

Chapman Client Alert

May 8, 2020

Current Issues Relevant to Our Clients

SEC Chairman and Director of the Office of Municipal Securities Encourage COVID-19 Disclosures in the Municipal Securities Market

On May 4, 2020, Jay Clayton, Chairman of the Securities and Exchange Commission (“SEC”), and Rebecca Olsen, Director of the Office of Municipal Securities, issued a public statement (the “*Municipal Issuer Statement*”) strongly encouraging issuers, conduit borrowers and other obligated persons (referred to herein as “*issuers*”) of municipal securities to make current and forward-looking disclosures describing the effects of the COVID-19 pandemic on their finances and operations in primary offering documents, contractually required continuing disclosure filings, and voluntary continuing disclosure filings, and offering some assurances with respect to the liability issuers assume when disseminating forward-looking information.¹

Background

On April 8, 2020, Chairman Clayton and William Hinman, Director of the Division of Corporation Finance, issued a statement (the “*Corporate Issuer Statement*”) addressing public company disclosures in light of the effects of and uncertainties created by COVID-19, urging companies to provide investors with as much information as practicable regarding their current financial and operating status and encouraging consistency with respect to company public and confidential disclosures.² The *Corporate Issuer Statement* also urged companies to disclose material information regarding their planning for, and expectations regarding, a company’s future financial condition and operating status and highlighted the availability of safe harbors for forward-looking statements available to corporate issuers.

The *Municipal Issuer Statement* is expressly intended to parallel the objectives of the *Corporate Issuer Statement*, while recognizing the significant differences between the corporate and municipal securities markets, including the large number of issuers, the diverse sources of revenues for repayment, the use of complex credit structures and the prevalence of “buy and hold” retail investors in the municipal securities market. Like the *Corporate Issuer Statement*, the *Municipal Issuer Statement* encourages timely and robust current and forward-looking disclosures relating to the impact of COVID-19 on an issuer’s operating and financial condition, and also offers considerations with respect to the content of such disclosures, as well as some assurance that current and forward-looking disclosures made in good faith and accompanied by appropriate cautionary language will likely not be subject to second-guessing by the SEC. The *Municipal Issuer Statement* also notes that issuers and investors should consider both

issuer-specific disclosures (e.g., the impacts of COVID-19 on an issuer’s overall financial and operating position) and security-specific disclosures (e.g., the impacts of COVID-19 on the different types of municipal securities that an issuer may have outstanding and their sources of repayment, such as property taxes, sales taxes, and revenues from the operation of airports, public transit systems, public utilities and other governmental enterprises).

Examples of COVID-19-Related Disclosures

The *Municipal Issuer Statement* provides the following examples of COVID-19-related disclosures considered important for inclusion in primary offering documents, contractually required continuing disclosure filings, and voluntary continuing disclosure filings:

- *Information Regarding the Impact of COVID-19 on Operational and Financial Condition:* A description of (i) an issuer’s current operational and financial status, including decreases in revenues and delays in revenue collection; (ii) the impact that an issuer’s COVID-19 response has had on its operational and financial condition; and (iii) how an issuer’s operational and financial condition may change as efforts to combat COVID-19 and its effects continue.
- *Information Regarding Sources of Liquidity:* A description of (i) cash on hand; (ii) the extent of access to reserves or other funds; (iii) access to liquidity facilities, and the material terms of such facilities; and (iv) the adequacy of current liquidity to fund essential services and make timely debt service payments.

- *Information Regarding Availability of Federal, State, and Local Aid:* A description of government aid an issuer has sought or plans to seek, including the timing of receipt and the material terms of such aid, if such aid is material to an issuer's operational and financial condition.
- *Reports Prepared for Other Governmental Purposes:* To the extent available, reports prepared for governance purposes that afford investors insight into local, regional, and sector-specific strategies developed to assist the issuer in combatting and recovering from the effects of COVID-19.

Disclosure Considerations

The Municipal Issuer Statement acknowledges the liability that issuers may assume by making voluntary, unaudited, and non-routine disclosures, including forward-looking statements, but outlines considerations that may weigh in favor of making such disclosures notwithstanding liability concerns, including:

- Disclosure of current financial and operating conditions aids investors in making informed investment decisions and supports the continued functioning of the municipal securities market, including the ability to raise new capital and refinance existing debt.
- Issuer liability for forward-looking disclosures may be mitigated by inclusion of cautionary language, including a description of relevant facts or assumptions made when assembling the disclosure and what could cause those assumptions to be incorrect, notice that certain information may be incomplete or unknown, and a description of the methodology used by the issuer to produce the information.
- Issuers may be required to disclose information concerning the impact of COVID-19 on other non-investor parties, including, for example, in connection with government-led initiatives to assess the financial impact of COVID-19 on government entities, and issuer efforts to obtain funding from governmental authorities and private lenders. Such disclosures should be consistent across all contexts, regardless of the purpose for which they are made, should be kept confidential until disclosed, and, when disclosed, should be disclosed to investors.
- The SEC does not expect to second-guess good faith attempts by issuers to provide appropriately framed current and/or forward-looking information.
- While a statutory safe harbor for forward-looking statements is not available to issuers of municipal securities, the judicially developed "bespeaks caution" doctrine which provides that economic projections, estimates of future performance, and similar forward-looking statements are not actionable when meaningful cautionary language is included in the disclosure document that adequately discloses the risks and uncertainties involved³ can inform an issuer's approach to forward-looking disclosures.

Practical Considerations for Market Participants

In addition to considering making voluntary disclosure filings on the MSRB's EMMA system regarding the impacts of COVID-19 on their finances and operations, issuers should consider the following matters:

- Issuers with continuing disclosure undertakings that require the near-term filing of annual financial information and/or audited financial statements for fiscal years that ended prior to the onset of the pandemic should consider including appropriate subsequent event disclosures regarding the impacts of COVID-19.
- Issuers should also review their existing continuing disclosure undertakings to determine whether any events have occurred as a result of COVID-19 that require a reportable event filing, such as an unscheduled draw on a debt service reserve, the incurrence of a new financial obligation or a modification of an existing financial obligation.
- Issuers that are including COVID-19 disclosures in official statements for new issues of municipal securities should consider providing those disclosures, with appropriate modifications and tailoring, in voluntary disclosure filings for its other outstanding issues of municipal securities.
- Issuers with outstanding bonds that are payable from separate revenue sources should consider tailoring any disclosures that they determine to provide on a security-specific basis to appropriately describe the different impacts of COVID-19 on each separate security structure.

Legal Considerations

The Municipal Issuer Statement represents the views of Chairman Clayton and Director Olsen and is not a rule, regulation, or statement of the SEC; the SEC has not approved nor disapproved its content. The Municipal Issuer Statement has no legal force or effect, as it does not alter or amend applicable law and it creates no new or additional obligations for any person. Notwithstanding these caveats, issuers should consider disclosing, when appropriate and if available, the type

of information identified as potentially important to investors, including information prepared for third parties such as governmental authorities or private lenders, that has or could become public.

As with any disclosure of material information to the investing public, all such statements should be accompanied by any additional information necessary to make the statements made by the issuer complete and not misleading, as well as appropriate disclaimers regarding forward-looking statements. Issuers that elect to provide voluntary COVID-19 disclosures should also recognize that these disclosures may become stale as the pandemic and its impacts change over time, and may need to consider providing updates to these disclosures at appropriate times. Issuers should consider consulting with experienced municipal securities law counsel regarding any COVID-19 disclosures.

Issuers may take comfort in the recognition by the drafters of the Municipal Issuer Statement of the challenges and uncertainties involved in disclosing forward-looking information generally, and particularly in times of deep economic distress, coupled with the assurances that current and forward-looking information, when provided in good faith and accompanied by appropriate cautionary language, can be shared with investors with limited concern for the second-guessing of such disclosures by the SEC.

[For More Information](#)

If you would like further information concerning the matters discussed in this article, please contact the Chapman attorney with whom you regularly work.

- 1 See Chairman Jay Clayton and Rebecca Olsen, Director, Office of Municipal Finance, The Importance of Disclosure for our Municipal Markets (May 4, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04>.
- 2 See Chairman Jay Clayton and William Hinman, Director, Division of Corporation Finance, The Importance of Disclosure — For Investors, Markets and Our Fight Against COVID-19 (Apr. 8, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-hinman>.
- 3 See Robert A. Fippinger, The Securities Law of Public Finance, § 8:4.4[B] (3d ed. 2019).

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