



# Port Bond Disclosure

Communicating with port bond investors in light of federal securities laws.

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WPPA Finance and  
Administration  
Seminar

Deanna Gregory  
Stacey Lewis  
Pacifica Law Group LLP

# Disclosure obligations of municipal bond issuers

## Overview

Although municipal bond issuers are exempt from the SEC's registration and filing requirements that apply to corporate issuers, all issuers (including municipalities) are subject to the antifraud requirements that apply when issuers speak to the market.

- **Antifraud Requirements**
  - Application of antifraud requirements
  - Rule 10(b)(5)
  - Section 17
- **Primary Disclosure**
- **Secondary Market Disclosure**
  - Required Annual Filings
  - Required Event Filings
  - Voluntary Disclosure (2020 SEC Chair Statement)
- **Disclosure Trends**
  - Airport trends
  - Seaport trends
  - Capital program trends
  - SEC initiatives

# Municipal Bonds; Antifraud Laws

## Rule 10b-5

Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, prohibits fraud in connection with the purchase and sale of securities. Among other provisions, it makes unlawful:

- any untrue statement of a 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,
  - in connection with the purchase or sale of any security.

Similar language under Section 17(a) of the Securities Act.

- SEC settlements under Section 17(a) have been based on a negligence standard
  - “knew or should have known” standard for establishing negligence
  - Failure by an actor to conform conduct to the standard of a reasonable person under like circumstances

# Materially Accurate and Complete

## Materiality

Whether a statement or omission can give rise to a securities law violation depends on whether the statement or omission is material. The definition of “material” has been established by case law.

- There is a substantial likelihood
  - That a reasonable bond investor
    - Would consider it important in making an investment decision
      - There must be a substantial likelihood that a fact *"would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."*

# SEC Staff Legal Bulletin (Feb. 7, 2020)

## A caution regarding the scope of the antifraud requirements

The SEC Office of Municipal Security (OMS) released a Staff Legal Bulletin summarizing existing law regarding the application of the antifraud requirements to public statements by issuers and borrowers.

### ▪ Rule 10b-5 under Section 10(b) of the Securities Exchange Act

- Applies to secondary market disclosures as well as primary disclosures
- Prohibits 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

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 therefore be subject to the antifraud requirements.

# SEC enforcement actions: **Examples**

## **Seeking financial penalties**

- Wenatchee PFD (failure to disclose feasibility report)

## **Looking outside official disclosure documents – secondary market example\***

- Harrisburg, PA (Mayor's state of the city speech and other documents on website)

## **Finding individuals liable; control person liability**

- Allen Park, Michigan (Mayor an active champion of the project, in a position to control the actions of the City and the City Administrator)

## **Bringing parallel criminal fraud charges**

- Ramapo, New York (accounting fraud)

## **Second guessing legal risk disclosure?**

- Port of NY & NJ (internal counsel noted questions of statutory authority)

## Recent enforcement actions

### Press Release

# SEC Charges Texas School District and its Former CFO with Fraud in \$20 Million Bond Sale

## FOR IMMEDIATE RELEASE

2022-43

*Washington D.C., March 16, 2022* — The Securities and Exchange Commission today charged Crosby Independent School District (Crosby ISD) and its former Chief Financial Officer, Carla Merka, with misleading investors in the sale of \$20 million of municipal bonds in order to pay its outstanding construction liabilities and fund new capital projects. The SEC also charged Crosby's auditor, Shelby Lackey, with improper professional conduct in connection with the audit of the school district's 2017 fiscal year financial statements.

The SEC's complaint alleges that Crosby ISD, which serves approximately 6,400 students outside of Houston, failed to report \$11.7 million in payroll and construction liabilities and falsely reported having \$5.4 million in general fund reserves in its audited 2017 fiscal year financial statements. According to the complaint, Crosby ISD and Merka, who was responsible for Crosby ISD's accounting and was the primary contact during the bond financing process, were aware that the financial statements significantly underreported the payroll and construction liabilities. Crosby ISD and Merka knowingly included the false and misleading financial statements in the offering documents used to raise \$20 million through the sale of municipal bonds in January 2018. In August of 2018, seven months after the offering, Crosby ISD disclosed that it was experiencing significant financial issues, including that it had a negative general fund balance. The following month, ratings agencies downgraded Crosby ISD's bonds.

Lackey, who audited Crosby ISD's financial statements, authorized the issuance of the fiscal year 2017 audit report. Lackey was charged by the SEC with failure to perform critical audit procedures necessary to verify the accuracy of Crosby's payroll and construction liabilities. She also violated Generally Accepted Auditing Standards (GAAS) by failing to obtain sufficient appropriate audit evidence to support the audit opinion, failing to properly supervise the audit, and by failing to exercise professional judgment and maintain professional skepticism.

## Recent enforcement actions

# SEC Charges Louisiana Town and Former Mayor with Fraud in Two Municipal Bond Deals

Town's Municipal Advisor and its Owner also charged

**FOR IMMEDIATE RELEASE**  
**2022-97**

*Washington D.C., June 2, 2022* — The Securities and Exchange Commission today charged the town of Sterlington, Louisiana and its former mayor, Vern A. Breland, as well as the town's unregistered municipal advisor, Twin Spires Financial LLC, and its owner, Aaron B. Fletcher, with misleading investors in the sale of \$5.8 million in municipal bonds across two offerings in 2017 and 2018.

According to the SEC's complaints, the town of Sterlington issued the revenue bonds to finance the development of a water system and improvements to its existing sewer system. As required by state law, Sterlington applied to the Louisiana State Bond Commission (SBC) for approval of the two offerings. The SEC alleges that Sterlington submitted false financial projections, created by Fletcher and Twin Spires, with then-Mayor Breland's active participation and approval, substantially overstating the number of historical and projected sewer customers in order to mislead the SBC as to the town's ability to cover the debt service for the proposed bonds. The town and Breland allegedly did not disclose to investors that SBC approval of the bonds was based on the false projections or that Breland had directed the misuse of more than \$3 million from earlier bond offerings intended for sewer system updates to instead pay for sports complex improvements, town legal fees, and payroll. The SEC further alleges that Twin Spires and Fletcher provided municipal advisory services to Sterlington without Twin Spires being registered as a municipal advisor with the Commission.





# Primary Disclosure

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# Primary Disclosure

## Antifraud Requirements Apply Whenever an Issuer Speaks to the Market

The antifraud provisions apply any time an issuer speaks to the market. Primary disclosure includes the preliminary official statement and final official statement prepared in connection with the sale of bonds. The SEC has settled alleged antifraud violations for primary disclosure under Section 17 and based on a negligence standard.

### Preliminary Official Statement

- Deemed final (includes all material information except pricing information)

### Final Official Statement

- Update the POS to include pricing information

### Stickers/amendments

- Between posting POS and pricing
- Between posting OS and closing
- Post closing
  - Note that bond purchase contact generally requires notifying the underwriter of material developments for 25 days after closing

**Key point:** Follow process to ensure review and sign off by responsible persons



# Secondary Market Disclosure

# Secondary Market Disclosure: Required Filings on EMMA

## Antifraud Requirements Apply Whenever an Issuer Speaks to the Market

The antifraud provisions apply any time an issuer speaks to the market. Secondary market disclosure includes required EMMA filings and voluntary disclosure. The SEC has settled alleged antifraud violations for secondary market disclosure (e.g. City of Harrisburg case) under Rule 10(b)5 and based on a willful or recklessness standard.

### ▪ SEC Rule 15(c)(2)-12

- Underwriter must confirm the issuer has entered into a written undertaking to provide annual information and notice of listed events
- ### ▪ Contractual obligation of the issuer and/or obligated party to provide:
- Annual financial statements
  - Annual operating or other information as stated in the undertaking
  - Notice of certain events within 10 business days of the notice of the occurrence of the event

# Required Filings on EMMA

## Certain events require notice

An undertaking to provide continuing disclosure is required, under Rule 15(c)(2)-12 to include a commitment to provide notice within 10 business days of the occurrence of certain events.

- Certain events must be noticed in all cases, such as:
  - Rating changes
  - Unscheduled draws on debt service reserves or credit enhancement reflecting financial difficulties
  - Defeasances and redemptions
  
- Other events must be noticed *if material*, such as:
  - Non-payment related defaults, if material
  - Incurrence of a new financial obligation, if material
    - ✓ Such as a liquidity line of credit or other private placement

# What are the additional notice events?

## Notice events 15 and 16

Amendments added two new notice events.

### Notice event 15

- Incurrence of a financial obligation of the obligated person
  - if material, or
- Agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders
  - if material

### Notice event 16

- Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person
  - any of which reflect financial difficulties

# Procedures for Notice Events 15 and 16

## Notices regarding financial obligations

Consider procedures for tracking and filing event notices regarding financial obligations.

### ▪ Financial obligations:

- Who manages financial obligations like bank lines of credit?
- What about leases or other agreements that “operate as vehicles to borrow money?”

### ▪ Materially review:


- Dollar threshold as a starting point?
- Factors to consider include:
  - ✓ The nature of the agreement
  - ✓ The length of the agreement
  - ✓ The impact on revenue available for debt service and related debt service coverage

### ▪ If material, file within 10 business days/monitor for changes (e.g. subsequent notices).

### ▪ Compliance:

- Day-to-day responsibility
- General counsel and Commission staff role?

# Continuing Disclosure EMMA Filings

 **PORT TACOMA WASH REV (WA)**  
Click on a tab to access data and documents about this issuer's municipal securities.

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Event-based disclosures submitted by this issuer within the last five years are listed. Click on the disclosure description to view details about the disclosure.

Display  results | Search within list:

[First](#) [Pre](#)

Posting Date	Disclosure Description
10/06/2021	Bond Call
07/19/2021	Rating Change: PNC Bank Moody's 07/12/2021
06/14/2021	Rating Change: Bank of America Fitch Upgrade 06/07/2021
04/12/2021	Financial Obligation - Incurrence or Agreement: Limited Tax General Obligation Refunding Bond, 2021, \$18, 075, 000 April 8, 2021 (Modified 04/14/2021)
04/07/2021	Rating Change: Port of Tacoma, WA Standard & Poor's Upgrade March 31, 2021
11/09/2020	Rating Change: Port of Tacoma, WA Moody's Affirmation November 2, 2020
10/30/2020	Financial Obligation - Incurrence or Agreement: Port of Tacoma Revenue Refunding Bond Series 2020 (AMT) October 29, 2020 (Modified 11/03/2020)
10/05/2020	Bond Call
07/17/2020	Rating Change: PNC Bank Fitch 07/10/2020
06/12/2020	Other Event-based Disclosures: Voluntary Notice Regarding Port of Tacoma and COVID-19





# Voluntary Disclosure

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# Voluntary Disclosure

## Antifraud Requirements Apply Whenever an Issuer Speaks to the Market

Public entities are subject to open public meetings and records laws and do not have the option of staying silent. The antifraud provisions apply any time an issuer speaks to the market.

- Should the information be shared specifically with investors?
  - EMMA
  - Investor Relations Site
  - Regulation FD Considerations
    - ✓ Regulation FD, which prohibits selective disclosure by public companies, is not applicable to state and municipal issuers
    - ✓ It may be a good idea to avoid selective disclosure in the interests of fairness and transparency
- If not, should cautionary language or additional context be added to this information when it is shared with the public on its website or at an open public meeting?

# Port of Seattle Voluntary Disclosure: Investor Relations Site Example

portseattle.org/page/investor-relations

Port of Seattle®

Care

SEA AIRPORT ▾ MARITIME ▾ BUSINESS ▾ COMMUNITY ▾ ABOUT ▾

Home / About / Finance / Investor Relations

## Investor Relations

**⚠ Update on the Port's COVID-19 response [Learn More.](#) ↻**

[f](#) [t](#) [in](#) [✉](#) [◀](#) [p](#)

Welcome to the Port of Seattle's Investor Information pages where investors can find documents relating to port bonds or notes.

Please note, the documents provided here are limited in scope and do not include all of the information necessary to make an informed investment decision. The documents do not constitute an offer to sell or a solicitation of an offer to buy Port bonds or notes.

### A note of caution

Each document in this section is dated and speaks only as of that date. The Port of Seattle does not undertake to update, and expressly disclaims any duty to update, any document.

# Statement on Municipal COVID-19 Disclosure

## Encourages Voluntary Disclosure

The recent statement of SEC Chair Jay Clayton and Rebecca Olsen, Director of the SEC Office of Municipal Securities, encourages voluntary disclosure of COVID-19 impacts and seeks to provide some assurances to issuers and borrowers in making a voluntary disclosure during this time of uncertainty

- “Today, in light of the potentially significant effects of COVID-19 on the finances and operations of many municipal issuers, we increase this focus and request that municipal issuers provide investors with as much information about their current financial and operating condition as is reasonably practicable. . . . We observe that, in today’s markets, the typical practice of providing historic financial information in the form of an annual information filing or similar disclosure may not enable investors to make informed assessments of the municipal issuer’s current and expected future financial condition.”
- “We also encourage municipal issuers to provide investors with forward-looking information regarding the potential future impact of COVID-19 on their financial and operating conditions.”

# SEC Statement on Municipal COVID-19 Disclosure

## Seeks to Provide Assurance

While encouraging disclosure of current and forward-looking information regarding COVID-19 impacts, the statement sought to provide some assurances to issuers and borrowers in making disclosures.

- “We would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.”
- Suggests use of “meaningful cautionary language.”
  - Description of **relevant facts or assumptions** affecting the reasonableness of reliance on and the materiality of the information provided,
  - Description of how certain important information may be **incomplete or unknown**, and
  - **Process or methodology** (audited vs. unaudited) used by the municipal issuer to produce the information
    - ✓ Notes “bespeaks caution” caselaw doctrine that provides some leeway with respect to forward-looking statements

# Recent Disclosure Trends: Airports and Seaports

## Disclosure developments.

Airport and seaport disclosure documents continuing to address COVID-19, now focusing on recovery trends.

### ▪ Airports

- Enplanement trends
- Shifts in airline activity
- Federal grant funds, BIL
- Concessions/labor market

### ▪ Seaports

- Global supply trends
- Congestion management
- Container, cruise trends
- Labor market

### ▪ Capital plans

- Supply chain
- Construction costs and other inflation

Fitch Ratings-New York/Austin-11 May 2022: Most U.S. airports are approaching pre-pandemic passenger traffic despite the most recent COVID variant stunting growth during the early months of 2022, according to Fitch Ratings in its latest peer review for the sector. However, the sector is still up against inflation and a hesitant full return of business and international travel.

Fitch Ratings-New York-17 March 2022: Pandemic pressures are receding for U.S. and Canadian ports, according to Fitch Ratings in its latest sector peer review. Fitch has revised its Rating Outlook for several North American ports to Stable from Negative over the last year.

Cargo ports have been particularly resilient, with preliminary 2021 throughput figures showing performance at or surpassing pre-pandemic levels for container cargo at Fitch-rated ports. Even cruise ports, which were harder hit by the pandemic, are showing signs of recovery.

“Challenges remain in terms of supply chain and congestion management pressures for cargo operations and passenger recovery for cruise facilities, but it appears the worst is over,” said Senior Director Emma Griffith.

# Recent (Mostly Corporate) Disclosure Trends

## Disclosure developments.

The SEC has undertaken several initiatives relating to climate change disclosure and other ESG topics (focused on corporate issuers). The MSRB also issued a request for information on ESG disclosure. The SEC also is focusing on cybersecurity disclosure.

### ▪ SEC

- Examination priorities
- Proposed climate change disclosure regulations
- Proposed cybersecurity disclosure regulations

### ▪ MSRB

- Request for information

### ▪ Voluntary initiatives

- GFOA best practices papers on ESG disclosure
- Distinguishing between ESG disclosure and “labeled” bonds
  - ✓ Risk disclosure
  - ✓ Green, social and sustainability bonds

# SEC Division of Examinations Announces 2022 Examination Priorities

## Enhances Focus on Private Funds, ESG, and Operational Resiliency

### FOR IMMEDIATE RELEASE

2022-57

Washington D.C., March 30, 2022 — The Securities and Exchange Commission's Division of Examinations today announced its 2022 examination priorities, including several significant areas of focus and many perennial risk areas. The Division will focus on private funds, environmental, social and governance (ESG) investing, retail investor protections, information security and operational resiliency, emerging technologies, and crypto-assets. The Division publishes its examination priorities annually to provide insights into its risk-based approach, including the areas it believes present potential risks to investors and the integrity of the U.S. capital markets.

The following are a selection of the Division's 2022 priorities:

- ESG
- Information security and operational resiliency
- Emerging technologies and crypto-Assets



# SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies

**FOR IMMEDIATE RELEASE**  
**2022-39**

*Washington D.C., March 9, 2022* — The Securities and Exchange Commission today proposed amendments to its rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incident reporting by public companies.

"Over the years, our disclosure regime has evolved to reflect evolving risks and investor needs," said SEC Chair Gary Gensler. "Today, cybersecurity is an emerging risk with which public issuers increasingly must contend. Investors want to know more about how issuers are managing those growing risks. A lot of issuers already provide cybersecurity disclosure to investors. I think companies and investors alike would benefit if this information were required in a consistent, comparable, and decision-useful manner. I am pleased to support this proposal because, if adopted, it would strengthen investors' ability to evaluate public companies' cybersecurity practices and incident reporting."

The proposed amendments would require, among other things, current reporting about material cybersecurity incidents and periodic reporting to provide updates about previously reported cybersecurity incidents. The proposal also would require periodic reporting about a registrant's policies and procedures to identify and manage cybersecurity risks; the registrant's board of directors' oversight of cybersecurity risk; and management's role and expertise in assessing and managing cybersecurity risk and implementing cybersecurity policies and procedures. The proposal further would require annual reporting or certain proxy disclosure about the board of directors' cybersecurity expertise, if any.

Would require corporate issuers to disclose:

- Current reporting of material cybersecurity incidents
- Periodic updates of reported incidents
- Reporting re cybersecurity policies and procedures, Board oversight, management expertise.

Thanks for joining us.

Questions?

Discussion.