
CRAFTING DISCLOSURE POLICIES



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The continued and increasing interest in written disclosure policies for issuers of municipal bonds led the Securities Law and Disclosure Committee of the National Association of Bond Lawyers to undertake the development of this paper. This paper is intended to provide counsel with information to help issuer clients develop effective policies and procedures to facilitate compliance with their disclosure obligations under the federal securities laws. This paper was prepared by a special committee of NABL members.

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The purpose of this paper is to provide NABL members with tools to advise issuers¹ of municipal securities in developing written disclosure policies and procedures.² Issuers may wish to do so as a means to facilitate compliance with federal securities laws, even though that there is currently no general requirement or mandate under the federal securities laws that issuers adopt written disclosure policies and procedures.

This paper explores the functions and benefits (as well as risks) of written disclosure policies, the subjects that drafters should consider addressing, and practical considerations for drafting such policies. We note, however, that this paper is not intended, and should not be read, to make any suggestion or establish any presumption as to best practices in the field. Attached to this paper as Appendix A is a summary and discussion of relevant enforcement actions by the U.S. Securities and Exchange Commission (SEC). An annotated statement of policies and procedures is attached as Appendix B. In addition, the internet address of the page on the NABL website with sample disclosure policies may be found at the end of this paper. Finally, a table of references is attached as Appendix C.

1. BACKGROUND

Under the federal securities laws, issuers of municipal securities (like issuers of other securities) may neither make a misstatement of material fact, nor make a statement that is misleading (in light of the circumstances in which it is made) due to the omission of a material fact, in connection with the purchase or sale of securities. 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.

Statements 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 Electronic Municipal Market Access (EMMA) system of the Municipal Securities Rulemaking Board (MSRB). As interpreted by the SEC and many courts, they also 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.³ Under this standard, many issuers may make frequent statements "in connection with the purchase and sale of securities," given the growing and now substantial amount of information that they release to the public in the information age. This paper refers to issuer statements reasonably expected to reach investors

¹ The term "issuer," as used in this paper, is intended generally to include direct and indirect obligors on municipal securities (including conduit issuers), unless the context otherwise suggests, but to exclude issuers of nonrecourse conduit securities.

² In the interests of brevity, this paper refers to "disclosure policies" to include both policies (e.g., principles establishing when an issuer may or must make a disclosure of information pertaining to a municipal security) and procedures (the process used to develop and make disclosures).

³ Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Commission Release No. 33-7049; 34-33741 (March 9, 1994).

as “disclosures to investors,” whether or not investors are the intended audience. While most issuers apply rigorous processes in preparing offering documents for primary offerings, many employ substantially less rigor in preparing, vetting, and releasing other disclosures to investors.

To comply with their legal duties and manage their legal exposure (and following admonitions from the SEC described in Appendix A), many issuers have adopted or revised written disclosure policies to assist them in preparing and vetting disclosure. Others are considering doing so or otherwise would like advice on disclosure policies. Issuers look to disclosure policies (1) to reduce the chances of making a material misstatement or misleading omission in disclosure to investors and (2) to establish a defense of reasonable care against actions for misstatements and omissions that nevertheless occur. By consciously exercising reasonable care in making disclosures to investors, issuers comply with their legal duties, reduce their exposure to private damage or enforcement actions, and protect investors, many of whom may be citizens of the issuer. Of course, they attain these goals only if the disclosure policies they adopt are sound and appropriate to the issuer, and if the issuer makes good faith efforts to follow them. Disclosure policies that are adopted and subsequently ignored may be worse than none at all, because they may document failure to exercise reasonable care.

Consequently, to provide the most benefit, disclosure policies should be tailored to the size, complexity, and other relevant features of particular issuers. They should be consistent with the issuer’s particular needs and capabilities. Disclosure policies appropriate to a large municipality with multiple revenue sources backing various types of debt obligations should look substantially different from those for a small special purpose entity that operates primarily through paid service providers, for example. One size or form cannot fit all.

2. WHAT ARE THE CORE ELEMENTS OF DISCLOSURE POLICIES?

There are four core components of good disclosure policies: (1) a description of the types of disclosures to investors that are covered by the policy; (2) a clear statement of the process by which (and by whom) each type of disclosure to investors will be undertaken, drafted, reviewed, and approved and how compliance with the process will be documented; (3) inclusion of adequate supervision and reasonable disbursement of responsibilities; and (4) provision for associated training of officials and employees, including (a) education regarding responsibilities under federal securities laws, (b) education regarding the adopted disclosure policy, and (c) specific training on the particular person’s role and responsibilities in the disclosure process.

2.1 What Disclosures are Covered

A comprehensive disclosure policy will include procedures addressing all potentially material statements that are “reasonably expected to reach investors and the trading markets.” Some issuers may choose to begin with a disclosure policy that initially addresses only the preparation of offering documents or of continuing disclosure filings. The following types of statements and documents should be considered for inclusion in any comprehensive disclosure policy ultimately adopted by an issuer.

- Primary Offering Documents. Offering documents in primary offerings (e.g., official statements, placement and remarketing memos, and other documents with which securities are offered to the public) are not only reasonably expected to reach, but are intended for, investors and should be covered by a disclosure policy.
- Continuing Disclosure Filings. Likewise, statements made in filings with EMMA under continuing disclosure agreements entered into for the benefit of investors are clearly expected to reach investors, and so should be covered by a disclosure policy.
- Audited Financial Statements. For the same reason, an issuer's audited financial statements filed with EMMA should be covered by disclosure policies. When the text of the notes to the financial statements and accompanying management's discussion and analysis (and, if filed, the Comprehensive Annual Financial Report (CAFR)) within which the financial statements are contained) are subjected to procedures described in the disclosure policies, an issuer can assess the consistency of the information contained in the audit or CAFR with the issuer's offering documents and other continuing disclosures.
- Websites. As issuers continue to expand the use of their websites as a means to provide information to their constituents, consideration should be given to whether the information contained on websites (or at least certain pages of or types of information posted to the website) should be subjected to the disclosure policy.⁴ When the structure of the website, the process for posting information material to investors, and the material information actually posted to the website are subjected to the disclosure policies, issuers are able to assess the consistency of such information with other information intended to reach the investment community. Important information about developing events that is not disclosed in a recent offering document or on EMMA could well be material and, if misstated or misleading, could be actionable.
- Other Statements. Other statements of the issuer that are reasonably expected to reach the investment community may be subject to scrutiny under the federal securities laws, even if not filed with EMMA or specifically intended for investors. Examples include press releases, publications, media interviews, and important speeches. While it may not be practical (especially for an issuer governed by elected officials) to subject all of the issuer's public statements to all aspects of the issuer's disclosure policy process, consideration could be given to including potentially material special events or recurring public statements within a modified process. In addition, public officials who may be called upon to make such statements should be sensitized to the extent possible, through training, to the applicability of federal securities laws to public statements. In addition,

⁴ The SEC found that information included on the City of Harrisburg's website violated the federal securities laws. See the Harrisburg Report.

disclosure policies can provide for monitoring important public statements and for corrective or clarifying statements to be released promptly when necessary.

2.2 Development of Procedures

After determining the extent of the disclosure policy, procedures should be reviewed and revised or developed to address each type of disclosure to be covered. This section provides examples of procedures that can be useful for a wide variety of disclosures. Which reviews are appropriate may vary depending on the kind of statement that the issuer is making or the type or circumstances of the issuer. For example, the appropriate level of review by an issuer may be different for a primary offering document than for an event statement to be filed on EMMA, and large complex issuers may require a more fulsome process than small special purpose issuers.

Internal working group review and diligence. Consideration should be given as to the identification of an internal disclosure working group to review the disclosure and consider whether it is accurate and complete, including whether there are any big picture trends or concerns that should be discussed in the disclosure, as opposed to merely marking up the data in the last disclosure statement. Additionally, thought should be given to whether and to what extent this internal working group (or designated members) should participate in (or lead) the diligence review process conducted by outside disclosure counsel and/or, in the case of primary offering disclosure, underwriter's counsel.

Subject matter review. Consideration should be given to whether there is information that is (or should be) included in the disclosure document such that review by individuals outside the internal disclosure working group would create a higher level of comfort that the information is both accurate and complete.⁵

Senior official review. Consideration should be given as to which senior officials will be involved in the process of preparing and reviewing disclosure documents. Senior officials may be in possession of information that other personnel do not have, either because management has a broader perspective or because the information has not yet been distributed widely within the issuer organization. Consideration should be given to whether specific officials should be asked to certify accuracy and completeness. A certification requirement might encourage senior officials to review documents more carefully.

Outside consultants. Consideration should be given as to whether the issuer should employ outside consultants (e.g., accountants, attorneys, financial advisors) to review or advise with respect to the disclosure. For example, recognizing that it is equally exposed to potential liability in issuing an offering document in a primary offering and in filing an annual report on EMMA, an issuer might choose to engage a consultant to assist in its continuing disclosure process to the same extent as in primary offerings.

⁵ In the Illinois Order, the Commission concluded that the State's pension system actuary should have been involved in reviewing the offering documents because of the actuary's expertise in the State's pension systems. Paragraph 24 of the Illinois Order. See also the discussions of "silos" in Appendix A.

Governing body review. Consideration should be given to what procedures relating to the review or approval by the governing body (city council, county board of supervisors, board of education, etc.), if any, should be included in the disclosure policy for primary offering documents, including:

- Whether and when disclosures should be approved and/or reviewed by the governing body (as opposed to governing body action authorizing specified officers to approve and distribute them);
- How much time in advance of a governing board meeting or dissemination of the disclosure should it be sent to the governing body; and
- What type of review should members of the governing body members undertake.

Continuing disclosure filing review. In addition to applying the processes described above to periodic continuing disclosure filings and event notices, issuers with continuing disclosure obligations should also consider policies for beginning the periodic filing process early enough to afford time for careful preparation and review. In addition, the annual or other periodic report should be compared with the applicable continuing disclosure undertaking to assure that it includes all required data. Even if a template is used, periodic review of the template (including after each new primary offering) may be valuable. Prior to posting the annual report, consideration should be given to whether there are other statements or explanations that are needed in order to avoid misleading investors as of the filing date. In addition to procedures for annual and other periodic reports, an issuer should also consider procedures for ensuring the timely filing of all required event notices. The irregular and ad hoc nature of events for which notices must be given means that issuers will not necessarily realize that an event notice is required when an event occurs. Issuers should consider how best to recognize when reportable events occur and to ensure that notices of those events are timely filed.

Reviews in connection with other public statements. With respect to statements made that are not intended for investors but are nevertheless available to investors, such as information on websites and other public statements, issuers should consider what procedures are appropriate for ensuring that those statements, if material, are properly vetted before being made public, including:

- Who will review the statements for accuracy and completeness? Issuers should consider whether a person who understands the issuer's obligations under the federal securities laws should review potentially material information that is posted on a website or otherwise made public.
- With respect to websites, issuers should consider whether the content of the websites that is material to investors, including appropriate disclaimers, should be periodically reviewed to ensure that it does not present a risk (due to staleness) of misleading investors who access the website.

Periodic Review of Procedures. The disclosure policy should address how frequently it should be reviewed and updated to address possible changes in the issuer's debt management program, financial reporting process, or organizational structure, among other changes.

2.3 Documenting Compliance

An additional subject that should be addressed in a disclosure policy is how compliance with the policy should be documented. Documenting compliance is particularly important if the SEC or another party conducts an investigation or otherwise scrutinizes an issuer's disclosures or disclosure policies. If an issuer maintains a disclosure policy, the issuer will want to be able to prove that it complied with that policy in making disclosures. Accordingly, issuers should consider how to document their compliance, including:

- Whether the issuer should maintain a deal file for each transaction and/or a report file or log for each annual or other periodic report and for each material event filing; and
- The kind of information that it should consider including in the deal or report file, including the following:
 - Evidence that proper reviews were conducted,
 - Evidence that all procedures have been followed, and
 - Sourcing of information.

2.4 Training

One of the recurring themes in the SEC's recent orders in the municipal securities market has been the importance of training issuer personnel involved in the preparation and review of disclosures. Issuers should consider what kind of training should be conducted to ensure that their personnel sufficiently understand the disclosure policy and the issuer's obligations under the federal securities laws, including:

- What should the scope of training encompass?
- Which personnel should be included in the training?
- Should there be different training for an internal disclosure working group as compared to personnel involved more marginally in the disclosure process?
- Should there be training for governing body members or other senior officials, and in particular training with respect to the applicability of federal securities laws to public statements?
- How frequently should training occur?

- How should training be conducted for new personnel?

As with all other aspects of disclosure policies, the scope, frequency, and other aspects of advisable training will vary with the size and complexity of the issuer and the frequency of disclosures, as well as other factors. In short, there can be no one-size-fits-all approach.

3. WHAT IS A GOOD APPROACH FOR DRAFTING DISCLOSURE POLICIES?

A good approach to developing a comprehensive disclosure policy takes several factors into consideration.

First, a written disclosure policy should keep the purpose of disclosure at the forefront of the process and avoid becoming just a checklist. A disclosure policy that is merely a checklist can result in a myopic process that does not encourage issuer staff and officials to see and convey the big picture (i.e., a lot of “trees,” but no “forest”). A disclosure policy ideally should strike a balance between being (a) systematic (which might warrant use of a checklist) and (b) pragmatic, ensuring that the systematic aspects of the process (such as working through a checklist) do not become the purpose of the disclosure process itself.

Second, many issuers already have established procedures for preparing at least certain disclosures, and those procedures may reflect important internal considerations that may not be apparent to outside counsel. The more consistent an issuer’s disclosure policy is with its existing procedures, the more comfortable and organic it will be to the issuer, and the more likely that the issuer will be able to comply with it without unwarranted disruption. Counsel should recommend written disclosure policies with a view not just to what might be the “best” disclosure process in the abstract, but also whether the process is one that the issuer is likely to follow.

In this light, consider the following two steps:

3.1 Step One: Determine Existing Processes.

This initial step may entail different measures for different issuers. Large issuers that are frequent participants in the municipal market have prepared disclosure documents for many years, perhaps decades. When advising these issuers, the process should start with understanding the issuer’s existing regular disclosure practices. Smaller or less frequent issuers may not have an established practice for the preparation of disclosure documents. When advising this type of issuer, the process should start with a survey of the operations of the issuer and identification of the key personnel who should be a part of the disclosure process. Often, merely documenting an issuer’s existing practices and ensuring that they are systematically followed can significantly improve an issuer’s disclosure culture.

3.2 Step Two: Determine What Enhancements Need to Be Made.

The next step is to consider whether the existing processes of the issuer should be enhanced in order to better facilitate future compliance with contractual undertakings and federal securities laws. In doing so, the following questions may be helpful:

- Are all of the employees and officials who possess relevant material information sufficiently involved in the process?
- Are officials with appropriate authority and knowledge of issuer-wide trends and risks reviewing disclosure?
- Are the various employees and officials who are involved in the disclosure process working together and interacting with each other?
- Are there key points in the disclosure process when the right employees and officials are thinking about the big picture of the disclosure and considering whether as a whole it is complete and accurate?
- Are relevant issuer personnel adequately trained to perform their duties in making disclosure?

4. SAMPLE DISCLOSURE POLICIES

NABL has gathered several examples of disclosure policies. They can be viewed at the following website address: <https://www.nabl.org/About-NABL/Committees-Projects/Securities-Law-and-Disclosure-Committee/Sample-Disclosure-Policies>. While many of these examples were prepared by NABL members, neither NABL nor its Board has approved or adopted a preferred template or form of disclosure policies. These examples are provided merely to assist counsel in understanding what other practitioners may have recommended and what issuers have adopted in the particular circumstances presented.

Attached as Appendix B is an annotated statement of policy and procedures, created for purposes of illustration. The annotated statement is not intended to be a recommended policy for any issuer. Rather, it is intended merely to illustrate the subjects (and, in the footnotes, additional considerations) that might be considered in formulating disclosure policies. As stated above, the disclosure policies that are best suited to an issuer will depend on a number of factors, including the intended overall scope of the policy; the size, type, 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 possible limitations imposed by state law or a charter, among other factors. While the sample may be helpful as a reference point, it is no substitute for evaluating what an individual issuer should do to make disclosure to investors in compliance with applicable federal securities laws.

APPENDIX A

UNDERSTANDING THE SEC'S RECENT EMPHASIS
ON DISCLOSURE POLICIES

Beginning in 2007 and in particular since 2010, the SEC and its staff have placed a heavy emphasis on the importance of disclosure policies with respect to issuers. This emphasis has come in the form of speeches, statements by the SEC in its orders against issuers, and requirements imposed by the SEC in orders against issuers as conditions of settlements. In addition to this emphasis, starting in 2010, the SEC has demonstrated a willingness to bring enforcement actions against issuers that are predicated only on negligent conduct rather than on intentional deception or highly reckless behavior.¹ These negligence-based enforcement actions address violations that, in the view of the SEC, arise because a material misstatement or misleading omission occurred as a result of the issuer's failure to exercise reasonable care. The SEC makes significant statements concerning the importance of disclosure policies in these actions.

This Appendix (a) identifies several of the instances in which the SEC has mentioned disclosure policies, (b) summarizes the concerns that the SEC and its staff have identified as grounds for its emphasis on disclosure policies, and (c) discusses how these concerns may be addressed in the process of developing issuer disclosure policies. A table of references can be found in Appendix C.

1. WHAT HAS THE SEC AND ITS STAFF SAID
ABOUT DISCLOSURE POLICIES?

The statements by the SEC and its staff concerning the importance of written disclosure policies fall into two categories. First, following the San Diego Order, the then-Director of the SEC's Division of Enforcement delivered a speech that discussed the importance and recommended content of written disclosure policies in detail. Second, beginning with the New Jersey Order in 2010, the SEC has mentioned disclosure policies in multiple orders. In these orders, the SEC cited poor or no disclosure policies as a cause of the issuer's alleged violation of securities laws, or cited post-violation adoption of disclosure policies as an ameliorative factor in reducing remedies, or imposed a requirement to adopt disclosure policies as a condition of an agreed settlement. A survey of these statements follows.

¹ Before 2010, the enforcement activity of the SEC against issuers in the municipal securities market was largely limited to situations of securities fraud that involved intentional deception or highly reckless behavior. The SEC continues to be active in enforcing intentional or reckless securities fraud as well. For a recent example, see the Allen Park Order, in which the Commission found that the City of Allen Park had violated Rule 10b-5. See also the Harvey Order alleging violations of Rule 10b-5.

1.1 Lessons Learned from San Diego.

Following the San Diego Order, the then-Director of the SEC's Division of Enforcement, Linda Chatman Thomsen, delivered a speech² that summarized her views concerning the lessons that the municipal securities market should learn from the SEC's action against the city. Then-Director Thomsen dedicated a substantial portion of her "lessons learned" speech to the importance of written disclosure policies, and provided the most detailed guidance by the SEC or its staff concerning why written disclosure policies are important and what they should contain. One of the most important statements in the speech concerning disclosure policies follows:

[C]ities should consider whether their internal controls and systems produce financial reports and disclosure documents that are accurate and complete. By internal controls and systems, I mean, among other things, written policies and procedures that, at a minimum:

- clearly identify who is responsible for what;
- clearly state the process by which the disclosure is drafted and reviewed; and
- provide checks and balances so there is adequate supervision and reasonable disbursement of responsibilities so that too much power and information is not placed with just one person.

Then-Director Thomsen also discussed other aspects of the process of disclosure, including the importance of training and the importance of keeping the big picture of the disclosure in mind.

1.2 SEC Orders.

The SEC has mentioned disclosure policies in one form or another in almost every order against issuers in the municipal securities market, beginning with the New Jersey Order. Below are several examples of those statements from several orders:

- New Jersey Order:

Treasury had no written policies or procedures relating to the review or update of the bond offering documents. In addition, Treasury did not provide training to its employees concerning the State's disclosure obligations under the accounting standards or the federal securities laws. Accordingly, the State's procedures were inadequate for ensuring that material information concerning TPAF and PERS or the State's financing of TPAF and PERS was disclosed and accurate in bond offering documents.

² Lessons Learned from San Diego by Linda Chatman Thomsen, Director, Division of Enforcement, U.S. Securities and Exchange Commission (December 11, 2007). The full speech is available at the SEC's website at the following address: <https://www.sec.gov/news/speech/2007/spch121107lct.htm>.

- Illinois Order:

The State failed to adopt or implement sufficient controls, policies, or procedures designed to ensure that material information was assembled and communicated to individuals responsible for disclosure determinations, to train personnel involved in the disclosure process adequately, or to retain disclosure counsel. As a result, the State lacked proper mechanisms to identify and incorporate into its official statements relevant information held by the pension systems and other bodies within the State.

- Harrisburg Report:

Given this potential for liability, public officials who make public statements concerning the municipal issuer should consider taking steps to reduce the risk of misleading investors. At a minimum, they should consider adopting policies and procedures that are reasonably designed to result in accurate, timely, and complete public disclosures identifying those persons involved in the disclosure process; evaluating other public disclosures that the municipal securities issuer has made, including financial information and other statements, prior to public dissemination; and assuring that responsible individuals receive adequate training about their obligations under the federal securities laws.

- South Miami Order:

The City's finance directors, while responsible for receiving, signing, and returning the annual compliance certifications, had no previous experience completing, reviewing, or assessing disclosure requirements or tax issues in bond offerings and did not receive any training or guidance on the subject.

- Kansas Order:

[A]lthough KDFA, KDA, and other members of the working group had an informal process for the development and review of official statements, neither KDFA nor KDA had any formal written policies or procedures for addressing trends or risk factors that might be material to bondholders.

In addition to these statements, in several recent settlement orders, including the West Clark Order, the South Miami Order, the Wenatchee Order, and the Allen Park Order, the SEC has required that issuers adopt written disclosure policies or retain an independent consultant to review the issuer's disclosure policies. In addition, the SEC has expressly stated in several other orders that the extent of remedies it sought from the issuer (or the lack of any required remediation) was mitigated by the adoption of policies by the issuer subsequent to the events leading to the SEC investigation and settlement described in the order.³

1.3 What's the point?

The SEC's comments regarding the importance of written disclosure policies are not isolated or ad hoc remarks, but rather appear to represent one of its major emphases in the municipal securities market. These comments are indicative of the SEC's position that issuers should adopt written disclosure policies to avoid the securities law violations alleged in these orders.

2. WHAT ARE THE CONCERNS THAT THE SEC IS FOCUSED ON AND HOW CAN THOSE CONCERNS BE ADDRESSED?

The SEC's repeated statements supporting the adoption of written disclosure policies are likely an indication of what the SEC has repeatedly encountered in the investigations related to these orders:

- Preparation of disclosure in "silos";
- Lack of training of employees; and
- Impact of political considerations.

All three of these concerns were mentioned in one form or another in the speech by then-Director Thomsen referred to above.

2.1 The "Silo" Effect.

One of the themes in these orders is the SEC's finding that issuer employees prepared disclosure within one or a few departments and did not gather information from and the perspectives of other departments within the issuer. Here are excerpts from the Illinois Order and the Kansas Order addressing these findings:

³ See, the New Jersey Order, the Illinois Order, and the Harrisburg Order.

Relying on prior “carryover” disclosures and “page-turn” reviews during group conference calls, the State and its advisors did not scrutinize the institutionalized description of the Plan adequately and made little affirmative effort to collect potentially pertinent information from knowledgeable sources—in particular, actuaries for the pension system and the State’s Commission on Government Forecasting and Accountability.⁴

Furthermore, although KDFA, KDA, and other members of the working group had an informal process for the development and review of official statements, neither KDFA nor KDA had any formal written policies or procedures for addressing trends or risk factors that might be material to bondholders. KDFA operated with the understanding that KDA was responsible for providing the information and disclosures in the Official Statements relating to financial issues impacting the State. Conversely, KDA understood that KDFA was responsible for such disclosure. This lack of clear communication, together with the absence of effective written policies or procedures in either organization, meant that neither KDA nor KDFA identified the absence of the KPERS unfunded liability, or discussed the need to add such disclosure to the Official Statements.⁵

Based on these excerpts, along with statements made in other orders cited above, the SEC appears to be concerned with what sometimes is referred to as the “silo” effect. Like any large organization, issuers can fall victim to the “silo” effect, where its organizational structure is so compartmentalized that facts known to one department or group are not known (or even envisioned) by those in another department. Absent established procedures for gathering all material facts from all departments, the department charged with producing disclosures may unwittingly omit material facts, and the omission can result in misleading disclosure. When an issuer fails to tell investors of a fact that investors need to know in order for the issuer’s disclosures not to be misleading, and another department or “silo” within the issuer actually possessed that fact, the SEC may conclude that the issuer failed to exercise reasonable care because its process was not designed to uncover that fact. Because the omitted fact is known to the issuer, the SEC or a private litigant could possibly bring an action under Rule 10b-5 for intentional failure to disclose that fact.

This “silo” effect can become very damaging to the preparation of effective disclosure, because it can lead to a largely mechanistic process accomplished by individuals in separate “silos.” A good disclosure policy can defeat this silo effect with procedures that encourage an issuer to think through where information and expertise resides within its organization and ensure that all of the relevant departments come together in an effective way to communicate a full and accurate picture to investors.

⁴ Paragraph 24 of the Illinois Order.

⁵ Paragraph 13 of the Kansas Order.

2.2 Lack of Training.

Another concern that the SEC addresses in some of the orders described in this appendix is the lack of training of employees. Here are illustrative excerpts from the New Jersey Order and the South Miami Order, respectively:

...Treasury did not provide training to its employees concerning the State's disclosure obligations under the accounting standards or the federal securities laws.⁶

The City's Finance Department experienced significant turnover from 2005 through 2009. The annual certifications required as part of the financing were signed by at least four different finance directors who were unaware of the implications of the certifications and how the 2005 Lease and Developer Loan affected the tax status of the bonds. The City's finance directors, while responsible for receiving, signing, and returning the annual compliance certifications, had no previous experience completing, reviewing, or assessing disclosure requirements or tax issues in bond offerings and did not receive any training or guidance on the subject.⁷

In several of the orders quoted above (most notably the New Jersey Order), the SEC has found that a lack of training was a significant contributor to the disclosure that the SEC found to be deficient. As the SEC states in the New Jersey Order, the State "viewed the updating of the pension funding sections as a routine process, requiring the insertion of new numbers or facts into an existing document."⁸ The SEC further found that the "State was aware of the underfunding of [the pension plans] and the potential effects of the underfunding. However, due to a lack of disclosure training and inadequate procedures relating to the drafting and review of bond disclosure documents, the State made material representations and failed to disclose material information regarding [the pension plans] in bond offering documents."⁹ From the SEC's perspective, a lack of training can lead to a disclosure culture that is not sensitive to the perspectives of investors and thus can lead to the misleading omission of material facts or an inadequate presentation of the information that is included. This concern has been exacerbated in situations where the issuer faces substantial turnover in its staff, such as in the case of the South Miami Order.

2.3 Impact of Political Considerations.

A theme of the influence of political considerations appears in several recent orders. In particular, the Harrisburg Order, the Harvey Order, and the Allen Park Order appear to be

⁶ Paragraph 16 of the New Jersey Order.

⁷ Paragraph 27 of the South Miami Order.

⁸ Paragraph 14 of the New Jersey Order.

⁹ Paragraph 50 of the New Jersey Order.

instances in which the SEC concluded that issuers allowed major political or policy considerations to impact the disclosure process. This, too, appears to be one of the problems identified by SEC Division of Enforcement then-Director Thomsen in her “lessons learned” speech following the City of San Diego’s failure to disclose its pension issues:

Given its ongoing underfunding and increasing obligations, San Diego knew that it would probably have difficulty in funding its future pension and health care obligations unless new revenues were obtained, pension and health care benefits were reduced, or services were cut. San Diego’s pension issues were well known among city officials, and San Diego repeatedly had to deal with these pension issues. In other words, the pension issue was an elephant in San Diego’s living room.

Despite the magnitude of the problem and the frequency with which San Diego officials confronted the pension issues, San Diego made five separate municipal bond offerings, made rating agency presentations, and made continuing disclosure filings without adequately disclosing these problems to the investing public. San Diego was saying little or nothing—and, in any event, clearly not enough—about the elephant in its living room.¹⁰

State and local governments are led by officers who are more familiar with political discourse than securities disclosure. In political discourse, it is often advisable to present issues in their best light and to rally public confidence in the government’s ability to deal with them. Consequently, when state and local governments encounter significant financial or operational challenges, these can become “elephants in the room.” When they arise, especially without training in the requirements of the securities laws, political considerations can unduly influence whether and how the issuer discloses the challenges to investors. Given the politically sensitive nature of “elephants in the room,” without a deliberate, thoughtful process to accurately disclose material facts regarding the financial condition and future financial prospects of the issuer, without misleading material omissions, an issuer like the City of San Diego can find itself seemingly disclosing everything except the most important facts.

Disclosure policies can be valuable in insulating disclosure from inappropriate political considerations, because the issuer can create committees or groups whose function it is to think through the issuer’s disclosure in an environment that is systematically and intentionally designed to be devoid of political considerations.

3. WHAT DOES THIS MEAN FOR COUNSEL ADVISING AN ISSUER?

A recognition and understanding of statements by the SEC concerning the importance of written policies (and how they can address underlying concerns about unguided disclosure processes) can assist counsel advising an issuer in at least two respects.

¹⁰ Lessons Learned from San Diego by Linda Chatman Thomsen, Director, Division of Enforcement, U.S. Securities and Exchange Commission (December 11, 2007). The full speech is available at the SEC’s website at the following address: <https://www.sec.gov/news/speech/2007/spch121107lct.htm>.

First, they can assist counsel in explaining the importance of written disclosure policies to their clients. With regard to issuers who have come under SEC scrutiny, the failure to have well-considered disclosure policies appears to have contributed to a disclosure culture that resulted in what the SEC considers violations of federal securities laws. Issuers who adopt effective written disclosure policies, systematically train their personnel, and follow their adopted procedures are more likely to produce accurate and complete disclosure documents in primary offerings and more likely to comply with continuing disclosure undertakings, thereby reducing the likelihood of attracting the SEC's attention. In addition, the failure of issuers to have developed systematic disclosure policies, including training, appears to have contributed to the SEC's conclusions that the issuers' faulty disclosures were a result of negligence.

Second, understanding these statements by the SEC and its underlying concerns provides meaningful guidance concerning the provisions common to sound written disclosure policies. Understanding the concerns of the SEC about some issuers' disclosure processes will help counsel in assisting issuers to develop disclosure policies that will establish processes and a culture conducive to compliance with federal securities law, thereby reducing the risk (and attendant cost) of an SEC enforcement or private damages action.

APPENDIX B

ANNOTATED FORM POLICY AND PROCEDURES

This annotation of disclosure policy and procedures is presented to illustrate and analyze the potential components of a disclosure policy. It is not intended to be and should not be viewed as a recommended policy for any issuer or obligor. Rather, it is intended merely to illustrate the subjects (and, in the footnotes, additional considerations) discussed in Crafting Disclosure Policies, 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 Crafting Disclosure Policies.

The disclosure policy that is best suited to an issuer or obligor will depend on a number of factors, including the intended overall scope of the policy, the size and complexity of the issuer's or obligor's capital structure and organization, the extent of publicly available information about the issuer or obligor, the nature of the issuer's or obligor's other policies and procedures, and possible 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 the procedures set forth herein.

POLICY AND PROCEDURES
CONCERNING COMPLIANCE WITH FEDERAL SECURITIES LAWS
RELATING TO DISCLOSURE FOR [INSERT LOCAL GOVERNMENT'S NAME]

This statement of Policy and Procedures Concerning Compliance With Federal Securities Laws Relating To Disclosure (the "Disclosure Policy") is promulgated to establish a framework for compliance by [Name of Entity] (the "[Entity]") with its disclosure and/or contractual obligations with respect to the securities it issues or that are issued on its behalf, pursuant to the requirements of the Securities Exchange Act of 1934, as amended, and the Securities Act of 1933, as amended, including, in particular, Rule 15c2-12, as amended, promulgated under the 1934 Act, and other applicable rules, regulations, and orders.

1. Meanings. Certain terms used in this Disclosure Policy have the meanings described in the attached Glossary.

2. Background.¹
3. Purposes. The purposes² of this Disclosure Policy are to formally confirm and enhance³ existing policies and procedures regarding compliance with federal securities laws relating to disclosure in order:
 - 3.1. Comply with Law and Contract. To facilitate compliance with applicable law and existing contracts when preparing and distributing Disclosure Documents in connection with Securities offerings and Continuing Disclosure Documents,⁴

¹ Background. A background section can be useful to inform both governing officers and implementing employees of their and the issuer's legal duties in making or approving statements in connection with the purchase or sale of securities. (References to an "issuer" in the notes to this Disclosure Policy include other direct or indirect obligors on municipal securities that choose to adopt disclosure policies and procedures.) This section might include a statement regarding Investor Reliance and Federal Securities laws such as the following:

Investor Reliance. The [Entity] has issued and expects to continue to issue Securities in the public debt markets and, in connection therewith, to issue offering documents and to enter into continuing disclosure undertakings to update financial and operating information contained in the offering documents at least annually and to file timely notices of certain events with the MSRB through EMMA. Investors in the [Entity]'s Securities rely on the filings [and may rely on portions of the [Entity]'s website and other Public Statements] in deciding whether to buy, hold, or sell the [Entity]'s Securities.

Federal Securities Laws. Under federal securities laws, the [Entity] must exercise reasonable care to avoid material misstatements or omissions in preparing Public Statements that are used to sell or tender for Securities in primary offerings, and it may not knowingly or recklessly include material misstatements or misleading statements in other Public Statements while its Securities are outstanding. Knowledge of any officer or employee of the [Entity] as well as information in files of the [Entity] may be imputed to the [Entity]. Disclosure Counsel opinions may help to establish care, but are no defense to an action for failing to disclose or misstating a known material fact.

- ² Purposes. The "Purposes" section is intended to explain the Disclosure Policy's goals, for the benefit of persons called upon to approve or implement the Disclosure Policy, which could provide useful motivation and understanding of officers and employees in implementing disclosure procedures.
- ³ Enhance Existing Policies. Issuers likely have practices and procedures, even if not established as a formal policy or even reduced to writing. Consequently, formal written policies and procedures in most cases may fairly be described as an enhancement to existing practices and procedures. This may be important so as not to give the impression that past disclosure was prepared without a systematic process.
- ⁴ Comply with Law and Contract. Complying with applicable law is stated separately from reducing exposure to liability, since an issuer is obligated and will want to comply with law even if there were no consequences for a breach. If the scope of the policy is expanded to include other activities such as voluntary disclosure, web site maintenance, and/or responding to investor inquiries, this section should be revised to be consistent with that scope.

- 3.2. Reduce Liability. To reduce exposure (of the [Entity] and its officials and employees) to liability for damages and enforcement actions based on misstatements and omissions in Disclosure Documents,⁵
- 3.3. Reduce Borrowing Costs. To reduce borrowing costs by promoting good investor relations,⁶ and
- 3.4. Protect the Public. To avoid damage to residents of the [Entity] and other third parties from misstatements or omissions in Disclosure Documents.⁷
4. Policy. It is the policy of the [Entity] to comply fully with applicable securities law regarding disclosure in connection with the issuance of Securities and with the terms of its Disclosure Agreements,⁸
5. Procedures. The following officials and employees of the [Entity] shall implement the following procedures in preparing, checking, or issuing the following Disclosure Documents.
 - 5.1. Official Statements.⁹

⁵ Reduce Liability. Implementation of and compliance with a Disclosure Policy may reduce legal risks in at least two ways: First, it may reduce the risk that actual material misstatements and omissions occur. Second, it may make it less likely that any misstatement or omission that does occur was a result of actionable (intentional, reckless, or negligent) conduct.

⁶ Reduce Borrowing Costs. NABL is not aware of any study that has either proved or disproved a correlation between disclosure and interest rates; however, this benefit has been cited publicly in various settings by public finance market participants.

⁷ Protect the Public. Especially in states with an income tax, investors are likely to include residents of the governmental issuer, whom the issuer should not want to harm through faulty disclosure. In addition, publicized faulty disclosure could adversely affect the issuer's reputation and, therefore, its citizens.

⁸ Sufficient Disclosure. As written, this Disclosure Policy addresses only the disclosure documents used in a primary offering (essentially the preliminary and final Official Statements) or required under a Disclosure Agreement. Consideration may be given to whether the policy would be expanded to specifically address other interactions by the issuer and the municipal market such as additional voluntary disclosure. Additional provisions are included in this annotated statement to assist in that consideration. Additionally, if an issuer expects to regularly obtain investor inquiries, counsel should consider whether the issuer should include a process for responding to those inquiries in the Disclosure Policy.

⁹ Solicitation Statements. Consideration may be given to whether this section should be expanded to address Solicitation Statements used in tender offers or consent solicitations.

- 5.1.1. Working Group. The Disclosure Working Group for preliminary and final official statements (collectively, "Official Statement") issued in primary offerings shall consist of the following officers and employees of the [Entity]: [offices and/or employee positions].¹⁰
- 5.1.2. Establishing Scope and Process. At the beginning of the disclosure process, the Disclosure Working Group will (a) determine (with input from the [Entity]'s underwriters, in the case of a negotiated offering) what information should be disclosed in the Official Statement to present fairly a description of the source of repayment and security for the securities being offered, including related financial and operating information (which may include a discussion of material risks related to investment in the securities), (b) assign responsibilities for assembling and verifying the information, and (c) establish a schedule for producing the information and the Official Statement that will afford sufficient time for final review by the Disclosure Working Group and the Disclosure Officers and the approvals required by this Disclosure Policy. While the information included in the last offering document may be used as a starting point, the Disclosure Working Group should be encouraged to provide suggestions for improvement and not assume it represents a complete list of what is currently required.¹¹

¹⁰ Working Group. This Disclosure Policy envisions that a group of senior officers or employees, with assistance from outside consultants, would manage and oversee the production and vetting of primary offering documents and annual disclosure reports. This is usually the practice with issuers, but this Disclosure Policy would formally appoint the members of this group and specifically charge the group with the overall responsibility for managing the disclosure process. The group should be inclusive enough so that there is a high likelihood that it will be able to recognize material misleading statements and/or omissions and also be able to command the attention of employees needed to assemble and vet the information to be disclosed. In a smaller or mid-sized issuer, the group might consist of the CEO, CFO, and CLO, among others. For a very small issuer, the working group may be limited to the Finance Director and attorney. In a larger issuer, it might consist of deputies in relevant departments who are charged with disclosure responsibilities. For example, in the case of a large city, it might consist of deputy heads of departments charged with finance, accounting, public works, enterprises, public safety, and legal matters. A large issuer with varied credits might include different group members for different credits. For example, it might include the head of airport operations for an airport revenue bond offering, but not for a utility system revenue bond offering. In addition, counsel should consider whether, if retained, Disclosure Counsel or the Financial Advisor, or both, should be members of the Disclosure Working Group in an advisory capacity.

¹¹ Establishing Scope and Process. An offering document may not omit a fact that is important to a reasonable investor, if the omission would make statements in the document misleading. When a Disclosure Document purports to describe the whole financial and operating condition and results of the credit supporting the Securities being offered, but omits a fact that is significant enough such that it is necessary to understand that condition as a whole, then the Disclosure Document taken as a whole runs the risk of being misleading. What facts are important to investors may change over time as conditions evolve. Consequently, it is important (as noted in SEC settlement orders) that issuers not merely update the numbers in their last offering document without asking whether it continues to address all important facts. Accordingly, it is suggested that the working group first address what information should be included in an offering document before beginning to prepare it. In negotiated offerings, it is suggested that input be sought from underwriters, too, because (as intermediaries) they should be better informed as to what is important to investors, and they should be better aware of what facts other issuers consider important and are disclosing.

- 5.1.3. Assembling Current Information. The Disclosure Officers shall (a) identify officers or employees of the [Entity] who are likely to know or be able to obtain and verify required information; (b) request that they assemble, verify, and forward the information and also notify the Disclosure Officers of any other fact that they believe to be important to investors; and (c) establish a reasonable but sufficient deadline for producing the information. The Disclosure Officers should produce (or cause to be produced) a draft of the Official Statement based on the information that they receive. The Disclosure Officers shall assure that employees within their areas devote sufficient time and care to produce timely and accurate information, when requested. The Disclosure Officers shall distribute drafts of the Official Statement to the Disclosure Working Group for review together with a description of the process used to compile it and a list of facts, if any, that employees forwarded as important but are not included in the draft.¹²
- 5.1.4. Review for Process, Accuracy, and Completeness. The members of the Disclosure Working Group shall review the Official Statement drafts and Disclosure Officers' process description to determine (and shall report to the Disclosure Officers as to) whether, based on information known or reported to them, (a) this Disclosure Policy was followed, (b) the material facts in the Public Statement appear to be consistent with those known to the members of the Disclosure Working Group, and (c) the Official Statement omits any material fact that is necessary to be included to prevent the Official Statement from being misleading to investors. The Disclosure Officers shall take such action as may be necessary, based on feedback from the Disclosure Working Group, to enable the Disclosure Working Group to conclude that this Disclosure Policy was followed and that the Official Statement is accurate and complete in all material respects.¹³

¹² Assembling Current Information. This Disclosure Policy is intended only to describe the basic elements of the process used to assemble a draft offering document, identifying which employees know the relevant facts, and asking that the facts be verified and provided. Requests for information could take many forms, e.g., circulating data from the last Disclosure Document and asking that it be updated, or sending out a list of information to be provided, etc. However, to avoid possible material omissions, employees identified as having the facts should also be asked if there are other facts that they think investors would consider important in judging the issuer's future ability to pay. It is suggested that the disclosure working group be informed of the process actually used to assemble the offering document (including, perhaps, the employees who gathered disclosed facts), so that the group will be able to gauge the reliability and completeness of disclosed information. This step might be eliminated in instances where the vast majority of the data used to prepare the offering document is assembled and reviewed by members of the Disclosure Working Group, such as is common with a smaller issuer.

¹³ Review for Process, Accuracy, and Completeness. This Disclosure Policy contemplates that members of the Disclosure Working Group would check the draft Official Statement for accuracy and completeness by comparing it to what they know or has been reported to them and identifying possible inaccuracies or omissions of known material facts. They would also confirm, based on the process description provided by the Disclosure Officers, that proper procedures were used to prepare the draft.

5.1.5. Final Approval. The Disclosure Working Group shall approve the final draft of the Official Statement. The approval of the Disclosure Working Group, together with the Official Statement and the Disclosure Officers' description of the process used to prepare and check the Official Statement, shall be sent to the [Chief Executive Officer, the Chief Accounting Officer, the Chief Financial Officer, and the Chief Legal Officer]. The Official Statement shall not be issued until approved by these officers.¹⁴

5.1.6. [Web Posting.¹⁵]

5.1.7. Documentation of Procedures. The Disclosure Officers shall compile and retain a file of the actions taken to prepare, check, and approve the Official Statement, including the sources of the information included, the comments and actions of the Disclosure Working Group, the description of the process followed by the Disclosure Officers, and the approvals of the [Chief Executive Officer, Chief Accounting Officer, Chief Financial Officer, and Chief Legal Officer].¹⁶

5.2. Annual Financial Information and Operating Data.

¹⁴ Final Approval. This Disclosure Policy contemplates that the Disclosure Working Group approve the Official Statement so as to assure that its members feel responsible for it and, accordingly, devote sufficient thought and effort to assure that it is accurate and complete. It also provides that designated senior staff members approve the document, since such officers are most likely to see the big picture and be aware of undisclosed breaking events or conditions. In a small issuer, these steps might be combined into one, if these officers are members of the Disclosure Working Group. Depending on normal practice or differences in legal authority, the Official Statement might be finally approved by the CEO or CFO, with the approval of the other officers coming after Disclosure Working Group approval and before final CEO or CFO approval. This annotated statement does not address governing body approval of the Disclosure Document. The process for authorization and approval by the governing body should be discussed with the issuer and, if considered appropriate, incorporated into the approved policy.

¹⁵ Web Posting. An issuer may wish to include its Disclosure Documents on its website or post a link to EMMA so that the information included may benefit its citizens as well as investors. If an underwriter files an Official Statement or an issuer files a Continuing Disclosure Document with EMMA, and the information in the document subsequently becomes stale, the issuer should not be legally responsible for losses incurred by investors who mistakenly rely on the document as current, if the issuer is not then in the market (e.g., by remarketing demand securities). If an issuer chooses to include the document or a link to it on its own 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. (See the Additional Provisions included with this annotated statement and accompanying notes.) Consequently, issuers and their advisors should weigh attendant benefits and risks in deciding whether to include Disclosure Documents on the issuer's own website.

¹⁶ Documentation of Procedures. This Disclosure Policy calls for a written record of the disclosure procedures actually used to produce the Official Statement, which should document reasonable care and, accordingly, help protect the issuer and its officers and employees from private or enforcement actions. In the case of any investigation of the issuer's disclosure, the issuer may need to establish that it complied with its Disclosure Policy in the specific disclosures at question. If the issuer does not sufficiently document its compliance, then the issuer may be able to establish its compliance only through the memory of its employees, which may be incomplete or faded.

- 5.2.1. Working Group. The Disclosure Working Group for [periodic/annual] financial information and operating data to be filed with the MSRB pursuant to Disclosure Agreements (the "Annual Filing") shall consist of the following officers and employees of the [Entity]: [offices and/or employee positions].¹⁷
- 5.2.2. Assembling Current Information. The Disclosure Officers shall (a) compile and maintain (and update after every issuance or defeasance of Securities) a list of all financial information and operating data required to be filed with the MSRB pursuant to each of the Disclosure Agreements; (b) assign responsibilities to officers and employees for periodically assembling and verifying the data; (c) request that they assemble, verify, and forward the data to the Disclosure Officers and notify the Disclosure Officers if they have learned of any other fact that they consider to be material with respect to the information provided; and (d) establish a schedule for producing the data (and the Annual Filing document) that will afford sufficient time for final review by the Disclosure Working Group and the Disclosure Officers and the approvals required by this Disclosure Policy. The Disclosure Officers shall distribute drafts of the Annual Filing to the Disclosure Working Group for review together with a description of the process used to compile it.
- 5.2.3. Review for Process, Accuracy, and Completeness. The members of the Disclosure Working Group shall review the Annual Filing drafts and Disclosure Officers' process description to determine (and shall report to the Disclosure Officers as to) whether, based on information known or reported to them, (a) this Disclosure Policy was followed, (b) the material facts in the Annual Filing appear to be consistent with those known to the members of the Disclosure Working Group, and (c) the Annual Filing omits any material fact that is necessary to be included to prevent the Annual Filing from being misleading to investors. The Disclosure Officers shall take such action as may be necessary, based on feedback from the Disclosure Working Group, to enable the Disclosure Working Group to conclude that this Disclosure Policy was followed and that the Annual Filing is accurate and complete in all material respects.
- 5.2.4. Final Approval. The Disclosure Working Group shall approve the final draft of the Annual Filing. Its action, together with the Annual Filing and the Disclosure Officers' report regarding the process used to prepare and check the Annual Filing, shall be sent to the Chief Executive Officer, the Chief Accounting Officer, the Chief Financial Officer, and the Chief Legal Officer. The Public Statement shall not be issued until approved by these officers.

¹⁷ Working Group. In most cases, the Disclosure Working Group for Annual Filings will likely be the same as the one for Official Statements.

5.2.5. Posting. The Disclosure Officers shall file the Annual Filing with the MSRB through EMMA by the deadline established by the Disclosure Agreements. The Disclosure Officers shall exercise reasonable care to file the Annual Filing in the format and with the identifying information required by the Disclosure Agreements, including applicable CUSIP numbers for the [Entity]'s Securities.¹⁸

5.2.6. Documentation of Procedures. The Disclosure Officers shall compile and retain a file of the actions taken to prepare, check, and approve the Annual Filing, including the sources of the information included, the comments and actions of the Disclosure Working Group, the Disclosure Officers' report regarding the process used to prepare and check the Annual Filing, and approvals of the Chief Executive Officer, the Chief Accounting Officer, the Chief Financial Officer, and the Chief Legal Officer.

5.3. Event Notices.

5.3.1. Identification of Reportable Events. The Disclosure Officers shall maintain a list of events of which the [Entity] is required to provide notice to the MSRB pursuant to the Disclosure Agreements. The Disclosure Officers (with the assistance of Members of the Disclosure Working Group for Official Statements) shall (a) identify the officers and employees of the [Entity] who are most likely to first obtain knowledge of the occurrence of such events and (b) request in writing that they notify the Disclosure Officers immediately after learning of any such event, regardless of materiality, and repeat such request in a quarterly reminder.¹⁹

¹⁸ Posting of Annual Filing to Website. Consider whether the Annual Filing or a notice that the information is available on EMMA will also be posted on the Issuer's website.

¹⁹ Identification of Reportable Events. While an issuer's CFO should know of most events for which notice is required to be given under Disclosure Agreements, a material non-payment default or material event affecting the tax status of bonds might occur without the CFO's knowledge, depending on the nature of the issuer's covenants. Consequently, to be able to comply with an issuer undertaking to give prompt notice of any such event, the issuer would need to establish a tickler system so that employees who are likely to first know about a covenant breach or tax event will know to share that information with the officer or employee charged with giving notice. Since such employees are likely not equipped to make a reliable judgment as to materiality, this Disclosure Policy contemplates that they will report all events and let the Disclosure Officers decide which, if any, are material and require notice.

- 5.3.2. Preparation of Event Notice. The Disclosure Officers shall (a) assess the materiality of any reported event with the assistance of legal counsel (reportable under the Disclosure Agreements only if material) and, if notice of the event must be given (or if no materiality standard applies to that particular event); (b) prepare an Event Notice giving notice of the event; and (c) except for notices of a rating change, bond call, or defeasance, forward the draft Event Notice to the Chief Financial Officer, and the Chief Legal Officer for their review.²⁰
- 5.3.3. Review and Approval of Event Notice. The Chief Financial Officer and Chief Legal Officer shall promptly review and approve or comment on the Event Notice. The Disclosure Officers shall incorporate such comments into the Event Notice to be filed with EMMA. The Disclosure Officers shall not file the Event Notice Statement until it is approved by the Chief Financial Officer and the Chief Legal Officer, unless the Event Notice (a) gives notice of a rating change, bond call, or defeasance or (b) such approval has not been received by the applicable Disclosure Agreement filing deadline.²¹
- 5.3.4. Posting. The Disclosure Officers shall file the Event Notice with the MSRB through EMMA by the deadline established by the Disclosure Agreements or, if the facts cannot be correctly and fairly described by the deadline, then as soon thereafter as possible. The Disclosure Officers shall exercise reasonable care to file the Event Notice in the format and with the identifying information required by the Disclosure Agreements, including CUSIP numbers for the applicable Securities.²²

²⁰ Preparation of Event Notice. Event notices can have a significant impact on the market value of securities, so this Disclosure Policy requires that non-routine notices receive high level review and review by counsel or other appropriate officer, employee, or consultant. In addition, unless an issuer chooses to file notice of an event, whether or not it is material, this Disclosure Policy requires that counsel advise as to materiality before the issuer decides that notice of an event should not be given because it is not material. If an issuer has outstanding demand securities that are remarketed on daily, weekly, or similar notice, it should consider establishing a similar reporting procedure to identify and give notice of any material event or change in circumstance, whether or not covered by a Disclosure Agreement, so as to reduce the risk that it may be responsible for remarketing the securities on the basis of misleading disclosure. If the issuer has engaged Disclosure Counsel, consider requiring consultation with Disclosure Counsel at this step.

²¹ Review and Approval of Event Notice. This Disclosure Policy would require that event notices be approved by senior officers or employees unless that would interfere with timely filing. Even if it would interfere with timely filing, the Disclosure Officers could delay filing pending senior official input, if necessary to correctly describe an event with complicated facts or repercussions and if timely filing a less fulsome description of the event could be misleading.

²² Posting. If an accurate event notice cannot be produced and filed by the filing deadline, this Disclosure Policy permits it to be filed late, so as to avoid the adverse repercussions of potentially faulty disclosure, which are judged to be more than those of a marginally late filing. If that occurs, counsel should consider a process for the issuer to keep track of any late filings to determine whether they should be disclosed to investors in future primary offerings.

5.3.5. Documentation of Procedures. The Disclosure Officers shall compile and retain a file of the actions taken to report each event and prepare, check, and approve the notice of the event, including the approvals of the Chief Financial Officer and Chief Legal Officer, if obtained.

6. Training.

6.1. Personnel to be Trained. Each member of a Disclosure Working Group, the Disclosure Officers, the Chief Executive Officer, the Chief Financial Officer, the Chief Accounting Officer, the Chief Legal Officer, the Public Information Officer, and each officer or employee designated as a source of data or an Event Notice pursuant to this Disclosure Policy shall undergo periodic training.

6.2. Training Content. The training program and materials shall be prepared by or with the assistance of the issuer's [outside bond or disclosure] counsel and approved by the Chief Legal Officer. The training program shall impart the requirements of federal and state securities laws and the Disclosure Agreements, the meaning of "material," and the duties of such officers and employees under this Disclosure Policy.²³

6.3. Training Frequency. Each affected officer and employee shall undergo training (a) promptly after being appointed to a position described in Section 6.1 and (b) annually as necessary to address any changes in law or this Disclosure Policy.

7. Updates to Policies and Procedures.

7.1. Periodic Review. The Disclosure Policy shall be reviewed annually by the Disclosure Policy Working Groups. In addition, at any time all officers and employees of the [Entity] are invited and encouraged to make recommendations for changes to this Disclosure Policy so that it fosters better compliance with applicable law, results in better information to investors, or makes the procedures required by this Disclosure Policy more efficient.

7.2. Recommendations for Change. Following receipt of any such recommendation, the Disclosure Officers shall give their advice regarding the recommendation to the Disclosure Working Groups. The Disclosure Working Groups shall consider the recommendation and advice, determine whether to propose a change to this Disclosure Policy, and submit such proposal to the Chief Executive Officer, the Chief Financial Officer, the Chief Accounting Officer, and the Chief Legal Officer.

²³ Training Content. While both senior officers and employees charged with fact gathering and disclosure reviewing should be trained, the content and emphasis of the training should differ, depending on the officer's or employee's responsibilities in disclosure procedures. Because each issuer's procedures will be unique to that issuer at least to some extent, a more generally available seminar may not be an adequate substitute for issuer-specific training.

7.3. Changes to Disclosure Policy. The Chief Executive Officer, with advice from the Chief Accounting Officer, the Chief Financial Officer, the Chief Legal Officer, and Disclosure Counsel, shall approve and implement any change to this Disclosure Policy that is proposed by the Disclosure Working Groups, does not change the fundamental policies or procedures established by this Disclosure Policy, and is determined by the Chief Executive Officer to be advisable.²⁴

8. Miscellaneous.

8.1. Internal Use Only. This Disclosure Policy is intended for the internal use of the [Entity] only and is not intended to establish any duties in favor of or rights of any person other than the [Entity].

8.2. Waiver of Procedures. The officers and employees charged by this Disclosure Policy with performing or refraining from any action may depart from this Disclosure Policy when they and the Disclosure Officers in good faith determine that such departure is in the best interests of the [Entity] and consistent with the duties of the [Entity] under federal and state securities laws. If either Disclosure Officer is charged by this Disclosure Policy with taking or refraining from such action, any such departure shall require approval of the Chief Legal Officer.²⁵

8.3. Document Retention.²⁶

²⁴ Changes to Fundamental Policies or Procedures. If the Disclosure Working Groups propose any change to the fundamental policies or procedures established by this Disclosure Policy and, based on such advice, the Chief Executive Officer determines that such change is advisable, the Chief Executive Officer may pursue the same course of action as the issuer took to adopt the Disclosure Policy. Such adoption process is specific to each issuer and may be influenced by state and local law. For example, such process may include the approval by the Governing Body.

²⁵ Waiver of Procedures. This Disclosure Policy recognizes that there may be times when the required procedures are impractical and, accordingly, permits departures from the procedures, but only with the approval of a Disclosure Officer. If an issuer does not follow procedures that it has established, then its failure may imply negligence. If, however, the procedures are first knowingly waived for good reason, no such implication should result.

²⁶ Document Retention. Consider whether a statement should be included regarding document retention. State law may govern whether such a provision should be included.

GLOSSARY

For purposes of this Disclosure Policy:

- 1.1. “Annual Filing” has the meaning given such term in Section 5.2.1.
- 1.2. “Chief Accounting Officer” means the [chief accounting officer].
- 1.3. “Chief Executive Officer” means the [chief executive officer].
- 1.4. “Chief Financial Officer” means the [chief financial officer].
- 1.5. “Chief Legal Officer” means the [chief legal officer].
- 1.6. “Continuing Disclosure Document” has the meaning given such term in Section 1.18.2 of this Glossary.
- 1.7. “Disclosure Agreement” means the provisions of each ordinance, order, resolution, or other agreement of the [Entity] by which the [Entity] undertakes to provide financial and operating data periodically, and timely notices of certain events, to the MSRB, whether expressly or as the only nationally recognized municipal securities information repository under SEC Rule 15c2-12.
- 1.8. [“Disclosure Counsel” means counsel²⁷ engaged from time to time by the [Entity] with the approval of the Chief Legal Officer to give advice to the [Entity] in accordance with this Disclosure Policy.]
- 1.9. “Disclosure Documents” means those items set forth under Sections 1.18.1, 1.18.2, and 1.18.3 of this Glossary.
- 1.10. “Disclosure Officers” means the officers or employees of the [Entity] charged with exercising the responsibilities of a Disclosure Officer under this Disclosure Policy, i.e., [offices of Disclosure Officers, preferably one senior finance or accounting official and one senior attorney].²⁸
- 1.11. “Disclosure Working Group” for any Public Statement means the officers or employees of the [Entity] charged with exercising the responsibilities of the Disclosure Working Group in preparing or checking the Public Statement under this Disclosure Policy, as described in Section 5.

²⁷ Outside Counsel. Large issuers may have in-house counsel who are knowledgeable about securities laws and disclosure practices. If in-house counsel are sufficiently knowledgeable and experienced to perform the role contemplated for outside counsel, then “Disclosure Counsel” could refer to such in-house counsel.

²⁸ Disclosure Officers. In a small issuer, the Disclosure Officers are likely to be the CFO and CLO. In a larger issuer, ideally they would be senior deputies to the CFO and CLO charged with the debt finance functions within the issuer.

- 1.12. “EMMA” means the Electronic Municipal Market Access System maintained by the MSRB.
- 1.13. “Governing Body” means the [name of governing body] of the [Entity].
- 1.14. [“Investor Inquiry Coordinator” means the [Chief Financial Officer].]
- 1.15. “Material” when used with respect to a fact included in a disclosure document means, generally, that a reasonable investor likely would attach significance to it in making a decision to buy, hold, or sell Securities of the [Entity]. When questions of materiality arise, counsel should be consulted.
- 1.16. “MSRB” means the Municipal Securities Rulemaking Board.
- 1.17. “Public Information Officer” means the [title of [Entity] officer or employee authorized to issue press releases and other public statements on behalf of the [Entity]].
- 1.18. [“Public Statement” means any statement or other communication that is intended (or reasonably can be expected) to be accessible to and relied upon by investors in the [Entity]’s Securities, including, as applicable:
- 1.18.1. Offering Documents: preliminary and final Official Statements and other documents by which Securities are offered to the public by the [Entity] as well as solicitation statements by which the [Entity] offers to purchase its Securities or requests consents or waivers regarding Securities;
 - 1.18.2. Continuing Disclosure Documents: financial and operating data and event notices filed with the MSRB through EMMA pursuant to Disclosure Agreements;
 - 1.18.3. Other EMMA Filings: other information filed with the MSRB through EMMA;
 - 1.18.4. Website Content: information uploaded or linked or posted to the website of the [Entity]; and
 - 1.18.5. Press Releases, Etc.: press releases and other formal statements of the [Entity] or the Chief Executive Officer, the Chief Financial Officer, or the Chief Accounting Officer.]²⁹
- 1.19. “SEC” means the United States Securities and Exchange Commission.
- 1.20. “Securities” means bonds, notes, certificates of obligation, certificates of participation, and other debt obligations or securities of the [Entity], or the payment of which the [Entity] is obligated to support by a lease, contract, or other arrangement, that are sold to or otherwise held or traded in by the public.

²⁹ This is an expanded definition and may include matters that are not within the scope of the Disclosure Policy. It is included here to provide an illustration of the types of public statements that may be addressed in a Disclosure Policy.

ADDITIONAL PROVISIONS

The following provisions may be helpful in expanding the scope of a Disclosure Policy to cover websites, press releases, investor inquiries, and other instances in which statements might be made by an issuer that could be determined to be subject to scrutiny under federal securities laws as well as the provision of updated quarterly information.

1. Website.

1.1. Review of Website. The Web Manager and Disclosure Officers shall review the [Entity]'s website at least annually to assure that (a) material third-party information is not linked or referred to without appropriate disclaimers, is not hyperlinked, and is not included unless the Disclosure Officers have reason to believe that it is reliable, and identifies the source of the information; (b) dated material information is removed from the website or moved to a clearly labeled archives page; (c) all material financial and operating data 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; and (e) the material information presented is consistent with the knowledge of such persons and not internally inconsistent.³⁰

1.2. Postings. The Web Manager shall review each posting of material information to the website to assure consistency with Section [1.1 of these Additional Provisions]. With respect to each Public Statement it receives from the Disclosure Officers, the Web Manager shall add a link to the document or post the document in the appropriate section of the website.

1.3. Documentation of Procedures. The Web Manager shall compile and maintain a record of (a) the source of all material information included on the [Entity]'s website, (b) the scope and results of each review of the website pursuant to Section [1.1 of these Additional Provisions], and (c) the actions taken following each such review.

³⁰ Review of Website. 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. Some issuers have separate policies for maintaining their website and, if so, the additional provisions included in this part might be better located in that policy. If an issuer's website contains material financial and operating data, then the data should be updated as required to prevent it from being misleading through staleness, or the website should make clear that the data speaks only as of its date, and the issuer makes no representation that recent condition or results do not differ. Some issuers isolate, in a separate investor relations section of their websites, information that they believe may be material, so that the information can be more readily managed to avoid material misstatements or misleading omissions. There is no federal requirement for issuers to maintain websites or, if they do, to include information for investors on it. If an issuer does not include investor information on its website, then these additional provisions and other suggestions to provide for the posting or linking of documents on the website should not be included.

2. Investor Inquiries.³¹

- 2.1. Investor Inquiry Coordinator. The [Chief Financial Officer] shall serve as the Investor Inquiry Coordinator.
- 2.2. 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.
- 2.3. 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, and (b) if information necessary to respond to such inquiry is not obtainable from information included in a Public Statement, then the Investor Inquiry Coordinator shall determine the best manner to respond to such inquiry in a manner that assures that it is accurate, which may include convening a meeting of the Disclosure Working Group for broader inquiries or ones that require subjective judgment in responding.
- 2.4. Documentation. The [Chief Financial Officer] shall compile and maintain a record of investor inquiries and responses.

3. Press Releases, Etc.

³¹ Investor Inquiries. Counsel should consider whether the issuer is likely to obtain investor inquiries. If so, the issuer may want to provide a written process for handling such inquiries so that (a) the responses do not contain a material misstatement or misleading omission and (b) if the issuer chooses for reasons of fairness, the responses do not disadvantage some investors relative to other investors. 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. Under current law, it is unlikely that disclosures by municipal or nonprofit issuers of "inside" information in response to investor inquiries would violate the federal securities laws, but disclosures that materially advantage some investors over others can raise fairness concerns, particularly when those disclosures are reasonably expected to influence the trading of Securities, so an issuer might choose not to respond to investor inquiries with material, non-public information without making it available to all investors. In that case, 2.3 of these Additional Provisions should be revised accordingly. See pages 4-5, National Association of Bond Lawyers, Providing Information to the Secondary Market Regarding Municipal Securities (2000).

- 3.1. Notification of Disclosure Officers. The Public Information Officer shall notify the Disclosure Officers of each Public Statement to be issued by the Public Information Officer and, whenever possible, provide them with an opportunity to review and comment before release.³²
 - 3.2. Review of Public Statement. The Disclosure Officers shall review each such Public Statement to determine whether it could reasonably be material to investors in the [Entity]'s Securities and, if so, to assure that the factual statements in the Public Statement are supported and appropriately qualified. The Disclosure Officers shall develop appropriate qualifications with the assistance of Disclosure Counsel. The Disclosure Officers shall forward their comments to the Public Information Officer, who shall take them into account before releasing the Public Statement.
 - 3.3. Posting. Whenever the Disclosure Officers determine that such a Public Statement could reasonably be material to investors, they shall determine whether such information is already readily accessible to investors and, if not, shall (a) file such Public Statement as a voluntary Disclosure Document with the MSRB through EMMA and (b) send a link to such filing to the Web Manager, who shall add the link to the [Entity]'s website.³³
 - 3.4. Documentation of Procedures. The Disclosure Officers shall compile and retain a file of the actions taken to review any Public Statement issued by the Public Information Officer.
4. Quarterly Check for Completeness.

³² Notification of Disclosure Officers. This additional provision for a Disclosure Policy contemplates advance review and input, whenever possible, of press releases, speeches, and other written releases by the issuer or its senior officials. In some larger, more complex issuers, there may be multiple officers with power to issue official press releases, in which case consideration should be given to expanding the policy to cover all of them. Any document released by an officer with the expectation that it will be reported on by public media may be a statement made in connection with the purchase or sale of securities, and could be attributed to the issuer and, accordingly, expose the issuer to possible liability under the federal securities laws, if it contains a material misstatement or misleading omission. This is particularly the case if the document includes new information that is of a magnitude such that it is likely to influence the trading of the issuer's bonds. An issuer can minimize (although not eliminate) attendant risk if it files current comprehensive disclosure information on EMMA and/or its website. Even if it does, and especially if material emerging developments are discussed, public statements should be reviewed before release or, if that is not feasible (e.g., in the event of an emergency), reviewed promptly afterward and publicly corrected as necessary. As an alternative to 3.1, the Public Information Officer could be trained to distinguish between material and immaterial statements and could be required to clear only material statements with the Disclosure Officers. In that case, it would be wise to forward other statements to them after the fact, so that they can review the statement and take action if necessary.

³³ Posting. If an issuer is in the market, it should assure that new material information is disclosed by a supplement to the offering document. In other circumstances, an issuer is not required to make new material information available to investors generally, except to the extent required by its continuing disclosure undertakings. This Disclosure Policy assumes that the issuer will want to provide material information to investors through EMMA once it has publicly released the information. If not, 3.3 of these Additional Provisions should be revised to limit filings to those required to correct prior misstatements or omissions.

- 4.1. Quarterly Check for Material Developments. Promptly after the [Entity]'s accounting records for each fiscal quarter are closed, the Disclosure Officers shall review the [Entity]'s financial results of operations and resulting balance sheet and request in writing that the members of the Disclosure Working Group, the Chief Executive Officer, the Chief Accounting Officer, the Chief Financial Officer, the Chief Legal Officer, and the persons described in Sections [5.1.3, 5.2.2, and 5.3.1 of Appendix B] inform the Disclosure Officers of any event or fact that any of them believes to be important to investors and not previously disclosed pursuant to this Disclosure Policy and filed with the MSRB through EMMA.³⁴
- 4.2. Preparation and Approval of Supplemental Filing. The Disclosure Officers, with advice from counsel [Disclosure Counsel], shall determine whether changes in financial results of operation or condition from the prior year, or any event or fact reported pursuant to Section [5.3 of Appendix B], would, if disclosed on EMMA, materially change the total mix of information about the [Entity] that is available to investors on EMMA. If it would, they shall prepare a Public Statement disclosing such results, event, or fact with the advice of Disclosure Counsel and forward the Public Statement to the Disclosure Working Group for comment. The Disclosure Officers shall (a) modify the Public Statement as they deem advisable on the advice of counsel [Disclosure Counsel] to respond to comments from members of the Disclosure Working Group and (b) submit the Public Statement to the Chief Financial Officer and Chief Legal Officer for approval.
- 4.3. Posting. After any such Public Statement is approved by the Chief Financial Officer and Chief Legal Officer, the Disclosure Officers shall file the Public Statement with the MSRB through EMMA. The Disclosure Officers shall exercise reasonable care to file the Public Statement with identifying information that includes all relevant CUSIP numbers for the [Entity]'s Securities. The Disclosure Officers shall notify the Web Manager of the filing of the Public Statement and shall provide the Web Manager with a link to the page on which the Public Statement is posted on EMMA. The Web Manager shall include the link on the [Entity]'s website or post the Public Statement in the appropriate section of the website.
- 4.4. Documentation of Procedures. The Disclosure Officers shall compile and retain a file of the actions taken to comply with this Section [4 of these Additional Provisions].

³⁴ Quarterly Check for Material Developments. This Disclosure Policy assumes that the issuer updates its financial and operating data by filing with EMMA annually, but not more frequently. Many issuers commit or choose to update their filed data quarterly in order better to market their bonds, or to assure that remarketings of their demand securities are done on the basis of current disclosure, or to reduce the risk that an official's overly optimistic statement might be actionable given the total mix of available information about an issuer. In that case, the procedures described in 4.2 of Appendix B (or a lighter version) should be used to produce the quarterly filings, and the procedures described herein are unnecessary. If an issuer is not required to and does not regularly file quarterly updates, then (a) it should do so when necessary to prevent remarketings based on misleading disclosure due to material subsequent events or changes in financial condition or results, if it has outstanding demand securities that are remarketed on its credit, and (b) it may do so voluntarily to improve investor relations or to give its officials more freedom to speak without adverse repercussions. This additional provision assumes that the issuer will choose to update financial and operating data between annual filings.

APPENDIX C

TABLE OF REFERENCES

“Allen Park Order” means In the Matter of Allen Park, Michigan, Exchange Act Release No. 73539.

“Harrisburg Report” means 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. 69516.

“Harvey Order” means the court order issued by U.S. District Court for the Northern District of Illinois in June 2014 against the City of Harvey, Illinois, Civil Action No. 1:14-cv-04744.

“Illinois Order” means In the Matter of the State of Illinois, Securities Act Release No. 9389.

“Kansas Order” means In the Matter of the State of Kansas, Securities Act Release No. 9629.

“New Jersey Order” means In the Matter of State of New Jersey, Securities Act Release No. 9135.

“San Diego Order” means In the Matter of City of San Diego, California, Exchange Act Release No. 54745.

“South Miami Order” means In the Matter of City of South Miami, Florida, Securities Act Release No. 9404.

“Wenatchee Order” means In the Matter of The Greater Wenatchee Regional Events Center Public Facilities District, Securities Act Release No. 9471.

“West Clark Order” means In the Matter of West Clark Community Schools, Exchange Act Release 70057.

