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Outlook: SEC In for a Dizzying Year.

The year 2024 is shaping up to be a landmark one for the Securities and Exchange Commission, not only through their own rigorous enforcement agenda but the regulator is in for continued industry backlash and a Supreme Court case that could test its enforcement powers and change how the SEC operates.

Through its own enforcement agenda, the SEC has made clear its muni market focus in 2024 will be to scrutinize solicitor municipal advisors and compliance with Regulation Best Interest. Dave Sanchez, director of the SEC's Office of Municipal Securities, also said during a panel during at regulator's Compliance Outreach Program in early December that issuers should keep an eye on the Government Finance Officer's Association's best practices for climate and ESG risk disclosure.

But outside of its normal examination priorities, the Commission has received intense backlash in recent years for what many market participants view as an unprecedented regulatory agenda, and with many of these proposals coming into effect in 2024, even more backlash is expected.

"Next year is going to be the year of the lawsuit for the SEC," said Chris Iacovella, chief executive officer of the American Securities Association. "This administrative state chairman (SEC chairman Gary Gensler), who is an unelected partisan, has decided to use his influence to demand that the MSRB write rules, when there is no market failure, is a threat to our marketplace and quite frankly, it's a threat to democracy and the freedom to operate because you have somebody coming in and telling the MSRB that they have to change what works, because that's what he thinks is best."

Top of mind for the broker-dealer community are the post-trade and time-of-trade reporting rules, which change the trade reporting window to one minute and the settlement date to T+1, respectively. The MSRB has also indicated in the new year that it will be soliciting feedback on pre-trade reporting.

"We're very concerned that he's not going to stop with post-trade reporting, and that he intends fully to lean on them to try to change to some pre-trade mechanism to force everything onto an electronic platform because he's predisposed to trying to do that, based upon his time at the CFTC, implementing the swaps regime," Iacovella said of Gensler.

"It's come to our attention that the current chair of the SEC has called the MSRB a glorified trade association," Iacovella said. "We obviously disagree with that but we're also concerned that the government is using its authority to lean on and pressure the SRO (self-regulatory organization) to do things that are unnecessary, because there's no market failure."

"My view is that 2024 is going to continue to be a difficult environment for the broker-dealer community," said Leslie Norwood, managing director, associate general counsel and head of municipal securities at the Securities Industry and Financial Markets Association. She noted a mix of factors such as the interest rate environment, expected to come down in 2024, that has caused new issue volume to decrease, and capital rules such as the Basel III End Game proposal, on which comments are due Jan. 16.

“There’s also direct costs that are at play, such as the increase in MSRB fees,” Norwood said. The MSRB recently filed its new rate card with the SEC and comments on that are due Jan. 2, though the rates were effective immediately.

“The rate card was put in place to try to create more certainty in terms of the fees and to try and smooth out some of the swings,” Norwood said. “However, the swings within each of the buckets of this new rate card model have been pretty dramatic this round, including a reduction in the trade count fees of 48% and an increase in the underwriting fees of 25%. The increase in underwriting fees was only 25% because they hit the cap,” she added. “I think that’s something that continues to be an issue for the broker dealer community.”

Gensler has made it clear that he’s trying to bring the Commission up to speed with the large technological and societal changes over the last several decades and has made strong efforts to issue regulations, not just enforcement actions.

“We’ve all seen complaints that they’re doing regulation through enforcement, and now they’re doing regulation through regulation so I guess we can’t have it both ways,” said Teri Guarnaccia, partner at Ballard Spahr, co-leader of the firm’s public finance group and co-leader of the firm’s municipal securities regulation and enforcement team.

But for the SEC’s Public Finance Abuse Unit, new ground has been broken on enforcement as well. Beginning at the end of 2022, the Office of Municipal Securities has begun enforcing nonadherence to the limited offering exemption, and so far, it’s had a positive effect on the habits of the market.

“I think that it is one of those areas like MCDC was, where the regulatory or the enforcement activities have forced better practices from broker dealers,” Guarnaccia said. “Where now, certainly at least the big banks, most of whom the SEC has already looked at, have policies and procedures in place and it’s received such attention that I think its people are really looking at it.”

Others have already noted the MCDC-like nature of the SEC’s look at the limited offering exemption, where the Commission takes a specific offense and offers lenient settlements with firms that self-report their offenses. The Commission has so far charged seven firms for violating the exemption.

“I don’t know that they’re done, because maybe they haven’t finished all of their started actions,” Guarnaccia said. “But I think going forward, people understand what they were looking at and are more cognizant of how to comply.”

But all will be eager to watch what happens in SEC v. Jarkesy, the case that will test whether the Commission’s statutory provisions which allow them to seek civil penalties have been violating the Seventh Amendment. The decision is expected in 2024.

By Connor Hussey

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