

Chapman Client Alert

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Current Issues Relevant to Our Clients

SEC Staff Issues Guidance on Public Statements of Municipal Issuers

On February 7, 2020, the Securities and Exchange Commission (“SEC”) Office of Municipal Securities (“OMS”) published Staff Legal Bulletin No. 21 (OMS) (“SLB 21”) that addresses the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and Rule 10b-5 promulgated thereunder (together, the “antifraud provisions”) to public statements made by issuers and obligated persons (referred to herein as “issuers”) of municipal securities that are reasonably expected to reach investors and the trading markets. SLB 21 outlines prior SEC guidance relevant to such application and sets forth the views of SEC staff on:

- Certain elements of Section 10(b) of the Exchange Act and Rule 10b-5;
- The scope of coverage under the antifraud provisions with respect to statements made by issuers in the secondary market; and
- The role of policies and procedures in providing accurate, timely and comprehensive information to investors and the trading markets.

Background

The antifraud provisions prohibit misstatements or omissions of material facts in connection with the purchase or sale of securities. SLB 21 was issued at the direction of SEC Chairman Jay Clayton in response to questions raised by market participants about the application of the antifraud provisions to public statements made by issuers. SLB 21 is part of the SEC’s ongoing efforts to encourage timely and robust issuer disclosures in the secondary market.

SLB 21 reiterates that the antifraud provisions apply to *all* issuer statements that provide information that is reasonably expected to reach investors, notwithstanding the intended recipient and method of delivery of such statements, as such statements are a principal source of significant and current information about the issuer. SLB 21 is clear that this is true even if an issuer has otherwise complied with its continuing disclosure agreements.

The Antifraud Provisions

SLB 21 reprises longstanding SEC and judicial interpretations regarding the elements required to establish liability under the antifraud provisions.

- An issuer must have “scienter,” which refers to a mental state embracing an intent to deceive, manipulate or defraud. The scienter requirement may also be satisfied by a showing of recklessness, which has been defined as an extreme departure from the standards of ordinary care.
- A false or misleading statement must be material. Information is material if there is a substantial likelihood that such information would be viewed by a reasonable investor as having significantly altered the total mix of information available. SLB 21 notes that the scope of information that may be viewed by a reasonable investor to significantly alter the total mix of information could differ among issuers. For example, the assessment of whether a particular piece of information about an issuer significantly alters the total mix might differ if access to accurate, timely and comprehensive information about the issuer is uneven and inefficient rather than regularly available to investors

either through EMMA or an investor website maintained by the issuer.

- Issuers disclose information about themselves in a variety of ways, both formally and informally, including through press releases, interviews with the media and discussions with groups whose members have a particular interest in their affairs. While issuers may not publish such information for the purpose of informing the trading markets, if the statements provide a principal source of significant, current information about the issuer, they can reasonably be expected to reach investors. SLB 21 provides a non-exhaustive list of examples of information that could be reasonably expected to reach investors and therefore subject issuers to potential liability under the antifraud provisions.

Examples of Statements Covered by the Antifraud Provisions

Information on Issuer Websites

SLB 21 reminds issuers that federal securities laws apply in the same manner to the content of websites as to any other statements made by or attributable to issuers and advises issuers to ensure information provided on their websites is accurate and not misleading. To that end, issuers are encouraged to follow historical SEC guidance provided to public companies¹ with respect to materials that appear on their website.

- *Historical Information:* When it is not apparent to a reasonable person that posted materials do not speak of a certain date, issuers should separately identify previously posted materials as historical and store them in a separate section of the website.
- *Hyperlinks:* Issuer liability for information on third-party websites for which the issuer has provided a hyperlink on its own website, is evaluated to the extent the issuer has explicitly or implicitly approved or endorsed the statements of the third party. Factors considered in evaluating potential issuer liability include why a hyperlink is being used, the nature of the hyperlink and the use of disclaimers, “exit notices” or “intermediate screens.”
- *Summary Information:* Issuers should take care to avoid confusing investors when providing summaries,

particularly summary financial information, and use appropriate titles and explanatory language, hyperlinks to the more detailed information and layered or tiered formats.

Public Reports Delivered to Other Governmental or Institutional Bodies

In the past, the SEC has identified CAFRs, budgets and mid-year financial reports as information reasonably expected to reach investors. SLB 21 provides additional examples of reports that may be subject to antifraud liability, including reports submitted by an issuer to a state agency, reports made to a legislative body and other similar reports made available to the public which are a source of significant, current information about the issuer.

Statements Made by Municipal Issuer Officials

Statements of issuer officials, including speeches, public announcements and media interviews are subject to the antifraud provisions if such statements are reasonably expected to reach investors. Notably, statements by issuer officials “who may be viewed as having knowledge regarding the financial condition and operation of a municipal issuer” could be a principal source of significant, current information about the issuer and thus be reasonably expected to influence investors.

Role of Policies and Procedures

SLB 21 concludes with a recommendation that issuers maintain policies and procedures reasonably designed to ensure the accuracy, timeliness and completeness of information provided to investors. Policies and procedures should identify who is responsible for compliance with the policies and procedures, institute periodic training for responsible staff, identify documents which typically contain current financial and operating information, establish a process for disseminating such information to investors and identify where such information will be made available.

Considerations for Market Participants

SLB 21, like any other SEC staff bulletin, represents the views of the office issuing the bulletin. It is not a rule, regulation or statement of the SEC, and the SEC has not approved nor disapproved its content. SLB 21 has no legal force or effect, as

it does not alter or amend applicable law and it creates no new or additional obligations for any person. Notwithstanding this caveat, while the views set forth in SLB 21 are principally restatements of past SEC guidance, it provides an important reminder to issuers of what OMS' view of the law is and is also an important reminder to issuers to take care that public statements that might reach investors do not violate the antifraud provisions. Issuers should consider evaluating existing policies and procedures in light of the bulletin to

ensure that they adequately take into account the extensive scope of statements that may be subject to antifraud liability.

[For More Information](#)

If you would like further information concerning the matters discussed in this article, please contact a member of our Public Finance Group or visit us online at chapman.com.

¹ See, Exchange Act Release No. 42728 "Use of Electronic Media" (April 28, 2000), 65 FR 25843 (May 4, 2000), *available at* <https://www.sec.gov/rules/interp/34-42728.htm>; and Exchange Act Release No. 58288 "Commission Guidance on the Use of Company Web Sites" (Aug. 1, 2008), 73 FR 45862, 45864 (Aug. 7, 2008), *available at* <https://www.sec.gov/rules/interp/2007/34-58288fr.pdf>.

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