a fee-splitting arrangement with their former employer without adequately disclosing to their clients the conflicts of interest associated with the arrangement or their relationship with the underwriting firm. In addition, the SEC alleged that the two individuals and their firm unlawfully engaged in municipal advisory services while being unregistered with the SEC or MSRB. The SEC's complaint alleges additional misconduct by one principal, whereby while still being employed at the underwriting firm, the principal allegedly improperly operated in a dual-capacity by simultaneously serving as a registered representative for the underwriting firm and also a municipal advisor serving as two clients' fiduciary. The complaint alleges that the principal increased the overall fees paid by the clients in an effort to enrich the principal and the firm at the expense of over \$40,000 in additional issuer expenses. The full complaint against the principal and the firm can be found [here](#), and the litigation remains ongoing. On December 13, 2021, the firm and

principal filed a motion to dismiss the lawsuit, arguing that the SEC is using the action to “test drive” a rule that it improperly failed to define. The firm and principal argue that they are not liable for fee-splitting simply based on the SEC’s allegations that they were paid at the same time as the underwriter, and that the SEC is relying on a novel interpretation of the term “fee-splitting” which is not supported by prior case law involving undisclosed payments and breaches of fiduciary duty. The other principal [agreed to settle](#) with the SEC and, without admitting or denying the findings, paid a \$26,000 penalty, and is required to participate in trainings on the duties of non-solicitor municipal advisors and have engagement letters reviewed by a third party for a period of one year.

Investment Bank Settles with FINRA Over Violation of Supervisory and Fair Dealing Rules

On October 4, 2021, a global investment bank settled FINRA charges that it violated MSRB Rule G-27 on supervision and MSRB Rule G-17 on fair dealing. In July 2015, FINRA issued [Regulatory Notice](#) 15-27, which, among other things, reminded member firms that their WSPs must include processes for detecting, resolving, and preventing the consequences of municipal short positions and comply with Exchange Act rules that require member firms to take prompt steps to obtain physical possession or control of municipal securities that are short more than 30 days. Over a five-year period, the investment bank had hundreds of short positions that were aged over 30 days, and its WSPs were designed only to prevent short positions originating from retail transactions in certain fixed-rate bonds, and did not consider or address short positions created by other causes. As of June 2021, the investment bank amended its processes to address positions when created, and communicated its revised processes and WSPs to its registered representatives. The aged short positions described above required the investment bank to pay at least \$796,000 in substitute interest to more than 1,500 customers, but failed to notify customers that the substitute interest paid to them was taxable, rendering the investors unable to make an informed decision on whether they wished to hold, cancel, or purchase a comparable security so as to avoid receiving taxable interest. As a result of these actions,

without admitting or denying the findings, the investment bank consented to a violation of MSRB Rule G-27 and MSRB Rule G-17 and was ordered to pay a \$1.5 million fine. The full Letter of Acceptance, Waiver, and Consent can be found [here](#).

FINRA Charges Underwriter for Fraudulent and Negligent Misrepresentations

On October 26, 2021, FINRA filed a [complaint](#) that alleged an underwriter and its representatives made numerous fraudulent and negligent misrepresentations and omissions of material fact in connection with two municipal bond offerings to fund, respectively, the purchase and rehabilitation of a dormitory and assisted-living facility. FINRA alleged the underwriter failed to conduct proper due diligence while still recommending that customers purchase the bonds. FINRA also found that the underwriter provided investors with overly optimistic financial projections but failed to provide information that called those projections into question, including reported projected revenue levels that were significantly higher than historic revenue and allegedly altering projected management fees and understating that expense by more than \$500,000 over the life of the projections. For example, in connection with conduit bonds issued to finance a 48-unit dormitory located at a community college, the underwriter told investors that the dormitory’s management company and the community college (the sole source of residents for the dormitory) maintained an excellent relationship, when in reality the community college recently had threatened to terminate its relationship with the dormitory management company. FINRA found that the underwriter and its representatives made approximately 55 sales of the bonds and customers sustained losses of approximately \$1.6 million. In a separate offering to fund the purchase and rehabilitation of a 61-unit assisted living facility, the underwriter failed to disclose two prior failed offerings, facility losses of more than \$115,000, and a personal loan made by the owner of the underwriter to entities associated with the issuer of the bonds in a 2011 offering. As a result of the alleged misconduct, FINRA charged the underwriter and its representatives with willful violations of MSRB Rule G-19 on suitability, MSRB Rule G-17 on fair

dealing, and MSRB Rule G-47 on time of trade disclosure. The litigation is ongoing, and the full text of the complaint can be found [here](#).

SEC Fines FICC for Inadequate Risk Management Policies

On October 29, 2021, the SEC ordered the Fixed Income Clearing Corporation (FICC), a wholly owned subsidiary of The Depository Trust & Clearing Corporation, to pay \$8 million to settle charges that it failed to have adequate risk management policies within its Government Securities Division. The FICC acts as the sole registered clearing agency for transactions in U.S. government securities. According to the SEC's [order](#), the SEC found that between April 2017 and November 2018, the FICC failed to comply with rules requiring it to have reasonably designed policies and procedures for holding sufficient qualifying liquid resources to meet the financial obligations created by the potential failure of a large participant and failed to undertake related due diligence. The FICC neither admitted nor denied the findings, and, in addition to paying the \$8 million fine, agreed to retain an independent compliance consultant to assess its compliance efforts.

FINRA Fines Registered Representative for Violating Fair-Dealing Rule

On November 5, 2021, a registered general securities representative [settled charges](#) with FINRA in regard to a violation of MSRB Rule G-17 on fair dealing. FINRA found that from November 2014 to November 2015, the representative provided a customer with six incorrect and misleading account reports which contained inaccurate account values performance information and understated the amount of commission the customer paid on municipal bond transactions. Without admitting or denying the findings, the representative agreed to a two-month suspension and to pay a \$10,000 fine.

SEC Obtains Final Judgment against Banker in Pay-to-Play Scheme

On November 22, 2021, the SEC obtained a [final judgment](#) against a former Managing Director and fixed-income research analyst at a registered broker-dealer who was

[charged](#) with aiding and abetting a pay-to-play scheme involving the New York State Common Retirement Fund. The U.S. District Court for the Southern District of New York found that, from 2014 to 2016, the fund's director of fixed-income solicited and received improper gifts and entertainment from the former Managing Director, in exchange for directing a significant amount of state business to the broker-dealer, from which the former Managing Director realized sizable commissions. After the Managing Director provided numerous gifts to the fund director, the Managing Director falsely submitted the fees as expense reports. The former Managing Director was ordered to pay \$100,000 to the SEC and disgorge the gains received from the alleged violations, and was enjoined from further violating the applicable provisions of the securities laws.

SEC Charges Former Investment Professional with Defrauding Investors

On November 23, 2021, the SEC charged a former investment adviser and broker-dealer for defrauding three investors out of approximately \$800,000, which the broker-dealer used to pay personal expenses. According to the [complaint](#), between January 2019 and November 2020, the former broker-dealer convinced three investors to transfer money out of their advisory and brokerage accounts to another bank account, whereby the money would be invested in tax-exempt bonds. The tax-exempt bonds in question, however, did not exist, and the bank account to which the former broker-dealer had directed the individuals to transfer their money was the broker-dealer's personal bank account. The complaint alleges that the former broker-dealer used that money to pay personal expenses, including mortgage payments, automobile purchases, and household renovations. The broker-dealer then allegedly tried to cover up the fraud by sending the three investors interest payments from the nonexistent bonds, using altered cashier checks drawn from funds out of the former broker-dealer's personal bank account. The SEC's complaint was filed in the U.S. District Court for the Northern District of Illinois, and the litigation is ongoing.

Ex-Municipal Advisor Pleads Guilty to Fraud in Connection with 2015 Bond Offering

On November 30, 2021, an ex-municipal advisor agreed to plead guilty to one count of fraud in connection with a 2015 bond offering by the city of Rolling Fork, Mississippi. According to the SEC's [original complaint](#) in July 2018, the former municipal advisor served as the municipal advisor for the city of Rolling Fork when he fraudulently billed the city for \$33,000, in addition to the \$22,000 authorized in the contract with the city. The former municipal advisor, without admitting or denying the findings, eventually settled with the SEC and agreed to pay nearly \$110,000 in civil penalties, disgorgement, and prejudgment interest. The former municipal advisor will be sentenced in 2022; the federal sentencing guidelines recommend a term of imprisonment in the range of 0-13 months.

Broker-Dealer Settles FINRA Case Over Violation of MSRB Suitability Rules

On December 15, 2021, without admitting or denying the findings, a FINRA-registered broker dealer agreed to a censure, to pay a \$550,000 fine (\$280,500 pertaining to MSRB Rule alleged violations), and to pay restitution of \$456,155 plus interest to settle FINRA charges that it violated numerous FINRA rules and MSRB Rule G-27 on establishing and maintaining a supervisory system. According to FINRA, from July 2013 to July 2016, the broker-dealer failed to establish, maintain, and enforce a supervisory system, including WSPs, reasonably designed to achieve compliance with FINRA and MSRB rules with respect to representatives' recommendations of high-yield corporate and municipal bonds. FINRA found that in July 2013, the broker-dealer changed the tax coding of municipal bonds in its internal compliance system, which inadvertently disabled the ability of the high-yield bond alerts to identify potential concentration issues for further assessment. The broker-dealer failed to detect this until July 2016, and as a result, the firm failed to review over 100 customer accounts with conservative profiles for potentially unsuitable concentrations of high-yield bonds. The full text of the order can be found [here](#).

MSRB Rulemaking – Year-End Review

MSRB Requests Input on Draft Compliance Resources for Dealers and Muni Advisors Regarding New Issue Pricing

On October 5, 2021, the MSRB [requested input](#) on draft compliance resources for brokers, dealers, municipal securities dealers, and municipal advisors in order to enhance its understanding of the existing regulatory standards as applied to regulated entities' supervision of conduct when pricing a new issuance of municipal securities. While compliance resources do not create new legal or regulatory requirements or new interpretations of existing requirements, stakeholders have inquired about the supervision of activities associated with the pricing of new issuances of municipal securities, specifically related to MSRB Rule G-17 on fair dealing, MSRB Rule G-27 on supervision, and MSRB Rule G-42 on duties of non-solicitor municipal advisors. The draft pricing resources are intended to highlight key rule provisions applicable to the provision of underwriting services or advice, respectively, with respect to pricing of new issuance municipal securities; answer frequently asked questions; and offer sample considerations to aid regulated entities in designing and assessing compliance and WSPs. The deadline to comment has been extended to January 19, 2022.

SEC Approves Amendments to MSRB Rules

On October 6, 2021, the SEC approved an MSRB rule change to MSRB Rule G-10 on investor and municipal advisory client education and protection and MSRB Rule G-48 on transactions with SMMPs. Under MSRB Rule G-10, broker-dealers and municipal advisors must provide specified notifications to customers and municipal advisory clients, respectively, within specified timeframes. Prior to the rule change, broker-dealers were obligated to provide the required notifications to all customers, including SMMPs, even if those customers had not effected any transaction in municipal securities. The rule change amends MSRB Rule G-10(a) to narrow the definition of customer to include only those customers who have effected transactions in municipal securities within the prior one-year period or who hold a municipal securities position. The MSRB also

carved out exceptions for certain dealers from the MSRB Rule G-10(a) delivery requirement, including: (i) a dealer that does not have customers; or (ii) a dealer that agrees with a carrying dealer servicing its customer accounts that the carrying dealer will comply with MSRB Rule G-10(a) requirements. The MSRB's related amendment to MSRB Rule G-48 adds a new section relating to SMMP customers who would otherwise receive the required notifications as a result of a municipal securities transaction or by maintaining a municipal securities position. Such SMMP customers now are excepted from direct receipt of the MSRB Rule G-10(a) notifications so long as the dealer has the notifications available on its website. The full text of the notice can be found [here](#).

MSRB Provides Additional Regulatory Relief due to COVID-19 Pandemic

On October 26, 2021, the MSRB [filed](#) a proposed rule change with the SEC to further extend regulatory relief on a temporary basis to brokers, dealers, and municipal securities dealers in light of the ongoing COVID-19 crisis. The proposed rule change will continue to allow dealers to conduct internal inspections remotely, subject to certain conditions, until June 30, 2022, so long as they comply with the requirements of MSRB Rule G-27 on supervision.

MSRB Seeks Input and Volunteers for Advisory Groups

On November 11, 2021, the MSRB [published](#) a notice seeking volunteers for Fiscal Year 2022 to participate in its Compliance Advisory Group (CAG) and Municipal Fund Securities Advisory Group (MFSAG). CAG helps the MSRB identify areas where dealers and municipal advisors could benefit from further resources and tools that support compliance and provides input, as needed, to MSRB staff on the development of such compliance resources. MFSAG provides input to MSRB staff on municipal market practices and educational resources related to 529 savings plans and Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE) programs, shares insight on market trends and legislative matters, and helps advance the MSRB's interests in identifying areas where the municipal fund securities industry could benefit from additional regulatory guidance. The application deadline to volunteer for both CAG and MFSAG was December 13, 2021.

Litigation Updates

Litigation Update: U.S. Court of Appeals Hears Oral Argument on SEC's Temporary Conditional Order

On October 22, 2021, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in *SIFMA v. SEC*, challenging the SEC's order permitting municipal advisors to act as placement agents without registering as broker dealers. As discussed in our [2020 Year-End Newsletter](#) and [2021 Mid-Year Newsletter](#), the SEC's [Temporary Conditional Exemption](#) (TCE), which allowed non-dealer municipal advisors to solicit investors in certain private placements of municipal bonds, expired at the end of 2020. However, the Securities Industry and Financial Markets Association (SIFMA) has argued that its lawsuit is not moot because the SEC could consider extending, reinstating, or revisiting the TCE. In its oral argument, SIFMA reaffirmed its position that the issue was not moot, highlighting the fact that the TCE still has continuing effects even after its expiration, such as transfer restrictions that are in place through December 31, 2021. Audio of the oral argument can be found [here](#).

Litigation Update – VRDO Litigation

As described most recently in our [2021 Mid-Year 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 regards to the litigation in the State of New York, the parties still are in discovery and the case remains ongoing.

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. On August 2, 2021, the plaintiff-appellant served notice of its appeal, which has not yet been decided as of the date of this newsletter.

With respect to the suit filed in Illinois, on September 28, 2021, a judge in the Circuit Court of Cook County, Illinois, County Department, Law Division, granted the plaintiff's motion to amend its pleadings, and the litigation is ongoing.

Litigation Update – Municipal Financial Firm Litigation

As described most recently in our [2021 Mid-Year Newsletter](#), 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 August 2021, a federal judge in the U.S. District Court for the Southern District of New York ruled that the plaintiff's federal antitrust lawsuit can go forward after ruling that the plaintiff laid out a plausible claim that the defendant led a boycott to block its access to deals in the high-yield market. The judge also rejected arguments from the defendant that the claims based on New York state antitrust laws were prevented because the plaintiff originally pursued them in Delaware State Court. The litigation in federal court remains ongoing. Additionally, the plaintiff revived its defamation claim in Delaware state court, and trial is set for July 11, 2022.

Industry Updates

MSRB Elects New Board and Adopts Strategic Plan

From July 21-22, 2021, the MSRB elected its new board and adopted a strategic plan for the 2022 fiscal year. Mr. Patrick Brett, a managing director and head of municipal debt capital markets at a global investment bank was elected as the chair. Ms. Meredith Hathorn, a managing partner at a law firm based in Baton Rouge, Louisiana, was elected as the vice chair. The MSRB [released](#) its strategic plan, which focused on modernizing municipal securities market regulation; increasing market transparency by, among other things, investing in the Electronic Municipal Market Access (EMMA) system; providing high-quality market data; and fulfilling its Congressional mandate to protect the public interest, including by seeking information on ESG best practices in the municipal market.

SEC Chair Testifies before Congress in Regards to Municipal Market

On September 14, 2021, SEC Chair Gary Gensler testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on the state of the U.S. capital markets.

In regards to the municipal market, Chair Gensler asked the SEC staff for recommendations on how the SEC can bring greater efficiency and transparency to the non-Treasury fixed income market. In 2017, former SEC Chair Jay Clayton established the Fixed Income Market Structure Advisory Committee, composed of a consortium of industry experts tasked with advising the SEC on fixed-income regulation and the evolution of markets. The Fixed Income Market Structure Advisory Committee charter expired in March 2021. In his testimony, Chair Gensler did not specifically lay out his plans for the Fixed Income Market Structure Advisory Committee, but reaffirmed the importance of the municipal market to issuers and the need for continued efficiency and transparency. Chair Gensler's complete remarks can be found [here](#).

SEC Announces Fiscal Year 2021 Enforcement Results

On November 18, 2021, the SEC announced its enforcement results for Fiscal Year 2021. The SEC filed seven percent more (697 total) enforcement actions in 2021 than 2020. Twelve of the actions were categorized under public finance abuse, which was consistent with 2020. A breakdown of the statistics can be found [here](#).

SEC Statement on LIBOR

On December 7, 2021, the SEC released a staff [statement](#) reminding underwriters of their obligations when recommending primary offerings of London Interbank Offered Rate-linked (LIBOR) investments, such as municipal securities, to customers, as well as for broker-dealers making recommendations of municipal securities. The staff statements comes on the heels of the staff statement [issued](#) in July 2019, whereby the SEC recommended informal guidance on the potential impact that the discontinuation of LIBOR may have on broker-dealers. The SEC's Office of Municipal Securities staff remarked that broker-dealers should consider a host of factors that the LIBOR transition may have in connection with other duties applicable to municipal securities activity, including complying with Regulation Best Interest and various MSRB rules. The transition from LIBOR to the Secured Overnight Financing Rate (SOFR) is ongoing.

ESG-Related Developments

GFOA Releases Best Practices on ESG

On October 1, 2021, the Government Finance Officers Association released a [report](#) on best practices related to the “S” factor of ESG disclosure. This report comes on the heels of the GFOA’s [report](#) on environmental, or “E”, disclosure, which we mentioned in our [2021 Mid-Year Newsletter](#). The report addressed the distinction between the “E” and “S” factors in ESG, and the lack of consensus in the municipal market industry about what factors fall under the “S” umbrella that may constitute important information related to credit analysis. In prepared remarks to the GFOA on October 20, 2021, MSRB CEO Mark Kim discussed the growing importance of ESG disclosure in the municipal marketplace, and reminded municipal issuers that the standard of materiality is what a reasonable investor thinks is material.

MSRB Announced New EMMA Feature to Help Investors Identify ESG Investments

On October 25, 2021, the MSRB [announced](#) that it launched a new feature on EMMA that indicates when an upcoming municipal security new issue is either self-designated or certified as meeting ESG criteria. The new issue calendar lists the municipal securities scheduled to come to market across the country, as well as those that have recently sold. The new issue calendar can be [accessed](#) on EMMA, and shows the principal amount, maturity dates, financial advisor, and tax-exempt status of the bond, in addition to any ESG designation.

MSRB Requests Information on ESG Best Practices

On December 8, 2021, the MSRB [issued](#) a request for information on ESG best practices in the municipal securities market as part of its broader engagement on ESG trends. Specifically, the MSRB is seeking to compile comments on: (i) the disclosure of information regarding ESG-related risk factors and ESG-related practices and (ii) the labeling and marketing of municipal securities with ESG designations. Presently, there are no uniform standards for ESG-related disclosures or ESG-labeled bonds. The MSRB hopes to gather information from municipal issuers, investors in municipal

securities, broker-dealers, municipal advisors, and other participants in order to compile best practices, ongoing trends, and frequently asked questions surrounding ESG bonds in the municipal marketplace. Our August 19, 2021 municipal securities [white paper](#) entitled “ESG Disclosure in Municipal Offerings,” as part of our Municipal Securities Disclosure Series, discussed many considerations related to ESG-labeled bonds and related disclosure. The deadline for comments is March 8, 2022.

Conclusion

Total issuance volume of municipal securities remained steady in the second half of 2021. The municipal market saw \$475.3 billion of debt in 2021, down nearly two percent from \$484.6 billion in 2020. The total issuance for 2021 still beat the previous record of \$448.6 billion in 2017. As part of the near-record issuance volume, the municipal market saw a continued uptick in regulatory and enforcement activity compared to recent years. Specifically, the SEC brought landmark actions in a case involving duties of municipal advisors and tender offers related to municipal bonds. Congressional politics will likely play a role in how the regulatory and enforcement landscape unfolds in the first half of 2022 and beyond. Climate change and other ESG disclosure remains a topic of interest for regulators and investors, and the potential passage of President Biden’s landmark legislation—the Build Back Better Act—has the potential to impact the municipal marketplace.

With changeover in the SEC’s Office of Municipal Securities, and the COVID-19 pandemic continuing to develop, it remains to be seen what priorities the SEC will continue to focus on in the first half of 2022. Until the COVID-19 pandemic passes, however, we expect that in the first half of 2022 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, obligated persons, and ESG factors, and continue to bring enforcement actions for violations of fair dealing rules and materiality.

Finally, with the MSRB implementing new rules relating to investor and municipal advisory client education and protection, and transactions with SMMP supervision, as

well as requesting information from market participants in regards to ESG disclosure, we expect new issues to arise in the municipal securities market relating to interpretations and best practices based on the new regulatory regime. We continuously are monitoring developments related to any rule changes and developments into the first half of 2022.

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