

**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA**

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SECURITIES AND EXCHANGE COMMISSION, )  
Plaintiff, )  
vs. ) **COMPLAINT**  
WACHOVIA CORPORATION, )  
Defendant. )  
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Plaintiff Securities and Exchange Commission (“Commission”) alleges:

**NATURE OF THE ACTION**

1. This case concerns incomplete disclosure in a quarterly report and in a joint proxy statement-prospectus in connection with a proposed merger between First Union Corporation (“First Union”) and legacy Wachovia Corporation (“ Old Wachovia”). On April 16, 2001, the two firms announced their intention to merge in a stock-for-stock transaction. As a result of the merger First Union would become the surviving corporation but would change its name to Wachovia Corporation (“New Wachovia”). The merger proposal contemplated that, at the time of the merger, each Old Wachovia share would be exchanged for two First Union shares, which would then be re-issued by the surviving company as New Wachovia shares.

2. On May 2, 2001, Old Wachovia's Management Investment Committee authorized management to purchase up to \$500 million worth of First Union common stock ("FTU"). After that authorization had been exhausted, the Management Investment Committee authorized the purchase of up to an additional \$55 million worth of FTU shares on or about June 28, 2001. During the period between May 2 and June 28, 2001, Old Wachovia purchased approximately 16,490,000 shares of FTU for a total purchase price of approximately \$555 million. Old Wachovia's purchases likely had the effect of supporting the price of FTU, which in turn supported the value of First Union's merger proposal and thereby made it appear more attractive to Old Wachovia shareholders.
3. On May 14, 2001, SunTrust Corporation ("SunTrust") announced a competing bid to acquire Old Wachovia. First Union and Old Wachovia, on the one hand, and SunTrust, on the other, waged a hotly contested battle in ensuing weeks, in anticipation of shareholders choosing between the two competing offers. During this period of time, Old Wachovia, First Union, and SunTrust each purchased their own shares of common stock.
4. In its May 11, 2001 Quarterly Report on Form 10-Q for the quarter ended March 31, 2001 (the "10-Q"), Old Wachovia disclosed that, since April 16, 2001, the date of the announcement of the merger, it had purchased \$18 million of First Union stock and that it intended to buy additional shares from time to time consistent with all applicable legal and regulatory requirements. Old Wachovia did not disclose that it had received authorization to purchase and intended, subject to the requirements of the Hart-Scott-Rodino Act, to purchase \$500 million worth of First Union stock. On June 26, 2001, Old Wachovia filed an amendment to the 10-Q (the "Amended 10-Q"); in that filing, Old

Wachovia did not disclose the amount of First Union stock it had purchased as of the date of that amendment. Similarly, First Union's May 15, 2001 Quarterly Report on Form 10-Q for the quarter ended March 31, 2001, also disclosed that since April 16, 2001, the date of the announcement of the merger, Old Wachovia had purchased \$18 million of First Union stock and that it intended to buy additional shares from time to time consistent with all applicable legal and regulatory requirements. First Union also did not disclose that Old Wachovia had received authorization to purchase and intended, subject to the requirements of the Hart-Scott-Rodino Act, to purchase \$500 million worth of First Union stock. In a June 26, 2001 amendment to First Union's Quarterly Report for the quarter ended March 31, 2001, First Union repeated the same disclosure regarding Old Wachovia's purchases of FTU, when , as of June 26, Old Wachovia had purchased approximately \$500 million worth of FTU shares.

5. On or about June 29, 2001, Old Wachovia and First Union mailed their joint proxy statement-prospectus (the "Joint Proxy") to shareholders entitled to vote at their respective annual meetings on the proposed merger between the two companies. The Joint Proxy incorporated Old Wachovia's and First Union's Forms 10-Q and Amended 10-Q by reference and did not disclose the amount of FTU purchased by Old Wachovia. This omitted information was material.

6. By reason of the foregoing, both Old Wachovia's and First Union's Forms 10-Q, Amended 10-Q and the Joint Proxy omitted material facts necessary to make the statements made in them, in light of the circumstances under which they were made, not misleading, in contravention of Sections 13(a) and 14(a) of the Securities Exchange Act of 1934 and Rules 12b-20, 13a-13 and 14a-9 thereunder.

## **JURISDICTION AND VENUE**

7. The Commission brings this action pursuant to Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u].

8. This Court has jurisdiction over this action pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Defendant directly or indirectly made use of the means or instrumentalities of interstate commerce, or the mails, or the facilities of a national exchange, in connection with the transactions, acts, practices and courses of business alleged herein. Certain of the Defendant's transactions, acts, practices or courses of business occurred within this District, and venue is proper pursuant to Section 27 of the Exchange Act.

## **DEFENDANT**

9. New Wachovia, formerly First Union, is a publicly-held company organized and existing under the laws of North Carolina that has securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. New Wachovia is a holding company that is engaged, directly and indirectly, through subsidiaries and affiliated entities, in various aspects of the banking and financial services industry. It is the surviving corporation in the merger between First Union and Old Wachovia, which was also organized under the laws of the State of North Carolina and had securities registered with the Commission under Section 12(b) of the Exchange Act.

## **STATEMENT OF FACTS**

10. On April 16, 2001, First Union and Old Wachovia announced their intention to merge in a stock transaction contemplating that, at the time of the merger, each share of

Old Wachovia common stock (“WB”) would be exchanged for two First Union shares, which would then be re-issued in the name of the surviving corporation, New Wachovia.

11. In early 2001, Old Wachovia announced that it intended to repurchase some of its own stock for the purpose, in part, of offsetting the impact of an issuance of shares it made to consummate an acquisition. On or about May 1, 2001, Old Wachovia entered into an accelerated stock repurchase agreement (“ASR”) with an unaffiliated brokerage firm, pursuant to which that brokerage firm sold short approximately 8 million WB shares, for approximately \$500 million, to Old Wachovia. Old Wachovia was able to retire all of those shares immediately upon execution of the ASR. During May and June 2001, Old Wachovia, pursuant to the ASR, requested that the brokerage firm enter into the market and purchase Old Wachovia shares to cover its short position.

12. On or about May 2, 2001, Old Wachovia’s Management Investment Committee, whose responsibility was to authorize the company’s investments, authorized management to purchase up to \$500 million worth of First Union stock during the period Old Wachovia was repurchasing its own stock. Because of its desire to consummate the merger with First Union, Old Wachovia had an interest in ensuring that the ratio that existed on April 16, 2001 between its stock price and First Union’s stock price did not widen significantly as a result of the covering purchases of Old Wachovia stock that were to be made in May and June 2001 pursuant to the ASR. This interest intensified after SunTrust’s proposal, which initially offered a higher premium to Old Wachovia shareholders relative to First Union’s proposal.

13. Between May 2 and May 8, 2001, Old Wachovia bought approximately \$18 million of FTU shares on the open market.<sup>1</sup> Old Wachovia stopped buying FTU on or about May 8 because of a possible limitation on the amount of such stock it could buy in a prospective merger partner without pre-clearance of those purchases under the Hart-Scott-Rodino Act.

14. On May 11, 2001, Old Wachovia disclosed in its 10-Q for the quarter ended March 31, 2001 that since April 16, 2001, the date of the announcement of the merger, it had purchased \$18 million of First Union stock and that it intended to continue to purchase First Union stock thereafter "from time to time" consistent with all applicable legal and regulatory requirements. The 10-Q did not disclose that Old Wachovia had authorized the purchase of up to \$500 million worth of First Union stock and intended, subject to the requirements of the Hart-Scott-Rodino Act, to buy that amount of stock. Similarly, in First Union's May 15, 2001 Quarterly Report on Form 10-Q for the quarter ended March 31, 2001, it also disclosed that since April 16, 2001, the date of the announcement of the merger, Old Wachovia had purchased \$18 million of First Union stock and that it intended to buy additional shares from time to time consistent with all

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<sup>1</sup> In connection with its FTU purchases, Old Wachovia instructed the broker executing the FTU purchases to do so in compliance with Rule 10b-18. In October 2003, the Commission adopted amendments to certain provision of Rule 10b-18. Release 34-48766 (Nov. 10, 2003), 68 FR 64952. The amendment clarified that the safe harbor is not available for purchases effected from the time of public announcement of a merger, acquisition, or similar transaction involving a recapitalization, until the earlier of the completion of such transaction or the completion of the vote by target shareholders, subject to certain exceptions. The safe harbor is not available once such a transaction is announced, because an issuer has considerable incentive to support or raise the market price of the stock in order to facilitate the merger or acquisition. 68 FR at 6495. The Commission also emphasized that "regardless of whether an issuer's repurchases technically satisfy the conditions of the Rule, the safe harbor is not available if the repurchases are fraudulent or manipulative, when viewed in the totality of the facts and circumstances surrounding the repurchases (i.e. facts and circumstances in addition to the volume, price, time, and manner of the repurchases)." 68 FR 64953. "To come within the safe harbor, however, an issuer's repurchases must satisfy (on a daily basis) each of the section's four conditions. Failure to meet any one of the four conditions will remove all of the issuer's repurchases from the safe harbor for the day." 17 240.10b-18 Preliminary Note 1.

applicable legal and regulatory requirements. First Union's 10-Q also did not disclose that Old Wachovia had received authorization to purchase and intended, subject to the requirements of the Hart-Scott-Rodino Act, to purchase \$500 million worth of First Union stock.

15. On May 14, 2001, SunTrust announced a competing bid for Old Wachovia. SunTrust's unsolicited proposal provided for an acquisition of Old Wachovia through a merger of Old Wachovia into SunTrust in which each Old Wachovia share would be converted into 1.081 shares of SunTrust common stock. Based on the closing market prices on May 14, 2001, the implied value per share of Old Wachovia common stock under this proposal was \$64.86. At the time of the announcement, SunTrust's proposal offered a higher premium to Old Wachovia's shareholders over First Union's offer.

16. On or about May 31, 2001, the Hart-Scott-Rodino issue described above was resolved, and Old Wachovia resumed buying FTU shares. By this time, however, Old Wachovia knew that the joint proxy statement-prospectus ("Joint Proxy") seeking shareholder approval of the proposed merger between First Union and Old Wachovia would likely be mailed at or about the end of June 2001 and that, under Regulation M promulgated by the Commission, Old Wachovia would be precluded from purchasing shares of FTU once the Joint Proxy was mailed.

17. At this point, Old Wachovia knew that it would have a limited number of trading days to purchase the full \$500 million in First Union shares that had been authorized by the Committee and that, as a practical matter, to accomplish that objective, it would have to make larger purchases of First Union stock than it had made in early May. As a consequence, Old Wachovia knew that the First Union purchases it planned to make prior

to the mailing of the Joint Proxy would likely have some impact on the market price for First Union stock. Old Wachovia also knew that, to the extent its purchases increased the price of FTU shares, that price increase could have the effect of making the First Union merger proposal more attractive to shareholders than the competing SunTrust proposal. Accordingly, Old Wachovia should have publicly disclosed more detailed information about its purchases of First Union so that the market would be able to evaluate the effect of those trades on the movement of the price of First Union stock during that period.

18. Between May 31 and June 25, 2001, Old Wachovia purchased approximately \$482 million of First Union shares, thereby exhausting the initial \$500 million Committee authorization. Old Wachovia's aggregate purchases on certain days were in such amounts that they likely had an impact on the price of First Union stock. For example, on June 25, Old Wachovia purchased 2.85 million FTU shares, or 53% of the total trading volume for FTU that day, largely through block trades. The stock closed approximately \$.50 higher than it had on the previous trading day. The closing price for this day was included in the joint proxy statement sent to shareholders.

19. On June 26, 2001, Old Wachovia filed its Amended 10-Q with the Commission. The Amended 10-Q did not provide updated information on Old Wachovia's purchases of First Union even though, following May 11, Old Wachovia had purchased an additional \$482 million of First Union stock. On June 26, 2001, First Union filed its Amended 10-Q with the Commission, in which, it repeated the disclosure it had made regarding Old Wachovia's purchases of First Union, even though, as discussed, Old Wachovia had purchased an additional \$482 million of FTU.



20. On June 28, 2001, knowing that the Joint Proxy would soon be mailed to shareholders, the Committee authorized Old Wachovia to purchase an additional \$55 million in First Union stock. On that day, Old Wachovia bought 1.5 million shares of FTU for approximately \$55 million.
21. On or about June 29, 2001, Old Wachovia and First Union mailed the Joint Proxy to the more than two hundred thousand shareholders entitled to vote at their respective annual meetings on the proposed merger between the two companies. The Joint Proxy, which incorporated both First Union's and Old Wachovia's Forms 10-Q and Amended 10-Q by reference, did not disclose the full amount of First Union stock purchased by Old Wachovia. Old Wachovia should have publicly disclosed more detailed information about its purchases of First Union so that the market would be able to evaluate the effect of those trades on the movement of the price of First Union stock during that period. This omitted information was material.
22. The proposed merger was approved by the shareholders of both First Union and Wachovia at meetings held on July 31 and August 3, respectively.
23. The merger was formally consummated on September 1, 2001, and the surviving company, First Union, changed its name to Wachovia Corporation.
24. During the course of the SEC staff's investigation into this matter, Wachovia provided incomplete and untimely document productions and failed to ensure comprehensive and complete responses to requests made and subpoenas issued by the SEC staff in this matter. These production deficiencies and delays unnecessarily prolonged the SEC staff's investigation in this matter.

### **FIRST CLAIM FOR RELIEF**

(Section 13(a) of the Exchange Act [15 U.S.C. Section 78m(a)] and Rule 13a-13)

25. Paragraphs 1 through 25 are re-alleged and incorporated herein by reference.

26. By reason of the foregoing, the Forms 10-Q and amended 10-Q that Old Wachovia and First Union filed with the Commission failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

27. By reason of the foregoing, Old Wachovia and First Union violated Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13, thereunder.

### **SECOND CLAIM FOR RELIEF**

(Section 14(a) of the Exchange Act [15 U.S.C. 78n(a)] and Rule 14a-9)

28. The allegations of paragraphs 1 through 25 are re-alleged and incorporated herein.

29. By reason of the foregoing, the Joint Proxy failed to disclose material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

30. By reason of the foregoing, Old Wachovia and First Union violated Section 14(a) of the Exchange Act and Rule 14a-9 thereunder.

### **PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that this Court enter a judgment:

a) permanently enjoining Defendant from directly or indirectly violating Sections 13(a) and 14(a) of the Exchange Act and Rules 12b-20, 13a-13 and Rule 14a-9 thereunder;

b) ordering Defendant to pay a civil money penalty pursuant to Section 21(d)(3)  
of the Exchange Act; and

c) granting such other relief as this Court may deem just and appropriate.

Dated \_\_\_\_\_, 2004

Respectfully submitted,

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