



# **Association of Public Treasurers Conference: Leveraging Technology to Improve Access to Capital Markets**

**July 25, 2017**

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CEO and Co-Founder  
Lumesis, Inc.

- Issuers' Continuing Disclosure Obligations in a Post-MCDC World
  - MCDC Orders – Overview
  - New Issues – What to Expect From Underwriters
  - Best Practices – GFOA Guidance, What We See Others Doing
- *DIVER for Issuers* – Technology to Support Access to the Capital Markets (and avoid SEC scrutiny)

- *“The Commission is bringing actions against more municipal issuers and public officials.”* Andrew Cersene, Director of Enforcement (10/13/2016) Keynote Address at Securities Enforcement Forum 2016
- Approximately 200 Enforcement Actions by the SEC and FINRA in 4 Years
  - Actions Against Issuers, Officials, Underwriters, Municipal Advisors
    - Miami and its former budget director guilty of securities fraud for faulty disclosures.  
“We will continue to hold municipalities and their officers accountable, including through trials, if they engage in financial fraud or other conduct that violates federal securities laws.” Andrew Ceresney, SEC Enforcement Director
- MCDC Recap:
  - Underwriters: 72 Firms and >\$18mm in Fines
    - Examples of “Materiality” Provided
    - Engage an Independent Consultant
    - One Year to Certify
  - Issuers: 71 Issuers Across 45 States
    - “Materially false or misleading statements or omissions about their compliance with continuing disclosure obligations”
    - Must do the following:
      - Establish Appropriate Policies and Procedures and Training within 180 days
      - Update Past Delinquent Filings
      - Disclose MCDC Order in Offerings for 5 year

## State of Disclosure: MCDC Cease & Desist Orders

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- Dealer and Issuer Orders:
  - Competitive and Negotiated Deals
- “Materiality” -- What We Learned About
  - Missed/Late Audited Financial Filings & Operating Data
    - Overall Filing
    - Detailed Operating Data – Incomplete
    - “Certain financial information” as agreed under previous offerings
  - No Statement About Prior Compliance Where Failures Existed
  - Sticker 4 months After OS Does Not Cure Misstatement
  - Corrective Filings Prior to an Offering Does Not Cure
  - Failure to File Notice
  - Misrepresentation of Annual Financials Contained in the Official Statement
  - EMMA Cross References
    - OS with an Annual Report filed with EMMA Lacking Cross-Reference to Issue and/or CUSIP
    - Failure to Provide, within EMMA, Cross-References to Previously Filed Audit and Operating Filings
  - Ratings & “Certain notices of defeasance”
- No Safe Harbor
  - Examples Do Not = Materiality Boundary

## New Issues – What to Expect from Underwriters

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- Approach to 15c2-12 Compliance
  - Review Obligations
  - Assessment/Documentation of Corrective Action for Issuers with Failures in Past Filings
  - Assessment of Issuer’s Disclosure in POS/OS
  - Assessment of Issuer’s Ability to Comply Prospectively
- Scope of “Reasonable Diligence” Given Deal Type - Risk Assessment
  - Competitive v. Negotiated
    - Audited Financials
    - Summary and/or Detailed Financial and Operating Data
    - Ratings (Underlying and 3rd Party)
    - Calls/Redemption Filings
  - Scope of Review
    - Summary, Issue, CUSIP
  - Underwriting Role – Lead, Co, Syndicate Member
  - Reliance on 3<sup>rd</sup> Parties
    - Law Firms
    - Vendors
    - Consultants
- Challenges for Underwriters and Issuers
  - Independent Consultant Recommendations Inconsistent
    - Underwriters May Have Differing Requirements than/for Issuers
  - What is “Reasonable Diligence” for the Underwriter?
  - “Materiality” – What Must the Issuer Disclose?

## Disclose Past CDA Non-Compliance in POS/OS and Ensure Future Compliance

- Gather Detailed Information for a Complete Picture
  - Know What Was Committed to be Disclosed and the Frequency
  - Analyze Your Disclosure History
- MCDC Cease and Desist Order Provides a Roadmap
  - Policies, procedures and training
  - Clean-up past filings
    - “Reclassification” of Misclassified Filings or Refile
    - File Where Missing
  - Disclose non-compliance and MCDC settlement terms
- GFOA Alert to Members – Five Essential Practices
  - Understanding/discussing issuer’s disclosure policies and procedures
  - Knowing who is filing what, when and where
  - Awareness of what was posted on EMMA
  - Knowing what the issuer committed to in its CDA
  - OS statement that issuer failed to materially comply with prior commitments
- Ongoing 15c2-12 Analysis/Refresh/Alerts – Ensure filings done as required
- What we have seen: increased disclosure (“overdisclosure” at times), amended and scaled back CDAs, lack of affirmative statements, in-house EMMA filings

# Issuers: Best Practices for Capital Markets Access and Reduced Risk

- What We Don't Know
  - “Materiality” – examples but no bright line
    - “Substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available”
  - Scope of “Reasonable Diligence”
- What We Have Seen
  - Omnibus Amendments
  - Links to Documents
- SEC and FINRA Follow-on
  - Exams
  - Legal Actions (City of Miami; Greater Wenatchee Regional Events Center; Port Authority of NY and NJ), Names Named/“Control Person” (City of Allen Park, Michigan)
- When In Doubt – Disclose
- Documentation

- Municipal Advisors and G-42: The Substantive Part
  - Review of G-42's Substantive Requirements
  - Practical Implications and Realities to the Issuer and Municipal Advisor
- DIVER *for Issuers* Screenshots



- Rule G-42 establishes the core standards of conduct and duties of MAs when engaging in municipal advisory activities.
- Summary from Regulatory Notice 2016-03:
  - Establishes standards of conduct consistent with the *fiduciary duty owed by a MA to its municipal entity clients*, which includes a duty of care and a duty of loyalty;
  - Requires a MA to *exercise due care* when performing its municipal advisory activities for its obligated person clients;
  - Provides for the *full and fair disclosure, in writing*, of all material conflicts of interest and all legal or disciplinary events that are material to a client’s evaluation of a MA;
  - Requires *documentation of the municipal advisory relationship*, specifying certain aspects of the relationship that must be included in the documentation;
  - Requires, when making a recommendation, that a MA have a *reasonable basis to believe that the recommendation is suitable* and, if appropriate, requires a MA to determine the suitability of recommendations made by third parties;
  - Specifically prohibits a municipal advisor from engaging in certain activities
- “Compliance Advisory for Municipal Advisors,” MSRB, June 2017

# Municipal Advisor Rule – MSRB Rule G-42

## **MA conduct “for a municipal entity client is subject to a fiduciary duty, which includes to both a duty of loyalty and duty of care.”**

- **Duty of Care:**
  - Knowledge and expertise needed
  - Inquiry as to the facts that are relevant to client’s determination to proceed with a course of action
  - Reasonable investigation to conclude a recommendation is not based on materially inaccurate or incomplete information
  - Reasonable basis for:
    - Advice Provided
    - Representations that may be relied upon by the client or others involved in transactions
    - Information provided to client or others in a transaction in connection with the preparation of the OS
- **Duty of Loyalty:**
  - Deal honestly and with the utmost good faith
  - Act in the client’s best interests without regard to the financial or other interests of the MA firm
- **Conflicts of Interest:**
  - Eliminate or provide full and fair disclosure to client about each material conflicts of interest, including compensation potential conflicts
  - Do not engage in municipal advisory activities with the client, if conflicts cannot be managed or mitigated
- **Certain Requirements:**
  - Disclose in writing all material conflicts of interest (actual or potential), prior to or upon engaging in MA activities
  - Disclose in writing any legal or disciplinary events
  - Evidence each relationship by a writing or writings (contract, agreement, letter, etc.):
    - Delivered prior to, upon or promptly after the establishment of the MA relationship
    - Dated and include minimum requirements
  - Do not engage in prohibited activities
  - Disclose and Update as Needed

## G-42: Municipal Advisor Recommendations

- Recommendations and Review of Third-Party Recommendations:
  - Rule G-42(d) provides that “[i]f a municipal advisor makes a recommendation of a municipal securities transaction or municipal financial product to a municipal entity or obligated person client, it must have a *reasonable basis to believe that the recommended municipal securities transaction or municipal financial product is suitable* for the client, based on the information obtained through the reasonable diligence of the municipal advisor.” (Emphasis supplied)
  - Ensure client is informed of the following:
    - Material risks, potential benefits, structure, and other characteristics of the recommendation
    - Basis upon which the advisor reasonably believes recommendation is, or is not, suitable; and
    - If reasonably feasible alternatives investigated/considered to meet objectives

## G-42: Municipal Advisors: Determining Suitability

- MSRB G-42 Supplementary Material provides guidance related to a municipal advisor's suitability obligations/determination.
- Determination of whether a transaction or financial product is suitable must be based on numerous factors including, but not limited to, the client's:
  - Financial situation and needs
  - Objectives
  - Tax status
  - Risk tolerance
  - Liquidity needs
  - Experience with municipal securities transactions or municipal financial products generally or of the type and complexity being recommended
  - Financial capacity to withstand changes in market conditions during the term of the municipal securities to be issued are reasonably expected to be outstanding
  - Any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after a reasonable inquiry.

# Practical Implications and Realities to the Municipal Advisor and Issuer

- More Than Registration and Continuing Education
  - Document the Relationship in Accordance with MSRB Rule G-42/G-8
    - Engagement, Disclosures (conflicts, Compensation, Legal), Recommendations and more
- Substantive Aspects
  - “Know Your Client” – essential facts and authority of those acting for the client
  - Inquire into Facts Relevant to Client’s Determination to Proceed with a Course of Action or Form a Basis for Advice Provided to the Client
  - Reasonable Investigation to Determine Not Basing Recommendations on Materially Inaccurate or Incomplete Information
  - Reasonable Basis for Suitability
- Documentation!
  - Rule G-8(h)(iv) – Recordkeeping Requirements for Recommendations and Reviews of Recommendations – “...make and keep a copy of any document created by the MA that was material to its review of a recommendation by another party or that memorializes the basis for any determination as to suitability.”

## Learn More

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Join our regular Tuesday and Thursday DIVER *for Issuers* webinars  
email [mharries@lumesis.com](mailto:mharries@lumesis.com) or sign up at [lumesis.com/our-solutions/diver-for-issuers](http://lumesis.com/our-solutions/diver-for-issuers)

- 15c2-12 Primary Market Management

- Ensure Proper Disclosure in New Issue Docs:

- Historical Debt Review for Continuing Disclosure Obligations
    - Independent Analysis: Audit, Financial/Operating Data and Ratings
      - Obligor, Issue and CUSIP Level Analysis
    - Color-Coded (“Stop-Light”) Filing Analysis Identifies Timely/Late/Missed Filings
    - Identification of Mislabeled/Categorized Filings

- Provide Underwriters Comfort of Ongoing Compliance Post Issuance
  - Proper Disclosure and Prospective Comfort = More Bidders for Your Bonds
  - Reduce Regulatory Risk

Summary FinOp Analysis: [Edit Filings](#)

Fiscal Year	2011	2012	2013	2014	2015	2016	2017
Fiscal Year End	December 31	December 31	December 31	December 31	December 31	December 31	December 31
Timing Requirement	FYE + 210 DAYS	FYE + 210 DAYS	FYE + 210 DAYS	FYE + 210 DAYS	FYE + 210 DAYS	FYE + 210 DAYS	FYE + 210 DAYS
Due Date	07/28/2012	07/29/2013	07/29/2014	07/29/2015	07/28/2016	07/29/2017	07/29/2018
Actual Financial Filing	12/02/2013	12/02/2013	06/04/2014	06/29/2015	05/11/2016	03/10/2017	-
Days Late	492	126	0	0	0	0	0
Financial Filing							-
Related Failure to File				-		-	-

Detailed FinOp Analysis: [Display Filing Exceptions Only](#) [Bond Level](#) [Change View](#)

Obligation View

Disclosure Obligation	Issue Description	Issue Amount	Dated Date	2011	2012	2013	2014	2015	2016	2017
<a href="#">Debt - Direct - Overlapping</a>	Multiple	Various	Various						-	-
<a href="#">Debt Service Fund</a>	Multiple	Various	Various						-	-
<a href="#">Assessed Valuations (current and hi...</a>	Multiple	Various	Various						-	-
<a href="#">Historical Receipts - No Real Estate T...</a>	Multiple	Various	Various						-	-
<a href="#">Largest Taxpayers</a>	Multiple	Various	Various					-	-	-
<a href="#">Tax Rates - Millage</a>	Multiple	Various	Various					-	-	-

Event Date	Agency	Prior	New	Rating Type	Issue	Insured	Note	Due Date	Filing Date	Days Late	Filing	
2/07/2017	Fitch	A	AA-	Standard	Multiple		NATL	-	02/22/2017	02/13/2017	0	
2/07/2017	Fitch	A	AA-	Unenhanced	Taxable General Obligation Series 1998-C		NATL	-	Timely	02/13/2017	-	
2/05/2014	Fitch	A	WD	Standard	General Obligation Series 2005-A		NATL	R	Timely	-	-	-
2/05/2014	Fitch	A	WD	Unenhanced	General Obligation Series 2005-A		NATL	R	Timely	-	-	-
1/26/2014	Fitch	A	WD	Standard	General Obligation Series 2006-C		AGM	-	Timely	-	-	-
1/26/2014	Fitch	A	WD	Unenhanced	General Obligation Series 2006-C		AGM	-	Timely	-	-	-
3/19/2014	S&P	AA-	AA	Standard	Multiple		AGM	-	Timely	08/06/2014	-	
3/18/2014	S&P	A+	AA-	Standard	Multiple		NATL	-	Timely	-	-	-
1/31/2014	S&P	A	A+	Standard	Multiple		NATL	-	02/14/2014	02/05/2014	0	

- 15c2-12 Secondary Market Continuing Disclosure Management
  - Provide Investors Comfort of Ability to Meet Obligations Post-Issuance
    - Current Year Obligations and Filing Status
    - Alerts for Filings Due for Audit, Fin/Op and Rating Changes
  - Annual (or more frequent) 15c2-12 Refresh Analysis to Ensure Filings Done Properly
  - Better Disclosure = Greater Liquidity
  - Reduce Regulatory Risk

Audit		Earliest Due Date: 08/31/2016	
Status	Deals	Days To File	
Missed Filing	1	-274	
Filed Late	2	-147	
Filed On Time	18	-	
	21		

Issue Description	Issue Amt.	Dated Date	Timing Req't.	Due Date	Filing	Status	Days To File	Action
Special Obligation Revenue Series 2011-A Mill River C...	\$16,245,000	10/24/2011	FYE + 2 MONTHS	08/31/2016	-	Missed Filing	-274	Submit Filing

Dear Client,

Please be advised that the following continuing disclosure filing is due for submission to EMMA.

**Filing:** Rating Change

**Obligated Party:** State of Connecticut

**Subject:** State of Connecticut

**Rating Agency:** S&P  
**Prior Rating:** AA-  
**New Rating:** NR  
**Rating Type:** Standard  
**Event Date:** June 06, 2016

**Due Date:** Timely

Issues:

Issue Description	Filing Due Date
General Obligation Series 2006-D	Timely
General Obligation Series 2007-A	Timely
General Obligation Series 2007-C	Timely

CUSIPs:  
 20772J2B7  
 20772J2C5  
 20772JZ70  
 20772JZ96



# DIVER for Issuers: Access to Capital Markets and Reduce Regulatory Risk

- Help Issuers Understand Disclosure Obligations, Ensure Proper New Issue Disclosure, Current Year Status and Prospective Obligations
- Disclosure Filing History and 15c2-12 Analysis
- Suitability and “Know Your Client” Support
  - Issuance History for Debt Outstanding Last 5 Years
    - Key Party Identification
    - Debt Profile
  - Obligor Profile with Key Data for Every Obligor
    - Ratings History
    - Economic and Demographic Data
  - Bitvore News – “Material Situation” Identification
- G-42 Client and Deal File Management
  - Document Storage by Deal and Obligor
    - Administrative and Substantive

Audit		Earliest Due Date: 08/31/2016	
Status	Deals	Days To File	
Missed Filing	1	-274	
Filed Late	2	-147	
Filed On Time	19	-	

**Issuer Docs**

(\*required) (Max file size: 20 MB)

Issuer: City of Stamford CT

* Engagement Letter:	Browse...	Upload
* Conflicts of Interest:	Browse...	Upload
Legal or Disciplinary History:	Browse...	Upload
Recommendations & Suitability:	Browse...	Upload
Inadvertent Advice Disclosure:	Browse...	Upload

Add another document

Issuer	Issue Description	Issue Amount	Dated Date	Type	Outs.	O/S	Lead UW	Bond Counsel	Municipal Advisor
STAMFORD...	General Obligation Series Issue 2016-B	\$45,000,000	08/30/2016	C	Yes		RAYMOND JAME...	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	General Obligation Refunding Series Issue 2016	\$21,170,000	03/23/2016	N	Yes		RAYMOND JAME...	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	General Obligation Series 2015-B	\$65,000,000	08/12/2015	C	Yes		CITIGROUP	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	Water Pollution Control System and Facility Rev...	\$31,070,000	08/04/2015	N	Yes		RAYMOND JAME...	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	General Obligation Refunding Series 2015	\$33,670,000	05/14/2015	N	Yes		RAYMOND JAME...	ROBINSON & C...	PHOENIX ADVIS...
CONNECTI...	General Revenue Green Series 2015-A	\$250,000,000	05/06/2015	N	Yes		GOLDMAN SAC...	SQUIRE PATTO...	LAMONT FINAN...
STAMFORD...	General Obligation Refunding Series 2014	\$16,550,000	10/07/2014	N	Yes		RAYMOND JAME...	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	General Obligation Series Issue 2014	\$50,000,000	08/22/2014	C	Yes		RAYMOND JAMES	ROBINSON & C...	PHOENIX ADVIS...
STAMFORD...	Water Pollution Control System and Facility Rev...	\$22,095,000	08/20/2013	N	Yes		RAYMOND JAME...	ROBINSON & C...	WEBSTER BANK...