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Filed by email

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Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attn: Nancy M. Morris, Secretary

Re: File Number S7-06-08, Part 248 – Regulation S-P, Privacy of Consumer Financial Information and Safeguarding Personal Information

Dear Ms. Morris:

Wachovia is pleased to provide comments on the Proposed Amendments to Regulation S-P under Title V of the Gramm-Leach-Bliley Act ("GLBA"), the Fair Credit Reporting Act ("FCRA"), the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisors Act of 1940 as published in the Federal Register on March 12, 2008 ("Proposed Amendments"). This comment letter is submitted to the Securities and Exchange Commission ("Commission") on behalf of Wachovia Corporation and its registered broker-dealer affiliates (collectively referred to as "Wachovia").[1]

Summary
Wachovia strongly supports the Commission's efforts to enhance the safeguarding requirements and better protect investor information. We believe the Interagency Guidelines on Safeguarding Consumer Information ("Safeguarding Guidelines") and Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice ("Interagency Guidance"), which have been previously issued by the banking agencies, provide appropriate standards for safeguarding customer information and for providing notice of security breaches. Wachovia supports adoption of equivalent standards by the Commission. It is essential that any standards adopted by the Commission closely track existing banking agency standards for developing and implementing safeguarding policies and procedures.

We also support the new proposed exception to notice and opt-out requirements allowing for limited disclosures of investor information when representatives move from one securities firm to another. Since 2004 certain broker dealers have operated pursuant to a protocol agreement

[1] Wachovia Corporation is a diversified financial institution which includes broker dealer affiliates such as Wachovia Securities, LLC, Wachovia Securities Financial Network, LLC, Wachovia Capital Markets, LLC, First Clearing, LLC, Metropolitan West Securities, Inc., and Evergreen Investment Services, Inc.

that closely parallels the proposed exception to notice and opt out. Use of the protocol has better facilitated investor choice and significantly reduced litigation among firms when representatives move to new firms.

The Commission specifically requested comment regarding the four proposed amendments. Our detailed comments expanding on these topics follow.

Potential Inconsistencies in Definitions

Since diversified financial institutions must already demonstrate adherence to the existing banking agency standards for protecting consumer information, and since these information security programs require a substantial investment in time and resources by the financial institution, it is critical that the Commission issue regulations with respect to protection of consumer information that are consistent with those previously issued by the banking agencies. Congress recognized the importance of consistent regulations by providing in Section 504(a)(2) of GLBA:

> Each of the agencies and authorities required under paragraph (1) to prescribe regulations shall consult and coordinate with the other such agencies and authorities for the purposes of assuring, to the extent possible, that the regulations prescribed by each such agency and authority are consistent and comparable with the regulations prescribed by the other agencies.

Accordingly, Wachovia requests that the Commission ensure that the information security standards differ from the Safeguarding Guidelines for protecting consumer data only where absolutely necessary.

Wachovia is concerned about several definitions in the Proposed Amendments that vary materially from existing definitions in the Safeguarding Guidelines and the Interagency Guidance. First, the Proposed Amendments would expand the definition of "personal information" covered by the regulation to include employee, investor and security holder information. However, GLBA only applies to nonpublic personal information about consumers (Section 509(4)) and does not provide a basis for extending the coverage of the implementing rules to additional categories beyond consumer customer data.

GLBA currently establishes obligations to assess and report on information security programs that protect consumer data, and to monitor and report on vendors who have access to consumer data. Expansion of the definition of "personal information" to include employee, investor and security holder information would require financial institutions to establish programs to track and report on categories of data that are not currently subject to GLBA. Financial institutions such as Wachovia already place a high priority on protecting personal information; therefore, the expansion of the definition of personal information to include employee, investor and security holder data would place new and unnecessary burdens on financial institutions either to expand the information security programs previously implemented under GLBA, or to manage separate information security programs for brokerage and non-brokerage units.

The Commission sought comment on whether the proposed rule should extend to the data of non-natural persons such as corporations. In general, non-natural persons are not subject to the fraud risk to which individuals are subject and that these rules are intended to address. In addition, for the reasons described above, there is not a basis under GLBA for this extension and the extension would be a deviation from the intended consistency between the proposed rule and the Safeguarding Guidelines.

The definition of "sensitive personal information" is also inconsistent with the definition of the term "sensitive customer information" under the Interagency Guidance and state laws on breach notification. The Proposed Amendments would define sensitive personal information to include a Social Security number (SSN) without any other identifying information. Neither the Interagency Guidance nor applicable state laws, such as those of California or New Jersey, define an SSN alone as a data element subject to breach notification laws.[2] Other information, such as an individual's name, address, telephone number, or birth date, is also important for purposes of authentication; but none of these elements alone would afford a criminal access to customer account information. Wachovia recognizes that SSNs should be appropriately protected and their confidentiality maintained in order to prevent fraud or identity theft but also notes that SSNs are only one factor in such schemes.

Information Security Program

Wachovia asks that the components of the safeguarding program requirements under the Proposed Amendments match those enumerated in the Safeguarding Guidelines in order to foster consistency between the requirements and to facilitate a single program for the institution.

The general requirements of information security programs described in proposed section 248.30(a)(1) state that "every" broker or dealer, "every" investment company, and "every" investment adviser must implement an information security program. Most diversified financial institutions already utilize a single information security program and require affiliates to adhere to that program. A single program fosters consolidation of information security resources to enable identification and resolution of potential threats. The proposed rule could be interpreted as requiring each legal entity to have its own program. Wachovia requests clarification that the rule will allow a financial institution to have a single program applicable to each of its affiliates.

The Commission requests comment on whether individuals should be named to coordinate the information security program. Wachovia notes that the Safeguarding Guidelines do not require identification of an individual to manage the information security program, and instead require an annual report to the Board of Directors on the status of the information security program. Wachovia believes that it creates an unnecessary administrative burden to require that an individual be named to coordinate the program without any accompanying benefit. Wachovia recommends that firms should have the flexibility to determine whether to identify a particular individual or position to coordinate the corporate-wide program.

Additionally, Section (vi)(a) requires firms to take reasonable steps to "select and retain" service providers. Wachovia believes use of the term "retain" is ambiguous and should more clearly refer to entering into a contract and not to keeping a service provider as a vendor for an extended period of time. Accordingly, Wachovia requests clarification that the term "retain" only refers to the entering into of a contract.

The Commission also requests comment on whether "red flag" elements for preventing identity theft should be incorporated into information security programs. Financial institutions are currently undertaking significant efforts to address the banking agencies' red flag requirements and will be implementing new measures over the next months. As a result, we feel the adoption of additional red flag requirements under the Proposed Amendments may be premature. We request instead that the Commission defer a decision regarding the creation of additional red flag requirements until the impact of the banking agencies' requirements can be evaluated and better understood.

[2] California Civil Code §§ 1798.29 and N.J. Stat. Ann. § 56:8-161 et seq.

Within the Proposed Amendments, a service provider is defined as "any person or entity that receives, maintains, processes, or otherwise is permitted access to personal information through its provision of services directly to a broker, dealer, investment company, or investment adviser or transfer agent registered with the Commission." The commentary on page 18 of the Proposed Amendment suggests that firms have discretion in determining what "reasonable steps [to take] to ensure that the [affiliated] service provider is capable of [implementing and] maintaining appropriate safeguards." We request, however, that it be made clear in the proposed rule that firms would not be required to have contracts in place with affiliates who provide services to them under circumstances in which, for example, the affiliates in a diversified financial institution, including those providing services to one another, are required to follow the company's enterprise wide safeguarding program. Requiring contracts among affiliates in this situation would be an unnecessary administrative burden within an organization and serve no useful purpose. We request the Commission clarify in the final rule that firms are not required to enter into contracts with affiliates specifying safeguarding requirements.

Disposal of Data

Proposed Section (b)(2) provides that each broker "document in writing its proper disposal of personal information in compliance with paragraph (b)(1)." Wachovia requests that the Commission clarify that financial institutions are only expected to maintain a data disposal program, including oversight responsibilities. Wachovia believes that the intent of the section is to document oversight of compliance with data destruction policies and not to require documentation of each disposition of personal information.

With regard to the proposal to extend the disposal rule to apply to natural persons, we understand the Commission's intent to make individuals directly responsible for properly disposing of personal information; however, we do not support this approach for two reasons. First, the Proposed Amendments are inconsistent with existing disposal requirements under the Federal banking agencies' rule as the Federal banking agencies' rule does not extend to natural persons. We request that the Commission strive to be as consistent as possible so as to minimize unnecessary or duplicative compliance and administrative efforts in complying with two varying sets of standards. Second, Section 501(b) of GLBA and FCRA already require financial institutions to have programs that include proper disposition of consumer data without imposing direct responsibility on individuals. Wachovia's internal policies, Code of Conduct and Ethics, and mandatory annual training courses require and reinforce the obligation to properly dispose of confidential information. We do not believe expanding the scope of the disposal rule to include individuals will further enhance existing programs. However, should the Commission decide to pursue this expansion of scope, we suggest that the Final Rule expressly state that an employee does not have personal liability in the event that customer information is not appropriately disposed of.

Notification of Security Breaches

Overall, Wachovia agrees that it is valuable for the Commission to provide guidance under GLBA on how firms should respond to security breaches. With regard to requiring firms to provide notice to the Commission only if the information compromised would be characterized as a significant event, we agree that this proposed standard will provide a sufficient early warning to the Commission. We commend the Commission for supporting the use of a risk-based approach for providing notice to the Commission, which will in turn allow for a more efficient use of administrative resources for reporting.

We would like to emphasize that the information requested on the proposed Form SP-30 is generally not immediately known at the time of the incident. As such, a firm could be required to submit additional forms to provide the Commission with subsequent data. This would become

a more time-consuming and burdensome process for the reporting firms. Instead of the Commission providing a standardized form or specifying required information in the rule, Wachovia recommends that firms provide only the relevant data available upon learning of an incident. The rule could instead include examples of the types of information that firms may wish to consider including in the report.

Wachovia finds appropriate and sufficient the standards in the proposed provisions regarding the threshold for notifying individuals, as it is similar to that in the Banking Agency guidance. However, the definition of "sensitive personal information" should be amended as described above. We also urge the Commission to include in the Final Rule examples of when notice would not be required, as there is little or no risk of harm to the consumer. Examples of when notice would not be necessary include if electronic data were encrypted, redacted or otherwise unreadable, if inadvertent access of customer information occurs, or if the accidental mismailing of an account statement occurs (instances cited in footnotes 28 and 49 of the Proposed Amendments).

The provisions of Section 248.30(a)(4) that require written records of determination of whether to provide notice following unauthorized access are overly prescriptive. Under that section, a written record would be required in numerous situations involving inadvertent access, such as a statement mailed to an incorrect address. These situations can be resolved quickly without the need for a written record. Instead, it should be sufficient to maintain written procedures for addressing unauthorized potential incidents of unauthorized access.

We also believe that flexibility must be afforded to financial institutions in determining how to implement the Proposed Amendment in light of situation-specific circumstances. The content of the notices to impacted individuals should be driven by the circumstances of the event and the institution be given the flexibility to tailor the notices to each situation. Therefore, we request that the Commission modify the proposed rule to allow the notice to include the five items listed at 248.30(a)(5) only when appropriate and that their inclusion not be required. This would also make the proposed rule more consistent with the existing Interagency Guidance.

Exception for Limited Information Disclosure when Personnel Leave Their Firms

Wachovia supports the Commission's proposal to confirm an existing successful practice by adding a new exception to Regulation S-P's notice and opt-out requirements allowing limited disclosures of investor information when registered personnel move from one securities firm to another. A significant source of litigation today flows from the strong incentive that departing representatives may have to transfer information about their clients to their new firms. As noted by the Commission, a group of broker-dealers have signed a "protocol" agreement not to pursue litigation against one another when limited investor information is disclosed during the course of a representative's transfer from one signatory firm to another. Permitting a limited exchange of customer information has worked well for the participating firms over the past four years, reducing litigation and costs. Codifying this orderly approach is an appropriate use of the Commission's rulemaking power, and it enhances investor protection and choice.

We suggest that the Commission alter the proposed rule in three important respects. First, as currently proposed, a firm would have to choose to share limited contact information when a broker-dealer representative changes firms. Giving the option to the representative's former employer (the "departing" firm) raises the potential for inconsistent application and actually works against the benefits of promoting investor choice, providing legal certainty, and reducing potential incentives for improper disclosures. Allowing the departing firm to choose for the individual investor whether the representative with whom the investor has worked in the past can have adequate information to facilitate further communication places the choice in the wrong

hands. It is the investor's choice to follow a representative or choose a firm; therefore, sharing such information on a representative's departure should always be available. Given this stance by Wachovia, we also agree that the proposed exemption should not be conditioned upon providing investors with specific disclosure regarding whether a covered institution would disclose personal information in connection with a representative's departure.

The second alteration to the Proposed Amendments that Wachovia recommends is closely related to the first. Since Wachovia believes that basic information should always be available upon a representative's departure, the scope of the information shared should be as narrow as possible. By narrowly defining the contact information that a representative may move to a new firm, the proposed rule would protect more sensitive information from potential exposure. In the absence of this exception, representatives would be tempted to take entire customer files when they move putting additional information at risk. As proposed, the rule would allow a departing representative to obtain information that includes "a general description of the type of account and products held by the customer." Under the protocol that has been in operation since 2004, the customer information that can be taken by a departing representative is limited to client name, address, phone number, email address and account title. This limited transfer of information has become the standard in transitions between protocol member firms.

As proposed, the rule would allow the departing representative to take exactly the same information as the protocol with the exception that the protocol "account title" category has been broadened to "a general description of the type of account and products held by the customer." With almost four years of protocol experience, firms have found that the more limited category of "account title" adequately facilitates the transfer of investors' accounts and is consistent with best practices in maintaining investor privacy. Supplying more information than needed runs the risk of potential abuse, increases the risk of identity theft, and invites the potential for litigation from customers and firms alike. Wachovia believes that the proposed exception should limit the disclosable information to that which is presently allowable under the protocol. Should the Commission decline to simplify the rule, we suggest that the rule add a definition concerning the permissible information covered by the "general description" phrase.

Finally, we request that the Commission change the proposal to exempt independent contractor registered representatives from the provisions applicable to employee registered representatives who changed broker-dealers. Independent contractor registered representatives typically operate as small "doing business as" (or "DBA") firms comprised of 1 to 3 registered individuals who contractually own their client relationships, but who choose to associate and are registered with a larger broker-dealer. These independent contractors do not "change firms," as the DBA firm for the customer remains the same. Instead, the independent contractors change the broker-dealer with which they are associated and registered. The customer information stays with these small DBA firms throughout the process of changing registrations.

The Commission should interpret the rule to conclude that the representative has not transferred firms when he or she becomes associated with a new broker-dealer, and therefore, the independent contractor register representative should be deemed to be exempt from the limitations on transferring customer information in this situation. The newly affiliated broker-dealer firm is, of course, also regulated by the Commission and Financial Industry Regulatory Authority such that the privacy protections would continue to flow to the customer from the DBA firm's new affiliation. Any customer who desires not to continue to be served by a particular independent contractor registered representative who has become associated with a new broker-dealer would have ample opportunity to transfer to any other broker-dealer or to refuse to sign the documents that are required to transfer the customer's account from one broker-dealer to another broker-dealer. Without an exemption, the proposed rule would have to

change in several respects to acknowledge some of the physical and conceptual impossibilities attendant to the independent contractor registered representative's legal status.

Effective Date

The proposed rule does not indicate an effective date. If the Proposed Amendments with regards to information security programs are not modified to be more consistent with GLBA, firms will need more than the 60 days generally provided for "major rules" as described in the Federal Register. If the information security program component of the Proposed Amendments is not modified, Wachovia requests that the Commission provide firms with a compliance date one year from the effective date in order to allow firms adequate time to determine the impacts to their business models and implement the necessary changes.

Conclusion

Wachovia is pleased to have this opportunity to provide the Commission with our feedback on the proposed changes to Regulation S-P. We believe the Commission's development of the Proposed Amendments will better protect investor information, will help prevent and address security breaches, and can provide valuable enhancements to institutions' information security programs. However, many issues have been raised, and we welcome the opportunity to further discuss and review this proposal before it becomes final. Should you wish to inquire regarding any elements of this letter further, please feel free to contact me anytime at (704) 374-4645.

Very truly yours,

Campbell Tucker
Director of the Privacy Office