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February 19, 2013

**Via E-mail to <http://www.msrb.org/CommentForm.aspx>**

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

Re: MSRB 2012-63 Request For Comment On MSRB Rules and Interpretive Guidance

Dear Mr. Smith:

Wells Fargo Advisors, LLC (“WFA”) applauds the Municipal Securities Rulemaking Board (“MSRB” or “the Board”) for seeking public comment as part of the Board’s review of its rules and interpretive guidance. WFA appreciates MSRB’s willingness to consider comment on MSRB’s entire rulebook, but notes that in view of the scope of MSRB’s rulebook and interpretive guidance the period of review granted was brief. Consequently, WFA urges the MSRB to consider comments offered by dealers and the public that the MSRB receives subsequent to the closure of its formal comment period. Furthermore, WFA respectfully requests that the MSRB consider adjusting the length of comment periods for any proposed modifications arising from the Board’s rulebook review to assure that dealers and public have sufficient time to provide a more considered response.

WFA consists of brokerage operations that administer almost \$1.2 trillion in client assets. It employs approximately 15,414 full-service financial advisors in 1,100 branch offices in all 50 states and 3,248 licensed financial specialists in 6,610 retail bank branches in 39 states.<sup>1</sup> WFA

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<sup>1</sup> WFA is a non-bank affiliate of Wells Fargo & Company (“Wells Fargo”), a diversified financial services company providing banking, insurance, investments, mortgage, and consumer and commercial finance across the United States of America and internationally. Wells Fargo has \$1.4 trillion in assets and 265,000 team members across

offers a range of fixed income solutions to its clients, many of whom regularly transact municipal securities in the secondary markets.

Below is an Executive Summary outlining WFA's comments to the MSRB's rules and interpretive guidance, followed by a detailed discussion of these topics.

## **I. Executive Summary**

WFA shares the Board's interest in assuring that MSRB's rules achieve their purpose of protecting investors and the public's interest in an efficiently functioning municipal securities market. In support of this objective, WFA respectfully requests that MSRB consider the following as part of its review.

- *Refine definition of broker's broker to reflect limited nature of broker's broker activities.*

Beginning with its 2010 request for comment on draft MSRB Guidance on Municipal Securities Broker's Brokers, the Board received numerous comments concerning the need for a clear definition of municipal securities broker's brokers.<sup>2</sup> WFA respectfully requests that MSRB reconsider these comments to help clarify the broad definition of broker's broker and ensure that Rule G-43 is applied only as broadly as necessary to achieve the rule's intended purpose.

- *Preserve fair and reasonable pricing standard.*

WFA believes MSRB's existing standard that dealers achieve "fair and reasonable" pricing in view of "all relevant factors" is sufficient to protect investor interests while enabling efficient dealer compliance.

- *Maintain current Appropriate Principal supervisory framework.*

WFA believes the existing Appropriate Principal framework balances the MSRB's interests in investor protection with the needs of an efficiently functioning municipal securities market.<sup>3</sup>

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more than 80 businesses. Wells Fargo's brokerage affiliates also include Wells Fargo Advisors Financial Network LLC ("WFAFN") and First Clearing LLC, which provides clearing services to 86 correspondent clients, WFA and WFAFN. For the ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

<sup>2</sup> See, for example, proposed definition of municipal securities broker's broker, SIFMA response to 2010-35, 4, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/-/media/Files/RFC/2010/2010-35/SIFMA.ashx>.

<sup>3</sup> MSRB Rule G-27(b)(ii)(C), <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-27.aspx>.

## **II. Refine Definition of Broker's Brokers Under MSRB Rule G-43 to Reflect Limited Nature of a Broker's Broker Activities.**

In addition to covering the activities of a dealer which "holds itself out as a broker's broker," MSRB Rule G-43 defines a broker's broker to include "a dealer, or a separately operated and supervised division or unit of a dealer, that principally effects transaction for other dealers."<sup>4</sup> WFA shares the view of many earlier commenters that this definition is overbroad, and respectfully requests that the MSRB consider revising the definition to narrow its scope.<sup>5</sup> WFA also respectfully requests that the MSRB issue interpretive guidance clarifying specific activities or business practices that may cause a dealer to fall within the broker's broker definition.

### **a. MSRB should refine its broker's broker definition to focus on any firm that represents itself as a broker's broker.**

In MSRB's May 2012 response to comments received by the Securities Exchange Commission ("SEC" or "the Commission") in relation to the proposed broker's broker rule, the Board addressed concerns related to the broker's broker definition. In particular, MSRB disagreed with comments suggesting that the meaning of the phrase "holds itself out as a broker's broker" is unclear. MSRB clarified that "a selling dealer should be entitled to rely on the representation of another dealer that it is a broker's broker."<sup>6</sup>

In light of the MSRB's concern that dealers should be able to rely on the representation of firms that describe themselves as broker's brokers, WFA respectfully requests that MSRB consider revisions that emphasize the "holding out" element as the primary criteria in the definition of a broker's broker. In addition, WFA respectfully asks the MSRB to consider limiting the portion of the broker's broker definition covering dealers that "principally effect transactions for other dealers" by providing interpretive guidance as discussed below. WFA believes that such revisions would tailor the definition to the rule's purpose by assuring that the rule covers dealers representing themselves to other members of the dealer community as broker's brokers.

### **b. Additional interpretive guidance should provide examples of conduct or business practices typifying a dealer's status as a broker's broker.**

MSRB's May 2012 response to the SEC reiterated the Board's objection to a proposed multi-factor broker's broker definition which had been earlier proposed by the Securities Industry and

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<sup>4</sup> MSRB Rule G-43(d)(iii), <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-43.aspx>.

<sup>5</sup> See for example, SIFMA Response to Request for Comment on MSRB Guidance on Brokers' Brokers MSRB Notice 2010-35, 4, [http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/~/\\_media/Files/RFC/2010/2010-35/SIFMA.ashx](http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/~/_media/Files/RFC/2010/2010-35/SIFMA.ashx)

<sup>6</sup> MSRB Response to Comments on File No. SR-MSRB-2012-04, 4-5, <http://www.msrb.org/RFC/2012-04/ResponseToSEC.pdf>.

Financial Markets Association (“SIFMA”). MSRB believed SIFMA’s detailed definition would enable a firm functioning as a broker’s broker to “avoid application” of the rule by structuring its business so that at least one criteria was not present.<sup>7</sup> For example, under SIFMA’s eight-part proposed definition, MSRB believed a firm “could simply carry customer accounts” to avoid application of the rule.

WFA believes, however, that it is possible to view the various criteria SIFMA presented as examples of conduct or practice typifying a broker’s broker instead of a requirement that each business practice be present for a firm to be subject to the rule. Under such an interpretation of SIFMA’s proposed definition, a dealer should be subject to the broker’s broker rule if a sufficient number of those factors are present.<sup>8</sup> With that view in mind, WFA respectfully requests that the MSRB consider interpretive guidance that reconsiders the list from SIFMA’s proposed definition as a set of business practices that typify the broker’s broker business model.

In WFA’s view, MSRB guidance would apply these items as facts and circumstances that help determine whether a dealer is a broker’s broker. MSRB can, of course, make clear in the guidance that a firm otherwise holding itself out as a broker’s broker could not evade application of the rule by the absence from its business model of any particular business practice otherwise identified in the guidance. The guidance could also provide direction as to the relative weight of the factors. Likewise, the guidance could indicate that the presence of a greater number of the factors makes it more likely that a firm is subject to the broker’s broker rule.

### **III. Preserve MSRB Rule G-30 Standards for Fair and Reasonable Pricing.**

In its 2012 report on the municipal securities market, the SEC urged the MSRB to finalize guidance on dealer duties with respect to the establishment of prevailing market price “consistent with that provided by FINRA.”<sup>9</sup> Furthermore, the Commission encouraged the MSRB to adopt a “best execution” duty for municipal securities dealers.<sup>10</sup> WFA believes that MSRB’s existing fair and reasonable guidance on dealer pricing obligations appropriately balances the MSRB’s interest in protecting investors while recognizing the idiosyncratic nature of the municipal securities market.

#### **a. MSRB should carefully consider prior responses to its 2010 draft interpretive guidance on prevailing market prices as part of its rulebook review.**

In 2010, MSRB sought comment on draft interpretive guidance concerning the determination of “prevailing market price” in relation to a dealer’s duty to provide fair and reasonable prices under MSRB Rule G-30. The draft guidance sought to institute “the same baseline provisions”

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<sup>7</sup> *Id.* at 5.

<sup>8</sup> SIFMA response to 2010-35, 4.

<sup>9</sup> SEC Report on the Municipal Market, 148, (July 31, 2012), <http://www.sec.gov/news/studies/2012/munireport073112.pdf>.

<sup>10</sup> *Id.* at 149-50.

for determining prevailing market price as FINRA uses for corporate bonds.<sup>11</sup> In its municipal market report, the SEC took note of the fact that MSRB's 2010 draft was not revised or submitted to the SEC for incorporation in MSRB's rulebook. In contrast, SEC approved FINRA's interpretive guidance on the determination of prevailing market price in 2007. On this basis, the SEC encouraged the MSRB to "consider possible rule changes" to assure that standards for determining prevailing market price are "consistent with that provided by FINRA for non-municipal debt securities."<sup>12</sup>

WFA commends the MSRB for not moving abruptly to seek approval the 2010 draft guidance on the determination of prevailing market price. Moreover, in view of SEC's recommendation that MSRB impose a consistent framework between municipal bonds and non-municipal securities, WFA respectfully urges MSRB to carefully review the comments it received in response to its 2010 draft before considering any revision.<sup>13</sup> These comments highlight important differences between the municipal securities market and for the "non-municipal debt securities" market covered by FINRA guidance. As SIFMA noted in its response to MSRB's 2010 guidance, efficient and effective regulation of fixed income markets requires regulators to recognize "the unique nature of the municipal securities market."

In fact, the SEC municipal market report also recognizes that illiquidity and inactivity of trading is typical for most municipal securities with "99% of outstanding municipal securities" failing to "trade on any given day."<sup>14</sup> With such municipal market idiosyncrasies in mind, SIFMA's letter observes that a "rigid hierarchy" of factors for the determination of prevailing market price might force "dealers to ignore important pricing information" critical to the establishment of a fair and reasonable price. For example, SIFMA expressed concern that under the 2010 draft guidance, dealers might be constrained in their ability to consider such factors as "quotation information or indications of interest in the same or *similar* securities" (emphasis added) in their determination of prevailing market price.<sup>15</sup> WFA shares SIFMA's view that a dealer may need to consider a "myriad of factors" in the determination of prevailing market price and that such flexibility is critical to a dealer's ability to meet its obligation to provide fair and reasonable prices in the municipal market.

**b. MSRB should maintain the existing fair and reasonable pricing duty outlined in Rule G-30 rather than adopt a best execution standard.**

The SEC's municipal market report encourages the MSRB to "consider a rule that would require municipal dealers to seek 'best execution' of customer orders for municipal securities."

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<sup>11</sup> MSRB Notice 2010-10, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-10.aspx>

<sup>12</sup> SEC Report on the Municipal Market, 148.

<sup>13</sup> Comments on MSRB Notice 2010-10, <http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-10.aspx?c=1>

<sup>14</sup> SEC Report on the Municipal Market, 113.

<sup>15</sup> SIFMA Response to MSRB Notice 2010-10, 2-4, <http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/~media/Files/RFC/2010/2010-10/SIFMACommentLetter.ashx>.

SEC contrasts the municipal rule with FINRA Rule 5310 which requires dealers to “use reasonable diligence” in pursuit of the best available execution for customer corporate bond orders. Accordingly, SEC believes that MSRB could “buttress dealer fair pricing obligations” for municipal securities by “incorporating a best execution obligation into MSRB rules and providing related guidance similar to FINRA’s approach to corporate fixed income securities.”<sup>16</sup>

WFA believes existing MSRB rules and guidance regarding dealer duties to provide fair and reasonable prices appropriately balances investor protection interests with the need for efficient municipal markets. Furthermore, WFA notes that FINRA’s best execution standard is tempered by supplementary material noting that “accessibility” of quotes is a factor to be considered in evaluating whether a dealer has met its duty to provide the best execution for a corporate bond transaction. A corporate dealer must take “reasonable steps” using the dealer’s “market expertise” to arrive at the best available execution.<sup>17</sup> Similarly, MSRB requires a dealer to exercise its “best judgment” about a municipal security’s “fair market value at the time of the transaction” to arrive at a fair and reasonable price.<sup>18</sup> Considering the above described complexity of municipal markets, WFA believes the fair and reasonable pricing duties of a municipal dealer remain an appropriate means of balancing MSRB goals of protecting investors and fostering efficient municipal markets.

#### **IV. Maintain MSRB Rule G-27 Framework for Identifying the Appropriate Principal Supervision of Municipal Securities Activities.**

In its recent concept proposal to strengthen account opening and supervisory practices for online municipal securities transactions with individual investors, MSRB sought to require that firms “have a municipal securities principal approve each new online account” prior to a municipal transaction.<sup>19</sup> A number of comment letters opposed such heightened supervisory account review measures as unnecessary to achieve investor protection aims.<sup>20</sup> WFA encourages MSRB to consider these comments not only with respect to the concept proposal but also as part of its rulebook review more generally.

As noted in MSRB Rule G-27, municipal dealers must develop and maintain supervisory systems to assure compliance with relevant securities laws, regulations and MSRB rules. The rule designates the appropriate principals for the supervision of specific classes of municipal activity. Under the Rule’s Appropriate Principal standard, a general securities sales principal (series 9 and 10) may be responsible for, among other things, approval of the opening of a

<sup>16</sup> SEC Report on the Municipal Market, 149.

<sup>17</sup> FINRA 5301.03 Supplementary Material on Best Execution and Debt Securities, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=10455](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10455).

<sup>18</sup> MSRB Review of Dealer Pricing Responsibilities, January 26, 2004, <http://msrb.org/Rules-and-Interpretations/MSRB-Rules-General/Rule-G-30.aspx?tab=2>

<sup>19</sup> MSRB Notice 2012-41 – Request for Comment on Concept Proposal to Strengthen Account Opening and Supervisory Practices of Dealers Effecting Online Municipal Securities Transactions With Individual Investors, <http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-41.aspx?n=1>

<sup>20</sup> See, for example, SIFMA response to 2012-41, 5-6, <http://www.msrb.org/RFC/2012-41/sifma.pdf>.

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customer account and periodic reviews of activity in customer accounts.<sup>21</sup> Accordingly, as numerous commenters noted in response to the heightened supervisory requirement included in MSRB's proposal to strengthen online municipal securities supervision, "a general securities sales principal has the requisite skills" to approve a new account which may or may not later engage in municipal securities transactions.<sup>22</sup>

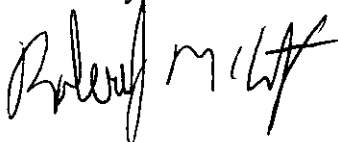
WFA would add that in FINRA's 2012 study outline for the General Securities Sales Supervisor exam, FINRA notes that 47% of the Exam's questions cover issues relating to the supervision of accounts and sales activities.<sup>23</sup> In addition, the outline indicates that the general securities supervisory exam provides significant coverage of municipal securities regulation as well. In view of the foregoing, WFA respectfully requests that the MSRB to maintain its current structure for Appropriate Principal supervision because it is well designed to protect investors and facilitate efficient municipal market compliance by municipal dealers.

### **Conclusion**

WFA appreciates that opportunity to offer comment for the Board to consider as part of its MSRB Rulebook Review. WFA believes the foregoing suggestions will help the MSRB achieve its purpose of promoting efficient compliance in the public interest.

If you have any questions regarding this comment letter, please do not hesitate to contact me.

Sincerely,



Robert J. McCarthy  
Director of Regulatory Policy

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<sup>21</sup> MSRB Notice 2007-32, Guidance on Implementation of New Supervisory Requirements Under Rule G-27, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2007/2007-32.aspx>.

<sup>22</sup> See SIFMA response to 2012-41, 5-6.

<sup>23</sup> FINRA General Securities Sales Supervisor Qualification Examination (Test Series 9 and 10) Study Outline, 2, <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/industry/p011069.pdf>