BDA Bond Dealers of America

1909 K Street NW • Suite 510
Washington, DC 20006
202.204.7900
www.bdamerica.org

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Submitted Electronically

Roland W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW
Washington, DC 20005

RE: Request for Comment on a Concept Proposal to Improve Disclosure of Direct Purchases and Bank Loans (2016-11)

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to the MSRB's concept proposal to require municipal advisors to disclose information regarding the direct purchases and bank loans of their municipal entity clients to the MSRB for public dissemination. Together with the MSRB and other market participants, BDA members remain concerned with the lack of required and timely disclosure of bank loans and direct placements, and believe that implementing a regulatory requirement to disclose material information about such transactions could provide for better investor protection. We appreciate the MSRB's continued effort to enhance disclosure; however, the BDA believes that requiring municipal advisors to provide such information to EMMA is not appropriate.

The BDA believes that a more effective and appropriate way to improve disclosure of bank loans is through a combination of the Securities and Exchange Commission ("Commission") amending Rule 15c2-12 to include the incurrence of a bank loan[1] or direct placement as a material event and through the provision of improved guidance in this area. As the SEC can attest, the BDA has discussed the need for a comprehensive update of Rule 15c2-12 with the Commission for several years and bank loan disclosure is another item the Commission should consider in order to improve transparency in the market.

[1] If concerned that not all bank loans are material to investors, the SEC could specify certain objective criteria for disclosure (e.g., bank loans in an amount above a certain dollar threshold).

BDA agrees that the disclosure regime for bank loans and direct placements needs to be improved.

As stated in the concept release, despite the MSRB's continued encouragement for issuers to voluntarily disclose bank loan financing on EMMA, many issuers still fail to disclosure the existence of bank loans. Additionally, many issuers have failed to disclose key terms of the financing leaving investors with limited information with which to make critical investment decisions.

BDA members are concerned that many market participants may not fully appreciate the fact that material information regarding bank loans is *already* required to be disclosed. Under the federal antifraud laws, when issuers make statements to the market that purport to be comprehensive updates to their financial condition, issuers are required to disclose material changes in total outstanding debt due to the incurrence of a loan, or other financial obligations. These statements typically occur in two distinct instances that may happen well after the incurrence of a bank loan or direct placement.

First, an issuer is required to disclose the existence of a bank loan and any material credit terms in its official statement when issuing new debt in the primary market. Second, an issuer is required to disclose the existence of a bank loan and any material credit terms in its annual financial information submitted by the issuer pursuant to its continuing disclosure agreement. Failure to disclose such financings in these two contexts renders those statements incomplete and misleading and could potentially lead to a violation of federal antifraud laws.

Aside from the requirements of federal antifraud law, there is no specific duty or requirement (or regulatory interpretation) for issuers to provide interim updates to the market regarding bank loans and direct placements. This creates a regulatory gap where issuers may continue to wait until specifically required to make such disclosures. For some issuers who issue debt less frequently, this can lead to a delay of disclosure of a bank loan for up to a year after the transaction. Also, and unfortunately, in some instances some issuers fail to include bank loan transactions in their financial reports entirely, and often for those issuers that do disclose a bank loan, the disclosure is incomplete or fails to include material information about the terms of the loan or placement.

BDA believes that the requirements contemplated by the concept proposal exceed the MSRB's statutory authority.

Section 15B of the Securities Exchange Act empowers the MSRB to adopt rules to regulate the activities of dealers and municipal advisors to protect the municipal securities market. However, the concept proposal does not address the regulation of the

activities of dealers and municipal advisors. The concept proposal, in fact, proposes to require municipal advisors to step into the activities of *issuers* and issuer responsibilities under the federal securities laws. As such, the BDA believes that the requirements contemplated by the concept proposal would exceed the statutory authority of the MSRB.

This proposal leads to the statutory interpretation that the MSRB could turn municipal advisors into a pseudo regulator of issuers. After this proposal, the MSRB could adopt a rule that would require municipal advisors post other key issuer documents about actuarial valuations or budget reports to EMMA. There has to be a limit to the MSRB's authority to adopt rules involving municipal advisors in this area. That line, to us, is that the MSRB can regulate the municipal advisory activities of municipal advisors (i.e., advice on the issuance of municipal securities and municipal financial products) but cannot force municipal advisors to operate outside their activities and start delving into the activities of issuers.

BDA does not believe that municipal advisors are the proper market participants to make this disclosure.

As much as BDA supports a regulatory requirement requiring greater disclosure of bank loans and direct placements, we do not believe it is appropriate to require municipal advisors to make such disclosures. Currently, under SEC Rule 15c2-12, issuers are primarily responsible for making disclosures related to their debt and financial condition.

In the concept release, MSRB compared its proposed requirement for municipal advisors to the requirements contained in MSRB Rule G-32 and MSRB Rule G-34. Under Rule G-32, dealers are responsible for posting an official statement prepared by and provided to the dealer by the issuer. The statements contained in the official statement are the statements of the issuer and not the underwriter (dealer). One of the requirements of MSRB Rule G-34 is for remarketing agents for variable rate demand obligations to "use best efforts to obtain" and submit any letter of credit or credit agreement prepared in connection with the financing. These documents are provided through EMMA just to those investors who need to know the specific key terms of the securities they are purchasing. That is, they are not disclosures that involve the total mix of information regarding the issuer. Further, these documents directly arise out of the activities of the remarketing agents in their position in between the issuer and the investors on the same municipal securities.

By contrast, the concept proposal places the municipal advisor into the role of assessing a bank loan and the terms contained in the bank loan in comparison to the issuer's outstanding bonds and the total mix of information regarding the credit of the issuer in order to make a judgment about materiality and the potential disclosure of a

bank loan. This places the municipal advisor into the role of making decisions about which loans and direct placements are material and which terms are material. BDA does not believe the municipal advisor is the best market participant to assess the materiality and disclosure of bank loans. BDA believes it is more appropriate for the issuer to make those judgments.

The concept proposal raises three practical issues regarding municipal advisors and bank loans.

Beyond the issues raised above, the concept proposal suffers from three practical weaknesses. First, municipal advisors are often times not involved in the preparation of disclosure documents generally. For disclosure to assist investors in making informed investment decisions, disclosure must reflect an understanding of the total mix of information concerning the credit. It must explain the total mix of information and enable investors to analyze key facts in the process of making an investment decision. When municipal advisors are not involved in the disclosure process, the concept proposal will force the municipal advisor to thrust itself into one very small area which impacts the total mix of information concerning the issuer in a limited way. This heightens the potential that the municipal advisor simply does not take much into consideration and accidentally misleads rather than informs investors.

Secondly, municipal advisors are often not involved in a bank loan or direct placement with an issuer. And, when they are, they are not frequently intimately involved in the negotiation of the loan terms. An issuer and municipal advisor could be at odds about which key material terms should be included in disclosures in order for the disclosures to be complete and not misleading. The issuer may disagree with a municipal advisor's characterization of a bank loan if the municipal advisor does not post documents but a description. Therefore, we believe that by inappropriately tasking municipal advisors with disclosure responsibilities creates significant new source of risk, which could result in investors being misled.

With respect to these first two points, it may be wholly insufficient for the bank loans themselves to be posted to EMMA as these documents can at times be very complex and a reasonable investor may not be in a position to understand what the bank loan means in terms of their investment decision.

The third problem is with the available infrastructure for making disclosures in the municipal securities market. The MSRB's EMMA system is simply not set up to facilitate the convenient and clear posting of bank-loan documents. Corporate issuers use EDGAR and there is a specific place where all of the material contracts of an issuer are posted. With EMMA, if a municipal issuer needs to post a document, it is forced to

prepare an awkward notice and link that notice to many CUSIP numbers. It is highly likely that this format will continue to confuse and mislead retail investors. This lack of capable infrastructure has led to a practice where many lawyers believe that the better practice is to post the documents on an investor's website so as to avoid this confusion of investors. MSRB would help solve this problem (and others that may arise in the future) if it provided a more-effective platform for the posting of these documents and all material contracts of an issuer on EMMA. We recognize that the MSRB has provided helpful guidance concerning how issuers should post bank loan documents. But our concern is not how easy it is for issuers to post bank loans but where those bank loans appear to investors. EMMA should be set up so that investors have one place they can go to obtain the material contracts of an issuer and, instead, EMMA is set up so that information is only posted to CUSIP numbers.

BDA appreciates the MSRB's recent guidance on bank loans.

BDA members appreciate the MSRB and FINRA's recent guidance and legal background on what constitutes a loan versus a security and the associated legal obligations. However, BDA continues to witness non-dealer municipal advisors acting as placement agents for securities transactions without registering as broker-dealers. It is concerning to BDA members that investors are not protected by a reasonable disclosure regime for material bank loans and are routinely being denied the protections of the broker-dealer regime in securities transactions that are inappropriately classified as loans.

Furthermore, BDA members believe that the continued misunderstanding of the classification of loans versus securities is evidence that the continued efforts of regulators to provide guidance to the market is not being fully absorbed by certain market participants and more education in the legal requirements associated with loans versus securities is needed.

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In conclusion, BDA appreciates the intent of the MSRB's concept proposal. However, BDA does not believe a municipal advisor is the most appropriate market participant to disclose bank loans and direct placements to the market. An update of Rule 15c2-12 is overdue and amending the rule to specifically add the incurrence of a bank loan or direct placement as a material event should be a Commission priority.

Sincerely,

Mike Nicholas
Chief Executive Officer