

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9404 / May 22, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15329

<p>In the Matter of</p> <p>CITY OF SOUTH MIAMI, FLORIDA</p> <p>Respondent.</p>

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) against the City of South Miami, Florida (“Respondent” or “City”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”)¹, as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds that:

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

SUMMARY

1. This matter involves a municipality that jeopardized the tax-exempt status of municipal bonds by improperly utilizing proceeds received through a conduit borrowing. The City of South Miami, Florida misrepresented and omitted material information concerning the eligibility of a parking garage for tax-exempt financing in a pooled conduit municipal bond offering in 2006 by the Florida Municipal Loan Council (“FMLC”). The City borrowed funds in 2002 and again in 2006 to construct the largest municipal parking garage in its principal downtown commercial district. The City’s participation in the offering enabled it to borrow funds from the FMLC at advantageous tax-exempt rates.

2. The City omitted to disclose to the FMLC that it had jeopardized the tax-exempt status of both bond offerings by impermissibly loaning proceeds from the offering to a private developer (“Developer”) and restructuring the parking garage lease agreement with the Developer prior to the 2006 bond offering. In documents prepared in connection with the 2006 offering, and explicitly relied upon by Bond Counsel in rendering its tax opinion attached to the Official Statement, the City made material misrepresentations and omissions regarding: (1) the use of the proceeds of the offering and, (2) the altered terms of the parking garage lease.

3. The City’s misrepresentations and omissions had a material impact on the tax-exempt status of the municipal securities issued in connection with this offering. In July 2010, the City filed a material event notice and disclosed for the first time the adverse impact of its actions on the tax-exempt status of the two bond offerings. In August 2011, the City entered into agreements with the Internal Revenue Service (“IRS”), paying \$260,345 to the IRS and defeasing a portion of the two prior bond offerings at a cost of \$1.16 million, so as to preserve their tax-exempt status for bondholders.

4. By engaging in this conduct, the City violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

RESPONDENT

5. **The City of South Miami** is a municipality located in Miami-Dade County, Florida. The City of South Miami was incorporated in 1927 and has an estimated population of approximately 11,000 residents.

BACKGROUND

A. The City Seeks Financing for a Parking Garage Through the FMLC Program

6. Starting in 1997, the City sought financing to develop a public parking garage (the “Project”) to manage a lack of available parking space in the City’s downtown commercial district. The City issued a request for proposals to develop the Project, which ultimately became a mixed-use retail and public parking structure to be developed by a for-profit Developer. In March 2002, the City Attorney, on behalf of the City, negotiated a lease agreement (the “2002 Lease”) with the Developer, under which the City would be responsible for the cost of construction of the Project,

less the amount required to construct the retail portion of the Project. The City retained full control over the operation and maintenance of the parking portion of the Project and all parking revenues.

7. The Developer's limited role under the 2002 Lease was critical to the City receiving the benefits of any tax-exempt financing. Under applicable IRS regulations, the Project could be financed on a tax-exempt basis only if its use by for-profit businesses, such as the Developer, was kept to a minimum.

8. The City approved the financing to cover construction of the tax-exempt portion of the Project through its participation in the FMLC's 2002 bond pool. However, upon receiving a copy of the 2002 Lease sent by the City's then-Finance Director (the "2002 Finance Director"), bond counsel for the FMLC identified a potential tax issue raised by the Project's mixed public/retail nature. During subsequent conference calls between bond counsel and the 2002 Finance Director, bond counsel communicated to the City officials that none of the proceeds of the bond offering could be used to fund the retail portion of the building. However, subsequent finance directors were unaware of the substance of these discussions.

9. Thereafter, bond counsel concluded that no tax issues existed concerning the anticipated borrowing by the City from the FMLC based on, among other things, the City's representation that no funds from the bond offering would be used to finance the retail portion of the Project.

10. In May 2002, the City executed a loan agreement (the "2002 Loan Agreement"), which was reviewed by the City Attorney, and various documents relating to the City's participation in the FMLC's 2002 bond pool. In the Tax Certificate executed by the 2002 Finance Director, the City made several material representations that the City would not use funds borrowed from the FMLC for private use and that the City's Project would be owned and operated in a manner that complied with IRS regulations for tax-exempt financing. Additionally, the former Mayor executed a 2002 Certificate of Borrower and the 2002 Loan Agreement which stated that the City would not violate the private use restrictions associated with tax-exempt financing.

11. On May 17, 2002, the FMLC issued \$49.8 million of Series 2002A Revenue Bonds ("2002 Bonds"). The City borrowed \$6.5 million of the bond proceeds to finance the Project. Relying in part on the City's certifications and representations, bond counsel rendered a legal opinion to bondholders to the effect that the interest on the 2002 Bonds was tax-exempt. Because the FMLC's bond offering qualified as tax-exempt financing, the City borrowed funds from the FMLC at advantageous tax-exempt rates.

12. Notwithstanding the City's representations made to the FMLC relating to the 2002 Bonds, in June 2002 -- less than one month after the offering -- the City loaned the Developer \$2.5 million of the bond proceeds (the "Developer Loan"). The 2002 City Manager, on behalf of the City, and the Developer executed this loan without consulting or informing any FMLC representatives or bond counsel.

B. The City Improperly Revises the Project Lease

13. Later that year, based on concerns regarding the City's ability to pay the debt service on the 2002 Bonds, the City Commission voted to cancel the Project and ceased further construction of the parking garage and retail space. As part of the settlement of subsequent litigation filed by the Developer regarding the Project, the City Attorney negotiated a revised lease with the Developer (the "2005 Lease").

14. The 2005 Lease significantly changed several key provisions from the 2002 Lease regarding the use of the Project. Among other things, the 2005 Lease leased to the Developer the entire structure of the Project, including the retail space and the parking garage. In contrast, the 2002 Lease only leased the retail space to the Developer, while the City maintained and operated the parking garage. Additionally, pursuant to the 2005 Lease, the Developer now owed the City rent payments for the parking garage as well as the retail portion, with the Developer and the City sharing in the profits of the parking garage portion of the Project.

15. The terms of the 2005 Lease caused the Project to be considered "private business use" and, therefore, further jeopardized the tax-exempt status of the 2002 Bonds and raised an additional risk to investors. The City did not inform the FMLC, bond counsel, or any other third parties to the 2002 Bonds transaction about the changes to the Project. Instead, with the City's approval, the City Attorney negotiated the 2005 Lease believing there would be no implications for the 2002 Bonds. The commissioners approved the 2005 Lease and the 2005 City Manager executed the lease on behalf of the City.

C. The City Made Misrepresentations and Omissions in a 2006 Bond Offering with the FMLC

i. The City Seeks Further Project Financing Through the FMLC

16. By the fall of 2006, the City's Project was still incomplete. The then-City Finance Director ("2006 Finance Director") communicated to the FMLC that the City was still working on the Project using proceeds from the 2002 Bonds but that the City was nearly out of funds and required additional funding for completion. The City sought to borrow an additional \$5.5 million through the FMLC's program to continue construction on the Project.

17. In October 2006, the City submitted its application for participation in the upcoming bond offering ("2006 Bonds"²) to the FMLC. From October 2006 through January 2007, among other things, bond counsel reviewed submissions by the City and other municipalities and also participated in discussions with the FMLC, the underwriters, the borrowers and their counsel.

18. In various communications, the City did not inform the FMLC that the 2002 Lease, which bond counsel previously reviewed and concluded would not impair the tax-exempt status of the 2002 Bonds, had been modified and that the 2005 Lease impermissibly leased the entire

² The Official Statement for this bond offering references "Series 2006" bonds, however, the closing date for this transaction was on January 9, 2007.

parking garage to the Developer, including the public and retail portions. Further, the City did not notify the FMLC that only one month after the 2002 Bonds were issued, the City provided the Developer with a \$2.5 million loan directly from the proceeds of the FMLC's tax-exempt bonds.

ii. The City Made Material Misrepresentations and Omissions in the FMLC's 2006 Bond Offering

19. Notwithstanding the terms of the City's 2005 Lease as well as the developer loan, the City misrepresented to the FMLC that its participation in the 2006 bond offering complied with tax-exempt requirements.

20. The City made misrepresentations to the FMLC in several documents, including the Loan Agreement, regarding compliance with the tax-exempt status of the loan. In particular, in January 2007, the 2006 Finance Director executed a Tax Certificate with the FMLC, which made the following misrepresentations:

- Not more than 10% of the proceeds of the City of South Miami Loan will be used (directly or indirectly) in a trade or business (or to finance facilities which are used in a trade or business) carried on by any person other than a state or local governmental unit. Not more than 5% of the proceeds of the City of South Miami Loan will be used (directly or indirectly) in trade or business (or to finance facilities which are used in a trade or business) carried on by any person other than a state or local governmental unit which private business use is not related to any governmental use or is disproportionate to governmental use . . .
- The City reasonably expects that the Project will be owned and operated throughout the term of the City of South Miami Loan in a manner that complies with the requirements set forth in Paragraph 23 above. The City will not change the ownership or use of all or any portion of the Project in a manner that fails to comply with Paragraph 23 above, unless it receives an opinion of Bond Counsel that such a change of ownership or use will not adversely affect the exclusion of interest on the Series 2006 Bonds from gross income for federal tax purposes.

21. Employees in the City's Finance Department were the primary contacts for the FMLC and bond counsel during the application process. Based on the existence of the 2005 Lease, which leased the entire parking structure of the Project to the Developer, and the Developer Loan, the 2006 Finance Director signed an inaccurate 2006 Tax Certificate on behalf of the City.

22. According to the Official Statement for the 2006 Bonds, the FMLC explicitly relied on the City's representations that the information did not contain any untrue statement of material fact or omit any material fact necessary to make the statements made, in light of the circumstances, not misleading. Based on the City's covenants and representations, bond counsel issued a bond opinion concluding that interest on the 2006 Bonds was exempt from federal income tax.

D. The City Incorrectly Files Annual Certifications with the FMLC

23. From 2003 through 2009, on behalf of the City, various finance directors incorrectly certified to the FMLC that the City was in compliance with the terms of the loan agreements. One of those terms was that no events had occurred which affected the tax-exempt status of the bonds.

24. For example, in 2003, 2004 and 2005, the 2002 Finance Director, and in 2006 the 2006 Finance Director incorrectly certified to the FMLC that the City was in compliance with the terms of the 2002 Loan Agreement relating to the bonds.

25. In 2008, bond counsel learned of the 2005 Lease. In February 2008, bond counsel explained in a conference call with the City Attorney and the then-Finance Director (“2008 Finance Director”), that the 2005 Lease would cause the City’s loan and the 2002 and 2006 Bonds to be considered private activity bonds unless the City amended the 2005 Lease to comply with the IRS’s guidance concerning the management of public facilities by for-profit entities. Nevertheless, the City never amended the 2005 Lease so as to comply with applicable IRS rules.

26. Despite this failure, and notwithstanding the City’s communications with bond counsel and the FMLC about the tax implications of the 2005 Lease, the then-Finance Director (“2009 Finance Director”), who replaced the 2008 Finance Director in March 2008, incorrectly certified that the City was in compliance with the terms of the 2002 Loan Agreement and 2006 Loan Agreement. Although the 2009 Finance Director also attended a subsequent conference call at which bond counsel reiterated the need to restructure the 2005 Lease to avoid forfeiture of the tax-exempt status, the 2009 Finance Director incorrectly certified in 2009 that the City was in compliance with the terms of the loan agreements relating to the bonds.

27. The City’s Finance Department experienced significant turnover from 2005 through 2009. The annual certifications required as part of the financing were signed by at least four different finance directors who were unaware of the implications of the certifications and how the 2005 Lease and Developer Loan affected the tax status of the bonds. The City’s finance directors, while responsible for receiving, signing, and returning the annual compliance certifications, had no previous experience completing, reviewing, or assessing disclosure requirements or tax issues in bond offerings and did not receive any training or guidance on the subject.

28. On July 19, 2010, the City submitted a material event notice pursuant to its contractual commitments with underwriters subject to the requirements of Rule 15c2-12 of the Securities Exchange Act of 1934 with the MSRB’s Electronic Municipal Market Access (“EMMA”) system,³ publicly acknowledging a potential adverse impact on the tax-exempt status of the 2002 and 2007 Bonds. Notwithstanding that bonds of each series had been trading since their respective offering dates, this was the first time that the City publicly acknowledged any potential adverse impact on the tax-exempt status of the 2002 and 2006 Bonds.

³ In December 2008, Rule 15c2-12 was amended to designate EMMA as the central repository for ongoing disclosures by municipal issuers effective July 1, 2009.

E. The City Settles with the Internal Revenue Service

29. On July 13, 2010, the City, jointly with the FMLC, sought permission from the IRS to apply for a settlement under the IRS's Voluntary Compliance Agreement Program ("VCAP") in an attempt to preserve the tax-exempt status of the 2002 and 2006 Bonds. The VCAP program involves self-reporting of potential problems with tax-exemption issues.

30. On August 17, 2011, the City and the IRS executed two "Closing Agreements" ("Agreements") settling the matters at issue. The IRS required the City to pay settlement amounts totaling \$260,325.40. Furthermore, prior to executing the Agreements, the City was required to establish an irrevocable defeasance escrow for the purpose of defeasing significant portions of the 2002 Bonds and 2006 Bonds and retiring them on their earliest call dates. In order to finance the defeasance, the City entered into a new taxable bank loan resulting in an additional cost to the City of \$1,164,008.24. As a result of the Agreements, bondholders are not required to include any interest from the bonds in their gross incomes.

LEGAL DISCUSSION

31. Municipal securities represent an important part of the financial markets available to investors. By participating in the FMLC's pooled bond offering in 2006 as a conduit borrower, the City was able to obtain advantageous tax-exempt rates. Conduit borrowers of municipal securities have an obligation to ensure that financial information contained in their disclosure documents provided to issuers is not materially misleading. Proper disclosure allows investors to understand and evaluate the financial health of the state or local municipality in which they invest.

32. The City, which participated in municipal securities offerings as a conduit borrower of bond proceeds, is subject to the antifraud provisions of the federal securities laws, such as Section 17(a) of the Securities Act of 1933. That section prohibits the obtaining of money by means of any untrue statement of material fact or omitting to state a material fact in the offer or sale of securities. A fact is material if there is a substantial likelihood that its disclosure would be considered important by a reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1987). Violations of Sections 17(a)(2) and (3) may be established by showing negligence. SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992).

VIOLATIONS

33. As a result of the negligent conduct described above, the City violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Specifically, the City made material misrepresentations and omissions in the 2006 Tax Certificate and Loan Agreement which certified that the City was in compliance with the terms of the loan agreements relating to the bonds. The City's misrepresentations and omissions were material because they directly jeopardized the tax-exempt status of the municipal bonds, which could have caused investors to pay tax-related penalties resulting in financial harm to investors. Moreover, numerous investors traded the 2002 and 2006 Bonds at prices that assumed those bonds were tax-exempt. Information regarding the bonds' tax-exempt status was important to investors in evaluating whether to purchase bonds through this municipal securities offering.

THE CITY'S REMEDIAL EFFORTS

34. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff and the remedial acts taken by the City, referenced in paragraphs 29 – 30.

UNDERTAKINGS

35. The City agrees to retain, at the City's expense and within 120 days of this Order, an independent third-party consultant, not unacceptable to the staff, for a period of three years, to conduct annual reviews of the City's policies, procedures, and internal controls regarding: its disclosures for municipal securities offerings, including: (i) disclosures made in financial statements; (ii) disclosures made pursuant to continuing disclosure agreements and disclosures regarding credit ratings; (iii) the hiring of internal personnel and external experts for disclosure functions; (iv) the designation of an individual at the City responsible for ensuring compliance by the City of such policies, procedures, and internal controls; and (v) the implementation of active and ongoing training programs for, among others, the City Attorney(s), the City Manager, the Mayor, the City Finance Director, and the City Commissioners regarding compliance with disclosure obligations. After such review, which the City shall require to be completed within 300 days of the of issuance of this order, the City shall require the independent third-party consultant to submit to the City, a report making recommendations concerning these policies, procedures, and internal controls with a view towards assuring compliance with the City's disclosure obligations under the federal securities laws. The City will submit to the Commission, the findings of the independent consultant making recommendations for any changes in or improvements to City's policies, procedures, and practices, and a procedure for implementing such recommended changes. The City agrees to adopt the recommendations made in such report within 90 days from the date of the report.

36. Within 14 days of the City's adoption of the independent third-party consultant's recommendations, the City agrees to certify in writing to the Commission staff that the City has adopted and implemented the recommendations. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. Thereafter, the City agrees to require the independent third-party consultant to conduct annual reviews in years two and three following the order, to assess whether the City is complying with its policies, procedures, and internal controls, and whether the new policies, procedures, and internal controls were effective in achieving their stated purposes. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. All certifications of compliance and supporting material shall be submitted to Jason R. Berkowitz, Assistant Regional Director of the Municipal Securities and Public Pensions Unit in the Miami Regional Office, with a copy to the Office of Chief Counsel of the Enforcement Division.

37. The City shall require the independent third-party consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the third-party independent consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the City, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the independent third-party consultant will

require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the independent third party in performance of his/her duties under this Order shall not, without prior written consent of the Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with the City, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the City's Offer.

Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

A. The City of South Miami shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. The City of South Miami shall comply with its undertakings as enumerated in paragraphs 35 – 37 in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary