Regulatory Affairs
1 North Jefferson Ave
St. Louis, MO 63103
MO 3110
314-955-6851
Fax 314-955-9668

September 18, 2009

Via Email:*rule-comments@sec.gov*

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-2009-047
Comments on Bank Brokerage Arrangements (FINRA 3160)

Dear Ms. Murphy:

Wells Fargo Advisors ("WFA") appreciates this opportunity to comment briefly on FINRA Rule 3160 relating to networking arrangements between members and financial institutions. As FINRA explains, the proposed rule is designed to harmonize FINRA's rules with those principles found in the Gramm Leach Bliley Act ("GLB") and Regulation R as passed jointly by the Federal Reserve board and the Securities and Exchange Commission ("SEC" or "the Commission"). WFA generally supports this harmonization effort but submits this comment letter to raise issues of concern that flow from the rule as currently drafted.

WFA consists of brokerage operations that administer over $900 billion in client assets. It accomplishes this task through 15,600 full-service financial advisors in 1,100 branch offices in all 50 states and 5,900 licensed financial specialists in 6,610 retail bank branches in 39 states.[1] The WFA experience in the 39 states with retail bank branches gives it an important platform from which to comment on FINRA Rule 3160.

[1] WFA includes a number of brokerage operations that have combined as the result of the 2008 purchase of Wachovia Corporation by Wells Fargo & Company. For the ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

The NASD Rule 2350 concerning operations at financial institutions applied to broker-dealer conduct on the premises of a financial institution where retail deposits are taken.[2] As proposed, FINRA 3160 would amend the scope of the rule to conform to the networking exception in GLB by extending the networking exception to broker-dealer conduct on ***or*** off the premises of a bank. Other than the rules relating to the physical location on bank property, FINRA Rule 3160 would apply to a member that is a party to a networking arrangement with a financial institution under which the member offers broker-dealer services, regardless of where the member conducts those services.[3]

The "on or off the premises" language is problematic and may reach a result never intended. Initially, there are disclosure requirements that flow when dealing with a client of a brokerage firm that has a networking arrangement with a covered financial institution.[4] FINRA 3160 will require that the firm deliver the "not, not, may" language orally and in writing. For a firm such as WFA which signs a networking agreement with its affiliated bank, the proposed FINRA Rule 3160 would seem to require that the entire firm's other brokerage activities act as if every customer was a bank brokerage client. One simple illustration may help understand the problem. As noted above, there are 11 states in which WFA operates but there is no affiliated banking presence. Nonetheless, because WFA has signed a networking agreement with its bank affiliate, every customer in those states who are by definition "off the premises," must be presented with the disclosure regimen, orally and in writing, that is designed for the customers of retail banks. In addition, WFA institutional clients, online-brokerage clients, and off-shore clients all would be "off-premises" such that every financial relationship would have to go through the bank-broker dealer mandatory oral and written disclosures. This result certainly could not be the intention of the overall regulatory scheme, and if it is, it arguably is a fatally flawed proposal based upon even the most elementary cost-benefit analysis. We request that the Commission eliminate the "or off the premises" language.

Although FINRA notes it is proposing the "off the premises" language because it is contained in GLB[5], FINRA does not explain the intent or purpose of the inclusion of that

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[2] NASD 2350 reads, "This section shall apply exclusively to those broker/dealer services conducted by members on the premises of a financial institution where retail deposits are taken. This section does not alter or abrogate members' obligations to comply with other applicable NASD rules, regulations, and requirements, nor those of other regulatory authorities that may govern members operating on the premises of financial institutions."

[3] "Except as otherwise provided in this Rule, a member that is a party to a networking arrangement under which the member conducts broker-dealer services on or off the premises of a financial institution is subject to the following requirements. . . ." Proposed FINRA Rule 3160(a).

[4] Such disclosures include that the securities products are: (1) not FDIC insured; (2) not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and (3) may be subject to investment risk, including possible loss of the principal invested. These disclosures are commonly called the 'not, not, may" language.

[5] Proposed FINRA Rule 3160 at p. 7. FINRA does not state here that language carried into the Regulation R language.

language in GLB. There is nothing in GLB requiring FINRA, as opposed to other banking agencies, to use the precise GLB language. Without an articulation of why it needs to apply its bank brokerage disclosures to every possible customer of a brokerage firm that also happens to have signed a networking agreement, FINRA should not be permitted to include the "off the premises" language. If, however, FINRA provides an interpretation that explains that the "off the premises" language is limited and designed to reach banking clients who may learn of the brokerage services at locations other than that of the retail bank, the proposed rule would be one that is easier to follow.[6]

In an apparent concession to practicalities, FINRA has also proposed to eliminate a requirement that, in addition to the mandated oral and written disclosures, a brokerage firm participating in a networking agreement with a bank also obtain a written acknowledgement from the customer of receipt of the disclosures. Eliminating the written acknowledgement requirement is a laudable goal, but it likely runs afoul of the Interagency Statement on Retail Sales of Nondeposit Investment Products ("Interagency Statement"). The commonly held view is that the Interagency Statement has survived GLB and Reg R intact. Designed to provide uniform guidance to depository institutions engaged in the sale of securities, it still requires that firms obtain written acknowledgement of receipt of the "not, not, may" and other disclosures. While FINRA adequately explains why it eliminates the requirement, given that most firms involved in a networking arrangement with a financial institution are still nonetheless subject to the guidelines of the Interagency Statement, firms likely cannot forego obtaining the written disclosure. Ideally, this proposal by FINRA will create an opportunity for the SEC to harmonize rules more with the banking regulators.

Thank you for providing WFA the opportunity to comment. We believe that the SEC can modify or clarify some of the provisions as discussed above. If you have any questions regarding this comment letter, please do not hesitate to contact me.

Sincerely,

Ronald C. Long
Director, Regulatory Affairs

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[6] It is also possible that simple statutory construction could aid the interpretation of the "or off the premises" language. The phrase arguably applies when a FINRA member institution has a networking arrangement to provide brokerage services on the bank premises and to also provide those same brokerage services "off" the bank premises. For the member firms that do not have an agreement to provide brokerage services "off" the bank premises, the "or off the premises" language is of no consequence.