



SEC reiterates stance on application of anti-fraud provisions to all public statements

February 18, 2020

Securities and Exchange Commission (SEC) Chairman Jay Clayton has expressed concern for some time that investors in municipal bonds (debt issued by state and local governments) are relying on stale information to make investment decisions. He believes that governmental entities are not doing enough to supply investors with up-to-date financial disclosures through the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA) system. Clayton asked the SEC's Office of Municipal Securities to prepare a bulletin on the subject, and the office released the promised [Legal Bulletin No. 21](#) on February 7, 2020.

The bulletin recaps the office's opinion that the anti-fraud provisions of federal law apply to any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets "because such statements are a principal source of significant, current information about the municipal issuer." Notice that the office applied these anti-fraud principles to any and all statements made by a municipal issuer, not just those formal disclosures made through EMMA that are specifically prepared for investors and designed to comply with Rule 15c2-12, the SEC's continuing disclosure rule.

The anti-fraud provisions are discussed in detail in the bulletin. Although intent to deceive is an element of establishing a violation of the anti-fraud provisions, the government can satisfy that standard by showing that a municipal issuer was reckless in its statements. These anti-fraud provisions apply to securities trading in the secondary market, as well as to an initial debt offering, which makes the bulletin relevant to issuers that have any outstanding, publicly-traded municipal debt.

As to the types of statements about which issuers should be concerned, the bulletin emphasizes that:

[T]he antifraud provisions apply to all municipal issuer statements that provide information that is reasonably expected to reach investors and the trading markets, whoever the intended primary audience and whatever the medium of delivery. Notably, this standard applies to all statements by a municipal issuer, whether on the MSRB's EMMA system or elsewhere, whether written or oral, and regardless of the extent to which the municipal issuer has fulfilled its contractual continuing disclosure obligations.

In other words, the office wants issuers to know that when they say "all statements," they really mean it, and there are no exceptions for form or venue. Furthermore, compliance with Rule 15c2-12 is not a defense to anti-fraud liability. A "non-exhaustive" list of examples cited by the bulletin include statements made through or at issuer websites (including general and historical information, hyperlinks and summary information), public reports delivered to other governmental or institutional bodies (including audits, budgets and mid-year financial reports), statements made by officials of the issuer, social media posts, public announcements, press releases, media interviews and public meetings. One irony of the framework set forth in the bulletin is that while anti-fraud liability attaches to all public statements made by municipal issuers and their officials, such issuers only get credit for filings made on EMMA when judging compliance with Rule 15c2-12.

Some participants in the municipal bond market had hoped that the SEC would give issuers a safe harbor for disclosing interim financial data and that such interim financial data would not be held to the same standard as more formal documents, such as audited financial statements. The office declined to provide such a safe harbor, and some are concerned that this will lead issuers to provide investors with less information as issuers attempt to reduce their potential anti-fraud liability.

The office concluded its bulletin with a recommendation that municipal issuers consistently implement policies and procedures designed to help the issuer provide accurate, timely and comprehensive information to investors; to better manage communications with investors; and to comply with the anti-fraud provisions of federal law.

Given the principles outlined in the bulletin and the SEC's continued regulatory and enforcement focus on the municipal bond market, issuers should carefully consider how all of their communications, including audits, state filings, public records and statements, comply with these anti-fraud rules. Any issuer experiencing financial difficulties should be particularly cautious that its public statements do not intentionally or unintentionally provide an inaccurate or incomplete discussion of the situation that it is facing.

Authors



Paul S. Rutter

Partner

Columbus

614.227.2372

prutter@bricker.com