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National Association of Health and Educational Facilities Finance Authorities
Regarding the Request for Comment on a Concept Proposal to Improve Disclosure of Direct Purchases and Bank Loans

2016 – 11

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The National Association of Health and Educational Facilities Finance Authorities (NAHEFFA) appreciates the opportunity to comment on MSRB's March 28, 2016 "Request for Comment on a Concept Proposal to Improve Disclosure of Direct Purchases and Bank Loans." NAHEFFA represents over 40 state authorities which issue tax exempt bonds for nonprofit purposes, primarily for healthcare and educational institutions.

We oppose the Concept Proposal in Notice 2016 – 11 to require municipal advisors ("MA") to disclose information regarding the direct purchases and bank loans of the municipal entity (for conduit financings, presumably borrowers, although it is unexplained in the notice.) We believe that this proposal is based on questionable legal authority, is inappropriately applied to MA's, and will not produce uniform disclosure of bank loans.

NAHEFFA and its member authorities have long been proponents of enhanced disclosure in our sector and have encouraged such disclosure by the thousands of nonprofit, charitable, health and education entities that we serve throughout the country. In that regard, we have served on municipal finance disclosure committees, offered educational opportunities for our authorities and conduit borrowers and are strongly supportive of the MSRB's core mission and EMMA system. We also have supported the upgrading of the MA function, whether as advisors to authorities or to our borrowers, and the intent of the provisions of the Dodd-Frank Act.

In particular, with respect to bank loans, we have been educating our members and their conduit borrowing institutions about the increased interest in bank loan disclosure. We welcome and disseminate broadly all briefings and communications by the MSRB, GFOA and others on the subject. We also are supportive of new voluntary efforts and guidelines that GFOA and other major market players are developing.

With due regard to the above, and recognizing the drumbeat by MSRB and financial analysts that there is a serious problem requiring drastic measures, we do not believe that the question of bank loan disclosure is a crisis in our sector. Certainly, it does not justify the MSRB or any regulator acting outside of its authority and imposing an awkward, inefficient, ineffective and costly new regulatory requirement.

We were surprised that MSRB's Notice asked 17 questions and not one of them was whether the MSRB or any regulator has the authority to impose disclosure requirements of this type on MA's. We question whether there is an appropriate legal basis for imposing such requirements. The purpose of the municipal financial advisor registration and other requirements in the Dodd-Frank Act clearly was to improve the professionalism of this category of advisor in order to protect the interests of issuers – – and in our case conduit borrowers – – not to provide regulators or other interested persons with another party to serve as a mechanism for disclosure. We do not believe that Congress intended for the MSRB to have the broad authority that it asserts on page 6 of the Regulatory Notice.

Second, we question what authority regulators have over non-securities bank loans. We recognize that there is no clear line between those bank loans which would qualify as securities and those which do not-- a situation exacerbated by the failure of the regulators to provide clear guidance. With respect to those bank loans which are not securities, we question that they come within the ambit of the MSRB or SEC.

If certain bank loan transactions are “material events " then they may be covered by existing continuing disclosure agreements as well as other obligations by the issuer/conduit borrower to disclose. If that is case, then either no further action needs to be taken or perhaps there needs to be clarification or revision to 15 c2 – 12 after due notice and comment. If such bank loans are not material, then it is unclear whether mandatory disclosure should be required.

As discussed below, the MA is the least suited of any market participant to provide this information. If there is a demonstrated and justified need for additional disclosure about bank loans it should be considered through revision to 15 c2 – 12and not through a new, separate regulatory requirement. We do not understand why the present disclosure system would not be sufficient for this purpose.

MA's are a particularly poor choice to subject to a requirement to disclose information about bank loans for a number of reasons.

First, issuers and borrowers do not engage MA's for every transaction so uniform disclosure about bank loans will still not be achieved, especially in the very active conduit financing context. Unfortunately, there is no commentary in the notice how the Concept would apply in the large conduit sector, whether to issuer MA's, borrower MA's, or somehow both. Since financial advisors often are chosen by issuers and borrowers only for particular financings and have no regular and continuous relationship with either the issuer or the borrower how could they possibly be in a position to provide reliable and continuously updated information on bank loans? MA's often are not involved in the due diligence process. In the case of a conduit financing, an MA for an issuer will not be in a position to know about post bond issuance transactions by the borrower. MA's for conduit borrowers may only be MA's for particular transactions. Further, an MA retained only for a non-securities bank transaction is outside of the jurisdiction of either the SEC or the MSRB.

Next, imposing this obligation on MA's undermines and is in contradiction to the very fiduciary duty to the issuers that MSRB has spent years developing and imposing through an extensive regulatory regime. Even the conceptually lower duty to borrowers in the conduit context is undermined if an MA must inform its client that it is obligated to make a report to the MSRB even though the conduit borrower may feel that is not necessary and/or is opposed to the disclosure. This proposed independent obligation is inconsistent with this high level duty of loyalty and in some cases fiduciary obligation.

Indeed, imposing this obligation would create incentives for borrowers and even issuers not to hire MA's if they feel the MA's will be acting contrary to their interests or will be more expensive. The point of Dodd-Frank in improving the professionalism of financial advisors surely has, as a component, to encourage the retention of high quality professionals by issuers and borrowers. Undermining that close relationship, adding undoubtedly to the cost of such advice and creating conflict between the issuing authority and its conduit borrower, runs contrary to the intent of the law and good public policy.

Any additional cost that would flow through from the financial advisors to issuers and borrowers would create an additional new economic burden and incentive to move from the tax-exempt, heavily regulated sphere to the much freer taxable sphere with no public policy benefit. Borrowers would pay more and disclose less.

MSRB needs to consider the regulated entities on which it is considering imposing new obligations. Most financial advisors are small firms or individuals who do not have in-house compliance departments or monitoring services, regular securities counsel or the IT capacity necessary to ensure compliance with this obligation. These additional costs will further burden these many small businesses and probably decrease the number of professionals available. And, as discussed above, it is doubtful that even with the best of efforts financial advisors can deliver the kind of information contemplated in the regulatory notice.

As described above, NAHEFFA believes the Concept is of questionable legal authority, is inappropriately applied to MA's and will not produce the desired result of uniform disclosure of bank loans. For these reasons, NAHEFFA opposes the imposition of this regulatory burden. We would be glad to participate in additional discussions about improving the present system, hopefully through voluntary efforts, but not with the unnecessary, costly and ineffective regulatory approach as discussed in the notice.

Thank you again for the opportunity to offer these comments.