



Disclosure Obligations of Public Officials Relating to Bond and COP Sales

October 15, 2024

The State of Washington sells Bonds and Certificates of Participation on a regular basis. In connection with these sales, the State publishes a securities offering document known as the "Official Statement".

The following information is important to you, in your role as a Public Official with particular knowledge of, and responsibility for, the State's finances and debt obligations.

The State's Obligations Under Federal Securities Regulations Apply to Public Officials.

- Public Officials with particular knowledge of, or responsibility for, State finances and debt must take care to ensure that their public statements are accurate, not misleading, complete, and consistent with the Official Statement prepared by the State.

What This Means to You.

- Be aware that any public statement (including press communications and social media posts) may be deemed by federal regulators as "Speaking to the Market." If public statements are misleading or inaccurate, they could adversely affect the State and its ability to borrow. Federal regulators have also sought "control person liability" for governmental officials who control such public statements.
- In addition to ensuring public statements are accurate, Public Officials should avoid public statements about State finances or debt that are potentially misleading or lack appropriate context. Any new financial or debt-related information that is to be shared should be widely made available to the public. Such information may also need to be incorporated into the Official Statement and/or posted on an agency website.

As an additional resource, please see the attached guidance from the State's disclosure counsel as well as the following link for a list of the State's upcoming sales and Preliminary Official Statements: <https://tre.wa.gov/>

Thank you for your service to the people of Washington.



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Memorandum

TO: Jason Richter, Deputy State Treasurer
FROM: Stradling Yocca Carlson & Rauth LLP
as Disclosure Counsel to the State
DATE: January 2, 2024
SUBJECT: Antifraud Provisions of Federal Securities Laws Applicable to State Debt Issuance

Overview

The Office of the State Treasurer (“OST”) is responsible for overseeing the issuance by the State of Washington (the “State”) of its bonds, certificates of participation, and other types of financial obligations (collectively called “bonds” in this memo). In that capacity, OST has engaged our firm as Disclosure Counsel to the State and has asked us to provide advice as set forth below.

The issuance of bonds by the State and their offering for sale to the public is a sale of securities generally subject to federal securities laws and regulations under the purview of the U.S. Securities and Exchange Commission (“SEC”). This memo provides guidance on the antifraud provisions of federal securities laws and their applicability to the actions of elected and appointed officials responsible for State bond issuances.

1. Federal Securities Laws and the Antifraud Provisions

Although bonds issued by states and local governments are not directly regulated by the SEC, issuers of municipal bonds (and their responsible elected and appointed officials) are subject to certain “Antifraud Provisions,” also referred to as SEC Rule 10b-5 or as Section 17(a).¹ The antifraud provisions apply to the State and to officers and employees responsible for aspects of issuing bonds in their individual and official capacities in connection with publicly offered municipal bonds.

The Antifraud Provisions prohibit fraud, including both intentional and negligent misstatements, and generally require disclosure of all material facts in a manner that is accurate and

¹ See Rule 10-5 of the Securities Exchange Act of 1934; and Section 17(a) of the Securities Act of 1933. The text of both provisions provides that “[it is unlawful] for any person, directly or indirectly... (a) to employ any device, scheme, or artifice to defraud; (b) 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; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”

complete and does not contain material omissions. Under Rule 10b-5, any information that the State provides in connection with its bonds must not include “any untrue statement of a material fact or . . . omit to state a material fact necessary in order to make the statements made . . . not misleading.” A fact is “material” if it is substantially likely that a reasonable investor would consider the fact to be important in making an investment decision. Stated another way, if an item of information alters the “total mix” of information available, it is likely to be considered material.

The obligation to make accurate and complete disclosures applies to material information in any communication that is reasonably likely to reach municipal bond market participants, which includes anyone considering investing in municipal bonds, from individuals to investment banks. The rules apply slightly differently depending on the time period:

- **Primary Disclosure** - At the time of the initial offering, the State prepares an offering document and has procedures in place for developing and reviewing that document prior to its release.
- **Secondary or Continuing Disclosure** – For so long as bonds that it has issued or guaranteed are outstanding, the State is required to provide updates of certain information that was included in the Primary Disclosure. Although limited to specific information, that information must still be accurate and complete and contain no material omissions.
- **Speaking to the Market** – Public communications at any time – both formal and informal - by elected or appointed officials with particular responsibility for the financial affairs that provide material information regarding the State’s securities or financial condition may be viewed by the SEC to be “reasonably expected” to reach market participants and subject to the Antifraud Provisions.

2. Primary Disclosure

To access the capital markets, the State must provide accurate and complete information in the form of an offering document (“Official Statement”) that is distributed to potential investors. A Preliminary Official Statement is typically published a week or two before any bond sale. During the period that bonds are being marketed to investors, the State has an obligation to update information set forth in the Official Statement. The obligations of accuracy and completeness apply to information and statements published in the Preliminary Official Statement, with exceptions for interest rates and similar information that will be set on the date bonds are sold and will be set forth in a final Official Statement.

OST has implemented procedures, with guidance from disclosure counsel and the State’s municipal advisors, to obtain information from and review by representatives of key State agencies (e.g., the Attorney General’s Office, the Office of Financial Management, the Office of the State Actuary, the Department of Transportation, and many other State agencies) to prepare the Official Statement.

Regardless of whether a State official is directly involved in the development of the Official Statement, all State officials should be asked to notify OST immediately if they become aware of new information that is material to the State’s financial condition. Not every event relating to the State will be material, of course. But during the marketing period, if a State official becomes aware of any information that differs from the information set forth in the Official Statement – whether due to an event that presents new information or due to any other change or correction – the official

should alert OST to determine materiality and select a course of action.

3. Secondary or Continuing Disclosure Obligations

After bonds are sold, the State must periodically update certain information that was included in the Official Statement for the benefit of the secondary market.. In general, the obligation requires the State to make filings with the Municipal Securities Rulemaking Board (MSRB) via its publicly accessible Electronic Municipal Market Access (EMMA) web portal.

OST is responsible for compliance with the State’s continuing disclosure obligations, which include annual filings (annually obtaining the relevant updated information from those State agencies that provide information for primary disclosure) and listed event filings (the occurrence of one of the events listed in the SEC regulations), as follows:

- **Annual Financial Information** filings, generally consisting of the State’s Comprehensive Annual Financial Reports and certain other financial and operating data, which differs from financing to financing depending upon the source of repayment for the applicable bonds.
- **Listed Event** filings consist of notice of the occurrence of certain events that would be of interest to bondholders. (Examples include things like rating changes, defaults, substitution of security, draws on reserves, etc.) If any of these events do occur, the State must file a notice within 10 business days.

While most of these events are within the purview of OST, there are certain events that may become known to an agency official before OST becomes aware of their occurrence. If any State official becomes aware of any event fitting the descriptions below, that official should notify OST as soon as possible, in order to comply with the short timeline for filing:

- The incurrence of a material “financial obligation” (including bonds, financing contracts or leases, and guarantees) or a material “agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation;” and
- Any default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation which reflects financial difficulties.

4. Speaking to the Market

The SEC has taken the position that the Antifraud Provisions apply not just to the published Official Statement, but also extend to both formal and informal communications by elected and appointed officials with particular responsibility for State finances, if that information can be reasonably expected to reach investors. Elected and appointed officials (and potentially other high-level employees) in this category would include heads of executive branch agencies, members of finance and forecast committees, members of budget committees, and similar positions with particular knowledge of the State’s financial condition. The types of communications subject to this scrutiny could include public speeches, press releases, social media posts, and other communications. It also applies to published agency reports and studies.

The SEC has taken this position as far back as 1994, stating:

[W]hen [a bond issuer] releases information to the public that is reasonably

expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions. The fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate antifraud proscriptions. . . Since investors obtain information concerning the fiscal health of a municipal issuer from its public statements concerning financial and other matters, [t]he nature of these statements and the assumptions upon which they are based must be carefully and accurately communicated to the public, so that potential investors may be fully informed of all material facts relevant to their investment decision. *[SEC Release No. 33-7049.]*

In 2020, an SEC Staff Legal Bulletin reiterated this position, stating:

Municipal issuers disclose current information about themselves in a variety of ways, including public announcements, press releases, interviews with media representatives, and discussions with groups whose members have a particular interest in their affairs. In addition, information about municipal issuers is collected by state and local governmental bodies and routinely made publicly available. Because, as the Commission has noted, access to “current and reliable information is uneven and inefficient” in the municipal securities market, these types of statements are “a principal source of significant, current information about the issuer of the security, and thus reasonably can be expected to reach investors and the trading markets.” The 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. *[Office of Municipal Securities Staff Legal Bulletin No. 21; footnotes omitted.]*

As a result, particular attention should be paid to financial information communicated by State officials or employees whom a reasonable investor would perceive as having particular knowledge of State finances or on the websites of agencies that provide financial information about the State. Such information should be reviewed for accuracy and completeness as well as consistency with published Official Statements.

While not every communication will fall into this category, the State should still make sure that high-level appointed and elected officials are aware that information that they provide to the public (particularly financial information) could be viewed by the SEC as “speaking to the market.” If such information differs materially from information that has been previously provided to investors, State officials should be encouraged to communicate with OST promptly (preferably in advance of any such public communication or press release) so that OST may determine whether any further action must be taken on behalf of the State in upholding the State’s responsibilities under the federal securities laws and regulations.

Conclusion

Whenever the State prepares to sell bonds to the public securities markets, we recommend that you remind State elected and appointed officials of the basic antifraud provisions applicable to the State and to individuals under the federal securities laws and regulations.

We trust that this is helpful to you. If you have further questions, please contact Alice Ostdiek (aostdiek@stradlinglaw.com) in our Seattle office.