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May 6, 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 2013-07 Request for Comment on Revisions to Suitability Rule

Dear Mr. Smith:

Wells Fargo Advisors, LLC (“WFA”) thanks the Municipal Securities Rulemaking Board (“MSRB” or “the Board”) for the opportunity to comment on MSRB’s proposed revisions to the suitability rule. WFA applauds the Board’s continuing effort to promote regulatory efficiency.<sup>1</sup> Accordingly, WFA encourages MSRB to carefully consider comments it receives in relation to its proposed suitability revisions to assure that the Board meets its objective of harmonizing its suitability rule with FINRA’s and that any differences reflect “unique attributes of the municipal securities market.”<sup>2</sup>

WFA consists of brokerage operations that administer approximately \$1.3 trillion in client assets. It employs approximately 15,354 full-service financial advisors in 1,100 branch offices in

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<sup>1</sup> MSRB Notice 2013-06 MSRB Seeks Input on Annual Planning, 2, <http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-06.aspx?n=1>.

<sup>2</sup> MSRB Notice 2013-07 Request for Comment on Revisions to Suitability Rule, 3, <http://msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-07.aspx?n=1>

all 50 states and 3,204 licensed financial specialists in 6,610 retail bank branches in 39 states.<sup>3</sup> WFA offers a range of fixed income solutions to its clients, many of whom regularly transact municipal securities in the secondary markets.

WFA offers the comments below in support of MSRB's proposed alignment of its suitability rule with FINRA's and to advance the Securities and Exchange Commission ("SEC") recommendation that MSRB continue efforts at "otherwise harmonizing MSRB rules with similar FINRA rules."<sup>4</sup> To achieve harmonization, WFA believes that MSRB's rule should include language similar to that in FINRA's suitability rule outlining limits on customer-specific suitability obligations for qualifying institutional accounts. Furthermore, WFA believes that MSRB should offer dealers guidance similar to that provided by FINRA clarifying that a dealer's suitability obligations relating to hold recommendations apply only to explicit recommendations.<sup>5</sup>

#### **I. MSRB's Suitability Rule Should Include Language Describing Dealer's Limited Suitability Obligations for Sophisticated Municipal Market Professionals.**

WFA requests that MSRB adopt a structure parallel to that of the FINRA suitability rule to make clear that under certain circumstances, a dealer has limited suitability obligations to institutional customers.<sup>6</sup>

The MSRB revised its definition of sophisticated municipal market professionals ("SMMPs") in 2012 "to maintain consistency with the revised FINRA suitability rule for institutional customers."<sup>7</sup> In its proposed suitability rule revisions, the MSRB again acknowledged that FINRA's suitability rule has provisions similar to those that "exempt dealers from the duty to perform a customer-specific suitability determination" for recommendations to SMMPs. Furthermore, MSRB has identified the promotion of regulatory efficiency as among its top priorities for 2013. Moreover, MSRB has identified the alignment of its rule format with that of

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<sup>3</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's brokerage affiliates also include Wells Fargo Advisors Financial Network LLC ("WFAFN") and First Clearing LLC, which provides clearing services to 89 correspondent clients, WFA and WFAFN. For ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

<sup>4</sup> SEC Report on the Municipal Securities Market, 141, <http://www.sec.gov/news/studies/2012/munireport073112.pdf>

<sup>5</sup> FINRA Regulatory Notice 12-25 Additional Guidance on FINRA's New Suitability Rule, 5, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p126431.pdf>.

<sup>6</sup> FINRA 2111 Suitability part (b) explains that a FINRA member "fulfills customer-specific suitability obligations" to institutional customers when the firm reasonably believes the customer can independently evaluate investment risks and the customer affirmatively indicates that it is exercising such independent judgment, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=9859](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859).

<sup>7</sup> MSRB Notice 2012-16 MSRB Files Restated Interpretive Notice on Sophisticated Municipal Market Professionals, 2, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-16.aspx>.

other regulators as one of its designated approaches to achieve the objective of regulatory efficiency.<sup>8</sup> Nevertheless, rather than adopt a suitability rule structure that parallels FINRA's with respect to potential limits on duties to institutional customers, MSRB is proposing a separate rule on SMMPs.<sup>9</sup> WFA notes that MSRB's proposed SMMP codification acknowledges that the rule has "interdependencies" with other MSRB rules, including MSRB's proposed revised suitability rule.<sup>10</sup>

WFA respectfully requests that MSRB reconsider its plan to handle the SMMP exemption separately from the revised suitability rule. Treating a municipal dealer's suitability obligations to SMMPs differently than a FINRA member's institutional suitability duties as reflected in FINRA 2111(b) undermines MSRB's broader objective to "promote regulatory efficiency."<sup>11</sup> In order to understand and comply with its municipal suitability obligations to an institutional client, dealers currently need to reference three separate MSRB rules and accompanying guidance.<sup>12</sup>

In addition, WFA is concerned that the SMMP exemption continues to impose additional suitability requirements for dealers conducting transactions in municipal securities with institutional clients beyond those required under FINRA 2111(b). Dealers considering whether an institutional account is a SMMP must assess the factors required under 2111(b) as well as additional criteria such as the institutional customer's ability to independently evaluate the "market value" of municipal securities and the "amount and type of municipal securities owned [by] or under management" of the institutional customer.<sup>13</sup> Consequently, even though MSRB seeks to harmonize its suitability rule with FINRA's, dealers will likely be required to maintain separate policies and procedures to satisfy suitability obligations to institutional customers transacting in municipal securities. Since some institutional clients may satisfy FINRA's exemptive criteria but not MSRB's, dealers will likely need to invest in costly technology enhancements to distinguish SMMPs under the MSRB rule from those institutional accounts eligible for the exemption described in FINRA 2111(b) for other types of securities.

WFA is also concerned the difference in rule structure will lead to regulatory confusion for clients and regulators. For example, the same institutional client might be required to provide more detailed information to facilitate a dealer's suitability obligations for an investment grade municipal bond transaction than for transactions in other types of securities that may entail greater investment risks. FINRA examiners will also have to be familiar with the difference in

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<sup>8</sup> MSRB Current Priorities, <http://www.msrb.org/About-MSRB/About-the-MSRB/MSRB-Current-Priorities.aspx>

<sup>9</sup> [MSRB Notice 2013-10](http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-10.aspx?n=1) Request for Comment on Proposed Sophisticated Municipal Market Professional Rules, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-10.aspx?n=1>.

<sup>10</sup> *Id.*

<sup>11</sup> MSRB Current Priorities.

<sup>12</sup> MSRB G-8,(a)(xi) defining institutional accounts, MSRB G-19 Suitability, MSRB G-17 Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals, July 9, 2012, <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules.aspx>.

<sup>13</sup> Text of Sophisticated Municipal Market Professional definition, <http://www.msrb.org/msrb1/pdfs/MSRB-2012-05-Exhibit-5.pdf>.

structure of the FINRA suitability rule and the MSRB's to understand the potential difference between a dealer's suitability obligations to institutional customers effecting municipal transactions and those transacting in other types of securities. This would be true despite MSRB's recent efforts to "maintain consistency with FINRA" in modifying the definition of a SMMP.<sup>14</sup>

The simplest means of addressing this potential for duplication and confusion would be for MSRB to synchronize its SMMP definition with the institutional provisions in 2111(b) and include it as part of the revised MSRB suitability rule.

## **II. MSRB Should Provide Guidance Clarifying that Suitability Obligations for Recommendations to Hold Apply Only to Explicit Hold Recommendations.**

WFA believes that MSRB should provide guidance similar to that FINRA has provided making clear that suitability obligations concerning hold recommendations cover only explicit hold recommendations.<sup>15</sup>

MSRB's request for comment on proposed revisions to the suitability rule explains how the Board has incorporated provisions of FINRA's suitability rule covering recommended "investment strategies" including "an explicit recommendation to hold a municipal security or securities."<sup>16</sup> The proposed rule text specifies certain types of communications about "investment strategies" that are excluded from coverage under the suitability rule unless they accompany a specific recommendation. It does not, however, offer detail to clarify what constitutes an explicit recommendation to hold a municipal security or group of municipal securities.<sup>17</sup>

In guidance issued in December 2012, FINRA provided an example of a covered recommendation to hold in which a registered representative "explicitly advises the customer not sell any securities" as part of a "quarterly or annual investment review." The December guidance also reinforces earlier FINRA guidance exempting "implicit recommendation[s] to hold" from coverage under the suitability rule. Moreover, FINRA's guidance makes clear that even when an explicit hold recommendation is made, it does not ordinarily create a duty to monitor the position or to later make recommendations concerning the security or securities.<sup>18</sup>

WFA respectfully requests that MSRB issue guidance similar to FINRA's clarifying the nature of an explicit recommendation to hold. Likewise, WFA encourages MSRB to ensure its guidance addresses the fact that an explicit recommendation to hold is made does not, by itself,

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<sup>14</sup> MSRB Notice 2012-16 at 2.

<sup>15</sup> FINRA Regulatory Notice 12-25 at 5.

<sup>16</sup> MSRB Notice 2013-07 at 1.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> FINRA Regulatory Notice 12-55 Guidance on FINRA's Suitability Rule, 3, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p197435.pdf>,

Ronald W. Smith

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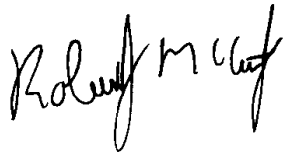
create an obligation to monitor a municipal security or group of securities, or to make subsequent recommendations.

### **Conclusion**

WFA appreciates the opportunity to offer comment for the MSRB to consider as the Board revises the municipal suitability rule. WFA believes the suggestions above will help MSRB achieve its objective of harmonizing its suitability rule with FINRA's and further the Board's objective to facilitate regulatory efficiency.

If you have any questions regarding this comment letter, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. McCarthy". The signature is written in a cursive, somewhat stylized font.

Robert J. McCarthy

Director of Regulatory Policy