

Bond Case Briefs

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Voluntary Disclosures and the SEC's Public Statement Regarding the Importance of Disclosure for Our Municipal Markets.

On May 4, 2020, the U.S. Securities and Exchange Commission (the "SEC") released a [public statement](#) from Chairman Jay Clayton and Rebecca Olsen, Director of the SEC's Office of Municipal Securities ("OMS"), titled, "*The Importance of Disclosure for our Municipal Markets*," wherein they encouraged issuers of municipal securities and obligated persons (conduit borrowers) to make voluntary disclosures regarding their current financial status and operations in response to the uncertainties created by the COVID-19 pandemic. The public statement only represents the views of the Chairman and the OMS Director. It is not a rule, regulation or statement of the SEC. This public statement does not alter or amend applicable laws and has no legal force or effect.

In compliance with SEC Rule 15c2-12 of the Securities Exchange Act (the "Rule") and under existing continuing disclosure agreements, issuers and obligated persons are required to provide (i) annual financial information and operating data and (ii) notices regarding certain listed events within ten business days of such event, in each case via the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA) system. Additionally, under existing continuing disclosure agreements, obligated persons are often required to provide financial information and operating data on a quarterly basis. Pursuant to these agreements, many issuers provide financial information and operating data to the municipal markets only once a year, and obligated persons typically provide financial information and operating data to the municipal markets five times per year. Issuers and obligated persons should consider adding in a required annual or quarterly filing a description of the impact of the COVID-19 pandemic upon their operating and financial data on a historical and forward-looking basis.

As a reminder, any statements posted on EMMA are subject to the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (commonly known as the 10b-5 standard) because they are "reasonably expected to reach investors and the trading markets." Therefore, issuers and obligated persons should follow the same policies and procedures they would follow for their required filings under any existing continuing disclosure agreements for any voluntary filings.

In the public statement, SEC Chair Clayton and OMS Director Olsen observed 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." They acknowledged that "developing voluntary, unaudited, and non-routine disclosures regarding current financial status and operating conditions may be challenging, particularly under the current circumstances." But they believe that "disclosure of the current financial and operating condition will not only aid investors in making informed investment decisions, but will also be important to the issuer-specific and more general functioning of the municipal securities market, including the ability to refinance existing obligations and raise new capital."

COVID-19 Event Filings

During the March 19, 2020 MSRB webinar, Ahmed Abonamah, Deputy Director of OMS, stated that, under the Rule, there is no requirement that issuers and obligated persons provide a generic event filing on EMMA based solely on the fact that the COVID-19 pandemic is occurring. However, in the public statement, SEC Chair Clayton and OMS Director Olsen stated that “in light of the potentially significant effects of COVID-19 on the finances and operations” of many issuers and obligated persons, they “request that [issuers and obligated persons] provide investors with as much information about their current financial and operating condition as is reasonably practicable.” Prior to making these voluntary filings, issuers and obligated persons (conduit borrowers) should discuss them with bond counsel, disclosure counsel or general counsel.

Forward-Looking and Cautionary Language

SEC Chair Clayton and OMS Director Olsen believe that every voluntary filing should include “meaningful cautionary language,” including a statement that the financial information and operating data are “forward-looking,” and such cautionary language should include the following types of information:

- A description of the relevant facts and assumptions affecting the reasonableness of reliance on and the materiality of the information provided;
- A description of how certain important information may be incomplete or unknown; and
- The process or methodology (audited or unaudited) used by the issuer or obligated person to produce the information.

In the public statement, SEC Chair Clayton and OMS Director Olsen state, “[w]e would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.”

Examples of Voluntary Filings

In the public statement, SEC Chair Clayton and OMS Director Olsen provide examples of information that issuers and obligated persons could provide to investors via EMMA.

1. Information Regarding the Impact of the COVID-19 Pandemic on Operations and Financial Conditions. Issuers and obligated persons could provide information to investors regarding the impact of the COVID-19 pandemic on their operations and financial conditions, including:

- Their current operational and financial status, including decreases in revenues and delays in collection of revenues;
- Any impacts on their operational and financial condition, including unbudgeted costs; and How their operational and financial condition may change as efforts to fight COVID-19 evolve.

Additionally, rating agencies routinely ask issuers and obligated persons to provide updated information as part of their ongoing reviews. Issuers and obligated persons should consider uploading any nonconfidential information provided to the rating agencies via EMMA.

2. Information Regarding Source of Liquidity. Issuers and obligated persons could provide information to investors regarding their sources of liquidity, including:

- A description of cash on hand;
- Access to reserves or other funds (and to what extent such access is limited);
- Access to liquidity facilities; and

- Whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments.

Additionally, SEC Chair Clayton and OMS Director Olsen suggest that if not otherwise disclosed, such information should include the material terms of any liquidity facility the issuer has used or expects to use.

Regardless of whether issuers and obligated persons are required under their existing continuing disclosure agreements to provide information via EMMA related to “Financial Obligations” (as defined under the Rule), issuers and obligated persons should consider disclosing information related to drawing on a line of credit or liquidity facility or having access to lines of credit or liquidity facilities to ensure timely debt service payments. For more information, please see our Client Alert on [Implications of COVID-19 Pandemic for Municipal Bond Transactions](#).

3. Information Regarding Availability of Federal, State and Local Aid. Issuers and obligated persons could provide information to investors on whether they are planning to seek federal, state and local aid. If they are planning to do so, SEC Chair Clayton and OMS Director Olsen suggest that issuers and obligated persons consider disclosing the nature, amount and other material terms of the aid if it materially affects or reasonably likely will materially affect their operational or financial condition.

4. Reports Prepared for Other Governmental Purposes. Issuers and obligated persons could provide via EMMA any reports prepared for other governmental purposes related to their current financial condition, especially those with respect to the COVID-19 pandemic.

Finally, in the public statement, SEC Chair Clayton and OMS Director Olsen state that issuers and obligated persons are often required to disclose similar information as described above to other parties, such as federal and state governments, and they reiterate that it is important that disclosure of “this type is (1) consistent across all contexts, regardless of the purpose and (2) kept confidential until disclosed, and when disclosed, disclosed broadly.”

SEC Chair Clayton and OMS Director Olsen acknowledge that issuers and obligated persons may not be entering the municipal market or may not be required to make a disclosure filing in the near future. Because this public statement does not create any new or additional obligations for any person, any additional filings or the inclusion of any forward-looking information regarding the impact of the COVID-19 as part of a required filing is voluntary. For more information, please contact any member of the Public Finance Group.

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