Practical Considerations in Electronic Disclosure by State and Municipal Bond Issuers

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State and municipal bond issuers increasingly use electronic media to communicate with their various constituents, including investors. Issuer websites, multimedia investor presentations, and social media can be used to share financial and other information of interest to institutional, retail, and other bond investors quickly and widely. Issuers see benefits in providing additional bond investor information through these and other electronic media channels and also seek guidance in effectively navigating applicable securities law requirements. This article identifies practical considerations in the use of electronic media in light of the antifraud requirements under the federal securities laws that apply when issuers provide financial or operating information reasonably expected to reach bond investors. Sample procedures reflecting these considerations are included in an appendix.

INTRODUCTION

State and municipal bond issuers increasingly use electronic media to communicate with their various constituents, including investors. Issuer websites, multimedia investor presentations, and social media can be used to share information, including financial and other information of interest, to institutional,

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retail, and other bond investors quickly and widely. Issuers see benefits in providing additional bond investor information through these and other electronic media channels and also seek guidance in effectively navigating applicable securities law requirements. This article is intended to identify practical considerations in the use of electronic media in light of the antifraud requirements under the federal securities laws that apply when issuers provide financial or operating information reasonably expected to reach bond investors, e.g., when issuers "speak to the market."[1] Sample procedures that reflect these considerations are included as a resource in the Appendix.

MUNICIPAL ISSUERS' USE OF ELECTRONIC DISCLOSURE

Increasing Use of Electronic Disclosure

Issuers increasingly use websites, social media, and other electronic media to communicate with their constituents. In 2008, the Securities and Exchange Commission (SEC) observed that companies were providing more information—in volume and type—through company websites and, accordingly, that investors were turning to websites as key information sources.[2] Recognizing this development, the SEC has encouraged the use of electronic disclosure to provide investor information, including in its 2008 Guidance.[3]

Since the SEC made these statements a decade ago, the use of websites, including by municipal issuers to communicate with investors, has increased dramatically. In his 2001 treatise *Making Good Disclosure*, Robert Dean Pope noted the clear future of electronic dissemination of information but also the uncertain regulatory

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[1] The National Association of Bond Lawyer's (NABL) publication *Crafting Disclosure Policies*, August 20, 2015, provides more general guidance regarding disclosure policies and procedures, including issuer websites and certain "other instances in which statements might be made by an issuer that could be determined to be subject to scrutiny under federal securities laws…." *Crafting Disclosure Policies*, Nat'l Assoc. of Bond Lawyers, B14-17 (2015) [hereinafter "*Crafting Disclosure Policies"*]; see, e.g. SEC, Report of investigation in the Matter of the City of Harrisburg, Pennsylvania Concerning the Potential Liability of Public Officials with Regard to Disclosure Obligations in the Secondary Market, Exchange Act Release No. 69,516 (May 6, 2013), *https://www.sec.gov/litigation/investreport/34-69516.htm* [hereinafter the "Harrisburg Report"].

[2] Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 17 C.F.R. §§ 241 and 271 (Aug. 1, 2008) [hereinafter the "2008 Guidance"], *https://www.sec.gov/rules/interp/2008/34-58288.pdf*.

[3] See, generally, Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Securities Act Release No. 7049, Exchange Act Release No. 33,741, 59 Fed. Reg. 12,748, 17 C.F.R. 211, 231, and 241 (Mar. 9, 1994), *https://www.sec.gov/rules/interp/1994/33-7049.pdf* [hereinafter the "SEC 1994 Release"]; *see also*, SEC Interpretation: Use of Electronic Media, Securities Act Release No. 7856, Securities Exchange Act 42,728 (Apr. 28, 2000) [hereinafter the "2000 Guidance"], https://www.sec.gov/rules/interp/34-42728.htm; see also, 2008 Guidance ("[i]ndeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws, we wish to continue to encourage companies to develop their websites in compliance with the federal securities laws so that they can serve as effective information and analytical tools for investors. Enhanced company website presentation of information can benefit investors of all types by enabling them to gather information about a company at a level of detail they believe is satisfactory for their purposes.").

landscape.[4] Only eight years later, the third edition of *Disclosure Roles of Counsel* noted that the SEC had provided guidance regarding disclosure through websites and that many issuers were providing website disclosure to bond investors.[5] In terms of the type of information being provided, the Government Finance Officers Association (GFOA) notes that "[m]any governments use their websites to provide disclosure information electronically, including preliminary official statements (POS), audited financial statements, feasibility reports, continuing disclosure filings, and other important financial and budgetary information."[6]

The continuing disclosure regulation that applies to municipal bond underwriters, Rule 15c2-12(b)(5)(i) (the "Rule" or "Rule 15c12-12"), now requires that new issue and continuing disclosure be posted via electronic disclosure to the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA®) website.[7] The MSRB describes EMMA® as "the official repository for information on virtually all municipal bonds, providing free access to official disclosures, trade data, and other information about the municipal securities market."[8] Pursuant to Rule 15c12-12, continuing disclosure undertakings require that annual financial information and listed event notices be posted to EMMA®.[9] Issuers also may choose to post additional voluntary disclosure, create customized "EMMA® issuer homepages" and sign up to receive EMMA® alerts.

Increasingly, issuers use social media, such as official Facebook®, Twitter®, and LinkedIn® accounts, to communicate with their constituents, but at this point, few municipal bond issuers or other participants in the municipal market view social media as a channel for communicating with investors. On the corporate side, companies more frequently use social media as part of or as a complement to an investor relations program.[10] The SEC noted in the Netflix Report defined below that there has been rapid growth in the use of social media for corporate communications with shareholders and other investors since the 2008 Guidance and that the Commission "supports companies seeking new ways to communicate and engage with shareholders and the market."[11] A 2016 National Investor Relations Institute

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[4] Robert Dean Pope, *Making Good Disclosure: The Role and Responsibilities of State and Local Officials Under the Federal Securities Laws* 77 (2001).

[5] American Bar Association Section of State and Local Government Law, American Bar Association Section of Business Law Committee on Federal Regulation of Securities, and National Association of Bond Lawyers, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* 244 (3d ed., 2009) [hereinafter "*Disclosure Roles of Counsel*"].

[6] GFO*A, Best Practice: Using Technology for Disclosure*, Government Finance Officers Association (last visited March 3, 2018), *http://www.gfoa.org/using-technology-disclosure*.

[7] Municipal Securities Disclosure 17 C.F.R. 240.15c2-12(b)(5)(i) (LEXIS through Feb 5, 2018).

[8] EMMA® Home Page, *https://emma.msrb.org/ (last visited February 7, 2018*.

[9] See *supra* note 10.

[10] Julie Jones and Cynthia McMakin, *Is Your Company Tweeting Towards Trouble?—Twitter and Securities Law Compliance*, 23 Insights: The Corporate and Securities Law Advisor 19, 20 (2009) ("Companies also are increasingly using Twitter as a free method of real-time dissemination of information being disclosed on Web casts and conference calls.").

[11] SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Exchange Act Release No. 69,279, 8 (Apr. 2, 2013), https://www.sec.gov/litigation/investreport/34-69279.pdf [hereinafter the "Netflix Report"].

(NIRI) Social Media for Investor Relations Survey found that 28% of corporate investor relations professionals use social media to communicate with investors.[12]

Antifraud Requirements

The antifraud requirements under the federal securities laws apply whenever state or municipal bond issuers "speak to the market," including through electronic disclosure.[13] Issuers "are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet."[14] Issuers may neither make a misstatement of material fact nor omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of any security.[15] "If they do, they could become exposed to an action by investors for damages, if the issuer's misstatement or omission is reckless or intentional, or to an enforcement action by the SEC, if it is negligent, reckless, or intentional."[16] In addition to preliminary and final official statements, continuing disclosure filings, and other formal investor disclosure, statements made through electronic disclosure channels may be subject to the antifraud requirements.[17]

Accordingly, issuers should be mindful of the potential application of the federal securities laws to financial, operating, and other information that is relevant to bond investors and is posted on their websites, on EMMA® issuer homepages, on social media and through any other electronic means. In the case of the City of Harrisburg, Pennsylvania,[18] the SEC conducted an enforcement action on the basis of misleading statements about the City's financial condition contained in official City documents such as the mayor's State of the City Address, Proposed

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[12] See NIRI, Social Media for Investor Relations Survey (2016); *see also* Matteo Tonello, *Corporate Use of Social Media*, Harvard Law School Forum on Corporate Governance and Financial Regulation (May 17, 2016), https://corpgov.law.harvard.edu/2016/05/17/corporate-use-of-social-media-2/ ("Twitter and Facebook are the two most frequently adopted social media platforms for corporations. The data show that adoption of Twitter and Facebook exceeds 47 percent and 44 percent, respectively…"); Ted Merz, *PR, Investor Relations Turn to Twitter*, Bloomberg Professional Services (May 31, 2017) (noting that "Bloomberg's decision to integrate tweets into its professional terminal has put these posts directly in front of investors.").

[13] See, e.g., the Harrisburg Report.

[14] 2000 Guidance; *see also supra* note 2, at B-14 ("Any information included on an issuer's website, in full text or by a link to a third-party website, could be viewed as reasonably expected to reach investors, and, depending upon the circumstances, could also be viewed as a statement made in connection with the purchase or sale of securities. Consequently, the information could subject the issuer to liability under the securities law if it contains a material misstatement or misleading omission that is not corrected in a filing with EMMA.").

[15] See 17 C.F.R. § 240.10b-5 (LEXIS through Feb 5, 2018); *see also* 15 U.S.C.S. § 77q(a) (LEXIS through Pub. L. No. 115-117).

[16] *Crafting Disclosure Policies, supra* note 2, at 1.

[17] See 2000 Guidance.

[18] Harrisburg Report ("Investors may be more likely to rely upon statements from public officials where written undertakings made pursuant to Rule 15c2-12 have not been fulfilled and required continuing disclosures are not available through the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ('EMMA') system.").

Annual Budget and Mid-Year Fiscal Report, documents that the City was not required to (and did not) file on EMMA® but did post on its own website. The materiality of these statements was enhanced by the City's failure to post required annual filings and event notices to EMMA® for several years. The SEC's report contained a warning:

> Public officials should be mindful that their public statements, whether written or oral, may affect the total mix of information available to investors, and should understand that these public statements, if they are materially misleading or omit material information, can lead to potential liability under the antifraud provisions of the federal securities laws.[19]

It is important to note, however, that the Harrisburg case may not be representative because the overall mix of information provided to investors was quite limited. It is unclear whether the SEC would have reached the same result if the City had posted all of its required annual filings and event notices to EMMA®.[20] Nonetheless, the case underscores that issuers should be as mindful of statements made through electronic disclosure as of any other statement that reasonably could be expected to reach bond investors.

With that caution, issuer websites, investor presentations, social media, and other electronic disclosure can be a valuable disclosure and investor communication tool for issuers, potentially representing a cost-effective and immediate way to reach a broad range of retail and institutional bond investors. The GFOA recommends that bond issuers use website, EMMA features, and other technology to share debt, financial, and other information with the municipal bond market.[21] The GFOA notes that advantages to issuers may include broadening and accelerating the distribution of information to the market, reducing investor inquiries and making information readily available and more accessible to investors. One of the benefits of maintaining an active investor relations program may be to provide a fuller total mix of information to investors, such that a particular fact is less likely to significantly alter the total mix of information made available.[22]

Electronic disclosure may be a particularly helpful tool in providing information to all bond investors on an equal basis, reducing information asymmetry among

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[19] *Id.*

[20] *Id*. ("There is a substantial likelihood that a reasonable investor would consider the financial condition of the City important in making an investment decision, and there were no other disclosures made by the City as part of the total mix of information available to enable investors to consider other information. These public officials' statements were the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market. Because statements are evaluated for antifraud purposes in light of the circumstances in which they are made, the lack of other disclosures by the municipal entity may increase the risk that municipal officials' public statements may be misleading or may omit material information.").

[21] GFOA, *Using Technology for Disclosure*.

[22] *See TSC Indust. Inc. v. Northway Inc*., 426 U.S. 438, 449 (1976) (standard of materiality stated as "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total' mix of information made available.").

institutional, retail, and other bond investors. The antifraud provisions of the securities laws do not establish a basis for liability based solely on the selective disclosure of information. Regulation FD requires that corporate issuers that disclose material nonpublic information to some investors must make that information public.[23] Regulation FD does not prohibit selective disclosure by municipal issuers, however.[24] Posting information to EMMA® and posting to an issuer's website, if established as a channel for providing information to investors,[25] may nonetheless help make information available to all investors at the same time and advance issuer goals of transparency and fairness.

Likewise, social media may serve as a channel—in addition to EMMA® and an investor relations page—for making investor information public.[26] Although there are no direct regulations or even much commentary regarding social media and disclosure in the municipal securities context, the guidance available in the corporate context (albeit for corporate issuers that are subject to Regulation FD) is helpful in establishing that social media may serve as an official channel for making information available to investors. As described in the SEC's Netflix Report, the CEO of Netflix, Inc. announced a major monthly viewership landmark on his Facebook® page, raising questions about whether this constituted proper public

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[23] SEC, Final Rule: Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599, 17 C.F.R. §§ 240, 243, and 249 (Oct. 23, 2000), www.sec.gov/rules/final/33-7881.htm ("Final Rule FD"). Regulation FD requires, with respect to the corporate markets, that issuers that disclose "material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may well trade on the basis of the information)… must make public disclosure of that information."

[24] See Paul S. Maco, Director, Sec. and Exch. Comm'n Office of Mun. Sec., Speech by SEC Staff: Securities Laws and the Municipal Issuer: Points for the Electronic Era (Sept. 13, 2000), https://www.sec.gov/news/speech/spch397.htm ("[t]he first thing that you should know about Reg. FD is that it does not apply to municipal securities; it is not based on the antifraud provisions of the securities laws. It does apply to the selective disclosure of material nonpublic information by companies registered with the Commission…However, as is often the case with other Commission regulations, rules and positions for registered securities, in some situations, Reg. FD might be a useful source of guidance for municipal securities issuers and practitioners. For example, if you want to 'speak to the market' because you are concerned that information may have been revealed to a few, but not all, investors, why not promptly send a notice to the NRMSIRS and take a cue from Reg. FD by issuing a press release?").

[25] Posting information to a website may be a part of a corporate issuer's process for curing selective disclosure: "In the Proposing Release, we stated that an issuer's posting of new information on its own website would not by itself be considered a sufficient method of public disclosure. As technology evolves and as more investors have access to and use the Internet, however, we believe that some issuers, whose websites are widely followed by the investment community, could use such a method. Moreover, while the posting of information on an issuer's website may not now, by itself, be a sufficient means of public disclosure, we agree with commenters that issuer websites can be an important component of an effective disclosure process. Thus, in some circumstances, an issuer may be able to demonstrate that disclosure made on its website could be part of a combination of methods, "reasonably designed to provide broad, non-exclusionary distribution" of information to the public." Final Rule FD at § II.B.4.b.

[26] 2008 Guidance at 40 ("Since all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, companies should consider and put in place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums.").

disclosure of investor information.[27] The SEC concluded that companies may use social media outlets to announce information pertinent to investors under some circumstances. The SEC reiterated its 2008 Guidance regarding use of company websites,[28] explaining "that issuers must take steps sufficient to alert investors and the market to the channels it will use for the dissemination of material, nonpublic information"[29] and concluded that these principles "apply with equal force to corporate disclosures made through social media channels."[30]

Social media communications can constitute "speaking to the market" and give rise to liability under federal securities law and, potentially, an SEC enforcement action for fraud, a point underscored by the recent SEC settlement with TESLA, Inc. (Tesla) and Tesla CEO Elon Musk in connection with Musk's tweets regarding potentially taking Tesla private.[31] Without admitting or denying the allegations, Tesla and Musk agreed to implement enhanced controls over social media disclosure, including retaining a securities lawyer to ensure compliance with Tesla's disclosure policy and controls and pre-approving tweets that reasonably could contain information material to investors.[32]

PRACTICAL CONSIDERATIONS

The following discussion outlines practical considerations for state and municipal bond issuers using websites, EMMA® issuer homepages, and social media channels to communicate with institutional, retail, and other bond investors, and concludes with a discussion of policies and procedures consistent with these considerations. The technology for making information available, including to bond investors, has evolved rapidly, as has the use and adoption of such technology. One result of such rapid evolution is that there is little direct law regarding the use of electronic disclosure in the municipal bond market.[33] Thus, it may be helpful to look to guidance issued by the SEC in connection with electronic disclosure in the corporate market, as well as guidance provided by thoughtful market participants, including the NABL, GFOA, and others. The following discussion of practical considerations draws on this guidance, providing specific suggestions for issuer websites, EMMA® issuer homepages, and social media channels.

It is important to note, as a threshold matter, that Rule 15c2-12 and the continuing disclosure undertakings entered into by state and municipal bond issuers as a result of the Rule require that annual filings and event notices be posted to EMMA®. Issuers are not required to provide continuing disclosure beyond these

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[27] Netflix Report at 5, 8.

[28] 2008 Guidance.

[29] Netflix Report at 8.

[30] *Id*. at 5.

[31] See SEC Press Release: Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge (Sept. 29, 2018) available at https://www.sec.gov/news/press-release/2018-226.

[32] Tesla, Inc., Form 8-K (October 16, 2018), available at *https://www.sec.gov/Archives/edgar/data/1318605/000156459018024373/tsla-8k_20181016.htm*.

[33] *Cf.* Harrisburg Report.

undertakings. Thus, communications through other electronic media are voluntary and should be supplemental to required filings made through EMMA® (i.e., they cannot take the place of required filings). To provide all market participants with equal access to investor-related information voluntarily posted to an issuer's investor relations page or distributed via social media, the issuer may choose also to post the information to EMMA®.

Issuer Websites

Issuer websites, including investor relations pages, are a common means for issuers to communicate with bond investors. Many issuers host investor relations pages on their official issuer websites. Others may provide investor relations information through third-party providers, such as BondLink®.[34] The following practice pointers may be helpful with regard to website disclosure, whether the disclosure is made through the issuer's website or through a third-party provider.

- **Investor relations pages.** An investor relations page (or pages) can play a role in clearly identifying information intended for investors and separating this information from that intended for other constituents. To this end, consider tools such as page hierarchy or tiering, labeling, introductory text, and visual and other cues. Clear delineation of information intended for investors and of information intended for other constituent purposes may help inform the reader of the context or "circumstances" under which the statements are made.

  To reinforce the role of the investor relations page, issuers may also use a customized EMMA® issuer homepage to provide the address of the issuer's investor relations site, communicating to investors that the issuer has an investor relations site used to present information of interest to investors from time to time. Issuers also may want to use this space to alert investors to their use of social media, e.g., Twitter or Facebook, for posting information of interest to investors.
- **Disclaimers.** Introductory text on an investor relations page can provide context to investors accessing the information and may include appropriate disclaimers. Generally, a disclaimer is ineffective in shielding an issuer from the antifraud laws.[35] The SEC does not view a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise.[36] To assume otherwise, the SEC says, would permit unscrupulous issuers to make false or misleading statements available to investors without fear of liability as long as the information is accompanied by a disclaimer.[37]

  A disclaimer can be effective to provide more informed disclosure rather than provide a shield; e.g., to inform the reader of context relevant to information

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[34] For example, see the Port of Los Angeles page hosted by BondLink® at https://www.portoflabonds.org/port-of-los-angeles-bonds-ca/i1683.

[35] 2008 Guidance.

[36] See *supra* note 3, at 36 (citation omitted).

[37] *Id.*

included within or linked from its website and thus to inform the "circumstances" under which the statements are made.[38] For example, a disclaimer could describe the purpose and scope of an investor relations page and its limitations.[39] That is, a disclaimer may remind visitors that documents are dated and that the issuer does not undertake to update documents. When a website user selects a hyperlink, additional explanation may be appropriate. For example, an exit notice window can inform users that they are exiting the issuer's website and will thereafter receive information from a source other than the issuer.[40] The notice also can explain why the information is provided and make clear that the issuer is not approving or endorsing the information.[41]

- **Contact information.** As noted below under the heading "Policies and Procedures," it is helpful to designate one or more responsible individuals to maintain control over the information provided to investors. The website should include contact information for the responsible individuals to whom investors should direct questions, including phone numbers and email addresses.
- **Financial and operating information.** Many issuers post annual financial reports (including audited financial statements), and many also post operating data. Issuers also may post interim financials and budgets, which may be particularly helpful for issuers who experience delay in receiving audits. Financial and operating information necessarily is subject to becoming stale, and should:
  - o Be reviewed for material accuracy and completeness (like any information posted or linked to the site);
  - o Be presented as of a specific date; and
  - o Include additional explanations as necessary (for example, to indicate if particular information is unaudited).

  As discussed below under the heading "Use of Archives," issuers should consider when information should be moved to an archive section of the site (for example, when more current information on the topic is posted), and when information should be removed from the site altogether (for example, it may be appropriate to remove an official statement for bonds at final maturity or earlier redemption).[42] Moving historic information to an archive section helps alert the reader that the information is stale.

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[38] Robert A. Fippinger, *The Securities Law of Public Finance* 8-40 (3rd. ed., 2017).

[39] "In light of the cautionary advice from the SEC, issuers that establish an investor information Web page may find it prudent to have a general disclaimer in a prominent position on the homepage (i.e. the opening screen without a need to scroll down), substantially as follows: The only information on this Web site that is posted with the intention of reaching the investing public, including bondholders, rating analysts, financial advisors, or any other members of the investment community, is located on the Investor Information Web page, access to which requires review of and consent to the conditions contained in the Investor Information Terms of Use." Disclosure Roles of Counsel, at 230.

[40] *Supra* note 3 at 36. The SEC also notes that a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading.

[41] See 2000 Guidance at § II.B.1.

[42] Fippinger, *supra* at 8-41.

- **Forward-looking statements.** Issuers may choose to post forward-looking information, such as budgets or projections, but, as with any other forward-looking statement, such information should be:
  - o Based on reasonable assumptions; and
  - o Accompanied by appropriate cautionary language such as a description of relevant factors that can cause the actual results to change materially and the substantial risks to achieving the forecasted result.[43]
- **Official statements.** Many issuers post official statements on their investor relations websites after issuance or include a link to the official statement on EMMA®.[44] The official statement may be a useful resource for investors until the bonds mature, at which point the issuer may consider removing the official statement from the website.[45]
- **Continuing disclosure filings.** Many issuers post their continuing disclosure filings on their investor relations website in addition to posting them on EMMA®. To comply with undertakings under Rule 15c2-12, filings must be posted to EMMA® (that is, website posting is not sufficient).
- **Third-party reports.** If third-party reports will be posted, issuers should consider whether any consent is required prior to posting. Exercise particular care when posting (or hyperlinking) to third-party information (as with any other information posted or linked, third-party information should be reviewed for material accuracy and completeness). A hyperlink can create the appearance that the issuer has adopted the information as its own.[46] To avoid the appearance of adoption or attribution, the issuer should take care to visually structure its webpage in a way that segregates the hyperlink from the rest of the page. Moreover, to avoid confusion or misunderstanding about what the issuer's view or opinion is with respect to the information provided in the hyperlink, the SEC recommends context-dependent explanations.[47] The SEC also suggests including exit notices or

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[43] *Supra* note 2 at B-14.

[44] Fippinger, *supra* at 8-41 ("Issuers may similarly conclude that official statements should remain on the issuer website until final maturity. Old disclosure documents should be in an archive separate from current information, with an entry notice that the documents are dated as of their date, and that the issuer has not undertaken any updates of the archived official statements. An alternative is to reference the location of the official statements on EMMA and possibly provide a hyperlink from the website to EMMA.").

[45] See Note 42, *supra*.

[46] See 2000 Guidance (The 2000 Guidance proposes two potential theories of liability: Liability under entanglement theory would depend on an issuer's level of pre-publication involvement in the preparation of the information. In contrast, liability under the adoption theory would depend upon whether, after its publication, an issuer explicitly or implicitly, endorses or approves the hyperlinked information.).

[47] 2000 Guidance ("An issuer might explicitly endorse the hyperlinked information. For example, a hyperlink might be incorporated in or accompany a statement such as "XYZ's web site contains the best description of our business that is currently available." Likewise, a hyperlink might be used to suggest that the hyperlinked information supports a particular assertion on an issuer's web site. For example, the hyperlink may be incorporated in or accompany a statement such as, "As reported in Today's Widget, our company is the leading producer of widgets worldwide." Moreover, even when an issuer remains silent about the hyperlink, the context nevertheless may imply that the hyperlinked information is attributable to the issuer.")

intermediate screens to help avoid confusion as to the source of the third-party information.[48]

- **Investor presentations.** As noted above, the antifraud provisions of the securities laws do not prohibit selective disclosure of information, and Regulation FD is not applicable to municipal issuers; therefore, selective disclosure by municipal issuers is not prohibited. However, in the interests of transparency and fairness, issuers may endeavor to provide information equally to all investors. Issuers often communicate directly with investors between issuances including through investor calls or presentations at investor conferences. Consider whether the issuer's website can be used to provide this information to investors more broadly. To this end, an issuer could post information regarding upcoming investor presentations or calls, copies of presentations, and transcripts or summaries of calls.
- **Investor inquiries and answers/FAQs.** From time to time, investors may inquire about content posted on an issuer's website or about its outstanding bond issues. Information regarding investor inquiries and responses between issuances may be made available broadly through the issuer's investor relations page(s), for example by posting a log of questions and answers (a "FAQ").[49] As described below, issuer policies and procedures for electronic disclosure should designate an "Investor Inquiry Coordinator"[50] or other responsible individual to manage inquiries from investors, to direct inquiries to a single individual within the organization, and to include steps for handling inquiries so that responses do not contain material misstatements or omissions.[51]
- **IRMA letters.** Issuers may post independent registered municipal advisor (IRMA) letters on websites for the purposes of the IRMA exemption under the rule requiring registration of municipal advisors.[52] The SEC Office of Municipal Securities has advised that municipal entities may provide the required municipal advisor representations by posting IRMA letters on its website with

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[48] 2008 Guidance.

[49] *Crafting Disclosure Policies* at B-15.

[50] *Id.* "In instances where the investor inquiry elicits a response that is in substance already contained within a document previously provided to investors (Official Statement, Annual Filing, Event Notice, etc.), then the response to the investor inquiry should be drawn from that document. In instances in which an investor inquiry elicits a response that is not already contained in such a document, an issuer may need a process to ensure that information it provides to the investor does not contain a material misstatement or a misleading omission, depending on the information that is sought. In addition, the issuer may consider if it is providing "inside" information to one or a small group of investors that allows them to trade to the disadvantage of other investors. In these instances, the issuer may decide to prepare a carefully written response to the investor that it also disseminates to other investors on its website or EMMA."

[51] *Id.*

[52] Registration of Municipal Advisors, Exchange Act Release No. 70462 (Jan. 2014), *https://www.sec.gov/rules/final/2013/34-70462.pdf*).

a statement of intent that market participants receive and use it for purposes of the IRMA exemption.[53]

- **Use of archives.** An archive section of an investor relations site can provide historical information, which may continue to be helpful to investors for reference or for comparative or other purposes. Dated material necessarily becomes stale, however, and historical information should be presented in a manner that makes clear the dated nature of the information.[54] To avoid confusion, the SEC recommends (1) separately identifying the historical information by dating the material and (2) segregating historical information in a different section of the website.[55] Moreover, an issuer could consider asking that users acknowledge the date of the historical information by clicking an "I agree" button before accessing the archival information. Issuers should consider the timing for relocating information to the historical section when it becomes stale and for removing the information altogether when no longer relevant.
- **Website security.** The GFOA notes that a benefit of web-based disclosure is that it allows the issuer to control the content and timing of the release of the information.[56] To achieve control over content, issuers should take steps to protect the security of their website, so that information is not compromised by unauthorized users. Issuers also should take steps to prevent inadvertent disclosure (through web-crawling, for example).[57] Precautions could include use of strong passwords, firewalls, and indiscernible file names, and unlinking confidential information from a publicly facing web server. Issuer electronic media or disclosure polices should address security issues surrounding disclosure and posting of materials.[58]

Any information posted to an issuer's investor relations site should be reviewed carefully for material accuracy and completeness by responsible individuals, consistent with the issuer's disclosure policies and procedures. The above practice pointers also advise care in designing an investor relations site and in posting categories of information to the site, so that investors understand the purpose, scope, and limitations associated with the information. Additional care is advised for historic, third-party, and forward-looking information that presents particular

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[53] SEC, Registration of Municipal Advisors Frequently Asked Questions (Last updated Sept. 20, 2017 (The SEC "staff believes that a municipal entity could provide its required representations in any reasonable manner, including one written disclosure to multiple transaction participants, to show that it is represented by, and will rely on the advice of, its independent registered municipal advisor. The staff further believes that a municipal entity could provide the required representations in one written disclosure to multiple market participants by posting it publicly on its official website and clearly stating in the written disclosure that by publicly posting the written disclosure the municipal entity intends that market participants receive and use it for purposes of the independent registered municipal advisor exemption. [January 10, 2014]."). Example letter at *https://comptroller.texas.gov/programs/systems/treasury-ops/exemption-letter.php)*.

[54] 2008 Guidance.

[55] *Id.*

[56] GFOA, Using Technology for Disclosure.

[57] NIRI Standards of Practice for Investor Relations at 51.

[58] *Id.*

challenges. The list is not exhaustive; these general principles may be helpful to consider in connection with other information, or categories of information, that issuers may wish to share through their investor relations site.

Customized EMMA® Issuer Homepages

With the introduction of EMMA® issuer homepages, issuers use EMMA® issuer homepages in addition to, or in lieu of, issuer investor relations sites. The following background information and practice pointers may be helpful with regard to EMMA® issuer homepage disclosure.

In February 2014, the MSRB began a pilot program allowing issuers to customize home pages on EMMA.[59] Many issuers have created customized EMMA® issuer homepages to include information useful to investors, including contact information for the issuer's disclosure representative and the address of the issuer's investor relations website. If an issuer also uses one or more social media channels to disseminate information to investors, an issuer may consider adding that information to its EMMA® issuer homepage. Issuers may consider posting additional information on a customized EMMA® homepage, such as information explaining where investors may find information on EMMA® for bond issues of the issuers under different base CUSIP numbers.

Issuers may even consider posting information on a customized EMMA® homepage in lieu of an investor relations page on the issuer's website. For example, on December 8, 2017, the City of San Diego, California, shifted from an investor relations page(s) on its website to providing investor information instead through a customized EMMA® issuer homepage.[60] This approach could allow an issuer to consolidate investor information on EMMA®, together with bond pricing and trading information, and reach municipal market participants who primarily rely on EMMA®. This approach also provides a clear separation from other information on the issuer's website, by directing investors only to EMMA® and entirely away from the issuer's website. Drawbacks may include EMMA's relatively fixed format: Issuers can post documents only under specific categories; documents are then displayed in order of posting date within the category; and issuers may not edit or delete information once posted. The tools that issuers use to present information on investor relations sites—page hierarchy or tiering, introductory text, visual cues, and entry or exit messages—are currently not as readily available on EMMA®, although the MSRB continues to add features from time to time.[61]

Social Media Channels

Many of the practical considerations for investor relations sites, or for EMMA® issuer homepages, are relevant to all electronic disclosure, including disclosure through social media channels. Issuers should take care that information is materially accurate and complete and, to that end, that investors understand the purpose,

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[59] *http://www.msrb.org/msrb1/EMMA/pdfs/EMMA-Issuer-Homepage-Fact-Sheet-for-Issuers.pdf*.

[60] *https://www.sandiego.gov/debtmanagement/investor*.

[61] See *http://msrb.org/msrb1/EMMA/pdfs/EMMA-Enhancements.pdf*.

scope, and limitations associated with the information. The additional cautions applicable to historic, third-party, and forward-looking information apply. Hyperlinking is a key feature of social media, and issuers should exercise care to avoid inadvertently approving or endorsing linked information. Any required filings will need to be posted on EMMA® because a social media posting cannot take the place of a required EMMA® filing.

Social media channels also present additional considerations. Information is shared through social media channels quickly, informally, and in an interactive environment, to a group of friends, followers, or connections. In addition to official social media accounts for an entity, elected and appointed officials may distribute information about the entity through their own social media accounts. Tweets are limited to 280 characters and cannot be edited[62] (Facebook®[63] and LinkedIn®[64] posts can be edited). Issuers cannot completely control who will see a post and in what sequence. Facebook® and LinkedIn® posts, and tweets, are displayed to users based on algorithms that determine the timing of and order in which, or even whether, friends, followers, or connections view the post. Issuers cannot "archive" or otherwise readily mark previously posted information as dated or historic. Readers can comment on posts; out-of-date posts can become reinvigorated with new commentary; and posts can go "viral" based on a comment or otherwise. Issuers who use social media channels should monitor postings to be able to address quickly a post that has resurfaced, or has been retweeted, out of context or in a manner that is misleading or otherwise problematic. Issuers who use social media to communicate with investors may not wish to "block" particular investors, due to considerations of fairness of access to information and potential First Amendment considerations.[65] Some investors may, however, create challenges for the issuer in an interactive environment.

With these additional considerations, state and municipal bond issuers will need to make a threshold determination whether to communicate with bond investors through social media channels, as a complement to information posted to EMMA® and/or an investor relations page. The SEC has voiced support for corporate entities' efforts to communicate with investors through social media.[66] The real-time nature of social media communications provides a benefit in sharing information promptly and broadly with investors. Issuers may wish to use social media to communicate with investors to take advantage of the tools' speed, efficiency, and transparency.

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[62] See *https://help.twitter.com/en/new-user-faq* ("No, you can't edit a Tweet once you have posted it, but you can delete your Tweet.").

[63] See *https://www.facebook.com/help/462476073850410?helpref=uf_permalink*.

[64] See *https://www.linkedin.com/help/linkedin/answer/70179/editing-a-post-on-linkedin?lang=en*.

[65] In *Knight First Amendment Institute v. Trump,* 17 Civ. 5205 (S.D.N.Y, May 23, 2018), a federal district court held that the First Amendment prohibited the @realDonaldTrump account from blocking Twitter followers in response to political viewpoints (decision available at *https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2018.05.23%20Order%20on%20motions%20for%20summary%20judgment.pdf*.

[66] Netflix Report at 8.

With the challenges and benefits of social media as context, the following points outline practical considerations for issuers in using social media to communicate with bond investors.

- **Identifying channels for investor information.** An issuer could consider establishing a separate entity social media channel for bond investor communications.[67] An issuer could instead use its general social media channel but identify information of interest to investors with labeling (a #bonds or #investornews hash tag, for example)[68] or introductory text (for example "Financial news:"). Some information may simply be ill suited to being shared through social media channels, requiring more context, and may be better suited to posting on an investor relations page or EMMA®.

  If an issuer intends to distribute information of interest to investors through a social media channel, consider including the entity's social media account information on the EMMA® issuer homepage, or the issuer's investor relations page and in other investor communications. Elected and appointed officials should be aware that the entity intends to distribute investor information through the entity's social media account and should take care not to inadvertently establish their individual social media accounts as additional channels for investor communications.[69]
- **Disclaimers.** Introductory text also can play an important role in providing context to investors reading the information, and this introductory text may include appropriate disclaimers. An additional consideration for social media is how to fit disclaimer language in the Twitter®, Facebook®, LinkedIn® bio or profile or "pinned tweet," and include key context in as few as 280 characters. Possible approaches would be to include a brief note of caution in the account's bio or profile, together with a link to the issuer's investor relations website for more detailed information. A particular announcement (regarding, for example, an upcoming investor presentation or release of annual financial statements) could be posted as a hyperlink to the complete document (for example, "The City's FY2018 audited financial statements are now available at [investor relations page link]") or included in a thread that includes introductory text and

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[67] Catherine T. Dixon, *Social Media and Regulation FD in a Post-Netflix World*, 45th Annual Institute on Securities Regulation (Sept. 1, 2013), *https://www.weil.com/~/media/files/pdfs/43220_chapter12_45th_institute_sec_reg_2013_vol_01.pdf*).

[68] *See* Ted Merz, *supra* at 3 (regarding corporate announcements labeled as being intended for a financial audience: "Note the use of the dollar sign, called a "cash tag," before the ticker. That's done to direct the information to a financial audience.").

[69] In contrast, see Richard Levick, *The Impact of the SEC's Social Media Pronouncement*, Forbes (May 15, 2013), *https://www.forbes.com/sites/richardlevick/2013/05/15/the-impact-of-the-secs-social-media-pronouncement/#3c075bb83811* (noting as an example of companies establishing social media as a channel for investor communications that "AutoNation listed five different places where investors could go for information, including the Facebook and Twitter accounts of its chief executive.").

disclaimers.[70] Forward-looking posts should include key assumptions and appropriate cautions; depending on complexity, this information may need to be included through a hyperlink to a full statement on the issuer's investor relations site and/or EMMA® issuer homepage.

- **Contact information.** A Twitter®, Facebook®, LinkedIn®, or other social media profile or bio should include contact information for the responsible individuals to whom investors should direct questions, including a phone number and email address.
- **Dating and archiving.** It may be particularly challenging to identify dated or historical information as it is posted or later retweeted or reinvigorated by commentary into a user's feed. Issuers should exercise particular care to keep the dated date of a document, and other important context for financial and operating information, connected to the originally posted information. Consider when a post should be deleted from social media, and consider moving deleted posts to an archive section of the issuer's investor relations website.
- **Hyperlinking, retweeting, or sharing links.** Issuers should exercise particular care in hyperlinking to, or even presenting, third-party information. As described above, a hyperlink can create the appearance that the issuer has adopted or endorsed the information. Even with a "retweets/shares are not endorsements" note in a bio or profile, an issuer risks the appearance of adopting or endorsing a retweeted or shared link. Including an explanation for the share or retweet may be helpful.
- **Comments.** In a similar manner, an issuer that interacts with commenters risks the appearance of adopting or endorsing views or comments. An emoji "thumbs up" to a misleading comment about the issuer being upgraded or beating budget could imply agreement with the comment, for example. Issuers should monitor comments and respond (if at all) with the same care as in responding to any other investor inquiry.[71] One approach would be to add investor inquiries and responses to the issuer's FAQ log of questions and answers on its investor relations website.
- **Channel security.** Issuers should take steps to protect the security of their social media channels, so that the channel is not hijacked and so that information is not compromised by unauthorized users or inadvertently disclosed.

Any information posted through social media should be reviewed carefully for material accuracy and completeness by responsible individuals, consistent with the issuer's disclosure policies and procedures. All of the cautions that apply to electronic

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[70] Some corporations, for example, announce earnings information via social media channels. Mark Garrison, *JP Morgan Takes to Twitter for Earnings Release*, Marketplace (Jan. 14, 2016), *https://www.marketplace.org/2016/01/12/business/bank-earnings-releases*; Levick, supra, at 3 ("Zillow became the first public company to solicit questions on its quarterly earnings call via Twitter and Facebook."); Merz, supra, at 2 ("Companies post results on their web site and then tweet the link.").

[71] 2008 Guidance at II.B.4 ("Since all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, companies should consider and put in place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums.")

disclosure apply to social media, and social media presents particular challenges due to its real-time, interactive nature and casual tone. Although the above points identify some of the challenges and suggest some approaches to addressing the challenges inherent to social media communications, the list is not exhaustive.

POLICIES AND PROCEDURES

Written bond disclosure policies and procedures may be helpful to state and municipal bond issuers in facilitating compliance with the antifraud requirements of the federal securities laws, particularly in light of the SEC staff's emphasis on the importance of disclosure policies and procedures.[72] For example, each of the settlements entered into by the SEC with municipal issuers that self-reported violations of Rule 15c2-12 pursuant to the Municipalities Continuing Disclosure Cooperation (MCDC) initiative required several actions to be taken by the issuer.[73] Among these was adoption of formal disclosure policies and procedures and training of appropriate staff regarding disclosure practices and procedures.[74]

In addition to addressing new issue disclosure, annual audited financial statements, and continuing disclosure, bond disclosure policies could address disclosure through electronic means, including filings on the issuer's website and, by implication, postings to social media accounts. *Crafting Disclosure Policies* notes that "[s]tatements made 'in connection with the purchase or sale of securities' include not only offering documents prepared for the purpose of selling securities in primary offerings, but also continuing disclosure documents filed with the [EMMA system]. . . ." and they have also been interpreted by the SEC and many courts to " . . . include other statements that are 'reasonably expected to reach investors and the trading markets,' e.g., those made on websites, in press releases, and even in reported speeches, even if the statements are not intended for investors."[75]

Although each issuer will, by necessity, take a different approach to developing its disclosure policies and procedures, certain elements should be included in all such policies and procedures and should be applied to all disclosure that could influence an investor's investment decision, including postings on EMMA®, the issuer's website, or through social media. These include:

- Designating an individual responsible for maintaining control over the issuer's disclosure;
- Reviewing the disclosure procedures periodically to ensure that they are being complied with and that they are effective;
- Establishing a review process for all potential disclosures (including disclosure via the issuer's website and other social media accounts); and
- Requiring training of the staff involved with disclosure.

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[72] *Crafting Disclosure Policies*, p. A-1.

[73] Municipalities Continuing Disclosure Cooperation Initiative (Nov. 13, 2014), *https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml*.

[74] *Crafting Disclosure Policies* at III.C.2.

[75] *Id*., citing Securities Act Release No. 7049; Exchange Act Release No. 33741 (March 9, 1994).

The unique aspects of electronic disclosure should be considered in developing disclosure procedures. The person responsible for maintaining control over an issuer's disclosure likely also will be made responsible for electronic disclosure, but he or she may require additional technical guidance or support regarding the manner in which certain electronic disclosures are made. Thus, a staff person with familiarity with the issuer's website and other social media could be added to the disclosure review team to assist with the technical aspects of these types of disclosure. Policies and procedures could identify those websites and social media accounts with postings, tweets, or other electronic communications that may be material to investors and could include these sites and accounts within the scope of the policies and procedures. Procedures may provide for prior review and approval of posts[76] as well as timely posting of corrections or clarifications of the prior post. Similarly, because electronic postings do not disappear, procedures for addressing dated materials on an issuer's website or superseded posts should be developed.[77] Disclosure policies and procedures likely should provide for a periodic review of the materials posted on an issuer's website and social media accounts and the removal of dated information or the shifting of it to a separate historical or archive location. Such a review should likely be undertaken no less often than annually, and more often for more frequent issuers. An issuer may wish to designate an investor inquiry coordinator to whom all investor inquiries are directed and who is tasked with responding to all investor inquiries, including those received through social media. The investor inquiry coordinator's email address and telephone number could be made widely available, both internally so that inquiries may be properly forwarded, as well as on the issuer's website, EMMA® homepage, and other social media accounts.

Similarly, formal and informal public speeches of an issuer's officials are comparable to tweets and other less formal postings that could be material to an investor. To address this concern, disclosure procedures could require notification of the designated disclosure officer before certain information is posted, whether on the issuer's website, Twitter® account (or the accounts of certain officials), Facebook® page or any other media. The process for reviewing and managing postings likely will have to vary by the type of information being posted and the medium of such posting, but such processes could include review by one or more persons who are not the author of the proposed posting to ensure that the information contained is materially accurate and complete. Depending on the subject matter of the posting, one or more persons who are familiar with the content may need to be consulted. For posts or tweets that address only a single issue, for example, a more informal review may be appropriate, while for a more complex posting or tweet, such as one regarding a material merger or consolidation, a more thorough review

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[76] In its SEC settlement, Tesla/Musk agreed to implement procedures including pre-approval of tweets that reasonably could contain material investor information. See n. 33 above.

[77] *Crafting Disclosure Policies* at B-6, FN 15 (as noted in *Crafting Disclosure Policies*, "[i]f an issuer chooses to include a document or link to it on its website, then it could be exposed to liability for allowing the document or link to remain there without updating it to reflect a material subsequent event, unless the issuer clearly identifies the document as dated and not indicative of current conditions.").

by multiple parties may be prudent. Not all of the public statements of an issuer's officials will be or can be subjected to prior review, but an issuer may wish to consider making more frequent postings of information in order to reduce the risk that such statements are actionable, given the total mix of available information about the issuer, and acting promptly to clarify or correct inaccurate or potentially misleading statements.[78]

As with all other aspects of disclosure, training is an important component. The SEC required all of the issuers with whom it has settled under the MCDC program and in recent enforcement actions to adopt training policies and programs for issuer staff involved with disclosure. By extending disclosure policies and procedures to cover electronic disclosure, the training also could reflect the breadth of disclosure formats and help sensitize appropriate staff to their roles and responsibilities with respect to all disclosure that could be material to an investor, including that made through social media. Training should include not only the person(s) in charge of disclosure and the team designated to review such disclosure, but it may be prudent also to include information technology personnel and issuer officials who post information that might be considered to be material to investors. Training may also be helpful in introducing new officials, upon election or appointment, to the entity's disclosure procedures. Depending on the officials' use of social media and familiarity with these issues, additional training specific to electronic disclosure—and especially social media disclosure—may be advisable.

Lastly, many state and municipal bond issuers maintain internal policies and procedures regarding the permissible and appropriate use of the issuer's social media, as well as impermissible uses. These policies should likely be reviewed and updated to be consistent with, and cross referenced to, the applicable provisions set forth in the issuer's bond disclosure policies and procedures. Many issuers update their social media policies regularly and require their employees to certify that they have reviewed the policies and procedures and that they will comply with them. By importing the key requirements relating to posting bond investor information to the issuer's website and other social media into these internal social media policies, the issuer may be able to achieve a number of goals, including making all employees aware of the requirements relating to posting any such material information, demonstrating good faith efforts to comply with the applicable securities laws with respect to the posting of material information, and training particular employees in these important matters.

Attached are sample electronic disclosure procedures reflecting these general points. The sample procedures are intended to illustrate the potential subjects, among others, that may be addressed in electronic disclosure procedures and should not be viewed as recommended procedures. Rather, the sample procedures are intended as a resource for issuers considering the adoption of written disclosure policies and procedures. The disclosure policies and procedures of a particular issuer will be specific to that issuer, reflecting a number of factors.

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[78] *Id.* at B-17, FN 34.

CONCLUSION

Issuer websites, investor presentations, and social media can be used to share financial, operating, and other information of interest to bond investors. These electronic disclosure channels provide benefits for issuers in terms of being able to quickly and widely share information with institutional, retail, and other bond investors. Technologies will continue to evolve. These practice pointers for presenting information clearly, in context, and with disclaimers and other markers to help bond investors understand the circumstances in which the information is provided, should continue to be helpful to state and municipal bond issuers in navigating the applicable securities law requirements.

APPENDIX: SAMPLE FORM—ELECTRONIC DISCLOSURE POLICY AND PROCEDURES

This sample electronic disclosure policy and procedures[79] is presented to illustrate the potential components of an electronic disclosure policy. This policy assumes that the issuer has an existing disclosure policy to which this electronic disclosure policy would be an appendix (or alternatively that the issuer has an existing electronic media policy to which this electronic disclosure policy would be an appendix). It is not intended to be and should not be viewed as a recommended policy for any issuer. Rather, it is intended merely to illustrate the subjects (and, in the footnotes, additional considerations) discussed in "Practical Considerations in Electronic Disclosure," the paper to which this annotated statement is attached, that might be considered by counsel in assisting issuers adopting written disclosure policy and procedures. This annotated statement should be read in conjunction with "Practical Considerations in Electronic Disclosure."

The disclosure policy that is best suited to an issuer will depend on a number of factors, including the intended overall scope of the policy, the size and complexity of the issuer's capital structure and organization, the extent of publicly available information about the issuer, the nature of the issuer's other policies and procedures, and any applicable limitations imposed by state law or a charter, among other factors. References to Disclosure Counsel in this annotation are not intended to suggest that issuers should retain Disclosure Counsel but rather that counsel consider, given the nature of the issuer and the role and responsibilities of any counsel the issuer has in fact retained for disclosure purposes, what is the appropriate involvement of Disclosure Counsel in procedures.

Background/Purposes/Policy. These electronic disclosure procedures are an appendix to the [Entity's] disclosure policies and procedures ("Disclosure Policy") and are in furtherance of the Disclosure Policy. The [Entity] expects to provide information that may be of interest to investors from time to time through [[Entity]'s website, [Entity]'s official Twitter®, Facebook®, LinkedIn®, or other social media accounts[, and [Entity] Officials' Twitter®, Facebook®, LinkedIn®,

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[79] For an annotated form policy and procedures including additional components of a sample disclosure program, see *Crafting Disclosure Policies, supra* n. 2.

and other social media accounts]]. Recognizing the Entity's responsibilities under federal securities laws with respect to the accuracy and completeness of its statements to the market, including through electronic disclosure to bond investors, the [Entity] confirms and enhances its existing procedures by requiring the following officials and employees of the [Entity] to implement the following procedures in preparing, checking, posting, or sharing investor information through electronic disclosure.

1. **Designation of Key Disclosure Personnel.** The Disclosure Policy identifies the members of the [Entity]'s Disclosure Working Group. The Disclosure Working Group shall include individuals with specialized knowledge of the [Entity]'s information technology policies and controls such as the Chief Information Technology Officer or his/her Senior Designee. Additionally, each employee of the [Entity] whose work involves posting, approving content to be posted, or speaking on behalf of the [Entity] shall be deemed Key Disclosure Personnel for purposes of these procedures (including training), regardless of whether they are part of the Disclosure Working Group or any other such group.
2. **Content of Disclosure.** These procedures apply to Investor Information posted through the following electronic media:
   - **a.** the Investor Relations page of the [Entity]'s website
   - **b.** [the [Entity]'s official Twitter®, Facebook®, LinkedIn® [, or other] social media accounts]
   - **c.** [[Entity] Officials' Twitter®, Facebook®, LinkedIn®, and other social media accounts][80]
   - **d.** Hyperlinked websites (see Section 4.3)
   - **e.** [Other (see Section 7)]

   Information posted to EMMA® is addressed in the Disclosure Policy.
3. **Training**
   - **3.1. Personnel to Be Trained.** All Key Disclosure Personnel shall undergo periodic training regarding electronic disclosure of Investor Information and related responsibilities under federal and state securities laws.
   - **3.2. Training Content.** The training program and materials shall be prepared by or with the assistance of the [Entity's] Chief Legal Officer. The Chief Legal Officer will decide on the level of participation of outside counsel or other consultants. In addition to electronic disclosure of Investor Information and related responsibilities under federal and state securities laws, the training will address the overall communications program of the [Entity] to allow Key Disclosure Personnel to understand the media utilized by the [Entity] and their role in ensuring an effective

[80] If [Entity] Officials' social media accounts are used to provide investor information related to the [Entity] or their official position, such content should be deemed to fall within the purview of this electronic disclosure policy.

and compliant electronic disclosure program. The training program will be reviewed by the Chief Legal Officer [and Disclosure Counsel] annually and revised as necessary to reflect changes in the law and practice.

3.3. Training Frequency. All Key Disclosure Personnel shall undergo training (a) promptly after being hired, elected, or appointed to such position; (b) annually on a set date; and (c) as needed in order to apprise them of any relevant changes to the Disclosure Policy or their role within it. The [Entity] shall state here which changes to disclosure policies and procedures may warrant interim training and by which means such training shall be carried out whether remotely or in person. Examples include: addition of a new social media channel or a change in law.

3.4. Certification and Record Keeping. The [Entity] shall retain records of each training session (for example, training agendas and a list of attendees). Trainees could be asked to annually certify their compliance with the Entity's policies and procedures.

4. Website

4.1. Dedicated Investor Relations Page. The specific section or page of the [Entity's] website dedicated to publishing investor information to the [Entity's] website is [address].[81] The Web Manager shall include the address of the Investor Relations page in the contact section of the [Entity's] EMMA® issuer homepage.

4.2. Webpage Disclaimers. As noted in Section 4.4(a) below, all content posted to the Investor Relations page should be accompanied by appropriate disclaimers to provide context regarding the scope, purpose, and limitations specific to the information.[82]

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[81] *id.*

[82] [The following disclaimers are provided as examples:

General Disclaimer for the Issuer's Homepage (example):

The only information on this website that is posted with the intention of reaching investors, including bondholders, is located on the Investor Information Webpage, access to which requires review of and consent to the conditions contained in the Investor Information Terms of Use.

Investor Information Terms of Use (Click-Through example):

DISCLAIMER/NOTE OF CAUTION

Materials that may be of interest to holders of bonds or notes issued by the [Entity] are presented in this section for general informational purposes only and are provided without warranty of any kind and, in particular, no representation or warranty, express or implied, is made or is to be inferred as to the accuracy, reliability, timeliness or completeness of any such information. The information set forth in the documents accessible from this page is limited in scope and does not contain all material information concerning the [Entity's] bond or notes or the [Entity] necessary to make an informed investment decision.

UNDER NO CIRCUMSTANCES SHALL THE INFORMATION IN THIS SECTION CONSTITUTE AN OFFER TO SELL OR THE SOLICITATION OF AN OFFER TO SELL OR BUY ANY SECURITIES. OFFERS TO PURCHASE THE BONDS OR NOTES MAY ONLY BE MADE THROUGH A REGISTERED BROKER-DEALER AND WITH DELIVERY OF AN OFFICIAL STATEMENT.

The documents presented address only the matters discussed therein, are each dated as of a certain date and have not been updated since that date and, as a result, may not address all factors that

4.3. Web Links in Offering Documents. The Disclosure Officers shall review each offering document at the time of offering to ensure all web links are either disabled or identified and recorded in Section 2 as being subject to these electronic disclosure procedures, including review described in Section 4.4. Such records should include the offering(s) with which the link is associated. Additionally, any hyperlinks accessible from the original linked webpage, including third-party sites, shall be documented and identified in Section 2 for purposes of the review described in Section 4.4.[83]

4.4. Review of Website.[84] The Web Manager and the Disclosure Officer(s) shall review the Investor Relations page [monthly] [quarterly] [semi-annually][annually] to assure that (a) material third-party information is not linked or referred to without appropriate disclaimers,[85] is not

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may be material to an investor and may contain material misstatements or omissions of fact because of the passage of time or changes in facts or circumstances subsequent to the date of such documents. Consequently, no person should make any investment decision in reliance upon the information contained in this section.

If you have read, understand, and agree with the Disclaimer and wish to continue to the Site, confirm your agreement by clicking "AGREE" below.

Forward-Looking Statements Disclaimer (example):

This website may contain statements that should be considered "forward-looking statements," meaning they refer to possible future events or conditions. Such statements may be identifiable by words such as "may," "will," "should," "plans," "expects," "anticipates, "estimates," "believes," "budget," or similar words. The achievement of certain results or other expectations contained in such forward-looking statements involve known and unknown risks, uncertainties, and other factors which may cause actual results, performance, or achievements described to be materially different from any future results, performance, or achievements expressed or implied by such forward-looking statements. We therefore caution against placing substantial reliance on such forward-looking statements. All forward-looking statements included within any document or post on this website are made only as of the date such document or post is labeled current. The [Entity] does not expect or intend to issue any updates or revisions to those forward-looking statements.

Information Subject to Change (example):

Content posted to this website is current only as of each document's date. Information may have a dated date that is different from the date it was ultimately posted. The [Entity] is not responsible for and is under no obligation to update information after it was originally posted in the event of new information, future events, or other factors that may otherwise alter the accuracy of the information.

Third-Party Information(example):

The [Entity] takes no responsibility for any third-party information that may be linked to this website (i) [Entity] did not participate in preparation of information, and (ii) [Entity] does not approve or endorse it.

Archive or Historical Information (example):

The materials included in this archive section of the site provide historical information, are dated as of their respective dates, have not and will not be updated, and are likely to contain either inaccurate or omitted material information due to the passage of time and occurrence of subsequent events. Investors should not rely on these materials as being up-to-date or in making an investment decision.

[83] *See id* at 26–27 (discussing the importance of ensuring web links in offering documents are used cautiously and reviewed for any inadvertent risk).

[84] Sections 4.4–4.6 are based on the website procedures included in Crating Disclosure, at B-14.

[85] *See supra* note 2, at 245.

hyperlinked or included unless the Disclosure Officer(s) has/have reason to believe that it is reliable, and identifies the source of the information; (b) dated Investor Information is removed from the website or moved to a clearly labeled archives page; (c) all Investor Information is presented as of a specific date with appropriate disclaimers as to the currency of the data; (d) no material forward-looking statements (projections, forecasts, etc.) are included unless they are based on reasonable assumptions and are accompanied by a description of the substantial risks to achieving the forecasted results; (e) the Investor Information presented is consistent with the knowledge of such persons and not internally inconsistent[; and (f) more current information, if available, is posted].

4.5. Postings. The Disclosure Officer(s) shall review each posting of Investor Information to the Investor Relations page for compliance with Section 4.4. Content received by the Web Manager from the Disclosure Officer(s) shall be posted or linked in the appropriate section of the Investor Relations page.

4.6. Documentation of Procedures. The Web Manager shall compile and maintain records of (a) the source of all Investor Information included on the Investor Relations page, (b) the scope and results of each review of the page pursuant to Section 4.4, and (c) the approval process that occurred for each posting.

5. Social Media

5.1. Identify Sources and Channels. The [Entity] should identify all social media accounts from which it publishes or may publish Investor Information. Such sources should include any third parties, including advertising agencies and other communication-related partners, who may be able to post, publish, or otherwise release Investor Information through a social media account on the [Entity]'s behalf. If [Entity] Investor Information is being distributed through a social media account, the account should be listed in Section 2.

5.2. Review of Social Media. The Disclosure Officer(s) shall review the [Entity]'s social media activity on accounts listed in Section 2 [routinely] at least [daily] [weekly] [quarterly] to ensure compliance with Section 4.4.

5.3. Postings. The Disclosure Officer(s) shall review each posting of Investor Information, regardless of whether the [Entity] is posting the information or the information is being posted on its behalf, to ensure consistency with Section 4.4. This review shall be completed in advance of posting. The Web Manager shall confirm that any document or link to the [Entity's website] included in the posting is added to the appropriate section of the [Entity]'s website.

5.4. Additional Considerations

5.4 1. Entity Officials. Any official communicating Investor Information on behalf of the [Entity] through social media shall use a

channel of communication identified in Section 2. [Entity] officials or any employees who may otherwise be known to speak on behalf of the [Entity] during the regular course of their employment shall be required to disclose conspicuously that any opinion, comment, retweet, or similar action does not represent the views or opinions of the [Entity] but are instead limited to that individual's personal opinion.

5.4.2. Additional Detail Needed. If, following review under Section 5.3, the Disclosure Officer determines that Investor Information to be posted is too brief to give the reader a complete understanding of the context and nature of the topic, the Disclosure Officer shall require that the posting include a link to a full statement on the [Entity]'s website or shall require that the posting be made to the Investor Relations page rather than through social media.

5.4.3. Interaction with Third-Party Content: [In addition to reviewing postings under Section 5.3, the Disclosure Officer shall review other account activity to the extent that activity relates to Investor Information (e.g., sharing, retweeting, liking, commenting. or other interactions with third-party content) by official accounts identified in Section 2 to confirm that Investor Information is not shared, retweeted [or liked] unless the Disclosure Officer(s) has/have reason to believe that it is reliable and confirms that it includes appropriate disclaimers and identifies the source of the information.] Additionally, such policies shall be conspicuously stated on the [Entity]'s social media account. For example, "retweeting or liking does not constitute approval or endorsement."

5.5 Documentation of Procedures. The Web Manager shall compile and maintain a record of (a) the source of all Investor Information included on the [Entity]'s Social Media identified in Section 2, (b) the scope and results of each review this information pursuant to Section 4.4, and (c) the approval process that occurred for each posting or interaction under Section 5.4.3.

6. Investor Inquiries[86]

6.1. Investor Inquiry Coordinator. The [Chief Financial Officer] shall serve as the Investor Inquiry Coordinator.

6.2. Processing of Investor Inquiries. Except for communications that occur in connection with primary offerings, all inquiries from investors shall be managed by the Investor Inquiry Coordinator. If any other employee of the [Entity] receives an inquiry from an investor, that employee shall refer such inquiry to the Investor Inquiry Coordinator. The [Entity] should ensure that any public-facing medium from which it may share

[86] Sections 6.1–6.3 and 6.5 are based on the investor inquiry procedures included in Crating Disclosure, at B-15.

Investor Information (the media listed in Section 2), conspicuously lists the Investor Inquiry Coordinator's contact information.

6.3. Responses to Investor Inquiries. With respect to each inquiry from an investor, (a) if information necessary to respond to such inquiry has already been included in a Public Statement, then the Investor Inquiry Coordinator may respond to such inquiry from information in the Public Statement; *provided* such information is not stale (e.g., has not become materially inaccurate or incomplete), and (b) if information necessary to respond to such inquiry is not obtainable from information included in a Public Statement or the information has become stale, then the Investor Inquiry Coordinator shall determine the best manner to respond to such inquiry in a manner that ensures that it is materially accurate and complete, which may include convening a meeting of the Disclosure Working Group for broader inquiries or ones that require subjective judgment in responding. After reviewing the accuracy and completeness of such information, the [Web Manager/Disclosure Officer] shall post the information to EMMA or the Investor Relations page (and also may distribute it through social media channels under Section 2) to share the information broadly.

6.4. Investor Calls. If the [Entity] conducts scheduled investor calls, the Disclosure Officer/Disclosure Working Group shall review the agenda and anticipated responses to questions in advance of the call. [Entity] should announce the investor call on [EMMA®/Investor Relations page/social manner channels identified in Section 2] in a manner designed to allow investors to be provided with advance notice of such calls. Following the call, the Disclosure Officer shall post any additional material information shared on the call to EMMA® or the Investor Relations page (and also may be distribute the information through social media channels listed under Section 2) to share the information broadly. If necessary, the Disclosure Officer] may ask Disclosure Counsel to review the agenda, anticipated responses, and additional information to be posted.

6.5. Documentation. The Investor Inquiry Coordinator shall compile and maintain a record of investor inquiries and responses.

7. Chat Rooms and Blogs. All other forms of electronic disclosure used by the Entity and that provide Investor Information, including chat rooms and blogs, should be identified. The [Disclosure Officer] should determine whether or not the media is intended to be used for Investor Information and, if so, list the media in Section 2 to be made subject to these procedures.

7.1. Chat Rooms. Before hosting a chat room event or discussion that may include Investor Information, the Disclosure Officer(s)/Disclosure Working Group shall review the scope and agenda of the discussion and anticipated responses to questions, to ensure consistency with Section 4.4. The Disclosure Officer shall post any additional material information shared to EMMA or the Investor Relations page (and also may

distribute the information through social media channels listed under Section 2) to share the information broadly. If necessary, the Disclosure Officer may ask Disclosure Counsel to review the agenda and any talking points related to the event.

7.2. Blogs. The [Entity] shall identify all blogs used by the [Entity] to share Investor Information and list such blogs in Section 2. All postings shall be reviewed prior to publication according to Section 4.4. Documentation and records should be retained for all blogs in conformance with the procedures and documentation specified in Section 4.6.

8. Review of Electronic Disclosure Policy/Procedures. An annual review of these Electronic Disclosure Policy and Procedures should be conducted by the Disclosure Working Group in conjunction with the review of the [Entity's] Disclosure Policy. Any changes made to the Disclosure Policy should be incorporated into these Electronic Disclosure Policy and Procedures where applicable. Any interim or annual changes should be reflected through version tracking of the relevant Disclosure Policy.

9. Glossary: For purposes of this Disclosure Policy:

"**Chief Executive Officer**" means the [*chief executive officer*];

"**Chief Financial Officer**" means the [*chief financial officer*];

"**Chief Legal Officer**" means the [*chief legal officer*];

"**Public Information Officer**" means the [*public information officer*];

"**Web Manager**" means the [*web manager*];

"**Investor Inquiry Coordinator**" means the [*investor inquiry coordinator*];

"**Disclosure Officers"**[87] means the [*disclosure individuals*];

"**Disclosure Working Group**" means [*disclosure working group members]*[88];

"Key Disclosure Personnel" [is defined in the Disclosure Policy] [means_____];

"**Disclosure Policy"** means the [Entity]'s policy related to its disclosure undertakings including but not limited to the background and purpose of such policy, procedures related to official statements, listed event notices, and procedures for reviewing annual financial information and operating data;[89]

"**Investor Information"** includes but is not limited to Official Statements, Preliminary Official Statements, any information provided in such statements, any amendments or stickers to such statements, listed event notices as defined under Rule 15c2-12, annual financial information and operating data,

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[87] The issuer should identify a Disclosure Officer and create a formal job title and duties/responsibilities for the role. This should be part of that function's official duties and built into their official job description.

[88] *See supra* note 2, at B-1 to B-13 (providing a sample disclosure section containing procedures for official statements, annual financial information/operating data, and event notices).

[89] *id.*

and other information that a reasonable investor could consider to be material in making an investment decision in the debt securities issued by or on behalf of the [Entity]. Additionally, any information that may affect the "total mix" of information regarding such issuer or its financial or operating data may be deemed material for purposes of this definition;

"**Public Statement**" means any statement regarding the [Entity] published or otherwise disseminated in any manner by the [Entity] or one of the Key Disclosure Personnel of the [Entity] that includes Investor Information.