Direct Dial: 804.787.6851
Facsimile: 804.344.6599
E-Mail: ronlong@wachoviasec.com

Wachovia Securities, LLC

February 7, 2005

Jonathan Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW (6-9)
Washington, DC 20549

Re: Proposed Rule: Certain Broker-Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Release No. IA-2340 (hereinafter the "Proposing Release") (File No. S7-25-99)

Dear Mr. Katz:

Wachovia Securities, LLC ("Wachovia Securities") appreciates the opportunity to comment on the above-referenced Proposing Release. Wachovia Securities supports the overall purpose of the Proposing Release, excepting from registration under the Advisers Act[1] those broker-dealer who provide nondiscretionary advice that is solely incidental to its brokerage services regardless of whether it charges an asset-based or fixed fee. At its heart, the Proposing Release seeks to enhance the public's trust and confidence in the financial services industry by giving investors the ability to choose the payment alternative that best addresses their individual investment needs. As recommended by the Commission, the Proposing Release also adds value to investors by avoiding the need for additional regulatory costs that would ultimately be borne by investors. We further applaud the Commission's decision to use the Proposing Release to eliminate the analysis that would have viewed as advisory accounts the full-service accounts of a firm that also offered discount brokerage services.

This comment letter will highlight key features of the Proposing Release that we believe are beneficial to both investors and the industry alike. At the same time, Wachovia Securities will urge the Commission to give some thought to whether the financial relationships today have so

[1] Investment Advisers Act of 1940, 15 U.S.C.§80b.

changed since 1940 that Congress needs to rethink the reasons underlying the Advisers Act restrictions that created the need for the Proposing Release.

I. Introduction and Overview

Wachovia Securities is a full service brokerage firm serving clients in 49 states. It assists its 5.7 million active retail accounts by offering clients a suite of financial services, including advisory programs, discount brokerage programs, fee-based brokerage and traditional brokerage accounts. Wachovia Securities was among the first to introduce a fee-based brokerage service and has supported the position of the Commission and others that such accounts may reduce the conflicts of interest that arise when investors are in a commission-based account[2] identified in the 1995 Tully Report. We further support the Tully Report's conclusion that providing clients with a choice as to how they pay for investment services outweighs the issues raised by groups who may oppose the Proposing Release.

II. The Proposing Release Properly Permits Fee-Based Programs without Necessarily Requiring Advisory Registration

The Proposing Release seeks to regulate properly the increasingly popular fee-based account, which grew directly from studies and reports on how best to align the interests of the growing investor class and the brokers that serve them. In order to tackle the prospect that the Advisers Act would require broker-dealers offering such accounts to register as advisers in addition to registering as brokers, the Proposing Release sets forth three criteria that need to be met in fee-based accounts to exempt a broker-dealer from registration:

1) The broker retains no discretion in the managing of the fee-based brokerage accounts;
2) Any advice is "solely incidental to" the brokerage transaction; and
3) The broker informs the client of key differences between brokers and advisers.

In brief, the advice offered in fee-based accounts is advice that is typical of the traditional brokerage account. Having broker-dealers exempt from the Advisers Act for such accounts does not mean that investors have less protection.

A. Fee-Based Programs Offer Advice as a Part of Traditional Brokerage Services

At its heart, the proposal seeks in part to enhance the public's trust and confidence in the financial services industry by giving investors the ability to choose the payment alternative that best addresses their individual investment needs. As recommended by the Commission, the proposal also adds value to investors by not creating the need for additional regulatory costs that would ultimately be borne by investors. Thus, for full-service broker-dealers like Wachovia Securities, the advisory programs offered to investors are clearly defined and our associates participating are registered as investment advisers as well as registered representatives. To the

[2] See Report of the Committee on Compensation Practices (Apr. 10, 1995)("Tully Report").

extent the Proposing Release requires disclosures advising clients that they are in this dual world, we believe that is an appropriate and sound business practice.

Fee-based programs, as the Commission is correct to conclude, really are an alternative pricing of traditional brokerage services. Much advice offered by a broker, whether in a commission context or in a fee-based program, consists of a service a customer expects as they make securities buy/sell decisions. We do support the Commission's rationale that broker-dealers may offer different levels of traditional brokerage services even in a fee-based account. As the assets in an account rise, increasing the level of service is proper. At the same time, where the nature and content of that advice far exceeds that traditionally provided by brokerage firms, under this proposal, those firms would dually register, as Wachovia Securities does for its advisory programs, to continue to service that client.

B. The Nondiscretionary Accounts

Wachovia Securities supports the requirement that the exemption from advisory registration applies only where the fee-based account is nondiscretionary. This bright line, coupled with the adviser registration requirement for those managing accounts on a discretionary basis, will also assist investors in understanding when they may be crossing into the advisory world.

Note, however, we believe that there are occasions where discretion for a limited time period is desirable and possibly necessary. It is important that the Commission codifies or otherwise makes allowances for the isolated and limited exercises of discretion. It may be that a written form signed by the investor describing the limited exercise of discretion, the reason for it, and the approval of a supervisor may furnish sufficient safeguards to allow the rules to recognize the life practicalities of the modern investor.

C. Adequate Investor Protections Exist For Fee Based Accounts

Wachovia Securities notes that many who complain that broker-dealers offering fee-based accounts would "evade" protections offered investors under the Advisers Act are mistaken. The Proposing Release properly explains that where fee-based accounts offer advice as a part of traditional brokerage services, such conduct is fully contemplated and monitored by the broker-dealer regulatory regimen. Both the Exchange Act[3] and the policies of the self-regulatory organizations ("SROs") contain a panoply of rules insuring that investors are protected from a broker's abusive practices, regardless of whether they occur in a fee-based account or a commission account.[4] In fact, as advisers compete for clients with broker-dealer, advisers are in no way handicapped because they operate under one set of investor protection rules and broker-dealer operate under another. The handicap probably is more on a brokerage firm as, unlike registered investment advisers, brokers are required to decide whether it is appropriate for a customer to be in a fee-based account rather than a transactional, commission-based brokerage account.[5] Apparently under current rules, registered investment advisers are permitted to charge

[3] The Securities and Exchange Act of 1934, 15 U.S.C. §78a.
[4] See August 5, 2004 SIA Letter to Commissioner Cynthia A. Glassman (containing a chart showing Exchange Act provisions offer comparable protections to those of the Advisers Act).
[5] NASD Notice to Members 03-68 (Nov. 4, 2003).

for services as a percentage of assets managed without regard for whether a commission-based approach is more suitable to that individual client. This factor, plus other rules, illustrates that the Proposing Release in no way alters the substantial protections available to customers enrolled in a brokerage firm's fee-based programs.

D. Customer Disclosure

A third key component the Proposing Release imposes in order for brokers to be exempt from registration while offering fee-based accounts is the requirement that there be sufficient customer disclosure that the account is in fact a brokerage account and not an advisory account. The disclosure must explain the differences in terms of a customer's rights and the firm's duties. In addition, the broker-dealer must identify a person who can discuss the differences with the customer. Wachovia Securities agrees that there should be clear and understandable disclosure to investors that the account into which they enter is a brokerage account, and we appreciate the principled attempt here. We feel that properly drafted marketing materials, point of sales materials and confirmation statements can all assist in clarifying this difference for investors. We are deeply concerned, however, that the Proposing Release goes too far in its requirements of a designated person and may create a clumsy, yet inexorable, slide into a costly disclosure morass that at the end will not serve the best interests of investors.

As constructed, the Proposing Release seems clearly to place a regulatory thumb on the scale an investor uses to weigh a decision on whether an advisory or brokerage account is proper for them. As noted earlier, will this discussion permit a broker-dealer to point out that investment advisers are not obligated to determine whether paying a fee based on assets is appropriate for that investor? It appears that the Advisers Act would merely require that the investor get an accurate description of the fees paid. In addition, full service firms like Wachovia Securities offer advisory accounts as well. In discussing the differences between a brokerage account and an advisory account, it seems only natural and appropriate that Wachovia Securities tailor that disclosure to the products it offers. Given the constituency to whom the Proposing Release attempts to respond in requiring additional disclosure, one questions whether that group would raise more objections should full service brokers describe the differences in terms of products it currently provides.

The provision that a firm makes available a person to discuss the differences between brokerage and advisory will create an entire subset of issues upon which the litigious could seize. Additionally, this provision seems out of step with the current national movement to reduce litigation. It does not take much imagination to see causes of action rising out this concept. Was the designated person "readily available"? Was the advice thorough? Did the designated person spend sufficient time discussing the differences? Such issues and others can all became fodder for the cannons of litigation.

As stated earlier, the investor education goal of this provision of the Proposing Release is laudable. Nonetheless, as presently written, it takes a single investor education issue and isolates it from and elevates it above all others. At a time when many lament the financial literacy of the

public generally[6], this rule would insure that at least one subset of the investor world will know, through both disclosure and a discussion, the difference between advisory and brokerage accounts. All other investors will wonder why this group of investors receives such special attention on this solitary topic among the many on which investors are in tremendous need of additional education.

Furthermore, in a firm such as Wachovia Securities, with close to 5.7 million accounts, it would impose a new and considerably expensive cost burden for it to sufficiently staff its geographic footprint with enough individuals to whom investors would turn to discuss the differences in brokerage and advisory accounts. The firm would certainly need a training program to insure that these designated persons would deliver consistent presentations throughout the firm. There is a likelihood that differences in presentation may arise, once again creating opportunities for possible litigation.

We think the Commission should drop this provision of the Proposing Release. Should it decide that the provision remains, we would encourage the Commission to modify the rule to allow alternative means of delivering the information. Interactive websites or multimedia software can allow for a firm-wide standard of discussing the differences between a brokerage and advisory account while also permitting investors to get relevant answers to many routine questions that arise. Permitting the firms to deliver to those investors requesting more information a CD-ROM or DVD that teaches them the differences between the two accounts may give the investor information they can readily digest (or replay, if necessary) to better understand a given point. Many investors, even after discussing the differences with a designated person, may be reluctant to ask that person to repeat some portion of the information. Using different versions of multimedia will allow an investor to absorb the information at a pace and level appropriate to him or her.

III. "Solely Incidental to Brokerage Services" Interpretive Position

A. "The Solely Incidental to Brokerage Services" Restriction is No Longer Needed

The Proposing Release does an admirable job of discussing the history of the Advisers Act exception for a broker whose advisory services are "solely incidental to the conduct of his business as a broker-dealer." While the Proposing Release intends to continue to offer that exception when the investment advice is "solely incidental to the brokerage services," the Commission truly must ask whether the "solely incidental" distinction is needed in today's regulatory world, a world far different than that of sixty-five years ago. There has been no evidence presented that investors have suffered abuses merely because of the exception in the

---

[6] See e.g., Susan Ferris Wyderko, Director, SEC Office of Investor Education and Assistance, "Testimony Concerning the Commission's Role in Empowering Americans to Make Informed Financial Decisions", *Before the Subcommittee on Financial Management, the Budget, and International Security, Committee on Governmental Affairs, United States Senate, (March 30, 2004);* Harvey L. Pitt, Chairman, SEC, "Testimony Concerning Financial Literacy," *Before the Committee on Banking, Housing and Urban Affairs, United States Senate, February 5, 2002;* Arthur Levitt, Chairman, SEC, "Financial Literacy and Role of the Media," *Speech before the Media Studies Center, (April 26, 1999).*

Advisers Act and the Staff's no-action interpretation contained in the original rule proposed in 1999. The numerous letters of those in one profession opposing the rule because of fears that investors will suffer abuse at the hands of broker-dealers in no way constitute such evidence.

In addition to there being a lack of abuse, the law of unintended consequences will certainly flow from the Proposing Release if there is not further change and study of the "solely incidental to brokerage services" provision. It is almost certain that, given the increasing popularity of fee-based brokerage accounts, the Proposing Release still will force certain broker-dealers managing nondiscretionary accounts to register as advisers. That growing number of dually registered broker-dealers will certainly increase the number of transactions where those brokers face a restriction on market making and principal activity. Section 206(3) of the Advisers Act[7] requires that an adviser disclose in writing and obtain the consent of the client every time it acts as a principal in a transaction. The increase in monitoring will probably negatively impact market making activities at broker-dealers with thousands of fee-based accounts, and it is unclear the full impact such a process will have on market liquidity.

It is important to understand that the Proposing Release represents a continuation of the Commission's almost six-year odyssey to fashion rules to govern modern financial realities so that they fit within the interpretations of Congress in 1940. The countless comment letters received, the lawsuit filed[8] and the increasing popularity of the fee-based brokerage account all point to a legislative imperative that Congress study the "solely incidental to" provision of the Advisers Act. Such legislative balancing of competing concerns is what Congress does, and while it is equally a role the Commission plays, this Proposing Release indicates it is time for Congress to decide now if the restrictions of the Advisers Act continue to have validity in this new century. We would suggest that the Commission table the Proposing Release, continue the 1999 no-action position, and seek Congressional study and review of this important issue.

B. Issues Concerning an Interpretive Position

Assuming that the Proposing Release will go forward, we comment upon the Proposing Release's discussion of when advice is "solely incidental to brokerage services." It explains that advice is "solely incidental to brokerage services" when "the advisory services rendered to an account are in connection with and reasonably related to the brokerage services provided to that account." Wachovia Securities agrees with this interpretation and the Proposing Release's rejection of the concept that "solely incidental to brokerage services" means "minor" or "insignificant." The Proposing Release then goes on to discuss related issues to the concept of "solely incidental." It requires that firms advertising fee-based accounts must disclose that brokerage accounts are not advisory accounts. Based upon previous comment letters, the Proposing Release notes some commenters believe that brokerage firms should not call their brokerage employees "financial consultants" or "financial advisers." These titles fit, however, with the roles registered representatives play in the accounts of many investors. The public has a general understanding that when they go to a broker-dealer they are paying for a suite of services that include to varying degrees sales, advice and consultation. The disclosures of the Proposing

[7] 15 USC §80b-6(3).
[8] The Financial Planning Association filed a petition for judicial review of the original 1999 rule proposal. Financial Planning Ass'n v. SEC, No. 04-1242 (D.C. Cir.) (case docketed on July 20, 2004).

Release will insure that customers face no confusion as to whether their investment professional is placing them in an advisory account.

Wachovia Securities encourages the Commission to state that financial planning services are "solely incidental to brokerage services." As alluded to in the Proposing Release, the financial world of today's investor is such that it is an integral part of a broker's duty to "know your customer." That a broker's work contains some effort to plan the investor's finances is a "best practice" as brokers utilize a variety of tools to accurately gauge a customer's needs. Accordingly, a blanket conclusion that financial planning services are not solely incidental to the provision of brokerage services would severely handicap the firms providing fee-based accounts in fulfilling a regulatory duty and would run counter to the common understanding of many of the offerings one can expect from a full-service broker.

It is important to recognize that various levels of financial planning are almost ubiquitous in today's society. There are financial planning tools that range from free, downloadable financial planning systems on various websites to the occasional financial literacy newspaper cutout to personal financial management software. The harsh reality is that, in a way, financial planning has become "solely incidental to" routine life for today's average investor. It would be unfair to craft rules that ignore the new world in which all in the financial community exist. Thus, it appears that the system might be unworkable if the Commission declares that a broker-dealer holding itself out as a financial planner or as providing financial planning services is not giving advice "solely incidental to brokerage services" and accordingly must register as an investment adviser. A better approach might be to identify specific types of financial planning services that should be off limits to brokerage firms that do not also register as financial advisers.

IV. Conclusion

The investing public, as evidenced by the tremendous growth in assets in recent years, has accepted widely fee-based brokerage accounts. While not suitable for all clients, fee-based brokerage programs serve to align the interests of investors, brokers and firms. Maintaining public confidence and giving investors a voice in determining how to pay for services as well as in the types of services offered certainly works to the advantage of investors and the financial industry. The benefits of offering clients payment options tends to make for longer client/investment professional relationships as well as long term relations of the professional with the firm relationships. This symbiotic process in turn may lead to a better ability to "know the client." Longevity may also lead to better investment advice. With this in mind and in light of the comments above, Wachovia Securities looks forward to having either the Commission seek Congressional input on changing the Advisers Act or having the Commission move forward to adopt the Proposing Release with appropriate changes.

We again appreciate the opportunity to provide these comments, and we would be pleased to answer any questions or provide more information to the Commission or the Staff as they work through these important issues.

Very truly yours,

Ronald C. Long

Ronald C. Long
Senior Vice President
Regulatory Policy and Administration
Wachovia Securities, LLC