



2013 MID-YEAR REVIEW

Key SEC Municipal Market Enforcement Actions

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The first half of 2013 confirms the trend we observed when we reported on the Securities and Exchange Commission's enforcement efforts in 2012: the annual increase in enforcement activity between 2011 and 2012 has continued, with the SEC pursuing more municipal market enforcement actions in the first six months of 2013 than it did in the first half of 2012.

What is different in 2013 so far, however, is the SEC's pronounced focus on the sufficiency and accuracy of the municipal market disclosures provided by state and local governments.

While the SEC did not bring a single enforcement action against a state or local government in 2012, it initiated actions against one state and three cities in the first half of 2013. These actions include allegations of fraud in connection with both primary and secondary municipal market disclosures and demonstrate intensive investigations into the accounting underlying these disclosures. In May 2013, for the first time in its history, the SEC brought an action against a local government based on public statements, not those stated in required municipal bond disclosure documents. Also in May 2013, the SEC alleged securities law violations in connection with underlying tax problems identified through a city's own accounting and audit processes.

The SEC's 2013 enforcement actions emphasize the importance of state and local government issuers' adoption of written policies and procedures—including continuing disclosure policies and procedures—to ensure the timeliness, currency, and completeness of the information provided to investors during and after a bond offering.

In its recent administrative settlements with state and local governments, the SEC did not require an admission of wrongdoing. The SEC has recently revised this policy and, as it announced in June 2013, now may require admissions of

wrongdoing in future settlements with municipal securities issuers as a condition of settlement. In announcing the policy shift, SEC Chair Mary Jo Whiteⁱ did not identify the types of cases in which defendants would be forced to admit wrongdoing, but stated that the SEC will consider “how much harm has been done to investors [and] how egregious is the fraud.”

E-ALERTS:

- **Additional Pay-to-Play Disclosure Required of Municipal Securities Dealers**
- **SEC Announces Policy Shift on ‘Neither Admit Nor Deny’ Settlements**
- **SEC Fraud Charges against Harrisburg, Pa., Have Implications for Secondary Market Disclosures**
- **SEC Issues No-Action Letter on Internet-Based ‘Road Shows’**
- **New Best Practices Released for Pension Obligation Disclosure**
- **NABL Issues Pension Disclosure Considerations**
- **Miami Is Latest Target of SEC Municipal Market Enforcement Actions**

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The SEC also continued to focus on public pension plans in 2013, bringing two actions against investment advisers for alleged violations of the Investment Advisers Act of 1940 (Advisers Act) in connection with their services to public pension plans. These actions are in addition to the action brought by the SEC against the State of Illinois for its alleged failure to disclose to investors systematic underfunding of its pension plans.

As a result, it seems clear that the SEC will continue to dedicate substantial and increasing resources to municipal securities investigation and enforcement. At the same time, the SEC's dedicated enforcement unit—the Municipal Securities and Public Pensions Unit—is awaiting appointment of a new Chief to replace Elaine Greenberg, who announced her departure from the SEC in June. That unit's Deputy Chief, Mark Zehner, continues to serve in that position, and consequently that Unit's proactivity is expected to continue. In fact, the SEC filed a complaint against another city to kick off the second half of 2013.

The following are summaries of key municipal market SEC enforcement actions brought in the first half of 2013.

OFFERING AND DISCLOSURE

Material Misstatements and Omissions in Official Statements

In April 2013, the SEC filed a complaint against an underwriter, two investment bankers, a developer, a city, the director of economic development for the city, and an Airport Authority (the Authority), alleging fraud in connection with tax increment bonds issued by the Authority in 2006, 2007, and 2008.

ⁱⁱ Proceeds from the bonds were used to fund redevelopment projects on a former Air Force base located in San Bernardino County, California.

According to the SEC's complaint, the redevelopment projects undertaken by the Authority included four new airplane hangars. The SEC alleges that, in constructing the hangars, the underwriter, one of the investment bankers, and the developer misappropriated \$2.75 million in bond proceeds. According to the SEC, these proceeds were used to pay excessive construction and property management fees, which were concealed from the Authority. Due to the non-disclosure of the unauthorized and excessive fees, the SEC contends that the 2007 and 2008 Official Statements contained material misstatements and omissions.

The SEC further alleges in its complaint that the Authority's 2008 Official Statement was false and misleading because, according to the SEC, it misstated the tax increment available to repay bondholders and the debt service ratio for the bonds. The SEC alleges that the calculations of the tax increment and debt service ratio were based on an improperly inflated \$65 million valuation by the developer of the new airplane hangars.

Finally, the SEC alleges that the underwriter and investment bankers falsely represented to investors that they had reviewed the Authority's Official Statements as part of their due diligence efforts and that the information contained therein was complete and accurate.

The SEC's complaint is based on nine claims of securities law violations. The claims include securities fraud and aiding and abetting securities fraud against all of the defendants, as well as alleged violations and aiding and abetting violations of MSRB Rules G-17, G-27, and G-32 against the underwriter and investment bankers. The SEC is seeking civil penalties, disgorgement, and permanent injunctions against the defendants. The case is currently pending in the U.S. District Court for the Central District of California.

Misleading Secondary Market Disclosures

In May 2013, the SEC charged a municipality with misleading investors about its financial health in the annual State of the City address, as well as in its financial and budget reports.ⁱⁱⁱ This is the first SEC action against a state or local government based on statements made publicly, as opposed to in the required municipal bond disclosure documents. The action is also the first to cite the failure of a municipal securities issuer to post continuing disclosure information on the Electronic Municipal Market Access (EMMA) website as contributing to the SEC's finding of fraud.

The SEC's allegations relate both to general obligation bonds issued by the city and to debt for which the city acted as primary guarantor. The SEC order charged that the city's 2007 annual financial report failed to include that the city had made \$4 million in guarantee payments on debt for a resource recovery facility (RRF).

Although the city had been repaid in 2007 from proceeds of a subsequent borrowing, the SEC alleged that the prior guaranty payments were an indicator of possible future debt guarantee payments required for the RRF. The SEC's order also charged that the city's 2008 financial report did not accurately reflect the likelihood of continued guarantee payments by the city or their effect on the city's financial condition.

According to the SEC, the 2009 budget posted on the city's website did not include the RRF debt guarantee payments the city knew would likely be required and misstated the city's credit rating. The SEC further alleged that the city's 2009 midyear fiscal report, intended to reflect the city's budget-to-actual numbers, improperly omitted \$2.3 million in RRF guarantee payments made by the city. The final public misstatement alleged by the SEC occurred in the State of the City address given by the Mayor in 2009 (an election year). According to the SEC, the Mayor improperly described the RRF financial difficulties as an "additional challenge" and an "issue that can be resolved" after it

had become clear the city may be forced to make significant RRF debt guarantee payments.

The SEC claimed that the city failed to timely post its 2008, 2009, 2010, and 2011 annual financial reports and certain event notices on EMMA as required by its continuing disclosure obligations as an issuer and a guarantor. As a result, according to the SEC, investors looked elsewhere for information about the city's financial health, and what they found included material misrepresentations and omissions by the city.

Quoting 1994 Interpretive Guidance issued by the SEC, the order states that "[s]ince access by market participants to current and reliable information is uneven and inefficient, municipal issuers presently face a risk of misleading investors through public statements that may not be intended to be the basis of investment decisions, but nevertheless may be reasonably expected to reach the securities markets." The SEC found the public statements by the city material, given the "total mix" of limited public information.

The SEC's order considered remedial actions taken by the city, including developing written disclosure policies and procedures, designating a city administrator to file annual financial information and event notices with EMMA, and implementing an annual training program for city employees involved in the disclosure process. The city also agreed to post its disclosure policy on EMMA as well as on its website. The city consented to the SEC's order without admitting or denying the allegations, and no monetary fines were imposed.

PUBLIC PENSION ACCOUNTING AND DISCLOSURE

Failure to Disclose Pension Plan Underfunding

In March 2013, the SEC charged a state with securities fraud for allegedly misleading investors by failing to disclose the systematic underfunding of its pension plans.^{iv} The SEC, which also announced a settlement of the case through a cease-and-desist order, alleged that the information was omitted from bond offering documents between 2005 and 2009.

The SEC's action is the latest development in its ongoing scrutiny of pension plan-related disclosures. It came more than two years after the SEC announced a similar action against a different state.^v In that case, the SEC contended that the state failed to disclose in its bond offering documents that the state had discontinued its stated pension funding plans. This exacerbated the perennial underfunding of the state's two largest state employee pension plans, the SEC alleged.

In the 2013 case, the state consented to the cease-and-desist order without admitting or denying the SEC's allegations. Importantly,

the order provided that the state's conduct was actionable as negligence; the SEC did not claim that the state's conduct constituted intentional securities fraud. The SEC noted that the state had taken remedial actions, such as retaining disclosure counsel and effecting written disclosure controls, policies, and procedures.

Most states' employee pension plan funding obligations are legislatively imposed, and this state's is no exception. Beginning in 1995, the state Pension Funding Act sought to address pension funding issues and achieve 90 percent funding through a 50-year contribution schedule. According to the SEC's order, those contribution calculations resulted in underfunded pension obligations, increased unfunded pension liability, and deferral of public pension contributions, which posed significant future risks to the state's financial health. The SEC's order noted that between 1996 and 2010, unfunded pension liability increased by \$57 billion.

In the offering documents, the state disclosed that its pension obligations are funded under a statutory plan and provided details of the plan. According to the SEC, however, the state failed to disclose that the plan could threaten its budget and financial condition, which in turn could have jeopardized the security of bondholders' investments.

The SEC's order also alleged that the state failed to provide investors with material information about amendments to the statutory plan. In particular, the SEC found that the state did not inform investors of the impact of legislatively enacted pension holidays that lowered contribution requirements in 2006 and 2007. Consequently, these holidays increased the state's unfunded pension liability and further pushed payment of the deferred portion of the contribution into the future.

Here, as in the previous case against a state, the SEC did not seek monetary fines or penalties on the state or any individuals.

Misrepresentation of Assets under Management

In April 2013, the SEC settled charges against the president and owner of an advisory firm in connection with its alleged overstatement to the California Public Employees' Retirement System (CalPERS) of the advisory firm's assets under management (AUM) in order to meet minimum adviser qualifications set by CalPERS.^{vi} The SEC further alleged that the president and owner subsequently used its selection as CalPERS' adviser and overstated AUM to solicit business from other clients and also misrepresented its AUM in forms filed with the SEC on at least four occasions.

According to the SEC's order, CalPERS issued an investment manager request for proposal (RFP) in 2008. CalPERS' RFP required that applicants meet a \$200 million AUM minimum as of December 31, 2007. The SEC alleged that the president and

owner falsely certified that the advisory firm met this minimum, when in fact its AUM was \$80 million at the close of 2007. The SEC's order notes that, in several emails to employees of the advisory firm, the president and owner admitted that the advisory firm's AUM did not meet CalPERS' standards. According to the SEC, the advisory firm managed approximately \$122 million for CalPERS at its peak. Furthermore, the SEC alleged that the president and owner informed, and encouraged others to inform, prospective clients that the advisory firm had been selected as CalPERS adviser and overstated the advisory firm's AUM on at least 14 occasions to potential clients. The SEC's order charged that such conduct by the president and owner violated the antifraud provisions of Sections 206(1) and 206(2) of the Advisers Act.

The SEC's order alleged that the president and owner inaccurately reported the advisory firm's AUM in at least four forms ADV filed with the SEC between February 2008 and July 2010. The SEC further alleged that the president and owner provided false information to SEC staff members regarding the advisory firm's AUM and other related information during a routine exam in January 2011. The SEC's order charged that such conduct violated Section 207 of the Advisers Act.

Without admitting or denying the SEC's findings, the president and owner consented to the SEC's order. The SEC ordered the president and owner to cease and desist from future Advisers Act violations. The president and owner was barred from the securities industry and ordered to pay disgorgement of \$20,018, prejudgment interest of \$1,680, and a penalty of \$100,000.

In another action related to CalPERS, the SEC is seeking an order against a former CalPERS CEO and a placement agent alleging they provided falsified documents to an investment firm to induce the firm to pay approximately \$20 million in placement agent fees. The case is currently pending in the U.S. District Court for the District of Nevada.

Misappropriation of Pension Funds

In June 2013, the SEC charged an investment adviser and its principals with allegedly misappropriating approximately \$3.1 million from its client, the Police and Fire Retirement System of the City of Detroit (PFRS).^{vii} According to the SEC's complaint, the misappropriated funds were used to purchase two California shopping malls.

According to the SEC's complaint, the investment adviser began managing approximately \$140 million in properties owned by PFRS in 2004. In connection with managing PFRS' assets, the investment adviser controlled a PFRS bank account containing rental income and refinancing proceeds generated by PFRS' real estate assets, according to the SEC. The SEC alleges that in 2008, the investment adviser and its principals, without permission,

used \$400,000 from the PFRS account to put a down payment on two California shopping malls. The SEC further alleges that an additional \$2.7 million was impermissibly used by the investment adviser and its principals to subsequently complete the purchase of the shopping malls.

The SEC's complaint alleges that in quarterly PFRS financial reports, as well as notices to PFRS regarding all fund transfers in the PFRS bank account provided by the investment adviser, the purchase of the shopping malls was never disclosed. The investment adviser principals also failed to disclose the purchase during their presentation at a PFRS board meeting to approve PFRS' 2012 budget, according to the SEC. The SEC alleges the misappropriation of \$3.1 million was not disclosed to PFRS until four years later, in 2012.

The SEC's complaint is based on violations of Sections 206(1) and 206(2) of the Investment Advisers Act. Without admitting or denying the SEC's allegations, the investment adviser agreed to pay disgorgement in the amount of approximately \$3.75 million and to be enjoined from further violations of the Advisers Act to settle the charges with the SEC. The settlement is subject to court approval.

In 2012, the SEC filed a complaint against the same investment adviser alleging that the investment adviser provided lavish gifts to trustees of PFRS and the General Retirement System of the City of Detroit while seeking a \$115 million investment from the pension funds.^{viii} The "pay-to-play" case is currently pending in the U.S. District Court for the Eastern District of Michigan.

TAX

In May 2013, the SEC charged a municipality with fraud for allegedly failing to disclose improper arrangements with the developer of a city parking and retail project that put at risk the tax-exempt status of bonds held by investors.^{ix} The SEC announced a settlement with the city through a cease-and-desist order.

According to the SEC's order, the city entered into a lease agreement (the Lease) in 2002 with a for-profit developer to develop a mixed-use retail and public parking project. Under the Lease, the city incurred the costs of the parking structure portion of the project and maintained control over its operation, maintenance, and revenue. The limited role of the developer was key to the project's eligibility for tax-exempt financing, according to the SEC. The city received a \$6.5 million loan to finance the project from proceeds of tax-exempt bonds issued by the Florida Municipal Loan Council (FMLC) in 2002. In connection with the loan, the SEC alleged the city represented in a tax certificate that bond proceeds would not be used for the retail portion of the project and that the project would be operated in accordance

with IRS regulations. According to the SEC's order, however, the city subsequently loaned \$2.5 million of the bond proceeds to the developer (the Developer Loan) without the knowledge of the FMLC or bond counsel.

Later in 2002, the City Commission voted not to move forward with the project and the developer sued the city, according to the SEC's order. The SEC alleges that the Lease was revised as part of negotiations to settle the lawsuit to provide, among other revisions, that the city would lease both the retail and the parking portion of the project to the developer as well as share parking profits with the developer (the Lease Revisions).

According to the SEC's order, in 2006 the City failed to disclose information to the FMLC about the Developer Loan and the Lease Revisions in connection with the FMLC's issuance of an additional series of tax-exempt bonds, resulting in an inaccurate 2006 tax certification. The SEC alleged that bond proceeds were used to loan an additional \$5.5 million to the city. Furthermore, the SEC alleged the city failed to disclose to the FMLC the Developer Loan and the Lease Revisions in annual certifications,

which included a certification by the city that the tax-exempt status of the bonds had not been affected by any events.

The SEC's order found that the city's failure to disclose the Developer Loan and Lease Revisions was material because, if such actions by the city caused the interest on the 2002 and 2006 bonds to become taxable, investors could be subject to tax penalties. Furthermore, investors trading the bonds relied on their tax-exempt status for pricing purposes and investment decisions, according to the SEC.

As part of its settlement with the SEC, the city agreed to undertake remedial efforts, including hiring an independent consultant to review the city's disclosure policies and procedures and help implement disclosure compliance training programs. The SEC did not impose any monetary fines on the city. In a related settlement, the city settled possible tax-exempt issues with the Internal Revenue Service pursuant to its Voluntary Compliance Agreement Program.

Ballard Spahr's Municipal Securities Regulation and Enforcement Group helps municipal market participants navigate a rapidly evolving regulatory, investigative, and enforcement environment, enabling them to anticipate and address compliance issues and respond effectively to investigations when necessary.

Our attorneys provide representation in proceedings involving the SEC, the Municipal Securities Rulemaking Board (MSRB), the U.S. Department of Justice (DOJ), the Financial Services Regulatory Authority (FINRA), and state securities commissions.

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- i. Mary Jo White was sworn in as SEC Chair on April 10, 2013.
 - ii. *SEC v. City of Victorville, Cal. et al.*, Case No. EDCV13-0776 (C.D. Cal., Apr. 29, 2013).
 - iii. *SEC v. The City of Harrisburg, Pa.*, Administrative File No. 3-15316 (May 6, 2013).
 - iv. *SEC v. State of Illinois*, Administrative File No. 3-15237 (Mar. 11, 2013).
 - v. *In the Matter of the State of New Jersey*, Administrative File No. 3-14009 (Aug. 18, 2010).
 - vi. *In the Matter of Umesh Tandon*, Administrative File No. 3-15282 (Apr. 18, 2013).
 - vii. *SEC v. MayfieldGentry Realty Advisors, LLC et al.*, Case No. 2:13-cv-12520 (June 10, 2013).
 - viii. *SEC v. Kwame M. Kilpatrick, et al.*, Case No. 12-cv-12109 (E.D. Mich., May 9, 2012).
 - ix. *In the Matter of City of South Miami, Fla.*, Administrative File No. 3-15329 (May 22, 2013).