Bond Case Briefs

Municipal Finance Law Since 1971

COVID-19 and Municipal Securities Disclosure.

COVID-19 is creating more questions than answers in every sector of American life recent days, and the municipal bond market is no exception. Issuers and obligated persons for municipal bonds (collectively, "Obligated Parties") have asked about their disclosure obligations pursuant to Rule 15c2-12 (the "Rule") relating to both their outstanding bonds and bonds for which they are in the process of conducting a primary offering. Obligated Parties should consider the following questions as they navigate challenges presented by COVID-19 as they relate to municipal securities disclosure, and consult with legal counsel to assess any needed action.

What should I do if I cannot meet my deadline for filing my annual financial information required by the Rule due to delays or closures relating to COVID-19? If I am able to make my filing deadline, should I say anything about COVID-19?

The Rule requires Obligated Parties to file certain annual financial information and to provide, in a timely manner, a notice of failure of such Obligated Party to file such annual financial information. The deadline for filing annual financial information is governed specifically by the continuing disclosure agreement (the "CDA") relating to such bonds which are typically six (6) months from the end of the fiscal year. During these hectic times, these deadlines may not be top of mind, but Obligated Parties should take care to provide a notice to the market pursuant to the Rule if they are unable to file. Further, the SEC has publicly stated that because CDAs are private contracts, it has no authority to provide relief from these deadlines.

If an Obligated Party is able to file annual financial information or interim financial information, it may be advisable to include cautionary language in the filing that is similar to that included in primary offering documents to the effect that:

- the filing is being made to comply with the Obligated Party's commitment under its CDA, not to provide all information material to an investment in the applicable securities, and does not purport to provide all such information;
- the dates as of and periods for which information is provided in the filing occurred before the onset of COVID-19 and it is possible that effects related to COVID-19 may adversely affect the Obligated Party's future financial performance to an extent that could be material; and
- consequently, the information set forth in the filing should not be relied upon as indicative of future financial performance of the Obligated Party.

Should I file a material event notice relating to COVID-19 for my outstanding bonds?

COVID-19 itself is not a material event provided for under the Rule. However, if the effects of COVID-19 are such that they trigger a material event such as a payment delinquency, an unscheduled draw on reserve funds, or a ratings change, an Obligated Party should file a notice of such material event. Similarly, if an Obligated Party has entered into a CDA after February 28, 2019 and the Obligated Party enters into a material "financial obligation" or experiences COVID-19 related effects that cause financial difficulties or trigger events of default, events of acceleration, termination events, modification of terms, or other similar events under the terms of a "financial

obligation" of the Obligated Party, a material event notice should be filed.

Should I file voluntary disclosure relating to COVID-19 for my outstanding bonds?

An Obligated Party need not file voluntary disclosure. If an Obligated Party chooses to provide voluntary disclosure, the Obligated Party should take care to determine whether the information provided is truly "material" to the market. Materiality, in this context means *"if there is a substantial likelihood that a reasonable investor would determine that the disclosed information significantly altered the "total mix" of information already available in the marketplace."* Put another way, is the information the Obligated Party is disclosing likely to be so critical that it would influence an investor's decision to invest in the Obligated Person's bonds, given other currently publicly available information? If so, the Obligated Party might consider posting a voluntary disclosure. The Obligated Party must balance this with an additional calculus of whether the voluntary disclosure would need ongoing updates.

What should I disclose regarding COVID-19 if I am in a primary offering?

Obligated Parties should consider what impacts COVID-19 is having on the Obligated Party in the short-term, as well as any potential long-term impacts on the Obligated Party and the revenue source supporting the bonds. Given the high level of uncertainty regarding these matters, many Obligated Parties have opted for generalized disclosure. Nevertheless, it will be important for Obligated Parties to work with Bond Counsel, Financial Advisors, the Underwriter and its counsel, and staff of the Obligated Party to determine the content of any risk or other financial disclosure in the offering document.

What about public statements by officials of an Obligated Party regarding COVID-19?

Obligated Parties should bear in mind that the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder apply to all statements providing information that is reasonably expected to reach investors and the trading markets. The Secondary Market Staff of the SEC Office of Municipal Securities previously issued a bulletin alerting issuers that these antifraud provisions apply to public statements and continuing disclosures under CDA. Obligated Parties should take care with any statements that are made with an eye towards, or can be reasonably expected to reach, the investing public.

Winstead PC

April 3, 2020