

## Protecting your City; Compliance and Keys to Successful Bond Administration

**Anita Luck**  
**Greg Davidson**

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- **Anita Luck** heads the Public Finance group at Aleshire & Wynder.
- Anita specializing in municipal finance law in addition to her general municipal law, land use and successor agency to redevelopment law practice.
- Ms. Luck advises public agencies on the formation of special districts, assessment districts, and community facilities districts, the adoption of special taxes, assessments, development fees and other innovative fees to assist cities in financing projects.
- In her public finance practice, Anita is experienced in representing cities as bond counsel in a variety of transactions, including the issuance of certificates of participation, general obligation, special tax revenue, utility and lease revenue bonds. Representative transactions include financings for a convention center, an airport, water facilities, special districts, redevelopment projects, major infrastructure, community facilities, non-profit corporations, low-income multifamily housing, and utility revenue financings.
- In addition, Anita has led public agency clients through distressed financial situations, including work-outs of troubled bonds, as well as investigations and compliance checks by the SEC, IRS, State Controller's Office and advises cities on ongoing compliance with SEC regulations and IRS requirements post issuance.

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- **Greg Davidson** is a director with NBS where he forms and administers Special Financing Districts (SFDs), which include Mello-Roos Community Facilities Districts (CFDs), Standby Charges, 1913 and 1915 Act Assessment Districts, Landscape Maintenance Districts, and Business Improvement Districts.
- He has 18 years of local government experience. Greg is involved with projects from the inception and feasibility stage to their approval and ultimately bond issuance. Greg has successfully managed hundreds of district operations, the preparation of the annual special assessment levies, preparation of Continuing Disclosure Reports and related special projects. He has worked directly with more than 100 agencies administering 300 districts. Greg has previously presented at the CDA, CMTA, CSMFO, and USDA, speaking on topics related to the formation and administration of Special Financing Districts.
- Greg received his Bachelor of Science, Business Finance with a minor in Psychology from San Diego State University and is Certified Downtown Professional, through California State University, San Bernardino.

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### YOU HAVE ISSUED DEBT, NOW WHAT?

- Legal Requirements: Tax, Securities, and State Law
- Type of Debt: Bonds, Lease, Installment Sale
- Debt Documents: Indenture, Lease Agreement, Installment Sale Agreement, Tax Certificate Continuing Disclosure Certificate
- Types of Covenants:
  - General Issuing Covenants
  - Ongoing Covenants:
    - Not materially impair security
    - Rate Covenant
    - Tax covenants
    - Continuing Disclosure
- State Law Reporting Requirements

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### HOW TO KEEP COVENANTS: JOIN THE PARTY




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P	Procedures
A	Allocation of Expenditures/Action
R	Record Keeping
T	Tell the Market
Y	Yell for Help

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**P** **Procedures** 

- What procedures do you have?
- Tax Compliance, Continuing Disclosure, Document Compliance, Audits
  - Each a subject on its own but always a reference and guide on what to do as a first source
- Purpose and Content of Procedures
  1. Maintain compliance with covenants
  2. Recordkeeping
  3. Maintain continuity with changing staff
  4. Education
  5. Assign responsibility
  6. Checks and Balances
  7. Reference when take action with bond financed property or expend funds



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**A** **Allocation of Expenditures** 

- Tax-Exempt Debt – the interest on bonds is not includable in the calculation of federal income tax of the owners thereof under Section 103 of the Internal Revenue Code
- Exemption at issuance can be affected post issuance - can depend on expenditures, uses of bond financed property and moneys received with respect to bond financed property
- Internal Revenue Services oversees municipal bond exemption, including the Tax Exempt Bond Office of the Government Entities Division which enforces the provisions of the IRC
- IRS achieves its goals through its examination (audit process)
- Increased enforcement in recent years in areas of unspent proceeds and private activity
- IRC Generally provides that interest on state and local bonds will not be included in gross income of the recipient as long as they are not:
  - Private Activity Bonds
  - Arbitrage Bonds
  - Bonds that do not otherwise meet the requirements of the Code



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**A** **Allocation of Expenditures Cont..** 

**What did you spent the money on?**

- Keep Records of what you spend the money on
- Depending on issue, likely needs to be Capital Expenditures or working capital
- Must use consistently applied method of allocating expenditures to facilities
- Can do final allocation within lesser of 5 years after issuance or 18 months after property is placed in service
- Direct tracing by IRS on audit if no final allocation

**When did you spend the money?**

- Reasonable Expectation Test for 3 Years
- Good Reason if spending it slowly
- Rebate may not need to be paid if spend it very quickly as trigger exceptions
- IRS enforcement on Hedge Bond issues – Issued to early



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**A** Allocation of Expenditures Cont.. 

**What are your plans for the use of the property financed by the bonds?**

- Private Activity vs. Governmental Bonds
  - Section 141 of the Code – must fail two tests to be a governmental bond
    - Private Business Test
    - Private Loan Financing Test
  - For Private Business Test:
    - More than 10% of the proceeds are to be used in the trade or business of a non-governmental unit; and
    - More than 10% of the payment of debt service on the issue is directly or indirectly secured by property used in a trade or business or derived from payments therefrom.
  - For Private Loan Financing Test – Governmental Unit provides tax-exempt bond financed loans to non-governmental persons for non-business purposes
- If catch violations or potential, can correct or take alternate course.
  - Remedial Action may be available, e.g. redeem non-qualified bonds, alternate use of disposition proceeds, alternate use of facility
  - Voluntary Closing Agreement Program



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**R** Record Keeping 

- Keep all records for a minimum of 3 years from the date of the final maturity of the bonds or any refunding bonds
  - Expenditures
  - Investments
  - Bond Documents
  - Contracts
  - Other pertinent information



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**T** Tell the Market 

- A. Tell the State-CDIAC
  - New Law –Adopt Debt Policies and Procedures prior to new debt
  - Certain Debt – annual reporting requirements, e.g. CFDs
  - New annual reporting requirements on all debt for which there is a report of final sale after January 21, 2017
- B. Tell the Market – Continuing Disclosure
 

Recent Enforcement Cases inform importance of vigilance in everyday situations (some allegations, none admitted)

  - Harrisburg-talking to the market with lack of information
  - Miami – inter-fund transfers
  - Chicago Charter School-Conflict of Interest
  - Victorville-correct valuations
  - Westlands – extraordinary accounting transactions



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T Tell the Market 

## CONTINUING DISCLOSURE

Greg Davidson  
Director



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Agenda 

- *History of Continuing Disclosure*
- *MCDC*
- *Honey do list (at work)*



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Why Disclosure 



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graph LR; 1[1 Investors loan $ to Agency] --> 2[2 Agency keeps investors up to date on investment]
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**What lead to MCDC**

A Lack of written procedures

B Staff turnover

C LATE OR MISSED FILINGS

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**Continuing Disclosure Agreement**

Parts of the CDA

A Annual Report and Financials

B Significant Events

C MATERIALITY

NBS

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**Significant Events**

- Principal and interest payment delinquencies.
- Non-payment related defaults, if material.
- Unscheduled draws on debt service reserves reflecting financial difficulties.
- Unscheduled draws on credit enhancements reflecting financial difficulties.
- Substitution of credit or liquidity providers, or their failure to perform.
- Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax-exempt status of the security.
- Modifications to rights of security holders, if material.

NBS

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## Significant Events

- Bond calls, if material, and tender offers.
- Defeasances.
- Release, substitution, or sale of property securing repayment of the securities, if material.
- Rating changes.
- Bankruptcy, insolvency, receivership or similar event of the City.
- The consummation of a merger, consolidation, or acquisition involving the City or the sale of all or substantially all of the assets of the City, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.
- Appointment of a successor or additional fiscal agent or the change of name of a fiscal agent, if material.



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## MCDC Results



*Almost all Underwriters impacted by Settlements*  
*Issuer Settlements ongoing*

### Core issues:

- Late and missing filings
- Missing operating data
- Official Statements that did not reflect all failures
- Failure to file Notice of Failure to File
- What is MATERIAL?



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## Next steps



- Adopt good disclosure policies and procedures
- Establish a point person for ALL disclosure
- Use the EMMA tickler system to track your bond issues



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Y **Yell for Help**  **ALESHIRE & WYNDER LLP**  
ATTORNEYS AT LAW

- Call your Lawyer
- Call your Consultant
  - Always when in doubt
  - Too important to ignore



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**Questions and Comments**  **ALESHIRE & WYNDER LLP**  
ATTORNEYS AT LAW

**Greg Davidson**  
*Special Financing District Formation & Administration*


 800.676.7516

 [gdaavidson@nbsgov.com](mailto:gdaavidson@nbsgov.com)

**Anita Luck**  
*Public Finance Partner*

 949.250.5426

 [aluck@awattorneys.com](mailto:aluck@awattorneys.com)



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