

## Communicating with Bond Investors during COVID

Cities, counties, and other issuers of municipal bonds are subject to the antifraud requirements of the federal securities laws. The antifraud requirements, including Rule 10b-5, prohibit making 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.

These requirements apply to offering documents used in connection with the initial sale of bonds and to ongoing disclosure filings made after issuance. The requirements also apply whenever the issuer otherwise “speaks to the market.” Over the past year, staff and officials of the Securities Exchange Commission (SEC) issued two statements to municipal bond issuers noting, first, the very broad application of the antifraud requirements to statements of public entities and officials and, second, specifically encouraging issuers to disclose any material effects of the COVID-19 pandemic.

### 2020 SEC Statements

The 2020 SEC statements underscore that the antifraud requirements go beyond the preliminary and final official statements provided to investors at the time the bonds are sold and even go beyond the annual reports and event notices that bond issuers are required to file on [EMMA](#) and that are outlined in the Continuing Disclosure Undertaking (CDU) signed at bond closing. (CDUs specify the annual financial information to be provided and list the now 16 events that require notice within 10 business days such as rating changes and, since February 2019, information regarding “financial obligations” such as bank loans.) All of these required disclosures constitute “speaking to the market” and are subject to the antifraud requirements.

The first of the 2020 SEC statements was a February [SEC Staff Legal Bulletin \(Bulletin\)](#). The Bulletin cautions that *any* public statement (at least by officials who may be viewed as having knowledge regarding the financial condition and operation of an issuer) may be reasonably expected to reach investors and may be subject to the antifraud requirements. The Bulletin notes that any material financial or operating information provided via a public statement – whether posted to a city, county or other issuer website or released through a press release, speech by elected official, or a report – may be reasonably expected to reach investors, stating that “[t]he fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate the antifraud provisions.”

Notwithstanding the Bulletin’s cautions, it seems impractical – if not impossible – for an issuer to review every public statement, particularly those of elected officials. One strategy suggested by the Bulletin is for issuers to provide investor information frequently and completely enough to lessen the possibility that a particular stray, out-of-context statement would be considered material. An omission is material if there is a substantial likelihood that it would have been viewed by the reasonable investor as having significantly altering the “total mix” of information made available, and so materially depends on this “total mix.”

The second 2020 SEC statement, a [COVID-19 Statement](#), specifically encourages municipal bond issuers to add to the total mix of information by disclosing – even on a voluntary basis – both current and forward-looking information regarding COVID-19 impacts on the issuer’s financial and operating condition to investors. The SEC is concerned that issuers may be experiencing material financial and operating impacts and that investors are scouring public statements for relevant information. The COVID-19 Statement encourages investor-focused disclosure by (1) stating “We would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the

SEC,” (2) blessing the use of meaningful cautionary language such as descriptions of key assumptions and unknowns, and (3) noting the “bespeaks caution” doctrine that provides leeway for forward-looking statements made in good faith and accompanied by disclosures of assumptions and significant risks.

Reading the two 2020 statements together, the SEC is warning issuers of the very broad reach of the federal securities laws and encouraging more investor-focused disclosure as a way to manage the risk, particularly in times of financial stress, posed by statements in other contexts.

### Washington examples

Washington issuers have included COVID-19 information in bond offering documents (including, for example, the [City of Port Angeles](#) (see pp. 39-40) and the [City of Bellingham](#) (see pp. 36-37)). Issuers have noted COVID-19 in required EMMA filings including through [subsequent event disclosure](#). Several issuers have also posted voluntary COVID-19 disclosures (including, for example, [King County](#), [the University of Washington](#), and the [State](#)). The general rules regarding disclosure apply, including that it is important to be materially accurate and complete and any disclosure should be tailored to the particular issuer and accompanied by appropriate cautions. Disclosure policies and procedures continue to be a helpful tool for issuers to identify responsible individuals to determine what, when and how to disclose information to investors.

If you have questions regarding election requirements for school district ballot propositions, please contact any of our public finance attorneys.

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