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Outlook 2021: SEC to Focus on Price Transparency, Muni Advisors and Disclosure Enforcement.

The Securities and Exchange Commission's enforcement activity will have a strong focus on issuer disclosure, municipal advisors, and pay-to-play practices in 2021.

Despite changes not only in presidential administrations but a new SEC chair a new director of enforcement, sources expect the SEC to stay vigilant if not more intense in its enforcement actions.

"The core organizing principle is that we want to pursue, and we prioritize, cases where there is a clear risk of investor harm," said LeeAnn Gaunt, chief of the SEC's Public Finance Abuse Unit. "We also consider it a key part of our mission to protect issuers, particularly small, infrequent issuers, from abusive practices by municipal advisors and broker-dealers."

In 2020, the SEC brought numerous cases against MAs and broker-dealers.

Prominently, the SEC continued a two-year crackdown of individuals and broker-dealers firms involved in "flipping" arrangements in 2020. Since 2018, there were multiple cases brought involving individuals and firms posing as retail investors to gain priority access to new-issue municipals. The bonds were then "flipped" for profit.

The SEC also charged a charter school in 2020 for misleading investors in a \$7.6 billion municipal bond offering. In April, the SEC charged the CEO and director of finance of a public charter school with misleading investors.

"Investor protection is our mission and is always our primary focus," Gaunt said. "Although new leadership does bring change, I think everyone appreciates the importance of the municipal securities market and supports enforcement where there are abuses in that market."

In 2021, MA enforcement and issuer disclosure will continue to be active, Gaunt said. The SEC will be focused on fraud in primary offerings, especially with distressed issuers. The SEC is also concerned about muni advisors' breaches of fiduciary duties, and staff prioritizes those cases, Gaunt said.

The SEC is also still seeing issues with firms and individuals providing municipal advice to issuers without registering as such, Gaunt said. In September, the SEC settled charges with consultant Irene Carroll after the regulator found she provided municipal bond advice to charter schools without registering as an MA.

The SEC will also focus on the lack of transparency and pricing of municipal securities, former SEC lawyers say.

"It all goes back to the idea, that equity security, like corporate stock and so forth, the staff has always believed and some commissioners that there is not the same liquid, robust market that regularly makes pricing available," said Peter Chan, partner at Baker McKenzie and former SEC

enforcement lawyer.

“The past year has shown that the SEC wants to use its enforcement power to address this concern,” Chan added. “There will be more to come.”

A new SEC chair will be chosen by President-elect Joe Biden this year and confirmed by the Senate. Former Chair Jay Clayton departed at the end of the year and the Director of Enforcement Stephanie Avakian also left. These moves are common as a new administration rolls in.

Changes in top seats will not change the aggressiveness of the SEC's enforcement, and if anything will bring more intensity, Chan said.

“With the new administration with a Democrat president, the expectation is that enforcement will be at minimum just as aggressive if not more aggressive in activity and the level of focus and energy,” Chan said.

A Democratic administration also tends to lead with a view that the SEC should be more aggressive in overall enforcement and SEC chairs appointed by Republicans historically want to protect the market, Chan said.

Changes in administration don't mean much to the muni market specifically.

“These changes in the administration don't necessarily mean a big shift in policy - at least in the muni world it's a little more steady,” said Dave Sanchez, senior counsel at Norton Rose Fulbright. “Ultimately it is a positive that folks can have a little more security of where the SEC is likely to go and where their focus will be because it's probably not going to dramatically change.”

A new SEC chair also won't have a material impact on muni enforcement. Sanchez said.

“You're going to see the priorities that have been identified by the Public Finance Abuse unit, as well as the Office of Municipal Securities, continue to be prominent without having any external interference,” Sanchez said.

Sanchez expects that muni enforcement will be focused on the transition to LIBOR, disclosure issues, issues related to COVID-19 disclosures and cybersecurity.

“It's the big general themes, but there might be some more specific focus on current topics that inform those themes,” Sanchez said.

Other sources said it was difficult to determine what role the next SEC chair would have.

“Clayton was a corporate guy but was definitely focused on disclosure, but it's hard to say,” said Rebecca Lawrence, senior counsel at Ballard Spahr.

Before joining the SEC, Clayton was a partner at Sullivan & Cromwell LLP where he was a member of the firm's Management Committee and co-head of the firm's corporate practice.

Whoever is in charge next though will be focused on more timely financial disclosure from issuers. Clayton keenly focused on that issue as chair demanding more timely and interim information from states and local governments. That issue has been ongoing for the past few decades.

Into 2021, the SEC is likely to keep an eye on MA enforcement since it is still a relatively newly-regulated group, Lawrence said. The Dodd-Frank Act of 2010 subjected non-dealer MAs for the first

time to a federal regulatory regime and required all MAs to have a fiduciary duty to put issuers' interests before their own.

As for broker-dealers, the SEC may focus on enforcing Regulation Best Interest, Lawrence added. Reg BI strengthens the broker-dealer standard of conduct beyond existing suitability obligations and makes it clear that a broker-dealer may not put its financial interest ahead of a retail investor. It also requires broker-dealers and investment advisers to state clearly facts about their relationship with their customers, including financial incentives. That rule went into effect during the summer of 2020.

By Sarah Wynn

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