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Lawyers, Issuers Say SEC's Concern On Muni Disclosure Is Mostly Unfounded.

Securities and Exchange Commission Chair Jay Clayton's observation that issuers are being advised that the information they supply on EMMA is subject to more scrutiny under federal anti-fraud laws than other platforms is plausible, lawyers say, since the site has more exposure in the industry.

At Monday's SEC Fixed Income Market Structure Advisory Committee meeting, Clayton said in introductory remarks that he was informed recently that some issuers were receiving advice from certain market participants that by disclosing information on the Municipal Securities Rulemaking Board's EMMA site, it triggered a "more rigorous liability standard for that information than disclosing the same information to investors through other means."

Some lawyers and issuers attributed Clayton's comments to mean that EMMA has more exposure than other platforms, such as issuers' own websites.

Clayton on Monday directed the SEC's Office of Municipal Securities to put together a staff legal bulletin to summarize the application of the federal securities laws to various disclosure scenarios.

The MSRB declined to comment for the story.

However, there are detractors to Clayton's statements.

Jonas Biery, business services manager for the city of Portland, Oregon, Bureau of Environmental Services, said he could understand the perception that posting on EMMA gives issuers more exposure and thus an elevated risk to anti-fraud provisions, but he still thinks that exposure is a good thing. He also still sees the same risk on both EMMA and other platforms.

"I'm not aware of either that advice being provided and I'm not aware of there being enforcement risk difference based upon the tool by which disclosure information is disseminated," Biery said. "If it's on EMMA or it's published elsewhere, the enforcement risk, so to speak, to my knowledge is identical."

If lawyers are advising issuers that information filed on EMMA is under more scrutiny, then they're giving bad advice, said Ben Watkins, director of the Florida Division of Bond Finance.

"It's not only bad advice," Watkins said. "It's simply wrong."

Watkins said he thinks Clayton was trying to portray that it shouldn't matter how issuers communicate with the investor community — it's subject to the security laws and he agrees with him.

Watkins' department maintains its own investor relations website, which it uses as its primary mode of communicating with investors and other stakeholders.

The division updates its site continually and lets investors know when updates are made and understands that posting information on it means they are subject to anti-fraud laws.

For smaller issuers that may not have their own website, filing on EMMA may be their main mode of communicating with the market. However, they usually have financial planners or other professional helping them file, putting them naturally under more scrutiny, Watkins said.

“If you’re just posting constituent information on your website, not intending to speak to the credit markets, you’re not thinking securities laws,” Watkins said. “You’re thinking I’m putting up information for my citizens and taxpayers.”

Watkins said he hopes Clayton is not suggesting that anytime governments speak, that they’re subject to securities laws, saying it would chill issuers’ willingness to provide information.

From Watkins perspective, someone intending to speak to the marketplace is different from posting meeting minutes, for example.

Watkins referenced Harrisburg, Pennsylvania, where the SEC charged it with securities fraud for its misleading public statements in 2013. It was the first time the SEC charged a municipality for misleading statements made outside of its securities disclosure documents.

“If the SEC takes the position that whatever information you provide is subject to the anti-fraud laws, then that’s going to scare people that are routinely providing information via their website for entirely different purposes than designed to reach analysts and investors,” Watkins said.

Theoretically, the SEC would be right to say all communication to the public is subject to securities laws, but Watkins said it needs a common-sense approach.

If an issuer has a designated site to communicate, such as his division, then the other information shouldn’t count, Watkins said.

Clayton’s comments aren’t something on issuers’ radars right now, said Kenton Tsoodle, Oklahoma City’s finance director. Tsoodle is also on the Government Finance Officers Association’s debt committee and said it has not been brought to their attention.

“Our understanding would be that we are responsible for everything we say in any form or fashion,” Tsoodle said.

Tsoodle had not heard of issuers getting advice that disclosing on EMMA would be subject to more liability than an investor website. He said he wonders whether there is an assumption that disclosing on EMMA makes it more official, but many issuers know they’re responsible for what’s put out into the market, despite the format.

The SEC may look at EMMA first for information, so that may be behind Clayton’s comments, Tsoodle said.

Issuers do have more exposure when they file statements on EMMA, which could in turn lead to a greater risk that an omission of a material fact could be found misleading, said Fredric Weber, a counsel at Norton Rose Fullbright.

“There’s a greater risk that an omission of a material fact is misleading if it’s an omission from a statement filed on EMMA as opposed to an omission from a wealth of information that’s filed on an issuer’s website for reasons other than communicating with investors,” Weber said.

Anytime issuers speak to the market, anything they say or write could be subject to anti-fraud laws. Some issuers don't maintain websites so they rely on EMMA to disclose information.

Issuers will hear from their counsel that voluntary disclosures on EMMA result in incremental exposure to liability, Weber said. He also added that additional work is needed to prepare a statement for filing on EMMA.

"So in deciding whether to make a voluntary disclosure or not, they see those two negatives and then they look for what's the offsetting benefit, and that's been absent," Weber said.

By that he means, issuers want to see an offsetting benefit to filing an EMMA, such as in the nonprofit healthcare market, where they can commit to provide quarterly disclosures to give more access to the market. The catch, though, is that healthcare credits can change over shorter periods of time compared to other municipal credits. Since most

"If the SEC would issue some public statement to the effect that issuers don't have exposure to an enforcement action for material omissions if they do make a voluntary disclosure and what they do say is correct, then at least part of the disincentive for issuers to make voluntary disclosures would be taken away," Weber said.

Currently, issuers are encouraged to put voluntary information up on EMMA, said Rod Kanter, partner at the law firm Bradley.

When issuers go to market to sell debt, they are focused on disclosure and anti-fraud provisions. However when posting annual reports and other items on EMMA, officials are generally more focused on the continuing disclosure agreement requirement and may easily lose focus on anti-fraud issues, Kanter said.

"I have not heard anyone say that filings on EMMA are going to be subject to great scrutiny from an anti-fraud perspective," Kanter said. "That's a new one for me. But I've been in many conversations with lawyers advising clients, saying hey remember when you're filing on EMMA, you're speaking to the market, so be careful about anti-fraud provisions."

By Sarah Wynn

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