May 26, 2016

Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314
Attn: Ronald W. Smith, Corporate Secretary

Re: MSRB Notice 2016-11, Request for Comment

Ladies and Gentlemen:

Lewis Young Robertson & Burningham ("LYRB") is pleased to submit comments on the above-referenced Notice.

LYRB is an independent financial advisory firm which has elected, since its inception 20 years ago, to be regulated as a broker dealer and, therefore, has been and remains subject to MSRB regulations. We are now also registered as a municipal advisor with the Securities and Exchange Commission and the MSRB pursuant to Rule 15Ba1-2 of the Commission.

LYRB does not underwrite or purchase securities for our own account or for sale to others nor do we carry customer accounts of any kind. We do not participate as a co-manager or member of selling groups and do not act as a remarketing agent. We are a major financial advisor in the State of Utah and work in some other states as well. LYRB has acted as a financial advisor on hundreds of transactions with a volume of over $7 billion. These transactions run the gamut from small to large, and include general obligation bonds, various types of revenue and tax backed bonds, revenue and bond anticipation notes, and taxable and tax-exempt (including Build America Bonds) bonds in both fixed rate and variable rate structures.

LYRB's Response to MSRB Request for Comment by (Selected) Question Asked

1. Would implementation of a disclosure requirement as described above help protect investors and promote informed investment decisions? If so, how? If not, why not?

While we can conjecture circumstances in wherein a disclosure requirement related to direct purchase transactions could help protect investors, in our opinion, this would be a rare circumstance due to the following considerations:

(a) Information about direct purchase transactions, including equipment leases, are included in the financial statements of a local government. While there may be a slight timing difference in when a direct purchase is entered into and when it appears in an audit, the

vast majority of circumstances where an investor might be interested in this information the audit would be the source to review that information. Annual continuing disclosure filings may also address the existence and at least some of the economic details of such transactions.

(b) Many issuers, including most of those for whom this may be of practical consequence, frequently enter the market. At such times the preliminary and final official statement would include data on directly purchased transactions which had occurred since the last audit. This is a very direct source of information for investors.

(c) The matter, raised in the Notice, of the question of remedies or covenants appearing in direct purchase transactions which may be material to other investors because they "may have provisions that make creditors senior to bondholders or that provide creditors with more favorable remedies than bondholders in the event of default" must also be considered. This matter raises numerous serious questions which go far beyond disclosure matters or other matters within the jurisdiction of the MSRB or SEC, if in fact, such concerns arise in the real world. First, most if not all documents for bond issues provide for remedies and security status of the issue they document. For general obligation bonds, this provision is inherent in the nature of the debt and its concomitant statutory and common law remedies. For revenue bonds, it is explicit in contract, interpreted against a statutory and common law background. The owner of a publicly offered series of bonds has access to this information and can evaluate it. Should a direct purchaser (usually a bank) seek to negotiate for itself remedies or "bootstrap" provisions which make the purchaser senior to prior holders of the same credit or which fundamentally alter the way a default would be responded to, such provisions would likely contravene existing covenants or in some cases, statutory or common law restrictions. Even if this is not the case, competent bond counsel, acting in its role as gatekeeper, would simply refuse the purchaser's request. Such requests might include an acceleration remedy where none exists for other parity debt holders, or even a right of "offset" if the purchaser is also the issuer's account bank and large balances of issuer assets are held. If there are instances where, through incompetence or malpractice, bond counsel fails to do this, the potential problems for existing debt holders are far more complex than disclosure adequacy. In cases, if there are any, in which bank covenants are inconsistent with the rights of prior parity holders, courts would probably set aside the offending "later in time" covenants purporting to benefit the bank.

This point is essentially a legal matter. Financial Advisors generally lack the expertise to evaluate it in detail. Disclosure of "all the documents" sounds good, but in fact would do little to forward the cause of dealing with this problem, if it exists, in any practical way.

To illustrate, suppose there is such a covenant in documents embodying security for a direct purchase of indebtedness, which is inconsistent with the parity status of existing publicly held bonds or which includes a remedy which, in effect, places the privately purchased debt at a purported advantage in a default. If the bond attorney does not "catch" this and prevent it, it is unlikely the financial advisor will do so. It is, by its very

nature, also true that the consequences will not be disclosed, because the lawyers who would write the disclosure don't even see the problem. If the documents embodying this are submitted as a disclosure, only analysis by a competent bond lawyer or public transaction workout lawyer would even reveal such a matter. Investors in general are thus unlikely to be benefitted by this document disclosure, and if they are it would only be in a selective manner (e.g., investor A has his competent attorney review the material, then decides whether to buy or sell in the secondary market. If he does so he "knows" something other investors don't).

If this is actually a problem, it can only be fixed by better bond and bank counsel. Disclosure will not repair this matter.

(d) By practice in our market, the preliminary and final offering documents for all publicly offered transactions contain contact information that an investor could utilize to access an individual from the issuer to ask any questions of, including "Has the issuer entered into any new direct purchase transactions, since the last audit?" This is a direct source of obtaining that information if of interest to the investor.

2. What information regarding outstanding indebtedness, such as direct purchases and bank loans, do issuers typically disclose in financial statements? What are considered industry best practices for such disclosures?

(a) In the financial statements of issuers in Utah what we typically see disclosed about direct purchase transactions is the amount of the transaction, final maturity date and interest rates.

(b) We cannot speak to what is considered industry best practice for such disclosure but surmise that the information being put into the audits is in accordance with generally accepted accounting procedures for local governments and as such is the current thinking on the industry best practices from a local government standpoint.

3. *What information does a bondholder need with respect to an issuer's outstanding indebtedness to make informed decisions about an investment (e.g., whether to buy, hold or sell a bond)?*

The principal items of information, as we see it, are:

(a) The level of priority the existing and new debt will take (i.e. parity or senior or subordinate)

(b) Overall debt structure (i.e., are there any balloon payments, steep escalation in payments or "spike" maturity years)

(c) For revenue bonds, historical and projected debt service coverage of all outstanding issues and proposed new issue for applicable issues

(d) Historical information regarding non-payment of any debt or obligation

4. *Do any market participants currently have more or more timely information about issuers' direct purchases or bank loans than other market participants?*

Certainly. The purchasers of obligations sold in direct purchase transactions have immediate and thorough knowledge of the transactions and given that they are regulated entities, it would seem that they are in the best position to provide this information in the timeliest manner.

6. What activity should trigger the disclosure requirement discussed in this concept proposal (e.g., advising on a specific type of financing transaction that occurs; advising on any financing transaction that occurs)?

We are of the strong opinion that the financial advisor, the fiduciary to the issuer, should not be in any way responsible for reporting an issuer's direct purchase transactions.

We suggest the MSRB carefully consider whether the approach of requiring financial advisors to make this disclosure is consistent with the statutory mandate which requires them to regulate advisors. Financial advisors are *indirect* participants in the market. They advise issuer direct participants on a fiduciary basis. The fiduciary principle, set forth explicitly in Dodd-Frank, embodies a clear and well understood set of requirements. These include a duty of loyalty. This duty includes a duty of confidentiality unless the client itself waives it. Since the client cannot be required to make these disclosures directly (other than in an Official Statement, if 10b-5 is implicated) it *cannot* be correct to first impose a fiduciary duty on a financial advisor and then require her to violate it by a breach of confidence. If you cannot regulate an issuer directly, you certainly cannot require the fiduciary advisor to take such a step, thus compromising the very obligations imposed by Congress. In addition, as a common-law fiduciary matter, such a rule would be akin to a rule for attorneys which obligates them to keep client confidences, except on matters X and Y, which must be promptly reported to the FBI. Such an outcome is problematic on its face.

The obligations imposed on underwriters to require a continuing disclosure agreement with an issuer as a condition of purchase is wholly different, as the underwriter is both directly regulated and is not a fiduciary to an issuer.

In sum, requiring a fiduciary to "dig up the dirt" on a client and report it doesn't seem consonant with a relationship of trust and confidence.

Other, more practical objections to a new rule requiring financial advisors to report such transactions include the fact that many such transactions may not be disclosed to or known by the advisor. This will often be the case in the case of privately purchased equipment leases or bank loans. It is possible, even likely, that small unsophisticated issuers, dealing with small unsophisticated banks, may enter into numerous small lending contracts which fail to pass even rudimentary legal muster. Is the advisor to become the government's investigator inquiring into such matters?

While some advisory contracts are general and cover a time period and a broad array of transaction types, many are limited to a single transaction or transaction type. Imposing general disclosure burdens on an advisor with a narrower engagement would require (possibly expensive) investigations which would likely not be otherwise undertaken.

Additionally, given that for most issues, much of this information will be available in the audit and/or continuing disclosure filings, the small time gain in having an interim report on a new direct purchase transaction doesn't seem worth the trouble it will cause.

7. How expansive should any proposed disclosure be (e.g., only if material to the financing on which advice is being given; all alternative financings outstanding, regardless of materiality to current transaction)?

As noted in response to No. 6 above, an issuer may or may not engage its financial advisor to provide advice on direct purchase obligations, including equipment leases, and the question seems to assume that a municipal advisor may be involved in some knowledgeable way on all direct purchase transactions. In fact, a large majority of our clients do not involve us on equipment lease transactions which, if for large rolling stock, could be sizeable transactions. It is unclear if the MSRB is asking that an advisor should be 'responsible to disclose' information only when working on a specific direct purchase for an issuer or when engaged to work on other publicly offered transactions. If it is the latter, and under the obligations of fair and full disclosure, the Issuer and its advisor and disclosure counsel should be providing all information in the POS material to the financing on which advice is being given, that should include a discussion about material outstanding direct purchase transactions.

8. What specific information regarding the direct purchases and bank loans should be required to be disclosed (e.g., documents from the financing or only certain terms thereof)? What information is important to investors? Is there a particular document typically used in these types of transactions that contains any or all of this information, and, if so, please describe the document and the information it provides?

From a practical perspective, it would seem reasonable to present the fact of the direct purchase issue, its principal amount, maturity schedule, interest rates, together with some indication of the security relationship to the publicly held debt should be sufficient. E.g., G.O. bond, parity senior debt, subordinated debt. Other matters, such as the identity of the purchaser and the documents governing the transaction are extremely unlikely to interest investors as such (although such data might be of interest to competitors of the purchaser). We do not believe any further disclosure than that set out in the first sentence of this paragraph is desirable.

9. Are there alternative methods the MSRB should consider for obtaining and publicly disseminating material information related to an issuer's direct purchases and bank loans?

The providers of the funding for the direct purchase transactions would seem to be one of the best sources. They are typically banks and are already under regulatory oversight. They

have immediate access to the information needed and would likely have the staffing / compliance resources in place to aid in the facilitation of property disseminating the required material.

10. Should such a disclosure obligation also apply to dealers broadly or in certain circumstances?

No. Underwriters or dealers (unless affiliated with the direct purchaser) are generally in no better position to have information available to them about direct purchases that may have transpired, or be in the works, than financial advisors.

11. What would be the additional costs and/or burdens on municipal advisors resulting from such a disclosure requirement? Would these costs and/or burdens be outweighed by the benefit of making the information available?

Please see our response to question 6 above.

12. How might such a disclosure requirement economically impact issuers of municipal securities and current investors?

It depends. If the only requirement is a one-time filing when a direct purchase is entered into, and the issuer does relatively few of them, and the provider of the funding (the bank) is required to make the one time filing, then the cost would likely be relatively minimal, maybe a fee, or increase in an up-front fee, from the bank.

Conversely, if the issuer is small, with minimal professional staff (thinking of many small rural communities) so the process is unfamiliar and the learning curve to report steep it could be quite a burden, or if it is a larger issuer that has a lot of direct purchase obligations and they are required to somehow update the filing information every year, it could require a significant amount of time and expense.

14. Is there additional information an investor may need in order to have a complete picture of an issuer's overall financial condition?

Not that shouldn't already be contained within a thorough offering document. Most issuers who use direct purchase also access the public markets from time to time.

15. In addition to direct purchases and bank loans, what other types of debt financings do municipal entities use as alternatives to the issuance of municipal securities for which disclosure would be useful to investors?

Equipment leases (if of a material size) if you are viewing these as separate and apart from direct purchase transactions.

16. The MSRB has provided detailed guidance on how an issuer or its agent can voluntarily submit disclosures regarding bank loans to EMMA, but there has been a limited number of

submissions. What additional steps might the MSRB take to facilitate these voluntary disclosures?

In our experience, voluntary compliance has been increasing, possibly due (indirectly) to rating agency attention to this matter and to more advisors and attorneys recommending this course. This trend may continue. Otherwise it would seem further investigation is needed to help to understand why this hasn't taken place on a voluntary basis. A survey of local government participants conducted by the GFOA may prove informational. Our educated guess as to some of the reasons would be: (1) Government officials already have more than enough to do with limited resources so why spend extra time and money to do something that is not a legal requirement; (2) They see no potential risk to bond investors; (3) they see no benefit to themselves as issuer in disclosing this information (although we think benefits of identifying potential refunding candidates would likely result to their benefit), and (4) issuers may possibly only see risks in submitting non-required data as many of them have been criticized for unintended missteps in required EMMA filings (errors in linking etc.).

Lewis Young Robertson & Burningham, Inc.

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By: Laura D. Lewis
Principal