SEC Calls for COVID-19 Disclosure from Municipal Issuers

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Following on its guidance issued last month on the need for public companies to disclose the effects and uncertainties created by COVID-19, the SEC on May 4, 2020 reiterated those concerns to municipal securities issuers and other municipal market participants. In a statement by Chairman Jay Clayton and Rebecca Olsen, Director, Office of Municipal Securities, the SEC stressed the ongoing and significant uncertainty for investors arising from the COVID-19 crisis and referenced its previous public company statement, which the May 4 statement was intended to parallel. For our description of that statement, see here.

The earlier statement strongly urged companies to provide as much information as possible regarding their current financial and operating status and the impact of COVID-19, together with information on plans for and expectations regarding future financial condition and operations. The new statement noted the differences between the corporate and municipal markets but stressed the common denominator of the need for “high quality disclosure,” which is all the more important in the current period of severe financial stress and uncertainty across all markets. The SEC emphasized that the “provision of current and, to the extent practicable, forward-looking disclosure” would significantly benefit investors, issuers and the municipal market more generally and offered certain “observations and requests.”

The SEC statement requests that issuers provide “robust, timely and accurate information” to the market on the potential effects of COVID-19, but also recognizes the challenge of developing voluntary disclosure under current circumstances. It seems clear, however, that the SEC still expects this disclosure to be provided, either in connection with primary offerings or through prompt voluntary disclosures.

The factors cited in the statement in support of making disclosures to the municipal markets include:

- Disclosures will aid investors and the municipal market in general and enhance market access for issuers;
- The use of “meaningful cautionary language” will reduce legal risks;
- The process or methodology, such as audited versus unaudited information, used to produce the information will improve the quality of the disclosure and mitigate legal risk;
- Disclosures will help ensure that information provided to other parties, such as federal or state authorities, even if made for other purposes, will be consistent with disclosures to the market, especially when disclosed “broadly”, which likely means via EMMA or other posting intended to reach the municipal market;
- Good faith attempts to provide appropriate current and/or forward-looking information would not be second guessed by the SEC; and
- Finally, issuers, in order to mitigate against litigation exposure, can rely on the “bespeaks caution” doctrine, which protects forward-looking statements from being misleading if they are accompanied by appropriate cautionary statements of risk.
The statement cited four specific types of information that it encouraged issuers to make:

• The impact of COVID-19 on operations and financial condition;
• Sources of liquidity;
• Availability of federal, state and local aid; and
• Reports prepared for other governmental purposes.

Municipal issuers and obligated persons should heed this guidance and prepare appropriate disclosure for the market. We recognize the challenge this can present under the current circumstances, but in many cases relevant information is already known about the current impact of COVID-19, even if it cannot be precisely quantified, and in many cases, projections can be made, with appropriate disclosure of assumptions and disclaimers. While the SEC will likely not second guess good faith disclosures made now, it may well second guess the failure to make any such disclosures when investors are misled. Moreover, timely and forthcoming disclosure now, even if voluntary, will benefit issuers by enhancing their standing with the municipal market.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors.

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