

GILMORE BELL
GILMORE & BELL, PC

**SECURITIES LAW ENFORCEMENT
THE IMPORTANCE OF
CONTINUING DISCLOSURE**

NASBO State Convention
April 14, 2016

A New Focus on Compliance



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**“The pipeline is very full,
we’re really operating on all
cylinders.”**

LeeAnn Gaunt, Director Municipal Securities
and Public Pensions; SEC Division of Enforcement.



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Issuing tax-exempt debt provides economic advantage to Issuers



In exchange, limitations are imposed by the federal government at the time the bonds are sold AND as long as the bonds are outstanding.

"Post-Issuance Compliance"

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Post-Issuance Compliance Requirements

- Where are they found?
 - Federal Tax Code & Regulations
 - Tax Certificate for each financing
 - **Continuing Disclosure Undertakings**
 - Written Compliance Procedures

Regulators are asking...
Can you prove you are in compliance?

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How does my Issuer prove compliance?

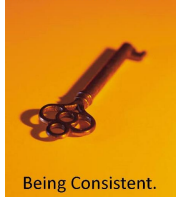


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Implement Written Compliance Procedures

The key to
Record Keeping is . . .



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Information for Investors

- Bonds are securities!
- Federal regulation of securities offerings
- Two primary statutes from 1933 and 1934 – the *securities laws*
- SEC's concerns
 - Investor protection
 - Market efficiency



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Primary Source of Liability

- Securities laws contain "anti-fraud" rules
 - Official Statement may not contain a material *misstatement* or *omission*



- It is illegal for an Official Statement to contain a materially inaccurate statement, or for an Official Statement to exclude a material piece of information

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Anti-fraud Rules

- Lack of SEC regulatory authority elsewhere
- Anti-fraud rules are the SEC's main source of ammunition for actions against municipal issuers
- Both the issuer of the securities and public officials may be held liable
- Significant uptick in enforcement of anti-fraud rules (MCDC)

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What "Fraud?"



According to SEC, negligence may include:

- Failure to follow procedures
- Failure to review documents to certain standards
- Failure to have the correct personnel review documents (e.g., CFO may not have all operations details)
- Coupled with a material misstatement or omission
- Focus on omissions!

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Heightened Enforcement Recently

- MCDC announcement
- No investor losses necessary
- Action against officials, not just issuers
- SEC using its one enforcement tool against issuers: the anti-fraud rules



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Underwriters



- SEC has broad authority to regulate underwriters



SEC uses its authority to regulate underwriters to indirectly impact disclosure obligations of issuers



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Rule 15c2-12

- Applies to underwriters (not issuers)
- Mandates a baseline of disclosure for municipal securities –
 - official statements
 - annual reports
 - event notices
- There are exemptions for certain offerings and financings

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Continuing Disclosure Undertakings

- Underwriter must obtain an undertaking from an "obligated person"
- Contractual obligation of obligated person
- Components
 - Annual Report (Audit + Operating Data)
 - Event Notices (14 Events)
- In new official statements, disclosure about noncompliance during 5-year historical period



WHY?

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Rule 15c2-12 – Obligated Person

The rule requires an underwriter to obtain from one or more "obligated persons" a compliant continuing disclosure undertaking

"Obligated person" – an entity committed by contract or other arrangement to support payment of all or part of the offered securities



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SEC's Focus

COMPLIANCE



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Continuing Disclosure Compliance – Step 1

Find the undertakings



****Continuing Disclosure Undertaking, Continuing Disclosure Agreement, Continuing Disclosure Certificate or Bond Resolution****

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Continuing Disclosure Compliance – Step 2

Review the specific requirements of each undertaking

- Filing Deadline (e.g., 180 days after fiscal year end)
- Audit requirement specifics
- Other financial information and operating data
 - Should be described by reference to specific tables in the Official Statement
 - Operating data is information about the obligated person's own operations
 - Quantitative; not demographic information; not projections

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Sample Undertaking Language

Section 2. Provision of Annual Reports.

(a) The Issuer shall not later than 180 days following the end of the Issuer's fiscal year commencing with the year ending June 30, 2016, file with the MSRB, through EMMMA, the following financial information and operating data (the "Annual Report"):

◀ Filing Deadline

(1) The audited financial statements of the Issuer for the prior fiscal year, prepared on a modified-cash basis. If audited financial statements are not available by the time the Annual Report is required to be filed, the Annual Report shall contain unaudited financial statements in a format similar to the financial statements contained in the final Official Statement relating to the Bonds, and the audited financial statements shall be filed in the same manner as the Annual Report promptly after they become available.

◀ Audit requirement, including accounting basis

(2) Updates as of the end of the fiscal year of the financial information and operating data contained in the final Official Statement related to the Bonds, as described in **Exhibit A**, in substantially the same format contained in the Official Statement

◀ Operating Data Required – included in an exhibit

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Continuing Disclosure Compliance – Step 3

Prepare annual report(s)



- Obstacles
 - Information not yet available
 - Audit delays
 - Information provided by third party sources (County Assessor)



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Last but Critical Slide

- SEC views an issuer's prior compliance with undertakings during prior 5 years as "material"
- Disclose to investors in Official Statements
- Include a plain-language summary of material failures to comply in the past five years
- Be wary of "remedial" language unless you are sure it is correct! ("...the Issuer is now in full compliance with its undertakings")



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Questions?



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