



## FEDERAL UPDATE

# Industry Focus on Disclosure

BY EMILY S. BROCK

Municipal market issue disclosures are critical to projects of all sizes during the time of COVID-19. This picture features construction on the Gerald Desmond replacement bridge in Long Beach, California in February.

**T**hroughout the COVID-19 pandemic, municipal issuers, their bond counsel and municipal advisors, and many other industry participants—including the Securities and Exchange Commission and the Municipal Securities Rulemaking Board—have focused on municipal market disclosure. Because of this effort, GFOA convened a group of industry associations to draft core principles for issuer disclosure considerations during this pivotal time. Authors of the core principles document include GFOA and the National Association of Bond Lawyers, National Federation of Municipal Advisors, National Association of State Treasurers, National Association of State Auditors, Comptrollers and Treasurers, National Association of Health and Educational Financing Facilities Authority, Bond Dealers of America, and National

Association of Municipal Advisors. We value their partnership in the drafting of this very important document and encourage wide acknowledgment of its core principles. The document below is also posted to GFOA's website.

## **GENERAL CONTINUING DISCLOSURE CONSIDERATIONS FOR MUNICIPAL SECURITIES ISSUERS INCLUDING THOSE RELATED TO COVID-19 FINANCIAL MATTERS**

These considerations have been developed by a municipal industry workgroup to provide guidance to issuers on timely disclosure. The ongoing COVID-19 pandemic and its impact on all municipal governments and their respective economies highlights a need for accurate, timely, and responsive municipal disclosure. While we feel the considerations below are general in nature, different

issuers of different credits may need to take into account other specific considerations while addressing disclosure both generally and during the COVID-19 pandemic. While the following recommendations are actions that municipal issuers should consider, all issuers are encouraged to discuss COVID-19 disclosure with their entire financing team, including with their bond or disclosure counsel.

**Material Event Filings.** Governments are reminded that when a credit is changed (either by a downgrade or an upgrade) by a credit rating agency that a material event filing must be made within 10 business days in the Municipal Securities Rulemaking Board (MSRB) Electronic Municipal Market Access (EMMA) system. Other events resulting from the COVID-19 crisis (such as draws on debt service reserve funds and changes in terms and conditions of financial obligations) may also require a material event filing. Governments are encouraged to speak with their bond or disclosure counsel about the need to make a filing and information to provide in the filing. Importantly, the SEC Rule 15c2-12 reporting requirement of 10 business days for listed material

events is NOT relaxed during this time. Please be mindful of material events and track the time that has lapsed to ensure timely reporting within the 10 business-day reporting requirement.

**Know Your Annual Disclosure Filing Dates.** Governments should always be aware of the dates in their continuing disclosure agreements (CDA) when annual disclosures are due to EMMA and make those filings accordingly. Although this is an unprecedented crisis, governmental entities continue to have responsibilities to make annual disclosure filings, per their continuing disclosure agreement(s), within the EMMA system. The Securities and Exchange Commission (SEC) has NOT suspended annual disclosure filing requirements.

**Making Annual Continuing Disclosure Filings.** If a government is unable to make a filing on time, due to current circumstances—including that many government staff may not be physically in the office to complete financials, and/or delayed internal and external audits—governments must follow the requirements contained

in their CDA, which may require a filing with EMMA with an explanation as to why the submission is late. Governments should consider filing on EMMA the parts of the required annual disclosures that are available by the date such annual disclosure is due. Some partial filing may be a requirement under the CDA. If any part of annual disclosure submissions did not occur as required in your CDA, information related to the failure to file required information will need to be disclosed in future issuance documents. Again, it is important to note the reasons why any part of the submission(s) was late—due to the inability to complete financials and/or audits or other reasons related to the COVID-19 crisis—as underwriters of future issuances will need to understand these reasons.

- **Primary Market Disclosure<sup>1</sup>**
- **Understanding Your Continuing Disclosure Responsibilities<sup>2</sup>**

**Good Investor Relations.** Governments endeavoring to promote good investor relations may want to consider facilitating widespread and contemporaneous access to information provided to individual

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investors (including lenders) and, perhaps, rating agencies, by providing the same information on their website or via a filing on EMMA so that it is available for all investors, and should consult their bond or disclosure counsel if there are questions or concerns.

**Determining whether and/or when to Make Voluntary Disclosure Filings.** Governments may be facing various fiscal challenges due to the crisis. Further, some market sectors may be affected more immediately than others. While urgency is important in providing information about the pandemic's impact, governments should take care to put these challenges into context and discuss with their internal and external financing teams (including bond and/or disclosure counsel) what should be voluntarily disclosed on EMMA to reflect any financial or operational problems caused by COVID-19. Actual and factual information should be clearly separated from any estimates or projections of revenues and budgets that are disclosed. In addition, distinguishing actual, factual, and any official estimates or projections from political speech or press reporting is also a key consideration. Governments are reminded that information on their own investor relations or similar web page on the entity's web site might be deemed disclosure of the government regardless if such disclosure is voluntarily submitted to EMMA.

**Presenting COVID-10 Voluntary Disclosure Information.** After determining if certain information should be voluntarily disclosed, what is and how it should be presented is an important consideration. For instance, any use of revenue or budget projections should be official estimates of the government and should be clearly marked as such, as should unaudited financial information. Further, per the SEC Public Statement of May 4, 2020 (cited below), the regulator encouraged

municipal issuers to provide investors with forward-looking information regarding the impact of COVID-19 on their financial and operating conditions. The SEC also provided that an entity may wish to add "... meaningful cautionary language—including for example, (1) a description of relevant facts or assumptions affecting the reasonableness of reliance on and the materiality of the information provided, (2) a description of how certain important information may be incomplete or unknown, and (3) the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information..." The SEC notes that such information "will not only improve the quality of the disclosure but also will reduce legal and other risks." The SEC also stresses good faith forward-looking information will not be second-guessed by the SEC. These disclaimers should be provided whether the information appears on an entity's general web site, an entity's investor relations web page, or in an EMMA filing.

- **The Importance of Disclosure for our Municipal Markets (SEC Chairman Clayton and Director Olsen)**<sup>3</sup>

**EMMA Filings.** Governments should make sure that when making annual, continuing, or voluntary disclosure filings within the EMMA system that they are filed correctly and for all relevant CUSIP numbers. The current COVID-19 crisis may cause different filings with the EMMA system, but issuers should focus the EMMA filing on the results or potential impact from the COVID-19 crisis (such as revenue and budget updates, draw on reserves, change in financial obligation terms and conditions, etc.). It is probable that single EMMA filings could be made under multiple filing categories under the EMMA system. The MSRB makes the following resources available

to assist issuers with submitting disclosures to the EMMA system:

- **Continuing Disclosure Submission Manual**<sup>4</sup>
- **Continuing Disclosure Submission Video Tutorial**<sup>5</sup>
- **Selecting Financial/Operating Disclosure Categories on EMMA Dataport**<sup>6</sup>
- **Selecting Event Disclosure Categories on EMMA Dataport**<sup>7</sup>

**Post-Issuance Compliance for Tax Law Purposes.** The Internal Revenue Service has NOT suspended the post-issuance responsibilities for issuers of municipal debt. Issuers are required to make federal arbitrage rebate and yield reduction payments, adhere to private use regulations, and comply with other obligations related to tax-exempt bond issuances.

- **Post Issuance Policies and Procedures**<sup>8</sup>
- **Debt 101**<sup>9</sup>

Similar to issuer responses to the COVID-19 pandemic, the best practices related to voluntary disclosure are growing and evolving. Over time, this municipal industry workgroup intends to review and update these considerations to address disclosure efforts that may not be addressed at this time, either for specific credits, issuers, or situations. ❏

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<sup>1</sup> [gfoa.org/materials/primary-market-disclosure](https://gfoa.org/materials/primary-market-disclosure)

<sup>2</sup> [gfoa.org/materials/understanding-your-continuing-disclosure-responsibilities](https://gfoa.org/materials/understanding-your-continuing-disclosure-responsibilities)

<sup>3</sup> [sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04](https://sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04)

<sup>4</sup> [msrb.org/msrb1/EMMA/pdfs/EMMACDManual.pdf](https://msrb.org/msrb1/EMMA/pdfs/EMMACDManual.pdf)

<sup>5</sup> [msrb.org/msrb1/Training-Tutorials.aspx?section=1&video=0](https://msrb.org/msrb1/Training-Tutorials.aspx?section=1&video=0)

<sup>6</sup> [msrb.org/msrb1/pdfs/Issuer-Guide-to-Making-Financial-Disclosures.pdf](https://msrb.org/msrb1/pdfs/Issuer-Guide-to-Making-Financial-Disclosures.pdf)

<sup>7</sup> [msrb.org/-/media/Files/Resources/Event-Disclosures-Guide-for-Issuers.ashx](https://msrb.org/-/media/Files/Resources/Event-Disclosures-Guide-for-Issuers.ashx)

<sup>8</sup> [gfoa.org/materials/post-issuance-policies-and-procedures](https://gfoa.org/materials/post-issuance-policies-and-procedures)

<sup>9</sup> [gfoa.org/materials/debt-101](https://gfoa.org/materials/debt-101)