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## SEC staff releases antifraud guidance for public statements made by issuers of municipal securities

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In response to questions raised by municipal securities market participants, on February 7, 2020, the Office of Municipal Securities of the Securities and Exchange Commission (SEC) released [Staff Legal Bulletin No. 21](#) (Bulletin) regarding the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 (Act) and Rule 10b-5 to public statements made by issuers of municipal securities and obligated persons in the secondary market.

### Background

The Bulletin was issued to “outline previous [SEC] statements relevant to understanding the application of the antifraud provisions to any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets and, thereby, promote more informed disclosure practices by municipal issuers in the secondary market; facilitate investor access to accurate, timely, and comprehensive information; and improve investor protection.” The Bulletin specifically discusses the SEC staff’s views with respect to the:

- Elements of Section 10(b) of the Act and SEC Rule 10b-5 (10b Antifraud Provisions)
- Scope of coverage under the 10b Antifraud Provisions of statements made by municipal issuers in the secondary market
- Role of policies and procedures in providing accurate, timely, and comprehensive information to investors and the trading markets

The principles outlined in the Bulletin were expressed by the SEC in [interpretive guidance released in 1994](#), which 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 because such statements are a principal source of significant, current information about the municipal issuer.... The [SEC’s] principles-based approach to the application of the antifraud provisions applies to all statements of municipal issuers that are reasonably expected to reach investors and the trading markets notwithstanding changes in municipal issuer disclosure practices, technology, investor expectations, and regulatory framework.”

The SEC employs the 10b Antifraud Provisions to regulate public statements made by issuers that may impact the secondary municipal securities market. Section 10(b) prohibits the use or employment, in connection with the purchase and sale of any security, of any manipulative or deceptive device or contrivance in contravention of SEC rules and regulations; and SEC Rule 10b-5 prohibits, in connection with the purchase or 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.

Issuers are generally familiar with SEC Rule 15c2-12—the need to fulfill continuing disclosure obligations by filing reports with the Municipal Securities Rulemaking Board’s (MSRB) Electronic Municipal Market Access (EMMA) website—and the application of the 10b Antifraud Provisions to information prepared and filed for continuing disclosure compliance. The focus of the Bulletin is on other types of public information and statements also covered by the 10b Antifraud Provisions, but less likely to be considered in the context of securities disclosure by issuers.

## **Our takeaways**

### ***Issuers are always “talking to investors.”***

The Bulletin reiterates (a view of the SEC staff) that municipal issuers in today’s Internet age are generally *always* talking to investors, regardless of the intended audience or the medium: “Municipal issuers disclose current information about themselves in a variety of ways, including public announcements, press releases, interviews with media representatives, and discussions with groups whose members have a particular interest in their affairs .... The fact that [such statements] are not published for purposes of informing the securities markets does not alter the mandate that they not violate the antifraud provisions.” As most public statements made by municipal issuers could reasonably be expected to reach investors, such statements should be considered in light of the 10b Antifraud Provisions if they have the potential to affect trading markets.

### ***As a consequence, issuers are responsible for the “total mix of information.”***

The Bulletin makes the point that, in light of the constant communication of information by issuers to investors, issuers have to assess whether each communication has “significantly altered the total mix of information available.” As the SEC staff says, “For example, the assessment of whether a particular piece of information about a municipal issuer significantly alters the total mix might differ if access to accurate, timely, and comprehensive information about that municipal issuer is ‘uneven and inefficient’ rather than regularly available to investors either through the MSRB’s EMMA system or some other investor relations-focused public medium....” That is, if a municipal issuer experiences a major development and investors are able to access that information through board minutes or other public statements not intended by the issuer to reach investors, then those statements may have altered the total mix of information. In that instance, those statements may not be suitable for consumption by investors, and yet they will be held to the same standard. Consequently, it will likely benefit the municipal issuer to think about its financial and operating condition on an ongoing basis and ensure that the information available to investors is evenly and efficiently disseminated to investors so that investors are not forced to move outside of that source of information to learn of major developments.

### ***Secondary market disclosure can be more complicated than it appears.***

The SEC staff points out that a wide range of statements not intended for investors can fall within the scrutiny of the 10b Antifraud Provisions, including public reports containing financial or

operating data that are prepared for other reporting requirements. If these reports or other statements either overstate or understate reality or simply do not address what matters to investors, then municipal issuers may not simply post the report or statements but may need to provide an even and efficient description to investors about what matters to investors about those reports.

***Compliance with continuing disclosure obligations not a safe harbor.***

The Bulletin references the SEC's enforcement activities with respect to Harrisburg, Pennsylvania, where the SEC found the issuer, who did not comply with its contractual continuing disclosure obligations, had made misleading public statements that were reasonably expected to reach investors in violation of the 10b Antifraud Provisions. The guidance in this Bulletin makes clear that an issuer *in full compliance* with its continuing disclosure undertakings could still face liability under the 10b Antifraud Provisions with respect to its other public statements. In other words, municipal issuers should not be lulled into a false sense of security that, because they are fulfilling their contractual disclosure obligations, their other public statements in the secondary municipal securities market are not subject to the 10b Antifraud Provisions. Other public statements, as they add to the total mix of information available to investors, still create risk and should be carefully considered in light of the 10b Antifraud Provisions.

***Policies and procedures remain a critical tool for compliance.***

In the end, as with so many other areas of SEC focus on municipal disclosure, the SEC places heavy emphasis on having robust policies and procedures with respect to a municipal issuer's secondary market disclosures. As the SEC staff says, "the staff encourages issuers to adopt policies and procedures which, among other things, designate an individual responsible for compliance with such policies and procedures; establish a periodic training schedule for issuer staff and officials responsible for developing, reviewing, and disseminating issuer disclosures; identify the documents, reports, etc. which customarily contain current information about, for example, the financial and operational condition of the issuer and establish a process by which the issuer makes such documents, reports, etc. regularly available to investors; and identify the place or places at which the issuer makes such documents, reports, etc. regularly available to the public, which may include a central repository, such as the EMMA system, or an investor-relations website." Perhaps the most significant takeaway for municipal issuers is to re-evaluate their disclosure policies and procedures to take into consideration how effective they are in addressing secondary market disclosures.

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