National Association
of Bond Lawyers

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October 7, 2019

Rebecca Olsen
Director, Office of Municipal Securities
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-7010

Dear Director Olsen:

You advised at the recent conference of the National Association of Bond Lawyers ("NABL")[1] that the staff is in the process of finalizing a Staff Legal Bulletin, at the direction of Securities and Exchange Commission ("SEC") Chairman Clayton. Based on Chairman Clayton's remarks directing that the Staff Legal Bulletin address the application of federal securities laws to various disclosure scenarios,[2] it is anticipated that the Staff Legal Bulletin will note in part the potential federal securities law liability attendant to a municipal issuer that "releases information to the public that is reasonably expected to reach investors and the trading markets" (quoting from the 1994 Interpretive Release[3]). We respectfully offer for your consideration in finalizing the Staff Legal Bulletin the analysis below.

Background. Municipal issuers are public bodies and are governed by state constitutions, state statutes, interstate compacts, city charters, and municipal codes, which limit their legal powers and allocate legal responsibilities among their officers, both elected and appointed. Public bodies that issue municipal securities are of an entirely different nature from business enterprises. As a leading treatise on municipal finance notes:

> The limitations imposed on public corporations by nineteenth century constitutional conventions, state legislation, and judicial fiat are totally incongruent with the parallel history of private corporations . . . Law providing for incorporation of private companies, enacted by legislatures competing for businesses, became relatively more similar at the same time laws creating public corporations were increasingly unique to local circumstances. [4]

[1] NABL is an organization of approximately 2,700 public finance attorneys, who represent municipal issuers, underwriters, and other parties engaged in municipal finance, in every state, territory, and the District of Columbia. NABL's mission statement is "to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance."

[2] Chairman Clayton, "Remarks to the SEC Fixed Income Market Structure Advisory Committee" (July 29, 2019).

[3] SEC Rel. Nos. 33-7049, 34-33741 (Mar. 9, 1994).

[4] Robert A. Fippinger, THE SECURITIES LAW OF PUBLIC FINANCE (3rd ed. & Supp. Rel. No. 8, Aug. 2019). See also, NABL's and the American Bar Association's DISCLOSURE ROLES OF COUNSEL (ABA, 3rd ed. 2009).

Municipal issuers, in connection with public offerings of municipal securities, generally prepare official statements, which are intended to reach investors. Official statements are subject to the general antifraud provisions of the federal securities laws.[5] As such, an official statement may not, in brief, contain a material misstatement or omit material information.[6]

In addition to official statements, municipal issuers also prepare annual reports and file material event notices pursuant to continuing disclosure agreements entered into in connection with a public offering of municipal securities.[7] Any information required by a continuing disclosure agreement to be submitted to the Electronic Municipal Market Access ("EMMA") system maintained by the Municipal Securities Rulemaking Board would also be tested against the general antifraud provisions of the federal securities laws because such information is intended to reach investors. Also, any information that a municipal issuer voluntarily submits to EMMA (or its investor information webpage) clearly is intended to reach investors and would be so tested.

Further and more generally, as noted in the cautionary language quoted above from the 1994 Interpretive Release, financial information that is "reasonably expected to reach investors" has the potential to be subject to federal securities law liability.

Harrisburg; Disclosure Controls. Despite the broad language in the 1994 Interpretive Release regarding "information reasonably *expected* to reach investors" (emphasis added), the SEC has shown prudence in applying such language in an enforcement context. There is only one instance, to our knowledge, in which the SEC brought an enforcement action for information on a general area of a municipal issuer's website and outside the context of a public offering.[8] As the SEC explained, there was a unique set of facts that resulted in such enforcement action: (1) distressed entity, (2) bonds were being actively traded in the marketplace, (3) the municipal issuer had not conducted a recent primary offering, (4) the municipal issuer was not current with continuing disclosure, and (5) the mayor posted his speech on the general webpage of the City without any disclaimer. In particular, the SEC noted that:

> From January 2009 through March 2011, at a time of increased public interest in Harrisburg's financial condition, and despite having entered into multiple written undertakings, Harrisburg failed to submit annual financial information, audited financial statements, notices of failure to provide required annual financial

[5] Section 17(a) of the Securities Act of 1933 and Section 10(b) and related Rule 10b-5 of the Securities Exchange Act of 1934 (the "34 Act").

[6] Rule 10b-5 provides that it "shall be unlawful for any person . . . To make any untrue statement of a material fact or to omit 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."

[7] Continuing disclosure agreements are entered into in order to allow the underwriter to satisfy its obligations under Rule 15c2-12 of the 34 Act. Such Rule requires that an underwriter reasonably determine that the issuer will provide, for the life of the bonds, annual financial information (including audited financial statements, when and if available) and notice of certain specified events (which are either deemed by Rule 15c2-12 to be material or determined by the issuer to be material). Rule 15c2-12(b)(5)(i) authorizes a written continuing disclosure undertaking to be entered into either by the municipal issuer or by "an obligated person for whom financial or operating data is presented in the final official statement."

[8] *In re* City of Harrisburg, SEC Rel. No. 34-69515 (May 6, 2013).

> information and material event notices. Investors may be more likely to rely upon statements from public officials where written undertakings made pursuant to Rule 15c2-12 have not been fulfilled and required continuing disclosures are not available through the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system. [9]

The SEC has encouraged municipal issuers to develop written disclosure controls and procedures and conduct associated securities law training, and has often made such procedures and training a condition of settlement in enforcement actions.[10] A key component of such controls is that the appropriate financial and legal officers of a municipal issuer carefully review the information that is intended to reach investors. This process is not practicable unless such review can be limited to that subset of financial information and operating data that is posted on EMMA (or a municipal issuer's investor information webpage). It is to everyone's benefit that a municipal issuer be able to define what information is intended for investors and to assure that such information is properly and comprehensively reviewed.

Conclusion and Summary. We respectfully suggest that, if the Staff Legal Bulletin were to note the continuing relevance of the 1994 Interpretive Release, the *Harrisburg* enforcement action should be put in its proper, limited context. In addition, it is key that a municipal issuer be able to define that subset of information that will be subject to its disclosure review process. Thank you for considering this letter and our suggestions. We hope that you find it to be helpful. Please let us know if you have any questions regarding this letter or if we can otherwise provide input as you finalize the Staff Legal Bulletin.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs in our Washington DC office, at (202) 503-3290 or at jgiroux@nabl.org .

Sincerely,

Richard J. Moore
President, National Association of Bond Lawyers

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[9] SEC 21(a) Report, "Report of Investigation in the Matter of the City of Harrisburg," SEC Rel. No. 34-69516 (May 6, 2013) (the "Harrisburg 21(a) Report").

[10] Such a program was first recommended by then-Director, Division of Enforcement, Linda Chatman Thomsen, in a speech entitled "Lessons Learned from San Diego" (Dec. 11, 2007). More recently, the SEC required, as a condition of settlement in the Municipalities Continuing Disclosure Cooperation Initiative, that municipal issuers "establish appropriate policies and procedures and training regarding continuing disclosure obligations." In addition, written disclosure controls and procedures and associated securities law training has been a consistent element in the last few years of SEC settlements of enforcement actions against municipal issuers. NABL provided guidance on this issue in its paper, "Crafting Disclosure Policies," dated August 20, 2015.