

**MEMORANDUM**

**TO:** Peter Schmitt, DPC Data, Inc.  
**FROM:** Paul Fitzgerald  
**DATE:** April 10, 2000  
**RE:** DownloadProspectus.com™

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The following memorandum is based on our review of the DPC Data, Inc. DownloadProspectus.com™ web site (“DownloadProspectus.com™”) and applicable securities regulations. You have asked us to evaluate DownloadProspectus.com™ for compliance with the Municipal Securities rulemaking Board (“MSRB”) and Securities and Exchange Commission (“SEC”) official statement and electronic delivery requirements. Our findings are set forth below.

**I. Official Statement Delivery Requirements**

SEC rule 15c2-12 requires that municipal securities underwriters provide, upon request, a preliminary official statement (if one exists) and a final official statement.<sup>1</sup> SEC rule 15c2-12 generally requires that underwriters send an official statement to customers for 90 days from the end of the underwriting period. However, if the underwriters make a copy of the official statement available through a nationally recognized municipal securities information repository (“NRMSIR”), such as DPC Data Inc., the underwriters are only required to send the official statement for 25 days from the end of the underwriting period. DownloadProspectus.com™ will make all official statements available for a period of not less than 30 days from the end of the underwriting period.

MSRB rule G-32 requires dealers selling new issue municipal securities to customers to deliver official statements and certain other information by settlement date and requires selling dealers, managing underwriters and certain dealers acting as financial advisors to deliver such materials to dealers purchasing new issue municipal securities, upon request. The MSRB has interpreted the “delivery” requirement to mean not merely sending the official statement prior to settlement but the actual receipt by the purchaser of the official statement. Valid delivery is presumed where the official statement is sent three days before settlement date.

The MSRB has stated that MSRB rule G-32 may be satisfied through electronic means, provided the delivery complies with the SEC’s electronic delivery requirements.<sup>2</sup> Disclosures

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<sup>1</sup> Securities Exchange Act of 1934 rule 15c2-12.

<sup>2</sup> MSRB Reports, Volume 19, Number 1 (February 1999) (the “MSRB Report”).

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required pursuant to SEC rule 15c2-12 may be sent electronically pursuant to the SEC Electronic Delivery Requirements detailed below.

## **II. SEC Electronic Delivery Requirements**

The SEC has determined that electronic delivery is an acceptable alternative to paper delivery for virtually all forms of required customer disclosures.<sup>3</sup> The SEC Electronic Delivery Releases mandate that electronic delivery must provide information that is “substantially equivalent” to the information that would otherwise be required in paper form. As discussed below, for purposes of this Memorandum it is assumed that the official statements provided in pdf format are virtually identical to the paper versions. The requirements for effective electronic delivery include notice, access and evidence of delivery. These requirements are briefly summarized below.

### Notice

Customers must be made aware of the availability of the electronic information. The transmission of electronic information directly to a customer’s designated e-mail address would generally satisfy this requirement. However, the mere passive posting of electronic information on DownloadProspectus.com™ would not be sufficient. Brokerage firms that passively make information available on DownloadProspectus.com™ must also provide a separate notice to customers of the availability of the information or otherwise verify evidence of delivery.

DownloadProspectus.com™ utilizes direct e-mail notification to customer-provided e-mail addresses to alert them to the availability of an electronic official statement for a particular municipal offering. The SEC Electronic Delivery Releases indicate that direct electronic transmission of a document is generally sufficient to meet the “notice” requirement. However, if a document is merely posted on DownloadProspectus.com™, additional customer notification may be required. While DownloadProspectus.com™ does not directly forward the official statement to all customers, the direct e-mail notification does provide clear notice of the availability of the official statement on DownloadProspectus.com™. In addition, the e-mail itself contains a direct URL link to the official statement. Taken together, these elements meet the SEC’s “notice” requirement.

One additional advantage that DownloadProspectus.com™ enjoys with respect to the SEC “notice” requirement is that DownloadProspectus.com™ maintains an audit trail sufficient to determine if a customer did in fact access the official statement through DownloadProspectus.com™. Even if an electronic information provider does not provide adequate notice of electronic delivery, the delivery is considered valid if it can be demonstrated that the customer actually accessed the required document.

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<sup>3</sup> See Exchange Act Release No. 34-36345 (October 6, 1995), 60 Fed. Reg. 53458 (October 13, 1995) and Exchange Act Release No. 34-37182 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996) (jointly, the “SEC Electronic Delivery Releases”).

### Access

Customers must have comparable access to what would be received in paper form. The use of an electronic medium should not be burdensome and the customer should have the ability to retain the information or have ongoing access equivalent to retention.

The official statements are made available through DownloadProspectus.com<sup>TM</sup> in pdf format. This is a widely used, standard computer format that meets the SEC's "access" requirement. The official statements can be printed out by customers or saved to their local hard drives. They also remain accessible to customers through DownloadProspectus.com<sup>TM</sup> for not less than 30 days. As set forth below, for purposes of this Memorandum it is assumed that the official statements are virtually identical to the paper versions.

### Evidence of Delivery

Either customers must provide "informed consent", or evidence of actual receipt of the electronic information by the customer must be maintained. The requirements for informed consent include notification to the user of: (i) the specific electronic medium through which the information will be provided (*e.g.*, proprietary system or Web based); (ii) the potential for incurring costs (*e.g.*, online charges); (iii) the period for which the consent will be effective; and (iv) the information to be delivered electronically. Customers may consent to the receipt of electronic information via electronic means (*e.g.*, by return e-mail).

The "evidence of delivery" requirement is satisfied by DownloadProspectus.com's<sup>TM</sup> functionality. In order to meet this requirement, electronic information providers must either obtain an informed consent from the customer, or obtain evidence of actual delivery. DownloadProspectus.com<sup>TM</sup> meets both of these requirements. The on-line consent form provided to customers satisfies the informed consent requirements. It sets forth the format that the official statements will be made available in, advises the customer that charges may be associated with the electronic receipt and advises them of their right to revoke the consent.

### **III. Recordkeeping Requirements**

MSRB rule G-8(a)(xiii) requires that each dealer make and keep a record of all deliveries of official statements and of the additional disclosures related to negotiated underwritings made to purchasers of new issue municipal securities. Although the rule does not obligate a dealer to maintain such records in any given manner, such records must provide an adequate basis for the audit of such information. NASD Regulation, Inc. (the "NASD") requires dealers to maintain, at a minimum, a record of the following information:

- the customer's name;
- a description of the security;

- the settlement date(s);
- the type of disclosure sent (preliminary or final Official Statement);
- the date the required disclosure was sent; and
- the name of the person(s) sending the disclosures.<sup>4</sup>

Where a broker-dealer has assigned the new issue municipal securities disclosure function to a third party vendor, the broker-dealer remains fully responsible for the adequacy of the disclosure. Although the member firm does not maintain “a record of delivery” of the new issue disclosure, NASD Regulation expects that the compliance review process will include, at a minimum, periodic testing to ensure that the new issue disclosures are being made at or before settlement. For purposes of this Memorandum, it is assumed that the audit trail provided by DownloadProspectus.com™ fully satisfies the NASD’s informational requirements. Our conclusions further assume that broker-dealers utilizing DownloadProspectus.com™ will have full access to this audit information and will comply with the periodic testing requirements.

#### **IV. Content and Format of Official Statement**

One important caveat in the MSRB Report is that,

“dealers must be particularly cautious in delivering official statements by electronic means since they may present special challenges in ensuring that they are received by customers and other dealers without material omissions or distortions in formatting (for example, tables in which data is more than negligibly misaligned) that may cause such materials not to meet the standard for electronically transmitted information comparable to information delivered in paper form.”<sup>5</sup>

For purposes of this Memorandum, we assume that the electronic official statements made available in pdf format through DownloadProspectus.com™ are virtually identical to the paper version.

#### **V. Conclusion**

Based on the assumptions detailed above and the current functionality of DownloadProspectus.com™, we believe that the use of DownloadProspectus.com™ fully satisfies the official statement delivery requirements of MSRB G-32, SEC rule 15c2-12 and the SEC’s standards for electronic delivery. DownloadProspectus.com™ also provides recordkeeping and audit trail information that can be used to meet the MSRB and NASD

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<sup>4</sup> MSRB Report.

<sup>5</sup> MSRB Report, Footnote 26.

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requirements pertaining to the delivery of official statements. We caution that these are highly fact-specific determinations that are subject to change if any portion of DownloadProspectus.com™ or its functionality is amended or modified. We also note that broker-dealer clients who utilize DownloadProspectus.com™ must be cautioned to maintain adequate procedures to deliver paper copies of official statements in a timely fashion to customers who either do not consent to electronic delivery, subsequently revoke their consent or who request a paper version.