

Guide to providing relevant COVID-19 disclosures to investors: A senior living finance update

May 27, 2020

Executive summary

Due to the extraordinary nature of the impact of COVID-19 on senior living providers, investors in public debt are looking for insight into how individual senior living borrowers are coping with the pandemic. Recently, the US SEC Chairman issued a public statement that emphasizes the importance of providing voluntary disclosure to investors in light of the pandemic. Accordingly, senior living providers with outstanding public debt should consider providing bond investors with voluntary disclosures on the impact of COVID-19 on their operations and financial position. This communication provides an overview of possible approaches for voluntary communications with investors related to COVID-19's impact on borrowers.

Required and voluntary disclosures

[Securities and Exchange Commission \(SEC\) Rule 15c2-12](#) requires borrowers to provide annual public disclosure of certain financial information and operating data, and prompt disclosure of key events to the Municipal Securities Rulemaking Board (MSRB) through the MSRB's Electronic Municipal Market Access (EMMA) website. Posting of voluntary notices (beyond required event notices) on EMMA is also permitted when borrowers/obligated persons determine it is appropriate. Whether required or voluntary, documents posted on EMMA are subject to the antifraud provisions of federal securities laws, so they may not misstate or misleadingly omit a material fact. Consequently, borrowers are typically cautious about voluntary disclosures that include forward-looking statements due to the potential application of federal antifraud rules to such disclosures, and the general

concern that the accuracy of forward-looking statements may be second guessed by regulators or plaintiffs' lawyers after the fact. ([An overview of the Rule is available on the MSRB's website](#)).

Recent SEC statement on the importance of COVID-19 disclosure

Borrowers should consult with legal counsel before providing COVID-19 disclosure

On May 4, the Chairman of the SEC and the Director of the Office of Municipal Securities issued a public statement titled "[The Importance of Disclosure for our Municipal Markets](#)" (the Municipal Public Statement) that encouraged municipal market

*This publication was produced by Norton Rose Fulbright and [Piper Sandler & Co.](#)

issuers and borrowers to consider providing voluntary disclosure regarding the current and reasonably anticipated future impacts of COVID-19 on financial and operating conditions. Providing some comfort regarding the SEC officials' view on forward-looking statements in light of the COVID-19 pandemic, the Municipal Public Statement noted "[the SEC officials] would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC." However, the Municipal Public Statement noted that certain "safe harbors" for forward-looking statements that are available to registered corporate issuers are not available to municipal issuers and borrowers, and municipal issuers and borrowers must instead rely on protections developed through judicial rulings. The Municipal Public Statement was clear that borrowers should be cautious and consider consulting their legal counsel prior to providing any forward-looking statements to investors.

The Municipal Public Statement provided examples of the information that the SEC officials believed are important to provide to investors relating to COVID-19, as described in the chart below and expanded on for topics relevant to senior living borrowers.

(The Municipal Public Statement is available at sec.gov/news/public-statement/statement-clayton-olsen)

Potential topics to include in voluntary disclosure

Impact of COVID-19 on operations

- Discuss status of cases among residents and staff and steps taken to protect communities
- Discuss communication with residents and families
- Describe impact on occupancy, re-sales and construction
- Detail state and local shutdown and any actions specific to senior living
- Describe availability of PPE and outlook for supply looking forward

Impact of COVID-19 on financial condition and liquidity

- Provide costs incurred during COVID-19 response and steps taken to mitigate costs

- Provide current days cash on hand and general outlook of cash position
- Provide overview of investment performance due to market volatility
- Detail line(s) of credit amount(s) and terms, if applicable
- Discuss other sources of liquidity

Extraordinary revenue and aid sources

- Detail CARES Act funds received or reasonably expected to be received
- Describe Medicare Accelerated Payments Program amount received and terms, if applicable
- Describe other governmental grants and stimulus funding received
- Describe increased Medicare or Medicaid funding, if applicable

Public reports regarding COVID-19

- The Municipal Public Statement suggests providing greater access to reports prepared by a borrower for governance or other purposes as a source of current COVID-19 information
- These public reports could be previously prepared press releases or public presentations which would assist investors in understanding the current situation and the response of the borrower to the pandemic

No future obligations for voluntary filings

Disclosure should not obligate the borrower to provide future voluntary filings and certain statements should be considered "forward-looking"

Any voluntary disclosure provided by a senior living borrower should be clear that the disclosure is provided only as of a certain date and that the disclosure does not obligate the borrower to provide future voluntary filings. Forward-looking statements, if included, should be made in good faith, based on reasonable assumptions, and accompanied by a brief description of substantial risks that could prevent forecasted results from being realized, including risks disclosed in related offering documents. While municipal issuers and borrowers do not have the benefit of statutory safe-harbors available to corporate issuers for forward-looking statements, the case law "bespeaks caution" doctrine is to a similar effect.

Potential communication methods

Below are some ways that borrowers may consider communicating with investors:

- Provide written, voluntary disclosure via EMMA at any time.
- Provide written, voluntary disclosure via EMMA as part of the borrower's normal annual or quarterly disclosure (e.g. for borrowers with required filings due in the near term). Since annual or quarterly disclosure made now is likely to be stale, it should note the impact of COVID-19 and that historical conditions and results therefore may not be indicative of future prospects.
- Provide a recorded investor call with a link posted to EMMA.
- Provide a live investor call (with details posted to EMMA) that allows investors to ask questions of management.

One option that may be attractive to many borrowers that do not have scheduled reports in the near future is to provide an initial "off-cycle" voluntary disclosure submission and then include voluntary updates with the borrower's normal continuing disclosure filings, as warranted.

Conclusion

The last few months have been unique and difficult for senior living borrowers. As the crisis related to the COVID-19 pandemic continues, bond investors will place a high value on additional disclosures from borrowers with regards to the impact of COVID-19 in order to make informed investment and trading decisions. Borrowers can generate goodwill with investors during these uncertain times and into the future by providing transparency through voluntary COVID-19 disclosures. Any disclosure strategy should be discussed with legal and capital markets professionals to ensure compliance with securities laws and that the most appropriate information is provided to the investor community.

Contacts

Norton Rose and Fulbright team

Scott Kortmeyer

Partner, Los Angeles | Dallas

Tel: +1 213 892 9268 | +1 214 855 7459

scott.kortmeyer@nortonrosefulbright.com

Bryon Farnsworth

Partner-in-Charge, Denver

Tel: +1 303 801 2757

bryon.fransworth@nortonrosefulbright.com

Fredric Weber

Of Counsel, Houston

Tel: +1 713 651 3628

frederic.weber@nortonrosefulbright.com

Matthew McCabe

Senior Associate, Dallas

Tel: +1 214 855 8059

matt.mccabe@nortonrosefulbright.com

Michael Swartz

Senior Counsel, Denver

Tel: +1 303 801 2736

michael.swartz@nortonrosefulbright.com

Piper Sandler & Co. team

Rick Lohr

Head Of Senior Living, Houston

Tel: +1 281 907-4918

richard.lohr@psc.com

Jeff Fivecoat

Managing Director, Columbus

Tel: +1 614 889-8401

jeffrey.fivecoat@psc.com

Amy Hayman

Managing Director, Chicago

Tel: +1 312 267-5058

amy.hayman@psc.com

Romy McCarthy

Managing Director, Milwaukee

Tel: +1 414 847-6373

romy.mccarthy@psc.com

Marc Silver

Managing Director, Albany

Tel: +1 518 242-7818

marc.silver@psc.com

Matt Weaver

Managing Director, Jacksonville

Tel: +1 904 381-9844

matthew.weaver@psc.com

Brad Wirt

Managing Director, Minneapolis

Tel: +1 612 303-6704

bradley.wirt@psc.com

Jeremy Gerber

Senior Vice President, Philadelphia

Tel: +1 215 446-9320

jeremy.gerber@psc.com

Ogieva Guobadia

Senior Vice President, Houston

Tel: +1 281 907-4917

ogieva.guobadia@psc.com

Jenny Wade

Senior Vice President, Minneapolis

Tel: +1 612 303-6261

jennifer.wade@psc.com

Matt Wunderlich

Associate, Minneapolis

Tel: +1 612 303-6427

matthew.wunderlich@psc.com

Kaltrina Smelaj

Analyst, Minneapolis

Tel: +1 612 303-6974

kaltrina.smelaj@psc.com

PIPER | SANDLER

NORTON ROSE FULBRIGHT

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notice. The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright [Office entity]. Extracts may be copied provided their source is acknowledged.
US_24952 - 06/20