

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Jill M. Petersen,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-26723; 812-13135]

### Wachovia Corporation, et al.; Notice of Application and Temporary Order

January 12, 2005.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

**SUMMARY OF APPLICATION:** Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Wachovia Corporation ("Wachovia")<sup>1</sup> on or about November 12, 2004 by the United States District Court for the District of Columbia (the "Injunction"), from January 12, 2005 until the Commission takes final action on an application for a permanent order. Applicants also have requested a permanent order.

**APPLICANTS:** Wachovia, Evergreen Investment Management Co, LLC ("EIMCO"), Evergreen Investment Services, Inc. ("EIS"), First International Advisors, LLC (d/b/a Evergreen International Advisors) ("FIA"), JL Kaplan Associates, LLC ("Kaplan"), SouthTrust Investment Advisors, A Division of SouthTrust Bank ("STIA"), and Tattersall Advisory Group, Inc. ("TAG") (EIMCO, FIA, Kaplan, STIA and TAG are collectively referred to as the "Advisers"), and Evergreen Investment Services, Inc. ("EIS") (the "Underwriter" and, together with the Advisers and Wachovia, the "Applicants").<sup>2</sup>

**FILING DATES:** The application was filed on November 5, 2004, and amended on January 5, 2005.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be

issued unless the Commission orders a hearing or further extends the temporary exemption. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 7, 2005, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Mark C. Treanor, Esq., Wachovia Corporation, 301 South College Street, Suite 4000, One Wachovia Center, Charlotte, NC 28288-0013.

**FOR FURTHER INFORMATION CONTACT:** Janis F. Kerns, Senior Counsel, or Todd F. Kuehl, Branch Chief, at 202-942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (telephone 202-942-8090).

### Applicants' Representations

1. Wachovia is a holding company that, through its subsidiaries and affiliates, provides banking, investment, financing, advisory, and related products and services on a global basis. Wachovia is the ultimate parent company of the Advisers and Underwriter. Each Adviser is an investment adviser registered under the Investment Advisers Act of 1940 and serves as investment adviser or sub-adviser to certain registered investment companies ("Funds"). The Underwriter is a broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act") that acts as a principal underwriter for certain Funds.

2. On or about November 12, 2004, the United States District Court for the District of Columbia entered the Injunction against Wachovia in a matter brought by the Commission.<sup>3</sup> The Commission alleged in its complaint

("Complaint") that Legacy Wachovia and First Union Corporation ("First Union") violated sections 13(a) and 14(a) of the Exchange Act and rules 12b-20, 13a-3 and 14a-9 thereunder.<sup>4</sup> The alleged violations occurred in connection with material factual omissions in a joint proxy statement/prospectus and quarterly reports filed by Legacy Wachovia and First Union in May and June 2001 during the pendency of First Union's offer to purchase Legacy Wachovia. Without admitting or denying any of the allegations in the Complaint, except as to jurisdiction, Wachovia consented to the entry of the Injunction and the payment of a civil penalty.

### Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that Wachovia is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they became subject to the prohibitions of Section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the application. Applicants have filed an application pursuant to section 9(c) seeking temporary and permanent orders exempting them from the disqualification provisions of section

<sup>18</sup> 17 CFR 200.30-3(a)(27).

<sup>1</sup> Wachovia is the surviving entity of the merger between First Union Corporation and the company known as Wachovia Corporation ("Legacy Wachovia") on September 1, 2001.

<sup>2</sup> Applicants request that any relief granted pursuant to the application also apply to any other company of which Wachovia is or hereafter becomes an affiliated person in the future (included in the term "Applicants").

<sup>3</sup> *Securities and Exchange Commission v. Wachovia Corporation, et al.*, Civil Action No. 04-1911 (D.D.C. filed Nov. 12, 2004).

<sup>4</sup> *Securities and Exchange Commission v. Wachovia Corporation, et al.*, Civil Action No. 04-1910 (D.D.C. filed Nov. 4, 2004).

9(a) of the Act with respect to the Injunction.

On November 12, 2004, the Applicants received a temporary conditional order from the Commission exempting them from section 9(a) of the Act with respect to the Injunction until the Commission takes final action on an application for a permanent order or, if earlier, January 12, 2005 ("Existing Temporary Order").<sup>5</sup>

3. Applicants believe they meet the standards for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the conduct alleged in the Complaint did not involve any of the Applicants acting in the capacity of investment adviser, subadviser, depositor or principal underwriter for any Fund. Applicants state that none of the current or former officers, directors or employees of the Advisers or the Underwriter who are or were involved in providing investment advisory, subadvisory, or underwriting services to the Funds were involved in the conduct underlying the Injunction.

5. Applicants state that the inability of the Advisers to continue providing advisory or subadvisory services to the Funds, and of the Underwriter from serving as principal underwriter to the Funds, would result in potentially severe hardships for the Funds and their shareholders. Applicants assert that section 9(a) disqualifications would deprive Fund shareholders of the services they selected in investing in the Funds, cause uncertainty by frustrating efforts to effectively manage Fund assets, and could increase the Funds' expense ratios to the detriment of the Funds' shareholders. The Advisers and Underwriter have distributed, or will distribute as soon as reasonably practical, written materials, including an offer to meet in person to discuss the materials, to the boards of directors or trustees of the Funds (the "Boards"), including the directors or trustees who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, regarding the Injunction, any impact on the Funds, and the application. Applicants will provide the Boards with all information concerning the Injunction and the

application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. The Advisers and Underwriter also state that, if they were barred from providing services to the Funds, the effect on their businesses and employees would be severe. The Advisers and Underwriter state that they have committed substantial resources to establish an expertise in advising, subadvising, and distributing the Funds. The Advisers and Underwriter state that prohibiting them from providing advisory and distribution services to the Funds would adversely affect not only the viability of their businesses, but also the livelihoods of the hundreds of employees of the Advisers and Underwriter. Applicants state that they have not received any orders under section 9(c) of the Act in the past.

#### Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Applicants, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application, or the revocation or removal of any temporary exemptions granted in connection with the application.

#### Temporary Order

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

*It is hereby ordered*, pursuant to section 9(c) of the Act, that Applicants are granted a temporary exemption from the provisions of section 9(a) of the Act, solely with respect to the Injunction, subject to the condition in the application, from January 12, 2005 until the Commission takes final action on the application for a permanent order.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51026; File No. SR-EMCC-2005-01]

### Self-Regulatory Organizations; Emerging Markets Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change To Establish Procedures for Exiting Open Fail Positions Prior to Dissolution

January 12, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on January 5, 2005, the Emerging Markets Clearing Corporation ("EMCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared primarily by EMCC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change establishes a cut-off date for processing securities transactions and implements procedures for EMCC to exit open fail positions prior to its dissolution.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, EMCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. EMCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.<sup>2</sup>

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

At EMCC's October 27, 2004, Board of Directors ("Board") meeting, the Board authorized EMCC's dissolution and deregistration as a clearing agency effective no later than March 31, 2005. In order to accomplish this, EMCC has

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> The Commission has modified the text of the summaries prepared by EMCC.

<sup>5</sup> Investment Company Act Release No. 26654 (Nov. 12, 2004)