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May 27, 2016

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

Re: Request for Comments on a Concept Proposal to Improve Disclosure of Direct Purchases on Bank Loans

Ladies and Gentlemen:

This letter is in response to the Municipal Securities Rulemanking Board's (the "MSRB") request for comments on the Concept Proposal to Improve Disclosure of Direct Purchases on Bank Loans (the "Concept Proposal"). I am commenting in my capacity as an Independent Municipal Advisor (a municipal advisor that is not affiliated with any firm that is a broker, dealer or bank).

Background

Although Bank Loans and Privately Placed securities are generally exempt from disclosure, for several years the MSRB has sought to increase disclosure for such obligations. In its Concept Proposal the MSRB stated that "One possible method of obtaining this information would be to require disclosure to the MSRB by municipal advisors that advise municipal entities on such financings, with public dissemination then undertaken by the MSRB."

In several notices including Notice 2011-37 (August 3, 2011), Notice 2011-52 (September 12, 2011) and Notice 2016-12 (April 4, 2016) the MSRB implied that in many cases Municipal Advisors are acting as unregistered broker-dealers on private placements. To date, the MSRB has not offered guidance regarding the conditions by which a person may serve as a Municipal Advisor on a private placement that is consistent with MSRB's interpretation of the securities laws. In addition, although Municipal Advisors are the only party in a municipal debt transaction that have a fiduciary duty to issuers, the MSRB has not offered municipal entities any information regarding the benefits of having a Municipal Advisor involved in their bank transactions.

Banks are exempt from registering as Municipal Advisors under the Dodd-Frank Wall Street Reform and Consumer Protection Act when the bank purchases securities for their own account. As noted in the SEC's May 19, 2014 responses to frequently asked questions, the Office of Municipal Securities stated that "Pursuant to an express provision in the bank exemption in the Final Rules, a bank may provide advice to a municipal entity or obligated person with respect to the purchase of a municipal security by the bank for its own account." As a result of this exemption, many banks are encouraging municipal entities to utilize bank loans. At the same time, many banks are discouraging the engagement of municipal advisors. Without the benefit of a Municipal Advisor that has a fiduciary duty to the issuer, many issuers have entered into bank loans with financing terms that may be unfavorable to both the issuer and prior bondholders.

The current state of the municipal market for bank loans and private placements can be summarized as follows:

1) Certain banks are aggressively pursuing municipal transactions for the purpose of offering bank loans. Banks are able to convince issuers of the "benefits" of bank loans by boasting lower costs of issuance and no disclosure obligations. These banks are advising municipal entities that engagement of a Municipal Advisor is superfluous to the transaction. Banks argue that incurring the cost of a Municipal Advisor is unnecessary since they can provide all transactional advice.

2) Some of the broker-dealers that serve as placement agents are also discouraging issuers from engaging Municipal Advisors. Referencing various portions of the MSRB's notices referred to above, some self-serving broker-dealers suggest that engagement of an Independent Municipal Advisor for a private placement is "unlawful." Broker-dealers also argue that engagement of Municipal Advisors results in unwarranted extra financing costs since a placement agent can provide advice.

3) Consequently, the majority of private placements are being completed without the benefit of a Municipal Advisor. This sometimes results in financing terms that are unfavorable to the issuer and to existing bondholders. For example, as noted in the MSRB Notice 2016-11 "some direct purchases and bank loans may have provisions that make creditors senior to bondholders or that provide creditors with more favorable remedies than bondholders in the event of default."

Comments

A. The MSRB's Concept Proposal is based on a misconception that Municipal Advisors are involved in a substantial number of bank loans and private placements. The majority of bank loans and private placements would not be impacted by this rule because Municipal Advisors are not engaged for most of these transactions.

B. Any rule based on the Concept Proposal would not have a material impact on disclosure filings for bank transactions because it does not require disclosure filing by placement agents or require disclosure filings by the primary market participants for these transactions (the banks themselves).

C. Any rule based on the Concept Proposal would have the following negative outcomes:

1. Bank loans and private placements that include the engagement of a Municipal Advisor will have higher costs of issuance.

2. The MSRB, already appears to discourage the use of Municipal Advisors for private placements. A rule that is selectively imposed on transactions with Municipal Advisors would further discourage engagement of a Municipal Advisor.

3. The SEC specifically exempted certain types of issues, including privately placed obligations from disclosure in order to avoid imposing excessive burdens on small issuers. Rather than being subjected to further disclosure, issuers may forego the use of a Municipal Advisor for their bank loans and private placements.

4. A rule that discourages the engagement of a Municipal Advisor, the only fiduciary in a municipal transaction, is not in the interest of issuers or existing bondholders.

5. Any rule that discourages the engagement of Municipal Advisors for bank loans and private placements encourages unfavorable financing terms. A Municipal Advisor works to assure that bank transactions have terms that are favorable to the issuer. By preventing financing terms that harm issuers (e.g. unreasonable redemptions) existing bondholders also benefit regardless of whether the bank transaction is disclosed. Accordingly, the proposed rule would be counterproductive.

Alternative Solution

Keeping in mind that any new disclosure rule may impose undesirable burdens on issuers, any rule requiring further disclosure can only be effective if it affects the majority of the bank loans or private placement transactions. Thus, any disclosure requirement should be imposed directly on the banks that are involved in these transactions.

Sincerely,

Joy A. Howard
Principal