Business Manager's SWAP SHOP

LASBO Spring Conference
March 16, 2017

Compliance with Continuing Disclosure Agreements

IT'S A BIG DEAL!!!!

Compliance with Continuing Disclosure Agreements

- SEC Rule 15c2-12 prohibits any underwriter from purchasing or selling bonds unless the issuer has committed to providing continuing disclosure regarding the security issuer, including information about financial condition and operating data.
- SEC Rule 15c2-12 also generally requires that any final official statement prepared in connection with a primary bond offering contain a description of any instances in the previous 5 years in which the issuer failed to comply with any previous commitment to provide continuing disclosure.

Compliance with Continuing Disclosure Agreements

What is the problem?

1. **Issuers** failing to comply with annual and material event filing notice requirements as agreed to in Continuing Disclosure Agreements (CDAs) entered into with Underwriters who sell your bonds.
2. **Underwriters** failing to ensure issuers are current with CDAs and providing investors with "fraudulent, materially misleading information" in Official Statements of bonds they bring to market.
3. Disclosures in Preliminary and Final Official Statements prepared for the sale of bonds in the marketplace contained "*materially false and misleading information"* to the purchasers of bonds because the issuer did not provide accurate information concerning compliance with the requirements of existing CDAs for the previous 5 years.

Compliance with Continuing Disclosure Agreements

The SEC considers "materially false and misleading information" provided in Official Statements about issuer continuing disclosures to be FRAUD.

This is because the ISSUER should have known the disclosures were inaccurate, and the UNDERWRITER should not have solely relied on any statements of compliance from the issuer.

Compliance with Continuing Disclosure Agreements

Did your government participate in the MCDC Initiative?

Compliance with Continuing Disclosure Agreements

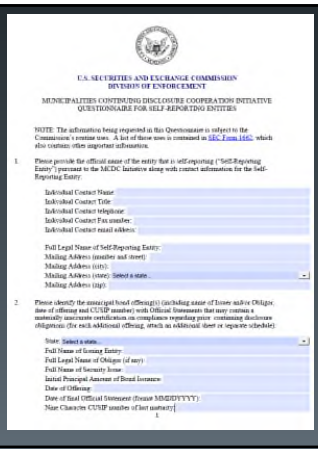
In 2014 the *Securities and Exchange Commission* (SEC) through its *Municipal Securities Rule-making Board* (MSRB) launched the *Municipal Continuing Disclosure Cooperative (MCDC) Initiative* whereby underwriters and **issuers** of bonds *voluntarily* reviewed compliance with continuing disclosure agreements, as required by Rule 15c2-12 under the Securities Exchange Act of 1934 and reported non-compliance.

Compliance with Continuing Disclosure Agreements

Who assisted the government in this voluntary reporting process?

Compliance with Continuing Disclosure Agreements

Did you send in the reporting form listing areas of non-compliance with your CDAs to the Securities and Exchange Commission?



U.S. SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

MUNICIPALITIES CONTINUING DISCLOSURE COOPERATION INITIATIVE
QUESTIONNAIRE FOR SELF-REPORTING ENTITIES

NOTE: The information being requested in this Questionnaire is subject to the Commission's routine uses. A list of these uses is contained in SEC Form 1662, which also contains other important information.

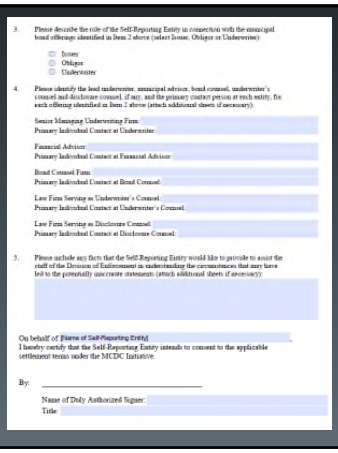
1. Please provide the official name of the entity that is self-reporting ("Self-Reporting Entity") pursuant to the MCDC Initiative along with contact information for the Self-Reporting Entity:

Individual Contact Name:
Individual Contact Title:
Individual Contact telephone:
Individual Contact Fax number:
Individual Contact email address:

Full Legal Name of Self-Reporting Entity:
Mailing Address (number and street):
Mailing Address (city):
Mailing Address (state): Select a state...
Mailing Address (zip):

2. Please identify the municipal bond offering(s) (including name of Issuer and/or Obligor, date of offering and CUSIP number) with Official Statements that may contain a materially inaccurate certification on compliance regarding prior continuing disclosure obligations (for each additional offering, attach an additional sheet or separate schedule):

State: Select a state...
Full Name of Issuing Entity:
Full Legal Name of Obligor (if any):
Full Name of Security Issue:
Initial Principal Amount of Bond Issuance:
Date of Offering:
Date of final Official Statement (Format MM/DD/YYYY):
Nine Character CUSIP number of last maturity:



3. Please describe the role of the Self-Reporting Entity in connection with the municipal bond offerings identified in Item 2 above (select Issuer, Obligor or Underwriter):

☐ Issuer
☐ Obligor
☐ Underwriter

4. Please identify the lead underwriter, municipal advisor, bond counsel, underwriter's counsel and disclosure counsel, if any, and the primary contact person at each entity, for each offering identified in Item 2 above (attach additional sheets if necessary):

Senior Managing Underwriting Firm:
Primary Individual Contact at Underwriter:

Financial Advisor:
Primary Individual Contact at Financial Advisor:

Bond Counsel Firm:
Primary Individual Contact at Bond Counsel:

Law Firm Serving as Underwriter's Counsel:
Primary Individual Contact at Underwriter's Counsel:

Law Firm Serving as Disclosure Counsel:
Primary Individual Contact at Disclosure Counsel:

5. Please include any facts that the Self-Reporting Entity would like to provide to assist the staff of the Division of Enforcement in understanding the circumstances that may have led to the potentially inaccurate statement(s) (attach additional sheets if necessary):

On behalf of [Name of Self-Reporting Entity],
I hereby certify that the Self-Reporting Entity intends to consent to the applicable settlement terms under the MCDC Initiative.

By: _____

Name of Duly Authorized Signer:
Title:

Compliance with Continuing Disclosure Agreements

If your government participated,
The SEC is giving you a
"GET OUT OF JAIL FREE"
Card!!!

Compliance with Continuing Disclosure Agreements

From: MCDCsubmissions <MCDCsubmissions@SEC.GOV>
Sent: Friday, March 03, 2017 1:04 PM
To:
Subject: Notice Related to MCDC Initiative (In the Matter of Certain Municipal Securities Underwritings)

We have concluded our review of the submission pursuant to the Municipalities Continuing Disclosure Cooperation Initiative from . Based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against . We are providing this notice under the guidelines set out in the final paragraph of Securities Act Release No. 5310, which states in part that the notice "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation." (The full text of Release No. 5310 can be found at: http://www.sec.gov/divisions/enforce/wells-release.pdf.)

Please email any questions to MCDCsubmissions@sec.gov.

Sincerely,

LeeAnn Ghazil Gaunt
Chief, Public Finance Abuse Unit

THE BOND BUYER
Wednesday, December 14, 2016 | as of 4:49 AM ET

Enforcement

SEC Ends MCDC Settlements, Turns to Violators That Didn't Participate

By Jack Casey
December 13, 2016

WASHINGTON – The Securities and Exchange Commission will not bring any more settlements under its Municipalities Continuing Disclosure Cooperation initiative and will instead focus on those underwriters and issuers that did not voluntarily disclose violations under the MCDC.

LeeAnn Gaunt, chief of the SEC enforcement division's public finance abuse unit, told The Bond Buyer about the unit's shift in focus on Tuesday, ending months of speculation about the future of the MCDC.

"We currently do not expect to recommend enforcement action against any additional parties under the initiative," she said. "We now think it is appropriate to turn our attention to issuers and underwriters and obligors that didn't participate."

The unit's enforcement lawyers view the underwriters and issuers who may have committed violations but did not self-report as part of MCDC as a high risk for future violations, Gaunt said, adding, "That is a group of particular interest to us and we intend to devote significant resources to identifying violations by those parties."

The enforcement lawyers would also like to learn about any instances where some violations were not self-reported even though the issuer or underwriter self-reported others, according to Gaunt.

There have been indications in the past that the commission may also pursue individuals that were associated with the violations that were reported under the initiative.

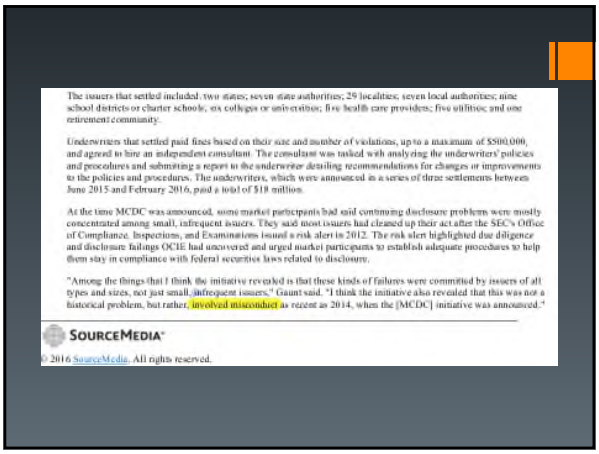
Market participants had been waiting for an indication from the SEC about MCDC's future since the commission released its round of issuer settlements in late August.

The SEC's decision to conclude the initiative was guided by the knowledge that MCDC both raised the level of awareness of continuing disclosure problems in the market and led to improvements to be put in place for "the key gatekeepers" in the market, according to Gaunt. MCDC also raised the quality of disclosure and due diligence in the market, she added.

The MCDC initiative promised underwriters and issuers would receive lenient settlement terms if they self-reported instances over the last five years where issuers falsely said in offering documents that they were in compliance with their continuing disclosure agreements. In total, the initiative led to settlements with 72 issuers from 45 states, including a 2014 settlement with California's Kings Canyon Joint Unified School District. In addition, 72 underwriters representing 96% of the underwriting market by volume paid a total of $18 million in MCDC settlements.

Issuers that settled under the initiative did not have to pay penalties but agreed to establish appropriate written policies and procedures as well as conduct periodic training regarding their continuing disclosure obligations to ensure compliance with federal securities laws. They also agreed to designate an individual or officer to be responsible for ensuring they are compliant with their policies and procedures. The designated individual is also responsible for implementing and maintaining a record of the issuer's disclosure training.

The issuers also have to disclose their settlements in future offering documents and cooperate with any subsequent SEC investigations.



The issuers that settled included: two states; seven state authorities; 29 localities; seven local authorities; nine school districts or charter schools; six colleges or universities; five health care providers; five utilities; and one retirement community.

Underwriters that settled paid fines based on their size and number of violations, up to a maximum of $500,000, and agreed to hire an independent consultant. The consultant was tasked with analyzing the underwriters' policies and procedures and submitting a report to the underwriter detailing recommendations for changes or improvements to the policies and procedures. The underwriters, which were announced in a series of three settlements between June 2015 and February 2016, paid a total of $18 million.

At the time MCDC was announced, some market participants had said continuing disclosure problems were mostly concentrated among small, infrequent issuers. They said most issuers had cleaned up their act after the SEC's Office of Compliance, Inspections, and Examinations issued a risk alert in 2012. The risk alert highlighted due diligence and disclosure failings OCIE had uncovered and urged market participants to establish adequate procedures to help them stay in compliance with federal securities laws related to disclosure.

"Among the things that I think the initiative revealed is that these kinds of failures were committed by issuers of all types and sizes, not just small, infrequent issuers," Gaunt said. "I think the initiative also revealed that this was not a historical problem, but rather, involved misconduct as recent as 2014, when the [MCDC] initiative was announced."

SOURCEMEDIA

Compliance with Continuing Disclosure Agreements

If your government did not participate in the process, you are *fair game* for the SEC to review your Continuing Disclosure filings today which are fully available to them on the Electronic Municipal Market Access (EMMA) system.

What can you do now?

KNOW THAT YOU ARE IN COMPLIANCE!

Compliance with Continuing Disclosure Agreements

1. Make sure all disclosure filings are up-to-date on EMMA, as required by all CDAs for the past 5 years.

   a) Filing Annual Report (operating data and audited and/or unaudited financial statements) within 180 days of your year-end or as stated in your CDAs.

   File a "Notice of Failure to File" before the deadline if you will not file the annual report or audited financial statements on time. DO THIS TODAY!

   b) File all past due Material Event Notices (These are required to be filed within 10 days of the occurrence of the event.)

Compliance with Continuing Disclosure Agreements

b) File all past due Material Event Notices (These are required to be filed within 10 days of the occurrence of the event.)

i. Principal and interest payment delinquencies
ii. Nonpayment related defaults
iii. Unscheduled draws on debt service reserves or credit enhancements
iv. Substitution of credit
v. Rating changes (any rating changes)
vi. Adverse tax opinions, IRS final determinations, or Notice of Proposed Issue (IRS Form 5701-TEB), or other material notices
vii. Bond calls, defeasance, refunding
viii. Modification of rights of registered owners
ix. Bankruptcy, insolvency, receivership, etc.
x. Agreement to merger, consolidation, acquisition, or sale of all or substantially all assets
xi. Appointment of an additional or successor trustee, or the change in name of a trustee (paying agent)

Compliance with Continuing Disclosure Agreements

2. Seek help from knowledgeable professionals to assist you with understanding and complying with Continuing Disclosure Agreements.
   - Bond Counsel
   - Municipal Advisor
   - Disclosure Counsel
   - Dissemination Agent

Compliance with Continuing Disclosure Agreements

3. Consider other financing options that do not require CDAs, in place of issuing publicly traded municipal securities/bonds, if feasible.

Compliance with Continuing Disclosure Agreements

Still not worried because you have others who do this for your Government?

Compliance with Continuing Disclosure Agreements

With my limited knowledge, I have classified issuers into 3 categories:

- "**Novice**" – Government/staff knows very little about the process of issuing pubic debt (new officials or administration on staff who have never been involved in a bond issuance before, or very limited engaged in the process.) A third-party handles the process for the government from start to finish.
- "**Casual**" – Government has routinely issued or refinanced bonds and staff has a general understanding of the process, but not too involved in the details because professionals are engaged to assist. *You know enough to ask questions, but you leave the details to someone else.*
- "**Sophisticated**" – The government has people on staff who stay on top of the municipal bond market; well-versed in bond transactions; and can make knowledgeable recommendations on structuring debt and timing into the market for a new bond issue or refinancing.

Compliance with Continuing Disclosure Agreements

- The SEC holds the ISSUER solely responsible for the filings made on EMMA and for compliance with all filing and notice requirements in the Continuing Disclosure Agreements and entered into with Underwriters and subsequent purchasers of bonds.
- Underwriters are involved at the initial sale of bonds when the official statements are issued. An underwriter's obligation to have a reasonable basis to believe that **the key representations in a final official statement are true and accurate extends to an issuer's representations concerning past compliance with disclosure obligations**.

Compliance with Continuing Disclosure Agreements

- Four (4) things necessary to prove you relied on other professionals:
  1. Completely disclosed all known facts to the engaged professional (auditors, bond counsel, disclosure counsel, underwriters, municipal advisors, etc.)
  2. Sought advice from the professional about a specific course of action
  3. Received advice from the professional
  4. Relied on the advice and followed through in good faith

Compliance with Continuing Disclosure Agreements

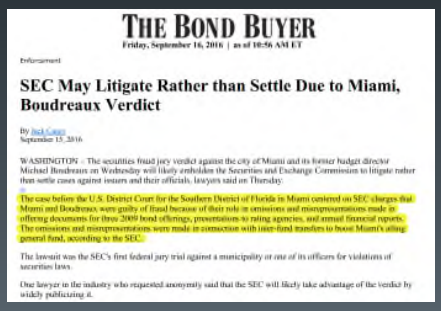
- Do you have agreements in place that cover all services your government is receiving from professionals?
  - Opinion on validity of bonds, that the bonds are tax-exempt
  - Issue tax compliance certifications
  - Filing reports and notices on EMMA
  - Rendering of advice on or preparation of official statements, annual reports, event notices, or continuing disclosure agreements
  - Gives advice on structuring of debt and financing terms, investment of proceeds, fairness of pricing, and bond ratings, etc.
  - Transmitting principal and interest payments to bond holders
  - Handling the settlement of bond transactions
  - Advice and representation in IRS tax audits

Compliance with Continuing Disclosure Agreements

- Get it in writing!
  - Agreements and advice

Compliance with Continuing Disclosure Agreements

- If you should receive a notice of investigation from the SEC for violating the terms of Continuing Disclosure Agreements or misstatements made in bond offering documetns, it is wise to seek the advice of counsel independent from any of the roles in the originating bond transaction.
- The enforcement action could be made against the primary government employee who should have had knowledge of any misstatements…which unfortunately has been the finance or budget officer in recent SEC litigation (Budget Director for the City of Miami).



THE BOND BUYER

Friday, September 16, 2016 | as of 10:56 AM ET

Enforcement

SEC May Litigate Rather than Settle Due to Miami, Boudreaux Verdict

By Jack Casey
September 15, 2016

WASHINGTON – The securities fraud jury verdict against the city of Miami and its former budget director Michael Boudreaux on Wednesday will likely embolden the Securities and Exchange Commission to litigate rather than settle cases against issuers and their officials, lawyers said on Thursday.

The case before the U.S. District Court for the Southern District of Florida in Miami centered on SEC charges that Miami and Boudreaux were guilty of fraud because of their role in omissions and misrepresentations made in offering documents for three 2009 bond offerings, presentations to rating agencies, and annual financial reports. The omissions and misrepresentations were made in connection with inter-fund transfers to boost Miami's ailing general fund, according to the SEC.

The lawsuit was the SEC's first federal jury trial against a municipality or one of its officers for violations of securities laws.

One lawyer in the industry who requested anonymity said that the SEC will likely take advantage of the verdict by widely publicizing it.

Compliance with Continuing Disclosure Agreements

Juanita Duke, CPA
Director of Business
Ouachita Parish School Board
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(318) 432-5234

THE BOND BUYER
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The lawsuit was the SEC's first federal jury trial against a municipality or one of its officers for violations of securities laws.

One lawyer in the industry who requested anonymity said that the SEC will likely take advantage of the verdict by widely publicizing it.

"I think they'll make sure that the issuer world pays attention to it," the lawyer said.

Robert Doty, president of the municipal securities litigation consulting firm AGFS, agreed that the commission might now be bolder about pursuing litigation instead of settling, which he said is significant because the SEC has been litigating more recently than it did in the past.

"I do think the commission took a bit of a calculated risk," Doty said, noting that litigation always comes with some risk. "It was a risk and they won big, they won really big."

Andrew Ceresney, the SEC's director of enforcement, said in a statement following the verdict that the SEC "will continue to hold municipalities and their officers accountable, including through trials, if they engage in financial fraud or other conduct that violates the federal securities laws."

Boudreaux's lawyer, Benedict Kuehne, told media outlets present after the verdict was announced that he intended to appeal the case.

Mitchell Herr, a partner with Holland & Knight in Miami and former SEC lawyer involved in an earlier SEC case against Miami, said that one area of the case that Kuehne would likely review when deciding to appeal is a discrepancy in the jury's findings made clear in the published jury report.

The jury found that Boudreaux did not use a "device, scheme, or artifice to defraud" in connection with the offer or sale of securities under Section 17(a)(1) of the Securities Act of 1933, but it did find he used a "device, scheme, or artifice to defraud" in connection with the purchase or sale of securities as part of Section 10b-5 of the Securities and Exchange Act of 1934.

"Because these findings are potentially inconsistent, I would expect Boudreaux's counsel to thoroughly investigate whether this potential inconsistency is a basis for appeal," Herr said. An important factor in the possibility of an appeal on that point will be whether Kuehne raised the issue and tried to get it fixed before the jury was excused.

Aside from that discrepancy, the jury found that both Miami and Boudreaux were guilty on all remaining counts, which included aiding and abetting charges against Boudreaux.

One other important consideration in the case, according to Doty, was the jury's conclusion that neither Miami nor Boudreaux met the standards to justify their defense that they relied on auditors when making the decisions tied to the alleged fraud and misrepresentations.

The jury found that they did not meet the four factors necessary for that defense. They did not: completely disclose the facts about the conduct at issue to the auditors; seek advice from the auditors about their specific course of action; receive advice from the auditors abut that course of action; or rely on and follow the advice in good faith.

"I think what the verdict does is it provides a roadmap [on] how issuers and issuer officials [can] establish justifiable reliance on professionals," Doty said, emphasizing the need to meet the four factors. "Somehow people need to understand what it takes to have justifiable reliance on professionals. It is not enough for the professional to just be involved in the transaction. That just doesn't get the job done."

The SEC will now have to file a motion by Sept. 28 seeking specific sanctions, which are expected to include an injunction barring Miami and Boudreaux from future securities law violations and financial penalties. The SEC has also asked the judge for an order that would command Miami to comply with a prior cease-and-desist order from 2003 that resulted from an earlier securities fraud case.

Ceresney said that the SEC expects the judge to find that Miami violated that previous order.

THE BOND BUYER
Wednesday, December 7, 2016 | as of 8:32 AM ET

Enforcement

Judge Drastically Lowers SEC's Penalties Against Former Miami Official

By Jack Casey
December 6, 2016

WASHINGTON – Former Miami budget director Michael Boudreaux will face a much lighter penalty for securities fraud than the Securities and Exchange Commission sought, after a federal court judge found on Monday that the commission overreached in its requests to have Boudreaux enjoined and fined $450,000.

Judge Cecelia Altonaga, who sits on the U.S. District Court for the Southern District of Florida in Miami, called the SEC's fine request "overreaching and punitive" in her order finding that Boudreaux will only have to pay a $15,000 fine and will not face an injunction against future securities law violations.

Miami already settled for $1 million after a jury verdict handed down in September found both the city and Boudreaux guilty of defrauding investors by not disclosing the city's true financial picture in connection with three bond issues in 2009. The $15,000 fine total is made up of three $5,000 tier-two fines, one for each of the three statutory violations for which the jury found Boudreaux guilty. Tier-two fines involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

"While the court recognizes a penalty is important for punishment and deterrence, the past three years of litigation alone resulting in a plaintiff's verdict serve as significant punishment and deterrence for Boudreaux's conduct in light of the record," Altonaga wrote.

She added that monetary penalties "serve to punish and deter future wrongdoers, but they must also be just in light of the facts and circumstances.

"Here, a low penalty is appropriate to satisfy the need for punishment and deterrence," she wrote, adding that "future municipal employees will likely be very cautious when advising their employers on the transfer of funds between accounts."

The SEC declined to comment on the order.

Benedict Kuehne, one of Boudreaux's lawyers, said Boudreaux "is gratified and relieved Judge Altonaga saw fit to impose only the minimal money payment of $15,000.

"While not a complete vindication yet, Michael Boudreaux and his legal team … continue tirelessly to fight for fairness and again [demand] that the SEC put an end to its effort to hold

him accountable for financial decisions of senior personnel and elected officials in a large, community-centered municipality," Kuehne added. "He always worked in good faith to serve his community's best interests to the best of his abilities."

Boudreaux is planning to study the order and determine his next steps, according to Kuehne.

The former budget director had argued that the $450,000 penalty was unfair based on the facts of the case as well as his status as a financially ruined man after fighting the fraud charges. Altonaga found that Boudreaux's financial condition, which included $5,218 in monthly income, $37,500 in debt, and $1,145 in monthly expenses, warranted a significant reduction of the SEC's penalty.

She also noted that unlike in other cases where guilty parties received large profits as a result of the fraud, "Boudreaux did not make a single penny from the securities violations."

Additionally, Boudreaux's lack of a history of securities law violations and the "strong emotional toll on Boudreaux that was evident throughout the trial" contributed to the finding that such a large penalty would be inequitable, according to Altonaga.

The judge said that she denied the SEC's request for a permanent injunction to prevent Boudreaux from committing future securities law violations because the SEC failed to establish a reasonable likelihood of future violations without the injunction. Such proof is one of two necessary hurdles Altonaga said the SEC would have had to clear to get such an injunction. The other required the SEC to establish a clear case that Boudreaux violated securities laws in the past, something Altonaga said the commission undoubtedly did.

The decision was based on six factors that are meant to determine the likelihood of future violations. The factors include the: egregiousness of defendant's actions; isolated or recurrent nature of the infraction; degree of scienter involved; sincerity of defendant's assurances against future violations; defendant's recognition of the wrongful nature of his conduct; and likelihood of defendant's occupation will present opportunities for future violations.

Boudreaux had argued that there was no likelihood that he would violate securities laws in the future in part because of his inability to work on any municipal budget or in any finance capacity since being accused of securities violations.

"Indeed, the evidence shows Boudreaux is unlikely to ever work at a municipality in a finance capacity, let alone work with securities or bonds," Altonaga wrote.

The SEC had argued against that point by noting during the trial that Boudreaux's resume said he is seeking a job in municipal finance.

Altonaga also concluded that Boudreaux's conduct was not egregious, adding that the "mere fact Boudreaux violated securities laws does not automatically make his behavior 'outstandingly bad' or 'shocking."

The evidence also points to the fact that Boudreaux's violations were an isolated occurrence and that his present occupation, a business manager for a nonprofit religious organization in New Orleans, will not present him with opportunities for future violations. She added that the extensive coverage of the trial in various publications means Boudreaux's name has appeared throughout the country and that his career and reputation have been drastically affected.

The SEC filed its complaint against Miami and Boudreaux in 2013 alleging that, starting in 2008, they misled investors about interfund transfers that were designed to cover up a growing general fund deficit in its fiscal years 2007 and 2008. The SEC said the misleading transfers were also meant to get more favorable bond ratings for offerings that were obtained in May, July, and December 2009.

The city disclosed the interfund transfers in each of their CAFRs and official statements but, according to the SEC, said the transfers contained money that was not expended and was being returned to the general fund. In reality, that money had already been pledged to several ongoing capital projects and some of it was restricted by city law for designated purposes and not the general fund, the SEC said. Thus, the funds that were transferred should not have been considered unallocated, the commission said.

Shelly Sigo contributed to this article