National Association
of Bond Lawyers

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May 27, 2016

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I St NW
Washington DC 20005

RE: NABL Comments in Response to MSRB Regulatory Notice 2016-11

Dear Mr. Smith:

The National Association of Bond Lawyers ("NABL") submits the following comments relating to MSRB Regulatory Notice 2014-16 (March 28, 2016), in which the Municipal Securities Rulemaking Board solicited comments on a concept proposal to require municipal advisors to disclose information regarding the direct purchases and bank loans of their municipal entity clients. The comments were prepared by an ad hoc subcommittee of NABL's Securities Law and Disclosure Committee comprising those individuals listed in Exhibit A.

NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. We offer these comments in furtherance of that mission.

If NABL can provide further assistance, please do not hesitate to contact Bill Daly in our Washington, D.C., office at (202) 503-3300.

Thank you in advance for your consideration of these comments.

Sincerely,

Kenneth R. Artin
Enclosure

COMMENTS OF
THE NATIONAL ASSOCIATION OF BOND LAWYERS
REGARDING
MSRB NOTICE 2016-11, REQUEST FOR COMMENT ON A CONCEPT PROPOSAL TO IMPROVE DISCLOSURE OF DIRECT PURCHASES AND BANK LOANS

On March 28, 2016, the Municipal Securities Rulemaking Board ("MSRB") published Notice 2016-11 (the "Notice"), in which the MSRB invited comment on a proposed concept of requiring registered municipal advisors to disclose to the MSRB the incurrence of a bank loan, or the issuance of a direct purchase debt obligation, by a municipal issuer client of the municipal advisor. The National Association of Bond Lawyers ("NABL") has long been a supporter of, and active participant in, the efforts of industry groups and federal regulators to improve delivery of and access to information in the secondary market (including information about bank loans and direct purchase debt obligations);[1] however, NABL believes implementation of the concept described in the Notice extends beyond the regulatory authority of the MSRB. Additionally, NABL believes the concept, as proposed, (1) would not meet the goals of the MSRB as described in the Notice, (2) would put registered municipal advisors in the untenable position of having to choose between violating their fiduciary duty to their municipal issuer clients or violating an MSRB disclosure rule, and (3) may subject registered municipal advisors to antifraud liability under the federal securities laws. For these reasons, among others described in these comments, NABL recommends that the MSRB abandon this concept proposal and instead consider continued education and outreach efforts, as well as enhancements to the EMMA system, that would make it easier for municipal issuers to provide information about bank loans and direct purchases and facilitate access to that information by municipal market investors who might be interested in such information.

Lack of Authority to Implement Concept Proposal

The current continuing disclosure requirements for municipal issuers with respect to bank loans and direct purchases were discussed in the paper "Considerations Regarding Voluntary Secondary Market Disclosure About Bank Loans," published May 1, 2013, by the Bank Loan Disclosure Task Force:

> Issuers [also] are not generally obligated to provide continuing disclosure about the incurrence of a bank loan. A municipal securities issuer, in general, has no obligation under the federal securities laws to provide ongoing or periodic disclosure to the secondary market even if such information would be considered "material" within the meaning of the federal securities laws. Although issuers of publicly-traded corporate securities generally

[1] For example, NABL was an active participant in the Bank Loan Disclosure Task Force that produced the 2013 "Considerations Regarding Voluntary Secondary Market Disclosure About Bank Loans", NABL's education conferences frequently have included sessions devoted to bank loans and direct purchase obligations and, at present, NABL is undertaking a comprehensive white paper on bank loans and direct purchase obligations that will include practical guidance on disclosure issues, as well as a discussion of many of the provisions of these transactions.

> are required to file continuing information or reports under the federal securities laws, most municipal securities are exempt from the registration and reporting requirements under the federal securities laws.
>
> In 1994, the SEC amended Rule 15c2-12 to require underwriters to obtain agreements from municipal issuers to provide certain disclosure on a continuing basis. Rule 15c2-12 lists certain specific events for which continuing disclosure [currently] is required to be provided within 10 business days of their occurrence; however, incurrence by the obligor of additional debt, such as a bank loan, is not one of the events listed in the rule. As a result, issuers must determine whether to voluntarily provide continuing disclosure about incurrence of a bank loan.

In adopting the continuing disclosure requirements of Rule 15c2-12, the SEC's stated interest in prohibiting broker-dealers from underwriting municipal securities unless a continuing disclosure agreement is in place was based upon its analysis that a commitment to provide ongoing information to holders of the bonds being marketed would prevent fraud. That provides a nexus of the regulatory action to the statutory authority of the regulator. Under Rule 15c2-12, the SEC is regulating the actions of broker-dealers (regulated entities) in primary offerings (regulated transactions) of municipal securities (regulated products). In the Notice, the MSRB's stated purpose is to require disclosure of bank loans and direct purchases of debt obligations that are not (or may not be) municipal securities[2]. As such, although the disclosure is to be made by a registered municipal advisor (which is a regulated entity), it would be required in a transaction that may not otherwise be subject to MSRB rules other than, perhaps, rules regulating the municipal advisor's responsibility to its municipal issuer client.

Despite the lack of regulatory nexus between the proposal advanced in the Notice and the MSRB's authority to regulate municipal advisors, the MSRB asserts in the Notice that its broad rulemaking authority over municipal advisors may permit it to require municipal advisors to file bank loan and direct purchase documents. Although the MSRB acknowledges that Section 15B(d)(2) of the Securities Exchange Act of 1934 (the so-called "Tower Amendment") may limit its regulatory efforts with respect to bank loan/direct purchase disclosure, the MSRB then lists examples of existing disclosure requirements contained in MSRB rules that do not run afoul of the Tower Amendment, including the requirement that dealers submit the official statement for an offering to the MSRB and remarketing agents use "best efforts" to obtain and post letter of credit agreements for the variable rate demand obligations they are remarketing. However, all the listed

[2] The MSRB acknowledged in Notice 2011-52 (September 12, 2011), Potential Applicability of MSRB Rules to Certain "Direct Purchases" and "Bank Loans", that it is unclear whether any particular bank loan or direct purchase obligation is a loan or a security for purposes of the federal securities laws, noting that "[c]ertain characteristics of some bank financings evidenced by notes may be indicative of securities, using the factors enumerated by the Supreme Court in [Reves v. Ernst & Young, Inc., 494 U.S. 56 (1990)]. An analysis of different bank financings may produce different results, depending upon the facts and circumstances. . . . While the MSRB's intent is to draw attention to the factors to consider in determining whether an instrument is a security, the MSRB draws no legal conclusions regarding any individual instrument."

examples relate to municipal securities being sold or remarketed in the public market. That is not the case with bank loans and direct purchases.

Municipal Advisors, Fiduciary Duties, and Unintended Consequences

Since the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC and MSRB have developed registration regimes and rules designed to define the role, duties, and responsibilities of municipal advisors. Central among the responsibilities contained in the rules applicable to municipal advisors, in particular MSRB Rule G-42, are the duties of care and loyalty that a municipal advisor owes to his or her municipal entity clients.

- **Requiring a municipal advisor to report the incurrence of a bank loan/direct purchase by the municipal advisor's client may present an unresolvable conflict of interest for the municipal advisor.**

    - Municipal advisors have fiduciary duties, including duties of care and loyalty, to their municipal entity clients. If a municipal advisor's client, for whatever reason, does not want to disclose a bank loan or direct purchase of bonds, which is not otherwise required to be disclosed, the MSRB's concept proposal would require a municipal advisor to choose between potentially violating his or her fiduciary duty of loyalty and act directly against the client's wishes in order to comply with a bank loan/direct purchase disclosure rule.

- **The stated goals of the Notice would likely not be fulfilled by the proposed requirement.**

    - Municipal issuers are not required to engage municipal advisors. Many small and infrequent municipal issuers (which are often singled out as being more at risk for incomplete or untimely disclosure) seek to avoid the cost of hiring a municipal advisor; similarly, large and sophisticated issuers often have experienced staff that serve in the role of advisor and therefore may avoid engaging outside municipal advisors.

    - Issuers may use municipal advisors for some debt issues and not others. An issuer may conclude that an outside municipal advisor is not needed for a direct purchase or bank loan transaction and, further, may be incentivized to specifically avoid engaging a municipal advisor in order to maintain control over the decision of whether to disclose the terms of the direct purchase or bank loan.

    - As a result, even if implemented, the concept proposal would result in only a portion of direct purchases and bank loans being disclosed, providing incomplete information to the market, and therefore frustrating the MSRB's stated purpose of maintaining an efficient, fair, and reliable disclosure framework.

Municipal Advisors, Issuers, and Antifraud Liability

Requiring a municipal advisor to report the incurrence of a bank loan/direct purchase by the municipal advisor's client may subject the municipal advisor to antifraud liability under the federal securities laws. Under the United States Supreme Court's decision in Janus Capital Group, Inc. v. First Derivatives Traders,[3] for purposes of the federal securities laws, "the maker of a statement is the person with ultimate authority over the statement, including its content and whether and how to communicate it."[4] However, under Janus, "[o]ne who prepares or publishes a statement on behalf of another is not its maker."[5] The Janus court explained this distinction as follows:

> [I]n the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.[6]

Suppose that a municipal advisor reports the incurrence of a bank loan/direct purchase by its client by filing the loan document and a summary on EMMA. Suppose further that the filing contains material misstatements or omissions (for example, the municipal advisor files the loan document but fails to include a definitions appendix critical to understanding the loan document, or the municipal advisor files a summary of the loan document that omits description of an event of default triggered by ratings downgrades). In this scenario, is the municipal advisor the speechwriter or the speaker? Is the municipal advisor the person with ultimate authority over the statements filed on EMMA, or is the municipal advisor merely preparing or publishing the statements on behalf of the issuer? Does the Tower Amendment dictate that the municipal advisor be considered the "maker" of these statements since the MSRB may not, directly or indirectly, compel issuers to furnish to the MSRB their documents or information?

Even if a court concluded that a municipal advisor was not the "maker" of statements by reporting the incurrence of a bank loan/direct purchase by its client, the municipal advisor still could be liable (at least in an enforcement action[7]) for aiding and abetting liability under the federal securities laws. This potential liability could make municipal advisors unwilling to advise issuers that incur bank loans/direct purchases. Conversely, issuers' concerns about potential liability under the federal securities laws could cause them not to engage municipal advisors in order to maintain control over the decision of whether to file bank loan/direct purchase documents on EMMA. As a result, the concept proposal could have the unintended consequence of depriving issuers of advice on bank loans/direct purchases from municipal advisors.

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[3] 564 U.S. 135 (2011).
[4] Id. at 142.
[5] Id.
[6] Id. at 142-143.
[7] See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 183 (1994).

Market Participant Education and EMMA Improvements

Continuing to educate municipal market participants on the value of increased or enhanced disclosure of information to the secondary market is the best approach to achieve the MSRB's desired goal. Through continued discussion among market participants, more issuers will come to understand and appreciate the benefits to be gained by more timely disclosure of bank loans/direct purchases.

Continued efforts on the part of the MSRB to enhance and improve the EMMA platform will also further the MSRB's goals. The current process for how bank loans/direct purchases are posted and retrieved on EMMA is challenging. Admittedly, MSRB Notice 2012-18 (April 3, 2012) Notice Concerning Voluntary Disclosure of Bank Loans to EMMA and the MSRB's publication "Posting Bank Loan Disclosures on EMMA" referenced in Notice 2012-18 provide practical guidance on how bank loans/direct purchases can be posted and retrieved; nonetheless, many municipal market stakeholders continue to profess frustration with the posting and retrieval process.

If consistent adherence to the guidelines contained in Notice 2012-18 and "Posting Bank Loan Disclosures on EMMA" truly would create improved bank loan/direct purchase disclosure, then perhaps continued outreach to municipal market stakeholders about the virtues of consistent adherence to those guidelines is the clearest path forward to improved bank loan/direct purchase disclosure. However, if the frustrations of municipal market stakeholders are well founded and consistent adherence to those guidelines will not produce improved bank loan/direct purchase disclosure, then NABL encourages the MSRB to work with municipal market stakeholders in order to make EMMA better (through, for example, creation of an event category under the name "Bank Loan or Other New Indebtedness" or "Other Event-Based Disclosures: Voluntary Disclosure of Financing Transaction" that would make the posting of bank loan/direct purchase information more intuitive and its retrieval more efficient). As it has in the past, NABL welcomes the opportunity to participate in any of these MSRB efforts in order to promote the timely disclosure of bank loans/direct purchases.

EXHIBIT A

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