



SEC Issues Bulletin on Antifraud Provisions

The Municipal Securities Disclosure Series

William C. Rhodes

Partner, Public Finance

Municipal Securities Regulation and Enforcement

215.864.8534 | rhodes@ballardspahr.com

Kimberly D. Magrini

Associate, Public Finance

Municipal Securities Regulation and Enforcement

215.864.8365 | magrinik@ballardspahr.com

SEC Issues Bulletin on Antifraud Provisions

April 2020

By William C. Rhodes and Kimberly D. Magrini

The Office of Municipal Securities (the Office) of the Securities and Exchange Commission (SEC) issued a [staff legal bulletin](#) (the Bulletin) on February 7, 2020. The Bulletin described the views of the Office staff on the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (together, the antifraud provisions) to certain disclosure scenarios, and clarified their view that any public statement made by issuers of municipal securities and obligated persons, including elected governmental officials, that is reasonably expected to reach investors and the trading markets are subject to the same antifraud standards applicable to primary offerings.

In the Bulletin, the staff expresses its view that it is consistent with the SEC's prior statements that antifraud provisions apply to all statements of a municipal issuer that provide information reasonably expected to reach investors and the trading markets, regardless of the intended primary audience, the medium of delivery, and the municipal issuer's compliance with its continuing disclosure obligations.

BACKGROUND

Rule 10b-5 prohibits, in connection with the purchase and sale of any security, the making of any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

A fact is considered material if there is a substantial likelihood that the information would have been viewed by a reasonable investor as having significantly altered the total mix of information available. In the case of municipal issuers, the "total mix" analysis, which is a facts and circumstances test, can differ greatly among the approximately 50,000 issuers in the market. The analysis may also depend upon whether access to accurate, timely, and comprehensive information about the municipal issuer is "uneven and inefficient" rather than regularly available to investors through the Municipal Securities Rulemaking Board (MSRB)'s Electronic Municipal Market Access (EMMA) website or some other investor relations-focused and public site (*i.e.*, an investor page on an issuer's website).

In 1994, the SEC published an [interpretive release](#) (the 1994 Release) relating to the application of the antifraud provisions to statements made by municipal issuers following an initial offering of municipal securities. The 1994 Release stated that "when [a municipal issuer] releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions." In the Bulletin,

the staff relies in part on the 1994 Release as the basis for its analysis. However, the 1994 Release was issued at a time when, generally, “access to current and reliable information was uneven and inefficient” and there was “no mechanism for disseminating information about the municipal issuer to the market as a whole.” The subsequent development of EMMA, a repository specifically designed for information meant to inform the market, led to a natural identification of information reasonably expected to reach investors and the trading markets. However, the Bulletin suggests there may be little distinction between information that might reasonably be expected to reach investors and information that is not intended to inform the market.

In its analysis, the staff cited to the 2013 Harrisburg Report, where the Office had noted that “[i]nvestors may be more likely to rely upon statements from public officials where written undertakings made pursuant to Rule 15c2-12 have not been fulfilled and required continuing disclosures are not available through [EMMA].” The staff’s statements in the Bulletin, however, appear to call into question the lengthy analysis leading to the justification of Harrisburg’s liability for material misleading information posted to the city’s website, namely that the “total mix” of available accurate information was scant due to Harrisburg’s failure to file required secondary market disclosures, and therefore investors were reasonably likely to search for any available information about the city, including the city’s website, and that, due to the absence of required filings, materially misleading information, including a mayoral address to city council, found on the website became likely to reach the trading markets. It is important to note that although the “total mix” of information is a facts and circumstances test and there may be differing interpretations of what is material or what medium of disclosure would result in information reasonably expected to reach investors, the SEC has now clarified its position and issuers and obligated persons are, once again, reminded of the importance of developing and maintaining comprehensive disclosure policies and are [on notice](#) of the Staff’s view on the application of antifraud liability to all public statements of the issuer or obligated person.

Over the past decade, the SEC has been focused on improving continuing disclosure—timeliness and substance—through initiatives like the Municipalities Continuing Disclosure Cooperation Initiative, recent enforcement activities such as the 2013 Harrisburg Report, and the latest amendments to Rule 15c2-12. At the same time, the investor community has also been pushing issuers for more frequent and timely disclosure. SEC Chairman Jay Clayton has spoken publicly several times on the topic of timely and meaningful issuer disclosure, including more timely annual financial reporting from issuers and more consistent release of unaudited interim information, in an effort to improve municipal disclosure. Chairman Clayton remarked to the SEC Fixed Income Market Structure Advisory Committee in 2019 that some issuers were receiving advice that information posted to websites or other media was subject to a lower legal scrutiny for accuracy and completeness than information available to investors on EMMA, presumably because such information was not provided in connection with the offer and sale of securities nor intended to inform the market. As a result, Chairman Clayton asked the Office to prepare a staff legal bulletin to summarize the application of the federal securities laws to various disclosure scenarios.

Although staff legal bulletins are by their nature meant to be summaries of the SEC’s views regarding various aspects of federal securities laws and SEC regulations, the seemingly new standard set forth in the Bulletin would have the antifraud provisions apply equally to all statements by a municipal issuer regardless of Rule 15c2-12 compliance, whether disseminated on the MSRB’s EMMA system or elsewhere, whether written or oral—including through public announcements, press releases, interviews with media representatives or discussions with rating agencies, citizens, voters, customers or public groups whose members have a particular interest in their affairs—and can extend to information about municipal issuers collected by state and local governmental bodies and routinely made publicly available. This raises a question of whether the SEC has now placed itself in the potential role of policing more than

just securities matters—including potentially reviewing intergovernmental reporting and political speech under the antifraud rules.

SEC STAFF ANALYSIS

In this Bulletin, the Office provided the following analysis on how issuers and other obligated parties should comply with the antifraud provisions for specific types of public information:

- Issuers should ensure that the information on their websites is accurate and not misleading.
- While the maintenance of previously posted historical information on websites does not constitute a republication of such materials for purposes of the antifraud provisions, previously posted materials or statements should be separately identified as historical and should be located on a separate section of the website in circumstances where it is not apparent to the reasonable person that the posted materials speak as of an earlier period.
- When an issuer posts a hyperlink on its website, liability for statements on the hyperlinked site depends on whether the issuer endorses or approves of the hyperlinked information. The SEC staff considers several factors, including the context of the hyperlink, the risk of confusing investors, and the presentation of the hyperlinked information. The staff therefore encourages municipal issuers to follow the [SEC's 2008 guidance](#) regarding the application of the antifraud provisions to the use of hyperlinks on the websites of public companies.
- The staff encourages municipal issuers to follow the SEC's guidance regarding the application of antifraud provisions to the display of summary information on the websites of public companies. This includes using summaries and overviews to highlight the nature of such information, the use of layered or tiered formats in presenting such information, and the use of appropriate titles and explanatory language.
- The staff believes that, depending on the facts and circumstances, reports submitted by a municipality to a state agency, reports made by a state or local official to a legislative body, and other reports made part of a public record and available to the public could be covered by the antifraud provisions. These are in addition to Comprehensive Annual Financial Reports, budgets and mid-year financial reports, which have already been identified by the SEC as being subject to the antifraud provisions.
- Statements of municipal issuer officials “who may be viewed as having knowledge regarding the financial condition and operation of a municipal issuer,” including speeches, public announcements, interviews with media representatives and statements disseminated through social media, could be subject to the antifraud provisions.

IMPLICATIONS

In light of the many avenues by which municipal issuers may disseminate material information to the public and therefore be subject to antifraud liability, the staff noted in the Bulletin that the SEC has consistently recommended (but not required) that municipal issuers adopt policies and procedures to ensure compliance with the antifraud rules, including the following elements:

- Designate an individual or individuals responsible for compliance with adopted policies and procedures.
- Establish periodic training for issuer staff and officials responsible for developing, reviewing, and disseminating issuer disclosures.

- Identify the documents and reports that customarily contain current information about the financial and operational condition of the issuer. Consider options to make clear what information is intended for investors. For example, any information posted on an issuer's or obligated person's website and specifically intended to inform the market should be clearly labeled as such.
- Establish a deliberate process by which the issuer makes such documents and reports regularly available to investors.

While the Bulletin is not a rule, regulation, or statement of the SEC and has no legal force or effect, it is intended to present the views of the Office. The Bulletin's impact on issuers may have an unintended effect of reducing issuer and obligated person disclosures and flow of information generally to the public for fear that some information (e.g., political speech), which was never intended to inform investors and is unrelated to an issuer's or obligated person's securities offerings, may subject the issuer, and their officials *personally*, to securities law liability.

In light of the analysis in the Bulletin, it is important for issuers and obligated persons to note, when considering whether to voluntarily make public statements or disclose (or not disclose) information, that antifraud liability can also result from omissions of material information, and such a determination to disclose or not disclose should be weighed against efforts to ensure no material information is omitted.

Further, fair questions arise as to whether and to what extent disclaimers are appropriate or effective in the staff's view, and if it is even advisable for issuers to maintain information on a website that goes beyond the legally required disclosure posted on EMMA. Issuers and obligated persons should carefully consider appropriate disclaimers on their websites, including (i) affirmative statements that all information intended for investors is posted only on EMMA or the investor section of the website, (ii) specific click-through webpages for investors only as an additional precautionary measure, and (iii) the nature and content of all public disclosures within the framework of their disclosure policies and procedures.

Municipal market industry participants should carefully consider the Bulletin when evaluating the effectiveness of their continuing disclosure policies and procedures, and managing compliance with their obligations under the federal securities laws—as well as prior to disseminating any information to the public in any format or by any medium. By implementing appropriate policies and procedures, maintaining compliance with continuing disclosure obligations, and taking steps to clearly identify information expected to reach investors and the trading markets as such, issuers and obligated persons may help insulate themselves from unintended securities law liability, including potential personal liability of issuer officials.

OUR LOCATIONS

ATLANTA

999 Peachtree St., NE, Suite 1000
Atlanta, GA 30309-3915
678.420.9300

LAS VEGAS

One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, NV 89135-2658
702.471.7000

PHILADELPHIA

1735 Market St., 51st Floor
Philadelphia, PA 19103-7599
215.665.8500

BALTIMORE

300 E. Lombard St., 18th Floor
Baltimore, MD 21202-3268
410.528.5600

LOS ANGELES

2029 Century Park E., Suite 800
Los Angeles, CA 90067-2909
424.204.4400

PHOENIX

1 E. Washington St., Suite 2300
Phoenix, AZ 85004-2555
602.798.5400

BOULDER

5480 Valmont Road, Suite 200
Boulder, CO 80301-2369
303.379.2275

MINNEAPOLIS

2000 IDS Center
80 South 8th St.
Minneapolis, MN 55402-2113
612.371.3211

SALT LAKE CITY

One Utah Center, Suite 800
201 S. Main St.
Salt Lake City, UT 84111-2221
801.531.3000

DELAWARE

919 N. Market St., 11th Floor
Wilmington, DE 19801-3034
302.252.4465

NEW JERSEY

210 Lake Drive E., Suite 200
Cherry Hill, NJ 08002-1163
856.761.3400

SIOUX FALLS

101 South Reid St., Suite 302
Sioux Falls, SD 57103
605.978.5200

DENVER

1225 17th St., Suite 2300
Denver, CO 80202-5596
303.292.2400

NEW YORK

1675 Broadway, 19th Floor
New York, NY 10019-5820
212.223.0200

WASHINGTON, DC

1909 K St., NW, 12th Floor
Washington, DC 20006-1157
202.661.2200

Ballard Spahr
LLP