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Recent SEC Guidance Raises Antifraud Liability Concerns for Issuers Making Statements to Investors

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By Jessica Grossarth Kennedy

On February 7, 2020, the staff of the Office of Municipal Securities (the “Staff”) issued a legal bulletin (the “Bulletin”) containing guidance on the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (the “Antifraud Provisions”) to public statements made by issuers of municipal securities in the secondary market.

A large portion of the Bulletin is dedicated to a discussion of the Antifraud Provisions’ application to *any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets* regardless of the medium through which the statements are made.

The Bulletin highlights the following types of statements municipal issuers should be mindful of in the context of the Antifraud Provisions and examples of each type of statement:

MUNICIPALITY WEBSITE

- Current or historical information;
- Information on third-party websites for which issuers have provided hyperlinks on their own websites; and
- Summary information, including financial information.

REPORTS

- Submitted to a state agency;

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- Made by a state or local official to a legislative body; and
- Made part of a public record and available to the public.

MUNICIPAL OFFICIALS

- Speeches;
- Public announcements;
- Interviews with media representatives; and
- Disseminated through social media.

While the Antifraud Provisions only apply when there is an intent to deceive, manipulate or defraud, which can be satisfied with a finding of recklessness, to avoid any potential violation of the Antifraud Provisions, the SEC Staff encourages all municipal issuers to adopt policies and procedures, which:

- designate an individual responsible for compliance;
- establish a periodic training schedule for those responsible for developing issuer disclosures and statements;
- identify the documents which customarily contain current information about the issuer and establish a process by which the issuer makes such documents available to investors; and
- identify the places at which the issuer makes such documents available to the public.

If you have any questions about this alert or are interested in creating policies and procedures to help protect your municipality from the Antifraud Provisions, please feel free to contact any of the attorneys listed above.

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