July 15, 2013
IM Ref. No. 201313711924
Wells Fargo Bank, N.A.
File No. 801-72865

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

We would not recommend enforcement action to the United States Securities and Exchange Commission ("Commission") under Section 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-3 thereunder if any investment adviser that is required to be registered pursuant to Section 203 of the Advisers Act pays to Wells Fargo Bank, N.A. ("Wells Fargo Bank") or any of its associated persons, as defined in Section 202(a)(17) of the Advisers Act, a cash solicitation fee, directly or indirectly, for the solicitation of advisory clients in accordance with Rule 206(4)-3,[1] notwithstanding an injunctive order issued by the United States District Court for the Northern District of California (the "Judgment") that otherwise would preclude such an investment adviser from paying such a fee, directly or indirectly, to Wells Fargo Bank or certain related persons.[2]

Our position is based on the facts and representations in your letter dated July 15, 2013, particularly the representations of Wells Fargo Bank that:

(1) it or any person associated with it will conduct any cash solicitation arrangement entered into with any investment adviser registered or required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3, except for the investment adviser's payment of cash solicitation fees, directly or indirectly, to Wells Fargo Bank, which is subject to the Judgment;

(2) the Judgment does not bar or suspend Wells Fargo Bank or any person currently associated with Wells Fargo Bank from acting in any capacity under the federal securities laws;[3]

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1 Rule 206(4)-3 prohibits any investment adviser that is required to be registered under the Advisers Act from paying a cash fee, directly or indirectly, to any solicitor with respect to solicitation activities if, among other things, the solicitor is subject to an order, judgment or decree described in Section 203(e)(4) of the Advisers Act.

2 *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. C 07-05923 WHA (N.D.Cal.) (May 14, 2013).

3 Section 9(a)(2) of the Investment Company Act of 1940 (the "Investment Company Act") provides, in pertinent part, that a person may not serve or act as, among other things, an investment adviser or depositor of any investment company registered under the Investment Company Act or a principal underwriter for any registered open-end investment company or registered unit investment trust if, among other things, that person, by reason of any misconduct, is permanently or temporarily enjoined from acting, among other things, as an underwriter, broker, dealer, investment adviser or bank, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security. Section 9(a)(3) extends the prohibition to any company any affiliated person of which is disqualified pursuant to Section 9(a)(2).

(3) it will comply with the terms of the Judgment; and

(4) for ten years from the effective date of the Judgment, Wells Fargo Bank or any person associated with it or any investment adviser with which Wells Fargo Bank or any person associated with it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Judgment in a written document that is delivered to each person whom Wells Fargo Bank or any person associated with it solicits (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (b) at the time the person enters into such a contract, if the person has the right to terminate such contract without penalty within 5 business days after entering into the contract.

This position applies only to the Judgment and not to any other basis for disqualification under Rule 206(4)-3 that may exist or arise with respect to Wells Fargo Bank or any of its associated persons.

Adam Glazer
Senior Counsel

The Judgment, absent the issuance of an order by the Commission pursuant to Section 9(c) of the Investment Company Act that exempts Wells Fargo Bank from the provisions of Section 9(a) of the Investment Company Act, would effectively prohibit Wells Fargo Bank and companies of which it is an affiliated person from acting in any of the capacities set forth in Section 9(a) of the Investment Company Act. You state that, pursuant to Section 9(c) of the Investment Company Act, Wells Fargo Bank and certain affiliated persons, on behalf of themselves and future affiliated persons, submitted an application to the Commission requesting (i) an order of temporary exemption from Section 9(a) of the Investment Company Act and (ii) a permanent order exempting such persons from the provisions of Section 9(a) of the Investment Company Act.

On July 15, 2013, the Division, acting under delegated authority, issued an order granting Wells Fargo Bank, certain affiliated persons and future affiliated persons a temporary exemption from Section 9(a) of the Investment Company Act pursuant to Section 9(c) of the Investment Company Act, with respect to the Judgment, until the date the Commission takes final action on the application for a permanent order or, if earlier, September 13, 2013. *In re Wells Fargo Bank, N.A., et al.*, SEC Rel. No. IC-30600 (July 15, 2013). Therefore, Wells Fargo Bank, certain affiliated persons and future affiliated persons are not currently barred or suspended from acting in any capacity specified in Section 9(a) of the Investment Company Act as a result of the Judgment.

K&L GATES

July 15, 2013

By E-mail

Douglas J. Scheidt
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. C 07-05923 WHA (N.D. Cal., May 14, 2013) – Request for Relief under Rule 206(4)-3 under the Investment Advisers Act of 1940

Dear Mr. Scheidt:

This letter is submitted on behalf of our client, Wells Fargo Bank, N.A. ("Wells Fargo Bank"), in connection with the entry of an order ("Court Order") by the United States District Court for the Northern District of California ("District Court") in connection with the above-captioned certified consumer class action ("Action"). The Court Order, among other things, enjoins Wells Fargo Bank (the "Injunction") from making or disseminating, or permitting to be made or disseminated, any false or misleading representations relating to the posting order of debit-card purchases, checks and automated clearing house ("ACH") transactions in its customer bank accounts. The court has set the effective date of the Injunction as July 15, 2013.

Wells Fargo Bank is registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940, as amended (the "Advisers Act").[1] Further, certain associated persons (as defined in Section 202(a)(17) of the Advisers Act) of Wells Fargo Bank currently engage in cash solicitation activities that are subject to Rule 206(4)-3 under the Advisers Act (the "Rule").[2] Accordingly, Wells Fargo Bank seeks the assurance of the Staff of the Division of Investment Management (the "Staff") that it would not recommend any enforcement action to the U.S. Securities and Exchange Commission ("Commission") under Section 206(4) of the Advisers Act or the Rule, if an investment adviser that is required to be registered pursuant to Section 203 of the Advisers Act, pays Wells Fargo Bank or any of its associated persons, directly or indirectly, a cash solicitation fee pursuant to the Rule, notwithstanding the existence of the

[1] Each of two separately identifiable departments within Wells Fargo Bank, Abbot Downing Investment Advisors (SEC No. 801-72865) and Wells Capital Management Singapore (SEC No. 801-76987), is registered as an investment adviser under Section 203 of the Advisers Act.

[2] Section 202(a)(17) of the Advisers Act defines a "person associated with an investment adviser" to mean, among other things, any person directly or indirectly controlling or controlled by such investment adviser.

Court Order, which could otherwise preclude such an investment adviser from paying such a fee, directly or indirectly, to Wells Fargo Bank or certain related persons.

While the Court Order does not operate to prohibit or suspend Wells Fargo Bank or its associated persons from acting as, or being associated with, an investment adviser and does not relate to solicitation activities on behalf of any investment adviser, the Court Order may affect the ability of Wells Fargo Bank and its associated persons to receive cash solicitation fees.[3] The Rule prohibits an investment adviser that is required to be registered under the Advisers Act from paying such fees to any solicitor that "is subject to an order, judgment or decree described in Section 203(e)(4) of the [Advisers] Act." Section 203(e)(4), in relevant part, provides that the Commission, by order, shall take certain actions against "any investment adviser... or any person associated with such investment adviser," if such investment adviser or associated person thereof has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction... from acting as... an affiliated person ... of any... bank..., or from engaging in or continuing any conduct or practice in connection with any such activity." Accordingly, the Injunction against Wells Fargo Bank from making or disseminating, or permitting to be made or disseminated, any false or misleading representations relating to the posting order of debit-card purchases, checks and ACH transactions in its customer bank accounts, which may be deemed to be conduct or practices in connection with the banking activities of Wells Fargo Bank, could cause Wells Fargo Bank and its associated persons to be disqualified under the Rule. Accordingly, absent no-action relief, Wells Fargo Bank and its associated persons may be unable to receive cash payments, directly or indirectly, from advisers required to be registered for the solicitation of advisory clients.

BACKGROUND

On May 14, 2013, the United States District Court for the Northern District of California issued the Court Order, enjoining Wells Fargo Bank from "making or disseminating, or permitting to be made or disseminated, any false or misleading representations relating to the

[3] Under Section 9(a) of the Investment Company Act of 1940 ("1940 Act"), Wells Fargo Bank and its affiliated persons will, as a result of the Injunction, be prohibited from serving or acting as, among other things, an investment adviser or depositor of any registered investment company or principal underwriter for any registered open-end investment company or registered unit investment trust. Wells Fargo Bank and its affiliated persons who act in the capacities set forth in Section 9(a) have filed an application under Section 9(c) of the 1940 Act requesting the Commission to issue both temporary and permanent orders exempting them, and Wells Fargo Bank's future affiliated persons should any of them serve or act in any of the capacities set forth in Section 9(a) in the future, from the restrictions of Section 9(a). The applicants believe that they meet the standards for exemptive relief under Section 9(c). On July 15, 2013, the Staff, acting under delegated authority, issued an order granting Wells Fargo Bank and certain affiliated persons a temporary exemption from Section 9(a) of the 1940 Act pursuant to Section 9(c) of the 1940 Act, with respect to the Injunction, effective July 15, 2013 until the date the Commission takes final action on the application for a permanent order or, if earlier, September 13, 2013. Investment Company Act Release No. 30600 (July 15, 2013).

posting order of debit-card purchases, checks and ACH transactions in its customer bank accounts."[4] The Court Order sets the effective date of the Injunction as July 15, 2013.

The Court Order was issued in a certified consumer class action under Section 17200 of the California Business and Professions Code relating to a Wells Fargo Bank bookkeeping device known as "high-to-low" posting.[5] The plaintiffs in the class action alleged that Wells Fargo Bank, without adequate disclosure to account holders, posted debit card transactions received each day for payment beginning with the highest amount and ending with the lowest amount (*i.e.*, high-to-low), which could have the effect of increasing the number of items posting into overdraft and, therefore, increased overdrafts fees.[6] While the plaintiffs' challenge to the practice of high-to-low posting and to the adequacy of the bank's disclosures was found to be preempted by the National Bank Act, Wells Fargo Bank was found liable under the California law for making misleading statements regarding the practice.[7] The Court Order requires Wells Fargo Bank to pay restitution of $202,994,035.46 (plus post-judgment interest) and enjoins Wells Fargo Bank from making or disseminating, or permitting to be made or disseminated, any false or misleading representations relating to the posting order of debit-card purchases, checks, and ACH transactions in its customer bank accounts.

DISCUSSION

In the adopting release for the Rule, the Commission stated that it "would entertain, and be prepared to grant in appropriate circumstances, requests for permission to engage as a solicitor a person subject to a statutory bar."[8] We respectfully submit that the circumstances presented in this case are precisely the sort that warrant a grant of no-action relief.

The Rule's proposing and adopting releases explain the Commission's purpose in including the disqualification provisions in the Rule. The purpose was to prevent an investment adviser from hiring as a solicitor a person whom the adviser was not permitted to hire as an employee, thus doing indirectly what the adviser could not do directly. In the proposing release, the Commission stated that:

> [b]ecause it would be inappropriate for an investment adviser to be permitted to employ indirectly, as a solicitor, someone whom it

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[4] *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. C 07-05923 WHA (N.D. Cal., May 14, 2013) (granting in part and denying in part motion for judgment following remand).

[5] *Id.* at 1.

[6] *Id.*

[7] *Id.* at 3 (citing *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 725-730 (9th Cir. 2012)).

[8] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295.

> might not be able to hire as an employee, the Rule prohibits payment of a referral fee to someone who ... has engaged in any of the conduct set forth in Section 203(e) of the [Advisers] Act . . . and therefore could be the subject of a Commission order barring or suspending the right of such person to be associated with an investment adviser.[9]

The Court Order does not bar, suspend, or limit Wells Fargo Bank or any person currently associated with it from acting in any capacity under the federal securities laws.[10] Wells Fargo Bank has not been sanctioned for activities relating to conduct as an investment adviser or relating to solicitation of advisory clients. The Court Order does not pertain to advisory activities. Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit an adviser from paying Wells Fargo Bank or its associated persons for engaging in solicitation activities under the Rule.

The Staff previously has granted numerous requests for no-action relief from the disqualification provisions of the Rule to individuals and entities disqualified from receiving cash solicitation fees pursuant to the Rule due to their status as an investment adviser, or an associated person of an investment adviser, that is subject to an order, judgment or decree of a court of competent jurisdiction, enjoining the adviser or associated person from engaging in or continuing a conduct or practice described in Section 203(e)(4) of the Advisers Act.[11] Indeed,

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[9] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

[10] *See supra* note 3.

[11] *See, e.g.*, J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail . Jan. 9, 2013); Wells Fargo Bank, N.A., SEC No-Action Letter (pub. avail. Sept. 21, 2012); J.P. Turner and Company, L.L.C. et al., SEC No-Action Letter (pub. avail. Sept. 10, 2012); GE Funding Capital Market Services, Inc., SEC No-Action Letter (pub. avail. Jan. 25, 2012); J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail. July 11, 2011); J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail. June 29, 2011); BAC Home Loans Servicing, LP, SEC No-Action Letter (pub. avail. June 2, 2011) ("BAC Letter"); UBS Financial Services Inc., SEC No-Action Letter (pub. avail. May 9, 2011); Citigroup Inc., SEC No-Action Letter (pub. avail. Oct. 22, 2010); Banc of America Investment Services, Inc., SEC No-Action Letter (pub. avail. June 10, 2009); Barclays Bank PLC, SEC No-Action Letter (pub. avail. June 6, 2007); Morgan Stanley & Co. Incorporated, SEC No-Action Letter (pub. avail. May 15, 2006); American International Group, Inc., SEC No-Action Letter (pub. avail. Feb 21, 2006); Goldman, Sachs & Co., SEC No-Action Letter (pub. avail. Feb. 23, 2005); Morgan Stanley & Co. Incorporated, SEC No-Action Letter (pub. avail. Feb. 4, 2005); Prime Advisors, Inc.; SEC No-Action Letter (pub. avail. Nov. 8, 2001); Legg Mason Wood Walker, Inc., SEC No-Action Letter (pub. avail. June 11, 2001); Dreyfus Corp., SEC No-Action Letter (pub. avail. March 9, 2001); UBS Securities Inc., SEC No-Action Letter (pub. avail. Feb. 7, 2001); Tucker Anthony Inc., SEC No-Action Letter (pub. avail. Dec. 21, 2000); J.B. Hanauer & Co., SEC No-Action Letter (pub. avail. Dec. 12, 2000); Founders Asset Management LLC, SEC No-Action Letter (pub. avail. Nov. 8, 2000); Credit Suisse First Boston Corp., SEC No-Action Letter (pub avail. Aug. 24, 2000); Janney Montgomery Scott LLC, SEC No-Action Letter (pub. avail. July 18, 2000); Aeltus Investment Management, Inc., SEC No-Action Letter (pub. avail. July 17, 2000); William R. Hough & Co., SEC No-Action Letter (pub. avail. Apr. 13, 2000); In the Matter of Certain Municipal Bond Refundings, SEC No-Action Letter (pub. avail. Apr. 13, 2000).

many of the requests previously granted by the Staff have been granted to individuals or entities disqualified from receiving cash solicitation fees pursuant to the Rule due to their status as an investment adviser, or an associated person of an investment adviser, subject to an order enjoining the adviser or associated person from engaging in or continuing a conduct or practice in connection with the purchase or sale of a security.[12] Here, the conduct underlying the Injunction relates to Wells Fargo Bank's banking activities. Accordingly, the basis for granting the no-action relief requested by Wells Fargo Bank, on behalf of itself and its associated persons, is arguably stronger, and under the circumstances, warranted.

UNDERTAKINGS

In connection with this request, Wells Fargo Bank undertakes:

1. To conduct any cash solicitation arrangement entered into with any adviser registered or required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3, except for the investment adviser's payment of cash solicitation fees, directly or indirectly, to Wells Fargo Bank, which is subject to the Court Order;

2. To comply with the terms of the Court Order; and

3. That for ten years from the effective date of the Injunction, Wells Fargo Bank and any person associated with it and any investment adviser with which it or any person associated with it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Court Order in a written document that is delivered to each person whom Wells Fargo Bank or any person associated with it solicits (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (b) at the time the person enters into a written or oral advisory contract with the investment adviser, if the person has the right to terminate such contract without penalty within 5 business days after entering into the contract.

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In light of the foregoing, we respectfully request that the Staff advise us that it will not recommend enforcement action to the Commission if an investment adviser that is required to be registered with the Commission pays Wells Fargo Bank, or any of its associated persons, a cash payment for the solicitation of advisory clients, notwithstanding the Court Order.

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[12] Wells Fargo Bank seeks the relief based on the Injunction enjoining it "from acting as … an affiliated person … of any … bank …, or from engaging in or continuing any conduct or practice in connection with any such activity." *See* 15 U.S.C. 80b-3(e)(4). In short, Wells Fargo Bank seeks the relief because in Section 203(e)(4) "such activity" appears to refer to any activity of a bank, regardless of whether it relates to the purchase or sale of a security.

If you have any questions regarding this request, please contact the undersigned at (202) 778-9475.

Sincerely,

Stacy L. Fuller

cc: Nadya B. Roytblat
Adam Glazer
U.S. Securities and Exchange Commission
Charles S. Neal
Douglas R. Edwards
Wells Fargo Law Department