

June 29, 2000

No. 8270

This opinion is in response to questions from Chuck Smith, Director, Debt Management Division, Oregon State Treasury, concerning the sale of bonds and certificates of participation issued by the State of Oregon through electronic media.

FIRST QUESTION PRESENTED

May the Office of the Oregon State Treasurer (the Treasurer) conduct a competitive sale of state bonds or certificates of participation (COPs) through the Internet?

ANSWER GIVEN

Yes.

SECOND QUESTION PRESENTED

May the Treasurer sell state bonds or COPs through a process that allows bidders to view other bids and actively bid against each other?

ANSWER GIVEN

Yes.

THIRD QUESTION PRESENTED

May the Treasurer sell state bonds or COPs on a maturity-by-maturity basis?

ANSWER GIVEN

Yes.

FOURTH QUESTION PRESENTED

May the Treasurer publish the preliminary official statement (POS) and the official statement (OS) for state bonds and COPs on a website?

ANSWER GIVEN

Yes.

FIFTH QUESTION PRESENTED

If a person requests a paper copy of the POS or OS, must the Treasurer provide a paper copy to the requestor?

ANSWER GIVEN

If a person requests a paper copy of the POS or OS under the Oregon Public Records Law, ORS 192.410 to 192.505, the Treasurer must provide one to the requestor. Although not entirely free from doubt, we believe that the requirements in ORS 287.018 that the Treasurer “make available” a POS do not require the Treasurer to provide a paper copy when the POS is available on a website. We could find no other state or federal laws that apply directly to the Treasurer that would require the Treasurer to supply a paper copy if requested. Because of the requirements imposed on the state’s underwriters by federal law, however, the Treasurer may wish to provide one or more paper copies of an OS or POS to underwriters.

DISCUSSION

I. Sale of Bonds and COPs over the Internet

The Treasurer wishes to competitively sell bonds and COPs issued by the State of Oregon over the Internet under the following procedures. The sales would be held at a designated date and time. Before the sale, a notice of sale (NOS) would be published either exclusively over the Internet or also by other electronic or more traditional methods. The NOS would provide instructions on how bids may be submitted through the Internet. At the designated time, potential purchasers would be able to begin submitting bids and to continue bidding until a specified closing time by which all bids must be submitted.

We understand there are a number of methods available to the Treasurer to conduct a sale over the Internet. The Treasurer may use a service under which an Internet firm receives all of the bids, calculates the bids and then informs the Treasurer of the winning bid. The Treasurer would log on to the Internet site and be notified of the winning bid(s). The Treasurer may also use a service under which the Treasurer’s office may log on to an Internet site when the bidding

opens and view the bids as they are submitted. At the close of the bidding, the service provider will calculate the bids and inform the Treasurer of the winner or, alternatively, the Treasurer could calculate the winning bids. The Treasurer may also use a service where staff or the service provider logs on to an Internet site at the close of the bidding and then retrieves and calculates the bids. We understand that in all cases, even if the service provider calculates the bids, the Treasurer's office will also verify the results. Upon acceptance and settlement of the sale, the Treasurer will be paid for the bonds or COPs.

The Treasurer would like to sell the bonds on an all-or-nothing basis or in combinations of differing maturity dates. The sales might be conducted on a closed basis where potential purchasers are not allowed to view the offers of other bidders (a closed sale). The sales might also be conducted on an open basis where bidders may view other bids and may actively bid against each other until the specified closing time (an open sale).

ORS chapters 286, 287 and 288 all address the issuance of state bonds. The provisions of these three chapters often overlap, are duplicative in some cases and override a related provision in a different chapter in other cases. *See, e.g.*, ORS 286.056, 286.058, and 287.022 (all describing requirements for the sale of state bonds); ORS 286.066 (appointment of bond counsel); ORS 288.523 (additional requirements for appointment of bond counsel). To determine the extent of the authority granted by the legislature to the Treasurer with respect to the issuance of state bonds and COPs, therefore, we must examine all of the relevant provisions in ORS chapters 286, 287 and 288. *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) (to determine legislative intent the court must examine text and context of statutory provisions); *Weidner v. Oregon State Police*, 319 Or 295, 300, 877 P2d 62 (1994); *State ex rel Penn v. Norblad*, 323 Or 464, 467-68, 918 P2d 426 (1996) (statutory provision's context includes part of same statute and other related statutes). Accordingly, we examine each chapter separately for the relevant sections that bear on the question of whether the Treasurer may conduct a competitive sale of state bonds or COPs through the Internet.

We also consider state and federal securities laws with respect to the questions asked. The Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively "Federal Securities Laws") and ORS chapter 59 generally govern the issuance and sale of securities in Oregon. *See* 15 USC §§ 77a *et seq.*, 15 USC §§ 78a *et seq.* and ORS 59.005 to 59.370, 59.991 and 59.995 (collectively Oregon Securities Law). Bonds issued by private and governmental entities are securities subject to the Federal and Oregon Securities Laws. ORS 59.015(19)(a); 15 USC § 77b(a); 15 USC § 77c(a). As an issuer of municipal bonds, however, the Treasurer is generally exempt from all but the anti-fraud provisions of those laws. *See* 2 M. GELFAND, STATE & LOCAL GOVERNMENT DEBT FINANCING (hereinafter "GELFAND") § 8:05 (1997); ORS 59.025(1)(a); 15 USC §§ 77c(a)(2), 78c(a)(12), 78c(a)(9).

A. ORS Chapter 286

ORS 286.031 designates the State Treasurer as the issuer of all general obligation and revenue bonds for the State of Oregon. In that role, the Legislative Assembly has given the

Treasurer broad authority to determine “where the bonds are to be marketed, sold and redeemed and bond payments are to be made.” ORS 286.031(5).^{1/} A decision to sell bonds over the Internet likely comes within the discretionary authority granted to the Treasurer in ORS 286.031 to determine “where” bonds may be sold or marketed. Although “where” may refer only to a physical geographic location, such as within or outside Oregon, the text of ORS 286.031 as a whole suggests that the legislature intended to give the Treasurer broad discretionary authority with respect to the marketing and sale of state bonds. *See* ORS 286.031(6) (Treasurer may enter into “any agreement” Treasurer considers necessary to competitively market state bonds). Therefore, absent more specific guidance from the legislature, these statutory provisions appear to allow the Treasurer to determine how state bonds will be sold, including through the Internet.

There are no specific statutory provisions in conflict with the broad grant of authority in ORS 286.031. There are, however, several statutes that expressly address certain items necessary to the sale of state bonds. These statutes, as amended by Oregon Laws 1999, chapter 44 (Senate Bill 200)^{2/} do not conflict with ORS 286.031 and may be read as filling in some of the details that are not set forth in ORS 286.031 with respect to the sale of bonds.

For instance, ORS 286.056 specifically addresses the notice required for a competitive sale of state bonds. This statute, as amended by SB 200,^{3/} provides:

The State Treasurer shall approve a notice of sale for all bonds that are to be sold at public sale. The State Treasurer shall cause the notice of sale, or a summary of the notice of sale, to be disseminated in a manner prescribed by the State Treasurer, which may include any means and methods for giving public notice of the bond sale, including, when reasonably practicable, the use of one or more electronic media networks.

This statute requires an NOS to be disseminated, but permits the Treasurer to prescribe the manner for doing so, which may include the use of “electronic media networks.” Because the Internet is an electronic media network, publication of an NOS over the Internet would satisfy the Treasurer’s duty under ORS 286.056.

ORS 286.058(1) describes the information that must be contained in the NOS. This statute, as amended by SB 200, provides:

The notice of sale required by ORS 286.056 shall specify:

- (1) The process by which bids will be received, considered and acted upon, including the deadline for submitting bids, the total amount of bonds and the denomination of bonds;
- (2) The issue date, maturity dates and amounts, interest payment dates, and place of payment of the bonds;

(3) The dates of redemption, if any; the call price premium, if any; and the order and place of redemption;

(4) The method of submitting and the amount of any required good faith deposit;

(5) Such constraints on the coupon or interest rates as the agency, with the approval of the State Treasurer, may wish to impose;

(6) The interest basis and definition thereof on which bids are to be awarded;

(7) The nature of the security on the bonds; and

(8) The name of bond counsel; the name of the source of the preliminary official statement; the means of communication used to circulate the preliminary official statement, which may include electronic or any other means prescribed by the State Treasurer; coupon rate multiples, registration provision, if any; estimated delivery date and place; the purpose of the bonds; the statutes and constitutional provisions pursuant to which the bonds are being issued; the procedure for awarding the bids; and such other provision as the agency, with the approval of the State Treasurer, may wish to impose.

The description of the sale that ORS 286.058 requires to be included in the NOS does not dictate that the bond sale be conducted in any particular manner. Clearly, the legislature contemplated some process for the sale, i.e., the bid must be received by the Treasurer in some form, considered and acted upon, ORS 286.058(1); there must be a method for submitting a good faith deposit, ORS 286.058(4); the notice must describe the procedure for awarding bids, ORS 286.058(8). Yet, the statute does not specify a particular form of bid or a particular method to receive, review and award the bid. It simply requires that whatever process is used must be described in the NOS. A bid may be received, considered and awarded, and a deposit paid at the Treasurer's office whether the bid arrives by Internet or on a piece of paper. Thus, there is nothing in ORS 286.058 that would prohibit the use of the Internet to conduct a competitive sale.

The provisions of ORS 286.031, 286.056 and 286.058 do not apply to the issuance of COPs. The plain language of those statutes addresses only bonds. In the common understanding of the word, bonds do not include COPs. Nevertheless, for purposes of ORS 286.710, the definition of bonds includes COPs, making this statute applicable to COPs. *See* ORS 286.710(3).^{4/} ORS 286.710 provides in relevant part:

(1) Notwithstanding any other provisions of law, in consultation with the administrative head of the state agency responsible for administering the bond proceeds, the State Treasurer may:

(a) Structure, market and issue bonds in the manner which the State Treasurer determines is in the best interests of the citizens of Oregon, after considering financial, economic and social factors[.]

Pursuant to the broad powers granted to the Treasurer in ORS 286.710(1)(a) to “market” bonds, including COPs, “in the manner which the State Treasurer determines is in the best interests of the citizens of Oregon,” the Treasurer has the authority to sell COPs through the Internet if the Treasurer determines that such a sale is in the citizens’ best interests.^{5/}

B. ORS Chapter 287

ORS chapter 287 also prescribes how the Treasurer may issue and sell bonds. ORS 287.022, as amended by SB 200, provides:

For bonds that are sold at public competitive bid sale, the issuer shall prepare and disseminate a notice of bond sale and provide for the submission and award of bids in the manner prescribed for revenue bonds in ORS 288.805 to 288.945.

For purposes of ORS 287.022, an "issuer" includes the State of Oregon, ORS 287.014(2), and the relevant definition of "bonds" includes state general obligation bonds. ORS 287.014(1).^{6/} Therefore, in addition to ORS 286.056 and 286.058, ORS 287.022 requires that state general obligation bond sales also comply with ORS 288.805 to 288.945.^{7/} We discuss the relevant requirements of ORS 288.805 to 288.945 in the section that follows.

C. ORS Chapter 288

ORS 288.805 to 288.945 sets forth the Uniform Revenue Bond Act under which the Treasurer may issue state revenue bonds. Pursuant to ORS 287.022, as amended by SB 200, the Act now also applies to the issuance of state general obligation bonds. Under the Act, the Treasurer may issue bonds “under such terms and conditions as the State Treasurer shall determine.” ORS 288.855. ORS 288.875 prescribes the method for conducting a competitive sale for a public body. This statute formerly required that bids be submitted in sealed envelopes. The statute was amended by Oregon Laws 1999, chapter 559 (Senate Bill 198). Under the new provision, a public body may approve a form of competitive bidding process under which the public body notifies potential purchasers, solicits firm bid proposals and awards the sale to the bidder offering the most favorable terms. There is no prescribed method for notifying potential purchasers, soliciting or awarding bids. If the public body does not formally approve of a specific process, then the specific requirements of ORS 287.875(2) and (3) apply, which may include the submission of bids in a sealed envelope. *See* Or Laws 1999, ch 559, § 17.

The processes of sale described in ORS 288.875(2) would apply to the Treasurer^{8/} but for ORS 288.895, which expressly applies to the competitive sale of state bonds. *See PGE v. Bureau of Labor and Indus.*, 317 Or at 610-611 (when interpreting text and context of statutory

provisions, courts employ certain rules of statutory construction, such as rule that a specific intent will control over a general intent); *Davis v. Wasco IED*, 286 Or 261, 593 P2d 1152 (1979); *Steamboaters v. Winchester Water Cont. Dist.*, 69 Or App 596, 688 P2d 92 (1984), *rev den'd* 298 Or 553, 696 P2d 49 (1985).

ORS 288.895, as amended by SB 200, provides:

For the state, a competitive bid process shall be conducted in the manner prescribed by the State Treasurer, which may include, but is not limited to, notifying potential purchasers, conducting sales, accepting and awarding bids by written, telephonic, facsimile, *electronic or any other means of communication* and offering for sale and accepting bids on any combination of bonds or on an all or none basis.

(Emphasis added.) This statute expressly allows a sale of state bonds to be conducted in the manner prescribed by the Treasurer, including by electronic means. A competitive sale conducted over the Internet constitutes a sale by electronic means within this statutory authority.

D. Oregon Securities Law

We find no provisions under the Oregon Securities Law that would prohibit the use of the Internet to publish an NOS or to collect bids for the sale of bonds. Thus, there appear to be no impediments under the Oregon Securities Law to the use of the Internet to sell state bonds or COPs.

E. Federal Securities Laws

Similarly, the Federal Securities Laws do not prohibit the sale of bonds or COPs through the Internet. The Securities and Exchange Commission (SEC) generally regulates compliance with the Federal Securities Laws. Only the anti-fraud provisions of those laws apply to issuers of municipal securities, such as the Treasurer. A 1975 Act of Congress directed the SEC to establish the Municipal Securities Rulemaking Board (MSRB). 2 GELFAND § 8.06 (1997); 15 USC § 78o. Although the MSRB has promulgated rules prescribing requirements for brokers and dealers in the sale of municipal securities, the MSRB does not regulate issuers. 15 USC § 78o-4(d). Nevertheless, the requirements that the MSRB imposes on brokers and dealers may impact the Treasurer's actions as the Treasurer relies on brokers and dealers for the sale of its bonds and COPs.

Both the SEC and the MSRB have indicated that electronic media may be used to market bonds, subject to certain standards. See MSRB Notice regarding *Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers*, 19 MSRB REPORTS, No. 1, p. 3 (February 1999) (hereinafter "MSRB Notice"); *Use of Electronic Media By Broker-Dealers, Transfer Agents, and Investment Advisers For Delivery of Information*, Securities Act Release No. 33-7288, Securities Exchange Act Release No. 34-37182 (May 9, 1996), 61 Fed Reg 24622 (May 15, 1996), 61 CCH SEC DOCKET No. 18 p. 2166 (hereinafter "1996 SEC Release"); *Use of Electronic Media for Delivery Purposes*, Securities Act Release No. 33-7233, Securities Exchange Act Release No. 34-36345 (October 6, 1995), 60 Fed Reg 53458 (October 13, 1995), 60 CCH SEC DOCKET No. 8, p. 1091 (hereinafter "1995 SEC Release").

The positions of the MSRB and SEC are discussed in greater detail below with respect to the publication of official statements on a website. The federal statutes and rules are aimed primarily at making sure that the market as a whole and potential purchasers have sufficient information to make a decision with respect to the purchase or sale of a security. *See* SEC 1995 Release. If these requirements are fulfilled, bonds may be sold and marketed through electronic means, including the Internet. *Id.*

II. Sale of Bonds Through an Open Bid Process

Several statutes reference the Treasurer's authority to use a "competitive bid process" without expressly describing what the legislature meant by that process. For example, a competitive bid process could involve potential purchasers either submitting closed bids that other bidders cannot view, or submitting open bids that other bidders can view and bid against. There are no statutory provisions that expressly authorize the Treasurer to conduct an open competitive sale.

As discussed above, the Treasurer is given broad authority in ORS 286.031 and 286.710 to determine how state bonds should be marketed and sold. There is nothing in ORS 286.056 or 286.058, as amended by SB 200, that prohibits an open competitive sale. Instead, those statutes allow a sale in the manner prescribed by the Treasurer, which may include an open competitive process. *See* ORS 286.058.

ORS 288.895, as amended by SB 200, applies to both state revenue and general obligation bonds that are sold at public competitive bid sales. ORS 287.022. ORS 288.895 requires the competitive bid process to be:

conducted in the manner prescribed by the State Treasurer, which may include, but is not limited to, notifying potential purchasers, conducting sales, accepting and awarding bids by written, telephonic, facsimile, electronic or any other means of communication and offering for sale and accepting bids on any combination of bonds or on an all or none basis.

This list of actions that the Treasurer may undertake in the sale of bonds does not provide express authority to conduct an open bidding process. The statute, however, authorizes a sale to be conducted "in the manner prescribed by the State Treasurer, which may include, ***but is not limited to***" the listed actions. ORS 288.895 (emphasis added).

ORS 288.915(2)(a) requires bids to be publicly opened at the time and place specified in the NOS. This provision could be interpreted to require that bids be closed and inaccessible to the public body and other parties before being opened. ORS 288.915(2)(a) does not apply to the Treasurer, however, so long as the Treasurer complies with the competitive process "formally approved [by the Treasurer] for notifying multiple potential purchasers, soliciting firm proposals from those potential purchasers, including interest rates and prices, and awarding the sale to the

bidder offering the most favorable terms to the [Treasurer].” Accordingly, we conclude that the Treasurer may prescribe any manner to sell bonds, including an open competitive sale.

III. Sale of Bonds in Combination of Maturities.

The only statutory provision that directly addresses the question of whether the Treasurer may sell bonds on an all or none basis or maturity-by-maturity is ORS 288.895. This statute expressly states that the Treasurer may accept bids “on any combination of bonds or on an all or none basis.” We find no conflicting provisions in ORS chapters 286 or 287. The Treasurer’s authority to sell “any combination of bonds” would include selling them on a maturity-by-maturity basis.

The sole statute addressing how COPs may be sold is ORS 286.710. This statute gives the Treasurer authority to “structure, market and issue bonds” in the manner the “Treasurer determines is in the best interests of the citizens of Oregon” and to sell bonds at a “public or private, negotiated sale.” There is no instruction or limitation as to the form such a sale may take. The apparent legislative intent in ORS 286.710 is to vest broad authority and discretion in the Treasurer. Within that broad authority the Treasurer may determine the manner of a sale, including whether COPs are sold on an all-or-none, or maturity-by-maturity basis.

IV. Publication of POS and OS on a Website.

The Treasurer wishes to publish a copy of the POS and OS for state general obligation bonds, revenue bonds and COPs on a website.^{9/} We are informed by the Treasurer’s staff that the website may be the Treasurer’s own proprietary site or a more general site maintained by a third party that is related to municipal securities. The Treasurer might publish the POS and the OS only on the website without any distribution of paper copies. Anyone with access to the Internet, whether an underwriter or a member of the public at large, could access the website, view, download and print the POS and OS. We consider whether either state law or federal law might constrain the Treasurer from publishing the POS and OS for state bonds or COPs on a website in this manner.

A. Oregon Law

As discussed above, ORS 286.710(1) gives the Treasurer broad authority to “market” bonds and COPs in the manner the Treasurer determines is best for the citizens of Oregon. Bonds are commonly “marketed” to potential purchasers by the circulation of a POS and OS that describe the amount of bonds for sale, the purposes for which the bond proceeds will be used, the repayment provisions and the collateral securing payment of the bonds. Thus, the authority given the Treasurer to “market” bonds as he determines is most beneficial may include a determination that the POS and OS may be published on the website.^{10/}

ORS 286.058(8), as amended by SB 200, confirms the Treasurer’s authority to publish the POS over the Internet. This statute lists the items that must be included in an NOS, including “the means of communication used to circulate the preliminary official statement, which may include

electronic or any other means prescribed by the State Treasurer.” Thus, the legislature has expressly approved the use of electronic means to circulate a POS, which would include publication on a website. There is no similar provision with respect to the OS. However, the discretion given the Treasurer in ORS 286.710(1) provides sufficiently broad authority to allow the OS also to be published on a website.

ORS 287.018(1) and 288.520 require that, for general obligation bonds sold at public competitive bid sale, “the issuer shall prepare and make available upon request to bidders and investors a preliminary official statement.”^{11/} This statutory requirement will be met if the POS is published on the Internet. (We discuss below whether this provision requires the Treasurer to provide a paper copy of the POS). The statutes prescribe the information that a POS must contain, but they do not prescribe the medium of communication or the format in which the POS must be presented. If a POS containing the required information is published on the Internet, the requirements of ORS 287.018 and 288.520 will be met. Potential bidders and investors may view the POS on a computer terminal located at Treasury or access it through their own, or another person’s, computer terminal.

We find no provision under the Oregon Securities Law that would restrict the Treasurer’s authority to publish a POS or OS on a website.

B. Federal Securities Laws

We found no provision under the Federal Securities Laws applicable to the Treasurer that would restrict the Treasurer’s authority to publish a POS or OS on a website.^{12/} Except for the SEC’s responsibilities relating to anti-fraud, neither the SEC nor the MSRB directly regulate the activities of issuers of municipal securities, such as the Treasurer. 2 GELFAND § 8:05. Nevertheless, the SEC and MSRB rules with respect to dealers and underwriters for municipal bonds indirectly impact the Treasurer when a POS or OS is created for the sale of State of Oregon bonds or COPs. SEC Rule 15c2-12 requires that underwriters: (1) obtain and review an issuer’s “deemed final” OS before making a purchase, offer or sale of municipal securities; (2) for certain sales, provide customers with an issuer’s most recent POS; (3) deliver copies of the OS to customers, if requested; and (4) contract to receive, within a specified time, sufficient copies of the issuer’s OS to fulfill the rule’s delivery requirement, and the MSRB’s requirements. 17 CFR § 240.15c2-12.^{13/} In addition, MSRB Rule G-32 requires a broker, dealer or municipal securities dealer to deliver a copy of the OS for a new issue, if one is prepared, to its customer by a specified time. The rule also requires an underwriter to send an OS to all brokers, dealers and municipal securities dealers that purchase the applicable securities. MSRB Rule G-32.^{14/}

We understand that the Treasurer generally prepares both a POS and an OS for use in the sale of state bonds and COPs. The content of the POS and OS are subject to regulation under the anti-fraud provisions of the Federal Securities Laws. 15 USC § 77q; 17 CFR § 240.10b-5. The Federal Securities Laws do not directly require the Treasurer to deliver the POS or OS to any bond purchasers or other parties. However, the underwriters to whom the Treasurer sells the state’s bonds, and the other dealers or brokers with whom the underwriters have contracted to

sell the state's bonds, do have delivery requirements imposed upon them under both SEC Rule 15c2-12 and MSRB Rule G-32. Therefore, from a practical perspective, the Treasurer may wish to provide a POS or OS in a form and manner that will allow the underwriters and other dealers or brokers to meet the requirements imposed on them by the Federal Securities Laws. We briefly discuss below the positions that the MSRB and the SEC have taken with respect to fulfilling the delivery and filing requirements imposed on municipal securities dealers and brokers through the use of electronic means and how they may impact the Treasurer.

In the MSRB Notice, which was issued on November 20, 1998, the MSRB stated that municipal securities issuers and dealers may transmit documents electronically if they adhere to the standards set forth in certain releases previously issued by the SEC on the use of electronic means to communicate or deliver documents. MSRB Notice at 3, citing 1996 SEC Release and 1995 SEC Release. The SEC releases set forth requirements for notice, access and delivery of documents. The MSRB has stated that "the Board believes that the standards applied by the SEC to communications with customers should also apply to communications among dealers and between dealers and issuers." MSRB Notice at 3. Each of these requirements is discussed below.^{15/}

1. Notice

When persons receive paper documents through the mail, they generally are notified by receipt of the document that they have received something they may wish to review. The MSRB has stated that recipients of electronic communications should also receive timely and adequate notice that information they may wish to review is available to them electronically. MSRB Notice at 4, citing 1996 SEC Release. If the electronic medium used cannot provide such notice, the MSRB has advised that dealers should consider sending a separate communication to inform a recipient that information has been sent electronically that the recipient may wish to review. *Id.* Specifically with respect to information available through a website, the MSRB cited the SEC's recommendation that separate notice be provided that information is on the website. MSRB Notice at 4 n 8.

As discussed above, there are no obligations imposed directly on the Treasurer by the SEC or MSRB with respect to a POS or OS, except related to anti-fraud. As a matter of contract, however, and as a practical necessity in the sale of bonds, the Treasurer may wish to inform underwriters or others with whom the Treasurer has contractually agreed to provide a POS or OS that the document is on a website. Thus, although not legally required of the Treasurer, the MSRB's recommendation of separate notice that information is on a website may have some practical application to the Treasurer in alerting parties to the presence of a POS or OS on a website. A separate communication, either physically delivered or by electronic mail, would provide that notice.

2. Access

The MSRB also advised that persons who receive information through electronic delivery should have access to the information that is comparable to that available when a document is delivered through the mail. MSRB Notice at 4, citing 1996 SEC Release. “The use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided.” *Id.* An electronic medium that requires an investor to “proceed through a confusing series of ever-changing menus to access a required document” would not meet this standard. MSRB Notice at 4 n 10, citing 1995 SEC Release n 24.

The MSRB has also cautioned that, when delivering official statements by electronic means, care should be taken to ensure that the OS contains no material omissions or distortions in formatting. Such distortions may cause the OS to fail the SEC requirement that electronically transmitted information be comparable to information delivered in paper form. MRSB Notice at 3 n 9, citing 1996 SEC Release. For example, tables that convey badly misaligned data in the electronic format would not be comparable to the same information delivered in paper form. *Id.*

We understand that the POS or OS may be published on the Treasurer’s website or on a separate website. In either case, the Treasurer’s office will develop the content and format of the POS and OS to be placed on the website. An underwriter or other party will be referred to the website and can view and retrieve the documents from the website.

As discussed above, the underwriters to whom the Treasurer sells state bonds and COPs have certain delivery requirements imposed on them under SEC Rule 15c2-12 and MSRB Rule G-32. Because these parties may fulfill their delivery obligations through the electronic version of the POS or OS created by the Treasurer, as a practical matter the Treasurer may wish the electronic version to conform to the accessibility standards established by the MSRB and SEC. Otherwise, the underwriters and dealers would not be able to meet their obligations through use of the Treasurer’s electronic document.

According to the SEC, an electronic document should contain all of the material and other information required under the Federal Securities Laws and present the information in any order that may be required under those laws. 1995 SEC Release, 60 CCH SEC DOCKET at 1094 n 20. Moreover, an issuer should update an electronic version of a POS to the same extent a paper copy would be updated to ensure that the POS correctly contains all material information. 1995 SEC Release, 60 CCH SEC DOCKET at 1095 n 26 and at 1098.

As the issuer of state bonds and COPs, the Treasurer is ultimately responsible for the accuracy and completeness of its POS and OS. If there is a material misstatement or omission in those documents, the Treasurer may be liable under both federal and state securities laws. 15 USC § 77q; 17 CFR § 240.10b-5; ORS 59.135. Therefore, the Treasurer should take certain precautions in publishing its offering documents on a website. If there is a paper POS or OS that contains all material facts necessary to comply with federal and state anti-fraud laws, and if the content and format of information contained in the electronic version on a website is clear and comparable to the paper version, the electronic version is likely to also comply with the anti-fraud laws. Accordingly, the documents the Treasurer places on a website should contain the same

information, same order of information, and be in substantially the same format as the paper POS or OS. Additionally, to ensure that all material information is adequately disclosed, the Treasurer should ensure that a POS on a website is updated to the same extent the paper POS is updated. If no paper version of the POS or OS is printed and disseminated, the Treasurer should place the information in a comparable format in an electronic POS or OS that is placed on a website. The electronic POS and OS should be published with software that is designed to prevent individuals from tampering with the contents of the documents.

The delivery obligations imposed on underwriters by SEC Rule 15c2-12 continue for a period of time. The SEC has specifically noted that “if disclosure is through a posting on the Internet, the document should be available for as long as the delivery requirement applies.” 1995 SEC Release, 60 CCH SEC DOCKET at 1095 n 26. Accordingly, if the Treasurer wishes to assist its underwriters and others in fulfilling their obligations, the POS should probably remain on the website until the OS is published. The OS should remain on the website as long as the underwriters are obligated to provide the OS.

3. Evidence to Show Delivery

The MSRB also advised that dealers should have reason to believe that information conveyed through an electronic means was actually received and the dealer’s delivery obligation met. MSRB Notice at 4, citing 1995 SEC Release and 1996 SEC Release. This standard may be met by the dealer’s:

- (1) obtaining an informed consent from an investor to receive the information through a particular electronic medium coupled with assuring appropriate notice and access;
- (2) obtaining evidence that an investor actually received the information, for example, by electronic mail return receipt or confirmation of accessing, downloading or printing;
- (3) disseminating information through certain facsimile methods;
- (4) permitting an investor to access a document by hyperlinking to a required document; and
- (5) using forms or other material available only by accessing the information electronically.

These guidelines do not apply to the Treasurer pursuant to MSRB Rule G-32 or SEC Rule 15c2-12. The underwriters and dealers involved in the sale of State of Oregon bonds and COPs are subject to them and may request the Treasurer’s participation in a process designed to confirm that an underwriter or dealer has met its delivery obligation.

V. Furnishing Paper Copy of POS and OS on Request

A. Oregon Law

We find nothing in ORS chapters 286, 287 or 288 or the Oregon Securities Law that would expressly require the Treasurer to provide a paper copy of a POS or OS when those documents are also available on a website. ORS 287.018 and 288.865 require the Treasurer to prepare and “make available upon request to bidders and investors” a POS that includes certain specified information. Although not entirely free from doubt, we conclude that ORS 287.018 and 288.865 do not require the state to provide a paper copy of the POS, if one is available on a website.

By its use of the phrase “make available,” it is unclear whether the legislature intended a POS to be actually delivered or provided to a requestor, or simply that the POS be open for inspection or review by bidders and investors. To determine the legislature’s intended meaning, we are to give words of common usage “their plain, natural, and ordinary meaning.” *PGE v. BOLI*, 317 Or 606, 611. The dictionary defines “available” as

such as may be availed of : capable of use for the accomplishment of a purpose : immediately utilizable * * * that is accessible or may be obtained : personally obtainable * * *: at disposal esp. for sale or utilization < ~ in many colors and sizes> <latest readily ~ information>

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 150 (1993). This definition refers to “accessible” and “obtainable.” An item may be accessible or obtainable even if it is not personally delivered. Making a POS accessible to persons who request it, rather than actually providing it to a requestor, appears consistent with other meanings provided in the definition such as “may be availed of” or “capable of use.”

We also examine other related provisions in ORS 287.018 and 288.865 to discern the legislature’s intended meaning. *PGE v. BOLI*, 317 Or at 611-612. Other subsections in those statutes indicate a likelihood that the legislature intended the POS to be accessible but not necessarily provided in a particular form. For instance, subsection (2) of both statutes states that the POS “shall be available not fewer than 10 calendar days preceding the date of the bond sale.” This language obligates the state to make the POS accessible or available for viewing by a date certain. It would be impossible for the state to ensure that a POS was actually provided to (i.e., received by) a requestor by a certain date. In addition, subsection (3) states that the POS “shall contain the best available information which shall be accurate to the best knowledge of the issuer.” In this phrase, the legislature has used the term “available” as synonymous with “accessible.” The legislature likely intended the term “available” to have the same meaning throughout the statute. Accordingly, we advise that, although not entirely free from doubt, ORS 287.018 and 288.865 do not require the Treasurer to provide a paper copy of the POS if it is published on the website. The POS has been made available by its publication in an electronic form.

A request for a copy of the POS or OS may be in the form of a request for a public record under the Oregon Public Records Law, ORS 192.410 to 192.505 rather than under ORS 287.018 or 288.865. The Public Records Law gives every person the right to inspect any public record of a public body in this state, with some exceptions. ORS 192.420.^{16/} A public record includes any writing containing information relating to the conduct of the public's business "prepared, owned, used or retained by a public body regardless of physical form or characteristics." ORS 192.410(4). A "writing" includes "every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings." ORS 192.410(6). As discussed above, an electronic form of a POS or an OS should follow substantially the same format as paper publications and contain the same information. Accordingly, an OS or POS, though published only on the website, would constitute a "writing" used to conduct the business of selling state bonds and so constitute a public record within the meaning of ORS 192.420.

ORS 192.440(2) requires that, if a record is maintained in a machine readable or electronic form, the custodian of the record "shall provide copies of the record *in the form requested*, if available." (Emphasis added.) If the Treasurer may provide a paper copy of the POS or OS simply by pressing the print button on a computer, then the electronic format is available in paper form. Therefore, under ORS 192.440, if a person requests a paper copy of an OS or POS that is maintained in an electronic file, the Treasurer should print a paper copy and provide it to the requestor. The Treasurer may charge the requestor for the costs of such printing. ORS 192.440.

B. Federal Securities Laws

The MSRB advises that "a person who has a right to receive a document under the federal securities laws and chooses to receive it electronically should be provided with a paper version of the document upon specific request or if consent to receive documents electronically is revoked." MSRB Notice at 4, citing 1995 SEC Release at n 27 and accompanying text and 1996 SEC Release at n 17 and accompanying text. As discussed above, the MSRB and SEC requirements related to investors do not directly apply to the Treasurer. There is no requirement imposed by federal law on municipal securities issuers to deliver a paper copy of the POS or OS to underwriters or other parties in the initial sale of municipal securities. However, the SEC and MSRB rules impose certain delivery obligations on the underwriters and dealers that may be fulfilled only by delivery of a paper copy of the POS or OS. *See* 17 CFR § 240.15c2-12; MSRB Rule G-32. An underwriter may fulfill the federal requirements by printing an OS from the Treasurer's website and making paper copies from the website. Alternatively, the Treasurer may agree through contract negotiation to provide a paper copy of the OS or POS to the underwriters with whom the Treasurer contracts to sell state bonds and COPs.

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^{1/} ORS 286.031 provides in its entirety:

Notwithstanding any other provision of law, for all general obligation and revenue bonds of this state the State Treasurer:

(1) Shall issue the bonds after consultation with the state agency responsible for administering the bond proceeds.

(2) Shall set the date of issuance after consultation with the agency.

(3) May combine the issues of bonds for more than one program into a single bond issue whenever a combination is consistent with the constitutional authority under which the bonds are issued.

(4) Shall determine the issuance and reissuance of all bonds and coupons.

(5) Shall determine where the bonds are to be marketed, sold and redeemed and bond payments are to be made.

(6) May enter into any agreement, and may appoint any agent, that the State Treasurer considers necessary to comply with the law of the nation in which the bonds are marketed or to market the bonds competitively. In making such an agreement or appointment, the State Treasurer shall comply with Oregon law that otherwise applies.

^{2/} Oregon Laws 1999, chapter 44, was signed by the Governor on April 19, 1999, and became effective July 1, 1999. This law amended several provisions in ORS chapters 286, 287 and 288 and gave the Treasurer greater discretion in determining how bonds will be noticed and sold.

^{3/} SB 200 amended ORS 286.056 as follows:

The State Treasurer shall approve a notice of sale for all bonds [*which*] **that** are to be sold at public sale. The State Treasurer shall cause the notice of sale, or a summary of the notice of sale, to be [*published prior to the sale in a national financial newspaper and in a newspaper or financial journal of general circulation published in Oregon. In addition to publication in a newspaper or financial journal,*] **disseminated in a manner prescribed by the State Treasurer, which** may [*approve other*] **include any** means and methods for giving public notice of the bond sale, including, when reasonably practicable, the use of one or more electronic media networks.

^{4/} ORS 286.710(3)(a) provides: “Bonds” means any certificates of indebtedness, bonds, notes, warrants, lease purchase agreements, installment purchase agreements, certificates of participation or other general or special obligations of the State of Oregon or any of its agencies.”

^{5/} The marketing of bonds is a broad concept that may include the actual sale of the bonds as well as other factors. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) at 1383 (to “market” means to expose for sale in a market or sell).

^{6/} Although ORS chapter 287 is titled "Borrowing and Bonds of Local Governments," the definition of “bond” for purposes of ORS 287.022 encompasses state general obligation (GO) bonds as

well as local government bonds. ORS 287.014(1) defines “bond” as "a general obligation bond or a limited tax bond, as defined in ORS 288.150.." In turn, ORS 288.150 defines a GO bond as "a bond including a credit agreement, which is a full faith and credit obligation, and which is payable from taxes which may be levied without limitation by section 11, Article XI of the Oregon Constitution, and without limitation by section 11b, Article XI of the Oregon Constitution." As bonds authorized by the Oregon Constitution, the state's GO bonds fall within those bonds that are exempt from Article XI, section 11, of the Oregon Constitution. *See* Or Const Art XI, § 11(11)(d)(A). Therefore, state GO bonds are within the bonds described in ORS 288.150. COPS are not within the definition of bonds to which ORS 287.022 applies.

^{7/} We have found no apparent reason for these overlapping and duplicative provisions. However, we must give effect to all, if possible. ORS 174.020. Because the statutes are not in conflict, they may be read together.

^{8/} ORS 288.875 applies to "revenue bonds" issued by a "public body." The applicable definition of a "public body" is the "State of Oregon, its agencies, institutions or any municipality." ORS 288.805(5). "Revenue bonds" are "bonds issued for any public purpose, which are secured by revenues either pledged or designated to be payable for such public purpose of the public body and which are sold under the authority granted by ORS 288.805 to 288.945." ORS 288.805(6).

^{9/} This opinion does not address whether simply publishing the POS or OS on a publicly-accessible website would subject the Treasurer to the laws of other states from which persons could access the website.

^{10/} ORS 286.710(1) also requires the Treasurer to consult with the agency for which the bonds (and COPS) are being issued.

^{11/} When issuing general obligation bonds, ORS 288.520 requires a public body to sell them in conformance with ORS 287.014 to 287.026, which includes the POS requirements of ORS 287.018.

^{12/} Our analysis and conclusions in this opinion are based on the current law. The use of electronic media in the marketing of securities remains under consideration by the SEC and further interpretive releases or rules addressing the subject of your questions are likely.

^{13/} Rule 15c2-12 provides in relevant part:

(1) Prior to the time the Participating Underwriter bids for, purchases, offers, or sells municipal securities in an Offering, the Participating Underwriter shall obtain and review an official statement that an issuer of such securities deems final as of its date, except for the omission of no more than the following information: The offering price(s), interest rate(s), selling compensation, aggregate principal amount, principal amount per maturity, delivery dates, any other terms or provisions required by an issuer of such securities to be specified in a competitive bid, ratings, other terms of the securities depending on such matters, and the identity of the underwriter(s).

(2) Except in competitively bid offerings, from the time the Participating Underwriter has reached an understanding with an issuer of municipal securities that it will become a Participating Underwriter in an Offering until a final official statement is available, the Participating Underwriter shall send no later than the next business day, by first-class mail

or other equally prompt means, to any potential customer, on request, a single copy of the most recent preliminary official statement, if any.

(3) The Participating Underwriter shall contract with an issuer of municipal securities or its designated agent to receive, within seven business days after any final agreement to purchase, offer, or sell the municipal securities in an Offering and in sufficient time to accompany any confirmation that requests payment from any customer, copies of a final official statement in sufficient quantity to comply with paragraph (b)(4) of this rule and the rules of the Municipal Securities Rulemaking Board.

(4) From the time the final official statement becomes available until the earlier of-- (i) Ninety days from the end of the underwriting period or

(ii) The time when the official statement is available to any person from a nationally recognized municipal securities information repository, but in no case less than twenty-five days following the end of the underwriting period, the Participating Underwriter in an Offering shall send no later than the next business day, by first-class mail or other equally prompt means, to any potential customer, on request, a single copy of the final official statement.

^{14/} Rule G-32 provides in relevant part:

No broker, dealer or municipal securities dealer shall sell, whether as principal or agent, any new issue municipal securities to a customer unless such broker, dealer or municipal securities dealer delivers to the customer no later than the settlement of the transaction:

(i) a copy of the official statement in final form prepared by or on behalf of the issuer or, if an official statement in final form is not being prepared by or on behalf of the issuer, a written notice to that effect together with a copy of an official statement in preliminary form, if any; provided, however, that if an official statement in final form is being prepared for new issue municipal securities issued in a primary offering that qualifies for the exemption set forth in paragraph (iii) of section (d)(1) of Securities Exchange Act Rule 15c2-12, a broker, dealer or municipal securities dealer may sell such new issue municipal securities to a customer if such broker, dealer or municipal securities dealer:

(A) delivers to the customer no later than the settlement of the transaction a copy of an official statement in preliminary form, if any, and written notice that the official statement in final form will be sent to the customer within one business day following receipt thereof by the broker, dealer or municipal securities dealer, and

(B) sends to the customer a copy of the official statement in final form, by first class mail or other equally prompt means, no later than the business day following receipt thereof by the broker, dealer or municipal securities dealer; and

(ii) in connection with a negotiated sale of new issue municipal securities, the following information concerning the underwriting arrangements:

(A) the underwriting spread;

(B) the amount of any fee received by the broker, dealer or municipal securities dealer as agent for the issuer in the distribution of the securities;

(C) the initial offering price for each maturity in the issue that is offered or to be offered in whole or in part by the underwriters, including maturities that are not reoffered.

Every broker, dealer or municipal securities dealer shall send, upon request, the documents and information referred to in this section (a) to any broker, dealer or municipal securities dealer to which it sells new issue municipal securities no later than the business day following the request or, if an official statement in final form is being prepared but has not been received from the issuer or its agent, no later than the business day following such receipt. Such items shall be sent by first class mail or other equally prompt means, unless the purchasing broker, dealer or municipal securities dealer arranges some other method of delivery and pays or agrees to pay for such delivery.

(b) Responsibility of Managing Underwriters, Sole Underwriters and Financial Advisors.

(i) Managing Underwriters and Sole Underwriters. When an official statement in final form is prepared by or on behalf of an issuer, the managing underwriter or sole underwriter, upon request, shall send to all brokers, dealers and municipal securities dealers that purchase the new issue municipal securities an official statement in final form and other information required by paragraph (a)(ii) of this rule and not less than one additional official statement in final form per \$100,000 par value of the new issue purchased by the broker, dealer or municipal securities dealer and sold to customers. Such items shall be sent no later than the business day following the request or, if an official statement in final form is being prepared but has not been received from the issuer or its agent, no later than the business day following such receipt. Such items shall be sent by first class mail or other equally prompt means, unless the purchasing broker, dealer or municipal securities dealer arranges some other method of delivery and pays or agrees to pay for such delivery. In addition, the managing underwriter or sole underwriter, upon request, shall provide all purchasing brokers, dealers and municipal securities dealers with instructions on how to order additional copies of the official statement in final form directly from the printer.

(ii) Financial Advisors. A broker dealer or municipal securities dealer that, acting as financial advisor, prepares an official statement in final form on behalf of an issuer, shall make that official statement in final form available to the managing underwriter or sole underwriter promptly after the issuer approves its distribution.

^{15/} In issuing their releases, the SEC and MSRB were reacting to the need of dealers in securities for guidance in the changing world of electronic communication. As the use of electronic media increases, the SEC or MSRB may provide further guidance with respect to the issues discussed in this opinion.

^{16/} Under the Public Records Disclosure Law and the Records Retention Law, a “public record” includes items in electronic form. ORS 192.005(5), 192.410(4), (6).