

212-820-9362

June 16, 2000

Mr. Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

RE: Use of Electronic Media
File Number 57-11-00

Dear Mr. Katz:

On behalf of the National Association of Bond Lawyers ("NABL"), we file these comments regarding the Commission's Release Nos. 33-7856, 34-42728 and IC-24426 (the "**Release**") pertaining to the use of electronic media under the federal securities laws. NABL encourages such use and appreciates the opportunity to express the views of its Board of Directors with respect to this important development in the municipal securities industry. By separate letter, the Electronic Disclosure Subcommittee of NABL is submitting additional comments to supplement the comments provided in this letter.

National Association of Bond Lawyers

NABL was organized in 1979 for the purposes of educating its members and others in the law relating to state and municipal bonds and other obligations, providing a forum for the exchange of ideas as to law and practice, improving the state of the art in the field, providing advice and comment at the federal, state and local levels with respect to legislation, regulations, rulings and other action, or proposals therefor, affecting state and municipal obligations, and providing advice and comment with regard to state and municipal obligations in proceedings before courts and administrative bodies through briefs and memoranda as a friend of the court or agency.

Over 3,000 attorneys and paralegals are members of NABL representing members from all 50 states, the District of Columbia, and Puerto Rico. NABL conducts an extensive series of seminars and workshops throughout the year and is active in the publication of materials on professional standards and conduct (in addition to coursebooks for the seminars), including the *Model Bond Opinion Report (1997 Edition)*, the *Model Letter of Underwriters' Counsel (1999 Edition)*, and *The Function and Professional Responsibilities of Bond Counsel (1995 Second Edition)*, and has co-sponsored the project first published in 1987, revised in 1994, as *Disclosure Roles of Counsel in State and Local Government Securities Offerings*.

Facilitation of Electronic Communications

NABL applauds the Commission's steps to facilitate electronic delivery of communications to investors. We agree that there are significant benefits that investors, underwriters and broker-dealers as well as municipal issuers can gain from the increased use of electronic media, and we believe that such use can occur in a manner consistent with the federal securities laws. The Commission's clarifications in the Release regarding investor consent, delivery of documents in portable document format and the general legal principles pertaining to online offerings should go far in permitting issuers of municipal securities and broker-dealers to continue development of sound electronic communications practices.

Access to Historical Information

One of the most important issues raised by the Release is how to facilitate communication of information by an issuer *on a web site* in a manner consistent with the issuer's duties under the federal securities law, in particular Section 10(b) of the Exchange Act and Rule 10b-5.¹ It is NABL's position that electronic versions of official statements, annual and quarterly financial information, and other types of information available on an issuer's web site and intended for investors should be treated the same as that information in paper format,² so long as a reasonable investor accessing the electronic version would understand that the information speaks as of a certain date. Therefore, the duties of an issuer with respect to such information would be the same whether the issuer chose to release information in a paper format or via its web site.³ Outside an offering period, absent a duty to correct or update, an issuer does not have

¹ 15 U.S.C. 78i(b); 17 CFR 240.10b-5.

² NABL's position is consistent with that of the SEC as articulated in Release No. 33-7233 (October 1995) (17 CFR Parts 231, 241 and 271): "Electronically delivered documents must be prepared, updated and delivered consistent with the provisions of the federal securities laws in the same manner as paper documents." See Footnote 20.

³ In this letter, we discuss only the release of information by an issuer with the intent of reaching the investing markets. In many cases, issuers will use their web sites to provide unrelated information not intended for such markets.

a duty to update an earlier disclosure merely because an investor receives or accesses such earlier disclosure. Further, the duty of an issuer to correct or update information after its release, if any, should be no different for the issuer who has released the information on paper (through a filing with a NRMSIR, a press release or otherwise) or electronically (through posting on its web site or by internet delivery).⁴ **In short, electronic documents should be treated no better and no worse than paper documents under the federal securities antifraud laws.**

Issuers of municipal securities have been encouraged by investors and analysts to post information on their web sites (outside the context of an offering of particular securities) in the interest of providing investors, analysts and the financial markets easier and more available access.⁵ Offering documents related to outstanding securities,⁶ comprehensive annual financial reports, press releases containing information of interest to investors, annual or quarterly information statements and event notices are a few examples. In the interest of providing this information promptly to a wider audience in the format (i.e., electronic) that many wish to receive such information, the use of a web site to communicate such information should be encouraged, without imposing any additional burdens or liabilities.

In its Interpretive Release,⁷ the Commission stated that an issuer must meet the anti-fraud standards *when it releases information* to the public reasonably expected to reach investors in the trading markets. The Release now raises the issue whether, due to the continuous availability of information once it is posted on a web site, information may be

⁴ This letter does not address issues concerning if and/or under what circumstances an issuer may have an obligation to correct or update information under the federal securities laws.

⁵ A web site also offers issuers the opportunity for communication with investors and the financial markets *during an offering period for particular securities*. For example, during an offering period, an issuer of municipal securities may wish to post an offering document on its web site in connection with the offering of its securities. In such a case, NABL believes that the electronic version of that offering document should be treated the same as one in paper format. Offering documents in paper format routinely indicate a date and explain that the information is subject to change without notice. NABL understands that some issuers have been advised to avoid potential confusion by posting offering documents during an offering period on a separate page/ screen of their web site, clearly identified for that particular offering of securities. Some issuers have also removed the offering document for a particular issue of securities from that screen following the related offering period, to avoid confusion as to the purpose of the posting.

⁶ For example, after issuance and delivery of securities, it may be important that offering documents related to those outstanding securities continue to be accessible to investors. While transaction confirmations delivered under Rule G-15 of the Municipal Securities Rulemaking Board ("MSRB") contain important summary information, it is typical that the best source of detailed information concerning terms of the securities remains the offering documents. Paper copies of such offering documents are frequently requested from and provided by issuers and are also available from the MSRB and other repositories. However, investors have complained that the paper copy retrieval systems are not cost effective and do not provide information on a timely basis. Details of redemption provisions, issuer covenants, and bondholder rights are often critical to an investment decision and should be as easily and immediately accessible as technology will permit. For the great majority of institutional investors, online access to such information is already important, and such access will continue to grow in importance as internet access becomes universal in the investor community.

⁷ See SEC Release No. 33-7049 (March 9, 1994) (17 CFR Parts 211, 231 and 241).

considered to be "republished" each time that it is accessed by an investor or each day it appears on the web site.⁸ NABL believes that the *issuer* does not release, and is not intending to release, information to the trading markets anew each time an *investor* accesses the issuer's posted information.⁹ Information on an issuer's web site should not be considered "republished" each time an investor accesses it or prints it out any more than information in a printed format would be considered "republished" each time accessed or photocopied by an investor. To conclude otherwise would create a *new* and *unique* continuing duty to update such information merely because it is provided by means of an issuer's web site, and would place an unreasonable burden on issuers choosing to provide information electronically rather than by a paper method of communication. Such a conclusion would frustrate the proper purpose of encouraging issuers to release to the investing public more information sooner, for a longer period of time and in a cost-effective manner.

In the Release, the Commission requested comment on how technology can help minimize investor confusion while providing for the accessibility of potentially useful information.¹⁰ Notwithstanding our views as expressed in the previous paragraph, we do not dispute the fact that the release of information on a web site differs from a paper format in respects that may necessitate certain steps in the case of a web site presentation to minimize investor confusion as to whether the information is current or historical. While the facts and circumstances relating to an issuer's presentation of information by electronic media will ultimately determine whether a reasonable investor would be so confused, we believe that approaches such as those discussed below can be effective to avoid that confusion but such approaches are proffered as examples only and are not intended to be the definitive approaches.

In the case of past official statements for outstanding issues or prior year CAFRs, for example, many issuers have posted such documents in a special, archival section on their web site, clearly designated as such. The use of such an archival section can be effective to avoid confusion, particularly if accompanied by a portal message such as the following which users must respond to and click to acknowledge their acceptance:

"By clicking the [CONTINUE] button below, the user acknowledges that the requested information has not been updated since [its date]."

⁸ Release at part D-5.

⁹ This letter also does not address when the voluntary release of information by an issuer to the marketplace *does* occur, i.e., as of the dated date of the information, the date of mailing, filing or publishing a paper format of the information, the date of posting by the issuer on the web site or at any other time.

¹⁰ Release at part 5.

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Keeping official statements, CAFRs and other relevant information in a governmental archive is often required by local law. This should be no different if an archive is on paper or in a public electronic file such as a web page. Governments are required to maintain public access to their archived documents. Making them available on a web page fosters the public interest in open government but should not form the basis for special securities law liability.

In the case of other historical documents and information that an issuer may wish to provide on its web site but not segregate in a separate archival section, it is NABL's understanding that issuers have taken many approaches to presenting such information by electronic media in a manner that clearly labels them as historical and indicates that they have not been updated. For example, access to an issuer's most recent annual or quarterly information statement may be provided with a portal message such as the following which users must respond to and click to acknowledge their acceptance. Alternatively, such a message can be provided as a necessary step before a reader can click to access the document.

"The information in this [name of document] is provided as of [the date]. Issuer A has not undertaken nor has it assumed any responsibility to update such information."

Conclusion

We submit these comments with the hope that the Commission will clarify its view as to an issuer's use of a web site to release information to the investors and the trading markets. NABL concurs with the basic principle expressed by the Commission in the Release (and prior related releases) that the use of electronic media to facilitate communications in the securities markets is to be encouraged.

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We hope these comments are helpful. We appreciate the opportunity to comment on the Release, and we look forward to further discussion of these important issues with the Commission and Staff.

Respectfully submitted,

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National Association of Bond Lawyers

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