SENATE BILLS 770 AND 870
CONSTITUTIONAL TESTIMONY

Mr. Chairman and Committee Members:

Thank you for the opportunity to testify today about Senate Bills 770 and 870. By way of introduction, I am Jeff Soles, bond and election attorney with Thrun Law Firm. I have been practicing in the bond and election area for over 20 years, the last 18 of which have involved public school districts in the State of Michigan. The Thrun Law Firm is a familiar name in that it has provided bond and election law and other legal services to public education institutions - both K-12 and post-secondary - in the State of Michigan for over 60 years. Since 1955, Thrun Law Firm has provided technical legal assistance to the Legislature, upon request, for many legislative initiatives involving public education including but not limited to, assisting with the drafting and revision of the 1955, 1976 and 1996 school codes, and the 1966 Community College Act. Most recently, we have provided technical legal assistance relating to the amendments to the Teacher Tenure law, PERA, to implement the anti-strike legislation.

Senate Bills 770 and 870 would significantly and detrimentally alter the Act that governs the School Bond Qualification and Loan Program and how the program is administered for hundreds of Michigan school districts. The Program, as you are all aware, is mandated by Article IX, Section 16 of our Michigan Constitution. The Program, in one form or another, has been around for over 60 years, helping school districts meet their capital improvement needs while limiting the millage impact on local taxpayers. The "gist" of the Program permits school districts to cap debt millage at a reasonable level to their local taxpayers and to borrow any excess debt service needs from the State in the early years of a bond issue. Such a school district would then continue to levy the capped millage in later years to payback the State for the loan. Importantly, these are loans, not grants or subsidies from the State of Michigan to school districts. Those loans are repaid in full, with interest, by school districts. Michigan is one of only eight states that do not provide any <u>subsidy</u> for the construction of K-12 school facilities - Michigan only provides this <u>loan</u> Program.

Article IX, Section 16 grants a <u>school district</u> the discretion to elect to borrow from the State for a portion of its debt service payments so long as that school district is levying the statutorily prescribed millage - not to exceed 13 mills. Currently, and under the proposed Senate Bill 770, that statutorily prescribed millage is 7 mills. So as long as a school district is levying at least 7 mills, that school district is constitutionally given the <u>right</u> to borrow from the State and, as it states in Article IX, Section 16, once the school district has elected to borrow the State <u>shall</u> lend the funds to the school district for its debt service payments. Senate Bill 870 and several provisions of Senate Bill 770 violate this sole constitutional prerequisite to a school district electing to borrow from the State under the Program.

First, Senate Bill 770 would prohibit any new school district bond issue from planning to borrow to meet debt service payments once the size of the Program exceeds $1.8 billion. It is estimated that the $1.8 billion cap will be reached sometime late 2014 and, if Senate Bill 770 is passed in its present form, the Program will remain above that cap until about 2042. That would be 28 years with no new school district bond issue being permitted to elect to borrow from the State under the Program, even if the school district is levying at or above the minimum prescribed level as provided by Article IX, Section 16. The proposed $1.8 billion cap for the Program clearly violates Article IX, Section 16.

Second, Senate Bill 770 would establish a single final mandatory loan repayment date for all bonds qualified through the Program with a "cooling off" period. Senate Bill 870 has a similar "cooling off" period. The "cooling off" period under Senate Bill 770 requires that no new mandatory loan repayment date can be established until 30 days after all qualified bonds and qualified loans have been fully paid, including any refunding bonds to refund qualified bonds and qualified loans. The "cooling off" period under Senate Bill 870 is less onerous in that it would permit the State Treasurer to qualify a new bond issue even while other qualified bonds of the school district remain outstanding so long as all qualified loans of the school district have been paid for five years. The single final mandatory loan repayment date and the two "cooling off" periods would force school districts who need to issue new bonds to levy millage in excess of the minimum millage threshold established by statute. Over time, this provision would force school districts to levy millage in excess of 13 mills, which is the constitutionally established maximum that a school district must levy in order to elect to borrow from the Program. The effect of the single final mandatory loan repayment date and "cooling off" periods on future school district bonds would be to require school districts to levy not only greater than the statutorily prescribed minimum of 7 mills, but ultimately greater than the constitutionally prescribed maximum of 13 mills. Accordingly, these provisions also violate Article IX, Section 16.

Third, Senate Bill 770 would require all school districts with outstanding bonds under the Program to conduct an annual review of millage requirements based upon current economic conditions and would require school districts to increase the millage above what was disclosed to the voters, above the 7 mill minimum millage requirement prescribed by the Legislature and, ultimately, above the limit established by contract between the school district and the State. This provision violates Article I, Section 10, of the Michigan Constitution as a Legislative impairment of contract.

The last constitutional issue I will discuss is not intended to be a criticism of the State Treasurer or anyone within the Department of Treasury. Instead, it is our legal determination that the proposed delegation of Legislative authority and the proposed grant of discretion in this context is constitutionally impermissible. Senate Bills 770 and 870 propose to delegate Legislative authority mandated by Article IX, Section 16 to the Department of Treasury. Those bills would also grant broad discretion to the State Treasurer (who will delegate this function to the Department's employees or appointed officials) to administer the Program. Currently, Act 92 - in compliance with Article IX, Section 16 - contains objective, Legislatively-established criteria. Once those criteria have been met by a school district, current law requires the State Treasurer to permit that school district to participate in the Program. Senate Bills 770 and 870 maintain much of the constitutionally permissive objective criteria under current law. However, Senate Bills 770 and 870 add additional subjective criteria exercisable by the State Treasurer or, most likely, employees or appointed officials of the State Treasurer. The final decision regarding a school district's participation in the Program is changed from an obligatory system if all Legislatively-established criteria are satisfied to one that is entirely discretionary on the part of the State Treasurer, its employees or appointed officials. Most troubling, that discretion can be exercised after voters have approved a bond issue, and even after bonds have been sold in the market, either of which could fundamentally change the structure of the bond issue after voter approval. This delegation and grant of broad discretion violates Article IX, Section 16, since those functions are specifically and constitutionally reserved to the Legislature by Article IX, Section 16.

In closing, the significant constitutional issues surrounding Senate Bills 770 and 870 should be addressed before these bills proceed. I recommend that this body to seek a formal opinion from the Attorney General's office regarding the Constitutionality of Senate Bills 770 and 870 before moving these bills out of committee. Again, thank you for the opportunity to testify on this important matter.