

# **Bond Case Briefs**

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## **To Disclose Or Not To Disclose - That Is The Bank Loan Question: Butler Snow**

Anyone involved in public finance for the last few months has asked themselves this question: Should a state or local government voluntarily disclose on EMMA the terms and conditions of a private bank loan transaction? The answer seems to be “yes” according to many industry groups involved in public finance. But is that truly the best answer for the municipal issuer? Oh dear, another question and we haven’t even answered the first one! So let us go back to the beginning.

Bank loan financings<sup>1</sup> are entered into directly with a bank without the involvement of an underwriter and are not subject to the continuing disclosure rules of Securities and Exchange Commission (“SEC”) Rule 15c2-12 (the “Rule”). As such, no offering documents are generally prepared and municipal issuers are not required to provide any information about bank loans via the Electronic Municipal Market Access website (“EMMA”), which is a service of the Municipal Securities Rulemaking Board (“MSRB”) (although information regarding these financings is typically included in a municipal issuer’s audited financial statements, which generally are filed on EMMA).

In April 2012, the MSRB released [Notice 2012-18, Notice Concerning Voluntary Disclosure of Bank Loans to EMMA](#), encouraging municipal issuers to voluntarily disclose bank loan financings on EMMA in order to provide “timely access for investors and other market participants to key information useful in making informed investment decisions.” The MSRB was concerned that investors needed the bank loan disclosure because of the lack of timeliness of information that is only included in the annual financials, covenants which could cause acceleration of the bank loan to the detriment of bondholders, and the dilution of bondholder’s security due to the creation of additional parity debt.

The MSRB is not alone. Since 2012, the Government Finance Officers Association, the National Federation of Municipal Analysts, Standard & Poor’s, and Moody’s Investors Service have all released white papers or best practice statements echoing the MSRB’s concerns and recommending that municipal issuers voluntarily disclose bank loan financings.<sup>2</sup> In addition, in March 2012, a Bank Loan Disclosure Task Force comprised of numerous industry groups issued a paper entitled [“Considerations Regarding Voluntary Secondary Market Disclosure About Bank Loans.”](#)

Fast forward three years. According to remarks made by Lynnette Kelly, Executive Director of the MSRB, during the National Association of Bond Lawyers 13th Annual Tax & Securities Law Institute held in New Orleans in March 2015, extremely few (less than a 100) bank loans have been disclosed on EMMA since 2012. In January 2015, the MSRB published a [Market Advisory on Disclosure of Bank Loans](#) again reiterating the necessity for municipal issuers to voluntarily disclose bank loan information. The MSRB also sent a comment letter to the SEC requesting a thorough review of the Rule to enhance the quality and timeliness of information made available to the municipal securities market, including requiring the disclosure of bank loan financing.

Issuers should carefully consider whether to voluntarily disclose bank loan information. If the bank loan does not materially increase the issuer’s overall debt profile or does not include covenants or

other features that would materially, negatively impact existing bondholders, it is arguable that no disclosure is needed. Factors weighing in favor of disclosure may include increases in overall debt that may impact the issuer's credit position, covenants or events of default that prefer the bank lender over other bondholders, or structures that may negatively impact payment streams available to bondholders.

Issuers must also decide what information to provide in a voluntary disclosure, keeping in mind that any items posted on EMMA, including voluntary information about bank loans, must not be materially inaccurate or misleading in the context in which it is provided. It is easiest to file the complete loan financing document; however, lenders may wish to redact information they consider proprietary. In some instances, the requested redactions may cause concern about materially misleading disclosures. Issuers can also file a summary of some or all features of a bank loan; however, issuers should carefully consider the information included in the summary due to concerns about material omissions or inaccuracy.

The answer to the question posed at the beginning of this article is "maybe." Since disclosure is not required, municipal issuers and their counsel should carefully consider their responsibilities under the federal securities laws in determining whether (and what) to voluntarily file with respect to bank loans.

#### Footnotes

[1] We are assuming for the purposes of this blog that the bank loan is a municipal security. Whether or not a bank loan is or is not a "municipal security" is a discussion for another day and another blog post.

[2] See: <http://www.gfoa.org/understanding-bank-loans>,  
<http://www.gfoa.org/understanding-bank-loans> ;  
<http://www.bondbuyer.com/media/pdfs/BBCal13-Reining.pdf> ,  
<http://www.treasurer.ca.gov/cdiac/seminars/2014/20140205/sp.pdf> ,  
[https://www.moodys.com/research/Moodys-Growth-in-bank-loan-and-private-financing-creating-information-PR\\_310660?WT.mc\\_id=AM~RmluYW56ZW4ubmV0X1JTQl9SYXRpbmdzX05ld3NfTm9fVHJhbnNsYXRpb25z~20141016\\_PR\\_310660](https://www.moodys.com/research/Moodys-Growth-in-bank-loan-and-private-financing-creating-information-PR_310660?WT.mc_id=AM~RmluYW56ZW4ubmV0X1JTQl9SYXRpbmdzX05ld3NfTm9fVHJhbnNsYXRpb25z~20141016_PR_310660)

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*