United States Securities and Exchange Commission

Office of Municipal Securities

First Annual Municipal Market Roundtable

PLACE: Room 1C30
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20459

DATE: Thursday, October 14, 1999

TIME: 8:45 a.m.

OPENING REMARKS

Arthur Levitt, Chairman
United States Securities and Exchange Commission

PANEL I: Bringing Bonds to Market - Issues Arising in Primary Offerings

MODERATOR & Bond Lawyer
John M. McNally
Partner
Hawkins, Delafield & Wood

Panelists
Walter P. Schuetze
Chief Accountant
SEC - Division of Enforcement

Amy Meltzer Starr
Special Counsel
SEC - Division of Corporation Finance

ISSUER
J. Ben Watkins III
Director
State of Florida Division of Bond Finance

UNDERWRITER
Barry T. Smitherman
Managing Director and National Head of Municipal Finance
Banc One Capital Markets, Inc.

FINANCIAL ADVISORS
William W. Cobbs
Chairman
Public Resources Advisory Group

Robert F. Sikora
President
Munistat Services, Inc.

NRMSIR
Joseph F. Sensale
Product Manager
Standard & Poor's

INVESTOR
Christopher M. Ryon
Principal
Vanguard Fixed Income Group

PANEL II: After the Closing - Issues Arising Throughout the Life of a Bond Issue

MODERATOR
Paul S. Maco
Director
SEC - Office of Municipal Securities

Panelists
Catherine McGuire
Chief Counsel
SEC - Division of Market Regulation

ISSUERS
Alan L. Anders
Director of Financing Policy and Coordination
City of New York Office of Management and Budget

Paul K. Burbine
Financial Director
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UNDERWRITER
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BOND LAWYER
Monty Humble
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Vinson & Elkins L.L.P.

NRMSIR
Peter J. Schmitt
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DPC Data, Inc.

INVESTOR
Richard A. Ciccarone
Senior Vice President
Van Kampen Investment Advisory Corp.

FINANCIAL ADVISOR
Robert F. Sikora
President
Munistat Services, Inc.

PANEL III: Electronic Disclosure

MODERATOR
Catherine McGuire
Chief Counsel
SEC - Division of Market Regulation

Panelists
Michael R. McAlevey
Deputy Director
SEC - Division of Corporation Finance

ISSUER
Frank R. Hoadley
Capital Finance Director
Department of Administration, State of Wisconsin

UNDERWRITERS
Joanne Mays Becker
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MSRB
Christopher A. Taylor
Executive Director
Municipal Securities Rulemaking Board

INVESTOR

Mary J. Miller
Municipal Department Director
T. Rowe Price Associates

PANEL IV: Fiduciary and Other Duties of Transaction Participants

MODERATOR
Meyer Eisenberg
Deputy General Counsel
SEC – Office of the General Counsel

Panelists
Paul F. Roye
Director
SEC - Division of Investment Management

ISSUER
Ann Butterworth
Assistant to the Comptroller of the Treasury
State of Tennessee

UNDERWRITER
Thomas E. Stanberry
Director of Fixed Income Capital Markets
U.S. Bancorp Piper Jaffray Inc.

FINANCIAL ADVISOR
Robert C. Bendzinski
Chairman
Bendzinski & Co.

BOND LAWYER
Fredric A. Weber
Partner
Fulbright & Jaworski L.L.P.

ACADEMIC
Tamar Frankel
Professor of Law
Boston University

INVESTOR
Thomas J. Kenny
Executive Vice President and Director of Municipal Bond Department
Franklin Templeton Group

CLOSING REMARKS
Paul S. Maco
Director
SEC - Office of Municipal Securities

OPENING REMARKS

CHAIRMAN LEVITT: Thank you very much and good morning. I am delighted to see all of you here, many of you professionals who work in this market as a daily undertaking and a number of municipal officials. I really identify with those officials. I welcome your presence here.

As you probably know, my father spent much of his life as comptroller of the state of New York. And part of my career has been spent working with many of you. And I'm glad you're here in our home today and I hope in a spirit of consensus and cooperation we can further the goal of working together. There are very few absolutes in life. I think all of us care passionately about preserving America's markets and I think all of us share our concern for protecting the interests of America's investors, not necessarily by regulation or legislation but more by full disclosure.

We have a number of moderators today that have given their time to make presentations. I am really very grateful for that. And the superb staff that has put this conference together is one that I owe a great debt of gratitude to.

Over the past year, a lot of time has been dedicated to issues involving regulatory modernization, market structure, which has certainly been in the forefront in recent weeks, and financial reporting, which has been in the forefront for a number of years. One of my first priorities when I came to the Commission was in the municipal market, and it remains an area of immense importance. I'm glad we can all gather today to assess where we've been – and more important – to focus on where we're going.

I suppose that all of us to greater or lesser degrees develop attitudes as a function of our experience. And I, too, having worked in the municipal market have developed feelings and attitudes that relate to that experience. I guess at heart I'm still a broker. I still resonate to the interests of those wonderful retail customers that I dealt with for many years. As a matter of fact, I miss that part of my life from time to time. But their attitudes about our debt markets, what motivated them to a very considerable extent impact my views and my goals and my objectives.

And, certainly, when I first came here the need for reform in the municipal bond market was obvious. The $1.3 trillion market which was once the domain almost exclusively of institutional investors has either directly or indirectly been taken over by individual investors. And I'm not sure that practices have evolved accordingly. Official statements in primary offerings had been all but impossible to obtain and, if available, the disclosure that we were seeing was less than desirable.

The voluntary efforts to improve that condition I think were useful efforts but they produced very few tangible results. After issuing bonds, few of the 52,000 issuers of municipal debt provided any kind of ongoing disclosure, and no central place existed to which an investor might go to find out the current condition of a bond that was issued some years ago.

That same investor had no ready means to find the current price of bonds he held, or even to determine whether the price he just paid was fair. Transparency simply didn't exist. I don't have to tell all of you that the core of our securities laws, the antifraud provisions, governed transactions in municipal securities, but municipal bond matters rose to the enforcement agenda infrequently.
Regulators simply didn't have audit trails and they worked in a certainly uncoordinated fashion to police the market.

What's more, corruption, conflicts of interest that could have stirred the envy of Boss Tweed had tarnished the reputation of the municipal market, overshadowing the many honest and diligent people who work there as well.

I'm chided from time to time by talking about such issues. Believe me, having worked in this market I know full well that over 95 percent of the people who work in the market are good, honest, decent, sound people. But that doesn't mean we can turn away from the charlatans, the crooks, the one who prey on investors, the ones who dissemble. We are going to be more and more active in that arena. But that is not to say that all of you shouldn't share that same interest.

When I speak of this industry I speak of it as a good, honest, fair, progressive industry. When we speak about the bad people in it we have no sympathy.

There was a magazine several years ago that labeled the market as America's notoriously corrupt municipal bond market. I think that kind of publicity is very, very destructive and left us with very little choice but to act. I put municipal bond reform at the top of the Commission's agenda. And I say, fortunately, many of you did as well. We formed a partnership between the Commission and those in the industry and we crafted a framework for secondary market disclosure through the amendments to rule 15c2-12.

Like any group of regulator and regulated, we didn't see eye to eye on everything. But I think we developed a healthy respect for one another's views. Our efforts were certainly the result of any catastrophe, which took place in the market, but they were a product of a consensus view. We hoped that our reforms would be well in place before the next crisis. Little did we know how soon it would come.

Within the month of our adoption of continuing market disclosure, and some months away from the effective date, Orange County filed for bankruptcy in what remains the largest municipal bankruptcy in the history of the nature. But as often happens, out of the ashes of this tragedy came many important and timeless lessons, such as the need for both prudent management of public funds and adequate disclosure of purposes of governmental borrowings and the risks associated with such financings.

Many of our settled proceedings during this time break out the reports of corruption that we found so disturbing and so prevalent six years ago. We initiated and settled proceedings involving hidden payment arrangements, conflicts of interest and kickbacks from New England through the mid-Atlantic, the South, and the West by regional and national underwriting firms. Other proceedings involved yield-burning. Several proceedings remain pending before the courts or the Commission, or are under active investigation.

The message to investors, the message to our markets I think is clear: our Enforcement Division is now a permanent part of the municipal landscape.

Only a few weeks after I was sworn into office, I said to the Congress that "to some observers, the most significant flaw in the municipal securities market is the lack of trading information available to investors and market professionals." Today, in addition to centrally available continuing disclosure for most municipal issues, next-day price and volume information is now available for municipal securities trading four or more times during a trading day. The MSRB has proposed to expand the data available and provide it free of charge over the Internet to subscribers. The Board expects this data to cover on average 9,000 individual transactions in approximately 1,000 frequently traded issues each day.

This MSRB program also provides the Commission and the NASDR with audit trails, reports of essentially all inter-dealer and all customer transactions. Regulators now have available the footprints of fraud in market transactions. Additionally, this data offers information on municipal market trading activity that was never before gathered in any one single place.

Six years ago, I also asked market participants to act together to ban the practice of pay-to-play, the selection of underwriters and other professionals based largely if not exclusively on political contributions. The dealers quickly responded through adoption of the voluntary ban and the MSRB followed with adoption of Rule G-37. This spring, the dealers were joined by independent financial advisers, who embraced a voluntary ban.

However, one significant party at the transaction table has failed to adopt even a voluntary ban - the lawyers. It is unfortunate that the one group of professionals that has a code of ethics is unable to come to terms with a practice that unfairly casts its shadow over those awarded legal work by elected officials.

This summer the American Bar Association failed to seize the opportunity to incorporate prohibitions on pay-to-play into its model rules of professional conduct. This is nothing less than a shame. Their clients are far ahead of them in occupying the ethical high ground.

For us, of course, ending pay-to-play is and always has been a matter of market reform, not campaign finance reform. Recent events, such as the conviction of the treasurer of the nation's second largest city for extorting campaign contributions from a manager of public funds, starkly illustrate the problem.

It's been said that trust is won with difficulty and easily lost. Municipal bonds and the municipal bond market have enjoyed a solid reputation because of the valiant efforts of people like you here today. We must all work to maintain and enhance public faith in this critically important market.

This morning, at what I hope and expect will become an annual event, we take another step to help ensure the municipal markets are even more transparent and more trustworthy. As you know, we have designed the Roundtable around a series of panel discussions. I'd like to mention a few of the panel topics, and raise some additional, more specific questions that I would hope would be addressed in these discussions.

The first panel will address the issue of primary offering disclosure. Among the questions that should be asked are who should be responsible for disclosure - issuer, underwriter, lawyer, or perhaps financial adviser? Are underwriters given sufficient time to review those disclosure documents? Whose documents is the Official Statement? Has there been a change in disclosure since publication of the Commission's 1994 interpretive release? Are conflicts of interest being adequately addressed in disclosure?

After that, the second panel will concentrate on secondary market disclosure. First and foremost, has continuing disclosure consistently taken place? If not, why and where exactly do the problems exist? Are financial statements and other information reviewed from material changes prior to filing? Has a failure to provide financial information by a deadline been filed with the appropriate bodies?

This afternoon, we will discuss electronic disclosure, an issue that is on the minds of all market participants. I would be interested in knowing if potential customers are, in fact, requesting electronic delivery. What qualifies as an investor's consent for receiving electronic disclosure instead of disclosure through the regular mail? What concerns do issuers have about electronic disclosure?

I know that most of you are familiar with the city of Pittsburgh's move to sell bonds directly over the Internet. I kind of think that this is just the beginning of a broader move to the Internet by issuers. If so, what impact is this going to have on the marketplace?

In recent speeches in conferences I have signaled the Exchange's willingness to consider technology as an ally, not as an enemy, to seek new ways of reducing costs and providing additional disclosure and information. This is clearly right on target in terms of what we expect to do with electronics.

And, finally, today's roundtable will focus on the scope of fiduciary duty owed by professionals in a municipal bond offering. What precisely are the functions and responsibilities of a financial adviser? And do underwriters have a similar fiduciary duty? What type of conflicts of interest arise? And, under what circumstances do bond counsel have disclosure duties?

Now, some of you are probably thinking of the line, "Question everything. Learn something. Answer nothing." Well, I hope that together, we may be able to develop some of the right answers. During these roundtables I pledge to you that we will listen and we will respond when appropriate. We will continue to offer guidance beyond today's dialogue, either formally or informally, through interpretive guidance.

In that spirit, I hope all of you will ask some tough questions and respond with frank and honest answers. If you think that a current practice doesn't serve investors' interests, speak up. If you think that a Commission rule or position is ineffectual, please sell – tell us.

If after six years of nearly monthly testimony before different committees of the Congress, who seek every opportunity to tell me what we may be doing wrong, if I haven't been insulated against criticism I guess I never will be. It's useful to have you tell us not what you think we want to hear but to tell us how we can do a better job, how we can be more constructive. It's in that spirit that this group has been convened. It's not going to answer every question. It won't solve every problem. But it should be the beginning of an ongoing dialogue, reduces some of the tensions, moves us forward in a constructive way.

Each of us has our own jobs to do and different responsibilities. But a market that isn't open, isn't fair, isn't efficient, isn't competitive is a market that's going to lose itself to over venues. You recognize that and we do as well.

In that spirit, with those goals, with that objective let's see whether we can come out of this day with a better feeling about where each of us are and where collectively we can go together.

Thank you very much.

(Applause.)

MR. MACO: We'll ask our first panel to assemble and we'll shortly begin the first of today's four panels.

PANEL I: BRINGING BONDS TO MARKET - ISSUES ARISING IN PRIMARY OFFERINGS

MODERATOR McNALLY: Good morning. Welcome to today's first panel. My name is John McNally and this is primary offering disclosure.

As indicated by Chairman Levitt, we do have representatives from every industry group - we have issuers, the SEC staff, financial advisors, underwriters on each panel. And we're going to try to take advantage of that because we're not going to be instructing. I'm not going to be speaking as I normally do on SEC enforcement actions. Rather, it's really a dialogue to just see how the market is working today, to see where there may be some areas for improvement, and just to go from there.

The structure we've outlined is we're going to begin with how official statements are prepared and who has the responsibility for the preparation and also for the document itself.

We will then consider how the market has responded to the SEC's 1994 interpretive release, and that was the release, if you recall, in which the SEC said there are six areas where improvement is needed. And we will go through each one of those areas and just see where the market is.

At the risk of sounding like an SEC staff member I have been asked by my partners to advise I am speaking today on my own behalf and not on the behalf of either Hawkins or of the National Association of Bond Lawyers. As Paul indicated, there will be questions from the floor that can be taken. And we'll pick the cards up. Then as the moderator I will filter the questions and ask the ones that are appropriate.

Let's begin with the official statement disclosure. And if I can ask the panelists who today is actually preparing the drafts? Who puts these documents together? What's been the experience of the panelists?

Either Billy or Barry if we can start?

MR. SMITHERMAN: You know, I think the answer to this, John, is a resounding it depends on the type of transaction and the complexity and whether it's a negotiated transaction or a competitive transaction. And I think we'll speak to this over and over today. Obviously it's the issuer's document but there are a lot of cooks in the kitchen that normally add their expertise and insight into the preparation of an official statement.

In a negotiated transaction you would expect the underwriters and underwriter's counsel to be more intimately involved. In a competitive transaction you would expect the financial advisor to be more intimately involved. And I think the issuer's involvement is probably about the same in both types of deals.

Billy?

MR. COBBS: I agree. With the one exception that I think it is the issuer's document that we all have a responsibility, all have liability if it's incomplete or false disclosure. Although in a negotiated transaction underwriter's counsel will have primary responsibility. And usually a lot of folks sitting around the table give their input. And I think it's everybody's liability. In the competitive transaction I think bond counsel would probably take the lead working with the issuer and the with the financial advisor's input. But, again, as I say, it's a collective undertaking and everybody is responsibility although probably the issuer has got the primary responsibility as far as the OS as being the issuer's document.

MODERATOR McNALLY: How often as financial advisor on a competitive deal would you actually do the preparation or would there be counsel that would prepare it?

MR. COBBS: One time I wrote Princeton University's first official statement, having gone to Princeton and it was a real challenge to write my alma mater's first OS from start to finish. I think that's the only time – rewrote New Hampshire's OS back in the early '80s but they had a trouble. They'd fall from AAA to A and they were really in a mess.

But by and large if it's a first time issue like something like Los Angeles Wastewater or San Diego Water or ECA, all those – well, not all those, Los Angeles' was competitive but bond counsel took the lead on that and financial advisor and the issuer. So you sit around a table and everybody makes comments.

MODERATOR McNALLY: Are you seeing more use of disclosure counsel since the **--**

MR. COBBS: I'm sorry?

MODERATOR McNALLY: Are you seeing more use of disclosure counsel since the **--**

MR. COBBS: Probably less. I would say probably less since the first, you know, New York City, since they pulled back from their fiscal crisis, although they have disclosure counsel still on GO they don't have it on the transitional finance authority which is securitization of the income tax receipts. And we don't see a lot of disclosure counsel. It's used sometimes but, frankly, I kind of find it's used to try to find a place for it, more than it is, it's necessary. Because things are so good right now that it's probably not those kind of exposure issues. Probably we see it less and less.

MR. SMITHERMAN: John, I would add that it depends upon the markets as well. You find some financial advisory firms that do a large volume with a number of very small issuers. And I think in those instances you would find that the staff of the financial advisors would be heavily involved in drafting the offering document obviously in conjunction with the issuer. And the first time that a lawyer may see the document is when it's almost ready to be printed. And that's a function of the fact that they're doing 500 deals a year.

MODERATOR McNALLY: This is a competitive situation?

MR. SMITHERMAN: Primarily in a competitive situation.

MODERATOR McNALLY: And in that instance where you seeing it just at the last minute I mean just what do you do as far as your responsibilities to look at the documents? I mean just what is the level of review?

MR. SMITHERMAN: Well, in a competitive transaction I think the level of review would be the same regardless of whether the document had been drafted by lawyers or by the financial advisor.

In a negotiated transaction we try to get in as quickly as possible and have a due diligence session with the issuer. We would, you know, normally get our underwriter's counsel in and meet with the issuer and try to get as much information as we could, not interrupting the proposed timetable for the financing. But it can be challenging.

MODERATOR McNALLY: And who are you seeing providing the opinions as far as the disclosure? Is that coming normally from underwriter's counsel or is that coming from bond counsel? Who speaks to the OS?

MR. COBBS: It's the issuer that – the 10(b)(5) certificate. And frequently bond counsel does to. And in negotiating sometimes I guess underwriter's counsel does – I'm sorry. Sometimes underwriter – The issuer is primarily responsible for a 10(b)(5) certificate.

MODERATOR McNALLY: Yeah, but I'm speaking about whether or not I mean who provides the various opinions as far as the nature of the disclosure? Does that depend on who's drafting? Does it depend on whether it's competitive or negotiated?

MR. SMITHERMAN: Well, in a negotiated deal we'll get an opinion from underwriter's counsel. I try to always get certificates from everyone who came close to the deal. Anyone who was responsible for any section of the offering document I'd like for them to give me a certificate attesting to the accuracy of the information. I don't always get it but I try to get it.

MODERATOR McNALLY: Let me ask more broadly, has there been any change over the last four to five years as far as who's preparing it, who provides the certificates, who provides the opinions? In light of the enforcement cases, in light of the various continuing and primary disclosure, or at least as far as who prepares it and who provides the opinions and the certificates has that pretty much stayed the same during the last few years? Has there been any evolution?

MR. SMITHERMAN: I'd like to hear Ben's answer.

MODERATOR McNALLY: Ben?

MR. WATKINS: I think it's really stayed the same. And it's really the practical reality of producing the documents. And you've got the disparity between large and small issuers. And I think that drives to a great extent who's involved in the process and exactly who's responsible for the preparation of a document. With large, frequent issuers in our case in the state of Florida we've got the critical mass and the staff onboard necessary to do the preparation work in house. And there are a number of people here, Frank Hoadley and I'm sure Art Heilman in Wisconsin and Pennsylvania, so large frequent to a great extent are handling document preparation in house.

But when we move down the scale into sort of the middle markets and smaller issuers they don't have the technical expertise and the familiarity necessary to do a good job. And in those cases you see either the financial advisor or the underwriter to a great extent or underwriter's counsel taking the lead role in preparation of the document.

So I don't see that that has really changed. I think the awareness of whose responsibility it is has been affected by the release and made it very clear that the issuer is primarily, the issuer is responsible for the document from a securities law standpoint.

MODERATOR McNALLY: So to summarize, there's been really no change as far as how it's prepared, who provides the opinions, who provides the certificate, but there has been a change in the perception as to whose document it is.

Let me speak to 15c2-12. Has there been any change in the way the document's prepared in light of 15c2-12 in the sense that does the obligated person concept influence how you structure the OS? Does the concept of what do you have to provide on a continuing basis, the financial information and operating data, does that alter or influence how you structure the OS? I mean just what is the interplay, if you will, between 15c2-12 and the preparation of the document initially?

MR. WATKINS: We are more, with the disclosure requirements we are more mindful of where we get the information, that how relevant the information is and how difficult it is to get. And if that information is not absolutely essential to the deal we will strip it out, especially if it's very difficult to obtain. Overlapping debt tables, competitive rates on multi-family housing units within a particular jurisdiction, things like that are not – while they're informative they're not necessarily critical to the credit. And when that information is very difficult to obtain we'll leave it out.

But we're not consciously going through and saying, oh, we've got to update this so let's leave it out. But I do think that there has been advice from the legal community to minimize disclosure as a result of in order to try to minimize the chance of their being any misstatement, to minimize and only say the things that you need to because of the ongoing obligation to update the information.

MODERATOR McNALLY: Chris, what's been your experience as far as an investor, are you seeing a change in the disclosure since 15c2-12? And I'm speaking peculiarly to the primary offering document.

MR. RYON: We've seen it get better, take a leap forward, and now has become more difficult and more difficult to get good information and varied information in terms of disclosure in the primary documents. For example, assessment rates are one area where tax assessments have not been forthcoming. They've been lagged. And they've been available in other public sources.

So we have seen a, we have seen, as Ben said, the disclosures start to be – fall back a little bit.

MODERATOR McNALLY: When you say fall back you're saying that you're getting less now than you did prior to the 15c2-12?

MR. RYON: We had a first, we had a good step forward where we had good disclosure because of the rule. But now we're starting to see issuers kind of move back a bit as to what they're disclosing. They want to make it the smaller amount because they realize they have to continually disclose. And getting information that's not in the official statement is becoming more and more difficult for us.

MODERATOR McNALLY: I mean to ask the obvious questions I guess, I mean from your perspective is all the information that's material to your investment decision in the OS? Or are you having to get other information from other sources you think is material before you would invest?

MR. RYON: Sometimes the information that's in the OS will bring up other questions. And then we have to ask for other information to answer these questions. And we continue to request that.

It will, it will color our overall opinion of the credit at times.

MR. SMITHERMAN: Chris, when you're looking for this additional information what's the procedure that you take, do you call the issuer up directly? Do you call the financial advisor?

MR. RYON: Typically we'll go to the issuer or the underwriter and we'll request the information. And many times we're told that, you know, they feel that they can’t provide that to us because they'd have to provide it to everyone in the market.

MS. STARR: Are these generally retail or institutional deals or does it make a difference?

MR. RYON: Pretty much primary deals, institutional deals that we will see. Larger ones.

MR. SMITHERMAN: Well, all I can say is you must not be calling Banc One. We're more than happy to give you all the information.

MR. WATKINS: Different issuers have different takes on that. There's some reluctance on the part of some issuers to give information to certain people, to answer inquiries of investors. But I can tell you from the state of Florida's standpoint we welcome any inquiries and we will address those inquiries on a one-on-one basis.

If we feel that an investor has raised an issue that has general application or general interest to the market we will make – we will write it up in a form and disseminate it to everyone. And that's a web page is extremely helpful because you get instant dissemination to the entire market. So from a best practice standpoint I think that's the way to go.

The other thing is in a lot of cases we will try to correct misinformation in the market, issues that had been misreported by the press. And those are the things that generate more discussion than the individual inquiries from investors. And so it again provides an opportunity to sort of set the record straight. And our philosophy may not be pervasive in the issuer community but, hopefully, that will evolve over time

MODERATOR McNALLY: There is going to be a secondary disclosure panel which will get into the obvious issues as to whether – how the issuer responds to the inquiries that come in, in the marketplace, whether there's insider trading concerns, etc. But I'm trying to focus peculiarly on the primary offering.

And were you speaking to when you're out there with the POS and OS you're getting these inquiries?

MR. WATKINS: We typically don't get any inquiries while we have POS on the street. I mean it is very infrequent that we get inquiries from issuers. I'm surprised at how infrequently it does occur. Maybe one a week.

MR. RYON: The inquiry is going to be dependent upon what the credit is. You may need more information, say, for a hospital deal than you would for a state GO deal.

One of our analysts' pet peeves is that a lot of times you'll have the rating agencies get more information than we're getting. And we're told that we can't have it because, again, they'd have to make it available to everyone in the market.

MODERATOR McNALLY: Is this in the – I'm sorry – is this in the primary market? When the issue is out there on the street and they're trying to sell it?

MR. COBBS: Yes. Sometimes you get questions. New York City is the best example. We go around to investors and we get questions back. And what we do, New York City does, is we sit down at Munifax and it informs the entire community. And that addresses Chris' concern, and you don't have a risk of insider information.

MODERATOR McNALLY: And I think the real concern is you get these inquiries while you're out there. And even though you think you've done the best you can --

MR. COBBS: Yes.

MODERATOR McNALLY: – with the document some question comes up that indicates perhaps there is some material thing that should be out there in the marketplace.

MR. COBBS: Then you put it on the Munifax.

MODERATOR McNALLY: And the question is what do you do at that point?

MS. STARR: Do you also then make it part of your OS?

MR. COBBS: Yeah, next time around or in the final OS. But you make it Munifax and that way Chris gets his information and there's no risk of insider information.

MS. STARR: The one question I had was does the level of disclosure in the OS is it different if it's an institutional as compared to retail deal?

MR. COBBS: The official statement **--**

MR. RYON: Some deals.

CHAIRMAN LEVITT – You made that point earlier, you don't go out and just sell, hardly ever it's entirely retail. You have the same document for both. Chris doesn't get favored treatment. We'd all get busted for that.

MODERATOR McNALLY: Well, I think we've had a consensus that, at least among the non-issuers, that it's the issuer's document.

(Laughter.)

MODERATOR McNALLY: And this does go back to the SEC's, all the way back to the SEC's '89 release issuers are primarily responsible for the content of their disclosure documents and may be held liable under the federal securities laws for misleading disclosure.

In light of it being the issuer's document and the underwriter nevertheless having their responsibilities to review and inquire, I'm questioning what people think of disclaimers, both generally and also the most recent BMA proposal on this? Let's start with the underwriters. I mean how do you view the disclaimers? Are they protective? What do you think you're accomplishing through the disclaimer?

MR. SMITHERMAN: I think what the disclaimers are designed for is just to somehow bring uniformity and a bright line to the issue of the standard of care that's required of underwriters in the disclosure process.

I think the thing that the underwriting community, this is my belief and assumption, is that the standard or care is not one of scienter or negligence but in some cases one of strict liability, and that that is not a standard of care that we should be held to. Certainly not in all transactions. As I said at the beginning, there will be transactions where the issuer and the investor desire us to be intimately involved in making judgments about the accuracy and the adequacy of disclosure.

But then there will be times when they won't desire it and we'll get an offering document, be expected to make a bid on it the next day. And in that case, you know, I can't see how we're supposed to be able to pass judgment on any part of that document.

MODERATOR McNALLY: And, therefore, what? And, therefore, you think the disclaimers are appropriate?

MR. SMITHERMAN: I think that the disclaimer that has been proposed – and I have a copy of it by the TBMA, and I was not involved in drafting it – I think it is an attempt to come up with some consensus on a disclaimer that does not rely upon the circumstances surrounding the transaction in a hindsight mechanism to determine three years down the road whether the underwriter's review was adequate or not.

MODERATOR McNALLY: Chris, I mean how do you – Do you have any concern with the disclaimers? What is your position as an investor on that?

MR. RYON: Again, it's hard to say for all cases. If you're looking at a state GO, well, you view the disclaimer one way. If you're looking at higher risk area, for example a lower rated healthcare deal, you'll view that disclaimer another way and it will color your opinion differently on whether you're going to buy the credit or not and what your confidence is in the underlying security.

MS. STARR: Let me ask a question. Given the Commission's statement with respect to the responsibilities of underwriters and their obligations with respect to forming a reasonable basis are underwriters and others being advised that the disclaimers actually have an effect of limiting the liability of the underwriters with respect to the disclosure in their document and minimizing the responsibility?

MR. SMITHERMAN: I don't think it's nearly that uniform. I mean I have never seen any kind of directive either from my firm or from any of the associations that this is what you're supposed to use and that this will somehow lessen your responsibility.

MODERATOR McNALLY: It was a leading question.

MR. SMITHERMAN: Yeah, I know. I'm trying to respond to it in the best way I can.

MODERATOR McNALLY: You need counsel.

(Laughter.)

MR. SMITHERMAN: I think that there are a host of different methodologies for trying to approach the issue. And I think that TBMA is attempting to try to craft something that can be used uniformly by all underwriters and all transactions.

Yeah, it's, I mean it's an incredibly interesting issue. I have to tell you of a story of myself. When I joined Banc One we had a certificate that our compliance department wanted all the bankers to sign that basically had this language in it that we had reviewed the offering document and we were certifying to its accuracy. And I came in and said, well, I don't think we ought to sign that.

And she said, well, you know, this is what the Commission requires. And I said, well, it may require that the firm stand behind it but why does it have to be the individual banker? Why can't it be the underwriter or someone else in the department? And, as you can imagine, I didn't win that battle.

But I think that it's an issue that needs, it needs more conversation.

MS. STARR: Let me ask just a question – and I'm sorry, John, to – From an investor's standpoint if you buy a deal that has a disclaimer in it do you – have you been advised or do you get any sense that you think that you may have waived any ability that you have to sue as a result of that disclaimer?

MODERATOR McNALLY: No.

MS. STARR: And that, you know, that's one of the key questions is does the existence of the disclaimer in fact mislead investors into thinking that they have potentially waived any rights that they have to, to sue any of the participants in the transaction.

MODERATOR McNALLY: Yeah, and this goes back, and Amy pointed this out to me, this goes all the way back.

First of all, there was the more recent '94 release of the Commission where there was the footnote "disclaimers without further clarification are misleading." And it was referring to the fact that there are responsibilities of underwriters set forth in the '88 release. And to the extent they're simply a disclaimer that may be misleading.

But I think it's interesting that it says "without further clarification," implying that perhaps a well drafted disclaimer could work.

Amy was referring I think at least in part to the '51, 1951 release from the SEC, actually it was a opinion of the general counsel at that time. And in speaking to disclaimers there's some very interesting language about the question being whether or not the reason for the disclaimer is to create the impression that in any way there has been a waiver of any right of action against the underwriter. And that's why it's very interesting to determine just how the investors do perceive these disclaimers.

But, once again, similar to the '94 release it did go on to say, and this is speaking to a disclaimer which sounds very familiar, "a legend in common use stays in effect that the information is obtained from specified sources and is believed to be reliable but its accuracy is not guaranteed." It goes on to say, "it is my opinion that the mere use of this legend is not objectionable."

So there has been no SEC position to the effect that absolutely blanket disclaimers are wrong. However, to the extent they are intended to mislead as far as what your right of action is or what your responsibilities are as an underwriter, then it is objectionable.

MR. SMITHERMAN: Yeah, John, what I would like to see, and I don't know if we'll ever get there, is disclaimers and language that really reflects the nature of the agreement that the underwriters and the issuers have struck with regard to how much input the issuers actually want from the underwriters when it comes to crafting it. And, Chris, I'd like your comment on this.

And it seems to me that there are deals where you absolutely are looking for the underwriter to give you some comfort on the deal. And there are other deals where I mean you don't care.

MR. RYON: Again getting back to what sector is the credit in, what is the credit itself? If it's a well-known credit, if it's the state of Florida, we're pretty confident we understand what's going on in that area. If it's not, where if it's a negotiated deal where the underwriter is a key, is playing a key role in bringing that credit to market we're going to look to the underwriter first to have much more liability in something like that.

MS. STARR: But I think the thing is you need to keep in mind is that you can't contract away your federal securities law responsibilities.

MR. COBBS: I think they should be almost a double, a dual standard, a double standard. I don't think you can – I'm not usually on the side of underwriters, I represent issuers and I fight with underwriters – but I think underwriters in competitive sales should not have the same level of liability as they do in a negotiated sale. They are not part of the process of developing the OS. And they get it you said the day before an issuer, and it's very, very difficult to be held to the same standard.

The one way I see to get around this is that you don't, with low rated transactions you can't sell them competitively. So you don't really run into this problem and you don't have much risk of having a blow-up. But I just don't see how you could rally ask an underwriter when he gets an OS on a competitive sale to have the same knowledge and the same level of liability after they sit around for weeks or months developing an OS.

MODERATOR McNALLY: Well, I mean I think in **--**

MR. COBBS: Don't think that's fair.

MODERATOR McNALLY: Yeah. Well, you appear to be directing that at Amy. And in her defense I don't think that is the SEC's position.

MR. COBBS: Okay.

MODERATOR McNALLY: There are different standards depending on whether it's competitive or negotiated. The '88 release as far as competitive at least it's a matter of reading it and asking questions if they're not apparent on its face and following up. There is considerably more required as far as a negotiated.

And along those lines at the risk of saying I wouldn't do this, as far as lecturing, the BMA disclaimer in my view has some problems with it. The way it reads is "In accordance with its responsibilities under the federal securities laws the underwriter has reviewed the information in this official statement but does not guarantee its accuracy or completeness."

And the premise that the BMA operated on, to quote from their release, "In drafting Section (b)(1) of the rule the Commission relied on a single word 'review' to signal the responsibilities of underwriters under the federal securities laws." And, just briefly, I think that's a misreading of the '88 release because when you read the '88 release it really speaks of review as being the starting point. And once you review it in a competitive situation you have to follow up. If you're reviewing a negotiated it's just one element of an overall due diligence inquiry.

And the mere fact that a procedural rule, if you will, which is 15c2-12(b)(1) which says you have to review prior to offering, does not mean that that in and of itself is sufficient. Nevertheless, I think you can draft a disclaimer, I think there's nothing prohibiting the disclaimer as we see it in the releases. And I think it is appropriate, as the BMA outlines, to try to set forth to the investor, if you will, the respective responsibilities of the issuer and the underwriter.

And in doing that, BMA had three standards it wanted to make sure were met. One, the official statement is the issuer's document, which we all agree. That the underwriter has reviewed the document, as required. And, that the underwriter does not guarantee its accuracy or completeness.

My proposal would be something to the following effect – and, Amy, I would like to see what you think of this, whether it works, maybe you can't comment – "The underwriter has reviewed the information in this official statement in accordance with and has otherwise satisfied its responsibilities under the federal securities laws but does not guarantee the accuracy or completeness of the official statement." It meets what I understand to be the BMA principles. It distinguishes the respective responsibilities but it avoids the implication that a mere review is sufficient.

MS. STARR: Well, actually let me step back a minute because I, of course, forgot to give my disclaimer which is anything I say represents my views not those of the Commission or my colleagues on the staff. And, no, I couldn't comment.

(Laughter.)

MR. WATKINS: Amy can't comment, John, but I can. You know, we've sort of danced around this issue a little bit but in my judgment I mean the disclaimer is there for a reason. And it's there, rest assured whether it affects the standard or not it will be defense exhibit number 1. And I think it's completely ineffective to change anyone's legal liability in a deal. I mean, if a deal goes south, look left, look right, you can rest assured you're going to be named as a defendant in the lawsuit. And the language that's been proposed does nothing to change that.

And if what we're attempting to do is inform investors about what the underwriter's level of involvement has been, the standard does not review – the standard – the review is not the standard as the position paper sets forth, the standard is having a reasonable basis for believing the key representations. That's the standard. The review is the physical act that's required.

And so if there's going to be – I don't have any problem with disclaimers if it's appropriately tailored to address whatever information is being delivered. But just a general disclaimer that you don't guarantee something I think is ineffective and should not be used. And if it's going to be used and we're going to develop some sort of standard to put in it needs to go further and explain to the investor what the underwriter's responsibilities are under the federal securities laws, which is having a reasonable basis for believing the key representations.

MODERATOR McNALLY: Returning to the original theme of trying to see just what's going on in the marketplace today can people speak as far as due diligence sessions, are they scheduled? Is there time in the schedule to properly conduct them? Have they changed over the last few years? Just what is people's experience with due diligence as far as negotiated offerings?

MR. SMITHERMAN: Yeah, I think the answer is a resounding "it depends."

MODERATOR McNALLY: It sounds like calls, facts and circumstances.

MR. SMITHERMAN: It does indeed. You know, my good friend Sylvia Garcia is in the audience from the city of Houston, the controller. And I can tell you that the city of Houston does a great job in conducting due diligence with everyone in the working group. But I don't think that's uniform across the issuer spectrum.

I mean there are some who invite everyone, they invite all the co-managers, they invite all the lawyers. But then there are others that don't. I mean you might be lucky if you have a conference call.

MODERATOR McNALLY: And does that affect whether or not you bid on a transaction, whether or not you think you've satisfied your responsibilities, for example?

MR. SMITHERMAN: You asked about negotiated.

MODERATOR McNALLY: Yeah.

MR. SMITHERMAN: Well, in a negotiated transaction it – obviously I'm going to be more comfortable in a transaction where we have been involved in due diligence unless it's an issuer that we've done a lot of business one, one that I'm very familiar with, one that I have a high degree of empirical and anecdotal knowledge of, then perhaps we don't need as much.

But I get very uncomfortable if it's an issuer for whom we have done no deals and they have not conducted what I would consider formalized due diligence.

MODERATOR McNALLY: But what does "very uncomfortable" mean? Would you nevertheless underwrite the transaction?

MR. SMITHERMAN: You know, I would – Yeah, probably.

(Laughter.)

MR. SMITHERMAN: Depends on the spread.

MODERATOR McNALLY: I thought that might be the answer.

MR. COBBS: My experience is it's not a problem negotiated through due diligence --

MR. COBBS: My experience is there's no problem in a negotiated transaction. There's plenty of due diligence. The problem comes in competitive. And this is why I asked about the dual standard. Underwriters don't get the same benefit. There are no conference calls, there are no due diligence meetings, it's much more cursory. We basically get the document which they haven't helped prepare.

Do you have conference calls, Ben, or do you have due diligence meetings when you sell?

MR. WATKINS: No, we don't. You know, the lines of communication are open. One of the things that we can do in the issuing community and we need to be mindful of, and we certainly do it in the state, is not to delivery an OS – if we're going to execute a competitive deal, is not to print and mail one day and execute the deal the next day. That's really in no one's best interest.

And one of our responsibilities is to make sure the papers get on the street and people have adequate time to review the information. And if you've done your job that should help in the execution of the deal not hurt you. I mean, refundings are a different issue. But one of the things that we try to do is a minimum of three business days for the papers to be on the street to give people an adequate, give underwriters and investors an adequate opportunity to review the document.

MR. SMITHERMAN: One quick comment on what Billy said. I think what is particularly bad in negotiated transactions is when you're a co-manager. There are very few issuers in my experience that include the co-managers. And God help you if you're a selling group member in any due diligence. And, yet, I think you're along for the ride just like a book runner.

MODERATOR McNALLY: We’ve been talking about the due diligence or lack thereof and due diligence sessions at the level of the investment banker. I'd like to ask what the situation is as far as the supervisory responsibility if you will.

Once you've determined to underwrite the deal what is the level of review as far as, if you will, some kind of committee of oversight? I mean just who determines at the investment banker level whether a deal should be brought to market?

MR. SMITHERMAN: Well, that's going to depend primarily upon the issuer, the rating, complexity of the deal. If it's AA-minus City of Houston Water and Sewer or City of Houston GO, that is not going to require much oversight at all. I mean we'll have a call with the underwriters and we'll talk to the salesmen, but in terms of getting someone from compliance and someone up the chain of command.

On the other hand, if it's a single B hospital transaction or a developer-related transaction then we actually have a commitments committee that will assemble itself and we'll talk about whether we're willing to accept the risk of that transaction.

MODERATOR McNALLY: Just as concluding this discussion on the due diligence responsibilities, what I'm coming across more and more frequently in the situation of private placements is the investors say, no, we don't want you, the investment banker, labeling yourself as a private placement agent. And we don't want to be buying directly from the issuer. We want whatever imprimatur we get by having this called a limited public offering by which you underwrite.

Is that something you would ask for, Chris, as far as before you purchase a new security if you saw it was a private placement?

MR. RYON: Not necessarily, no. If we were going to look at lower rated private placements we're going to look at it depending upon what the underlying strength of the credit is because ultimately that's what is going to pay us.

MODERATOR McNALLY: Let me ask it another way, to the extent an investor does come back to the investment banking house and say we'd like you to put a different hat on, not be the private placement agent but be the underwriter, what do you think you're getting by that sort of denomination?

MR. RYON: Well, we're getting the underwriter to be with the issuer if there's a problem.

MODERATOR McNALLY: Barry, is that your understanding?

MR. SMITHERMAN: Well, I think that speaks to the point that I've been making earlier which is I mean some of this is a matter of negotiation and contract, notwithstanding Amy's comments about, you know, these are federal securities requirements. In the type of deal that you articulated, we are being paid to help tell a story on an issue that doesn't tell its own story. And I think in that example Chris is expecting us to put our imprimatur on it. And, yeah, we're liable on that. No question about it, if it goes south, you ought to come after us.

Is that, Chris, your **--**

MR. RYON: Absolutely.

MODERATOR McNALLY: Having this **--**

MR. RYON: I'll probably come after you anyway.

MR. SMITHERMAN: Yeah. You probably will.

MODERATOR McNALLY: You have best success if you say you're private placement.

MR. SMITHERMAN: Yeah, right.

MR. SCHUETZE : John, may I ask, are the external auditors being invited to these diligence sessions?

MODERATOR McNALLY: Yes. They are.

MR. COBBS: Not very often.

MS. STARR: You don't think so?

MR. COBBS: Not very often. I don't see auditors being at due diligence sessions. Again, I go to a lot of them.

MR. SCHUETZE : Is that because of the audit contract between the audit firm and the issuer?

MR. COBBS: No. The most you get is a cursory update. And usually the auditors don't do that. You may get interim statements, six month, you know, financials. And sometimes there's not even a release by the auditors. But we don't see them playing a significant role.

I think one of the most important things, but that happened 20 years ago, was going to GAAP and having statements audited by nationally recognized firms.

MR. SCHUETZE : What do you mean by get a release from the auditors?

MR. COBBS: Well, I mean get a consent. In the corporate market you normally get a consent.

MR. SCHUETZE : Consent to use the auditor's report?

MR. COBBS: You don't, you know, you don't see that nearly so much. That's just part of the contract to have the ability to use the most recent financials.

MODERATOR McNALLY: Yeah. Let's touch upon that because what I'm seeing more and more frequently is that there is a request to include the audited statements. And the auditor will say, that's fine, here is our fee of $12-15,000 for doing that. And I guess the question is, what do you do when you're in that posture? Do you pay the fee? Do you simply say the statements are ours, we're going to include them without your permission? I mean, how are people responding to that?

MR. COBBS: I think most people have to make contracts – Most people have to make contracts that they can use it rather than having to pay a fee every time. That's just ongoing business.

MR. SCHUETZE : Well, but wouldn't that contract also specify that if the auditor is going to sign a consent consenting to the use of his or her report that the auditor then would be able to do the necessary down to date review procedures?

MR. COBBS: I don't see that.

MR. SCHUETZE : You don't?

MR. COBBS: I don't see that, no.

MR. SCHUETZE : I just wonder why the auditors are allowing the consenting to the use of their report which may be months old and then not doing the minimum review procedures that are specified in the auditing literature for accountants. That just sounds strange to me.

MR. COBBS: I just think it's pervasive in the municipal – in the public, public finances as in corporate finance. I just don't think it's there.

MODERATOR McNALLY: What's pervasive?

MR. COBBS: Huh?

MODERATOR McNALLY: What in particular is pervasive?

MR. COBBS: I think that is pervasive in the public finance market as in the corporate finance. Corporate finance they bring down the financials of the most recent period to get a stud period.

MR. SMITHERMAN: So even leaving aside a stud period question, so is what's happening then as far as you see that auditors are not doing their bring down procedures as Walter had mentioned, is there any disclosure in the official statement as to what the audited statements in fact represent and what they don't represent?

MR. COBBS: Well, there will be an appendix usually.

MR. COBBS: There will be an appendix. The auditor's statements will be an appendix for the OS. And that's pretty much it.

I mean do you see anything different, Ben?

MR. WATKINS: Well, we've had a little bit different experience. But your experience is much broader across the issuing community. But we've had a different experience, and that is where the auditors just to a naked consent they are requiring, their internal procedures require premised upon their professional standards, that they do a bring-down. And I don't believe that – I don't – I'm not a – I'm a recovering accountant but I don't – I've read the literature and they're borrowing a concept from the '33 and '34 Act where if an accountant is associated with a registration statement that they have responsibility, they have statutory liability through the date of the registration statement.

So that concept is migrating over to the municipal market and is inappropriate in my judgment. It presents problems for me because all I want is the consent to use their audit report. The audit report speaks as of its date. And I'm not intending to give any – give the investors just by virtue of the fact that I've gotten the consent to use the financial statements the impression that the accountant has done anything.

MODERATOR McNALLY: But, Walt, maybe you can speak, when the accountant says if you want to include this you have to pay this fee, but understand that we're requiring this fee because there's these additional procedures, what are those additional procedures they do?

MR. SCHUETZE : Those additional procedures are primarily inquiry. Inquire, inquire, inquire. Read, read, read. There are almost no substantive auditing procedures that the auditor would do in a down to date review.

Let's lay aside the law for a minute. Let's think about this from a common sense standpoint. The reason the financial statements are there is that A) they're relevant and B) they're material. Now, if they're not relevant and they're not material, take them out. But if they are relevant and they are material, they're in. If they are relevant and they are material then the investor deserves the best information that he or she or it can get. So have the review done and hold the auditor liable for having done what he or she did so as to get the best information to the marketplace. Don't give the marketplace half-baked information.

MR. SENSALE: Just speaking from the norms of perspective of what we've seen so far, and we see almost everything that comes through, the majority of the audited or the financial and operating data that's included in the official statement is to the last fiscal year-end. So if a deal, if a fiscal year-end is March and the deal comes to market in September you're going to lose out on six months of financial data that could have been updated.

So that, there is – we haven't seen bring-down much at all.

MR. COBBS: That's what you get.

MR. RYON: That goes to the question that was raised earlier, when you're in that position you'll ask for maybe unaudited financial statements to see where you stand now. Understanding that they are not audited. But you're going to look to see has there been material that you're going to see changes from the last audit and then pose your questions around that.

MS. STARR: So is the sense that I'm getting then that the only financials then that may be included in OS is, say, that are done six months after a fiscal year-end would not include the unaudited stub period?

MR. COBBS: What I say is that issuers put in their own preliminary estimates. Let's say year-end is June 30, which is typical, and you'd have a transaction in October. And the new audit isn't out yet. You have year-end '98, June 30, '98. And then you have a preliminary results for '99 put out by the issuer. But you don't have an accountant blessing the information. There is no bring-down.

MODERATOR McNALLY: And that's the question I wanted to ask was, Chris, you speak of the financials get sufficiently old that you want to see some stub information. And I guess my question is, is that simply from the issuer or do you want to see that stub information, even though it's unaudited, at least a bring-down review having been conducted? And do you, would you as an investor inquire as to whether or not that had been done?

MR. RYON: I had to join the chorus but again I'm going to say it depends. If it's the state of Florida I'm going to be comfortable with looking at the audited statements and hearing what the state of Florida has to say about their credit and what's happened in the interim period.

If it's a lower rated hospital and I have to look at nine months of stub periods since the last audit I'm going to ask for an auditor to do some work on that.

MR. WATKINS: I would reiterate what Chris says because, for example, on a revenue credit I mean we routinely include stub period numbers. And we look at the corporate model in terms of the timeliness of the disclosure, you know, 45 days after the end of the quarter and 180 days after the – 145 days after the end of the year to determine whether or not we need to include stub period or not.

But that being said, it's – I have to use my judgment as an issuer about whether or not there's value added to have a review performed and involve the accountants. And from a process standpoint that ought to be my decision, not necessarily mandated by regulators about what is appropriate and what isn't appropriate. And in certain contexts, as Chris has mentioned, it's entirely appropriate to have the accountants involved in getting assurance that the numbers you're getting are comparable and have been evaluated by the accountant.

But there are other situations where we are including stub period number where the involvement of the accountants are not – should not be required and are not necessary in order to give Chris the information he needs with the level of credibility that I think is demanded by the marketplace.

MODERATOR McNALLY: But that's you as the issuer – and I recognize it's your document – making that decision. And I guess the question I have for Barry is, I mean are you comfortable knowing that the decision has been made that you're not getting that letter? Or is that better part of your inquiry?

MR. SMITHERMAN: If we can get the letter without the issuer having to pay up for it, that's great. Obviously, we're going to be interested in getting as much comfort as we can. And I'll tell you, there have been times --

MR. SCHUETZE : When you say "the letter" do you mean a comfort letter or do you mean just a consent to use the report?

MR. SMITHERMAN: At times, both. But at a minimum the consent letter to the extent that we can get a bring-down, depending upon how long it's been since the audits were out. And if it's something where we think that that's going to help in the marketing of that particular issue we'll move for that. And, in fact, at times we have made for that. I don't want to make that a general practice for the issuer community, but sometimes it makes a difference.

Other times, again, depending upon the credit if it's, you know, Harris County or University of Texas AAA puff, you know, I'm going to be very comfortable with the information that they're providing without it having to be updated or brought down or a consent letter, anything like that.

MR. COBBS: I think it's more pragmatic. I think it's a question may not get a rating that you want or you may not get buyers unless you have a low graded credit. You may have to come up with a comfort letter as well as a consent. Just but I think it's pragmatic. I don't think being asked to have it, his issuers, I don't think it should be forced on him.

MODERATOR McNALLY: But I guess that the question, Walter, is to the extent that the determination has been made by the issuer that there's been no material changes, they don't think there's any value added, if you will, by the bring-down, they view the financials and the audit report as theirs having already paid for it, what is their potential liability if the audit says, You need my consent, and they say, Well, we're going to publish it anyway? We're going to put it into our official statement. What are the responsibilities there or potential liabilities?

MR. SCHUETZE : I don't know that I have a good answer to that question. I think the auditing community, if I go back to when I was in practice where I did a lot of '33 Act work, the auditors there would be, of course, following the rules. And to the extent that the rules are migrating over to minis the auditors are going to try to do that.

I keep going back to this question about is the information relevant and is it material? If it is, then I suspect we should bring it – I think from the standpoint of market efficiency we should, and best pricing and everything else, we should bring it down as close to as possible prior to the sale.

I don't know what the answer is in the auditing community if the issuer refuses to pay for the consent and the whatever procedures the auditor would do to bring his or her work up to date. Now, it's minimal work, to be sure, it's minimal work. And if there were just a disclaimer by the issuer that the auditor Smith & Smith did the audit as of September 12 and that's the date of their report and nothing more is implied, I don't know what the answer is.

MODERATOR McNALLY: Yeah, I mean you would further, to provide the accurate disclosure you would say that permission of the auditor was not requested so the investor would know that whatever procedure they normally do had not been done. So there is full disclosure of the situation. And the question is can that be done or is there any liability?

MR. SCHUETZE : Well, I don't know about liability.

MODERATOR McNALLY: Yeah.

MR. SCHUETZE : Can it be done? That may be a matter of contact between the auditor and the issuer.

MS. STARR: But I think, John, the other related point though is in the disclosure that you're talking about how do you make it clear that the investor's not misled into thinking in terms of how they're interpreting the audited statements and the audit report as being included? I mean that's, that's one of your key issues that you're looking at is, is the inclusion of an audit report without a consent misleading investors into thinking that, say, nothing has happened from the snapshot date of your fiscal year-end to the date of, you know, your OS?

MODERATOR McNALLY: Yeah, I wasn't proposing you simply include it. Because I think that does create the implication that there has been some additional procedures done. I'm proposing you include it, you say the audit speaks as of its date, you did not ask permission for inclusion and, therefore, no additional procedures were done. Full disclosure as to the facts, and I guess the real question becomes whether or not there is in fact some change which has been brought forth by that procedure.

What we've been touching on is really one of the areas of the '94 release. If you recall, there were six areas the Commission spoke to about areas where improvement is needed and financial disclosure and stale audits was one of them.

Let me go through those areas and then we'll discuss each one of them in turn. The first one was conflicts of interest and other relationships or practice.

The second one was terms and risk of securities, including particularly derivative securities. And, as the Chairman mentioned this morning, very timely did that come out shortly before Orange County.

Financial information, the availability of continuing information, clarity and conciseness and delivery of official statements.

And there's a lot of questions here that have been coming up to me. And I want to let you know that in going through them I think we will address them as we go through these six points.

In particular, let's start with the conflicts of interest. Whoever wants to start. I mean, what is the information, what procedures are undertaken to determine whether or not there is a conflict? And to the extent one is found, what do you do? Is it simply disclosure? I mean, just how is that handled and has that changed since the '94 release?

MR. SMITHERMAN: One practice that we see is a lot of issuers will include in their RFPs a question about do you have any conflicts? And oftentimes that terminology is not defined but it's an attempt to try to get the information on the table before they go about selecting investment bankers. And that, I think that's gaining fairly widespread acceptance.

Billy, do you see that in your product?

MR. COBBS: To me financial advisors have a fiduciary responsibility to the issuer and to the buyers and there's just no place for any sort of thing like this. There should be no fee splitting, which was exposed several years ago. I don't think people should hire consultants to go out and get business. Just like we shouldn't have contributions.

Our firm adhered to G-37 as soon as the underwriters did. We helped SEC get extended financial advisors. I think there's no place in our field for this type of practice. And I just don't think anybody that has a conflict of interest should be out of the transaction.

MODERATOR McNALLY: Barry, I mean you were speaking to the fact that the issuers asked you about conflicts. I mean do you in turn as part of your inquiry determine whether or not there is some conflict between a board member and the obligor on the agreement or whatever? Does it work the other direction?

MR. SMITHERMAN: Probably not as well as it should. And I think it's because it brings into account human nature. I mean, this can get a little sensitive, sitting around the room, okay, who here is related to the mayor within the second degree of consanguinity? I mean, how far do you go with these kind of questions? And I think some of them are very relevant.

I mean, if there is clearly a situation where someone appears to have gotten in a deal because of something untoward, that ought to be on the table. But, you know, you're dealing with human beings and you're dealing with people that you aren't handed people that you want to do repeat business with. And, again, I think what we make as underwriters is a judgment about materiality. I mean, if someone is married to a distant cousin that's, you know, been divorced from the mayor that probably doesn't matter. But some of it probably does matter.

MS. STARR: But what about asking about financial and business relationships between parties, which I think may be where John was really going was, you know, do you ask what I'll call the tough questions as to the various participants down the line in the transaction?

MR. SMITHERMAN: Yeah, we would look to I think a couple sources of information to try to get comfortable. One would be the filings on G-38. I mean, we would know going into the transaction what consultants the co-managers would have. And we would also look to the issuer to share with us any information that they have received through their inquiry. And I think almost all the issuers that we deal with these days have made such an inquiry.

But, you know, we probably don't line people up and say, okay, you know, every one of you spill your guts out and tell me what the deal is.

MS. STARR: Let me take an obvious example.

You've got an IDB financing. One of the board members of the industrial authority has a separate business relationship with the developer or with the president of the company that's getting the $10 million financing. Okay? Now, the question is now where – that's a nice little relationship there. And did the company get the IDB financing because of this relationship and this arrangement? I mean, that's --

MR. SMITHERMAN: Yeah, I, you know, I'm reluctant to get into the whole IDB area because that's completely different.

MS. STARR: Well, no, that's really an example.

MR. SMITHERMAN: I mean it's a completely different set of circumstances. And, you know, I know that some of the releases have spoken to the Commission's efforts perhaps to bring greater regulation in that area when you've got corporations essentially accessing the tax exempt market because they can under statute. I just think that's a completely different set of circumstances.

MS. STARR: Okay, then make it a hospital. I mean it doesn't matter. No matter what test pattern you use the real question is how far down the line do you go into the depths of the transaction itself to make sure that there is not something that people should know about when they're investing? It's not necessarily bad in the relationship – or the arrangements are not necessarily bad but they are things that investors may need to know so that they're able to make informed decisions.

MODERATOR McNALLY: Why do they need to know it? I mean as far as a conflict with how the underwriter was chosen, for example, it may indicate that the underwriter – I'm the investor. I want to know the underwriter is going to perform its obligations and I want to know that it's been chosen properly, it knows what the due diligence procedures are and it's not simply going to put the issue to market without having done that. So as an investor I want to know that relationship.

But you're speaking of relationships between – on a hospital financing that, I mean why are they material to the investor I guess is the question?

MS. STARR: Well, I think one of the questions that the Commission pointed out in the interpretive was, you know, when you have relationships among parties in a transaction it may be that it may not directly relate to the pricing or it may relate to the pricing, or it may be that the money may have been used better for a different type of transaction or with a different party. As an investor do you want to know if, you know, Joe Blow and Sam are, you know, in business together? Does that – Is that relevant to you or is it not relevant, I mean?

MR. RYON: If I'm looking at, if I'm looking in your first IDB where you've got maybe a developer and a couple of the parties, yeah, I want to know a little bit more about them, their involvement, what their involvement is as we go lower in the credit spectrum. Does the issuer come to market? Does it need market access? My need to know is less for that type of issuer.

MODERATOR McNALLY: In defense of that answer, the '94 release says, "the range of financial and business relationships, arrangements and practices that need to be disclosed depend on the particular facts and circumstances."

MR. SCHUETZE : May I ask are the issuers or the underwriters asking the auditors to explicitly say something about their independence? In other words, that the auditor doesn't own any of the previously issued bonds and is not going to buy any of the bonds to be issued and that none of his or her partners owns any of the previously issued bonds and is not going to buy any of the bonds to be issued?

MR. SMITHERMAN: I have never made that inquiry?

MODERATOR McNALLY: It’s a very good question.

But I've not heard it asked.

MS. STARR: Ben, do you ask your auditors?

MR. WATKINS: No, we don't.

MODERATOR McNALLY: Is there an auditing standard of some sort that precludes them from doing the audit if in fact they do have that conflict?

MR. SCHUETZE : Well, there are rules published by the AICPA, by the various 50 state boards of accountancy and the territories. Practically all of those rules, including the SEC's rules, have fairly strict independence requirements. And one of those independence rules would be that the auditor may not have a financial interest in his or her client. Therefore, if the auditor owns a previously issued bond of X I would think that that auditor would have a financial interest in his or her or its client and would thus not be independent.

And if the auditor has a commitment to buy any of the current issue I would think that he or she or it would not be independent.

MODERATOR McNALLY: Well, to the extent the auditor's letter says we are independent certified public accountants, bla-bla-bla-bla.

MR. SCHUETZE : That's normally in the heading, isn't it? Well, it may say **--**

MODERATOR McNALLY: Well, it's normally in the letter.

MR. SCHUETZE : It's in the letter. Yeah, right.

MODERATOR McNALLY: Can we then not assume that they have done whatever they had to do to say in fact they're independent?

MR. SCHUETZE : Well, but the underwriter said they do everything. Don't you inquire of them too?

MR. SMITHERMAN: Yeah, let me ask this question.

Not practicing in corporate --

MR. SCHUETZE : Safeguards alone don't work.

MR. SMITHERMAN: Not practicing in the corporate arena, are these types of inquiries made when Exxon does a debt offering, I mean?

MR. SCHUETZE : There are procedures, although informal, that audit committees go through in discussions with their auditors about their auditor's independence as to Exxon or General Electric or General Motors or any of the other U.S. generals.

MODERATOR McNALLY: Another area of the '94 release other than the conflicts was terms and risk of securities. And two areas in particular we want to discuss today were the degree to which the investors are looking to the underlying ratings for credit enhanced transactions. And, also, what's happening in the derivative market? What information do investors want to see? Are you talking about simply the current exposure? Are you talking about the investment policy of the issuer?

Let's start with the underlying ratings: are they obtained? are they sought? are they – just what happens with them? Let's assume it's a bond issuer deal as opposed to an LLC.

MR. RYON: We look to the underlying credit but we also look for – and this brings up another issue with disclosure as to what rights are being ceded to the insurance company that is insuring the bond? There seems to be an increase in the insurer's demanding more of the bond holder's rights because they believe they are first in line for payment of principal and interest.

But the disclosure there that I believe is important is that sometimes the insurer and the bond holder's interest are not parallel. So you have to make enough disclosure there so that an investor can determine whether their interests are parallel and if they're willing to take on that type of risk.

MODERATOR McNALLY: I mean, having seen that it's insured and then having looked at the contract and whatever rights are given to the insurer are you also concerned with, if you will, the underlying rating, not merely the fact that it's AAA but if there is an underlying rating provided? Do you see --

MR. RYON: As an investor we're going to make an independent determination of what we believe the underlying rating to be.

MODERATOR McNALLY: So you're not dependent upon a rating from the rating agency for that, for the underlying?

MR. RYON: No. The ratings agencies will put AAA on it, but for the sake of the insurance. Again, we look to the underlying – we look to our own evaluation of the underlying credit.

MODERATOR McNALLY: Do you think the underlying rating – I mean you have the ability to do that. As far as a retail investor do you think it's sufficient the fact that there is a AAA on it or should there be some underlying rating provided to the market?

MR. RYON: I think it's sufficient that they have the AAA from the insurer. But, again, getting back to my earlier point, I think that the underlying – the investor has to understand what rights they're ceding to the insurance company and how that is changing. And then to be able to make a determination as to whether they believe their interests, their best interests are going to be parallel with the insurance company.

MODERATOR McNALLY: Barry, are you seeing an interest in the underlying ratings from the retail investors or do you as the underwriter want to know what the rating agencies provide as the underlying rating? Or is it the insurance related level of the inquiry you take?

MR. SMITHERMAN: Again, I think it depends upon the particular issuer that you're dealing with. Obviously, if it's an issuer that's in the market frequently the market is going to understand what their underlying rating is. And you may have – they may have chosen to use insurance because when you did a cost benefit and analysis the day before pricing it was more efficient to use insurance.

And I would suspect that retail investors are interested in knowing what the underlying rating is. I would be very surprised, Chris, if they understood any types of responsibilities that they were ceding over to the insurance company. I think it's a good point.

MR. RYON: Well, that's why that disclosure has, I think has to be beefed up.

MODERATOR McNALLY: Turning to derivatives, I mean what do you like to see as far as the disclosure, are you interested in not only the current investment but also the investment policy? And what is the level of inquiry that's done as far as the investment policy of the issuer?

MR. SMITHERMAN: I think we should distinguish between the investment policy of the issuer**--**

MODERATOR McNALLY: And the current portfolio?

MR. SMITHERMAN: – well, and a debt instrument that might have a derivative component to it. I think those are two distinct areas.

Yeah, I'd like, again I'd like Chris' take on what he wants to see if an issuer is doing a floating rate transaction and they swap it to fixed?

MR. RYON: Well, if we look at the issuer's investment philosophy in terms of what they do with their cash management role I want to understand what that philosophy is, I want to understand the parameters of their philosophy. To the extent they choose to use a derivative security as long as it's allowable within that philosophy I'm pretty indifferent to that because it could probably replicate the same risk for term potential in the cash market in terms of adding risk to the fund or taking away from it.

In terms of whether in their overall the way they structure their debt, if they have swaps involved I want to make sure that I understand that and I know what their exposure is there also.

MODERATOR McNALLY: Ben, Billy, are you seeing inquiry into the investment policy of the issuer as part of the normal questions that are coming up now?

MR. WATKINS: We include a section dealing with the investment policy of the state, and largely it was a result of Orange County and which, you know, precipitated the interest in investors understanding what the risk profile was on the investment side of any governmental entity. And so we have beefed up the disclosure in that area to address that particular issue.

MR. RYON: California issuers now are just – they have probably the best investment philosophy disclosure going on because of Orange County. They've tightened that up. They've tightened their constraints that they allow their managers to invest within. So that's worked there.

Geographically it varies on the degree to which other issuers will do that.

MODERATOR McNALLY: Walter, to what degree do the financials have to address the derivative securities and the various risk, if you will, of the portfolio?

MR. SCHUETZE : I don't know whether the Governmental Accounting Standards Board has addressed that issue. I know from the standpoint of commercial issuers there is extensive disclosure required by the Financial Accounting Standards Board on derivatives and the like. And the SEC has extensive disclosures for corporate issuers in the regulation. I just do not know whether the Governmental Accounting Standards Board has issued such guidance.

And maybe somebody in the audience does.

MR. SMITHERMAN: Ben, I'd like your opinion on the following: you know, the evolution of disclosure on what underwriters was making started with us disclosing what our spread was. And then if there was an open market portfolio we disclosed what we made on that. But I haven't yet seen anyone disclosing if there was a derivative transaction as a part of the debt issue as to what the hypothetical profit would have been, understanding that maybe it can't be 100 percent determined today.

Are you seeing that? Is that something as an issuer that you care about? And I guess I'd like some opinion from the SEC staff as to whether that's the kind of stuff we're supposed to put in the offering document.

MR. WATKINS: In performing my role in policing the transaction it's very important for me to know where every dollar in the transaction goes. That's just part of my responsibility in overseeing the transaction.

That being said, obtaining the information on derivative transactions is very, very difficult. And that information is closely guarded, considered proprietary. It's what goes on behind the curtain. But we have been in certain contexts been able to at least assess that level of compensation because that's going to affect my decision on whether or not to enter into the transaction.

That being said, I don't know how relevant that is as a matter of disclosure. So my motivation is just from a business standpoint and knowing how much money --

MR. COBBS: Yeah, that's what we do for our clients. We have a --

MR. COBBS: That's what we do for our clients, New York City. Alan Anders is here from the city and can speak to it. By the way, Alan, what is the city's disclosure on derivatives? Do you know what the requirement is? Because, you know, every month for the city we get what their liability is for their various derivatives they have outstanding. And so every month they're up to date and they can manage their risk.

MR. SCHUETZE : Are the issuers disclosing the fair values of the outstanding derivative contracts at any date? Balance sheet date, three months later?

MR. COBBS: That's what I, I don't know whether the city is – I think at year-end they do disclose if they have yen financing.

MR. SCHUETZE : I would just point out that in the "Wall Street Journal" of about ten days ago there is a full-page add for a new enterprise that's called CFO.COM. CFO.COM has the ability to price immediately all types of vanilla swaps and will price apparently complicated swaps, complicated puts, complicated calls, complicated callers for free. So there isn't any problem in getting this information. There are people out there who will do, push the pencil for you right now.

MR. WATKINS: How credible is anything you get for free? That's my only question.

MR. COBBS: Well, we get it every month.

MR. SCHUETZE : Huh?

MR. COBBS: We get it every month for our clients. And they have it, year-end and then they disclose that they have yen financing, and they disclose where the yen is relative to what their swap arrangement was when they swapped the dollars, and then swapped from fix rate yen to floating rate dollars.

MR. SCHUETZE : Do they give the user of the information sufficient information to where he or she can price the contract?

MR. COBBS: I don't think so, no.

MS. STARR: Barry, I have one --

MR. SCHUETZE : Well, the yen has gone from 120 down to 105. I would suspect that that price is now --

MR. COBBS: Well, that's right. That's what we, that's what we disclose. That's what they have every month is what the liability is relative where they entered into the contract.

MR. SCHUETZE : Well, but the liability would be only the amount of cash currently payable or if the contract splits the other way.

MR. COBBS: That's right.

MR. SCHUETZE : The amount of cash currently receivable. But if it's a 20-year swap you've got 19.5 years that you need market price information for.

MODERATOR McNALLY: There's really two things we're discussing. One is whether or not you disclose the value, if you will, of the portfolio and the investments. And other one we were touching upon is whether or not there's disclosure of the compensation to the underwriters to the extent they're involved in structuring this.

And I think the answer was you're interested but it may not be material to you.

Barry or Amy, what are you seeing on the research?

MS. STARR: Let me sort of step in on both points. One, Barry, from the standpoint of the underwriter and what they're making I think the real question is does the participant to the transaction need to look at the disclosure to make sure that there is adequate disclosure in the OS with respect to both the proceeds of the offering as well as underwriter compensation. I mean, beyond that, you know, it really is up to the participants to assess whether in fact there is adequate disclosure depending on the particular transaction.

MODERATOR McNALLY: Amy, as far as the compensation I understand that with respect to the underwriter's take-down, and perhaps in addition whatever they're additionally making in relation with the issuer, investing the portfolio or involved in the swap or whatever, all of that goes to what they're making with the issuer and perhaps influences their judgment, if you will, in underwriting the transaction.

Let's say it's not with the issuer. Let's say it's a matter of buying a security and then wanting to do something to it in the marketplace, is that something that has to be disclosed to --

MS. STARR: Again, what I would – I mean I – one thing that I always suggest is if there's not learning in the muni market is to look to the corporate market for guidance. And that I would suggest the same in this context. And **--**

CHAIRMAN LEVITT – What do they do there, do they disclose the compensation?

MS. STARR: Again, depends on the trans – depends on the company, depends on the deal. I couldn't tell you that.

MR. SMITHERMAN: Let me make two points with regard to what Ben said. If you've got someone who's providing derivative trades for you and they're not telling you what they're making, you should fire them. Because I think that's a piece of information that you're entitled to. Whether that's a piece of information that goes in the official statement may be debatable.

Secondly **--**

MODERATOR McNALLY: Are you talking about a derivative with the issuer?

MR. SMITHERMAN: Yes. Yeah, I'm talking about a derivative that is part of a primary offering where you either turn it into a tender option bond or it's a swap to floating or a fixed rate swap or a floating rate swap to fixed, you ought to know that.

Secondly, **--**

MODERATOR McNALLY: Let's say you buy it in a competitive deal, not a negotiated, and then in turn you're going – I mean, clearly there's nothing – is there anything there when you're in turn reselling it about you're securitized in some manner. Does the investor need to know what you've made on doing that?

MR. SMITHERMAN: You know, at that point we've clearly become an investor. And I think to the extent that they are interested in knowing what we've done I mean I think that as a good customer/client relationships we ought to be forthcoming. Now, maybe they're not entitled to it. But I think it's good business.

MS. STARR: I think the related issue, too, is whether the impact that it has on the ability of the issuers to disclose their risks as end users of derivative products. Because, you know, to the extent that they're engaging in a derivative transaction to sell out their bonds they're subject to a risk as well. And that's something that was addressed in the '94 interpretive release as well.

MODERATOR McNALLY: Another point in the '94 interpretive release was the availability of continuing information. And I think generally that's being handled now by disclosure in the official statements as to what the continuing disclosure agreement is. So I don't think there's any confusion in the marketplace about what you're getting on a continuing basis.

The next point in the '94 release was the clarity and conciseness of the offering documents. And, Amy, perhaps as an introduction to this I mean what is the standard now – what is required as far as plain language in the corporate area?

MS. STARR: In the corporate arena anybody who is selling securities on a registered basis has to have their cover page, summary and risk factors in plain English. Now, that's really, you know, the beginning of your document.

You know, I pointed out to people that I understand that we've seen counsel who have actually put descriptions of the trust indenture into plain English. And it's publicly available on EDGAR. But, I mean the balance of your document needs to be clear.

There is a emphasis on use of bullets, making sure there is a very limited use of defined terms, so that it's much easier for an investor to understand what it is that they're investing in, what the risks are, what the terms of the securities are.

MR. RYON: John, I'd like to, if we could, go back to one point you --

MODERATOR McNALLY: Sure.

MR. RYON: – mentioned earlier about the availability of continuing information and what that is. In our experience we've run into issuers who have said that the rule mandates that, or they've been advised that what the rule mandates is that all they have to do is provide us with their audited financial statements when due. At any period of time that could be up to three months after the end of their – after the end of their fiscal year. And we found that unacceptable and have either tendered some of their floating securities or sold their bonds because of that.

We're not getting the information we need on a timely basis.

MR. SENSALE: Just to also touch on that point, as NRMSIR we receive all the official statements and peruse them. And there have been instances where the continuing disclosure agreement is not even included in the official statement. It's a separate document that you have to request on your own. And the NRMSIR then has to take a pro-active stance to find out what that is simply to have it on record and also for other business purposes.

MS. STARR: is there not then a description of what the continuing disclosure agreement provides in the OS.

MR. SENSALE: It will just reference, it will reference the fact that another document exists and you'll have no clue as to what's in that document.

MODERATOR McNALLY: Well, that's not good practice.

MR. SENSALE: Again, it hasn't – I can think of instances in the past. It hasn't happened frequently. I can think of one issue in particular where you actually had to go out and get it.

MODERATOR McNALLY: Well, I mean what we're seeing more and more it's just not worth the risk of trying to summarize it or the trouble of trying to summarize it. You simply attach it as an exhibit and say continuing disclosure will be provided pursuant to this agreement.

There will be – the next panel will address the whole question of when you're in the secondary market I mean what are the concerns in getting the information, are there insider trading concerns, etc. But as far as the primary market are you saying that based on a description of what you're going to be getting and how much time they had to provide the financials you may not buy something once you know what the --

MR. RYON: Pretty much we would have already bought it, gotten the information we want. And then when we have secondary market problems that's when we'll tender the bonds or sell them if we cannot get the proper disclosure.

MODERATOR McNALLY: Okay. Even though it may be a situation where that disclosure, they're doing exactly what they said they were going to do when they did the primary offering, namely, disclosure pursuant to the continuing disclosure agreement.

MR. RYON: For some older securities their interpretation is what is due.

MODERATOR McNALLY: Okay. What are people seeing as far as the point, I mean, Amy spoke to what the requirements are, are we seeing plain language in the municipal statements? Billy, Ben, are you seeing it at all?

MR. WATKINS: No. Here's my description of where we are in the muni industry with respect to clarity and conciseness: "Extremely serious warning printed on a separate page in red letters with a yellow background. Unless you're as smart as Albert Einstein, savvy as a half-blind Calcutta bootblack, tough as General William Tecumseh Sherman, rich as Bill Gates, emotionally resilient as a Red Sox fan, and generally able to take care of yourself as the average nuclear missile submarine commander, you should never be allowed near this document."

MODERATOR McNALLY: And I didn't even set him up. He just, just brought this with him.

(Laughter.)

MR. WATKINS: There's a lot to be done in that area. It sort – it's been a natural evolution, I think, the way OS's have developed. And it's really being used as more of a defensive tool. And out of an abundance of caution everything is being put in the document. And we really haven't, as issuers haven't done a great job distilling what information is absolutely essential and using the OS as a means to clearly and effectively communicate with investors. Because that's what we're really talking about doing.

And I think that the SEC has given a lot of advice and guidance on this. We did a pretty good job in adopting GFOA disclosure guidelines with respect to the substance of the information in the OS. And I think that's evolved and we've made a lot of progress on that front. But I think just the physical appearance of the document and how it's written is fertile ground for a lot of improvement in that area.

And we're in the process now of standardizing the cover page in bullet point format and going through the document and rewriting it in such a way not to diminish the disclosure in any respect but just to make it a lot more user friendly. And there's a lot of upfront work involved but, as you know, once you get it done then you can – it will be a lot easier once we get over that threshold level.

MODERATOR McNALLY: And I guess I'm interested, too, in whether as an investor, Chris, you care or what it means as far as your ability to review documents in plain language in this area?

MR. RYON: Well, we do care about it because it's going to help us review them in a more timely manner, in a more efficient manner. It's going to help the issuers, especially the smaller issuers. When we look at a week where we have, say, 20 different securities coming to market we have a limited amount of analysts that can be used to review these credits. So we're going to begin to tier the credits by where we can get the most bonds and be most effective for our portfolios. So we won't even look at certain issues because they just don't fill – it will take too much time to get to them.

To the extent it becomes more difficult then we have to get our legal area involved, it's going to take more time. We're going to need to get the OS's earlier. That's another area of improvement.

MODERATOR McNALLY: I think this is a very important point because generally the reaction of the marketplace has been, sure, plain language is nice, it would be nice if we could do it. It takes a lot of time, it's a lot of work, and it's not going to save us five basis points. But you're telling us it may impact the pricing because it impacts whether or not you're going to in fact even read the OS based on your --

MR. RYON: Well, we're going to read the OS for everything we buy. It just determines what we're going to look to buy.

MODERATOR McNALLY: Exactly.

MR. SMITHERMAN: And what you're saying, particularly with regard to issuers that are not household names.

MR. RYON: Uh-huh.

MR. COBBS: Particularly the first time issuers the language sometimes is very, very dense and opaque and almost rather it not be written by a lawyer. I think to a large extent the clarity depends on which lawyer is doing it. But sometimes it maybe should be done as Ben said be rewritten by lay folks. Or sometimes I'll read over the next day, is an anecdotal story about William Faulkner and The Sound and the Fury, he used to write when he was drunk and the next day he read something in The Sound and the Fury and he said, I don't know what it meant but I liked it so much I kept it. And sometimes I feel that about the OS, the next day I don't know what it means but it's in there. And it's just impossible to understand.

MODERATOR McNALLY: Another area beyond the clarity and conciseness in the '94 release was the whole question of delivery of official statements. And I guess I'd like to ask both the underwriters and the investor just what is happening in that area, are you getting, for the underwriter are you getting the OS in time from the issuer and from the investor or are you getting it in time from the underwriter?

Barry, do you want to speak to your experience?

MR. SMITHERMAN: It's a challenge. This is an issue that we spend a great deal of internal time on. We have probably two people in our firm that are devoted almost entirely to making sure our bankers get the official statements to the investors in a timely fashion. And I'm sure that we're dropping the ball from time to time.

MODERATOR McNALLY: Because you're not getting it from the issuer or because you're just dropping the ball?

MR. SMITHERMAN: Obviously it's the former. Yeah, I think it's a function of their being a lot of deal flow. This, you know, strange as it may sound this is not the only thing that most issuer finance staffs do. I mean particularly with smaller issuers, they may have one or two persons that does everything, including trying to get an official statement printed and delivered.

So, we try to work with them as much as we can. We try to stay on top of it without being a pain. But there-- it falls through the cracks.

MR. RYON: Especially on the competitive side.

MODERATOR McNALLY: There's two parameters here. One is the 15c2-12(b)(3) which requires the underwriter to contract to receive the official statement in sufficient time to accompany confirmations. The rule only requires the underwriter to contract to receive it. And once they've satisfied that contract they've satisfied their obligations, at least under 15c2-12.

But the other concern is MSRB-G-36 which requires the underwriter to file the OS with the MSRB ten business days after the execution of the purchase contract. So what do you do if you just don't – if you don't have it you can't file I guess is the answer.

MR. SMITHERMAN: Right. We get fined.

MODERATOR McNALLY: You get a G-36 litigation suit.

MR. SMITHERMAN: I mean, again, this is something that we spend a lot of time on, we're working on it, we're trying to improve it. I think every firm on the street is challenged by this, particularly firms that do high volume. And, you know, all I can say is that we're doing the best that we can. I agree with Chris, on competitive deals it's sometimes even more difficult.

MODERATOR McNALLY: And is that, I mean whose fault is it, is that the issuer or is that the financial advisor? I mean.

MR. RYON: I'd have to say it's the FA's.

(Laughter.)

MR. RYON: Well, when we see a competitive deal coming on the calendar we'll call the underwriters to find out whose got the OS. And a lot of time the Friday before the week it comes to market we'll hear "we haven't gotten it yet," or "we just got it and we'll Federal Express it out the next day."

MODERATOR McNALLY: You're talking about the POS now?

MR. RYON: Yes.

CHAIRMAN LEVITT – So you don't even get the POS before you bid?

MR. RYON: Well, we don't bid.

MODERATOR McNALLY: Well, on a competitive situation you may not get the POS **--**

MR. SMITHERMAN: We will have papers before we bid.

MODERATOR McNALLY: Okay. But it may not be **--**

MR. SMITHERMAN: I think that's required, isn't it?

(Laughter.)

MODERATOR McNALLY: No comment. Bill, is it the fault of the FA's that they're not getting the –

MR. COBBS: Well, as I said before, we don't write a lot of OS's. We've just been part of the process, and to say, yeah, responsibility, we always push to try to get it out. If there's a transaction on, say, Tuesday to at least to get it out the Friday before. That's sort of the last possible to get it out. And if it's a start-up, a first time issuer then we'll want to get it out a week before.

And the retail order period you want to get it out before the retail order period starts which is the Friday before. But, again, sometimes it is a challenge, it really is to get it out. But I know with a lot of the smaller issuers that the financial advisor probably takes primary responsibility for getting it out. But that's not usually it, you know, we help get it out.

And I think it is a problem. That's why I said before I think underwriters have a real liability and they if they don't get an OS till the day of the offering or the day before it's tough. And it's tough for buyers too. But I don't see any.

MODERATOR McNALLY: We'll be leaving the '94 release because I think we've gone through each of the points. But I think in summary, in looking at it, conflicts of interest apparently sometimes questions are asked, sometimes they're not, at least the questions Amy would like
to ask.

Terms and risk of securities, sometimes there's not proper disclosure of that.

We had a discussion about the financial information, whether or not there's a bring-down. Clarity and conciseness there's been a very slow movement towards plain language. And delivery of official statements people tell us there's still some problems. So interesting analysis I think.

Let's go to just how these official statements are filed. Joe, can you speak to this?

MR. SENSALE: Sure.

MODERATOR McNALLY: How they're filed, how you maintain a database and just how people can access the information?

MR. SENSALE: Official statements received from underwriters and other entities cover approximately 70 to 75 percent of those received over the MSRB's MSIL service, which is the Municipal Securities Information Library. So using the filing over the MSIL service pretty much allows our NRMSIR as well as the other three NRMSIRs that subscribe to that service to obtain about 25 percent of those official statements that we wouldn't receive, say, from the underwriter. So the institution, the MSIL service does fill the gaps that we normally – we otherwise wouldn't have been able to receive.

When we receive official statements through either method, either through the mail or through the electronic MSIL service, it immediately gets – the receipt of that official statement immediately gets recorded in a database, in fact two databases, one that supports our products and as an information provider, and also an internal database. You don't have to subscribe to any one of our products in order to get an official statement. All you need do is just call up our repository and they will deliver it to you for around $30.

Again, and it's available immediately. As soon as we get it we turn it around immediately. Now, I know that there has been great improvement with the MSIL service's turnaround time for official statements. So that's even helped us out that much more.

You can access the – in order to get an official statement one would need to call up and just provide the CUSIP or even the description of the deal if you don't know the CUSIP, then you'll be able to obtain it from us. And we would FedEx it to you, we would tax it if necessary. So we're accessing official statements really is not – it's a pretty well – it's a pretty solid mechanism. They are accessed at a much greater rate than, say, financial information documents that are filed simply because I think the nature of the official statement from every interested party as opposed to a financial statement where a lot of densely packed information is in there.

And going back just to touch on continuing disclosure, you would get in the official statement the fact that financial information operating there that need to be provided on an ongoing basis. And it may only be maybe two or three lines of data. But in return you would get several, you would get a whole chapter to touch on secondary markets as compliance. And, unfortunately, people don't access those huge documents as opposed to the one or two-line page of a operating data or a financial information file.

The point being that official statements, I think, the nature of the document itself creates its own demand whereas for other types of documents that are filed that's not the case. Between 100 and 150 official statements are requested at our NRMSIR every month and only between five and ten financial statements are. So it's not the mechanism I think that may be problematic, it's the fact that official statements, the nature of the document itself is what creates the demand for it.

MODERATOR McNALLY: I mean the NRMSIR, Joe is telling us it's not a problem because he maintains it, he can always get it right away. Is that your experience, Chris, Barry? Have you tried to access official statements and, if so, have you been able to readily get them?

MR. RYON: We subscribe to a service that we get them on microfiche in our office and we haven't had to access them that much. But when somebody, underwriters who are trying to sell a particular deal in the secondary market and we don't have the official statement and can't access it through our in-house system we'll get them from the NRMSIR and we usually receive them the next morning in Federal Express or whatever.

MR. SENSALE: Right. Usually turnaround. Again, there will be another panel on electronic disclosure but the turnaround right now with regard to paper is as best it can be, it's immediate turnaround.

Just to further comment on – just to go back and touch on continuing disclosure agreements, just to raise the issue, as the NRMSIR we get to peruse these things. And sometimes there will be a, in the CBA there will be a contract that provides financial information almost a year after the previous fiscal year-end. And I don't know what purpose that serves. Again, that's not everybody. It's a small minority. But, you know, it's something to keep an eye on because if we think that three months of financial information, a lapse of three months is important I can only imagine the impact of the year's financial statement.

MS. STARR: But it is permitted by the rule.

MR. SENSALE: Yes, it is. You're right. So I mean that's something that maybe you, the SEC, may want to address. But, yeah, practicality-wise I think doesn't really serve much of a purpose. I know you wanted to talk about central repository.

MODERATOR McNALLY: Well, I mean it is 11:00 o'clock. We did, in fact, start early. Nevertheless, there are at least a few questions which didn't get asked. And let me just ask a few of these if I can. Some of these I'm afraid are for me but some are for the panel more generally.

The difference in underwriter responsibility in competitive versus negotiated deals is at least somewhat defined. I guess it's a comment on the '88 release, "somewhat defined.' But what about senior versus co-manager underwriters in negotiated deals, what does the co-manager have to do in our current, this current practice for the co-managers to do it?

Amy, do you want to speak to that?

MS. STARR: Honestly I'm not --

MODERATOR McNALLY: Do you want me to speak to that?

MS. STARR: Yeah, that would be helpful.

MODERATOR McNALLY: The '88 release does distinguish both negotiated and competitive. But also there is a statement in there to the effect that if you are a member of the syndicate and if you trust who the senior manager is to properly conduct due diligence and you have no reason to think they have not conducted it, you can rely upon their investigation as part of your responsibilities.

Another question: My bankers seem to think that the firm has less responsibility for review of OS credits if we are the FA. Is there a difference in underwriter responsibility?

Well, regardless of whether there's an FA in a – I guess this is speaking of they're serving as FA. Billy, what do you view as your responsibility as opposed to the underwriter's review that's set forth in the '88 release? And what do you view your **--**

MR. COBBS: I thought we all help with negotiated transactions. I think it is primarily the issuer's document to be, I think, I'll agree to. But I think after that we're all liable and we all have responsibility. I would say in a competitive sense actually that we've probably got more liability, hate to say it, than an underwriter has because we help prepare the document.

MODERATOR McNALLY: Well, I think that's right. I mean I think there I a bit of enforcement actions where to the extent under contract the FA put the OS together, that was one of the items set forth in the enforcement action?

In which statute or Commission rule is the reasonable basis standard found?

Is that simply case law, Amy, or is that defined?

MS. STARR: The reasonable basis for the underwriters?

MODERATOR McNALLY: Yes.

MS. STARR: It was laid out in the '88 and '89 releases.

MODERATOR McNALLY: So, okay, so there is no defined term but you're speaking of what constitutes that is laid out in the '88 releases for both competitive and negotiated?

MS. STARR: That, yes, it's laid out.

MODERATOR McNALLY: Okay. Okay.

I have seen disclosure statements indicating that the rating agencies have received more information than is available in the OS. My question is, why do rating agencies need more information if not material? If it is material, shouldn't it be in the OS?

It's an interesting question because **--**

MR. COBBS: It's a good question.

MODERATOR McNALLY: It is a good question. And, Chris, I think you alluded to this. And I think it is the case that information is provided to the rating agencies, and also to institutional investors occasionally, because they'll ask a particular stress test that they want to see before they buy the security. And I think the analysis of those involved in the transaction involved is, well, what does this stress test prove? Is it something they simply wanted before they could invest?

Obviously, if it proves that there is some problem that's not been discovered it has to be disclosed. But it's not uncommon to provide information to both the rating agencies and, frankly, the institutional investors that does not go into the OS and has been asked for by them. Is that your experience as well?

MR. SMITHERMAN: I think so.

MR. COBBS: Chris, when we do an investor presentation what you get is basically the same thing we get, rating agencies get, we use the same book with slightly different pages, so there's not a big disparity in that.

MR. RYON: No. Maybe to issuers there isn't but on some transactions we've been asked for information that rating agencies have received and been told that is not published.

MODERATOR McNALLY: I'd like to thank all the panelists. In particular I would like to thank the SEC for giving us the opportunity to make this presentation.

(Applause.)

PANEL II: AFTER THE CLOSING - ISSUES ARISING THROUGHOUT THE LIFE OF A BOND ISSUE

MODERATOR MACO: We'll begin the second panel in just about a minute after we give everyone a chance to be seated.

MODERATOR MACO: Good morning. My name is Paul Maco and I am the Director of the Office of Municipal Securities. I'm going to ask our panelists to introduce themselves. Once again we have a panel that covers the spectrum of the marketplace from issuer to investor with, again, a representative from one of the NRMSIRs on our panel as well.

There is one substitution I will mention before he does introduce himself just from the scheduled panelists that you found in the book that was handed out. We have had one victim fall to the flu. Unfortunately, Patricia Garrison-Corbin will not be able to join us today and she will not be the financial advisor on this panel. Bob Sikora graciously agreed to switch from the previous panel which he was on and he will be joining us on this panel as our financial advisor.

And why don't we start with you, Bob, and work our way down the table. Tell us where you're from.

MR. SIKORA: Good morning. My name is Bob Sikora. I'm with Munistat Services. We're a municipal finance advisory service, financial advisory service to local governments and school districts throughout New York State. Thank you.

MR. ANDERS: I'm Alan Anders. I'm an issuer. I run the bond financing officer for New York City and its various financing entities.

MR. CICCARONE: I'm Rich Ciccarone. And I'm the co-head of municipal investments at Van Kampen. And investment advisory and mutual funds is our primary business. I also have a, just have to make a footnote there, I'm also now on a village board so I'm an elected official to a government body as well.

MODERATOR MACO: I'll take this opportunity just to give the disclaimer for myself and for all the Commission staff who appear on today's panels. The comments that we make represent our own point of view and not necessarily that of our colleagues on the Commission staff nor that of the Commission.

MR. SOLLERS: I'm Scott Sollers, principal with Stone & Youngberg. We're a broker/dealer located on the west coast. We originate and distribute to the secondary market both insured paper and non-rated paper. I am a personal – personally I'm a banker. I work with issue restructuring financings. And this panel is secondary marketing so I ask forgiveness from the traders in the room and my partners back in San Francisco if I don't say things exactly to coil.

MR. HUMBLE: I'm Monty Humble with Vinson & Elkins. We serve as bond counsel for and underwriters counsel for various types of issuers and borrowers.

MS. McGUIRE: Hi. I'm Kate McGuire. I'm the Chief Counsel of the Division of Market Regulation. We administer Rule 15c2-12 and answer interpretive questions among our many other duties.

MR. BURBINE: Paul Burbine, the Massachusetts Housing Finance Agency. I'm the Financial Director. We are an issuer, we issue between 10 to 12 issues a year and in the amount of between $4 to $600 million.

MR. SCHMITT: Good morning. I'm Pete Schmitt. I'm the President of DPC Data. DPC Data is one of the four NRMSIRs serving the municipal market. Our company is also one of the major basic disclosure document providers and data, integrated data to the professional municipal bond market.

MODERATOR MACO: Let me begin with a question to you, Richard. One of the analysts in the last session made the observation that there have been some official statements that have come by his way that do not contain a continuing disclosure covenant. they may refer to it at best, it may be embodied in some other document but there is nothing contained in the official statement. Is this something you've seen? And, if so, how frequently?

MR. CICCARONE: In all honesty I have not seen that. And that's only because I think the kind of securities that we would purchase are going to be securities in which we would absolutely demand that. And there tend to be riskier securities when they get outside of the insured area.

But I have not had any of the analysts on our team that have mentioned that to me either. But I can't, in all honesty I can't make a conclusive remark about that.

MODERATOR MACO: Peter, how about you, you have a good look at quite a variety of official statements that come your way. Is this something that you have experienced or seen to any degree?

MR. SCHMITT: I would say not. We get a large variety of documents. Of course not every investment opportunity that comes to market and whose documents come through the DPC Data NRMSIR or any other NRMSIR would be subject to the rule. Note financings, commercial paper and some other we see that may not from time to time have any kind of continuing disclosure language in them. But generally I'm not aware of any other type of issue that would be – from an issuer that would be subject to the rule that would not have that passage in the document.

MODERATOR MACO: How about our other members of the panel, any experience in this matter?

(No response.)

MODERATOR MACO: Let me move to a second variant of that, and that is rather than less, more. One of the comments made in the adopting release to 15c2-12 was that market participants were free to add to the event notices and other requirements that would be produced under the contract that the rule has a baseline but it does not set the ceiling. And if market participants wanted to add the provision of specific information or additional events they certainly were welcome to do so.

Rich, have you seen this at all?

MR. CICCARONE: Now that we have seen. We have frequently asked for information that is beyond the requirements of 15c2-12. They tend to be for quarterly financials and operating information. And issuers have obliged us. Unfortunately, we always ask for those even when there has become a market expectation for a lower rate of securities on the hospital area for quarterlies.

The dangerous thing there and the part that's disturbing is that we have sometimes asked for them, they have agreed to do that, and then they have retracted that after the deal has been done. And so there is no enforcement of that particular area. That's caused a great deal of problem and stress and market valuation decreases as a result of that.

MODERATOR MACO: How about the other panelists? Alan, in your experience as an issuer and, Paul, I'll come to you as well, have you ever been asked to add elements to the 15c2-12 contract and what's been your response? What are your general thoughts on the matter?

MR. ANDERS: In introducing myself I didn't mention that I also sort of bring the perspective of GFOA as vice chairman of the Debt Committee there, and CIFA as the head of the Regulatory and Legislative Committee there. And I think the general standard of the marketplace, and it's still – acknowledging your personal speeches, Paul – nevertheless, that the standard in the marketplace and the New York City standard is that we report on the 11 deadly sins and that's it in terms of filings.

What we stress and what GFOA has strongly stressed is that that needs to be supplemented with a strong investor relations program. And there are other – I know it's one of the questions later on, perhaps we'll go into greater detail, but there are other techniques, the most important of which is a press release. And so we certainly make other information available and tend to go that route rather than to file that with a NRMSIR.

In terms of responding to investors we try to be very careful that we're not telling investors items that we don't generally disclose. And if we find out it's relevant enough and important enough to tell them, what we'll probably do is issue a press release, not a filing, and get that information out to everybody.

MODERATOR MACO: Paul?

MR. BURBINE: We have issued notices at least once when we had an event that we thought was a significant event but not one that was reportable under 15c2-12. We did stop some subsidy that we were giving to particular multi-family loans and gave notice that it could result in redemption of bonds. It wouldn't necessarily result in that, but it could. And we felt that was necessary to send out on Munifax even thought not created as one of the 11 deadly sins.

MODERATOR MACO: Bob, as a financial advisor, and as I understand it – correct me if you're wrong – your practice covers quite a number of smaller issues in the northeast. Have you experienced any of those issuers going beyond the 15c2 – the baseline 15c2-12 contract?

MR. SIKORA: We make a clear distinction in our practice between material event notices, the 11 deadly sins, and the annual filings. Okay. With regard to the material event notices, none of my clients have actually ever gone beyond the required 11, okay. And we are not generally responsible for reporting those on their behalf unless it's in the course of, say, a rating change or if we're doing a refunding, reporting the defeasance of the outstanding bonds.

With regard to the annual – excuse me – the annual filings, sometimes, depending upon the nature of the issuer or the transaction we may include information in the undertaking that wouldn't ordinarily be required by other issuers or other issues.

MODERATOR MACO: Can you give us a "for instance"?

MR. SIKORA: Sometimes there's statistical information that relates to a particular issuer that wouldn't actually be strictly defined as annual operating and financial information. Okay? Or there's economic and demographic information that we feel is appropriate to include and we'll do that.

MODERATOR MACO: And how has this been received by the investors?

MR. SIKORA: I have actually gotten ever – I've never gotten any negative feedback about it. And I don't know, I've never gotten any positive feedback either.

(Laughter.)

MR. SIKORA: But if we felt that the information was material enough to include in the original official statement we've generally taken the position that the annual filing should mirror the information that's in the official statement and, therefore, include it in the undertaking.

MODERATOR MACO: Scott, you are between the issuer and the investors. And as an underwriter feel the direct weight of compliance with the rule.

MR. SOLLERS: Uh-huh.

MODERATOR MACO: Have you experienced or witnessed demand from investors to go beyond the baseline in the rule?

MR. SOLLERS: Well, first of all I'd make a clear distinction between, well, really kind of four distinctions, enhanced and non-enhanced financings in terms of how the market treats them, and also governmental purpose and conduit financings. With respect to the original undertaking, I think on the banking side it's common to see the annual report include things that have to do with operating data beyond just the annual financial statement, dealing with an enterprise and so forth, which is useful.

The real problem with that is the timing of the information. If it's accompanying the annual report then it's not going to be available to the market until required by the undertaking which is oftentimes seven to nine months after the end of the fiscal year. So it's of fairly limited value.

The event, material events list, given its scope and dimensions, I've never seen it expanded as part of an undertaking the value of which, of course, would get information out on a more timely basis. Even though the end report has the substantive information, it's just too late.

As a dealer trying to comply with the rule it's – and satisfy investors' demands we're straddling several bridges here. With respect to just the mechanics of the rule, generically dealers are typically when they buy securities into their inventory, keystroking in a CUSIP, looking up material events to see if anything exists, and I can tell you that 95 percent of the time if there's a material event it has to do with a call notice or a redemption feature, not any sort of a credit issue.

Is there's a credit issue I can pretty well tell you the street knows about it by word of mouth well before it gets reported as a material event.

And, again, distinguishing between the enhanced and non-enhanced universes, generally speaking the dealer community will look at the material event, check to see if a rating is current, and then do the trade versus going and trying to get additional credit information from, say, a NRMSIR which would even though it might be useful it's very dated and it's not available till the next day.

On the non-rated area most dealers that we work with that take into inventory a non-rated transaction will undertake some of their own research by calling an issuer or the FA that was originally involved with the transaction. So you kind of – there's kind of a cottage business there in terms of making something work outside the legal framework of the rule just so you know what you're talking about. But there is a clear distinction in the market I think between the insured and non-insured paper and the governmental purpose and the conduit areas.

MODERATOR MACO: Monty, you quite often sit in the middle of a transaction as the bond counsel. What's your experience? Have you ever seen anyone go beyond the 11?

MR. HUMBLE: Paul, I think people are reluctant in my experience to expand on the list of 11. But I have had transactions where people separately in the documents provided for direct mailings to bond holders or provision to the trustee with the bond holders having the right to request other information, particularly quarterly financials, where I'm representing the underwriters in an offering and the borrower offers quarterlies up to the investors I want to be sure that that's a covenant in the document so that it actually gets done.

MODERATOR MACO: So the possibility is that the issuer will provide quarterlies to bond holders but not to the marketplace through the NRMSIR mechanism?

MR. HUMBLE: That's correct.

MODERATOR MACO: Is this something that is infrequent, frequent? Is it standard to or is it common to any particular sector that you see?

MR. HUMBLE: Well, I guess I can only speak with any real experience to the healthcare sector because that's where I spend most of my time. And in that sector I think Scott's dichotomy is pretty clear, a credit enhanced transaction you have far less interest in additional information. For a AA credit you have far less interest in information than you have for a BBB transaction.

MODERATOR MACO: Scott, is this something you've seen?

MR. SOLLERS: It is. In fact, it's interesting, if you've got a financing that was originally underwritten and sold to a limited group of holders and they've been the recipient of ongoing information and then there's a subsequent trade in the secondary market you really are forced to scramble. I'm now talking about a non-enhanced financing where the disclosure was very restricted and not available to the general market. You've got to do a lot of scrambling to try and get on top of the current credit situation. And I don't think that the framework of 15c2-12 in terms of the annual report, that doesn't do you any good because the information is way too dated and the list of material events that are, you know, they're reasonably precise in terms of what is asked for but that doesn't get to the underlying issues that might have caused those events.

And that's where the digging starts. The fix has got to be somewhere in the annual report in terms of compressing the time period that is available to the public or some tinkering with material event notices because there's this gap between the two. One might have the information you want but it's dated and not readily accessible. And the other is supposed to be available on an immediate basis or as nearly as practical but it's not extensive enough.

So we're the dealer to comply with this rule that you're selling bonds on a reasonable basis of the credit seeing price properly is only met through your dogged investigation internally. And I would have to say there's probably a great deal of inconsistency in the market about how thorough that individual research really is, particularly in the area of conduit financings.

MR. HUMBLE: Paul, on that last point let me say that I'm not entirely sure that it's completely a matter of lack of investigation by buyers. I know in one situation we had a hospital that had received a notice from the Internal Revenue Service of intent to revoke its status which is about as disastrous an event as you can have. And we made the filing with the NRMSIRs as well as trying to get it out in the press. And a year later I was still being contacted by people who had bought the secondary market and hadn't found the notice.

MR. SOLLERS: It sounds like the underwriter wasn't checking to see if there was – that was put out as a material event.

MR. HUMBLE: That's the way we filed it. In following up I was told that it had gotten mixed in with the hospital's annual filing and had disappeared there. Apparently we had filed both at the same time.

MR. SOLLERS: I think the dealer community is pretty good about checking when they bring bonds into inventory the CUSIPs and material events. So if it's filed there you're going to see it.

I'm not sure how good the dealer community is on monitoring material events in their current inventory. I mean that is once you've checked it and given the duration that bonds are held in inventory I think it's probably impractical to assume that the dealer community is going through daily and monitoring material events relative to what's going on in their inventory. It's just too much data.

But when it comes in my understanding is there is widespread compliance with checking with material events.

MODERATOR MACO: I want to come back to this line of discussion in a moment and, in particular, give Peter a chance to provide the NRMSIR point of view. But before I do, I'm intrigued by something I heard about the provision of certain information to bond holders, but bond holders only, and not to the investing marketplace or the world of potential investors.

Richard, as a potential investor I assume you buy bonds in the secondary market as well as in primary offerings. What's your reaction to the idea that there may be information that is provided to holders who may be putting their bonds out for bid but that you haven't had access to because you're not a bond holder?

MR. CICCARONE: That's been a continuing problem. We talked a lot about that before the amendment. The old line was why should you have to buy a bond to find out you didn't want to own it? And it still is true. We still have that problem and, unfortunately, much too often. We do walk away from those deals.

But it shouldn't have to be that way. We already have a liquidity problem on lower risk or lower rated credits in the marketplace today because of the limited number of institutional buyers out there. And many of these deals in my opinion shouldn't be sold to retail. So that there is – we have a real urgency to try to find a solution that problem, and that is that we cannot be satisfied with information only available to the bond holder. It has to be to the prospective marketplace.

MODERATOR MACO: Alan and Paul, both of you are members of larger industry groups that reflect your – the segment of the market in which you operate. And without addressing your personal experience but looking at the experience of your colleagues are you aware of colleagues who have provided information to bond holders that they don't provide generally to the marketplace? Is it frequent that you see this? And how do you feel about it from, Alan, something, the perspective you mentioned earlier on, an investor relations program, is that consistent with a good investor relations program, particularly for the potential investors as opposed to existing investors?

MR. ANDERS: No. I mean clearly, as I said before, any information that's material ought to be out in the general marketplace. I would be – I'd like to ask Richard, I would be surprised if, you know, we have all these various sectors out there and it's easy to extrapolate from the so-called problem sectors to the, you know, we have 30,000 issuers, the great majority of them are just plain vanilla, you know, water and sewer entities or GO-ALBA issuers and who pay attention to the best practices of GFLA And, clearly, that's not the recommended practice. The practice is that you designate someone to deal with the market and that you put out into the marketplace whatever information is deemed to be material.

I'd be surprised if for plain vanilla issuers that isn't generally the case.

MODERATOR MACO: Paul, do you have any thoughts?

MR. BURBINE: I'm not aware of any member of the National Council of State Housing Entities that would provide information specifically to a bond holder, not to the general public or to the buying public.

MODERATOR MACO: Kate, do you have any thoughts on this?

MS. McGUIRE: I have a question. Is this --

MS. McGUIRE: I'm sorry. My question is, is this primarily coming up in the conduit and healthcare areas?

MR. CICCARONE: May I answer that? As far as we're concerned in the investment community there's a vast evolution, I mean there's an evolution that needs to be recognized here.

In 1984 when we in the National Federation of Municipal Analysts first started to bring this issue to attention it was very widespread. It was widespread even with governmental issuers. And today I would say that it really focuses, the issue really focuses on a minority of the market but a very key segment of the market, and that is the areas that is unenhanced and often riskier.

Issuers like New York City are a model today. And for this, the reason being on this panel is not to argue why not, I mean the argue is – the reason for being on the panel would be an example of what's good out there: frequent meetings with issuers, answering questions, a lot of documents, a lot of disclosure.

But, you know, when you look at where the problems are it's not the GOs, it's not the large utilities who follow corporate standards, you know, it's – and some of the best disclosure we have when you get into the conduit area is all conduits because the best conduit area we have is actually those that are filing corporate filings. So we're very pleased with those, those reports.

So it comes down to those that are not subject to that. And a very important group. And you take a look at the market this week, you had a $2 billion hospital bond issue. Now, granted it was AA, or I believe it was AA. And yet $2 billion is as big as any corporate bond deal out there and yet they're not subject to the same standards in the corporate area yet we consider it to be a corporate risk.

So we've really got to focus in on where the real heart of the issue is.

MODERATOR MACO: Let's move to the actual step of preparing information in compliance with the covenant. And, Bob, what's your experience? Do you participate with the issuers? Do you prepare it yourself? Do you have any involvement at all in that?

MR. SIKORA: We have a tremendous amount of involvement, Paul. As I said, we represent small issuers, and they are not about to even begin to try to do this. I don't even know if they understand what the obligation is when they sign the undertaking. And they generally defer to us or whoever their financial advisor is to assist them in compliance with the obligations of the undertaking.

So we prepare the annual statement and file it on a timely basis for each of our clients who's contracted with us to do that. And since the amendments to 15c2-12 were enacted I think we have two clients that have not retained our services. One is filing his CAFR and the other decided that they would do it themselves.

MODERATOR MACO: Alan?

MR. ANDERS: Well, just to deal briefly with the sort of big frequent issuers, 15c2-12 is very easy for us because we can basically just file our frequent official statements and we're done. And if you issue once or twice a year it's possible to do that.

There are some big issuers, and the state of Wisconsin of course is famous as going way beyond that with their own annual statement despite the fact that they're a frequent issuer.

I think generally in the marketplace the feedback we're getting from issuers in GFOA is that they are pretty well after five years now established in terms of procedure. It's usually working with bond counsel rather than internal counsel because most issuers don't have securities law staff on their law departments and so you have to actually bring in your bond counsel. I guess occasionally it's financial advisors. The feedback I get is it's more often bond counsel. And that everyone's pretty comfortable that those, both in terms of the annual filings and the notice filings, that the system is working pretty smoothly.

MODERATOR MACO: Paul, you have a different type of credit that you bring to the market. Does that affect the way you put together the annual financial information? What's been your experience?

MR. BURBINE: No, since we're a very frequent issuer also we generally just file the latest official statement along with our annual report in connection with work we do with our both bond counsels. We have a single family bond counsel and a multi-family bond counsel. Together with them we make our annual filing and it's really not a big deal.

MODERATOR MACO: Scott, do you participate in assisting issuers? Do you have an ongoing relationship with your underwriting clients that you comply with the contract?

MR. SOLLERS: Well, first of all, when you're structuring a financing you're definitely in the room helping lay out the ongoing disclosure document. And with respect to most governmental purpose financings the issuer is pretty cooperative about putting – willing to be put in operating data, pretty much following the template that the OS has set forth. Again, the real problem with the usefulness of that information is it's linked in the annual report to the availability of the audited financial statements. And it just gets – it's too late.

But the issuers by and large are willing to provide it as part of their normal course of business. They generally have it very close on the heels of the close of the fiscal year. Operating data I'm referring to, or enterprise data.

So we don't see any tension between the banking community and the issuer community in agreeing to provide that. I believe they'd even be willing to provide it on an earlier basis if you could de-couple the operating data with audited financial statements or instead use unaudited financial statements to be followed up with audited financial statements. That arena is kind of okay except for timing, which is a problem.

On the conduit side it's more difficult. There you're not in an adversarial role but your – the juxtaposition of the dealer, the issuer's conduit and the obligor, you're circling each other a bit. And it's, you know, a negotiation to deal with what the obligor is going to be willing to provide and when. And there I think there's a great deal of variety in the marketplace which I think the NFMA to their credit is trying to moderate by virtue of the guidelines they've published, these various industry sectors. They're out for comment. And I hope that's going to evolve in raising the bar a bit and being more consistent in what goes out there.

But right now it is pretty inconsistent both in terms of timing and content on the conduit side. And it's a, you know, it's an interesting discussion in every one of those financings, I can assure you.

MODERATOR MACO: Monty, do your clients look to you to help prepare the annual information?

MR. HUMBLE: Paul, some do, some don't. I've, you know, tried when we're doing the financing to point out to them that probably just filing an unadorned financial statement that speaks as of the date four months earlier or six months earlier without spending some time to think about whether there have been subsequent developments that should be disclosed is probably not a wise course of action. You know, even if they don't call me I assume that they're either calling Rick Weber or else taking care of it on their own.

MODERATOR MACO: Peter, when we chatted briefly before the panel you mentioned you had some statistics. Can you share those statistics with us and, in particular, if you have any relating to the timing of filing of annual information? But interested to hear the wealth of statistics you brought with you generally.

MR. SCHMITT: Okay. Thanks. I know there's a danger to speaking to numbers without any exhibits but I will try to minimize the confusion with this. Let me talk first about material event notices.

I share Rich's sentiments on this topic. We became effective as a NRMSIR in August of 1997. Between August of 1997 and this morning 42,279 material event notices have been filed with us.

I also have a strong sense, as Rich mentioned, that very, a very large amount of relevant and material information never makes it into the public system, i.e. through material event filings with the NRMSIRs. For example, when a public relations release is made with something that might affect the trading value of an outstanding bond as opposed to putting it through a public repository, it may not make it into the hands of investors.

I don't know how many retail investors, for example, have access to Munifax or Bloomberg wire or any other private wire system. And occasionally if the issuer is large enough and the event is significant enough it will make it into the general press, but not often.

I can give you a little bit of evidence. Between August of 1997 and August of 1999 DPC Data received exactly nine requests for material event notices from the investing public. So we have to go through a great deal of expense and effort to prepare and promulgate these things, so we decided to give them away for free. We put them on our website now. And usually we get them processed and available where you can screen them by type and all the other criteria. And you can actually download a PDF version of it usually within about 15 minutes of when we receive it. And you can do that at www.dpcdata.com.

The question that comes to mind is as the market continues to evolve toward retail investors, away from sophisticated institutions, will adequate information be available to Joe Public at the point of his bond transaction? And I think that's an important issue.

Away from material events we have done some statistics. And I want to tell you what we did. We tried to measure, if such a measurement can reasonably be provided what the compliance with 15c2-12 has been with regard to continuing disclosures and the filing of financial information. This probably would require, if it were to be a formal study, a little bit more work and the assumptions would certainly be made clear. But let me tell you what we did.

We took the information on the bonds that were issued that we received documents for during the year 1998. It was a very busy year in the market. We received prospectuses from the MSRB and also others that were filed directly with our NRMSIR that were not in the MSIL collection. For purposes of this little case study we looked at 14,032 bond issues, separate issues.

And then we looked at the CUSIP numbers, the 9-digit CUSIP numbers for those, and we tried to find any kind of non-material event filings in our collection that would be among the 20,048 documents that have been filed with us between January, the first business day of 1999, through last Friday. And we found some interesting things.

I also have to say that in that collection if an issuer sold a bond in 1998 and did not make a filing because they had another public issue that was in our possession, the information from that issue was also captured.

What we found was, especially looking from three different perspectives – and I will share them with you very briefly – that overall compliance is not very good. Of those 1998 issues only about 42 percent have filed anything with our NRMSIR through last Friday during 1999.

What we found was something I think I heard here a moment ago was that the larger issuers actually show better compliance than smaller issuers. Let me give you a little flavor for that.

We took a look at those 14,000-some issues and we broke them down by the size of issues. Not very scientific. Bears more scrutiny. But here's an indication. For issues under 10 million, about 35.25 percent of them by the number of issue actually filed any other continuing disclosure with us, not counting material event notices, so far in 1999.

For the $10 to $50 million range it gets better, it's about 53 percent of them had filed something. And then we found a similar experience in the range of 50 to 100 million and over 100 million. Both of them are about 61 percent.

So I guess if, you know, frequency to markets, sophistication in dealer – I'm sorry, with investor relations has been supposed until now I think we can develop data to indicate that that's in fact the case.

We looked at it in a slightly different way also. We took a look at security type, whether it's a unlimited tax, an enterprise revenue, a lease revenue, etc., etc., and we looked at the same sample and found the same 42 percent, of course. But we found a tighter distribution of compliance around the 42 percent number when we look at it by security type.

Let me give you an idea of this. The best compliance was demonstrated by note issuers. They're in the market all the time. DANS, CANS, FRANS, other anticipation notes. They weighed in with about a 58 percent compliance by filings something during 1999 so far.

Worse compliance was demonstrated in the lease revenue sector. That's about 18.5 percent. Think about that.

Unlimited tax, which tends to be predominantly small issuers, had about 46 percent, which means that the market is still at least for compliance statistics purposes being driven by the small issuer. Enterprise revenue is under 40 percent.

Just to take this to the next step, we looked at it by use of proceeds. There are some surprises here. Corporate guarantors of municipal debt showed the worst compliance with 15c2-12. Can't explain it.

Let me give you some examples: the corporations, the obligors behind industrial development revenue bonds, 9.6 percent of them filed anything. That's out of 479 issues that were in the sample that we looked at.

Pollution control, mostly big utilities, 15.5 percent.

Economic development, a fairly large group, 405 issues, only 160 have filed anything for about 39.5 percent.

You can see that it falls into a little bit of a shocking portrayal here.

Compliance, the best percentage of compliance by use of proceeds, interesting. Healthcare and single family mortgage revenue bonds, they both are at about 57 percent.

Multi-family housing, solid waste, resource recovery and nursing homes, which I think many would regard as being some of the riskiest sectors only complied about 35 to 38 percent of the time. Which means your chances are slightly better than one out of three that anything material and ongoing would have been filed with the repository.

A couple of summary observations just to wrap this up, most municipal issuers only file financials and continuing disclosure materials when their audits are released, which in our experience is typically six months after the end of the fiscal year. The largest month for those documents to appear in any NRMSIR collection then is December because about two-thirds reporters of municipalities, 501c3 corporations, are actually on a June 30 fiscal year.

Compliance, as I tried to portray for you here, appears to be worst among the smallest issuers and also among the riskiest sectors and the riskiest security types.

On a position note, not to be just negative, think 57 percent is very good compliance, but judging from the volume of filings that come through our NRMSIR which, by the way, number about 2,000 a month for both material event notices and also for the other kinds of continuing disclosures, the volume is clearly on an upward trend. And it's about 25 percent – 25 percent increase year to year in the number of filings.

MODERATOR MACO: Let me ask the members of the panel if they have any reaction to this interesting data, any questions that they may have of Peter?

MR. CICCARONE: I can just support a lot of what Peter said. One of the interesting comments you made about corporate filings are not going to the NRMSIRs and they're probably not being pushed because I know a lot of investors like us are just going straight to EDGAR and to the corporate filing methods that you would have. And when we need to talk to them they're very accessible to us. They deal with us like they deal with corporate investors.

So that's probably why they're getting by. But it's really not the way it should be, as you point out.

I, you know, I find some of those numbers consistent with our own thoughts, Peter. So, in fact, we compiled, I compiled some numbers from our collection of official statements and they come out pretty close to what you're coming out with. But I only did it for hospitals and utilities. And the hospitals in the first six months we get 53 percent of the hospitals that we're requesting.

Now, we are requesting 1,300 hospital financial reports a year and we're getting 53 percent for six months. But we're getting 32 percent in nine months or more, so, which has been our history for the last three years. So it goes to show you that data really gets stale. When everybody wants quarterly you're still getting them that late.

Utilities have a little bit record – better record but they still have 28 percent that actually we, because they're small, we may never get is the way it's coming out right now.

So these are where the gaps are. We talked about the minority. I think this data that Peter has provided you and, hopefully, I could give you a little more kind of define some of the scope of this problem in terms of getting financial reports.

MR. SCHMITT: Paul, can I add one thing about material event notices?

MODERATOR MACO: Uh-huh.

MR. SCHMITT: Of the – I took a look at our entire database of filings that went from August of '97 through the last business day of September. There are just under 42,000 of them. Of those, 87.5 percent are either bond calls or defeasances. The next largest category is other with at about 8.75 percent. And the balance, less than .7 percent have anything to do with delinquencies or defaults and they go down from there.

MR. SOLLERS: Well, even as appalling as those statistics are I'm not sure that if there was widespread compliance with the timing of the filings with the NRMSIRs that that necessarily is going to help the dealer community comply with their responsibility to have a reasonable basis for a recommendation to the secondary market for the simple reason that the data are dated and difficult to access.

When you've got a bid wanted on the table and you've got to make a decision about a credit you don't have time to go to the NRMSIR and wait a day to get financials that are realistically, either if they're even available, are so dated as to be un – just not usable.

So the dealer community I think is in a very vulnerable position with the existence of the rule, and we've always had the requirement to have a reasonable requirement to make a recommendation, but now it's been formalized in the context of 15c2-12 where there's this assumption that if you do the event notice check and if you get the annual report that you've got an adequate array of information to make a recommendation. I don't think you do, particularly in the conduit area. Those data are just not relevant.

And that's why I think the coupling the audited financial statements with the annual reports so you can get it filed in a more timely basis so the operating data are available three or four months at the end of the fiscal year makes some sense. And, frankly, I will be very interested to see what kind of compliance we get on the NFMA's guidelines for improving disclosure in the secondary market, if the bar doesn't get raised there. You know, then the only muscle we would have would be expanding the material event notice to include some circumstances particularly in the conduit area where you're required on an as-soon-as-practical basis to get the information out to the marketplace.

We need some help because the way it's working, I mean that's widespread failure on the issuer's side to get the information there. And even if they do, I question its usefulness.

MODERATOR MACO: Well, a number of panelists have mentioned timing as a concern, as have a number of questions from the audience. Alan and Paul and Bob as well, looking to your member groups, the GFOA, CIFA and the housing groups, from their perspectives are there difficulties in providing annual financial information within six months?

MR. BURBINE: We as an agency don't have any difficulty in Massachusetts because we have a 90 day requirement on our statutes that we have to file our annual financials. I think there are some other state HFAs that probably don't have that requirement. And maybe they do take a longer term. But I agree, those are very stale numbers after that.

MODERATOR MACO: Bob, let me ask you, I think you have a diverse base of small issuer clients. Do they have difficulty meeting a six-month timetable? What are the sources of that difficulty, if indeed they have it?

MR. SIKORA: We really don't, Paul. Our local governments and school districts in New York are required to file an annual financial report with the state within 90 days of the close of the – actually within 60 days of the close of the fiscal year. They can get an additional I believe 60-day extension if they request it.

So we have unaudited financial information available to us within six months of the close of a fiscal year of every local government and school district. Where we do run into a problem sometimes is with the audited financial statements. But we've taken the position at our firm to file the annual financial and operating information no less than six months after the close of the fiscal year. And if the audit's not available, then the audit gets filed when we get it.

But I'm just addressing Scott's problem, and it is a problem, I understand that, but there are undertakings that have been promulgated by bond counsel I know that do state that the filing can wait until the audit is available. And I know that's not in conformance with the rule, and should not be, and we don't really adhere to it, we file within six months.

MODERATOR MACO: Alan, any thoughts on, again you belong to two different groups and two greatly different sectors of credit in each group, any thoughts as to why these statistics are as surprising as they may be or why they sound the way they sound?

MR. ANDERS: Well, I don't want to be at all an apologist for – to look like I'm just trying to take a point of view that compliance is universal, because I think these are very interesting statistics and they merit some examination and some thought. But just thinking about them for three or four minutes now, you know, your statistic that 80 to 90 percent of the filings are defeasances or calls, and I would add sort of I would imagine most of the rest of them are – might be rating changes and perhaps substituting credit providers.

If you think about smaller issuers, many – some of whom, many of whom probably still are old fashioned issuing, you know, non-call, who don't do many refundings because – or they go through waves of refunding, who it isn't that frequent, thinking of your former employer, Peter, that, you know, credit enhancers are changed, I guess it wouldn't necessarily surprise me or indicate that there is large scale non-compliance just because you have that 50 percent statistic or that most of your filings are in December. Maybe they're annual filings.

But I don't know. I think it merits sort of thought and we ought to think about it. But I'm not sure.

MR. SCHMITT: We have to distinguish between material event notice filings and your disclosure filings. And there is confusion. I try to field most of the calls that come in to our NRMSIR regarding what has to be filed and when and how could I explain how to solve a certain problem of someone who's out of compliance, or is the failure to provide annual financial information notice, it's being filed today but we should get the financial statement Monday, what can – you know, obviously I can't respond to those questions.

But, you know, there seems to be some confusion there and also around enhanced issues. There is a belief out there among some issuers and some of their fiduciaries that if an issue comes to market with bond insurance they're exempt from filing annual disclosures because they have to file under the terms of the insurance policy with the insurance company, and the whole subrogation issues that, you know, arise between an issuer and an insurer.

So, you know, I'm not sure that if we look broadly across the entire spectrum and talk to all counsel and all fiduciaries who are advising the issuers about this that you're going to find a consistent answer with what compliance is and what your affirmative responsibilities are.

MR. CICCARONE: Let me just briefly comment on this, on Alan's point here too. I mean, you're questioning whether maybe that there's a reason, maybe that's justifiable that we have such a small number of filings on continuing information. And I say it's not justifiable, it's not acceptable. Because what has happened is that in the investment community analysts have come to not have a lot of faith in the NRMSIR filings because of the quality of information. It is just, it's not that interesting, you know, to look or just to call information.

And when you get default information it's after the fact. I mean it's too late to worry about that at that point in time. You're looking to see how you could bail out. But, you know, your key factors that are changing, that are relevant, the same kind of key factors that when you call up and ask what's going on and they say, we can't tell you that it would be inside information. They're not filing it necessarily with the NRMSIR either. Because if it were it would be a lot more interesting to read those notices and there would be a lot more of them.

So I think that because we've been preconditioned to the fact that we have this minimalist attitude or this legalistic and minimalist attitude about what goes on where it tends to defeat the whole process of what this was intended to do, which is to provide a continuing flow of information to the public. So I think we have to have a higher standard of expectation. And that comes from the part of issuers as well as the entire community.

MODERATOR MACO: Monty, do you have thoughts on the apparent delay that exists in filing and, indeed, apparent level of non-compliance with the filing requirements?

MR. HUMBLE: Well, I guess I had a series of questions that occurred to me as I listened to Peter speak. First, it sounds as if an entire year has not elapsed since the time of the original issue so it's not clear how many of the universe simply will never file and how many have not yet been required to file.

MR. SCHMITT: That's absolutely correct. And because the June fiscal year ending date, and typically we get the statement, the annual financial statements, the audits, particularly six months after the fact.

If we revisited these numbers in December or in January to show the full year of 1999 the numbers would be better. They wouldn't be 100 percent but they would be better.

MR. HUMBLE: And then I think there are clearly some exemptions permitted by the act for, for example, variable rate test that's in a weekly as a put and is in $100,000 pieces, query whether that's included in your sample?

MR. SOLLERS: They're in there. Absolutely.

MR. HUMBLE: So I think you have those issues, Paul.

In my own experience I've only run across one issuer who when we came back to do the second issue had not made the filing required by the first issue. And we do ask because I think that's part of what the interpretive relief says you have to ask as part of your diligence process and part of your disclosure process.

Also, the first question that you asked about the disclosure in the official statement about the undertaking, I guess we've gotten so that even where we believe we have an available exemption gotten used to going ahead and stating that in the offering document because we invariably get a call if we don't.

MODERATOR MACO: Peter, one of the questions that we've received from the audience is asking a response from you that many have experienced the problem with NRMSIRs that they know information is filed by when they go – you hear this often from issuers – they know that they've filed information but when they go to check to see if it's available in the NRMSIR's database it isn't.

MR. SCHMITT: I'm sure that happens. Fortunately for us, I mean we became a corporation in 1992, we were founded in 1992, and then we became a NRMSIR in 1997. And under our DPC Data's no action letter from the SEC regarding our NRMSIR status we're not required to retain paper, we have to retain electronic images.

I know the other three NRMSIRs at least when they obtained their designation were obligated to keep paper. And if you're talking about tracking a paper system, that's a problem.

But can I say categorically that we have never lost track of a single document? No. I'm sure there are a handful that have been lost. When you talk up in the 50, 60, 65,000 document realm that happens. But we do absolutely everything we can to log documents in so that when you call for – if you called in to get a verification that documents have been filed that we have an operator whose job it is to go through the database and identify the document, who filed it and when.

But we take it a step further. As we look at the market statistics as a NRMSIR and we see that more of the business percentage wise is gravitating toward retail we have made those documents themselves available, usually on the day they're received and in practically every other case on the day after they're received on our website. So anybody can come to our website and download any document that is held on our NRMSIR.

Typically with prospectuses, you know, final official statements and so forth we get them up there in downloadable form in such a time frame where around two-thirds of them are available before the syndicate closing date, for example. Material event notices are available, not an edited version of them, but the entire material event notice in its original submitted form, in PDF format you can download immediately too.

Do things get lost? I think on occasion it may happen but I don't think it's a routine problem.

MR. BURBINE: I have a question on your numbers, Peter. We file one annual report but we issue ten to 12 issues a year. When you get these statistics, about 30 percent or so, do you tie our one annual report to all those issues that we've done?

MR. SCHMITT: No.

MR. BURBINE: And so maybe that's why that number is so low.

MR. SCHMITT: Here's what we did for this. And I agree with the statement that, you know, this really should bear some more refined scrutiny, particularly in a statistical sense. I present these merely as indications of in a broad sense of where these things are. But for purposes of these statistics that I shared with you a moment ago we made note of the fact whether or not a financial statement particularly had been – was in a prospectus in 1999 for an issuer that sold a bond issue during 1998. We didn't look for other non-financial continuing disclosure information.

So if a prospectus, if we had a prospectus in our possession that we received in 1999 for an issue subsequent to 1998 and it had a financial statement in it that was counted in the statistics as an incidence of compliance.

MR. SOLLERS: Paul? Just a quick comment on compliance.

When we're structuring financings with issuers we will set up a procedure so that there is follow-up on our part to remind them about their ongoing obligations. With enhanced financings we really don't necessarily track to make sure they've complied. The non-enhanced areas we're way ahead of the curve, we're dealing with them directly. We just couldn't wait to get the annual report to get an update on our research on that non-enhanced financing.

That being said, you know, there's really not much-- you really don't have much leverage with the issuer to comply with the ongoing disclosure document in the event – in the circumstance, not in the event of default. I mean you can pursue an action to have them comply with the contract but, believe me, the dealer community is reluctant to engage the issuer community in any sort of litigious way under any circumstance. So that really is not an effective leverage.

And so procedures are one thing but the enforcement or the requirements to comply are another. And the undertaking that the issue goes into with the onus on the dealer to have this reasonable basis again I think comes around to the dealer as having the real vulnerability here in the long run.

MODERATOR MACO: Scott, when you do an underwriting of an issuer that has issued bonds after the effective date of the amendments to 15c2-12 do you check to see if they're --

MR. SOLLERS: Yeah, part of our due diligence there is to check. And to my knowledge there has been no issuer we have worked with that has come to market subsequent to a financing that has not complied with the rule.

MODERATOR MACO: Do you see this as something that your competitor firms in the industry also do?

MR. SOLLERS: Yeah, I think that's a typical due diligence question: have you been consistent with your filings? And I know that's why these statistics are so interesting because I don't see widespread noncompliance, at least among the issuers that have come to market over the past five years on some repeated basis. And, again, we're not checking on the enhanced areas to make sure they file, even though we remind them, but if they come to market again we do.

And I haven't seen situations where they're not providing the information. But that doesn't deal with the issue of timeliness of content.

MODERATOR MACO: I want to ask Paul and Alan if underwriters ask them or look into whether they're current with their filings and comply with their filing covenants as part of the – and then, Kate, I'll come to you because I know you have a question – what's been your experience, do underwriters check as part of their due diligence before they underwriter?

MR. ANDERS: I think the short answer is yes. We have sort of such a sort of cozy group and that does many financings in New York that we all kind of work together on all of this. And so when we have the diligence meeting that's not one of the question they ask the budget director but in the process, you know, sort of monitoring us on an ongoing basis. And that's the value of having a team that does that. That's one of the things they certainly ask.

MODERATOR MACO: Paul, do people ask you that as part of the process?

MR. BURBINE: I can't recall the specific question being asked. But we do have an underwriting team in place that we keep in place for a couple of years. So I mean they are aware whether we do file or not. But they haven't actually specifically asked the question.

MODERATOR MACO: Kate, you have a comment or a question?

MS. McGUIRE: I do. It seems to me that what I'm hearing is that the statistics that you've put our really suggest and support Richard's idea that – and also yours – that this disclosure isn't really timely and it may all come in, in December. And so everyone may be in compliance but it's very late.

And so my question was really for Alan and Bob and Paul again, and focusing more on your groups, but do you take a legalistic view of when you have to file and what you have to file? Is there resistance to – Would there be resistance, for instance, to the idea of making these press releases available to the NRMSIRs or filing, taking advantage of the flexibility in the rule to file in two stages so that the audited financials come later? So what's your attitude towards the rule at this point? Do you see it as a valuable tool to investor relations or as something off to the side?

MR. ANDERS: A two-part answer in this case which gives me a chance to talk about unaudited financials. Our legal team does take a legalistic view that the only thing that we file in terms of materials filings is the 11 deadly sins. And we file them extremely promptly. We don't wait till December. And certainly it's I think the viewpoint of GFOA and best practice that you don't wait, you file them promptly.

On the question of separating the operating and financial data and publishing unaudited, I really think it's so important and just really request that the analysts and others who are thinking about this issue distinguish between sectors. It's so easy to jump to corporate practice to enterprise systems of which hospitals are a very important sector and, you know, where you would think they're supposed to be publishing quarterly unaudited financials, and then not thinking about the problems that the sort of preponderance of issuers have, the GO issuers, where basically unaudited – the audited financials on GAAP with accruals is derived at the last minute in the audit process from basically cash basis or budget information.

So it's not generally available at all. If it were given out it would be likely to be misleading. It would have large unintended errors. It's an extremely bad idea for GO issuers to think that the audit information that typically comes out I think like 120 days for most issues, maybe it's six, for the small issuers it's at six months or more. I think that's improving. That, that be, that there be some information available a month after the fiscal year closed.

On the other hand there are other sectors, the water and sewer sector I think of our water authority where audited financials on GAAP basis are not meaningful. We're required to do it, so it is. It comes out, you know, basically four months later. But basically the coverage numbers are on a cash basis. And those are basically our numbers in our system. And we do provide them. And we provide them, you know, in terms of our undertaking on a historical basis, not projected necessarily.

So I think it's very important to distinguish by sector and not drag – it would be an extremely costly and I think an unfortunate and misleading practice to require GO issuers to provide unaudited financial statements.

MODERATOR MACO: Richard, as a consumer of this information how do you react to Alan's observations?

MR. CICCARONE: That's what I'd like to do, I'd like to be very practical, pragmatic about this in saying we'd like to distinguish between the sectors, and in fact that's my intention to do it that way. But I think we need to have the spirit – and I've heard people on this panel, including you, Paul, who have really advocated that we really can't go to a minimal standard here. I mean this doesn't mean that we shield ourselves when asked the question, because there's going to be times in which we might be worried about something going on in New York City or in Miami, Florida, or in Baltimore, Maryland, and although generally speaking we may not really follow those credits that closely because they're in a period of prosperity generally, there will be times in which we want to come to you and we need to talk to you, be open with us.

So how does this market work effectively so we can get the kind of pertinent market inform – credit information that we need on the right time without using a shield of, well, we don't have to, and it's best we stick with our legalistic views here on that.

So I'm willing to go that route, Alan. I really believe in it. I want to stay that way without the strictness of a regulation. But at the same time, you've got to have the spirit of cooperation here to make this work.

MR. SIKORA: Paul, excuse me, just about – I wanted to address something that both Alan said and something that, you know, Kate asked.

As I said before, we do make the distinction between the filing of the annual financial statement and the filing of the audit. One of the things that the panel should be aware of with regard to the small and tiny GO issuers is that audited financial statements are really of a secondary concern to many of them. And, in fact, in a lot of places, New York included, there are certain local governments that aren't even required to have them.

That being said, where they are being prepared we've taken the step and our clients have mostly complied with us of asking that the audits be prepared as soon as possible. Generally in the past they may not have been available until about this time of the year for a fiscal year that ended last December 31. But now we're getting them as early as May or June in a lot of cases.

And I really thank the auditing firms for stepping up, and our clients too, for stepping up and being proactive in that regard because we know it's important to the market and to the participants in the market to.

Thank you.

MODERATOR MACO: Scott and Bob I have a question for you and, Monty, I'll look to you for a reaction on this.

Bond counsel are often identified as the bad boys in the continuing disclosure milieu, characterized as advising their clients to use 15c2-12 as the maximum disclosure requirement. And is this something that you have witnessed or you believe there's any credence to this?

MR. SOLLERS: Yeah, I witness a lot of it. And I think in fairness to the legal community there is – there has been a reaction that I think is evolving here. There's been an attempt to shield the issuer from liability by just following the letter not the spirit of the rule. I think that's softening, Paul. I think what the NFMA has been doing in communicating with the marketplace about best practices and trying to communicate effectively with the market is beginning to take hold, in fits and starts, and it varies geographically around the country and it varies with the type of credit.

But there's a little better awareness, I think, among market participants about their obligations here in terms of making sure that we're getting the right information so we can comply with our responsibilities. Believe me, we're kind of used to them saying help us make sure we're not categorically going to violate 15c2-12 by not having reasonable basis. You've got to help us out.

And they're getting the message. And so it's a, I think it's a team effort. Coming from a fairly low point where some counsel just said flat out, this is all you've got to give. Don't give any more or you're going to subject yourself to some real liability, insider trading problems, etc. The insider trading problem is ours, not the issuers.

So, evolving would be my summary comment.

MODERATOR MACO: Bob, do you see – have you seen situations where counsel comes in and tells your financial advisor clients to just give out this much and no more, shut the door?

MR. SIKORA: No, we haven't actually seen that, Paul. I think in the beginning counsel was much more likely to adhere to the letter of the rule. And that, as Scott said, that's evolved. I think they're not quite as stringent to the letter as they used to be.

MODERATOR MACO: Monty, what's your reaction to this as a bond lawyer? Feel it's a fair characterization, unfair, and if so, why?

MR. HUMBLE: Paul, I think it would be a fair characterization of my behavior when I've been asked by clients, I guess my overall attitude is be good citizens, recognize these people are your creditors and hold your paper and they have a right to ask questions. But, at the same time also recognize that if you have material non-public information in your possession you have to either keep it non-public or else disseminate it in a way that it's fairly available to the market as a whole and not to a single buyer or your friend or your cousin or whatever.

So I think that probably that cautionary statement gets heard either by the analyst or by the client or by the analyst by way of the client as "we don't talk to you." But that's not the way it has been couched I don't think by me or by other bond lawyers by and large.

But if, for example, I know that a hospital has gotten a friendly letter from the Internal Revenue Service saying "We don't think you're tax exempt any longer," I'm going to tell the hospital, "you can't tell the first analysts who calls that you've gotten that letter. You have to manage the disclosure of that information."

In terms of the unaudited financial statements, I guess I have a concern there about the variance between the unaudited financials and the audit. Once you've filed a set of financials or disclose the set of financials that purport to cover a period and be as of a date, if you come back then later with an audited set that show material variances I think you've already given away half of your 10(b)(5) lawsuit, you've already got the defaults part and now you're just debating about whether it's material or whether there was damage.

MR. CICCARONE: I have to respond to a couple of these points right now because I think there are a lot of people that are in the audience that are investors, analysts, who feel very strongly about this issue. We're not seeing it go away, particularly in the riskier sectors, that they're referring to their lawyer's statement who has advised them no longer to talk to the analysts unless it goes to the NRMSIR, or just it doesn't get said at all. And it's just happening too often. It's not gone away and it's too important.

We had an extreme example of that last year, in the past year, in which the market really penalized that bond issue. As more and more people found out in the market about it went from a good, solid premium with a deep discount without interest rate help. And it was because they cut off the information flow. They'd gone from being open to very, very closed, with new lawyers that advised them in that account. And I know of at least one legal firm that has advised almost all of their clients in that area of that.

So, I have to say that I don't really – I think it's incumbent that I make that clear that I don't think that this is, this problem has gone away. It's too strongly out there with too many important issuers.

But on the audited statement, one of the things there, you know, being on the village board here I see our cash statements and they're very good and they come out pretty close to the audit. And we asked the auditor about it, how did our numbers look? they came out pretty close. And, frankly, I think that with the proper hedging on this and the understanding that these numbers are estimated and made very significantly from the actual audit, I think it's sufficient disclosure. But from a material credit standpoint if that's what the legislature is getting is cash numbers and the staff is working with cash numbers throughout the year that are significantly going to be different year to year with their audit, I'd say that's all material.

I wouldn't necessarily call it 10(b)(5) if you give it the proper disclosure because I think what we're doing is we're taking a look at what goes wrong in governments like Miami, Florida, you know, it's bad management. And we need to find that out. And this becomes a very relevant tool for management.

So, I don't know, I think we should have those.

MODERATOR MACO: Monty, let me ask you a question going back to the advice that you may often give clients. Do you see there's a balance between advising them on lessening liability and how that may – does that have any relation to what Alan mentioned very early on, an aggressive investor relations program? Are there two ways of addressing this concern: you can either clamp down and keep the information from flowing out so that you avoid, you hope to avoid liability, or can you respond to it in a different way by adopting an investor relations program that aggressively gets information out?

MR. HUMBLE: Paul, I guess let me say first off that before I get myself painted back into the same corner I frequently find myself in, that if you released information and you're getting a series of calls for analysts asking for clarification of that information then my advice to the client would be clarify it. Because you've obviously on the evidence produced something that is not clear and could possibly sink to the point of being misleading.

But I want to distinguish that case on the one hand from the case on the other where you have something that is material and clearly non-public and perhaps unrelated to what's been disclosed already.

In terms of investor relations, generally I haven't found hospital finance officers to be real eager to consider, for example, investor conference calls or something like that. I'm talking to one right now because I've heard so much about this that I have just an intellectual curiosity to see how it would be received and how it would be handled.

MODERATOR MACO: Alan and Paul and Bob as well, considering the advice that you give to your clients do you have any feel for which is, in a cost benefit sort of way, which is more sensible for you, is it the liability avoidance road of just shutting down on the information? Is that a more effective way of addressing this? Or is it more effective given your overall interest to have an aggressive investor relations program where you're putting out as much information as you can once you can get your handles on it to make sure that its' accurate and sensible when you put it out?

MR. ANDERS: I think given the fact that we're public officials and we're conservative and we're going to listen to our lawyers means that the most, the logical way that good information is going to get out or should get out or bad information should get out if it's not in the 11 events is through investor relations. And I think it's possibly very conservative, if that's what your advisors are advising you on, what you put into your material event filings.

And yet, be very forthcoming through the various ways you can use investor relations program to get information out, whether it's a Munifax wire or it's a press release or a combination or websites that investors know.

For example, for New York City, and I think this is getting down to intermediate size issuers too, that you can see every press release that the mayor has issued on the mayor's website. You can see every press release the controller has issued on the controller's website. And then if we think it's relevant, we do our own press release on our water authority or TFA website. And I think people look to those websites and expect for that information to be there. It's a way to be conservative and yet get the information out.

MODERATOR MACO: Is such a program a budget buster or is it fairly easy to implement? The cost factor has often been raised particularly with respect to smaller issuers. And, Bob, I'd like your thoughts on that as well.

MR. SIKORA: It's been our policy to provide more information rather than less. And I think there's nothing wrong with that as long as you're clearly identifying the source of the information and the nature of it.

My clients, by the way, are most general obligations issuers so we don't have the concern that other kinds of issuers might have. But as far as the cost is concerned, we've had a website for a couple of years now, and we post a lot of information on it with regard to our clients, our official statements, our audits, things like that, and we never have a problem with it.

MODERATOR MACO: Paul, any thoughts?

MR. BURBINE: We do have a full-time person that does nothing but investor relations. We are very sensitive to our price in the market, very sensitive to where the rate is going to be. Most of our investors are not concerned about whether they'll get paid but when they'll get paid. And that's what they're really concerned about. It's not a credit issue at all.

MODERATOR MACO: Richard, let me ask you your thoughts on the merits of an investor relations program. Also, one of the sectors that much of the conversation has drifted towards is the healthcare sector. One that recently was identified by one of the rating agencies, Moody's, is being particularly stressed right now. As a consumer, as a buyer of bonds is the clamp down at all sensible or is the aggressive investor relations program more sensible? And why aren't more people following it if it is sensible?

MR. CICCARONE: I think it's a good idea. The fact is that New York City, for instance, has proven itself in the last could be as much as ten years, the last five years for sure, as being an issuer that goes out of its way to make sure you get all the information, and some would say almost too much information. But if they can do it, so can many others and so could smaller governments.

When you talk about cost, which I think is the biggest objection, one way to handle this is to use organizations like state bond divisions like Ben Watkins' who was here this morning. And if he could be the conduit for many, many small governments in the state of Florida when you have questions you can deal with him, as long as he's able to get all the questions answers that you need to get answered. I think that may be a cost effective way to try with smaller issuers to use state facilitators like that.

So we've just got to be a little creative. Websites are still in their infancy in terms of using financial information. I know of thousands of websites are out there right now for state or local governments that I would say only 10 percent have anything to do with financials. And that's very lean. And maybe only less than one percent have CAFRs on there. Because that's not what they think who is going to be using the website.

But I think you can find – that's on the governmental side – you can find more advanced use of the web when you get into some of the special revenue areas which also helps and may control your costs.

When you get to the larger, special revenue bond issues the chief financial officer of the airport could assume the investor relations role but it would be better, if it's an airport like Harts Field or Orlando or O'Hare, they certainly can employ an investor relations person and to do that job.

So I really think that this idea deserves to be considered. And in terms of cost effectiveness let's be creative, let's see if we can get facilitators to handle larger groups of these so that we can get the questions answered so that the answers are consistent from one organization to another.

But the conduit, it brings up the issue that I really wanted to make, Paul, and that is – and it comes to a lot of questions that have come up here, we're focusing with a problematic area that tends to be in many conduit financings like healthcare which deserves to be a risky considered sector like you said. I think that this tax exemption pledge shouldn't come so cheap, is that when the city or the state or the agency gives it away to a conduit borrower or obligated party that they give it away without ties. I think you should hold the city, states, agents, you should hold them to the same standards they would hold for themselves for timeliness of information and the completeness of the information. Why should they give that away for nothing?

And I think if the states and local governments take that up by themselves it takes it out of the federal hands and it will I think be a much better situation. And so that would apply, again, to see that they have the proper investor relations situations in play for them as well.

MODERATOR MACO: We are running out of time. But before we break I do have one question for Peter. And, Peter, that is do you have any way of determining who accesses your database? Can you tell if it's broker/dealers who are doing so as part of the systems and procedures they have in place? Are there investors who are accessing the information? And any idea of the frequency of that access?

MR. SCHMITT: Yeah, I can. Actually, we have a pretty clear idea. We have published products that have been in the market for several years that one is called Muni IRAs, it's a CD ROM product, has prospectuses and escrow documents. We have another product called Muni Annuals that has the continuing disclosure, CAFR, financial, audited, interim financial statement information in it. And those products are actually delivered to over 200 financial institutions every month in the country. So they're broadly available and broadly used.

About five weeks ago we moved to a more sophisticated web presence. And, of course, anyone can screen any database for any document, including material events on our website and there's no charge for it. And in order to download a document you have to register.

And we charge a nominal fee of, if you don't have a prepaid account, of $20 per document whether it's a 2-page continuing disclosure or a 400-page CAFR we don't care, it's 20 bucks. You download it. And all the material events are free. And but in order to download them you have to register. And when you register then we can track, you know, who you are. And so that is knowable.

MODERATOR MACO: Do you have any feel for a breakout between individual investors and are dealers doing it to satisfy their reasonable basis requirement? Are investors doing it because they want to know what it is they're buying? What's the breakout on the people tapping into your website?

MR. SCHMITT: It's hard to say. I mean one of the things that we cannot capture is the intent for use of the person that comes to us for a document. But in a general sense the buy side of the market that either buys our published products or obtains documents from us over the internet do so for a split between current research – it doesn't take a day anymore to get a document, it takes you depending on if you've got fairly decent band width you can have any document you want in five minutes or less. They do it also for compliance.

The sell side tends to be more trading support and investment banking, research. We have not seen a large number of retail investors come to our website yet but we haven't promoted it through retail either. We expect that, that will develop because once information becomes generally available like that in a comprehensive way we think the market will awaken to it and use it.

MODERATOR MACO: Peter, thank you. And thank you to all the panelists.

PANEL III: ELECTRONIC DISCLOSURE

MODERATOR McGUIRE: I'd like to welcome you all back to the First Annual Municipal Market Roundtable sponsored by the Office of Municipal Securities and the rest of the Commission. This afternoon's topic is electronic disclosure. And I think it's a very interesting one. I'd like to first ask the panelists to introduce themselves so that they can state their affiliations and favorite accomplishments. And we'll start with the underwriters.

MS. BECKER: I'm Joanne Becker and I'm a banker at J.P. Morgan. But I've been a research analysis, underwriter and trader at different points in my career. And I'm also chairing a task force on electronic information delivery for the Bond Market Association.

MR. MARSH: I'm Ward Marsh. I'm in charge of the Municipal Securities Division at Salomon Smith Barney. I have a hard time saying Salomon. I apologize to anybody here. And I spent most of my career on the distribution side, mostly on the institutional sales side. But I will try to address the banking issues as well as the capital market issues the best that I can this afternoon.

MR. VISLOSKY: I'm Mark Vislosky with Fiscal Advisors. My background is accounting. I do part-time work as controller for the Town of Salinas. So I'll be wearing two hats today if anybody cares to ask.

MODERATOR McGUIRE: Following the tradition of the last moderator, first of all I'm Catherine McGuire, I'm the Chief Counsel with the Division of Market Regulation. And on behalf of the SEC panelists I'd like to reiterate our disclaimer which is that the views we express today are our own and not necessarily those of our colleagues or the Commissioners or anyone else really.

MR. McALEVEY: My name is Michael McAlevey. I'm the Deputy Director of the Division of Corporation Finance. Prior to joining the staff I was a partner at Alston & Bird in Atlanta where I did primarily corporate finance work and M&A transactions. A lot of – although in this area 10(b)(5) is really the concern as opposed to Section 5, there is a lot that the staff of the Division of Corp. Fin. is doing in the electronic area that I think has a lot of crossover applications.

MR. HOADLEY: I'm Frank Hoadley, Capital Finance Director for the State of Wisconsin. I'll be representing the viewpoint of a bond issuer.

MS. MILLER: I'm Mary Miller and I manage the Municipal Bond Department for T. Rowe Price in Baltimore.

MR. TAYLOR: I'm Kit Taylor, Executive Director of the Municipal Securities Rulemaking Board. The board has had a longstanding interest in trying to facilitate disclosure throughout the municipal securities industry. And we would love to see more and more of it electronic.

MR. FIPPINGER: I'm Bob Fippinger with Orrick Herrington & Sutcliffe. The firm is a bond counsel firm, although my practice is primarily representing investment bankers on negotiated underwritings.

MODERATOR McGUIRE: I'd like to start with Joanne and ask her to describe how underwriters are using the electronic disclosure to fulfill their various responsibilities under Rule 15c2-12.

MS. BECKER: I think the first thing is that electronic content is a bit of a problem at this point. And where we've been able to get electronic documents I think the street is using them to fulfill marketing obligations or opportunities. So basically what we're doing is we're distributing official statements for POS's but we're not using them for official – final official statement purposes mainly because we just don't have the electronic infrastructure to be able to deliver and keep track of the compliance requirements. But I think that's going to change over the next year.

Where I have seen a lot of change is using electronic documents for working group purposes. And we had a NABL session in Chicago. Last year I asked the audience for a show of hands as to how many people were using documents, electronic documents for working group purposes and maybe there were five or six hands. This year I asked the same question and about three-quarters of the room raised their hand. So I think that's a major difference.

I've used – I've out sourced electronic documents. Hired Thompson to distribute them for marketing purposes. We've converted documents into HTML ourselves and distributed them. We've used them for private placement purposes. But I don't really see a great deal of this being done in the market. And I think once we have the infrastructure available for G-32 purposes that will really change. At this point, you know, there's a limited incentive for issuers to provide the content until they really see the benefits, which are primarily in the speed of access and reduced FedEx charges and reduced printing costs.

MODERATOR McGUIRE: Ward, do you want do, could you comment on the timeliness of this stuff? Do you have an infrastructure to actually deliver information to customers electronically for those who would like it or how are you set up to do that?

MR. MARSH: Well, I'd like to add one other thing. I think that Joanne basically hit on the I think electronic disclosure has moved much more slowly than we all would have liked. And I think it has a lot to do with the motivation of the issuers or lack of motivations. And the one thing I think would get to the key force to get them to embrace this is the notion that they could broaden their market and I think beyond the impediments.

I also think that with the exception of some very motivated issuers who want to be the first to do it in an electronic format there aren't – you've got bankers who, God bless them, are overworked at this point in time that this would just add to their menu of things that they have to do. I think that it takes more lawyers hours to review both the cellulose document and the electronic document, so they avoid that.

And I think there's also the issue of the incorporation of feasibility studies and audited financials which typically arrive not in what I will call a native – or a native PDF form but rather in a bit map format. And I think there's always some dynamic tension about the inclusion of their documents in the half native/half bit map format. There are impediments that I think are surmountable, but at this point we need to provide motivations short of an angry boss because they want to be the first on their website to have more archived final OS's.

In terms of timing when it's an infrastructure, I don't think that there is a whole lot of infrastructure. I think, again, it goes to motivation. I mean if you have native PDF files, we have at our firm a retail site which when we have POS's or final OS's we make available there. We have an institutional site. So if we've got it the great beauty in electronic disclosure is that it's instantaneous. And I don't think it takes a lot of infrastructure to do it other than getting the infrastructure that we employ on deals to do it in an electronic, and again I underline, native format.

MS. BECKER: Can I just ask a quick question?

MODERATOR McGUIRE: Yeah.

MS. BECKER: Ward, are you keeping track of informed consents for retail clients and institutional clients?

MR. MARSH: In terms of delivering on an electronic basis?

MS. BECKER: Uh-huh.

MR. MARSH: I would tell you that if we have any I could count them on one hand. I don't think we've solicited it and I don't think it's a large part of our business.

MS. BECKER: Because that's really what I meant by, you know, the infrastructure. The system that we're working on basically would enable investors to come in and literally go on the screen, give their informed consent which is, of course, subject to revocation, and then to download the file. And it sounds very easy but actually it took a lot of programming time. And it's not finished yet.

And I think one of the problems has been everyone has been so concerned with Y2K compliance that, you know, you start talking about electronic OS's and they say, Go away. You know?

MODERATOR McGUIRE: I think you've highlighted a lot of issues. And I think Mike might want to react and I think some of the issuers and lawyers might too. Why don't you go ahead.

MR. McALEVEY: Yeah. I think that in the corporate world with respect to more traditional, you know, corporate financings I think that, you know, there we've seen plenty of examples of people being much more ready to adopt the new technology and to use electronics to accomplish their delivery requirements under the securities laws. So, you know, I think – I'm confident that things are going to move in this direction pretty quickly.

One of the – another point that's consistent with one of the criticisms that we're hearing of the existing system that we have for electronic delivery is many of you know from those releases in the mid-'90s that the Division, that the Commission issued on electronic delivery there is a model for touchstones that need to be touched in order to accomplish electronic delivery.

There is this concept of notice, access and evidence of delivery. And the point about consent and the difficulty to get that, in getting that consent and tracking consents comes up in the evidence of delivery requirement. There we basically said that there's a number of ways that you can demonstrate that the document has indeed been delivered. One of those is to get an informed consent. And many underwriters and issuers, people with delivery obligations under the securities laws have said to us those mid-'90s releases are helpful, however, it's the difficulty in getting that informed consent which is really slowing the process down.

Our thought on it is that it would seem fairly easy to get the informed consent, you know, either to seek it through and e-mail, seek it through cellulose, some way to get it. This is the first I've heard of the approach that you all are developing which is to just have on the website, you know, here, please provide us with your consent. And once you've provided us with that consent you can click through to the document. I think that that's, you know, an interesting way to resolve the problem.

MR. FIPPINGER: Mike, on the corporate side the evidence of delivery, has that been problematic?

MR. McALEVEY: When you say "the evidence of delivery" what aspect of it do you?

MR. FIPPINGER: Being able to demonstrate that the document is actually delivered to the investor.

MR. McALEVEY: Well, I think that that is a challenge in the paper world as well as it is in the electronic world. There is no requirement that there is actual evidence that the document has arrived, you know, and the person has picked it up and read it.

We haven't, people generally haven't had a problem with the evidence of delivery prong of this. I mean, for example, we all know that with e-mail you can have return receipt requested.

MR. FIPPINGER: Right.

MR. McALEVEY: That's a fine way to be able to do it. Another way that was recognized in those mid-'90s releases was if you connect to a document that is hyperlinked to the information that is required to be delivered that would satisfy it.

And this informed consent was just one way to satisfy the evidence. That, however, has sort of become the central concern. And we've received plenty of comments about how to remedy this.

One suggestion that we're thinking about currently is a model of implied consent. Today the requirement is that in order to use the informed consent to satisfy that prong of the electronic delivery test is to actually receive back from the person affirmative consent, that is, you know, the investor or the person to whom the document is sought to be delivered needs to actually get back and say, yes, please deliver to me that document electronically.

A lot of people are saying that is the hard part, getting people to get back to us. How about this? Why don't you just sort of flip the presumption and say if the person who is attempting to fulfill their obligation of delivering sends a notice to the person and says, We are going to deliver the document to you electronically unless we hear back from you. So the inertia is going in the other direction now, that if the person doesn't get back to the person with the delivery obligation then, you know, they can – then sending it electronically they can assume that their obligation has been satisfied.

It's an interesting idea. Obviously there are some investor protection concerns that we have about that. But that's one of the ideas people have.

MODERATOR McGUIRE: But it is important too, isn't it, to note that the consent goes to evidence of delivery, so if the person actually gets the document there's no need for consent; is that right?

MR. McALEVEY: That's correct.

MODERATOR McGUIRE: Frank, I thought there were some questions about issuer incentives. Could you talk a little about that in terms of whether you see an incentive to provide information electronically?

MR. HOADLEY: Well, clearly we see an incentive from the standpoint that we think that electronic preparation and dissemination of our documents makes our documents more widely available faster. And while I know that there are views to the contrary, we think that the majority of those users of those documents find the electronic documents more convenient to use than the paper documents.

With respect to the delivery and consent issues, for the most part these are questions and issues that don't affect issuers directly because we only have very limited delivery requirements. We have to deliver the official statement to the underwriter and we have to deliver certain disclosure documents to the NRMSIRs. Beyond that it's a real problem created by the regulatory environment to prove the delivery to investors. But we don't have a role in solving that particular problem at this time.

MODERATOR McGUIRE: Mary, did you want to comment on the usefulness of electronic documents and your access to them?

MS. MILLER: I think that I would probably separate my comments into sort of the front-end issues of the primary market and receiving preliminary OS's electronically. And the other area might be the secondary market and the types of information available electronically there.

We think right now we're getting about 10 percent of our official statements electronically. And I might just introduce some of the practical problems we face getting them that way, if I could.

Just to step back for a minute and talk about how we work. In any week we might see $3 to $4 billion of new issues and we frequently don't know which ones we'll be finally interested in until we see the pricing and structure of the issue. As a practical matter, at that point if we want to begin doing research on it and we want to take it off the internet the first thing the analyst does is hit the print key. I've yet to meet an analyst who enjoys reading a 200-page document on a computer screen.

So we'll spend some time printing. And it's still one-sided printing. A lot of documents being printed at the same time. Most of these issues are priced on Tuesday or Wednesday, so we can have sort of printer gridlock with a lot of paper being printed.

But the bottom line right now, and I can see some things changing with time, is that we still seem to need hard copy on these documents. We can get them more easily electronically, and I think the burden of printing is being shifted to the investor, and I don't think we have a problem with that. But there are still some practical issues on the front end.

I'll just offer that.

MR. MARSH: Mary, can I ask a question? One of the true advantages I think to electronic disclosure on a preliminary OS basis is that very often we are forcing deals into the market. And if there is something complex about the credit we often hear complaints, well, the POS just arrived and you're pricing it at 11:00 o'clock this morning. Of the10 percent of the documents you get have you been advantaged on a timing basis in that regard or is it just simply the delivery mechanism? Has it gotten there a day earlier because it was electronic? If you'd waited for the FedEx would it have, you know, pressured you into making a quick decision or a decision not to buy at all?

MS. MILLER: We were trying to figure that out. And there isn't one answer either way. Some of the OS's we are getting early electronically, and that's great. Others are arriving day of or, you know, along with the mail with the other more traditional means of disseminating OS's.

So I can imagine it become a better tool if there is consistency in early delivery of the POS's, but we have not seen any clear pattern of them coming in a lot earlier because they're electronic.

MR. TAYLOR: Can I also ask, Mary, I just want to make sure everyone in the audience understands or at least maybe just me needs to understand, but you are really talking about POS's?

MS. MILLER: Yes.

MR. TAYLOR: You are not talking about final OS's which are the subject of the delivery requirement to customers after the deal is sold?

MS. MILLER: Yeah. I wanted to make that clear that really this is front-end, primary market, new issues, preliminary official statements.

MR. FIPPINGER: Are you seeing any final official statements delivered electronically?

MS. MILLER: Yes.

MR. HOADLEY: And a further question, do you consent to that delivery as an investor?

MS. MILLER: You know, I'm listening to that. I have not personally consented to it. I have to go back and ask our analysts if they are consenting when they get that. I don't know the answer to that.

MODERATOR McGUIRE: Are there any other questions about the front-end POS process? I guess I still would like to know whether – maybe Mark you would know, you might work with more issuers – whether you can see a way to make issuers be more interested and what hurdles there are to be having this be used more widely?

MR. VISLOSKY: On a yearly basis we average around 300 issues a year. And out of that amount about 150 would be POS's that we would put on our website. But we do not preempt the normal mailing of the POS and notice of sale as we have always done because we're looking at it from a generational standpoint that even though the technology is there and we can go light speeds with delivering electronically, you still have a large segment of the population that is not a large issuer, that is not a large institution, that does not have access to electronic data.

So to kind of more speak to the point, a lot of our issuers are small issuers. On average it's $3 to $5 million per issue. And the benefit that we saw initially and when we tracked it is that we were receiving hits on the website from as far away as Great Britain, from American Online servers. Now, we couldn't weight the benefit as to whether people were just surfing the net and happened upon this information or if they were true downloads and that people were actually taking the information and making some kind of value judgment on that information.

But we looked at it as more of a, for lack of a better term, a marketing approach. How can we better get issue, the smaller issuer out there to gain the best market for them? But at the same time, we realized that there were still some concerns with delivering the final or rather the preliminary official statements to the underwriters and the notice of sale concern.

So we're still playing both sides of the fence, if you will.

MODERATOR McGUIRE: I don't know when the best time to introduce the MSIL system and the NRMSIR system is, whether it would be good to discuss it now or whether we should go through the periodic and material event notice discussion first and then go to that.

MR. TAYLOR: Well, if you want to wrap up this part of – I mean what we've talked about right now is sort of the new issue process. And, you know, we can sort of deal with that and then move on to the secondary because I think in some ways the issues are different.

Ward I think has really picked up on one of the key things, and I was talking to Mary early on before the panel began, one of the biggest problems about electronic delivery just of the pure practical consideration, electronic delivery over the net or through an attachment to e-mail of an electronic document is its size. And when Ward says produce the thing in native PDF, you're trying to get the thing down under a meg if you can possibly do it. The smaller you get the size of the file the better off you are.

A lot of the stuff that we've seen or heard about is really what Ward calls bit mapped, which is just take a picture of it. And those files are huge and really aren't – they're similar to what we actually do with the official statement when we get it in, in a hard copy form. We basically take an electronic picture of each page. That really in the long run is not something that's going to be transmitted or easy to transmit.

We really need to go back to what Frank may be doing which is producing the original document all electronically, including the financials, including the engineer's reports, including all of the maps that go into a final OS. That's really when we'll be able to speed the whole thing through the process.

MR. MARSH: And various analysts might even be able to read a native PDF on their screen.

MR. TAYLOR: Right.

MR. MARSH: Save it free.

MODERATOR McGUIRE: Bob, when do you think that's going to happen? You deal with these issuers. I know you're there as the lawyer when you write the documents but --

MR. FIPPINGER: Well, let me answer that by commenting on some things that came out in the last panel. I think that the lawyers who are advising issuers, particularly with websites, should be encouraging them to use the websites in emphasizing the positive features of the websites and not the risks. The fact is they're beneficial to issuers, they're beneficial to investors. The regulatory environment for website and electronic delivery is very favorable.

And as I think as this panel develops the theme we're going to find that the website solves more problems than it creates. So I'm very much in favor.

MR. TAYLOR: Do you want to take up websites right now?

MR. FIPPINGER: All right.

MODERATOR McGUIRE: That's fine with me. Why don't we start with Frank. And you're the one with the website, so maybe you could tell us a little more about what caused you to develop it and what works for you and anything else you think that would be helpful to this group?

MR. HOADLEY: Well, our website is we think one of the most comprehensive around in terms of sending the needs of the capital finance function of the state of Wisconsin. Examples of the information which is on our website today include such things, for example, as RFPs for financial services. And a new variant on that is that once the RFP is delivered to a proposed service provider in electronic format we expect the proposals also to come back in electronic PDF files. So we actually receive the responses back electronically also.

We recently went through an RFP process for financial – for investment banking services. And, frankly, the savings in time and effort receiving those proposals back mechanically at our end was phenomenal.

We also post all of our competitive sale documents, including the notice of sale and the preliminary official statements. We produce a separate and special annual continuing disclosure report. That document is available on the website.

And as a footnote to that document, that document is incorporated by reference in all of our other official statements. So when you open up an official statement, be it a POS or a final OS, you will find hotlinks in the official statements to the most recent annual continuing disclosure report.

We also put on our website unaudited annual financial reports. Our 1999 unaudited financial report will be released tomorrow and will be available on our website. We don't consider that report in any way fulfilling our 15c2-12 requirements.

Our CAFRs are put on the website separately as soon as they are available. Again, we don't consider putting the CAFR on the website as satisfying 15c2-12 requirement. We look at fulfillment of our 15c2-12 requirement very narrowly by the filing of our annual continuing disclosure report which contains all of the elements necessary to meet the legal requirements. And that document is essentially filed at the end of the year six months after the close of the fiscal year.

We publish a forward calendar of our bond sales on our website. We also include every material event and information notice on our website, complete with any attachments that are usually associated with those events or announcements. We use the NRMSIR system and the material event disclosure system both for the 11 deadly sins as well as for other information releases which we think are material to investors.

And then, finally, we have links to other state agencies who have important economic information, including employment data and revenue collection data. And then we have an archive of the final official statements for all of our bond issues since 1995.

That's what we're doing with the website today. A question that frequently is asked is, well, how much effort does it take and how much does it cost to maintain such a website? The reality is everything that's going on, on that website are activities that we would be doing on paper anyway. We're blessed in the state of Wisconsin of having some very good technological resources in terms of an available website and available servers. But in terms of the additional effort and time and expense of putting it out there, there is no additional time or effort or expense in keeping a website current.

MODERATOR McGUIRE: Does it improve the timeliness of information do you think?

MR. HOADLEY: You're going to find the information on the website before you'll get it from the NRMSIR.

MR. FIPPINGER: I think it's important to note that Frank's system has old official statements. And I would hope everybody on the panel would agree that the posting of old official statements does not carry with it a duty to update those official statements, that those official statements speak as of their date. They're not required to turn in to a movie. The hyperlink from the official statement to the continuing disclosure that Wisconsin has I think is very valuable.

But as to updating those official statements I don't think there is any duty unless there is an incorrect statement in them which there, of course, it's a duty, or a forward looking statement that requires being addressed.

MR. McALEVEY: I don't know if, you know, I don't know if I can necessarily – I think from a practical perspective you make a very good point. This is an area that I think not all the circuits are in agreement on, on this duty to update issue. And I am not aware currently – somebody else on the panel may be – of any judicial decisions on the application of the, you know, common law duty to update as applied to information on an issuer website. There may be cases out there that I'm unaware of.

Suffice it to say that I think there is uncertainty in this area. Having said that, however, we have observed a number of practices that, you know, I think, would reduce the risk of being subject to the duty to update the information on the site. One is the archiving. You know, if you have a separate, you know, as information ages your first point should be if it's information that speaks as of a date be sure that the document says that it speaks as of that date. And maybe even affirmatively put in the document you undertake no obligation to update the information. A header would be a nice thing to do in that respect.

And then on an ongoing basis, and this is where some cost may come into the picture, because you're going to have to have a live body looking at the website, but as the information ages to take it off the portion of, you know, another portion of the site and move it to an archive portion. And that archive, you know, a separate button that you have to click before you can get into that information. And as you go through that, you know, click on that you get a jump screen that says this is the archive section of this website, this is old information, please be aware. We undertake no obligation to update this information, it speaks as of the date, you know, at the top of the document.

And these are sort of precautions. Now, again, we're going to have to wait and see how these things turn out in the courts. But I think in the interim that there is some very helpful guidance out there on things that you can do to reduce the risk.

MR. FIPPINGER: Yeah, I think the archiving is fine as long as it's easy to access. But there is a lot of information in old official statements that is important to the secondary market, including redemption provisions, covenants, remedies on default, tax information.

MR. TAYLOR: Let me interrupt. Bob has raised a key issue: easy to access. Let me put the question to Ward. As it was discussed this morning in the secondary market panel, a block of bonds come in, are you happy with the idea of your traders going out and checking these websites and how practical is that from a dealer's point of view of finding out what the status is? Because that's exactly what we heard dealers try to do in the best world.

MR. MARSH: We as a firm rely still on the telephone and on paper documents for the most part. What Frank has described is the – and I don't mean this in a facetious – but basically the poster child of an issuer's website. Unfortunately, the issuers that are more problematic, the issues that we would want to trade and want to be comfortable with in the secondary market, because of the complexity of their credits are probably, number one, not going to have a website because they're going to be afraid of the timeliness, accuracy of the information that they put up there.

So I don't think that we now, nor do I see in the very short future, the reliance on the internet for our credit analysts to go get timely information. I think that that still is going to be a telephonic event. If that answers your question.

MR. TAYLOR: It's close enough in the sense that I was thinking of the other practical aspect of it is you have a whole bunch of people going out on the net, and the net isn't always very quick or very reliable unless you have super high speed connections and not too many people hitting those connections.

MR. HOADLEY: One point about the presence of the old official statements on our site. One of the factors we keep in mind in terms of what information we put on the site is to anticipate and respond to those questions which are most frequently asked. And one of the most frequent questions that we get is, Can I get a copy of some old official statement?

And the answer is, yes, we can mail you one or you can get it right now at this address. And we point the address out to analysts and others and then we say, Do you want a paper copy? And they say, Oh, no, this will be fine.

MR. McALEVEY: As a matter of fact, under the '95 releases dealing with electronic delivery that you're permitted to do electronic only offerings. And I realize that that's something that doesn't seem to have made it into the municipal market completely yet. But you need to keep in mind that even if you are conducting, if you're delivering documents electronically, you have to be prepared to deliver it in paper to people. If they call up and say, I want a copy, you've got to be able to deliver it to them.

So right now we have parallel systems in effect operating that you can use electronic, the electronics to fulfill your delivery obligations but you have to be prepared to deliver that piece of paper if it's so requested by the person to whom you have the obligation to deliver it.

MS. BECKER: I think also it's important to make a distinction between issuers using websites as extensions of their open meetings, laws, file cabinets and marketing purposes and make a distinction between that and the decentralized NRMSIR system that we have. And I think it's important that the websites end up not substituting for the NRMSIR system.

If issuers have, you know, true electronic data available it should be filed with the NRMSIRs. All the firms take subscriptions to all of these different products. And, you know, given the amount of time that you have to do due diligence for a secondary market trade, you don't want to have to go and do a website search if you can go straight to the CD ROM product that you're subscribing to.

And I think website development is something that we've really seen over the past two years. And I think, frankly, there's been an exponential growth in the number of sites. But, again, content is really the problem. And most of the content that's being delivered over the internet by the NRMSIRs and to a great degree by the issuer community are basically paper documents that have been scanned and are stored in PDF and are just simply image files that are being displayed. And there's a huge difference between having, you know, data that's been authored in an electronic format, Word, WordPerfect, HTML, native PDF, take your pick, but between displaying that and printing it and transmitting it and downloading image files.

MODERATOR McGUIRE: Joanne so that for the people who aren't so savvy with respect to the internet could you explain the significance of that? I assume that it has to do with size and cost and clarity and the ability to manipulate data. Maybe you could explain these terms to us.

MS. BECKER: Sure. Scott Sollers has a term, he calls it PDF, pretty darn friendly, versus HTML, hard to master language. But essentially native formats are, you know, just Word, WordPerfect, Excel, Lotus, what have you.

And you can either author in those forms and convert them into PDF, which is it's still a text file but it's a much smaller file, it takes up much less space on a disk, it takes less band width in order to transmit it, and it's much quicker to download.

If you take, and this is primarily the reason why the NRMSIRs are using PDF, they're taking existing image files and taking paper, scanning it into PDF and then simply displaying it. And the problem is a picture of a page takes up an enormous amount of space on a disk. It uses a multiple in terms of band width in order to transmit it.

Consequently, it's much, much slower. And the same thing for printing, it just takes an awful lot longer to print it. And until we have, you know, text files – I mean everyone is producing the documents using Word and WordPerfect and Excel. It's out there. And that's, you know, eventually it's going to get into the NRMSIR system in true text format.

And I think that's the significance of working groups using electronic documents. Everyone's, you know, experimented with this and they understand the differences from practical, of practical experience, you know, trying to translate from Word into WordPerfect or read a file that's in a different version. And these are all things that have to be worked out. And I think we're going to see an enormous amount of change in the next year.

MODERATOR McGUIRE: Go ahead.

MR. HOADLEY: I'd like to just expand on this just a little bit more. And Joanne and I have discussed this topic in the past.

But we are concerned about some aspects of electronic disclosure and electronic files. And we feel that any electronic format is subject at any one point in time to corruption. And potentially to misinterpretation. For that reason, given those limited filings that we as an issuer have to undertake, believe it or not, we're Luddites, we file it and we make all those filings in paper.

On the cover page of each piece of paper or each document we file there is a legend which says this document is available electronically at this web address. So while all of our documents are available electronically in very friendly native format, we make the legal filing in paper. And that's to simply assure ourselves that that filing was made once and for all and it's exactly the same document we prepared.

MODERATOR McGUIRE: Kit, how does that fit with your idea of the future for the industry as a whole? Doesn't that have to change if anything's going to change?

MR. TAYLOR: Well, several practical hurdles have to be dealt with. First of all, the drafting of the whole document in some sort of native format is absolutely essentially so that you get it down to manageable size. Much of the POS and much of the discussion about POS's or working groups really relies on the fact that that's the first 80 percent of the OS. It's the last 20 pages of the OS which has the engineer's reports, a copy of the auditor's letter and things like that that begin to create real problems because that's produced on somebody else's letterhead. And how do you – right now it goes into the OS as a photocopy. It's delivered to the printer not as an electronic WordPerfect file but as a print file, as a bit map.

MODERATOR McGUIRE: Frank, do you get that from your people?

MR. HOADLEY: Our contract with our auditors require them to deliver audit reports to us in electronic format, ready for use in disclosure documents.

MR. TAYLOR: As Ward pointed out, Frank's the poster child. I think as a practical matter, then you get into the next step which is what Frank has talked about is how from the MSRB's point of view where we're trying to get a copy into a library and to store it for the life of the deal, how do we make sure that we've got the official copy or an official copy? Right now it's usually satisfied, as Frank points out, his official copy is paper. So my official copy has to be paper.

When Frank can get his bond attorney to say the electronic thing is an official copy too then the whole thing can work electronically.

MR. MARSH: Can I just add one thing? One of the issues here, one of the advantages – I'm not trying to sell a product – but, Frank, you talked about the notion that every electronic form was subject to corruption. I think what we fear most is deliberate corruption. And to the extent of all the formats, John, you talked about PDF I think we would agree is about as immutable – nothing's immutable – but is about as immutable as all the formats we've talked about.

MR. McALEVEY: Is the reason for that that it's an image as opposed to text?

MR. MARSH: It's not an image. No, it's not an image.

MR. HOADLEY: And I don't think that, frankly, you know, if you work with PDF files and then create PDF files you pretty quickly realize there are several security layers built into that software. And most people never go beyond the first security level. And from that standpoint I don't think that PDF is any more secure from deliberate tampering than almost any other file format is. I think it is more secure from accidental corruption than other formats.

MS. BECKER: I think there's a difference between, you know, providing security for a database and providing a document that is not – that is less subject to being altered. And I think all the NRMSIRs and the MSRB provide security and fire walls so that their databases can't be corrupted. But I think in terms of the ability of a person to download a file, make changes and send it off to unsuspecting retail mom and pop investors, you know, that's a whole other ball of wax. If someone really wants to commit fraud they can do it with a paper document. They just cut and past it.

And, you know, should we really expect that we can provide documents that aren't mutable? Shouldn't we look more towards the procedures that we have in place for delivering electronic documents? And if I'm a retail investor I don't think I want to get a copy of an official statement or a stock offering from my retail broker, I think I'd take a great deal more comfort obtaining it from a NRMSIR.

MR. HOADLEY: Incidentally, as far as the security issue is concerned the bit map file is more secure by far than any of the others.

MR. TAYLOR: I think at the end of the day a lot of the practical problems can be resolved once you have a reason for people to do this all the way down the chain. Right now, when Mike McAlevey was talking earlier about what was going on in the corporate world I kept thinking, well, yeah, the form and content issues have all been pounded out by the Commission by direct rulemaking. We don't have that kind of luxury in the municipal world.

We're really up to what the issuer wants to provide to the industry or to the dealer community, and it's only going to happen when the dealer community can turn to the issuers and say here's how you can save some money. Or the dealer figures it out that it's really going to be a lot cheaper for them and they're willing to go through the work to do it?

MR. MARSH: Or broaden your market.

MR. TAYLOR: Yeah. Whatever. I mean there has to be some sort of economic incentive.

MR. MARSH: Where we're going as an industry is the direct sales. You know, if we're going to create a transparent market and we're really trying to court this friendly marketplace you're going to have to create information that the consumer can use, which going to your point, there is not a person on the planet that has a 28.8 modem at home that's going to download a 150-page bit map official statement. Just simply not going to do that.

So, I mean I think a lot of this centers around getting it user friendly for retail which might provide economics the issue is a broadening of their marketplace. And I think it does center ultimately around technology and that would be self-reinforcing.

MODERATOR McGUIRE: Mark, what's your sense of this?

MR. VISLOSKY: Well, again, a large part of our issuers are small issuers. As an example, we're working with a village up in the north country, what we call the north country of New York, which is really up north. But it's a small issuer. It's going to be issuing about a million-and-a-half in sewer-related bonds. And they don't have a website. And in the near future they're not going to have a website because they really have no need. They don't have an economic base that will entice people to access the website.

What we find is a large majority of our issuers, which are school districts, have the greatest amount of technology. But in that example with the north country municipality we are taking on the role of trying to put a or an official statement on a website. Now, we don't foresee providing continuing disclosure, and it doesn't seem practical right now, providing ongoing disclosure on our website and acting as a conduit for them. We see the paper trail being a better mechanism at this time.

Now, for a larger issuer, sure, it makes sense. But I think for the rest of the country that are a large part of the small issuers it's just, we just don't see it happening that rapidly. And maybe I'm in too small of a market to see that. But, you know, the technology is there, sure, but unless you're a large issuer and you have the staff to be able to maintain a website and gather all this information and disseminate it out there it's just, it's not happening right away.

MODERATOR McGUIRE: What about the part about just preparing the official statement in electronically? And what would your fears or the fears of your clients be in terms of filing it with the MSRB electronically?

MR. VISLOSKY: I don't think there would be any fears filing it. And it's, quite frankly, easy to convert from a Microsoft Word to a PDF and upload it onto the and then from there either transmit it to the NRMSIRs or directly from the internet.

MODERATOR McGUIRE: Bob, legal issues?

MR. FIPPINGER: Well, Rule 15c2-12 is drafted so that everything can be done electronically. The only step in the process that requires a paper delivery is compliance with G-36 and the delivery to the MSRB after the sale date. So the law is in place to let it happen.

MODERATOR McGUIRE: And the MSRB I think also has an electronic delivery.

MR. TAYLOR: We did not – we have it for customers, we didn't have it for 36 because at this point we hadn't seen anybody produce a complete document electronically. And more to my questions after this will be to talk to Mary about which documents she actually did get completely electronically because everything we've seen up to now it's only the first 80 pages that are electronic. People really aren't producing an official copy of the final official statement electronically. They're producing, you know, bits, parts, but not the final official statement.

I think, Kate, really in answer to an earlier question you had which is where is this going? The real progress is actually probably not going to be as quick in the OS part of it as it is in the continuing disclosure. I see much more ability to deal with that issue, similar to what we're doing with the NCSHA, the National Council of State Housing Agencies, where the council sat down with investors and said, What do you want? A whole bunch of the housing agencies right now produce quarterlies, which are not required by 15c2-12, in easily downloadable formats, any one of the Microsoft products.

We take them in, we turn around and flip them instantly to, right now to anybody who's a test subscriber. And I can foresee the day when they go out and they go onto an FTP site or they go out to someplace where anybody can pull them down. But I think there's much more likely to be progress on a sector by sector basis in secondary market disclosure. And we look forward to working with various sectors in that regard.

MODERATOR McGUIRE: Frank?

MR. HOADLEY: I'd like to raise just sort of a side issue of a catch-22 with respect to MSRB filings. Issuers cannot make filings with the MSRB. The only people who made filings with the MSRB are broker/dealers.

At the same time, there is a hint in 15c2-12 guidance that in order to incorporate by reference financial statements or other information, that information should be on file with the MSRB. Because we incorporate very heavily by reference in our official statements, we have no first-hand knowledge or way of knowing whether or not the requisite referenced information is on file at the MSRB, and in most cases we suspect it's not because it's not official statement.

And so there is a sort a catch-22 that exists there and we tend to just look past it.

MR. TAYLOR: Well, just for clarification, A) the Board cannot require issuers to file anything with us. Congress specifically prohibited us from doing that. The only thing the Board does get in the way of documents is the final official statement. And it is through the dealer community.

So we don't have all of the other things on your website that you would like to have as cross-reference because we would have to right a rule that says Ward has to give it to us in some fashion. And that puts an obligation on him that's not clear how it would work.

MODERATOR McGUIRE: Well, is that necessarily true? I'm just brainstorming here, which is always dangerous. Why we do that disclaimer thing at the front. But is there anything that keeps a dealer from delegating to the issuer to make the filing? I mean isn't it actually, I mean don't we have the team.

MR. TAYLOR: I'm going to let counsel here to my right answer for me.

MR. FIPPINGER: I think that's a good idea.

MODERATOR McGUIRE: I'm sure the dealers wouldn't mind.

MR. FIPPINGER: Well, the Tower amendment does say that they can't do anything directly or indirectly.

MR. TAYLOR: Right.

MR. FIPPINGER: But if they are not involved and it is simply a contractual arrangement between the underwriter and the issuer but the issuer will do the filing, I don't think that's a problem under the Tower amendment.

MODERATOR McGUIRE: Go for it, guys. It's a great idea. It's mine. Of course, when it turns out to have problems, it was the panel's.

MR. TAYLOR: No, Kate. Kate, we're going to lay it right at your doorstep, don't worry.

MODERATOR McGUIRE: Okay, Kit.

MR. McALEVEY: May I just --

MODERATOR McGUIRE: Yeah, go ahead, Mike.

MR. McALEVEY: – for a minute before we move off the topic of website content. We kind of drifted away from that.

We touched upon it on the sort of the duty to update. But website content, I think of the duty to update as just a sub-issue under website content generally. I think that we recognize the importance of website communication.

We think it's a great thing. But I think that issuers and their counsel and the other participants in the capital markets need to understand that if you're operating a website and you're participating in the sale of securities, the offering and sale of securities, Section 10 and rule 10(b)(5) promulgated thereunder are, you know, alive and well. And they present some challenging issues for people as they apply to this new technology.

I think that, I think that most people can agree – I won't say that it's universally agreed upon, but if you have information that is directly on your website that you have anti-fraud responsibility for that information, basically you have made it your own, it's something that the issuer is actively, you know, putting out on its behalf, on its own behalf, 10(b)(5) liability would more than likely apply to that if all the elements of the claim could be established.

More difficult issues arise, however, when you begin talking about hyperlinking to other sources of information, issuer initiated hyperlinks or broker/dealer initiated hyperlinks to third party material. What is the liability there for, the 10(b)(5) liability there? Again, unclear. The court's haven't spoken on these points yet, to my knowledge.

However, again, you know we have observed a lot of practice that seems to make a great deal of sense to try to limit responsibility for information linked to the issuer's site. In essence, you know, you have to – I think it's really helpful to view it through the lens of the elements of the successful 10(b)(5) claim which is materiality, reliance and scienter. And what type of things, it's very common sensical, what type of things would help rebut the ability of somebody to establish these elements?

And ideas like jump screens, you know, exist screens or notices. For example, if you're moving into information off the site you just have a screen that says you are now leaving our site, and, you know, please be aware that, you know, we have not reviewed this information – or something to that effect.

I'm not going to give you a lot of comfort that disclaimers work. Okay? I don't know if they do. I think that there's a number of cases out there already that say that, well, maybe they don't work. But I think that the extent that you do some sort of jump screen or disclaimer exit notice, that helps. I think it's a positive factor that says that somebody can't really rely upon that information on that other site with respect to making an investment decision of the issuer security. I also think it goes to the materiality prong. Maybe, you know, somebody will say it's not material. I mean, look at this notice, I mean it was – you were told that you maybe shouldn't rely upon this. So it goes to the elements of the claim.

Control is really the, you know, a central consideration here. I mean to the extent that the issuer has control over that linked site such that they can dictate what is said on that link site, I think that is a bad factor. I think it would be very difficult for an issuer in a case to be able to establish that they are not responsible for that information if it can be established that they had control over that information.

I think that links on a non-selective basis, this comes up a good deal with analysts' reports, you see a lot of practical guidance being given out there about linking to analyst reports. Most people think it's a pretty good thing, you know, to put this, you know, put this information at the hands of the investors. One of the practical points that's made, though, is do it on a non-selective basis. What that means is that some, if one analyst is following your stock or your security or the company, the issuer, then try to list all of the analysts who are following you. And the reason is that that will prevent somebody from being able to say, ah-ha, you selectively provided a link to positive research as opposed to some negative research.

So the idea is to try to if you're going to link to these third party sources to try to do it as much as possible on a non-selective basis.

Another factor might be if you're just linking to a news service, sort of a general what I'll call library type where, you know, a Yahoo Finance or something like that where it's not, you know, it's information that anybody can get any time, it's not necessarily, you know, company specific. You know, that sort of thing I think would be a factor that would weigh against, you know, or would be, you know, evidence that you indeed, you didn't have control, that you weren't trying to take responsibility for the information and that sort of thing.

But I think it's very important to keep in mind that, you know, 10(b)(5) applies to this information on the website just as if it was in cellulose. You've got to be concerned about the information that you have on your own site and you also have to be concerned about the information to which you hyperlink.

MODERATOR McGUIRE: One of the pieces of advice I've always heard in addition to the ones that Mike has just summarized is that you have to be sure that your marketing guy isn't your webmaster. And

I suppose that's less likely maybe in municipal finance than it is in corporate finance but there sometimes is a disconnect between what, you know, if you're basically putting up a tourism message on your city finances.

So that might be an important factor. I think we got a question from the audience, Frank, for you that was related to website management?

MR. HOADLEY: Yeah. And I think it touches on the question of entanglement also. And the question is how does Wisconsin coordinate or limit information being posted on links which are off of our server? And are the hotlinks limited to sites under a single control or a single official?

I would say honestly we probably don't take the precautions as extensively as have been described here. They are links to other state departments, they are links to information which has an extremely long history of being produced in a consistent fashion by people who we know to be responsible state officials. But we're not putting up the signs that say you're leaving our official disclosure site.

I think, though, there's – I think this question of entanglements is an interesting question and one that's of concern with us today. Just to take one more example, we have a large housing program called Veterans' Home Loan Program with almost a billion dollars of bonds outstanding. And the essence of pricing housing bonds, as you well know, is to understand the likelihood of call of those bonds at any point, one point in time prepayments. We have an extremely large number of maturities that are all subject to a cost call.

We get very frequent questions from the street every time a block of these bonds is up for bid. We get flooded with questions. We publish in our official statement a methodology that the state uses for selecting maturities. But applying that methodology to the database is another matter.

We suggested to a regional broker/dealer with a respected research capability that they might provide value to the state and value to the market if they undertook a research effort to consistently describe to the market those bonds using the state's methodology which are most likely to be called and those bonds which are least likely to be called.

The broker/dealer has responded by preparing what we think is a pretty good research piece which they have posted on their site. We think it's in our interest, we also think it's in the interest of investors in those bonds today that that information be generally made available to the street and to the market. We would like to include a reference to that research piece on our site. Yet, we're getting some pretty mixed signals about the nature of that language.

MR. McALEVEY: Yeah, I think that you're going to continue to get mixed signals about it until they, you know, some authority speaks definitively on it or it's resolved by the courts. It's a very – you know, it's really just a, in my mind a business decision.

You know, lawyers can talk about risk and, you know, I talk about the elements of the 10(b)(5) claim and all that sort of stuff. I think you just have to wait. You know, they have to put it in the balance. I mean, is making this information available to your investors more, you know, such that you are willing to take an increased risk of being responsible for the information that you're providing, providing to them in connection with that decision?

And it's really just a business decision because all we're talking about is risk and, you know, how you're going to allocate the risk. And, you know, to me that's a business decision.

Having said that, I think that there are some things that careful counsel can advise you to do which will really help you minimize that risk and make the business decision easier.

MR. FIPPINGER: Yeah, this is a difficult one because the usual entanglement illustrations involve a situation where a company has ten analysts that are following the company. And the advice of law review literature is to be careful not to selectively hyperlink to the favorable reports, not the unfavorable reports. Due them alphabetically or in such order that doesn't show any preference.

Here you're dealing with a single report and yet it seems like it's material information that ought to be out there. I would be inclined to say go ahead and do it unless the issuer has any reason to believe that there is misinformation in the report. But if there is no misinformation in the report that you're aware of, seems to me like referencing an article or a press release that's a single item as opposed to a list.

MR. McALEVEY: Yeah, but that may impose a responsibility on the person establishing the link and that to actually review it. Because I'm not sure, you know, under the existing, the existing scienter standard case law, you know, that there is actual knowledge and there's recklessness. And to say, to simply say that you don't have any reason to know may not, you know, may not satisfy the scienter requirement.

MODERATOR McGUIRE: Yet in this market for underwriter due diligence, at least in competitive bid situations, we only require that you follow up on red flags in terms of recklessness. So I don't want to leave the sense that it's absolutely not manageable in terms of it, and I don't think you do either.

MR. McALEVEY: No. And I don't mean to suggest that. Indeed, I think it is, it is quite manageable. I am just saying that, you know, I think that there, you know, to Kate's very good point, I think the responsibility would be to take a look at that and to test it for red flags. But I don't think that you can say not look at it and say I don't have any reason to believe that this is materially false.

MODERATOR McGUIRE: So it's a sort of a reverse thing, maybe the issuer needs to look based on what your knowledge is and see if it looks like the broker/dealer did what you, you know, what you would have thought would have worked out.

It's interesting that this goes both ways. There's a question from the audience also which asks do the underwriters feel that they have any concerns about potential liability if they develop websites for their investors to access OS's or other information from. And do they feel in any way that that increases their risk other than the due diligence risk that they already have under 10(b)(5)?

MS. BECKER: No.

MODERATOR McGUIRE: That's a good answer. I like that one. Might be wrong, but I don't see how.

(Laughter.)

PANELIST: I'm glad I didn't answer that.

MODERATOR McGUIRE: No, no, I don't know how it would be. It seems to be that you have the same liability with respect to the paper document. I guess though you have that website management issue in terms of, you know, being clear, moving it into archives, that sort of thing. and I guess that's one of the dangers with websites is that they can get stale or out of date. And they do have to be actively managed.

But these legal issues tend to cause people to think, oh, well, this is never going to happen and it's not a good idea. And so I'd like to turn back to Mary to tell us again how you're using electronic information to actually make secondary market decisions. And I think that's more positive.

MS. MILLER: Yeah. I was going to say, we're leaving website on a very negative note here.

MODERATOR McGUIRE: I know. I'd like to go to a more positive note.

MS. MILLER: I think it's an area of just enormous promise to investors. I think the timeliness of dissemination of information, the fairness of dissemination are just huge issues. And I see our firm using the web more and more in the secondary market. And I am truly amazed at some of the information that is available that I think is really quite extraordinary for very small issuers that are providing quarterly updates on things that it's really quite amazing.

Some of the states have just incredible websites. You've heard about Frank's. We use that information all the time.

To give you one example, this year we were interested in the Y2K preparations that issuers were making. Very cumbersome to call thousands of issuers and ask them that question. But so many of them have posted information on the web that we could go and read and update throughout the year, it's very helpful to us.

We are beginning to see CAFRs, the annual audited financial reports come out on the web. That's still early on. But I think that's an area of enormous promise as well.

So I would say today the secondary market uses of the web are greater for us than the primary market, and for the reasons I talked about earlier, some of the practical issues. But I think it's something that is growing exponentially.

MODERATOR McGUIRE: Kit, what do you think?

MR. TAYLOR: I, as I said earlier, I agree with Mary, I think that we're going to see more progress in the secondary market more rapidly than we are in the primary market in terms of finding ways to deliver the information to people.

The NCSHA pilot that we're working with, we're working with them, I see no reason why it can't be applied to other sectors where there can be an agreement between the investor community and the issuer community. And we'll be working with people over the coming year to see what we can bring about in that regard.

So I think that's, that is really where the promise is in the short run for this industry.

MODERATOR McGUIRE: What's the capacity of the MSRB to continue in this role? You've made great contribution so far.

MR. TAYLOR: Well, in the system that we're using right now for the NCSHA pilot is by no means maxed out. And it is, it can be scaled up if necessary. It's just not, it's not a big deal once the document is originally produced all electronically. And that really is the hurdle that we've got in the primary market but we don't have that hurdle in the secondary market.

MODERATOR McGUIRE: Paul, I don't know how long this is supposed to last. I'm a bad moderator.

MR. MACO: Five more minutes.

MODERATOR McGUIRE: Five more minutes. Good.

I'd like to give each panelist a chance to sum up or to pass if that's what you want to do.

MS. BECKER: I don't think I want to sum up because there's too much.

MODERATOR McGUIRE: Make any single point?

MS. BECKER: But one final point, and that is that, you know, we've been in a very unique interest rate environment. We've experienced historically low rates, limited credit spreads. And so there really hasn't been much spread with which to reward issuers for making good disclosure or making electronic disclosures. But, you know, the market goes up and the market goes down. And when we get back to 13.5 percent rates there will be ample spread to reward issuers for making good disclosure or electronic disclosure.

MR. MARSH: Not this afternoon, I hope.

I think that the theme that we all embrace here is that electronic disclosure is a great thing. And I think that we are that far away from creating incentives to get to whether we folks belong on the format, I think that's important on the primary side of things. But, you know, to Joanne's point, there's going to be a point in time when we're going to rely much more heavily on our fundamental research people. You know, we also besides the interest rate environment have enjoyed an awful lot of insurance issue and stuff.

We are embracing this both on the institutional and the retail side. It is fraught with business/legal decisions. And, you know, to the extent that the SEC could give us more precise guidance as to the liabilities we have I think it will be very helpful.

MR. VISLOSKY: I still think we're very much in our infancy in this regard. What we try to stress is let's expound continuity in the information that we're presenting and let's be consistent in the information we're presenting on behalf of our issuers. And we'll let the electronic disclosure take us where it may. But right now let's walk tenderly until we get a lot of these issues resolved.

MR. McALEVEY: Howard, you're prescient. We are currently in the Division of Corporation Finance in coordination with Market Regulation we are in the process of working on an internet release that is going to attempt to follow up on the guidance that was given in the '95 – in the mid-'90s on electronic delivery and some other issues.

And one of the areas that we're thinking about giving guidance, and I put a lot of emphasis on the word "guidance" because I'm not suggesting at all that what we're talking about here is safe harbor. We're talking – or exemptions from applications of the anti-fraud rules. I'm just talking about guidance here on what the responsibility may be for hyperlink material, you know, on an issuer's website and maybe some factors that would go into the analysis, or at least an analysis of whether or not the SEC would consider, you know, pursuing an enforcement action.

So I think that, you know, these are ideas that we have to – that we're grappling with right now. And I don't want to make any promises, but these are things that we're thinking about. And we appreciate the need out there for guidance on these type of topics.

MR. HOADLEY: I guess I'd like to address a couple of remarks very specifically to the SEC in this regard, and that is if you want the participation of the majority of issuers in a process of electronic disclosure you're going to have to give them more comfort than can be derived today.

The SEC, this panel, this meeting is dealing in some very sophisticated concepts of securities law. The concept of fraud that is used by the SEC is far different than what ordinarily people think of when they think of the word fraud. The concept of facts and circumstances is lost on most local government officials. And until there is some really bright line guidance and some safe harbors I think it's going to be very difficult to draw into this process many small bond issuers.

MS. MILLER: I would just say that I think electronic disclosure is the direction we're headed in and we're going to get it whether we like it or not. But I think it offers a great deal to the investment community in terms of productivity, dissemination of information. We certainly are embracing it and will try and work through some of the difficult issues you've touched on and some other people have today. But I think that the sooner the better as far as we're concerned.

MR. TAYLOR: I'd echo that. Ward talked about us being that close. To deal with that gap there is going to take a hard work with a lot of groups and who are represented in this room. And I would hope that everyone would enter into those discussions which will have to take place in a very cooperative spirit. We look forward to working with people to try to achieve that.

MR. FIPPINGER: Well, I agree with all of Mike's cautionary language and the practical advice he gave for managing a website. And I particularly appreciated his using the word "notice" rather than "disclaimer." It's much easier to notice the public that you are leaving the issuer's website than disclaim responsibility.

But the bottom line I think comes back to a theme that Alan Anders was emphasizing this morning which is it takes active management. And if a website is properly managed I think the risks are fairly minimal.

MODERATOR McGUIRE: I'd like to thank you all, all the panelists, and also those of you in the audience who gave us questions.

Thank you.

(Applause.)

PANEL IV: FIDUCIARY AND OTHER DUTIES OF TRANSACTION PARTICIPANTS

MODERATOR EISENBERG: All right, if you'll all take your seats we'll be able to get started.

MODERATOR EISENBERG: All right. I want to welcome you to this – Please turn off your cellphones. It's like in a play in a theater, please turn off your cellphones, no photographs unless authorized.

My name is Mike Eisenberg. I'm Deputy General Counsel of the Commission. And we have an august panel for you to discuss fiduciary and other duties of transaction participants. I want to say first before I introduce the panel that this is supposed to be, I am instructed, a free-flowing discussion, not a group of talking heads who will take 15 minutes apiece. So we will try to do that.

But we will also try to cover specific subjects so that we have an interchange of ideas. I understand that you are welcome to write out your questions. And if I think the question is appropriate I may get to ask it.

First let me introduce the panel, probably in the order in which the questions are going to be asked, just for convenience. Now, since this is unrehearsed and I haven't met many of the members of the panel you can be assured that this is going to be an unrehearsed, unstructured discussion.

Robert Bendzinski at the end is more or less the representatives of the financial advisors. Mr. Bendzinski is the chairman of, you'd be surprised to know, Bendzinski & Company, municipal finance advisors, a firm which was established all the way back in 1976. And they basically provide financial advisory services to municipalities.

Prior to having Bendzinski & Company open he was a financial consultant. He was controller and assessor and active as the city manager on various occasions for the city of Gross Pointe, which I assume is in Michigan. And Mr. Bendzinski served as accountant for the city of East Detroit, which I know is in Michigan.

He was one of the first persons to be designated a certified independent public finance advisor or a CIPFA as prescribed by the rules and testing requirements of the National Association of Independent Public Finance Advisors.

The second person who is basically an underwriter of municipal bonds is Tom Stanberry, who is where?

MR. STANBERRY: Right here.

MODERATOR EISENBERG: Yeah, okay. I should read the sign.

He's director of fixed income and capital markets for US Bancorp Piper Jaffray and is responsible for corporate and government underwriting, trading and institutional sales and municipal underwriting. And Mr. Stanberry is a member of the Management Committee of the Board of Directors of US Bancorp Piper Jaffray.

The issuer end of this discussion will be carried by Ann Butterworth who is the Assistant to the Controller of the Treasury of the State of Tennessee. She has served as Assistant to the Controller of the Treasury for Public Finance since the beginning of this year. But before that served as the "Director of the Division of Bond Finance for the State of Tennessee for over 12 years. And she was responsible for the debt programs of the state Funding Board and various Tennessee local development authorities.

Representing the lawyers, not a small group, is Fred Weber, who I do know, who is a partner of Fulbright in Houston. Ric has a extensive background in municipal finance. He heads his firm's public finance and administration department. He practices in the area of public finance, acts as bond counsel, underwriter's counsel and borrower's and credit enhancer's counsel. And he has considerable experience in the non-profit area as well.

The investment or investor end of this is going to be covered by Tom Kenny from Franklin. And it's, I guess it's Franklin Advisors, Inc. And he's the Director of Franklin's Municipal Bond Department which includes ten portfolio managers and 21 research analysts. And he oversees
a portfolio management of about 38 tax free funds. Those are, you know, The Franklin Group. That's one of the largest fund groups in the country with assets of over $51 billion.

In addition, Mr. Kenny is the lead manager of the 6.5 billion Franklin High Yield Tax Free Income Fund which has – in which he's worked since 1986, a fund which is regulated by my friend Mr. Roye.

Tamar Frankel who I also know well. Tamar is a professor of law at Boston University. Tamar has taught at Boston University. She's taught at Harvard. She's taught at Boult Hall, University of California at Berkeley, and basically has done a significant amount of work in fiduciary responsibility. She's an expert on mutual funds. Her textbook on mutual funds, fiduciary responsibility and related financial institutions I think has been widely used.

Current research and teaching interests she says involve corporations and regulation of financial markets and financial institutions. Not only was that her current interest, it's been her past interest as well.

In 1999/2000 Professor Frankel will be a faculty fellow at the Berkman Center for Internet and Society at Harvard University. And I'm going to find out what that is.

Sitting next to me is another person I do know, and that's Paul Roye who is the Director of Division of Investment Management. Before Paul came with the Commission, which was at about the same time that I came, which was the end of last year, he was a partner, long-time partner at Dechert Price & Rhoads. And his specialty has been over the course of his professional career has been mutual funds and investment advisors and related issues.

Paul comes to this in terms of the relationship between the financial advisor and registered investment advisors. And we'll hear from him later.

All right. Now, what we want to explore is the relationship of the financial advisor, the duties that a financial advisor has, what role a financial advisor actually plays, and the legal responsibilities that are imposed on investment advisors particularly under federal law and perhaps also under state agency law.

We also want to deal with the issues of what are the duties of underwriters of municipal instruments and the duties of the – of bond counsel which has been the subject of much discussion.

Let me just say before we get into those questions and before we talk about those specifics, I was a partner at Ballard Spahr. I know Rick Ballard is here in the room. And he will forgive me if I say that when I was there, there was a – it was a fairly substantial bond counsel end, the people who did securities work always had trouble understanding the bond people. And I know the bond people had difficulty understanding the securities people.

My first official statement that I authored I raised a lot of questions. That's the last one they gave me.

(Laughter.)

MODERATOR EISENBERG: I think we've come a long way since those days. But I think the issues that have developed are ones that peculiarly employ the issues that are common to investment companies and investment advisors who register under the act. Because what we're really talking about is the control of conflicts of interest.

And the Investment Company Act and the Advisors Act basically deal with the recognition of conflicts of interest, fiduciary duty and how to resolve those, those questions. To the extent that municipal financing involves conflicts of interest and the roles of the financial advisor, the underwriter and bond counsel, some of the lessons which have been learned from the institutional area under the Investment Company Act and the Advisors Act as well as the antifraud provisions of the '34 Act, might be useful whether they apply or whether they're particular precedent or whether or not the lessons apply under other laws, under state laws.

For instance, the conflicts of interest that are inherent in an investment company situation is where the investment manager has a conflict in determining the fee that he will charge with the directors of the mutual fund which is being advised. Just yesterday the Commission issued for comment a proposed rule which would deal with strengthening the role of the independent director vis-a-vis the management company.

And there are many conflicts in that area which we call fiduciary duty, which some people call agency, and which has specific requirements under the federal securities laws, the '40, both '40 Acts.

Now, what we're going to talk about is the resolution of conflicts of interest and the identification of conflicts of interest and how to apply them in the context of the municipal bond market. And I have been taught and I recognize that the municipal bond market has been to some extent a separate animal in the way it operates. However, over the past decade the rules of the Commission and the rules that have applied to other issuers have become applicable in one guise or another to the municipal bond industry or the municipal – the people who participate in the municipal bond area.

There have been Commission enforcement cases, there are the G-23 and the other rules of the MSRB, and there is the fuzzy line when investment – when people become investment advisors or whether they have remained financial advisors and aren't required to register.

So, with all of that introduction let me just throw open the question, first to Mr. Bendzinski, what do you do, what is the role of a financial advisor? And that may seem a little simplistic to start with, but there are some problems arising out of what the definitions are. So how does it work?

MR. BENDZINSKI: Well, there are two types of financial advisors or we classify them as, one, are independent financial advisors who are not underwriter related, broker/dealer related, bank related, account related, engineering related, and don't provide advice on investment of any type. Their primary role is first to develop the project and find out the entire cost of the project. Then provide the technicians, the bond attorneys and local attorneys, with the necessary information to prepare the bond authorizing documents, including the, where applicable, the development of the necessary revenue stream to pay for those debt obligations that are being issued.

For example, we frequently attend special assessment hearings and follow through the procedures of special assessment hearings to make sure they comply with Michigan law before we even proceed with the issuance of the bond documents with – co-developing them with the bond counsel. And so, if it's a revenue issue we make sure that the revenue issue, the revenue stream is in place, all the additional bond tests are met, all the covenants are met, and advise the client on what additional covenants might be put in place to make the issue more marketable to the investment community.

In Michigan we have what is called the Municipal Finance Division of the Michigan Department of Treasury. Prior to any issue being sold or offered for sale we much secure approval from the Michigan Department of Treasury. And we assist the clients in doing that.

We also assist the client in the possibility and feasibility of insuring the issue, credit – meetings with the credit rating agencies. And then we prepare as their representative and in conjunction with the information provided by the client and other sources, and in Michigan we're so very fortunate we have many state agencies that require reports that are information that are required under 15c2-12.

So, we prepare the official statement on behalf of the client. We do due diligence with that client and then put out the preliminary official statement for our client.

We then prepare the notice of sale in conjunction with bond sale – bond counsel, advertise the bonds for sale, and then proceed with the bond sale.

Now, Michigan you must remember is primarily a competitive bid state. Michigan does permit negotiated sales under certain conditions and with certain bells and whistles, as I like to refer to them as, on the type of issue. So about 95 to 98 percent of our annual bond sales, and we average somewhere around 100 a year, are of competitive nature.

After the bond sale we then assist the client and bond counsel in preparing the legal transcript and the delivery of the bonds, including the printing of it. At that point we then become available to the client to deal with project and bond issue matters.

We have a specific contract with each of our clients which outlines our services and the services that we will provide and the basis of establishing our fee. Our contract does not include the investment advice of bond proceeds.

MODERATOR EISENBERG: Do you consider yourself to be a fiduciary of the issuer?

MR. BENDZINSKI: No.

MODERATOR EISENBERG: You're not a fiduciary. What kind of responsibility do you have with respect to, for instance, the material which you say you help prepare, the official statement?

MR. BENDZINSKI: The information in the official statement, and over our competition I have one advantage, as you read in my short sketch there, I had been in local government for ten years in the state of Michigan. So I know all the reports that are generated, which reports go to the state agencies, which agencies they go to. And I even teach our staff the form numbers to make it easier so when they're communicating with state bureaucrats.

So, we're taking that information from reports that are required to be filed by the various officials and officers of the municipality with various state agencies. In the discussion we had Friday one of the questions that arose was what do we do with tax collections? How do we know they're correct and accurate?

In most cases we go directly to the counties who are the collection agent in Michigan for delinquent taxes. So we go directly to the county, find out what the issuer has returned in delinquent taxes, and part of that return is a warrant signed by the treasurer and attested to by the clerk, I believe, that these, this was the levy, these were the collections, this is what's uncollected. So we gather that information from these reports that are filed with the state treasurer. They're public information under Michigan's Freedom of Information Act. They're part of the procedure that the treasurer is liable for in the state of Michigan and is bonded for – not bonded as municipal bonds but as a security bond in the performance of his duties.

MODERATOR EISENBERG: Now, you have a duty of due diligence?

MR. BENDZINSKI: Yes. We perform due diligence on competitive sales. We sit down with the various officials, the assessor, the treasurer, the administration, and go through the preliminary official statement prior to publication of that document.

MODERATOR EISENBERG: **MR. WEBER**, is he a fiduciary?

MR. WEBER: I would say that not only is he not a fiduciary in the sense that he's only giving advice to an issuer that then uses that advice in making its own decision, and we're talking typically about issuers who have probably full-time directors of finance or some other finance officials.

MR. BENDZINSKI: Not necessarily. I'd say about half.

MR. WEBER: Half. I think you can, if you can think of a case in which you had a small special district that had no employees and had all volunteer board members and didn't have the capacity to make an independent judgment to take the advice and process itself, in that circumstance I think it's possible the financial advisor in effect is acting as a fiduciary.

But I think in the normal case it's providing advice to an entity to someone who has a full-time paid job to run the finances of the governmental unit. And I think in that case the financial advisor is not acting as a fiduciary. I buy only used automobiles. And typically when I do that I get a lot of advice from the person making the sale about the car, but I don't think for a minute that the salesman is a fiduciary.

MS. BUTTERWORTH: I'm sorry, are you comparing financial advisors to used car salesmen?

(Laughter.)

MR. WEBER: Did I make that comparison?

MS. BUTTERWORTH: I think at this point it would be helpful to me to get a better definition then of what is a fiduciary because, I must say, I thought based on our conversation Friday that we were going in a little different direction. Obviously I wasn't paying enough attention. If I could defer to the more learned person on our panel.

MODERATOR EISENBERG: Tamar is the designated learned person.

MS. FRANKEL: Oh, my!

It seems, let me put it this way, I would say that the fiduciary is somebody who gets power or property from another person in order to efficiently give service to that person. So including, for example, a doctor who performs an operation on me, he has control over my body but that's only for the purpose of making me better.

And the same applies to a money manager to whom I give my money. It's not for him. It is given for control, but given for a particular person – purpose and not for any other purpose.

So once we do that we can then calibrate the more control that person has for the purpose of performing his duties, the more control that person has the higher the duties that person has. It's not a yes or no. It is a function of how much power you have over another person's let's put it just property.

Now, if you had an advisor to whom somebody delegates really the power to do exactly what you're doing, and that is of finding out all the information, doing due diligence and so on, there is a delegation of power which binds that person legally. That's the definition of anagent. Yes? It binds legally. And I think depending on how much that person relies, that would give you the degree of legal duties.

And, last, we have a whole family of fiduciaries. We start with bailees. When I put my car in the garage, that person is a fiduciary, he is a bailee. But his powers are very limited and his duties are very limited.

Then I go all the way up to a trustee who not only I can't control the trustee. I didn't pick him up. I'm a 2-year-old beneficiary. In that case the trustee has tremendous strict duty.

And so when we talk now about you, it's not exact, there isn't a bright line, but we kind of feel we know the degree of duty that you would have.

MODERATOR EISENBERG: Professor Frankel, you've heard what Mr. Bendzinski does.

MS. FRANKEL: Right.

MODERATOR EISENBERG: Do you think he's a fiduciary to Ms. Butterworth if he undertakes those things?

MS. FRANKEL: I think he is but his duties may be very limited if the client reviews, controls what he does, looks and asks him questions, Why don't you go again and check for me? and so on. The less discretion he has, the less fiduciary he is.

MODERATOR EISENBERG: All right. Now, Ms. Butterworth, in the real world you're hiring Mr. Bendzinski, what kind of responsibility do you think he has given what he's going to be doing for you?

MS. BUTTERWORTH: Well, listening to what he was describing it sounded as if he had taken over the preparation and going forward and was acting in the place of an issuer, determining the structure, developing the documents, providing the interface. And that's a little different from the experience I have had in public finance. But it seems like to me that the description of what a financial advisor will do in terms of a contractual document does not differ that often, enough that I could look at a document and say, well, in this case it was intended to create the fiduciary relationship, but in this case it did not.

It seems like to me a lot of the distinctions that we may be trying to draw here are in the actual application. And you could have a contract that sets out the same language but you may in this case have an issuer where there is extensive review of the documents being brought back in. But I don't know you're going to find that kind of distinction in the written contractual document.

MS. FRANKEL: May I say just one thing first?

MODERATOR EISENBERG: Sure.

MS. FRANKEL: I am not sure that the contract determines the status of the advisor. I think the court does. The court may listen, may look at what the parties intended, but only at the terms, not at the legal classification. The court can say you decided XYZ and, therefore, you are a fiduciary or you are a fiduciary or you are not.

And, so, I don't think that that classification will help.

MR. ROYE: Professor Frankel, does that mean that contractual provisions in a contract that attempt to disclaim responsibility for being a fiduciary or saying that you're not an agent would generally be --

MS. FRANKEL: I don't think --

MR. ROYE: – ignored by the courts or?

MS. FRANKEL: The courts may pay some attention to the parties' intent but I've seen many cases in which the court said we are looking not at what you said you are, we are looking at what you said or what you do. And we come to the conclusion that you are a fiduciary or you are not.

MODERATOR EISENBERG: Well, Professor Frankel's analysis is supported by the district court opinion in Dain Rauscher in District Court of Arizona. Now, in effect that says, that case says "the Supreme Court has held that parties have a duty of disclosure to one another when a fiduciary or agency relationship exists or when the circumstances exist such that one party has placed trust and confidence in the other." (Ciarella v. U.S.)

Now, when you hire him to do the things that he said he would do are you placing that kind of trust and confidence in him with respect to the official statement and recommendations and the kinds of things that he's doing?

MS. BUTTERWORTH: I would think so in that case because his description of his job was to say that I would – that he would go on my behalf, seek out that revenue information, go out, get all the relevant information for it. And so I would say.

MODERATOR EISENBERG: All he said that he wouldn't do was he wouldn't tell you what to do with the proceeds.

MS. BUTTERWORTH: Right.

MODERATOR EISENBERG: But that's not enough to negate that trust and confidence that you're placing in him. For instance, in terms of duty of disclosure which the court in I guess it's Rauscher Pierce at the time was talking about in which the other courts in the 9th Circuit have been talking about, the duty to disclose other payments, the duty to disclose his relationships with others, what the arrangements are, does he have a duty to do that?

MS. BUTTERWORTH: I would think so. But based on what he said earlier, he doesn't have an arrangement with anyone else on any other basis. So I think in his case uniquely.

MODERATOR EISENBERG: No, well, obviously no. But if he did.

MR. BENDZINSKI: I think, if I may, the key is that we're independent advisors. We're representing a single client. The due diligence issue, we prepare the official statement based upon the information. We hold a due diligence meeting with the client and all the appropriate officials.

MODERATOR EISENBERG: Right.

MR. BENDZINSKI: That meeting we're asking them, is this information accurate, complete, not misleading? Have we omitted anything that could be misleading or anything that could give the investor the wrong opinion of this security that's being offered. And we do sit down and explain this at the beginning of the meeting.

The whole purpose here is not to develop the Chamber of Commerce program but for here to have a securities offering and be factual. And I'd like to use the case of one of our clients who was very upset with us because we had a preliminary official statement when we met with the rating agencies, and we refused to put in this preliminary official statement that the county was about, was about to – and the word "about to" is very important here – enter into an agreement for the development of a new regional shopping center, enclosed shopping center, which would be the first in the west side of the state.

And after meeting with the rating agencies the county manager in this case said to the rating agencies. Well, we have this coming but we don't know when we're going to finalize. And God bless his soul, old Wade Smith at Moody's, who most of you in this room are probably too young to remember, said, no, you should not disclose that.

MODERATOR EISENBERG: Now, taking it away from you because we don't want to personalize this, supposing a financial advisor knows or has reason to know that things that are being asked, that he's being asked to put into the official statement are really not so. Then he has a duty not to put it into the OS?

MR. BENDZINSKI: I believe --

MODERATOR EISENBERG: I think you would all agree with that.

MR. BENDZINSKI: I believe he does not – he should not put it in.

MODERATOR EISENBERG: He should not. If he does, he's liable?

MR. BENDZINSKI: I think so, yes.

MODERATOR EISENBERG: Mr. Weber?

MR. WEBER: Even I would agree with that.

(Laughter.)

MODERATOR EISENBERG: See, now we're really getting someplace.

MR. BENDZINSKI: One for the prologues.

MODERATOR EISENBERG: Go ahead.

MR. WEBER: I think fiduciary is a term that's used too loosely and too often, I think. And the results of several of the enforcement actions that have occurred I think can be more easily explained just in terms of a breach of the duty of care in performing the service that financial advisor or the bond counsel was hired to perform.

If you – if an issuer hires a financial advisor or disclosure counsel to basically give it advice on what should be disclosed and to prepare the disclosure documents, then it seems to me a financial advisor or disclosure counsel that does not take the issuer through the questions that the issuer should ask of itself to see whether it has information that is material and that is not being disclosed and that makes what is said misleading is not doing his job.

And so that you could I think state an action for negligence if the issuer then offers the securities with material misstatements and incurs liability.

It's another question, though, if you have a financial advisor or disclosure counsel that has advised the issuer on the sorts of things that should be disclosed, the issuer comes back and says, here is everything that fits that description, and the question is does the financial advisor have a duty to go check on the principal or the issuer that has supplied the information?

The only rationale I can think of for that – and by the way, there is a footnote in the 1988 SEC release that proposed Rule 15c2-12, the original rule, that takes the position that at least in a competitive offering under some circumstances the financial advisor has the same responsibility to check on the information that's disclosed that a manager of negotiated offering – managing underwriter would have. It says – I can't read the footnote number, it's too small on my copy – but it says that, it mentions that financial advisors typically publicly associate themselves with the offering by having a section financial advisor or indicate in the offering document their role in the financing or putting it together.

And it says, "Where such financial advisors have access to issuer data and participate in drafting the disclosure documents, they will have comparable obligations under the antifraud provisions to inquire into the completeness and accuracy of disclosure."

The only rationale I can think of, the only support for that proposition is that by publicly associating itself with the preparation of the offering document it leaves the investor with the impression that it has independently checked the accuracy and completeness of the information supplied by the issuer.

MODERATOR EISENBERG: Mr. Stanberry, you're the --

MR. WEBER: And it seems to me that is an impression and can be typically is negated by a disclaimer.

MODERATOR EISENBERG: Mr. Stanberry, you're the underwriter and you see this situation. What do you expect or what do you understand to be the relationship with the financial advisor? Can you rely on that? what do you do when you get the draft official statement and you start looking into whether or not you want to underwrite this offering.

MR. STANBERRY: I'm assuming you're talking about a competitive sale?

MODERATOR EISENBERG: Yes. Right.

MR. STANBERRY: Well, we do rely upon the financial advice. We operate from the assumption that the document that we receive is the issuer's document. So that the issuer, whether they have delegated responsibility to a third party financial advisor, the issuer is fully responsible for everything that's in that document. And if we have questions, we may call the financial advisor as the issuer's agent or we may go directly to the issuer at that point.

But if they have engaged a financial advisor we operate on the assumption that they're the agent of the issuer and that they're engaged in a fashion that they can speak on behalf.

MODERATOR EISENBERG: Do you have a lot of contact with the financial advisor in the real world and you speak to them, talk to them, they come to Minneapolis and talk to you?

MR. STANBERRY: We have our, I mean our competitive underwriting desk speaks to financial advisors in I would say the majority of the competitive transactions we underwrite.

MODERATOR EISENBERG: You view them as agents of the issuer?

MR. STANBERRY: Unless we're aware of some circumstance where there isn't an agency relationship we view them as the agent.

MODERATOR EISENBERG: You don't look at the contract, do you?

MR. STANBERRY: No, we never, we never – I shouldn't say never, we rarely see the contract. We see the disclosure document, we see the notice of sale. We may receive a call from the financial advisor asking us if we intend to bid on the transaction. And then whoever the senior underwriter is makes the assessment and either calls the issuer with questions or calls the financial advisor with questions.

MODERATOR EISENBERG: Mr. Stanberry, do you think they're your agent?

MR. STANBERRY: What?

MODERATOR EISENBERG: The financial, the financial advisor. I'm sorry. I didn't mean to make that --

MS. BUTTERWORTH: I got thrown off by the initial part of the question. Could you repeat the question?

MODERATOR EISENBERG: I don't remember. No, in terms of in effect Tom Stanberry is saying that we regard the financial advisor as the agent of the issuer. You're the issuer. Do you regard the financial agent as your agent?

MS. BUTTERWORTH: I would think so, because we – Yes. We have contractually, we have hired a financial advisor to represent us in dealing with rating agencies. I would say, though, having not thought this out fully beforehand that the agency relationship does have its limits in terms of the representations that can be made on our behalf. And working through or with, for example, an RFP process and the selection of firms, oftentimes we have the financial advisor serve as the sole contact for communication and keeping communication from being made elsewhere within the issuer system. So, yes.

MR. STANBERRY: I think one thing needs to be clarified here. And I side with Rick on this. We're throwing around a lot of technically legal terminology. "Contract with an agent," well, you can contract with a lot of people who aren't going to be your agent. You can contract with an independent contractor who may decide that they want to have fiduciary responsibility but may in fact have no legal fiduciary responsibility.

So, as you start throwing around the terminology "Does someone have a fiduciary obligation, have they entered into a contract?" I think you have to be real careful what you're saying.

We may contract with someone in a situation where it's absolutely clear we have no fiduciary responsibility but we may willingly engage in a fiduciary relationship and commit ourselves to one for one reason or another. But I think you need to decide, you just need to be careful as you walk down this path. When Ann says, I've contracted with somebody, I don't think that necessarily means you have a fiduciary obligation.

MODERATOR EISENBERG: Professor Frankel?

MS. FRANKEL: Just to ask, if a secretary calls and gives information to you, you don't consider the secretary to be, or an administrative assistant to be the agent which is defined as the person who can bind another person to legal obligations. If you take that definition which I think we do, then you could distinguish then the secretary would not be the agent, you wouldn't rely on it though, would you?

MR. STANBERRY: Presumably the secretary isn't an officer or isn't in a position to bind that agent.

MS. FRANKEL: Correct.

MR. STANBERRY: So, no, we wouldn't. We wouldn't rely upon that.

MS. FRANKEL: So this is the distinction you would make. Okay.

MS. BUTTERWORTH: But does it matter whether I have left the impression that anyone answering that particular telephone line has the ability? It says, "For further information call this number," and when you're talking on the phone you can't tell whether that's an administrative assistant or a vice president.

MS. FRANKEL: You'd better identify.

MODERATOR EISENBERG: Well, already said be careful.

MR. STANBERRY: I'm loath to jump into this but I can't --

MS. FRANKEL: Me too.

MS. BUTTERWORTH: They're falling asleep. You have to.

MR. STANBERRY: I know. I can't help myself. There has to be an element of common sense that comes to play here. If Mr. Bendzinski says that he is, let's say he says he's an agent or he sends us an official statement or my senior underwriter has a question and she calls his office and it's after hours and speaks to the maintenance person, presumably she's not going to rely upon that conversation. So, you know, again at some point common sense has to function here.

MODERATOR EISENBERG: Okay, but if you talk to Mr. Bendzinski or you talk to one of his vice presidents and there are discussions had about some of the things that he has undertaken to do for the state of Tennessee is he acting as an agent? I mean that's not necessarily a legal question it's also do you regard him as representing and standing in the shoes of the state of Tennessee?

MR. STANBERRY: I think for most, for most purposes on that competitive sale, yes, we do.

MODERATOR EISENBERG: Do you regard yourself as an agent of the state of Tennessee if you are retained by the state?

MR. BENDZINSKI: If we were retained by

(Laughter.)

MODERATOR EISENBERG: All right, now that means something in legal terms which is that there is a duty of certain kinds of disclosure with respect to conflicts of interest. Now, you're in a position where you say we don't have any conflicts of interest because we're independent. You want to tell us about financial advisors that do have relationships? What kind of relationships do the ones that aren't independent financial advisors have? And what are – are their responsibilities different?

MR. BENDZINSKI: I think they are because I've been in that situation prior to starting my own firm was–I worked for two brokerage houses, broker/dealers who were very large in the municipal bonds. They were the premier house at one point in time.

Really the story on Friday of the situation where we were, I was providing the service as the financial advisor to a particular client and the underwriting desk came up to me, and those were in the old days where we actually went out to the municipality's board which generally met in the evening, and we opened bids there. And, thank God, most of them had Frieden so we could calculate the bids at the time, but the underwriter came to me and said, Here, Bob, here's two envelopes. Envelope A, if there's other people there, envelope B if there's nobody else there.

And I looked at our underwriter and said, Sorry, I'm representing the issuer and I will not take out two envelopes. You give me an envelope that you want to submit as your bid. Hopefully it's the best bid. And if there's somebody else there, if there's nobody there, too bad.

Well, needless to say, I had held the pay for about six months before I would not enrich the company for the benefit of my client. I think that happens all the time.

The other circumstance that I found myself wrestling with when I was working for these brokerage houses was a client calls me and says what we now call a material event, one of the 11 deadly sins, what do I do? I can't go to my underwriting desk because that would giving information to our, my firm and would be placing me in jeopardy in terms of disclosing to one firm who might enrich itself because of the information provided by me as an employee of that firm.

So frequently I would just say to the client let's, I'll meet with you today, tonight, tomorrow, whatever, and we will put a disclosure letter together and send it out to everybody.

MODERATOR EISENBERG: Now, Mr. Stanberry, does Piper Jaffray act as financial advisor as well as underwriter in some cases?

MR. STANBERRY: Yes, we do.

MODERATOR EISENBERG: And how does that work and how does that complicate your life?

MR. STANBERRY: I think in situations where we're a financial advisor – I agree with a lot of what Mr. Bendzinski said – I think you have to set up some type of Chinese wall procedure to segregate what goes on, on the underwriting side of the house from what goes on, on the financial advisory side of the house. And if there is material information that comes into the hand of the financial advisor it can't be shared with the underwriting desk. So you provide the segregation, not unlike the kind of segregation you'd provide with the Chinese wall in a corporate finance operation between the fundamental research analysts and the investment banking team or the research analysts and the underwriting desk.

So in those situations we make it clear that the bankers who are engaged as financial advisors don't communicate that information with the underwriting desk and essentially set themselves up as an independent unit inside the department.

MODERATOR EISENBERG: And that's the way things work in the industry generally?

MR. STANBERRY: I don't know that I can say it's the way things work in the industry generally. I think that if you're, if you are functioning as a financial advisor in an environment where you have other duties, where you have underwriting desks, sales operations, you need to figure out some way to segregate the two operations.

MODERATOR EISENBERG: Ms. Butterworth, do you work with financial advisors that are also underwriters?

MS. BUTTERWORTH: The state of Tennessee used to select firms for those entities that had the ability to choose negotiated sales and entered into contracts, written documents that provided for both underwriting and financial advisory services. And several years ago it was determined that we would move away from that, move towards a single financial advisor for all state level debt issuers.

And it was determined by contract we would say during the period of this relationship you cannot be involved in the underwriting of the debt of any of the issuers for whom you are serving as financial advisor. But we have not taking a policy position to say we will not hire or consider firms that both underwrite and provide financial advisory services, and, in fact, have hired several firms. So we do not have a predisposition towards a financial advisory only firm.

MODERATOR EISENBERG: Is this general throughout the states or is Tennessee a minority?

MS. BUTTERWORTH: I don't think there's any uniformity there.

MR. STANBERRY: More often than not when we're hired as a financial advisor we're asked or at least persuaded to agree not to bid on a competitive sale. So we come to the same conclusion or the clients have come to the same conclusion that you have that notwithstanding the Chinese wall, I think that's a hard concept for many clients to understand. So we do that internally. Clients just simply ask us not to bid.

MS. BUTTERWORTH: Okay.

MR. BENDZINSKI: I might add that there are several public finance departments, as they're referring to in the underwriting, associated with underwriters who claim on a competitive sale all they have to do is disclose in the offering circular, the preliminary official statement, that they are acting as financial advisor. And that absolves them from the requirements of G-23. I don't necessarily agree with that.

MR. WEBER: In a competitive or a negotiated sale?

MR. BENDZINSKI: Competitive.

MODERATOR EISENBERG: There are two things I want to cover now, first from the point of view of the investor because Mr. Kenny runs a very large portfolio of bond funds, and the other is from the point of view of the Commission staff. And I want to talk, have Paul Roye talk about when you cross the line from financial advisor to investment advisor which requires registration under the Advisor's Act.

So, first, from the point of view of a portfolio manager, how do you view these relationships? And does it matter to you? Do you just look at the numbers and say, okay, the yield is safe, this is what we're going to do? How much analysis do you do?

MR. KENNY: Well, first, I'm glad to hear that everyone really agrees on the definition of fiduciary and contracts and whatnot. But from an investor perspective, to us it really doesn't matter whose responsibility is defined internally. You have an underwriter, you have an issuer. And all three of them from our opinion are involved. It's their document in total, whether the issue is driving it, the FA or the underwriter. And if the deal goes sour because there wasn't full and accurate information disclosed, we're going to go after everyone.

MODERATOR EISENBERG: That's right. Debbie Gatzick would go after all three of them. That's right.

MR. KENNY: I think she would.

MODERATOR EISENBERG: Sure. But which is interesting in terms of who do you look to if you have questions; would you go to the financial advisor?

MR. KENNY: It depends on --

MODERATOR EISENBERG: Or would you go to the underwriter?

MR. KENNY: It depends on the deal. Most of the time on negotiated deals you'll go directly to the underwriter and the issuer to get answers to your questions. And many times even on negotiated deals the FAs will bring the issuers through our offices for meetings to go over the transaction and some of the numbers. So it really depends on the issuer.

MODERATOR EISENBERG: Yeah, well, you're really concerned about credit worthiness.

MR. KENNY: Yes.

MODERATOR EISENBERG: And so you rely on the credit, the credit bureaus. And but you have your own analysts that look into the credit worthiness of the deals?

MR. KENNY: These days you can't rely on the credit bureaus, you have to be doing your own homework. And so, therefore, the information provided is extremely important to us, not only to accuracy but also that we're getting full and complete.

MODERATOR EISENBERG: And so to do that who do your people go to, to the underwriter?

MR. KENNY: Primarily the underwriter. But many times the underwriter will delegate to the issuer to answer some of the specific credit questions because the underwriter won't have the answers many times to the questions. And so they will bridge between the issuer and us. And many times put us directly in touch with the issuer.

MODERATOR EISENBERG: Do you have relationships with specific underwriters who you look to, to fill your needs?

MR. KENNY: We look to all underwriters.

MODERATOR EISENBERG: To all of them, yes.

MR. KENNY: Some are better than others.

MODERATOR EISENBERG: Well, we'll take names.

(Laughter.)

MR. KENNY: I'll stop there.

MODERATOR EISENBERG: All right. I wanted to save some time for a question which I think is important to us. And I think important to all of you.

Paul, when does a financial advisor step over the line and become an investment advisor which would be subject to the provisions of the federal securities laws?

MR. ROYE: The fiduciary duty question I think it's clear that once you step over the line and meet the definition of an investment advisor that the Supreme Court says you're a fiduciary. So at least resolved that issue, once you become an investment advisor.

But the Investment Advisor's Act of course contains a definition of what an investment advisor is. And it essentially has three prongs to it. It's any person who for compensation is engaged in the business of providing investment advice or advice with regard to securities. And each of those three elements – compensation, being in the business, providing investment advice – has traditionally been construed fairly broadly by both the courts and the Commission.

Those of you who want to study this issue I would recommend that you look at Investment Advisor's Act Release Number 292 which tries to work through each of those three elements. In order to be an advisor you have to meet all three of those elements.

On the compensation front, again, it's construed broadly as pretty much any form of economic benefit to the organization or individual providing the service. It doesn't have to be specifically defined or specifically confined to "investment advice." It can be compensation that's a range of services, part of a package of services, indeed part of the package of the services that Bob outlined that they perform, in addition to investment advice. It can be bundled up there.

The compensation doesn't have to come necessarily from the issuer, it can come from a third party, it can come from entity who's compensating the advisor because the issuer bought securities and they received a commission or some kind of payment in that regard.

So you can find compensation in a variety of different ways under the definition. I note that there were some no action letters that a number of financial advisors have relied on, I guess the Knight Group and Dominion Resources. Other letters. Those letters in some respects tend to suggest to determine the fact that there was no compensation paid in connection with occasional type of advice with regard to securities, temporary investment of idle proceeds in connection with bond offerings. And even though those letters talk about they're not being compensation, I personally question whether or not when you look at those relationships whether or not you couldn't find compensation.

I know in other types of situations I think the Commission – Commission staff rather has come to the conclusion that there is compensation. But when I look at those no action letters it seems to me that when the staff took the no action position that it took in those letters involving financial advisors it was really in my mind it was really more the second test, which is whether or not you're in the business of being an investment advisor. If the nature of the investment advice with regard to securities was really so isolated, it was at the instance of the issuer, it wasn't something held out as a service that the financial advisor would provide to its clients, and it was really more, in my mind that was more driving, what was driving the Commission to take those kinds of positions.

Again, it has to be investment advice with regard to securities. As these municipal deals have evolved from investing proceeds into government securities, you know, where there is an exemption, if you're giving advice only with respect to government securities there is an exclusion in the Advisor's Act for that kind of advice. If you're giving advice with regard to repos, forward contracts, GICS, you're outside that exclusion and you're giving advice with regard to securities.

When you look at the O'Brien Partners settled enforcement proceeding that's exactly what was going on. In that situation indeed their contracts called for the financial advisor to provide investment advice with regard to investment of bond proceeds. It was part of the contract, it was part of the understanding. They were making recommendations on investing in repos and GICS and forward contracts. So it seems clear in that kind of situation that it was contemplated that they would be giving investment advice with regard to securities and each of the elements of the investment advisor definition was met.

So I guess when you go back and you analyze the no action letters and you look at the O'Brien Partners case I guess the message you take away is that look at the Knight Group letters fairly narrowly, a narrow set of facts. Bob pointed out that his contract doesn't even suggest in any way that they give investment advice.

If you had a contract that contemplated investment advice, even albeit for temporary proceeds, I suggest that maybe you're holding yourself out as an investment advisor suggesting that was an issue there.

So, you know, I think it's an area that my understanding when the O'Brien Partners came out there was some confusion out there as to what was the Commission's position. But I think you can distinguish the two situations, at least in my mind, pretty clearly. I don't think it turns so much on whether or not there was compensation or not, I think it really turns on really the issue of are you really in the business of giving investment advice.

I think this is an area that, you know, we'll look to see if in some form or fashion we can't somehow issue additional guidance and clarification. But that's kind of a summary of the law I think from my perspective.

MODERATOR EISENBERG: Two things, of course. There is no exemption from the antifraud provisions. And if, in fact, as Mr. Kenny has pointed out, his general counsel would look to all three groups for if something really goes wrong in terms of if they can show fraud, as the allegations in Rauscher Pierce, for instance, or Orange County concerned, there's no exemption.

And the question of whether or not there is a breach of fiduciary duty in connection with the purchase or sale of securities in connection with the advice given, the question would be whether or not the actions of the financial advisor was such as to establish that kind of a relationship where they were responsible. And with respect to the underwriter, similarly.

And then there is the question of the conflicts of interest and whether or not the duty of disclosure devolves on those people disclosure of what? Disclosure of their possible conflicts which if the issuer had known about the conflicts of interest they would not have entered the transaction and so on.

There is one last question. And I want to wind up on time. A question from the audience: In public documents the SEC has suggested that underwriters bear or should bear a fiduciary obligation to issuers in negotiated transactions.

Is that the SEC's position?

What?

MS. BUTTERWORTH: We didn't get on the bond attorney.

MR. WEBER: That's all right by me.

MODERATOR EISENBERG: Well, we're not finished yet. Now, how much time do we have, Paul?

MR. MACO: About ten minutes.

MODERATOR EISENBERG: We have ten more minutes?

MR. MACO: Go till 5:00 o'clock.

MODERATOR EISENBERG: Okay. We'll get to the bond attorneys for the next ten minutes. Now, go ahead.

MR. ROYE: I'm the investment management lawyer.

MODERATOR EISENBERG: The question is, in public documents the SEC has suggested that underwriters bear or should bear a fiduciary obligation to issuers in negotiated transactions. Is that the SEC's position?

MR. WEBER: I would hope not.

MR. STANBERRY: Well, want to give the legal definition, the lawyers.

MODERATOR EISENBERG: Well, I mean why is it different from anything underwriters of corporations have to do?

MR. WEBER: Well, I mean there are also other public documents SEC has released that indicates that disclosures enhance that there is a healthy tension between underwriters and issuers, that investors rely upon underwriters to kick the tires and to go beyond the representations of issuers in a negotiated transaction at least, and to make some inquiries too.

MODERATOR EISENBERG: Right.

MR. WEBER: And it's very difficult for me to rationalize that environment in which the underwriters are expected to act in effect as an adversary almost and doubt the information that the issuers are supplying and at the same time imply a fiduciary obligation on the part of the underwriters to the issuer.

And it strikes me you're creating a – you're really creating impossible expectations of the underwriter as intermediary.

MR. STANBERRY: Well, you put the underwriters in an incredibly untenable position. While that may be the articulated viewpoint of the SEC I think – I can't speak for the entire underwriting community – but certainly for our firm and for most of the firms that I know that are in the negotiated underwriting business, we unequivocally believe we don't have a fiduciary obligation. Our job --

MODERATOR EISENBERG: To the issuer.

MR. STANBERRY: To the issuer. Our job is to purchase bonds. Either to purchase bonds in a negotiated transaction or a competitive transaction. In doing that we'll work with – and I have a situation. In a competitive situation if we see the financial advisor providing us a transaction that is not market worthy we'll give the financial advisor advice that certain terms and conditions need to be changed.

In a negotiated transaction we give that advice directly to the issuer and we don't – unless we contract to do so we don't take discretionary responsibility, we don't make decisions on behalf of the issuer. We make sure that the issuer makes it.

MODERATOR EISENBERG: Let's make this concrete. Does the underwriter have an obligation to disclose to the issuer financial arrangements which it might have with the financial advisor?

MR. STANBERRY: We may. If, you know, if there are conflicts of interest that arise, if in some way it could impact some material element of the transaction, if it could impact the tax exempt status of the transaction we clearly have a duty to disclose that.

So I think, yes, in most cases we have a duty to disclose those kind of financial obligations. That doesn't make us fiduciary --

MODERATOR EISENBERG: Ms. Butterworth would want to know what kind of deal you had with the financial advisor.

MR. STANBERRY: Absolutely. If we're buying a bond in a competitive transaction and we have a side agreement with the financial advisor I'm sure she'd want too know that because in my opinion we'd probably taint the sale at that point. But, again, **--**

MODERATOR EISENBERG: So there is some kind of obligation?

MR. STANBERRY: To the issuer. There may be, there may be an obligation. There may be an obligation to disclose certain conflicts of interest or certain material information. We've got to go back to what we started talking about earlier. That doesn't rise to the level of a fiduciary obligation. We are not a fiduciary, we are the purchaser of securities.

MODERATOR EISENBERG: Well, forget what you call it, there is an obligation to make disclosure with respect to the conflict of interest that exists with respect to you and the financial advisor and for the financial advisor to disclose the conflicts that he has in his arrangements with you when he is being hired.

MS. BUTTERWORTH: I may be saying the wrong thing but in a competitive sale you as underwriter I do not believe have a responsibility to disclose to me your arrangement with my financial advisor. I would be looking to my financial advisor for the **--**

MODERATOR EISENBERG: To be responsive.

MS. BUTTERWORTH: Because unless I put that in my bid form as one of the requirements of information I'm soliciting I don't believe I – I mean I can want you to tell me that. But I don't believe that I should be relying on you to disclose that. I believe the disclosure of that relationship must come from my financial advisor.

MR. STANBERRY: I think that's a case where you need to distinguish between legal obligations and what I would consider to be good business practice obligations.

MS. BUTTERWORTH: What we try to think of if it appears on the paper, front page of the paper, the next page or the banner on the internet site the next day **--**

MR. STANBERRY: Right.

MS. BUTTERWORTH: – can you retain your job by noon?

MODERATOR EISENBERG: All right. Professor Frankel?

MS. FRANKEL: There's one thing, you're right, I don't think that you have a duty to disclose except for one thing. If you help somebody who is a fiduciary to breach the obligation, through that back door you may be liable.

MODERATOR EISENBERG: Mr. Bendzinski?

MR. BENDZINSKI: Well, I think I wanted to make the distinction between an independent advisor and a public finance department. And my comment was going to be is this where the Chinese wall starts crumbling? Because if you're giving advice to your public finance department, Tom, to structure the deal in this fashion isn't that Chinese wall starting to disappear?

MODERATOR EISENBERG: You'll remember what happened to the Chinese when the Mongol's appeared at the Chinese wall.

MS. FRANKEL: I wasn't there, Meyer.

MR. STANBERRY: No, I don't think so, because I think that's still – there still are circumstances where you can act as the financial advisor and keep that relationship on one side of the Chinese wall and keep the underwriting relationship on the other side.

MODERATOR EISENBERG: All right. Now let's turn to counsel. Do you have any conflicts that you ever deal with? What do you disclose to your clients? Let's assume you're – can you represent an underwriter and a financial advisor at the same tie?

MR. WEBER: I think you, I think you can. We have circumstances in which we represent an issuer and a conduit borrower, for example. But under ethical rules we need the consent of, the informed consent of each.

We explain the potential danger as well as the potential benefits to them of having common representation and then get their informed consent. Typically when we do that we explain that there are on the several issues where there are like – where their interests are not likely to be consistent that we'll not provide advice to either of them and they look to their own internal counsel or somebody else for that advice.

I think it's possible also to represent both an underwriter and an issuer. We have done that in some circumstances. You have the same issue of informed consent. But we typically will go on and counsel the underwriter that they have a much weaker in effect due diligence defense if they have hired the issuer's counsel or not only someone who represents the issuer from time to time but is representing the issuer in that transaction.

But sometimes there are transactions that are small enough, there are general obligation bonds, there's really not a lot of question about need for a lot of diligence and tricky disclosure issues, and so as a cost savings sometimes we will end up representing both parties. Because the key I think is that there needs, when counsel has conflicts like that, under professional rules of ethics we need to have a consultation call which discloses the risk followed by the consent.

MR. STANBERRY: Rick, when you say represent the issuer do you distinguish between bond counsel versus disclosure counsel versus actual counsel to the issuer, their general counsel?

MR. WEBER: That can, that can have an impact on the relative risks of the conflict, that is what, it really depends on what advice they're looking to us for. If they're looking only for us to render an opinion as to the legal validity of the bonds there's really pretty limited risk. If they're looking to us to help negotiate the legal terms of documents then there is much great risk. And so it would have an impact on that.

But, still, it seems to me you're a lawyer and you have to have a client that you represent. And if you're going to – and if it's proposed that you represent more than one client in a substantially related manner you need to have informed consent.

MODERATOR EISENBERG: Okay. It's 5:00 o'clock. Paul, I understand you have some closing comments.

I'd like to thank all of the members of the panel for the discussion. And we really do appreciate your all coming and listening.

Thank you.

(Applause.)

CLOSING REMARKS

MR. MACO: I want to thank all of you that stayed with us throughout the day. And I want to thank all of today's participants in this first municipal market roundtable. And particularly I want to thank the staff of the Office of Municipal Securities which worked so hard to bring this group together, provide the background information for the panels, and enable the discussions that we've had today as well as assemble the list of the very distinguished group of panelists we had today.

To the panelists themselves, all of whom have very responsible jobs, this is a very significant devotion of their time taking themselves away from their daily routine to spend this day with us in these discussions. That is particularly appreciated.

Today's discussions have been lively, as we have come to expect from the municipal market, and I hope for all here today, informative. We have listened well. And we have taken good notes. I hope we have answered a few questions as well during the course of the day. As **CHAIRMAN LEVITT** said this morning, where appropriate, we will continue to offer guidance beyond today's dialogue, either informally or formally through interpretive guidance.

Issuers, underwriters, financial advisors, lawyers and investors have had the chance today to share and discuss their views on what each expects in a municipal offering, what works and what doesn't. I suspect that a good deal of common ground has been found, as well as differing opinions on what works best for the transaction. It should be clear that sensitivity to each other's obligations and concerns helps the process such as issuers taking into account dealers' obligations to comply with MSRB rules.

While the buy side was well represented today, we should also keep in mind the interests of the individual investor. For, as the most recent statistics tell us, the individual investor continues to grow in significance as a purchaser of municipal bonds.

We on the Commission staff frequently urge all participants in the market to review existing Commission guidance on municipal market practices and I repeat that urging again today. If you are of the belief that additional guidance is needed, ask.

The Division of Market Regulation, for example, has provided guidance in the past on the operations of Rule 15c2-12. If you have additional questions that are not covered by that guidance, ask them.

Today we heard some interesting statistics on NRMSIR filing compliance. A look at a full year's complete data would be interesting to see in light of the data we heard earlier.

Many issues crystallized during our discussions. Can small and midsize issuers, and especially healthcare issuers, come to the same level of appreciation for an aggressive investor relations program as the appreciation shown by the larger issuers?

Are your independent auditors independent?

Are you as an independent financial advisor required by your activities to be registered as an investment advisor? When was the last time you reviewed this question with your lawyer?

Will issuers begin to see websites as a solution to problems rather than a source of problems? Will their lawyers?

While one respected bond counsel suggested this approach will other lawyers embrace such wisdom?

As one participant observed on a few issues, some of the discussions today barely broke beneath the surface. I hope the issuers, financial advisor, underwriters, lawyers and investors will continue today's dialogues in the conferences, seminars and other educational efforts that each group of market participants holds throughout the course of the coming year. As always, we will participate in an appropriate way.

Thank you once more. And we hope to see you again next year.

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