



U.S. Securities and Exchange Commission

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69516 / May 6, 2013

Report under Section 21(a) of the Exchange Act

Report of Investigation in the Matter of the City of Harrisburg, Pennsylvania Concerning the Potential Liability of Public Officials with Regard to Disclosure Obligations in the Secondary Market¹

The Commission today instituted a settled cease-and-desist proceeding against the City of Harrisburg, Pennsylvania ("Harrisburg" or "the City") for its violations of Section 10(b) of the Securities Exchange Act ("Exchange Act") and Rule 10b-5 thereunder.² As a result of an investigation conducted by the staff of the Division of Enforcement, the Commission found that certain public statements made during a two-year period misrepresented and omitted to state material information regarding Harrisburg's deteriorating financial condition and credit ratings downgrades, thereby violating the antifraud provisions of the Exchange Act. During the same period, Harrisburg, a near-bankrupt city under state receivership, did not provide to the public current and accurate information regarding the City's financial condition, including annual financial information or notices in accordance with its written undertakings pursuant to Rule 15c2-12 of the Exchange Act.

Based upon information obtained during the investigation, the Commission deems it appropriate that it issue this Report of Investigation pursuant to Section 21(a) of the Exchange Act to address the obligations of public officials³ relating to their secondary market disclosures for municipal securities. Public officials should be mindful that their public statements, whether written or oral, may affect the total mix of information available to investors, and should understand that these public statements, if they are materially misleading or omit material information, can lead to potential liability under the antifraud provisions of the federal securities laws.

As the Commission stated in its 1994 interpretive guidance ("Interpretive Guidance") concerning the obligations of participants in the municipal securities markets under the antifraud provisions of the federal securities laws, when information about a municipal issuer is "reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions."⁴ Given this potential for liability, as the Commission stated in the Interpretive Guidance, "in order to minimize the risk of misleading investors, municipal issuers should establish practices and procedures to identify and timely disclose, in a manner designed to inform the trading market, material information reflecting on the creditworthiness of the issuer."⁵

In 1996, two years after its Interpretive Guidance, the Commission issued a Report of Investigation in the Matter of County of Orange, California

("Orange County Report") to emphasize the responsibilities of public officials under the federal securities laws relating to primary offerings of municipal securities and related disclosure documents.⁶ Unlike many primary offering disclosure documents, statements by public officials that reach the secondary market may not be subject to the same comprehensive review with respect to the disclosure standards of the federal securities laws. Nevertheless, public officials may have liability under the antifraud provisions of the federal securities laws for such statements. Therefore, the statements of those public officials who may be viewed as having knowledge regarding the financial condition and operations of a municipal issuer should be carefully evaluated to assure that they are not materially false or misleading. The Commission's July 2012 Municipal Market Report also addressed this issue, recommending that issuers and other municipal market participants follow and further develop voluntary industry initiatives to enhance disclosure policies and procedures for both primary offering and ongoing disclosures. Such initiatives may include the adoption of issuer disclosure committees and training programs.⁷

In this case, among other things, public officials who worked within the City's administration ("City Administrators") publicly released statements and financial information that omitted or misstated material information about Harrisburg's financial condition, including its credit ratings and payments made by the City on debt it guaranteed for a resource recovery facility. The financial information and other statements, publicly available on Harrisburg's website at the time, included the City's 2007 and 2008 Comprehensive Annual Financial Reports ("CAFR"), 2009 Budget and Transmittal Letter, 2009 State of the City Address and its Mid-Year Fiscal Report for 2009. For example, City Administrators submitted Harrisburg's 2008 CAFR, which omitted to include a downgrade by Moody's Investor Services, Inc. of the City's general obligation debt from Baa2 to Ba2. City Administrators also released a 2009 Budget that did not include funds for debt guarantee payments for the resource recovery facility, although \$2.1 million had informally been set aside in anticipation of having to make those payments. In another instance, City Administrators released a Mid-Year Fiscal Report for 2009 without reference to the \$2.3 million in guarantee payments made by the City for a resource recovery facility. In addition, an annual public address given by a Harrisburg public official omitted to state the amount of resource recovery facility debt the City would likely have to repay from its General Fund, and the impact the repayment was having on Harrisburg's finances. Harrisburg public officials failed to take measures, appropriate under the circumstances, to ensure that their financial information and other statements were not materially misleading.

The misstatements and omissions in this case were not the result of an isolated incident but were recurrent and stretched from one fiscal year into the next. 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 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.⁸

The statements by the Harrisburg public officials were part of, and could

have altered, the total mix of information available to the market. There is a substantial likelihood that a reasonable investor would consider the financial condition of the City important in making an investment decision, and there were no other disclosures made by the City as part of the total mix of information available to enable investors to consider other information. These public officials' statements were the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market. Because statements are evaluated for antifraud purposes in light of the circumstances in which they are made, the lack of other disclosures by the municipal entity may increase the risk that municipal officials' public statements may be misleading or may omit material information.

Given this potential for liability, public officials who make public statements concerning the municipal issuer should consider taking steps to reduce the risk of misleading investors. At a minimum, they should consider adopting policies and procedures that are reasonably designed to result in accurate, timely, and complete public disclosures; identifying those persons involved in the disclosure process; evaluating other public disclosures that the municipal securities issuer has made, including financial information and other statements, prior to public dissemination; and assuring that responsible individuals receive adequate training about their obligations under the federal securities laws. Public officials may also look to Commission enforcement actions or Commission guidance in developing the disclosure policies, procedures and controls that they choose to establish. Public officials may choose to identify and implement other practices or procedures that they believe are appropriate to meet their obligations under the federal securities laws. Harrisburg has since instituted formal and tailored written policies and procedures with respect to public statements regarding financial information and other statements and its written undertakings pursuant to Rule 15c2-12 of the Exchange Act.

By the Commission.

¹ Section 21(a) of the Exchange Act authorizes the Commission to investigate "whether any person has violated, is violating, or is about to violate" the federal securities laws. "The Commission is authorized . . . to publish information concerning such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of" the federal securities laws. This report does not allege a violation by any public officials currently or formerly associated with Harrisburg of Section 10(b) or Rule 10b-5 of the Exchange Act and the Commission has not charged such public officials with any violations of the federal securities laws. This Report also does not constitute factual findings or an adjudication of any issue addressed herein.

² In the Matter of the City of Harrisburg, Pennsylvania, Exchange Act Release No. [34-69515](#). Harrisburg consented to the issuance of the Order without admitting or denying the findings therein.

³ In this Report, the term "public official" means elected officials, appointed officials, and employees, or their functional equivalents, of any State, municipality, political subdivision or any agency or instrumentality thereof.

⁴ See Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Exchange Act Release No. 34-33741

(March 9, 1994) ("Interpretive Guidance") at 12-13.

⁵ *Id.* at 13.

⁶ Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors, Exchange Act Release No. 36761 (January 24, 1996).

⁷ Municipal Market Report at 141-42.

⁸ See <http://emma.msrb.org/>

<http://www.sec.gov/litigation/investreport/34-69516.htm>

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