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Disclosing COVID-19 Risks and Impacts in Connection with Municipal Securities.

Given the far-reaching consequences of the COVID-19 pandemic, including unprecedented financial and operational impacts, volatile municipal market conditions and the potential for a significant economic contraction, many issuers and other obligated persons in the municipal market are faced with the challenge of not only managing their financial health, operations and the safety of their employees, residents, customers, patients, students, clients and other personnel, but also complying with federal antifraud securities laws in both the primary market and secondary market and avoiding potential securities law liability.

Due to the rapidly evolving facts and circumstances relating to COVID-19, obligated persons often struggle to determine what COVID-19 related disclosures—whether in offering documents for primary offerings or in secondary market disclosures—may be appropriate and informative to the market.

Am I required to post notices to EMMA about COVID-19?

Obligated persons must comply with their undertakings as written, including the timely filing of annual disclosures of operating and financial data and financial statements, as well as any interim disclosures covered thereby. While the material event categories enumerated under SEC Rule 15c2-12 do not include pandemics, the impact COVID-19 may have on an obligated person's financial health or operations may eventually give rise to a material event required to be disclosed. Recently, when asked about how the COVID-19 pandemic would impact obligated persons' undertakings to provide secondary market disclosures under continuing disclosure agreements, staff from the Office of Municipal Securities (OMS) of the Securities and Exchange Commission (SEC) demurred, noting that the SEC lacks the regulatory authority to provide relief with respect to continuing disclosure undertakings, as these agreements are private contracts and the SEC has no authority over obligated persons in connection with contractual undertakings.

COVID-19 impacts may result in delays in an obligated person's ability to timely file annual reports or financial statements. Any delay in filing annual disclosures or audited financial statements due to COVID-19 should be treated in the same way as any other delay—if there is a failure to file annual disclosure by the required date, an obligated person must file a "failure to file" notice, and may include an explanation of the relevant facts and circumstances causing the delay. When an obligated person eventually files its annual financial and operating data, that filing may also include a similar explanation. Upon determining that a late filing is material, the obligated person should also include disclosure of the late filing in its offering documents for the next five years as required by Rule 15c2-12.

What should I say in my Offering Documents about COVID-19?

Obligated persons entering the primary market, as well as those who remain committed to providing the secondary market with current information on a voluntary basis, can apply a consistent analysis

to their disclosure decisions concerning COVID-19. As the market can fairly be presumed to be aware of COVID-19 generally, general information about the pandemic and risks applicable to any obligated person, regardless of its particular facts and circumstances, are not necessary, nor particularly probative. Risk factors should be as specific to the obligated person as possible; and general risk factors should be discouraged. An obligated person who simply parrots general risk factors used by others in its industry, without evaluating its own unique situation and market and risk profile, is not providing the market with material information. Rather, obligated persons should disclose (i) how COVID-19 is directly and indirectly impacting their current business and operations, (ii) how they currently assess the near-term and long-term impacts on their financial condition, results of operation, and business prospects as a result of COVID-19, and (iii) how they are managing or mitigating the impacts from COVID-19 on their business and operations.

On March 25, 2020, the SEC's Division of Corporate Finance provided disclosure guidance to corporate registrants concerning the COVID-19 disclosures. While not directly applicable to municipal securities obligated persons, this guidance provides valuable insight into the level of diligence the SEC believes an obligated person should undertake with respect to COVID-19. All obligated persons in the municipal market should consider the following inquiries carefully in preparing their own primary and secondary market disclosures.

How has COVID-19 impacted ***your financial condition and results of operations?***

In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?

- Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted ***your capital and financial resources,*** including your overall liquidity position and outlook?
- Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change?
- Have your sources or uses of cash otherwise been materially impacted?
- Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
  If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?
- Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk.
- Do you expect to disclose or incur any material COVID-19-related contingencies?

How do you expect COVID-19 to affect assets on ***your balance sheet*** and your ability to timely account for those assets?

- For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?

Do you anticipate ***any material impairments*** (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

Have COVID-19-related circumstances such as ***remote work arrangements*** adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?

- If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?

Have you experienced challenges in implementing your ***business continuity plans*** or do you foresee requiring material expenditures to do so?

- Do you face any material resource constraints in implementing these plans?

Do you expect COVID-19 to materially affect the ***demand for your products or services?***

Do you anticipate a material adverse impact of COVID-19 on ***your supply chain*** or the methods used to distribute your products or services?

Do you expect the anticipated impact of COVID-19 to materially change the ***relationship between costs and revenues?***

Will your operations be materially impacted by any constraints or other impacts on ***your human capital resources and productivity?***

Are ***travel restrictions and border closures*** expected to have a material impact on your ability to operate and achieve your business goals?

In preparing its disclosure, an obligated person should consider not just its particular facts and circumstances, but also assess the potential magnitude and likelihood of future COVID-19 impacts. The level of disclosure should be directly proportional to magnitude and probability of such impacts. Information concerning the efforts an obligated persons is undertaking to manage—and mitigate—the magnitude and probability of COVID-19 impacts is particularly well suited for inclusion under a "Management Discussion and Analysis" section in the offering document.

What about COVID 19 information in other forms of communications?

Obligated persons must also consider that antifraud liability may attach not only to their public statements, whether specifically incorporated into offering documents, posted on EMMA or an obligated person's website, but may also arise in connection with any communication of information. Compliance with effective (and updated) policies and procedures regarding municipal securities disclosures should be the starting point, as noted in this recent White Paper analyzing a recent staff legal bulletin from OMS regarding the application of antifraud rules to all communications by obligated persons that may reasonably be expected to reach the market, even if not intended for that purpose.

While the impacts from COVID-19 remain uncertain, is it better to remain silent?

Obligated persons must also recognize that liability under the federal securities law can attach for the omission of material information. An omitted fact is considered material if there is a substantial likelihood that the missing information would have been viewed by a reasonable investor as having significantly altered the total mix of information available. In the case of municipal issuers, the "total mix" analysis, which is a facts and circumstances test, can differ greatly among the enormous number—and variety—of issuers in the municipal market. Following the guidance set forth above,

however, should assist obligated persons in developing effective disclosures of all material information, including risks and impacts of COVID-19.

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