

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-26440; 812-12839]

### Wachovia Bank National Association, et al.; Notice of Application May 3, 2004.

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

**ACTION:** Notice of an application for an order under (a) section 12(d)(1)(J) of the Investment Company Act of 1940 ("Act") for an exemption from sections 12(d)(1)(A) and (B) of the Act, (b) sections 6(c) and 17(b) for an exemption from section 17(a) of the Act, (c) section 6(c) for an exemption from section 17(e) of the Act, and (d) section 17(d) of the Act and rule 17d-1 under the Act for an order permitting certain joint transactions.

**Applicants:** Wachovia Bank National Association ("Wachovia Bank"); Evergreen Money Market Trust and Evergreen Select Money Market Trust, and their series (the "Evergreen Money Market Funds"); Evergreen Investment Management Company, LLC ("Advisor"); and Wachovia Securities, LLC. ("Wachovia Securities").

**Summary of Application:** Applicants request an order that would permit certain registered management investment companies, and series thereof ("Registered Lending Funds") (a) to invest cash collateral that is received in connection with a securities lending program ("Cash Collateral") in shares of the Evergreen Money Market Funds beyond the limits set forth in sections 12(d)(1)(A) and (B) of the Act, (b) to pay a lending agent, which may become an affiliated person of a Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, a fee based on a share of the revenue derived from securities lending activities, (c) to lend portfolio securities to broker-dealers, which may become affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, and (d) to engage in principal

transactions with, and pay brokerage commissions to, broker-dealers that are affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds.

**FILING DATES:** The application was filed on June 21, 2002, and amended on November 20, 2003.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. 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 June 1, 2004, 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 Catherine F. Kennedy, Evergreen Funds, 200 Berkeley Street, Boston, MA 02116-9000.

**FOR FURTHER INFORMATION CONTACT:** Stacy L. Fuller, 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 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 Bank is a national banking association chartered by the Office of the Comptroller of the Currency and a banking subsidiary of Wachovia Corporation, a publicly held financial holding company. Wachovia Securities is a wholly owned subsidiary of Wachovia Corporation that is registered as a broker-dealer under the Securities Exchange Act of 1934; Wachovia Securities and other broker-dealers that are controlling, controlled by or under common control with Wachovia Securities are each referred to as an "Affiliated Broker-Dealer" and collectively referred to as the "Affiliated Broker-Dealers." The Advisor is an

indirect wholly owned subsidiary of Wachovia Corporation and of Wachovia Bank that is registered as an investment adviser under the Investment Advisers Act of 1940. Each Registered Lending Fund has as its investment adviser an entity that is not affiliated with Wachovia Corporation. Registered Lending Funds may participate from time to time as lenders in the securities lending program, described below, with Wachovia Bank as lending agent (the "Program").<sup>1</sup>

2. The Evergreen Money Market Funds, which are series of Delaware statutory trusts, are open-end management investment companies that are registered under the Act. The Evergreen Money Market Funds are money market funds that comply with rule 2a-7 under the Act. The Advisor serves as investment adviser to all of the Evergreen Money Market Funds. Shares of the Evergreen Money Market Funds ("Shares") will not be subject to any sales load, redemption fee, asset-based sales charge under a plan adopted in accordance with rule 12b-1 under the Act or service fee (as defined in rule 2830(b)(9) of the Conduct Rules of the National Association of Securities Dealers ("Rule 2830")).

3. The Program will be administered by Wachovia Bank. Wachovia Bank will enter into a securities lending agency agreement ("Agency Agreement") with each Registered Lending Fund (a) appointing Wachovia Bank to serve as the Registered Lending Fund's agent in connection with lending portfolio securities held in a custody account for the benefit of the Registered Lending Fund, (b) authorizing Wachovia Bank, as agent for the Registered Lending Fund, to enter into a master securities loan agreement ("SLA") with each entity designated by the Registered Lending Fund as an eligible borrower ("Borrower"), and lend securities to Borrowers in exchange for Cash Collateral and other permitted types of collateral, and (c) instructing Wachovia Bank to invest any Cash Collateral in Shares of an Evergreen Money Market Fund or otherwise pursuant to instructions from the Registered Lending Fund or its investment adviser.

4. The duties to be performed by Wachovia Bank as lending agent with respect to any Registered Lending Fund will not exceed the parameters

<sup>1</sup> All existing investment companies that are advised by the Advisor and currently intend to rely on the requested relief have been named as applicants. Any existing or future Registered Lending Fund, Affiliated Broker-Dealer or Evergreen Money Market Fund may rely on the requested relief only in accordance with the terms and conditions of the application.

<sup>5</sup> 17 CFR 200.30-3(a)(1).

described in Norwest Bank, Minnesota, N.A., SEC No-Action Letter (Pub. Avail. May 25, 1995), except to the extent that the staff or the Commission may amend, modify or withdraw that letter.

5. With respect to securities loans that are collateralized by Cash Collateral, the Borrower will receive a fixed return based on the amount of cash held as collateral for the term of the loan; the Registered Lending Fund will be compensated on the spread between the net amount earned on the investment of the Cash Collateral and the return fixed for the Borrower. In the case of collateral other than Cash Collateral, the Registered Lending Fund will receive a loan fee paid by the Borrower equal to the agreed upon fee times the percentage of the market value of the loaned securities specified in the SLA.

6. Applicants request relief to permit the Registered Lending Funds (a) to invest Cash Collateral in Shares of the Evergreen Money Market Funds beyond the limits set forth in sections 12(d)(1)(A) and (B), (b) to pay Wachovia Bank, a lending agent that may become an affiliated person of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, a fee based on a share of the revenue derived from securities lending activities, (c) to lend portfolio securities to the Affiliated Broker-Dealers, which are affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, and (d) to engage in principal transactions with, and pay brokerage commissions to, the Affiliated Broker-Dealers.

### Applicants' Legal Analysis

#### A. Investment of Cash Collateral in the Evergreen Money Market Funds

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company representing more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or, together with the securities of other investment companies, more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be

owned by investment companies. Applicants propose that the Registered Lending Funds acquire Shares of the Evergreen Money Market Funds, and the Evergreen Money Market Funds sell Shares to Registered Lending Funds, beyond the limits set forth in sections 12(d)(1)(A) and (B) of the Act.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person or transaction from any provision of section 12(d)(1) if and to the extent that the exemption is consistent with the public interest and the protection of investors. Applicants request an exemption under section 12(d)(1)(J) to permit each Registered Lending Fund to use Cash Collateral to acquire Shares of an Evergreen Money Market Fund in excess of the limits imposed by section 12(d)(1)(A), and each Evergreen Money Market Fund to sell its Shares to the Registered Lending Funds in excess of the limits imposed by section 12(d)(1)(B).

3. Applicants state that the abuses meant to be addressed by section 12(d)(1) of the Act, including undue influence and the layering of fees, are not created by the proposed investment of the Registered Lending Funds' Cash Collateral in the Evergreen Money Market Funds. With respect to undue influence, applicants state that each Evergreen Money Market Fund is managed to maintain a high degree of liquidity; accordingly, no Registered Lending Fund will be in a position to gain undue influence over portfolio management due to the threat of redemption. Applicants also state that the proposed arrangement will not result in an inappropriate layering of fees because the Money Market Funds will not charge a sales load, redemption fee, asset-based sales charge or service fee (as defined in Rule 2830).

Applicants further state that access to the Evergreen Money Market Funds will enhance each Registered Lending Fund's ability to manage and invest Cash Collateral. Finally, applicants represent that no Evergreen Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A), except that an Evergreen Money Market Fund may (a) acquire securities of a registered open-end investment company in the same group of investment companies as the Evergreen Money Market Fund to the extent permitted by section 12(d)(1)(E) of the Act and (b) purchase shares of an affiliated money market fund for short-term cash management purposes to the

extent permitted by an exemptive order.<sup>2</sup>

4. Sections 17(a)(1) and (2) of the Act prohibit an affiliated person of, or principal underwriter for, a registered investment company, or any affiliated person of the affiliated person or principal underwriter ("Second Tier Affiliate"), acting as principal, from selling any security to, or purchasing any security from, the registered investment company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person; any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; any person directly or indirectly controlling, controlled by, or under common control with, the other person; and, in the case of an investment company, its investment adviser. Control is defined in section 2(a)(9) of the Act to mean "the power to exercise a controlling influence over the management or policies of a company."

5. Applicants state that if a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, the Evergreen Money Market Fund may be deemed to be an affiliated person of the Registered Lending Fund. As a result, section 17(a) may prohibit each Evergreen Money Market Fund from selling its Shares to, and redeeming its Shares from, the Registered Lending Funds.

6. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policy of each registered investment company concerned and with the general purposes of the Act. Section 6(c) of the Act authorizes the Commission to exempt any person or transaction, or any class or classes of persons or transactions, from any provision of the Act if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

<sup>2</sup> Evergreen Select Fixed Income Trust, *et al.*, ICA Rel. Nos. 24213 (Dec. 21, 1999) (notice) and 24260 (Jan. 24, 2000) (order).

7. Applicants request an order under sections 6(c) and 17(b) of the Act to permit the Registered Lending Funds to use Cash Collateral to purchase Shares of the Evergreen Money Market Funds and to redeem those Shares. Applicants maintain that the terms of the proposed transactions are reasonable and fair because the Registered Lending Funds will purchase and sell Shares based on net asset value determined in accordance with the Act. Applicants represent that Wachovia Bank will not purchase Shares, as agent for a Registered Lending Fund in the Program, unless an officer of the Registered Lending Fund has certified to Wachovia Bank that its policies generally permit the Registered Lending Fund to engage in securities lending transactions, and the Registered Lending Fund has represented to Wachovia Bank that (a) such transactions are conducted in accordance with the guidelines of the Commission and/or its staff, (b) its policies permit the Registered Lending Fund to purchase Shares with Cash Collateral, and (c) its securities lending activities will be conducted in accordance with all representations and conditions in this application.

8. Section 17(d) of the Act and rule 17d-1 under the Act prohibit any affiliated person of, or principal underwriter for, a registered investment company or any Second Tier Affiliate, acting as principal, from effecting any transaction in connection with any joint enterprise or other joint arrangement or profit sharing plan in which the investment company participates, without an order of the Commission.

9. Applicants state that if a Registered Lending Fund owns 5% or more of the Shares of an Evergreen Money Market Fund, the Registered Lending Funds (by purchasing and redeeming shares of the Evergreen Money Market Funds), the Advisor (by acting as investment adviser to the Evergreen Money Market Funds), Wachovia Bank (by acting as lending agent, investing Cash Collateral in Shares, and receiving a portion of the revenue generated by securities lending transactions), and the Evergreen Money Market Funds (by selling Shares to and redeeming Shares from the Registered Lending Funds) could be deemed to be participants in a joint enterprise or other joint arrangement within the meaning of section 17(d) and rule 17d-1.

Applicants request an order under section 17(d) and rule 17d-1 to permit the transactions incident to the investment of Cash Collateral in the Evergreen Money Market Funds.

10. Under rule 17d-1, in passing on applications for orders under section 17(d), the Commission considers

whether the investment company's participation in the joint enterprise is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the proposed transactions satisfy the standards of section 17(d) and rule 17d-1.

11. Applicants state that the Registered Lending Funds will purchase and sell Shares of the Evergreen Money Market Funds based on their net asset value determined in accordance with the Act. Applicants also maintain that, to the extent that any Registered Lending Fund invests in the Evergreen Money Market Funds as proposed, each Registered Lending Fund will participate on a fair and reasonable basis, relative to the size of its investment, in the returns and expenses of the Evergreen Money Market Funds.

#### *B. Payment of Lending Agent Fees to Wachovia Bank*

12. Applicants state that to the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund (and thereby becomes a Second Tier Affiliate of Wachovia Bank), the Agency Agreement, under which compensation is paid to Wachovia Bank based on the revenue generated for the Registered Lending Fund by the Program, could be deemed a joint enterprise or other joint arrangement in violation of section 17(d). Applicants accordingly seek an order under section 17(d) and rule 17d-1, to the extent necessary, to permit Registered Lending Funds to pay, and Wachovia Bank to accept, fees in connection with Wachovia Bank acting as lending agent. Applicants state that the nature of the affiliation between Wachovia Bank and the Registered Lending Funds would be such as not to give rise to any potential for overreaching and that the transactions between Wachovia Bank and the Registered Lending Funds would be on an arm's length basis.

13. Applicants submit that the proposed lending fee meets the standard of rule 17d-1. Applicants state that the lending agent fee will be negotiated on an arm's length basis by and between the Registered Lending Fund and Wachovia Bank. Applicants further state that Wachovia Bank will not purchase Shares of an Evergreen Money Market Fund for a Registered Lending Fund unless an officer of the Registered Lending Fund has certified in writing that (a) participation in the Program has been approved by a majority of its directors (or trustees) who are not

interested persons, as defined by section 2(a)(19) of the Act, of the Registered Lending Fund ("Independent Directors"), and (b) the Independent Directors of the Registered Lending Fund will evaluate the Program no less frequently than annually to determine that the investment of Cash Collateral in the Evergreen Money Market Funds is in the best interests of the Registered Lending Fund's shareholders.

#### *C. Lending Portfolio Securities to the Affiliated Broker-Dealers*

14. Section 17(a)(3) of the Act makes it unlawful for any affiliated person, or Second Tier Affiliate, of a registered investment company acting as principal, to borrow money or other property from the registered investment company. Applicants state that to the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, the Affiliated Broker-Dealers will be Second Tier Affiliates of the Registered Lending Fund. Accordingly, section 17(a)(3) could prohibit the Affiliated Broker-Dealers from borrowing securities from the Registered Lending Funds.

15. Applicants seek relief under sections 6(c) and 17(b) from the above-described application of section 17(a)(3). Applicants submit that the requested relief meets the standards of sections 6(c) and 17(b) of the Act. Applicants state that each Registered Lending Fund will have an investment adviser that is not affiliated with the Affiliated Broker-Dealers. Applicants state that such investment adviser will have pecuniary interests directly aligned with those of the Registered Lending Fund, and that such adviser will have an opportunity to monitor the Registered Lending Fund's transactions with Affiliated Broker-Dealers and to compare such transactions to those effected with other Borrowers. Applicants further state that the board of directors (or trustees) of each Registered Lending Fund will have an opportunity to impose conditions or limitations on borrowing activities between the Registered Lending Fund and Affiliated Broker-Dealers.

16. To the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, applicants state that the Registered Lending Fund and Affiliated Broker-Dealers may be prohibited by section 17(d) and rule 17d-1 from entering into securities lending transactions. Accordingly, applicants seek relief under rule 17d-1. For the reasons discussed above, applicants assert that the requested relief meets the standards of section 17(d) and rule 17d-1.

#### *D. Transactions With the Affiliated Broker-Dealers*

17. Sections 17(a)(1) and (2), as noted above, prohibit certain principal transactions between a registered investment company and its affiliates, including any Second Tier Affiliates. Applicants state that to the extent that the Affiliated Broker-Dealers and the Evergreen Money Market Funds are deemed to be under common control, an Affiliated Broker-Dealer could be considered to be an affiliated person of an Evergreen Money Market Fund and a Second Tier Affiliate of a Registered Lending Fund that acquires 5% or more of the Shares of an Evergreen Money Market Fund. Accordingly, applicants state, sections 17(a)(1) and (2) could prohibit the Affiliated Broker-Dealers, on a principal basis, from selling securities to and purchasing securities from the Registered Lending Funds.

18. Applicants seek relief under sections 6(c) and 17(b) from section 17(a) to permit principal transactions between Registered Lending Funds and Affiliated Broker-Dealers where the affiliation between the parties arises solely as a result of an investment by the Registered Lending Fund in Shares of an Evergreen Money Market Fund. Applicants submit that the requested relief meets the standards of sections 6(c) and 17(b). Applicants assert that each Registered Lending Fund will have an investment adviser that is not affiliated with the Affiliated Broker-Dealers (and that in reality may be a competitor of the Affiliated Broker-Dealers). Accordingly, applicants maintain, the Affiliated Broker-Dealers will have no influence over decisions made by Registered Lending Funds, each transaction between a Registered Lending Fund and an Affiliated Broker-Dealer will be the product of arm's length bargaining, and there will be no element of self-dealing. Applicants further contend that, because the interests of a Registered Lending Fund's investment adviser will be directly and solely aligned with the Registered Lending Fund, it is reasonable to conclude that the consideration paid to, or received by, a Registered Lending Fund in connection with a principal transaction with an Affiliated Broker-Dealer will be reasonable and fair.

19. Section 17(e)(2)(A) makes it unlawful for any affiliated person of a registered investment company, or any Second Tier Affiliate, acting as broker in connection with the sale of securities to or by that registered investment company, to receive from any source a commission for effecting the transaction that exceeds, with respect to sales

effected on a securities exchange, the usual and customary broker's commission. Rule 17e-1 provides that a commission shall be deemed not to exceed the usual and customary commission if certain procedures are followed by the registered investment company.

20. Applicants seek relief under section 6(c) from section 17(e) to permit the Affiliated Broker-Dealers to (continue to) engage in brokerage transactions with, and to receive commissions from, Registered Lending Funds that become Second Tier Affiliates of the Affiliated Broker-Dealers solely by reason of a Registered Lending Fund's investment in Shares of an Evergreen Money Market Fund. Applicants contend that the proposal meets the standards of section 6(c). Applicants submit that the proposed brokerage transactions raise no possibility of self-dealing or any concern that the Registered Lending Funds will be managed in the interests of the Affiliated Broker-Dealers. Applicants believe that each transaction between a Registered Lending Fund and an Affiliated Broker-Dealer will be the product of arm's length bargaining because no investment adviser to a Registered Lending Fund will have an interest in benefiting an Affiliated Broker-Dealer at the expense of the Registered Lending Fund.

#### **Applicants' Conditions**

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

##### *General*

1. The securities lending program of each Registered Lending Fund will comply with all present and future applicable guidelines of the Commission and/or its staff regarding securities lending arrangements.

2. No Registered Lending Fund will purchase Shares of an Evergreen Money Market Fund unless an officer of the Registered Lending Fund certifies in writing that (a) participation in the Program has been approved by a majority of the Independent Directors of the Registered Lending Fund and (b) the Independent Directors of the Registered Lending Fund will evaluate the Program no less frequently than annually to determine that the investment of Cash Collateral in the Evergreen Money Market Funds is in the best interests of the shareholders of the Registered Lending Fund.

#### *Investment of Cash Collateral in an Evergreen Money Market Fund*

3. No Registered Lending Fund will be permitted to invest its Cash Collateral in Shares of an Evergreen Money Market Fund unless an officer of the Registered Lending Fund certifies in writing that such investment complies with the Registered Lending Fund's investment objectives and policies.

4. Investment in Shares of an Evergreen Money Market Fund by a particular Registered Lending Fund will be in accordance with the guidelines regarding the investment of Cash Collateral specified by the Registered Lending Fund in the Agency Agreement. A Registered Lending Fund's Cash Collateral will be invested in a particular Evergreen Money Market Fund only if (a) an officer of the Registered Lending Fund certifies in writing that the Evergreen Money Market Fund has been approved for investment by the Registered Lending Fund and (b) the Evergreen Money Market Fund invests in the types of instruments that the Registered Lending Fund has authorized for the investment of its Cash Collateral.

5. Shares of an Evergreen Money Market Fund sold to and redeemed by a Registered Lending Fund will not be subject to a sales load, redemption fee, any asset based sales charge or service fee (as defined by Rule 2830).

6. An Evergreen Money Market Fund will not acquire securities of any other investment company in excess of the limits of section 12(d)(1)(A) of the Act, except that an Evergreen Money Market Fund may (a) acquire securities of a registered open-end investment company in the same group of investment companies as the Evergreen Money Market Fund to the extent permitted by section 12(d)(1)(E) of the Act and (b) purchase shares of an affiliated money market fund for short-term cash management purposes to the extent permitted by an exemptive order.

For the Commission, by the Division of Investment Management, under delegated authority.

**Jill M. Peterson,**

*Assistant Secretary.*

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