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COVID-19 and Secondary Market Disclosure: Butler Snow

Our thoughts are with you, your loved ones and organizations as we all navigate this public health crisis together. We are providing this alert to our public finance clients and other professionals regarding COVID-19 and its potential impact on secondary market disclosure.

A Continuing Disclosure Review.

Before discussing some of the secondary market disclosure issues, a brief review is in order. The Securities and Exchange Commission (the "SEC") has promulgated Rule 15c2-12 (the "Rule") that prohibits underwriters from purchasing or selling most municipal securities unless an issuer or conduit borrowers (collectively, an "Obligated Person") has agreed in writing to provide specific information to the market on an ongoing basis, i.e. continuing disclosure. The written agreement can be a certificate or an agreement and is often referred to as an "Undertaking." Pursuant to the Rule, the continuing disclosure to be provided to the market consists of: (i) annual financial information and operating data as specified in each Undertaking, (ii) annual audited financial statements; and (iii) timely notice of the occurrence of certain events specified in each Undertaking (known as Event Notices). These filings must be made on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access system ("EMMA"). The EMMA website is: www.emma.msrb.org.

Listed Events.

Event Notices must be filed in a timely manner not in excess of ten business days after the occurrence of any of the events listed in an Undertaking for a specific series of bonds. A list of all events currently required follows; however, this list has expanded over time and your Undertakings may not include all of them.

1. Principal and interest payment delinquencies;
2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;
7. Modifications to rights of security holders, if material;
8. Bond calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the securities, if material;
11. Rating changes;
12. Bankruptcy, insolvency, receivership or similar event of the obligated person;
13. The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the

termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material;
14. Appointment of a successor or additional trustee or the change of name of a trustee, if material;
15. Incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and
16. Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

Some Issues to Consider.

The following are some of the issues that our public finance clients are now confronting or asking about.

Is it necessary to file any disclosure about the impacts COVID-19 is having on an Obligated Person? An Obligated Person is only required to file notices of events specified in an Undertaking. No filing is required unless one of those events has occurred (see above for the current list of events; but be aware that some Undertakings have fewer events and some may contain additional events requiring disclosure). It is important for Obligated Persons to consult each Undertaking to determine whether there is some required disclosure. Some of the 16 events may occur as a result of this crisis and Obligated Persons need to be prepared to file an Event Notice. For example, rating changes must be disclosed and Obligated Persons are responsible for filing an Event Notice if a rating change occurs.

What should Obligated Persons consider in making a voluntary filing on EMMA or on its website? Some Obligated Persons may want to make a voluntary filing on EMMA or its website regarding the impacts of COVID-19 on their operations and finances. If such a filing is made, it is subject to the antifraud provisions of the federal securities laws; the information that is provided must not be materially inaccurate or misleading in the context in which it is provided.

What considerations apply if the staff of the Obligated Person prepares revised financial projections for the governing body or if the chief elected official of an Obligated Person makes a speech about the impacts of COVID-19 on the Obligated Person? In a 1994 interpretive release, the SEC advised as follows: “A municipal issuer . . . when it 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.”

Information on an Obligated Person’s website, press releases regarding the financial health of the Obligated Person, certain public statements by its officials, and responses by its officials to inquiries from the public, all may be considered to be reasonably expected to reach the investing public. The information that is provided must not be materially inaccurate or misleading in the context in which it is provided.

May the staff of an Obligated Person respond to requests from credit analysts for information about the impacts of COVID-19 on the Obligated Person? The staff may respond to such requests, but again the information provided must not be materially inaccurate or misleading in the context in which it is provided. Ideally, the staff should provide only publicly available information to requestors. No provisions of the federal securities laws apply to municipal issuers providing information to investors requesting it. However, the Municipal Securities Rulemaking Board (the “MSRB”) and other market participants have expressed concern about Obligated Persons providing new, nonpublic information to select investors or analysts. In a market advisory, the MSRB said:

> The MSRB encourages issuers and their financial professionals to implement practices to ensure that all investors and stakeholders have equal access to the same information in a timely manner. For example, an issuer may choose to voluntarily disclose the information to the broader marketplace by a method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public. Although issuers could choose to utilize other means, such a dissemination could be accomplished by posting the relevant information on EMMA. Based on the type of information, there are multiple options for how an issuer may choose to make such a voluntary disclosure.

What should be done if the audit of the Obligated Person will not be completed in time to meet the filing deadline set forth in the Undertaking? Pursuant to the Rule, the Obligated Person should file a notice on EMMA that the audited financials are not yet ready and that they will be filed late. Check the individual Undertakings to determine whether unaudited financials are required to be filed if the audit isn't complete; should you determine that unaudited financials will not be available either, indicate that in the notice.

If the Obligated Person is late in making filings required by an Undertaking, how will that impact the Obligated Person when it next wants to sell bonds? An underwriter must have a reasonable basis to conclude that an Obligated Person will comply with future Undertakings. Filing a notice as described above satisfies the Undertaking, so an underwriter should be able to review the circumstances and reach the conclusion that the Obligated Person will be able to comply with its future Undertaking.

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