

SEC Provides Disclosure Guidance on Public Statements by Municipal Issuers

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On February 7, 2020, the Securities and Exchange Commission's Office of Municipal Securities issued [Staff Legal Bulletin No. 21 \(OMS\)](#) ("SLB 21") to provide its views on the application of the antifraud provisions to public statements made by municipal issuers and obligated persons in the secondary market. SLB 21 implements the directive that SEC Chairman Clayton gave in mid-2019 for the SEC staff to provide guidance and address misunderstandings about application of the antifraud provisions, specifically Rule 10b-5. It provides useful guidance to municipal issuers, reaffirms and updates prior SEC guidance, and offers some helpful suggestions for meeting disclosure obligations and avoiding liability.

SLB 21 begins with the broad statement, consistent with prior SEC positions, that the antifraud provisions apply to *any* statement by municipal issuers that is reasonably expected to reach investors and the trading markets. The SEC staff reiterated an observation from its 1994 interpretive release regarding this topic that

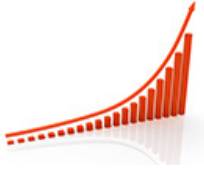
"... municipal issuers do not have the option of remaining silent. Given the wide range of information routinely released to the public, formally and informally, by these issuers in their day-to-day operations, the stream of information on which the market relies does not cease with the close of a municipal offering."

Exposure to liability is not limited to information that is intended or designed to reach investors but extends more broadly. Thus, the antifraud provisions apply both to information formally provided to investors and posted on EMMA and to information disclosed to investors through other means, such as public announcements, press releases, interviews with media representatives, public meetings or discussions with interested groups and social media. However, being subject to the antifraud provisions is not a reason for municipal issuers to be discouraged from making disclosures useful to investors through informal channels.

The SEC staff notes in SLB 21 that scienter is required for Rule 10b-5 liability, with scienter including an intent to deceive or recklessness in disregarding the danger of misleading an investor. Misleading information must also be material, which means that there is a substantial likelihood that the information would be viewed by a reasonable investor as significantly altering the total mix of information available, which is determined based on the particular facts and circumstance. Thus, SLB 21 points out, for example, that if required continuing disclosure is regularly and timely provided, other information may be less important, and conversely failure to provide required information can result in other statements being entitled to more weight. Designating information as intended for use by investors, and using appropriate disclaimers for other information, could be part of the context entitled to be taken into account when assessing materiality and the total mix of information.

In view of the breadth of the information that can provide a basis for 10b-5 liability, we recommend that municipal issuers consider specific ways to mitigate or protect against that liability. The following are some examples noted in SLB 21 or otherwise worth considering:

- **Information on websites** needs to be accurate and not misleading. Posted information should be dated so its relevance has context and historical information should regularly be archived to a separate section. Websites in this context means an issuer's entire website, not just a portion



- specifically designated for investor information. Issuers should still consider either establishing a specific investor relations section or otherwise inform investors that information *intended* to reach them will be made available on that portion of their website or will be posted to EMMA.
- **Hyperlinks** should be used carefully to avoid the municipal issuer becoming entangled with or being considered to be adopting the linked information when that is not intended. The SEC has provided extensive guidance on this issue to public companies. Factors to be considered in evaluating potential liability include why a hyperlink is being used, the nature of it and the use of appropriately worded disclaimers, “exit notices,” or “intermediate screens.”
 - **Summary information** can be helpful for investors, but it should be identified as such and hyperlinks to the more detailed information used when appropriate to avoid potentially misleading investors.
 - **Reports to other governmental bodies or to the public** can reasonably be expected to reach investors, even if not prepared or expected to be used for that purpose, and therefore should be treated with the same care as other information intended to reach investors. SLB 21 specifically mentions annual CAFRs, budgets and mid-year financial reports as being subject to the antifraud provisions, but specifically notes that other reports, especially those with significant current information about the issuer, could similarly be subject to the antifraud provisions depending on the particular facts and circumstances.
 - **Statements by municipal issuer officials** are also subject to the antifraud provisions if reasonably expected to reach investors or the securities markets. Speeches, public announcements, interviews and social media postings may create potential liability. The officials most likely to be exposed to potential liability are those who likely know about the financial condition and operation of the issuer and thus could be seen as a source of significant current information about the issuer and therefore be reasonably expected to influence investors and the secondary market. Accordingly, appropriate training for these officials is important, as are procedures for ensuring the accuracy of those statements and monitoring when clarifications may be necessary.

SLB 21 concludes with the important message that municipal issuers should have in place appropriate policies and procedures tailored to their particular circumstances reasonably designed to ensure the accuracy, completeness and timeliness of information provided to investors. These include identifying who is involved in the disclosure process, who has responsibility for compliance with the policies and procedures, monitoring the range of formal and informal disclosures that can be made, establishing where information intended for investors will be available, and ensuring that those involved with disclosure have effective and periodic training. Having these policies and procedures in place and following them can help avoid disclosure problems and provide a defense against claims for violation of the antifraud provisions by negating the existence of scienter.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors or your Locke Lord relationship attorney.

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