CONSIDERATIONS REGARDING VOLUNTARY SECONDARY MARKET DISCLOSURE ABOUT BANK LOANS

EXECUTIVE SUMMARY

Since 2009, state and local governmental issuers and conduit borrowers (collectively, "issuers") have increasingly used private bank loans ("bank loans") as an alternative to publicly-offered municipal securities (collectively, "bonds").

Because incurrence of additional debt, including bank loans, is not one of the material events for which disclosure is required under Rule 15c2-12, holders of an issuer's outstanding bonds may not become aware of a bank loan or its impact on the issuer's creditworthiness until the issuer's next financial audit is released or new bonds are sold.

Facts relating to incurrence of a bank loan may be important to bondholders for a number of reasons, such as:

- The bank loan may increase the issuer's debt outstanding;
- The covenants and events of default for the bank loan may be different than those for the bonds, potentially allowing the bank to assert remedies before the outstanding bondholders;
- Certain assets previously available to secure bonds may be pledged to the bank as security for the bank loan; and
- The bank loan may be structured with a balloon payment at the end of its term and create refinancing risks that may impact the issuer's ability to pay outstanding bonds.

As a result, bondholders and their representatives began encouraging issuers to voluntarily post information about bank loans to the Electronic Municipal Market Access ("EMMA") website maintained by the Municipal Securities Rulemaking Board (the "MSRB"). In April 2012, the MSRB published MSRB Notice 2012-18, in which it encouraged issuers to voluntarily post information about bank loans to EMMA.

These calls for voluntary disclosure about bank loans led to the formation of the Bank Loan Disclosure Task Force in March 2012. The Bank Loan Disclosure Task Force has prepared this document ("Considerations") to assist issuers and their financial advisors and legal counsel in determining whether to disclose the incurrence of a bank loan on a voluntary basis and the extent of any such disclosure.

If an issuer concludes that it will make voluntary disclosure about a bank loan, the issuer could file appropriate documents relating to the bank loan, such as the loan or financing agreement, with EMMA. Another alternative is for the issuer to file a summary of some or all of the features relating to the bank loan with EMMA. If an issuer elects to prepare a summary, the Bank Loan Disclosure Task Force recommends that the issuer consider including the following information:

- Date of incurrence, principal amount, maturity and amortization
- Interest rate, if fixed, or method of computation, if variable (and any default rates)
- Information on interest rate swaps, caps and other interest rate management products that hedge the bank loan
- Purpose/use of proceeds
- Collateral/security pledge (e.g., general obligation, specified revenues, real property, personal property), and whether the pledge is on parity with or subordinate to bonds
- Demonstration of compliance with applicable additional debt tests
- Covenants, events of default and remedies, if different from outstanding bonds
- Term-out provisions if the bank loan allows the bank to seek repayment earlier than the stated maturity date (e.g., a demand or put date)
- Terms under which the bank loan can be sold or transferred by the bank to other investors
- Disclosure of "most-favored nation" or similar clause
- Ratings, if assigned

This list is nonexclusive, and the issuer is free to add or delete features. MSRB Notice 2012-18 also contains a nonexclusive list of possible features to be included in a summary.

Voluntary disclosure about a bank loan is most useful if it is timely. Issuers who are willing to make voluntary disclosure about a bank loan could do so in the same time frame as mandatory disclosure of material events under Rule 15c2-12 (i.e., within 10 business days).

Because voluntary disclosure about a bank loan posted on EMMA would be reasonably expected to reach investors and the trading markets, such disclosure is subject to the antifraud provisions of the federal securities laws and the information that is provided must not be materially inaccurate or misleading in the context in which it is provided. In preparing a summary of the features of a bank loan (or if any information is redacted from documents being filed), issuers should consider whether the omission of any features of the bank loan (or redaction of information from the bank loan documents) would result in the information provided being materially misleading in the context in which it is provided.

An issuer may wish to use terms of usage or disclaimers in connection with voluntary disclosure of information about a bank loan.

The Bank Loan Disclosure Task Force included representatives of issuers, lenders, bond counsel, underwriters, financial advisors, securities analysts, institutional investors and other interested parties. The particular groups that comprised the Task Force are listed in Appendix A.

> *These Considerations are not intended to create legal standards or describe existing legal standards in any detail, nor establish a template for all issuers regarding disclosure concerning their bank loans. This document represents a consensus of the Task Force participants, but does not necessarily reflect the individual views of, or formal approval by, any particular participating organization.*

May 1, 2013

INTRODUCTION

The increasing use by state and local governmental issuers and conduit borrowers (collectively, "issuers")[1] of bank loans (as defined below), particularly tax-exempt bank loans,[2] since 2009 has caused many participants in the municipal market to consider, or reconsider, disclosure about such arrangements to existing holders and prospective purchasers (collectively, "bondholders") of the issuer's publicly-offered municipal securities (collectively, "bonds"). This document ("Considerations") provides analysis of considerations in making voluntary secondary market disclosure about a bank loan after such indebtedness is incurred.

These Considerations do not attempt to analyze whether a bank loan should be treated as a "loan" or a "security" under the federal securities laws,[3] because these Considerations are equally applicable to voluntary disclosure about bank loans whether they are treated as "loans" or as "securities."

For purposes of these Considerations, a "bank loan" will be assumed to be made by a bank in one of two ways:

- a ***direct purchase*** **–** by purchasing a bond directly from the issuer,[4] or

- a ***direct loan*** **–** by entering into a loan agreement or other type of financing agreement with the issuer.[5]

The term "bank loan," as used in these Considerations, does not include purchases of bonds by banks in a primary public offering or in the secondary market.[6]

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[1] Bonds issued by a state or a political subdivision thereof for its own benefit are usually referred to as "governmental bonds." When a state or a political subdivision issues bonds for the benefit of a third party, usually a 501(c)(3) organization (e.g., hospitals, universities) or a for-profit entity for certain types of facilities (e.g., manufacturing facilities, qualified residential rental projects, solid waste disposal projects, etc.), such bonds are usually referred to as "conduit bonds" and the governmental issuer is also referred to as a "conduit issuer." Because the proceeds of conduit bonds are usually loaned to the beneficiary of the financing, such beneficiary is usually referred to as a "conduit borrower."

[2] Although banks have long made tax-exempt and taxable bank loans to issuers, it is the willingness of banks since 2009 to make an increasing amount of tax-exempt bank loans to issuers as an alternative to publicly-offered tax-exempt bond issues that has led to the disclosure considerations addressed in this document.

[3] On September 21, 2011, the Municipal Securities Rulemaking Board (the "MSRB") issued Notice 2011-52, to alert municipal market participants that, under existing legal principles described in the Notice, certain financings that are called "bank loans" may, in fact, be municipal securities. If that is the case, and parties regulated by the MSRB play a role in such financings, those parties may inadvertently violate MSRB rules, as well as other federal securities laws. As the Notice acknowledges, determining whether a bank loan made to a state or local government (for its own benefit or the benefit of a conduit borrower) is a security "can be a difficult question." That question is beyond the scope of these Considerations.

[4] The use of the term "bank loan" in these Considerations to describe direct purchases is not intended to imply that such transactions will constitute "loans," as opposed to "securities," under the federal securities laws.

[5] In some states, e.g., North Carolina, governmental issuers do not have constitutional and statutory authority to enter into a general unsecured bank loan. These issuers may be required to obtain bank loans through the bank's direct purchase of a general obligation bond or revenue bond or by entering into a nonrecourse, secured installment purchase agreement with the bank.

Diligent market participants typically are alerted to the incurrence of additional debt by an issuer by reviewing annual financial information made available by the issuer pursuant to a continuing disclosure agreement that satisfies Rule 15c2-12 under the Securities Act of 1934 ("Rule 15c2-12") or by reviewing an official statement for a new bond issue. Issuers, however, generally are not required to prepare, and do not prepare, an official statement or other offering document for a bank loan financing (including direct purchases), nor is the incurrence of a bank loan a material event required to be disclosed to existing bondholders pursuant to Rule 15c2-12. As a result, the Municipal Securities Rulemaking Board (the "MSRB") and certain bondholders or their representatives have encouraged issuers to voluntarily post information about bank loans to the MSRB's Electronic Municipal Market Access ("EMMA") website.[7]

The Bank Loan Disclosure Task Force has prepared these Considerations to assist issuers and their financial advisors and legal counsel in determining whether to disclose the incurrence of a bank loan on a voluntary basis and the extent of any such disclosure.

Readers are encouraged to keep in mind the following regarding the scope of these Considerations:

- These Considerations assume that an issuer has outstanding publicly-offered bonds. If an issuer is only a party to a series of private financing transactions, none of which are disclosed on EMMA, voluntary disclosure of information regarding incurrence of a bank loan on EMMA would serve no purpose.

- While these Considerations only address voluntary disclosure about incurrence of a bank loan, they may be equally applicable to issuers who are considering voluntary disclosure about incurrence of other additional debt (e.g., financing provided by non-banks, lease financings, etc.).

The Bank Loan Disclosure Task Force included representatives of issuers, lenders, bond counsel, underwriters, financial advisors, securities analysts, institutional investors and other interested parties. The particular groups that comprised the Task Force are listed in Appendix A.

These Considerations are not intended to create legal standards or describe existing legal standards in any detail, nor establish a template for all issuers regarding disclosure concerning their bank loans. This document represents a consensus of the Task Force participants, but does not necessarily reflect the individual views of, or formal approval by, any particular participating organization.

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[6] Banks who purchase bonds in a primary public offering also are providing financing (i.e., making a "loan") to the issuer; however, as discussed in more detail below, a principal concern of bondholders regarding bank loans is the possibility they are made on terms and conditions different from those that apply to the issuer's bonds. When a bank purchases bonds in a primary public offering or in the secondary market, it presumably is doing so on the same terms and conditions as other bondholders (the other "lenders").

[7] See MSRB Notice 2012-18 (April 3, 2012), available at http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-18.aspx, which is discussed in more detail below.

BRIEF HISTORY OF BANK PURCHASES AND BANK LOANS IN THE MUNICIPAL MARKET

Appendix B contains a brief history of bank purchases and bank loans in the municipal market. This history recounts that:

- By the early 1980s, banks were the biggest buyers of municipal bonds. For example, in 1980, the banking sector was the largest investor in the market, holding 39% of outstanding issues.

- The Tax Reform Act of 1986 added Section 265(b) to the Internal Revenue Code of 1986, which had the effect of eliminating the tax benefit for banks of owning most municipal bonds by preventing banks from deducting the carrying cost of such bonds. As a result, the banking sector became a net seller of municipal bonds beginning in the middle of 1986, and by mid-1992, banks held only 9% of all municipal bonds.

- Section 265(b)(3) of the Code provides an exception from the general rule of Section 265(b) for "qualified tax-exempt obligations," which are usually referred to as "bank-qualified" obligations. After the 1986 Tax Act, bank loans generally were limited to bank-qualified obligations. From 1986 through 2008, bank-qualified obligations constituted a relatively small percentage of the new issuances of municipal bonds and attracted little attention in the marketplace.

- From 1986 through 2008, banks continued to play an important role in the municipal market by providing liquidity facilities and letters of credit to support variable rate demand obligations ("VRDOs") purchased by tax-exempt money market funds.

- To encourage banks to extend credit in the municipal market during 2009 and 2010, the American Recovery and Reinvestment Act of 2009 ("ARRA") amended Section 265(b) to expand the scope of bank-qualification. The changes made by ARRA had the desired effect: issuance of bank-qualified obligations doubled in 2009 and 2010.

- The ARRA amendments to Section 265(b) expired on December 31, 2010. As a result, during 2011 the issuance of bank-qualified obligations fell back to a level consistent with issuance from 2000 to 2008. Contrary to the expectations of many participants in the municipal market, however, banks have continued to make a substantial amount of bank loans on a non-bank-qualified basis since January 1, 2011.

- Many bank loans made since 2009 have been conversions by banks of existing liquidity facilities and letters of credit into funded bank loans, often on terms that are the same or substantially similar.

CURRENT DISCLOSURE REQUIREMENTS FOR BANK LOANS

As the MSRB noted in Notice 2012-18 described below, "because . . . bank loans generally do not require the same level of disclosure as public offerings for municipal securities, holders of an issuer's outstanding debt, as well as potential investors and other market participants, may not become aware of such bank loans or their impact on the issuer's outstanding debt until the release of an issuer's audited financial statements." Issuers generally are not required to prepare, and do not prepare, an official statement or other offering document for a bank loan financing, including direct purchases.[8]

Issuers also are not generally obligated to provide disclosure to the secondary market 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.[9] Although issuers of publicly-traded corporate securities generally are required to file continuing information or reports under the federal securities laws,[10] most municipal securities are exempt from the registration and reporting requirements under the federal securities laws.[11]

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.[12] Rule 15c2-12 lists certain specific events for which continuing disclosure 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 disclosure about incurrence of a bank loan.[13]

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[8] If a bank loan is not a security, existing securities law requirements with respect to disclosure, including Rule 15c2-12, do not apply. Even if a bank loan is a municipal security, the transaction is likely to be a "limited offering" exempt from Rule 15c2-12.

[9] ABA Section of State and Local Government Law, ABA Section of Business Law Committee on Federal Regulation of Securities, and National Association of Bond Lawyers, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (3d Ed. 2009) ("*Disclosure Roles*"), at 221.

[10] A company subject to the periodic reporting requirements of Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 (a "public company") is required to file SEC Forms 10-K, 10-Q and 8-K.

[11] Most municipal securities are (1) exempt from the registration requirement of the Securities Act of 1933 (the "Securities Act") pursuant to Section 3(a)(2) of the Securities Act and (2) exempt from the registration requirement of Section 12(g)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") and, therefore, also are exempt from the periodic and annual reporting requirements of Section 13(a) of the Exchange Act. *Disclosure Roles* at 222. Section 15B(d) of the Exchange Act, enacted in 1975 (the "Tower Amendment"), also prohibits the SEC or the MSRB from requiring, directly or indirectly, the filing with the SEC or the MSRB of any document before the sale of a municipal security, and prohibits the MSRB from requiring any secondary market disclosure from issuers.

[12] Rule 15c2-12 prohibits underwriters from purchasing or selling municipal securities unless the obligor (e.g., the governmental issuer in a governmental bond issue or the conduit borrower in a conduit bond issue) on such securities has contracted to provide continuing disclosure as described in the rule, including annual financial information and operating data and notice of certain specified material events, subject to certain exemptions.

The SEC in its 1994 Interpretative Release[14] cautioned that "when [a municipal securities issuer] releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions [of the federal securities laws]."[15] Thus, if an issuer chooses to voluntarily provide disclosure about the incurrence of a bank loan, the information that is provided must not be materially inaccurate or misleading in the context in which it is provided.[16]

The question whether to provide voluntary disclosure about incurrence of a bank loan cannot be decided as a matter of law. Each issuer, after weighing relevant considerations, will have the ultimate responsibility for deciding whether to voluntarily provide such information.[17]

MSRB NOTICE 2012-18

In MSRB Notice 2012-18, the MSRB encouraged issuers to voluntarily post information about their bank loan financings to the EMMA website in a timely manner and described a recommended procedure for posting this type of information to EMMA.

The MSRB observed that "[t]he increased use by state and local governments of bank loans to meet funding needs has raised concerns among market participants about the level of such disclosure about such loans." In encouraging voluntary submissions to EMMA, the MSRB stated that:

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[13] Under certain facts and circumstances, however, an issuer could be obligated to provide disclosure about incurrence of a bank loan. For example, if an issuer incurs a bank loan after the end of a fiscal year, but before it files its annual continuing disclosure for that fiscal year, an issuer should consider whether the failure to disclose information regarding the incurrence of the bank loan would cause its annual continuing disclosure to be materially misleading. *See* Robert A. Fippinger, *The Securities Law of Public Finance* (3d Ed. 2012) ("*Fippinger*"), § 9:4.4 at 9-51.

[14] SEC Release Nos. 33-7049, 34-33741 (Mar. 9, 1994) (the "*1994 Interpretative Release*").

[15] 1994 Interpretative Release at nn.85-87 and accompanying text.

[16] *Disclosure Roles* at 232.

[17] A white paper prepared under the auspices of the National Association of Bond Lawyers ("NABL") for use by its members in counseling clients regarding voluntary secondary market disclosure concludes that:

> The decision to voluntarily provide . . . disclosure cannot be decided as a matter of law. Accordingly, bond lawyers can provide counsel regarding a decision whether or not to provide additional disclosure, but it is not appropriate to tell obligors on municipal securities that, as a matter of federal securities law, they must provide additional information or, alternatively, that they must not provide additional information. Bond lawyers can, based upon experience and knowledge, help obligors to identify some of the legal and nonlegal issues that they should consider. Such counseling, however, does not relieve the obligor itself of the ultimate responsibility for making the decision to voluntarily provide information.

See "Providing Information to the Secondary Market Regarding Municipal Securities," approved by the NABL Board of Directors on September 20, 2000. This white paper is restated, with modest revisions, in *Disclosure Roles* at 231-38.

> The MSRB believes that the availability of timely information about bank loan financings is important for market transparency and promoting a fair and efficient market. Voluntary submission of information concerning bank loan financings through EMMA . . . would provide timely access for bondholders, potential investors and other market participants to key information useful in assessing their current holdings of municipal securities or in making investment decisions regarding potential transactions in municipal securities.

MSRB Notice 2012-18 contemplates that issuers would submit (1) an appropriate document relating to the bank loan financing, such as the loan or financing agreement, or (2) in the alternative, a summary of some or all of the features relating to the bank loan financing, including:

Lender	Payment dates
Borrower	Maturity and amortization of loan
Purpose of loan/financing	Optional, mandatory and extraordinary prepayment provisions
Security for repayment	Tax status of interest
3rd party guarantees	Events of default/remedies
Source of repayment	Current credit rating of borrower (if applicable)
Dated date/closing date	Governing law
Par amount	CUSIP number, if applicable
Interest rates (or index if variable), including method of computation, if applicable	Redistribution rights, if applicable

In footnote 5, the MSRB pointed out that: "This list is not inclusive, and issuers are free to add or delete factors."

DISCUSSION AND ANALYSIS OF CONSIDERATIONS IN MAKING VOLUNTARY SECONDARY MARKET DISCLOSURE ABOUT BANK LOANS

In light of the possible importance to investors and MSRB Notice 2012-18, the Bank Loan Disclosure Task Force recommends that, when incurring a bank loan, issuers consider:

- whether to make voluntary disclosure through EMMA of a bank loan in a timely manner after the loan is incurred, and

- if disclosure will be made, what information regarding the bank loan should be disclosed.

Determining Whether to Make Voluntary Disclosure about a Bank Loan

Bank loans provide issuers with access to capital, supply needed cash flow, reduce some of the structural risks associated with bank-supported VRDOs (e.g., remarketing risk, bank downgrade risk), and can be easier and less costly to obtain for an issuer than a public debt issuance. An issuer is likely to be required to disclose certain facts about the incurrence of a bank loan (to the extent they are material) in its annual continuing disclosure (e.g., in the footnote regarding debt in their financial statements) for the fiscal year when the bank loan was incurred or in the official statement for its next publicly-offered bond issue. As mentioned above, however, issuers typically do not prepare official statements or other offering documents for bank loans. This may leave diligent secondary market participants without current information that is relevant to a timely assessment of a bank loan's impact on the issuer's credit position and any additional risks (e.g., liquidity, refinancing) the bank loan may pose.

Depending upon its terms, the incurrence of a bank loan can affect outstanding bondholder security or introduce potential risks that may impact a bondholder's willingness to continue to hold the issuer's bonds, affect bond ratings or impact pricing in the secondary market. These factors may have an impact on the valuation of the issuer's outstanding bonds (which is important to mutual funds because they are required to "mark-to-market" their holdings and declare net asset values of their shares daily). As a result, bondholders and their representatives recently have been encouraging issuers to voluntarily post information about bank loans to EMMA after they are incurred.[18]

For an issuer who is considering whether to voluntarily disclose information about a bank loan after incurrence, it may be helpful to understand some of the reasons why incurrence of a bank loan may be important to bondholders. For example:

- The incurrence of a bank loan (e.g., a new money financing) can result in an increase in the aggregate outstanding amount of the issuer's debt, which may cause bondholders to reassess the issuer's credit position (e.g., if incurrence of the bank loan causes the ratio of net available revenues to projected debt service to fall to levels near or below what is necessary to meet the rate covenant or additional bonds test of outstanding bonds).

- Bank loan covenants and events of default can be different from or set at higher levels than those applicable to outstanding bonds, thereby enabling the bank to assert remedies prior to other bondholders (which may effectively prioritize repayment of the bank loan).

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[18] Reasoning by analogy, bondholders and their representatives can point to the fact that a public company is required to file a Form 8-K if "the company becomes obligated on a direct financial obligation that is material to the company."

- Assets or revenues that previously had been available to secure or pay debt service on outstanding bonds may be pledged to the bank as security for a bank loan.

- Instead of having a fully amortizing debt service schedule, a bank loan may be structured with a large, "balloon" payment of principal or purchase price due at the end of the term of the loan (e.g., the maturity date or a mandatory tender date), creating a refinancing risk that could compromise an issuer's ability to repay outstanding bonds.

While bondholders and their representatives would encourage issuers who are considering whether to voluntarily disclose information about a bank loan to err on the side of disclosure, it is not necessary or practical to expect that issuers will provide voluntary disclosure about every bank loan they incur.[19] Because an issuer, in determining whether to voluntarily disclose information about a bank loan, must consider the facts and circumstances relating to that particular bank loan, it is not possible to establish specific guidelines regarding the appropriateness of voluntary disclosure.

It may, however, be helpful to issuers to provide examples of certain facts and circumstances under which accelerated voluntary disclosure about incurrence of a bank loan might be less important to bondholders, such as when:

- The proceeds of the bank loan are used to refinance existing debt without any adverse impact on bondholders (e.g., when an outstanding VRDO issue supported by a bank credit or liquidity facility is converted into or refinanced with a bank loan with the same or substantially similar covenants, events of default, amortization, etc.).[20]

- A governmental issuer whose only outstanding bonds are general obligation bonds incurs a purchase money bank loan (i.e., a bank loan secured by a lien on the asset financed with the proceeds of the bank loan).

- The principal amount of the bank loan is relatively small when compared to the aggregate outstanding principal amount of the issuer's bonds (e.g., less than 5%) and the structure of the bank loan does not introduce additional risks (e.g., refinancing risk from a balloon payment).

Because voluntary disclosure is being encouraged primarily to address the timing of disclosure about incurrence of a bank loan, an issuer who is considering whether and what to

[19] Reasoning by analogy, issuers and their representatives can point to the fact that a public company is required to file a Form 8-K only if it becomes obligated on a direct financial obligation that is "material."

[20] In this circumstance, in lieu of more detailed voluntary disclosure about the terms of the bank loan, the issuer may wish to consider a voluntary filing stating that the existing debt has been refinanced or replaced with a bank loan, which would confirm for bondholders that the existing debt was not simply retired.

disclose voluntarily may want to consider what information about the bank loan will be disclosed in (a) its next audited financial statements and (b) its next bond offering.[21] For example, if the disclosure about the bank loan in its next audited financial statements or official statement will be specific or extensive, then an issuer may conclude it is appropriate to voluntarily disclose that information sooner rather later. On the other hand, if little, or no, specific information about the bank loan will be included in the next audited financial statements or official statement (e.g., other than the principal amount of the bank loan and some information about the interest rate), then an issuer may conclude that voluntary disclosure about the bank loan is less likely to be important to bondholders.

Making Voluntary Disclosure about a Bank Loan: Filing Loan Documents or a Summary

If an issuer concludes that it will make voluntary disclosure about a bank loan, the issuer could file appropriate documents relating to the bank loan, such as the loan or financing agreement, with EMMA. This approach would be consistent with the requirement under MSRB Rule G-34(c) that documents relating to bank letter of credit or liquidity facilities supporting VRDOs be filed with EMMA. Many issuers, particularly governmental issuers, may prefer this approach, which is likely to be less time-consuming than preparing a summary of the relevant documents. Moreover, if an issuer concludes that it will not redact any information from the documents before filing them with EMMA, that issuer may be even more likely to use this approach because it eliminates the risk of a material omission in preparing a summary of the documents.[22]

Some issuers (e.g., conduit borrowers) may conclude that it is appropriate to redact certain provisions in the documents before filing them with EMMA, because they believe such provisions are confidential or competitive information.[23] For example, if the interest rate on a bank loan is determined pursuant to a formula (e.g., 68% of LIBOR plus 0.75% per annum), some issuers, reasoning by analogy to guidance on MSRB Rule G-34(c), which permits the redaction of the bank's fee for a liquidity facility, may conclude that the fixed spread can and should be redacted. As discussed above, once an issuer chooses to make voluntary disclosure about a bank loan, the disclosure must not be materially inaccurate or misleading in the context

[21] Governmental issuers that have different types of outstanding bonds (e.g., general obligation bonds, water-sewer revenue bonds, airport revenue bonds, certificates of participation subject to nonappropriation clauses) may need to consider whether disclosure about a bank loan would be different with respect to each type of its outstanding bonds.

[22] To the extent that certain features relating to bank loans described below are not contained in the bank loan documents, e.g., information on interest rate swaps, caps and other interest rate management products that hedge the bank loan, demonstration of compliance with applicable additional debt tests, or ratings, if assigned, issuers may wish to consider providing disclosure about those features in addition to filing appropriate documents.

[23] MSRB Notice 2012-18 is silent on the question of redaction; however, the MSRB's guidance in Notice 2011-17 (February 23, 2011) (Notice on Upcoming Changes to Rule G-34(c) to Require Dealer Submission of ARS and VRDO Documents to the Short System) and Notice 2012-20 (April 11, 2012) (MSRB Reminds Dealers of Limits on Redactions of Short System Documents), provides insights into what the MSRB views as appropriate information to redact in a similar context. Because the provider of the bank loan also may believe it is appropriate to redact certain information, an issuer may wish to review its proposed disclosure with the lender before filing the disclosure with EMMA.

in which it is provided; therefore, an issuer should not redact any information which would cause the disclosure to be materially misleading.

Instead of filing bank loan documents, an issuer could file a summary of some or all of the features relating to the bank loan with EMMA.[24] In preparing a summary, an issuer may wish to consider including all or some of the following features relating to the bank loan in a summary:

- Date of incurrence
- Original principal amount
- Maturity and amortization
- Interest rate, if fixed, or method of computation, if variable (and any default rates)
- Information on interest rate swaps, caps and other interest rate management products that hedge the bank loan
- Purpose/use of proceeds
- Collateral/security pledge (e.g. general obligation specified revenues, real property, personal property, etc.), and whether the pledge is on parity with or subordinate to bonds
- Covenants that are more restrictive or have higher threshold levels than or are in addition to those provided to bondholders
- Events of default, if different from bonds
- Remedies upon an event of default, if different than bonds
- Term out provisions if the bank loan allows the bank to seek repayment earlier than the stated maturity date (e.g., demand or put date)
- Terms under which the bank loan can be sold or transferred by the bank to other investors
- Disclosure of "most-favored nation"[25] or similar clause
- Demonstration of compliance with applicable additional debt tests
- Ratings, if assigned

Like the list contained in MSRB Notice 2012-18, the foregoing list is nonexclusive, and an issuer is free to add or delete features (e.g., other features listed in MSRB Notice 2012-18). In

[24] These Considerations assume an issuer will file the bank loan documents or a summary of some or all of the features relating to the bank loan; however, as footnote 22 explains, an issuer might choose to file the bank loan documents and file a summary of certain other features relating to the bank loan.

[25] In a bank loan agreement, a "most-favored nation" clause would entitle the lender to any additional or more restrictive covenants, additional or different events of default and/or greater rights or remedies that the issuer gives to any other lender or bondholder. The strongest versions of such clauses provide that the covenants, events of default and/or rights and remedies are automatically deemed to be incorporated into the bank loan agreement, without the need for a formal amendment.

determining whether to add features to a summary, issuers may wish to consider adding any feature that has an impact on the security of holders of outstanding bonds.

In preparing a summary of features relating to a bank loan, and determining whether to include any of the factors listed above, an issuer is faced with the same issue presented by redaction: the information that is provided must be accurate and not misleading in the context in which it is provided. In determining whether or not to include any particular feature of a bank loan in a summary, the issuer should consider whether the failure to include such information will result in the summary being materially misleading in the context in which it is provided.

Timing of Voluntary Disclosure/Identifying Affected CUSIPs

If an issuer concludes that it will voluntarily disclose information about a bank loan through EMMA, the issuer should make such disclosure in a timely manner. For example, such disclosure could be made in the same time frame as mandatory disclosure of material events under Rule 15c2-12 (i.e., within 10 business days).

Voluntary disclosures that are made by issuers are most useful when they are associated with the CUSIP numbers that are affected by the information disclosed. Therefore, issuers should consider adhering to the practice of identifying affected CUSIPs of their outstanding bonds as is currently followed for required continuing disclosure.

Terms of Usage/Disclaimers

In determining whether to make voluntary disclosure about a bank loan, issuers and their counsel may consider whether such voluntary disclosure:

- Creates a duty to disclose all material developments since any previously disseminated public disclosure, e.g., the issuer's most recent annual continuing disclosure;[26]

- Creates a duty to disclose information about the incurrence of other bank loans;[27] or

[26] In his treatise, Robert Fippinger concludes that: "Generally, the issuer is not required to disclose all material information at the time of making annual [continuing] disclosure and may limit statements to specific responses to the contractual undertakings, but the statements may not be misleading." *Fippinger* § 9:4.4 at 9-47. An issuer could presumably reach the same general conclusion with respect to voluntary disclosure about a bank loan, which is analogous to a more limited material event notice under Rule 15c2-12; however, if voluntary disclosure about a bank loan is accurate, but misleading in light of the circumstances in which it is made, the disclosure must be amplified in order not to be misleading. *See Fippinger* § 9:4.4 at 9-47. For example, if an issuer obtains a bank loan to address a liquidity problem, e.g., to pay operating expenses such as payroll, additional disclosure regarding the issuer's financial condition may be necessary.

[27] This concern might arise from cases such as *Minneapolis Firefighters' Relief Assoc. v. MEMC Elec. Materials*, Inc., 641 F.3d 1023 (8th Cir. 2011), in which the plaintiff alleged that the defendants had a duty to disclose certain information because they had a "pattern" of disclosing similar information. In that case, the Eighth Circuit rejected the plaintiff's argument.

- Creates a duty to disclose information about amendments or modifications to such bank loan.[28]

To address these issues, an issuer should consider use of terms of usage or disclaimers in connection with disclosure of information about a bank loan.[29] Such terms of usage or disclaimers should clearly provide:

- That the information is being made available on a voluntary basis,
- The date as of which the information speaks,
- That the issuer, by such filing, is not undertaking to update the information in the future or to report regularly on financial or other developments,
- That no representation is being made that there has not been a change in the affairs of the issuer since the date as of which the information speaks,
- Any limitations on the information gathering and reporting process,
- Limits on responsibility for third-party information, and
- Language negating any claims of implied state law contractual guaranties of the accuracy or completeness of the information.

Further, if forward-looking statements are contained in the information about a bank loan (for example, debt service schedules based on assumptions about obligations bearing a variable rate of interest), the terms of usage or disclaimers could include appropriate cautionary language about the forward-looking statements. Finally, if summaries of bank loan documents are provided and the bank loan documents are being filed (or will otherwise be made available), the issuer could make clear in the terms of usage or disclaimers that the summaries do not purport to be complete and that reference is made to the documents for full and complete statements of their provisions.

A sample of terms of usage/disclaimers is attached as Appendix C.

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[28] This concern might arise from cases regarding the so-called "duty to update," where subsequent disclosure is necessary "if a prior disclosure 'becomes materially misleading in light of subsequent events.'" *Backman v. Polaroid Corporation*, 910 F.2d 10, 17 (1st Cir. 1990) (*en banc*).

[29] Terms of usage or disclaimers may limit a disclaiming party's liability under the federal securities laws. For example, terms of usage or disclaimers may be used to appropriately limit a disclaiming party's liability with respect to information provided by third parties, provided that the disclaimer is specific and appropriately tailored as to the information disclaimed, and the disclaiming party does not know, and is not reckless in not knowing, that the statements disclaimed are materially false or misleading. Similarly, the federal courts of appeals have been developing the "bespeaks-caution" doctrine that economic projections, estimates of future performance and similar forward-looking statements in a disclosure document are not actionable when meaningful cautionary language elsewhere in the document adequately discloses the risks involved.

APPENDIX A

Bank Loan Disclosure Task Force

Participating Organizations

American Bankers Association (ABA)
Bond Dealers of America (BDA)
Government Finance Officers Association (GFOA)
Investment Company Institute (ICI)
National Association of Bond Lawyers (NABL)
National Association of Health and Educational Facilities Finance Authorities (NAHEFFA)
National Association of Independent Public Finance Advisors (NAIPFA)
National Federation of Municipal Analysts (NFMA)
Securities Industry and Financial Markets Association (SIMFA)

APPENDIX B

Brief History of Bank Purchases and Bank Loans in the Municipal Market

Bank Purchases of Municipal Bonds Prior to the Tax Reform Act of 1986

Historically, banks were major purchasers of municipal bonds through public offerings. In 1958 the Treasury Department estimated that of the $56.7 billion of outstanding municipal bonds, 27.9% were owned by banks.[30] Through much of the early 1970s, commercial banks held more than 15% of their assets in municipal securities.[31] By the early 1980s, banks were the biggest buyers of municipal bonds. For example, in 1980, the banking sector was the largest investor in the market, holding 39% of outstanding issues.[32]

Section 265(b) of the Code; Bank-Qualified Obligations

The Tax Reform Act of 1986 (the "1986 Tax Act") changed the tax consequences to banks of holding municipal bonds by adding Section 265(b) to the Internal Revenue Code of 1986 (the "Code"). Section 265(b) had the effect of eliminating the tax benefit for banks of owning most municipal bonds by preventing banks from deducting the carrying cost of such bonds.

Section 265(b)(3) of the Code, however, provides an exception from the general rule of Section 265(b) for "qualified tax-exempt obligations," which are usually referred to as "bank-qualified" or "BQ" obligations. Only governmental bonds and qualified 501(c)(3) bonds can be bank-qualified obligations. Bonds issued for the benefit of for-profit conduit borrowers (e.g., exempt facility bonds and qualified small issue bonds) cannot be bank-qualified.

"Traditional bank-qualified" or "traditional BQ" obligations are tax-exempt obligations that qualify for the original exception in Section 265(b)(3) of the Code. That exception was in effect from the adoption of the 1986 Tax Act until the adoption of the American Recovery and Reinvestment Act of 2009 ("ARRA") and became effective again on January 1, 2011 after the ARRA amendments to that exception expired. Traditional BQ obligations must be issued by a "qualified small issuer," i.e., an issuer which reasonably anticipates to issue, together with subordinate entities, not more than $10 million of tax-exempt obligations during the calendar year; therefore, an issue of traditional BQ obligations cannot under any circumstances exceed $10 million in principal amount. Additionally, because obligations issued by a governmental issuer for itself and any 501(c)(3) conduit borrowers count against such issuer's $10 million annual limit, it has been difficult for most 501(c)(3) organizations to find a qualified small issuer and obtain traditional BQ financing.

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[30] Investment Bankers Association of America, *Fundamentals of Municipal Bonds* (1959), at 20-21.

[31] *The Bond Buyer*, "Banks Return to Munis" (September 27, 2010). By way of comparison, as of September 2010, commercial banks held only about 2.2% of their assets in municipal securities. *Id*.

[32] Matthew R. Marlin, "Did Tax Reform Kill Segmentation in the Municipal Bond Market," 54 *Public Administration Review* 387 (Jul. – Aug. 1994).

Bank-Qualified Issuance from 1986 through 2008

After the 1986 Tax Act, bank direct purchases of municipal bonds generally were limited to traditional bank-qualified obligations. The banking sector became a net seller of municipal bonds beginning in the middle of 1986, and by mid-1992, banks held only 9% of all municipal bonds.[33]

Traditional bank-qualified obligations are typically issued by smaller, less frequent governmental issuers for their own benefit (i.e., not as a conduit for a 501(c)(3) organization).

From 1986 through 2008, traditional bank-qualified obligations typically would be fixed rate obligations structured to fully amortize during their stated term (5-10 years for equipment and 15-20 years for construction).

During this period, traditional bank-qualified obligations constituted a relatively small percentage of the new issuances of municipal bonds and attracted little attention in the marketplace. For example, from 2000 through 2008, traditional bank-qualified issuance was fairly consistent from year to year, ranging from approximately $13-17 billion per year.[34]

ARRA Expansion of Bank-Qualification in 2009 and 2010

To encourage banks to extend credit in the municipal market during 2009 and 2010, ARRA amended Section 265(b) to expand the scope of bank-qualification in two ways:

- $30 million bank-qualified obligations: During 2009 and 2010, the $10 million limit for qualified small issuers was increased to $30 million, and 501(c)(3) organizations were treated as qualified small issuers entitled to their own $30 million limit, and

- 2% de minimis bank-qualified obligations: Financial institutions are permitted to exclude new money tax-exempt bonds (regardless of otherwise non-BQ status) issued in 2009 and 2010 (and bonds issued to refund such new money bonds) up to an amount equal to 2% of the adjusted basis of the bank's assets in determining the bank's deduction for interest expenses.[35]

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[33] *Id*. During this same period, tax-exempt mutual funds and tax-exempt money market funds increased their holdings from near zero to over 20% of all outstanding issues. *Id*. The purchases of VRDOs by tax-exempt money market funds, however, provided banks with an opportunity to continue to play an important role in the municipal market by providing liquidity facilities or letters of credit to support such obligations. And, coming full circle, since 2009 many VRDOs have been converted into bank loans.

[34] Janney Capital Markets, "Municipal Bond Market Note" (September 14, 2011).

[35] Although some 2% de minimis bank-qualified obligations were structured as direct purchases/loans, banks also could obtain the benefit of these obligations by purchasing them in primary public offerings or the secondary market.

The changes made by ARRA had the desired effect: issuance of bank-qualified obligations doubled in 2009 and 2010. About 9% of municipal bonds sold in 2010, and 8% in 2009, were bank-qualified, compared with 4% in 2007 and 2008.[36]

The ARRA provisions enabled 501(c)(3) organizations, particularly health care organizations and educational institutions, to obtain substantial access to the bank-qualified market during 2009 and 2010. For many of these organizations, this was the first time they had access to this type of private, tax-exempt financing. This was also happening at a time when the ratings of many banks were downgraded, making the VRDO structure less attractive to issuers. Bank loans for 501(c)(3) organizations and larger governmental issuers immediately became an alternative to VRDOs supported by bank liquidity facilities or letters of credit. In fact, many of the bank loans in 2009 and 2010 were conversions by banks of existing liquidity facilities and letters of credit into funded loans.

The ARRA provisions also made bank loans to larger, more frequent governmental issuers possible.

Bank loans for 501(c)(3) organizations and larger governmental issuers under the ARRA provisions differed from most traditional bank-qualified deals for governmental units in two important ways:

(1) they were usually variable rate, often a percentage of one-month LIBOR plus a fixed credit spread, and

(2) the commitment of the bank to purchase the bonds or make the loan was often for a term (e.g., 3 years, 5 years, etc.) that was substantially shorter than the final maturity of the obligation.

Bank loans for 501(c)(3) organizations and larger governmental issuers under the ARRA provisions typically have been structured with terms and conditions (e.g., representations and warranties, covenants, events of default and remedies) that are identical or substantially similar to bank facilities for VRDOs.

Bank Loans after Expiration of ARRA

The ARRA amendments to Section 265(b) expired on December 31, 2010. As a result, during 2011 the issuance of bank-qualified obligations fell back to a level consistent with issuance from 2000 to 2008.[37] Traditional bank-qualified obligations continued to be issued primarily by governmental issuers for their own benefit, at fixed rates and held to maturity by the purchasing banks.

[36] *The Bond Buyer*, "Banks Return to Munis" (September 27, 2010). By September 2010, issuers had sold $57 billion of bank-qualified debt since the beginning of 2009, more than the four previous years combined.

[37] Janney Capital Markets, "Municipal Bond Market Note" (September 14, 2011).

Contrary to the expectations of many participants in the municipal market, however, some banks (including some of the country's largest banks or their non-bank affiliates) have continued to make bank loans to 501(c)(3) organizations and larger governmental issuers on a non-BQ basis since January 1, 2011. These non-BQ bank loans are generally being done on the same terms (variable rate, generally a percentage of LIBOR plus a fixed spread, with a limited holding period) as the BQ transactions done in 2009 and 2010.

APPENDIX C

Sample Terms of Usage/Disclaimers for Voluntary Disclosure Regarding Bank Loans

On ____, ___, [Full Name of Issuer] (the "Issuer") entered into a [loan agreement] with [identify lender] (the "Transaction"). [A copy of the [loan agreement] is attached hereto. Portions of the [loan agreement] have been redacted] [A summary of the [loan agreement] is attached hereto; the summary does not purport to be complete] [and reference is made to the [loan agreement] for full and complete statements of its provisions].

The Issuer is filing this information as a voluntary filing on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system. The Issuer is not required pursuant to any continuing disclosure undertaking to file this information and makes no commitment to update this information.

This information is only accurate as of its date. The Issuer makes no commitment to provide any notice (advance or otherwise) of any amendment, modification, redemption, cancellation, or other event or circumstance with respect to the Transaction.

The provision of this information to EMMA is not intended as an offer to sell any security and the Issuer does not intend that the Transaction involve the offering to the public of any security of the Issuer. No representation is made as to whether this information is material or important with respect to any particular outstanding debt issue of the Issuer or whether other events have occurred with respect the Issuer or its outstanding debt that might be material or important to owners of the Issuer's outstanding debt.

[Note to drafter: If forward-looking statements are contained in the information about a bank loan (for example, debt service schedules based on assumptions about obligations bearing a variable rate of interest), consider including appropriate cautionary language about the forward-looking statements.]