

**BROKER-DEALER REGULATION S-P VIOLATIONS RESULT IN MONETARY
PENALTY AND OTHER SANCTIONS**

On April 9, 2009, the Securities and Exchange Commission (the “SEC”) issued an Order (the “Order”)¹ against Woodbury Financial Services, Inc. (“Woodbury”), an SEC-registered and Financial Industry Regulatory Authority, Inc. (“FINRA”) member broker-dealer for violating Rules 4, 6 and 10 of Regulation S-P.

Summary

The SEC found that Woodbury violated Regulation S-P by (i) allowing newly recruited representatives to provide nonpublic personal information (“NPI”)² of their current employer’s customers to Woodbury without prior notice to or consent of the customers and (ii) allowing its departing registered representatives to take customers’ NPI with them to non-affiliated broker-dealers and not informing its customers that it would allow that practice.

Background

Woodbury, an SEC-registered broker-dealer and FINRA member since 1968, currently has approximately 1,800 registered representatives nationwide and more than 200 home office employees.

In general, Regulation S-P implements Gramm-Leach-Bliley Act notice requirements for “covered institutions,”³ which include SEC registered broker-dealers, and restricts their ability to disclose NPI about natural persons who are either consumers or customers.⁴

¹ Rel. 34-59740; File No. 3-13437. Woodbury consented to the entry of the Order without admitting or denying any of the findings in the Order.

² 17 C.F.R. § 248.3(t) defines “nonpublic personal information” as “personally identifiable financial information,” including “any list of individuals’ names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available information, such as account numbers.”

³ In addition to broker-dealers such as Woodbury, “covered institutions” include registered investment companies and registered investment advisers.

⁴ For the purposes of Regulation S-P, a “consumer” is an individual who obtains, from a covered institution, financial products or services that are to be used primarily for personal, family or household purposes. A “customer” is a consumer who has a “customer relationship” with a covered institution, and a “customer relationship” is a continuing relationship between a consumer and a broker-dealer, fund or registered adviser under which the institution provides a financial product or service that is to be used by the consumer primarily for personal, family or household purposes.

Findings of the SEC

Woodbury was found to have violated Rules 4, 6 and 10 of Regulation S-P. Rule 4 requires a covered institution to provide customers with a clear and conspicuous notice that accurately reflects its privacy policies and practices. Rule 6 requires a covered institution to identify in its privacy notice the categories of NPI that it discloses. Rule 10 provides that, unless otherwise authorized by another provision of Regulation S-P,⁵ a covered institution may not disclose a customer's NPI to nonaffiliated third parties without proper notice and a reasonable opportunity to opt out.

The SEC found that Woodbury willfully violated Rule 10 by allowing its departing registered representatives to take nonpublic customer information when leaving Woodbury for a nonaffiliated broker-dealer and Rules 4 and 6 by not informing customers of the fact. Additionally, because Woodbury did not determine whether recruits, or such recruits' current employers had obtained a customer's consent to provide Woodbury with such customers' NPI, Woodbury was found to have caused underlying violations of Rule 10 by allowing newly recruited registered representatives to bring, and, in certain cases, assisting such representatives in bringing, customers' NPI to Woodbury prior to such persons' actually becoming customers of Woodbury.

Sanctions

In the SEC settlement, Woodbury agreed to revise its policies, practices and procedures to comply with existing regulations, and to cease and desist from current and future violations of Rules 4, 6 and 10 of Regulation S-P. In addition, Woodbury was censured and agreed to pay a civil monetary penalty of \$65,000.

Practical Implications

The findings in this Order are quite similar to those in the recently decided Next Financial Group, Inc. case,⁶ in that both broker-dealers were found to have violated Rules 4, 6 and 10 of Regulation S-P for similar conduct in allowing both their newly recruited and their departing representatives to use NPI without proper disclosures or customer consent. In light of the increasing scrutiny by the SEC, broker-dealers and other entities subject to Regulation S-P would be well advised to review their privacy notices and policies to ensure that they are in compliance with both federal and state privacy and data security regulations. Moreover, even with proper notices and policies in place, it is critical for entities subject to these regulations to supervise their representatives so not to knowingly allow or assist in conduct contrary to such notices and policies, whether they be their own policies or those of another broker-dealer.

⁵ Regulation S-P includes a number of exceptions to the requirement to provide an opt-out clause, including "service provider" exceptions and exceptions for government and judicial compulsion.

⁶ Initial Decision Release No. 349 Administrative Proceeding File No. 3-12738 (June 18, 2008).

* * * * *

If you have any questions regarding this memorandum, please contact, Martin R. Miller (212-728-8690, mmiller@willkie.com) or Marc J. Lederer (212-728-8624, mlederer@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

April 21, 2009

Copyright © 2009 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.