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SEC Chair and OMS Director Issue Joint Statement Encouraging COVID-19 Disclosure by Municipal Issuers.

On May 4, 2020, Securities and Exchange Commission (SEC) Chair Jay Clayton and Office of Municipal Securities Director Rebecca Olson issued a joint statement available here strongly encouraging robust and timely disclosure in the municipal market about the effects of the coronavirus disease 2019 (COVID-19) public health crisis. The joint statement follows a similar statement issued in early April for corporate issuers.

The joint statement specifically discusses the importance of municipal issuers providing investors with information regarding the impact of COVID-19 on their financial and operating conditions. This disclosure is encouraged (and likely necessary) in connection with disclosures made in official statements for current debt offerings, and perhaps filings made under continuing disclosure agreements, depending on the circumstances. In addition, the SEC Chairman and OMS Director encourage municipal issuers to make voluntary disclosure filings if they are not currently in the market or otherwise posting required information on EMMA. The joint statement suggests this disclosure would include:

- Information regarding the impact of COVID-19 on operations and financial condition, including (1) the current operational and financial status, including decreases in revenues and delays in collection of revenues; (2) how COVID-19 has impacted operational and financial condition, including increased costs; and (3) how the financial condition may change as the COVID-19 crisis evolves
- Information regarding availability of sources of liquidity, including cash on hand, access to reserves or other funds, liquidity facilities and whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments
- Information regarding availability of federal, state and local aid, including information about aid that has been applied for or received and the expectation of future payments
- Reports prepared for other governmental purposes, including reports that could provide insight into local, regional and sector-specific strategies to fight and recover from COVID-19

The SEC Chairman and OMS Director recognize the challenge in providing specific information about potential effects of COVID-19 due to the evolving nature of the current public health crisis. However, the joint statement sets out a number of factors that they believe should be weighed heavily by municipal issuers in determining whether to provide meaningful disclosure on a voluntary basis.

Perhaps the most important matter discussed in the joint statement is how the SEC Chairman and OMS Director expect “forward-looking statements” in municipal disclosure to be viewed by the SEC. The SEC Chairman and OMS Director stated, “We would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.” This is important because there is no specific “safe-harbor” for “forward-looking statements” for municipal disclosure. Nevertheless, we have generally concluded that protection from liability for “forwardlooking statements” in municipal disclosure would be afforded in the municipal market by

analogy and under the judicially acknowledged “bespeaks caution” doctrine, similar to that provided in the corporate market for reporting companies.

The information provided in the joint statement is consistent with and, to a certain extent, a confirmation of what we have said in prior alerts regarding dealing with disclosure issues during the COVID-19 public health crisis and generally. To the extent that you are making public statements about the impact of COVID-19 on your financial position or operations, whether those statements are specifically intended for your bond investors or not, you should follow your existing disclosure procedures to provide for consistent information for all interested stakeholders, including governing body members, citizens, other government agencies, lenders and investors in your publicly offered debt obligations. These statements should include appropriate explanatory information about the basis for the statements and precautionary language regarding the “forward-looking” nature of the information provided and the likelihood of the information changing, as the public health crisis continues to evolve.

There is no doubt these are challenging times. However, it is important to continue to follow your disclosure policies and procedures, even when challenged by a great national public health crisis. The joint statement by the SEC Chairman and OMS Director is a welcome response in the midst of the current pandemic and will help to facilitate the production of meaningful disclosure.

Squire Patton Boggs

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