

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97064 / March 7, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21336

In the Matter of

KEYBANC CAPITAL MARKETS INC.,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND
CEASE-AND-DESIST
PROCEEDINGS, PURSUANT
TO SECTIONS 15(b), 15B(c)
AND 21C OF THE
SECURITIES EXCHANGE
ACT OF 1934, MAKING
FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b), 15B(c) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against KeyBanc Capital Markets Inc. (“KBCM” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b), 15B(c) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings involve KBCM's failure to comply with Exchange Act Rule 15c2-12 (the "Rule") when participating as an underwriter in certain primary offerings of municipal securities. Exchange Act Rule 15c2-12 generally requires underwriters, in primary offerings of \$1 million or more, to obtain disclosure documents from issuers and to reasonably determine that the issuer of the municipal securities or an obligated person has undertaken to provide certain information pertaining to the offered securities on a continuing basis to the Municipal Securities Rulemaking Board ("MSRB"). This undertaking is commonly referred to as a "continuing disclosure undertaking" or a "continuing disclosure agreement." Continuing disclosures enable investors in municipal securities in the secondary market to make informed investment decisions and to protect themselves from misrepresentations or other fraudulent activities by brokers, dealers and municipal securities dealers.

Rule 15c2-12 includes an exemption for limited offerings of municipal securities placed with a small number of sophisticated investors with investment intent. Underwriters participating in offerings of municipal securities issued in denominations of \$100,000 or more that are sold to no more than thirty-five persons are exempt from the Rule's requirements if the underwriters have a reasonable belief that each purchaser: (1) has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the investment; and (2) is not purchasing the securities for more than one account or with a view to distributing the securities.

From September 2017 to December 2021, KBCM, while serving as sole underwriter for 47 limited offerings, sold securities to broker-dealers and certain investment advisers without a reasonable belief that the broker-dealers and investment advisers were purchasing the securities for investment as required under Exchange Act Rule 15c2-12(d)(1)(i). Moreover, KBCM lacked policies and procedures reasonably designed to determine if purchasers satisfied the exemption's requirements. As a result, KBCM violated Exchange Act Rule 15c2-12, as well as MSRB Rule G-27, which requires municipal underwriters to adopt, maintain and enforce written supervisory procedures reasonably designed to ensure compliance with Rule 15c2-12. KBCM also violated Section 15B(c)(1) of the Exchange Act for failing to comply with the MSRB rule.

Respondent

1. **KBCM**, incorporated in Ohio and headquartered in Cleveland, Ohio, is registered with the Commission as a broker-dealer and municipal advisor.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Rule 15c2-12 under the Exchange Act

2. Broker-dealers that participate as underwriters in primary offerings of municipal securities of \$1 million or more must comply with Exchange Act Rule 15c2-12 unless the offering is exempt pursuant to Section (d) of the Rule.²

3. Exchange Act Rule 15c2-12 is designed to prevent fraud in primary offerings of municipal securities. The Rule enhances the accuracy and timeliness of disclosures made to investors by establishing standards for the procurement and dissemination of disclosure documents by underwriters.³

4. Exchange Act Rule 15c2-12(b) requires underwriters in primary offerings of municipal securities: (a) to obtain and review a copy of an official statement deemed final by the issuer of the municipal securities, except for the omission of specified information; (b) in non-competitively bid offerings, to make available, upon request, the most recent preliminary official statement, if any; (c) to contract with the issuer to receive, within specified time periods, sufficient copies of the issuer's final official statement; and (d) to provide, for a specified period of time, copies of the final official statement to any potential customer upon request.⁴ Before purchasing or selling municipal securities in connection with an offering, the Rule also requires an underwriter to reasonably determine that an issuer of municipal securities or an obligated person has undertaken in a written agreement or contract, for the benefit of holders of such securities, to provide annual reports containing certain financial information and operating data to the MSRB, as well as timely notice of certain specified events pertaining to the municipal securities being offered.⁵ This undertaking is commonly referred to as a "continuing disclosure undertaking" or a "continuing disclosure agreement." Continuing disclosures enable investors in municipal securities in the secondary market to make informed investment decisions and to protect themselves from misrepresentations or other fraudulent activities by brokers, dealers and municipal securities dealers.

Exemption from Rule 15c2-12 for Limited Offerings

5. The primary intent of Exchange Act Rule 15c2-12 is to focus on those offerings of municipal securities that involve the general public and are likely to be actively traded in the secondary market.⁶ When the Commission adopted the Rule in 1989, it included exemptions

² 17 C.F.R. §§ 240.15c2-12(a) [general application of Rule] and (d) [offerings exempt from general application of Rule].

³ *Municipal Securities Disclosure*, Exchange Act Rel. No. 34-26985, 54 Fed. Reg. 28799, 28800-01 (Final Rule, Jul. 10, 1989) [Rule 15c2-12 promulgated, in part, under Section 15(c) of the Exchange Act, 15 U.S.C. § 78o(c)].

⁴ 17 C.F.R. §§ 240.15c2-12(b)(1)-(4).

⁵ 17 C.F.R. § 240.15c2-12(b)(5).

⁶ 54 Fed. Reg. 28799 at 28809.

designed to facilitate certain offerings where the Commission believed that, given the sophistication of the investors and the alternative mechanisms developed by the industry to facilitate disclosure in connection with such offerings, the specific requirements of the Rule were not necessary to prevent fraud or to encourage the dissemination of disclosure into the secondary market. This included an exemption for limited offerings.⁷ Specifically, Section (d)(1)(i) of the Rule exempts primary offerings of municipal securities “in authorized denominations of \$100,000 or more, if such securities ... are sold to no more than thirty-five persons each of whom the Participating Underwriter reasonably believes: (A) has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment; and (B) is not purchasing for more than one account or with a view to distributing the securities.”⁸

6. The Commission was concerned that any securities offered pursuant to a limited offering exemption could immediately be resold to public investors without the benefit of the Rule’s requirements, including the undertaking by issuers to provide investors with continuing disclosure about their investments. For these reasons, the Commission required that the securities be issued in relatively large denominations, \$100,000 or more, and that the underwriter have a reasonable belief that the securities are being acquired by the purchaser for investment. The Rule also requires underwriters to determine if each investor is purchasing the securities for one account in order to preserve the integrity of the limitation on sales to no more than thirty-five persons. Moreover, the persons that purchase the securities must possess the necessary knowledge and experience to evaluate the merits and risks of the investment. The Rule does not identify purchasers presumed to meet these criteria. Instead, the Rule requires that underwriters make a subjective determination that investors meet the purchaser qualifications.⁹

KBCM Failed to Comply with the Limited Offering Exemption

7. From September 2017 to December 2021, KBCM acted as sole underwriter for at least 47 offerings of municipal securities where it sought to rely on the exemption provided in Exchange Act Rule 15c2-12(d)(1)(i), but where the offerings did not actually satisfy the exemption’s requirements. KBCM did not provide investors in these securities with copies of any Preliminary Official Statement or Final Official Statement for the securities, or determine that a continuing disclosure undertaking had been entered into by the issuer, or an obligated person, as required by Exchange Act Rule 15c2-12(b).

8. In these 47 limited offerings, KBCM sold the municipal securities to broker-dealers and/or investment advisers with separately managed accounts. When it sold the municipal securities to these broker-dealers and investment advisers, KBCM did not have a reasonable belief that the broker-dealers and investment advisers were purchasing the securities for investment as required under Exchange Act Rule 15c2-12(d)(1)(i). KBCM did not inquire, or otherwise determine, if the broker-dealers and investment advisers were purchasing the securities

⁷ 54 Fed. Reg. 28799 at 28801, 28808.

⁸ 17 C.F.R. §§ 240.15c-12(d)(1)(i)-(ii).

⁹ 54 Fed. Reg. 28799 at 28809-10.

for more than one account or for distribution. It also failed to ascertain for whom the broker-dealers and investment advisers were purchasing the securities. KBCM therefore was unable to form a reasonable belief that the broker-dealers and investment advisers were purchasing the securities for investors who possessed the necessary knowledge and experience to evaluate the investments. As a result, these 47 limited offerings did not qualify for the exemption under Exchange Act Rule 15c2-12(d)(1)(i).

9. KBCM realized \$263,607.66 from the 47 limited offerings that did not qualify for the exemption under Exchange Act Rule 15c2-12(d)(1)(i) and that resulted in its failure to comply with the disclosure requirements in Exchange Act Rule 15c2-12(b).

**KBCM Failed to Adopt Policies and Procedures Reasonably
Designed to Ensure Compliance with the Limited Offering Exemption**

10. MSRB Rule G-27(c) requires broker-dealers to adopt, maintain and enforce written supervisory procedures reasonably designed to ensure that the conduct of the municipal securities activities of the broker-dealer and its associated persons is in compliance with the Exchange Act and MSRB rules.

11. From at least September 2017 through December 2021, KBCM did not have any specific policies or procedures reasonably designed to comply with Exchange Act Rule 15c2-12(d)(1)(i) and enabling it to form a reasonable belief that persons to whom it sold municipal securities pursuant to the limited offering exemption: (a) had such knowledge and experience in financial and business matters that they were capable of evaluating the merits and risks of the prospective investment; and (b) were not purchasing for more than one account or with a view to distributing the securities.

Violations

12. As a result of the conduct described above, Respondent willfully¹⁰ violated Exchange Act Rule 15c2-12 and MSRB Rule G-27.

13. As a result of Respondent's willful violation of MSRB Rule G-27, Respondent willfully violated Section 15B(c)(1) of the Exchange Act.

Disgorgement

14. The disgorgement and prejudgment interest ordered in paragraph IV.C is consistent with equitable principles, does not exceed Respondent's net profits from its violations, and

¹⁰ "Willfully," for purposes of imposing relief under Sections 15(b) and 15B(c) of the Exchange Act "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

returning the money to Respondent would be inconsistent with equitable principles. Therefore, in these circumstances, distributing disgorged funds to the U.S. Treasury is the most equitable alternative. The disgorgement and prejudgment interest ordered in paragraph IV.C shall be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Remedial Efforts

15. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

IV.

On the basis of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b), 15B(c) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, Exchange Act Rule 15c2-12, and MSRB Rule G-27.

B. Respondent is censured.

C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of \$263,607.66 and prejudgment interest of \$33,528.55 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

D. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$100,000.00 to the Securities and Exchange Commission, of which a total of \$16,667.00 shall be transferred to the MSRB in accordance with Section 15B(c)(9)(A) of the Exchange Act, and of which the remaining \$83,333.00 shall be transferred to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

E. Payments must be made in one of the following ways:

- (1) Respondent may transmit payments electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying KBCM as a Respondent in these proceedings and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Assistant Regional Director Kevin B. Currid, Division of Enforcement, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110.

F. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary