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THE PROTOCOL AFTER FIVE YEARS

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When the Protocol for Broker Recruiting was announced in 2004, there was skepticism it would endure. After years of bitter recruiting litigation it seemed unlikely to some that brokerage firms would simply allow advisors to walk out the door with their clients. Others expressed concern over the taking of client information that the Protocol contemplated.

Five years later, the Protocol has not only survived – it has thrived. From the original three member firms, the Protocol now has more than 250 member firms. It has effectively become an industry standard and has been acknowledged by the Securities and Exchange Commission ("SEC") in its proposed amendment to Federal Regulation S-P rules.

This course book chapter examines the Protocol now that five years have passed, looking at both the practice in the field and how courts have dealt with it. Seemingly simple, the Protocol is full of nuances that can be the subject of dispute. Yet, the major firms have largely avoided litigation. This chapter provides insights into how the Protocol has been applied and real-world tips on how to stay within the safe harbors the Protocol establishes. Armed with this information, a practitioner should be able to guide an advisor safely from one Protocol member firm to another and avoid the litigation that used to be a routine hazard in advisor transitions.

A. OVERVIEW OF THE PROTOCOL

The Protocol establishes rules for financial advisors and hiring firms to follow in connection with advisor transitions and provides that, if those rules are complied with, the prior firm will not bring legal action against either the advisor or the hiring firm for injunctive relief or damages. A copy of the Protocol is **Attachment A** to this chapter.

The three original member firms - Merrill Lynch, Smith Barney and UBS Financial Services - signed the Protocol in August 2004. At that time, a press release was issued inviting all other industry members to join. A firm joins the Protocol by executing a signature page stating that its terms are "agreed and accepted."

To date, more than 250 firms have joined the Protocol. Currently, most of the major firms are Protocol members, including (in addition to the three original signatories): Wells Fargo Advisors (formerly known as

Wachovia Securities), Morgan Stanley Smith Barney, RBC Capital Markets, Credit Suisse and Raymond James. Notable firms that have not joined the Protocol include Goldman Sachs, Edward Jones and JP Morgan Chase.[2]

The Protocol states that its "principal goal" is to "further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representative ("RRs") between firms."[3] The Protocol protects client privacy by limiting significantly the client information the advisor can take with him or her and restricting the information's use by the advisor and the hiring firm. In doing so, the Protocol changes past practice in the industry, well-documented in case law,[4] under which the advisor often took a wide variety of client information, including account statements, holding pages and copies of client files.

The Protocol's other stated goal is to protect clients' "freedom of choice" to follow their advisor to the new firm.[5] It accomplishes this goal

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2. The Protocol provides that member firms may withdraw on ten days' written notice. It specifies that "[a] signatory who has withdrawn from the protocol shall cease to be bound by the protocol and the protocol shall be of no further force or effect with respect to the signatory." Only one firm has withdrawn from the Protocol.
3. For the sake of readability this article uses the term "advisors" rather than "registered representatives" or "RRs," as in the Protocol.
4. *See, e.g.*, Merrill Lynch v. Silcox, 2001 WL 1200656 (S.D. Fl. 2001) (departing advisor allegedly took customer names, addresses, telephone numbers, Merrill Lynch account numbers, and trust documents); Merrill Lynch v. Chamberlain, 145 F.Supp.2d 621 (M.D. Pa. 2001) (departing advisor allegedly took client account statements which contained client names, addresses, types of accounts and account numbers); Merrill Lynch v. Chung, 2001 WL 283083 (C.D. Cal. 2001) (departing advisor allegedly took customer names, addresses, telephone numbers, account numbers, asset values, and account titles); Merrill Lynch v. Coffindaffer, 183 F.Supp.2d 842 (N.D. W.Va. 2000) (departing advisor allegedly took client names, addresses, social security numbers and Merrill Lynch account numbers); Orbach v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1994 WL 900431 (E.D. Mich. 1994) (departing advisor allegedly took client names, addresses, telephone numbers, social security numbers, and Merrill Lynch account numbers).
5. In this regard, the Protocol takes its cue from FINRA pronouncements regarding the importance of protecting client choice. *See* NASD Notice to Members 02-07 (January 2002), stating that "it is inconsistent with just and equitable principles of trade for a member to interfere with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative."

by prohibiting the prior firm from seeking injunctive relief. Most financial advisors are subject to some sort of post-employment restrictive covenant. Prior to the adoption of the Protocol, firms routinely went to court to obtain an injunction prohibiting a departing advisor from soliciting clients and requiring the advisor to return any client information taken.[6] Under the Protocol, member firms agree not to file such legal actions provided the advisor complies with the specifics of the Protocol, even where the advisor has a contract and may be violating the contract by soliciting clients.

The Protocol has seemingly accomplished both of its goals. Practitioners in the field confirm that advisors by and large are complying with its restrictions with respect to the client information that can be taken. Also, a review of the case law indicates that litigation between member firms is much less frequent than it used to be, meaning that courts are being called upon far less often to issue injunctions prohibiting advisors from freely communicating with their clients. It thus seems clear that the Protocol has been good not only for member firms and advisors, but also – and perhaps more importantly – for public customers.

B. THE PROTOCOL'S GOOD FAITH REQUIREMENTS

The Protocol mentions "good faith" in two separate places. Both references are important to understand.

First, the Protocol expressly imposes a duty of good faith on member firms. It provides that "signatories to this Protocol agree to implement and adhere to it in good faith." In practice, this means that member firms endeavor to comply with the Protocol in connection with all hires from other member firms – not just on hires where they want to avoid litigation. In other words, compliance has been treated as mandatory rather than optional.

Member firms' duty of good faith also presumably has contributed to the significant reduction in litigation between member firms. Instead of bringing suit based on every suspected breach of the Protocol, member

6. *See, e.g.*, Merrill Lynch v. Silcox, 2001 WL 1200656 (S.D. Fl. 2001); Merrill Lynch v. Chamberlain, 145 F.Supp.2d 621 (M.D.Pa. 2001); Merrill Lynch v. Chung, 2001 WL 283083 (C.D.Cal. 2001); Merrill Lynch v. Coffindaffer, 183 F.Supp.2d 842 (N.D.W.Va. 2000); Orbach v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1994 WL 900431 (E.D.Mich. 1994).

firms have generally worked together to cure non-compliance. Litigation has become the exception rather than the rule.[7]

The Protocol's second reference to good faith relates to the departing advisor's efforts to comply with the Protocol's rules. It provides that the advisor will be "deemed in compliance with this protocol so long as the RR exercised good faith in assembling the list and substantially complied with the requirement that only Client Information related to clients he or she serviced while at the firm will be taken with him or her." As such, provided the advisor exercises good faith in connection with compiling the Protocol list, he or she should be immune from litigation.

C. NUTS & BOLTS OF A PROTOCOL TRAONSITION

As its name suggests, the Protocol establishes rules to be followed by departing advisors and hiring firms in connection with advisor transitions. Most of these rules relate to the taking and use of client information – specifying not only which types of client information are permissible, but also which clients may be included on the advisor's client list and solicited.

1. Permitted Client Information

The client information an advisor may take is limited to: name, address, phone number, e-mail address and account titles. If the client has more than one phone number (e.g., home, cell and work) or more than one account, the advisor may take information regarding all of them. An advisor may not take any other client information. Thus, an advisor may not take account numbers, social security numbers, account statements, cost-basis information, asset reports or any other information relating to the client, such as "know your customer" profile data. Nor may an advisor take his or her client files, whether in original or copied form.

The Protocol does not impose any restriction on the format in which the client information may be taken. An advisor may take a paper copy of the client information or an electronic copy – or both. The client list can take the form of an Excel spreadsheet or be handwritten. The key to Protocol compliance is not the format of the client list, but that only "Protocol information" be included.

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7. Member firms, however, clearly retain the option to go to court where the Protocol has been violated and are not obligated to try to work things out.

2. Clients who may be Included on List

In addition to specifying what types of client information an advisor may take, the Protocol establishes rules concerning which clients may be included on an advisor's client list and solicited without fear of litigation. The general rule is that an advisor may list and solicit clients that he or she "serviced" while with the prior firm. This means that an advisor may not list or solicit clients serviced by other advisors in the branch office.

The fact that an advisor may have signed a restrictive covenant does not prevent the advisor from moving his or her clients pursuant to the Protocol. Non-solicitation covenants contained in training agreements are subject to the Protocol, as are non-solicitation restrictions contained in promissory notes and reassigned account agreements. Provided the advisor follows the Protocol's rules, the member firm has agreed not to enforce such non-solicitation restrictions against him or her.

The Protocol, however, does not prevent member firms from enforcing *all* post-employment non-solicitation covenants. There are three exceptions to the general rule that a departing advisor may list and solicit any clients he or she serviced.

Teams and Partnerships

The first exception relates to clients serviced as part of a team or partnership arrangement. Many financial advisors are part of a team or partnership under which two or more advisors pool their clients and service them together. Even if they are not part of a formal team or partnership, many financial advisors have a joint number with another advisor in which a limited subset of their business is pooled and serviced jointly. Such pooling arrangements – whether covering all of the advisors' accounts or just a subset – are typically governed by team agreements or joint production agreements.

Under the Protocol, if the entire team or partnership is moving, then all clients serviced by the team or partnership may be solicited, notwithstanding any non-solicitation covenant in the team agreement. It is a different matter, however, if one or more of the team's or partnership's members is staying behind. In such instances, the Protocol sets forth rules governing whether a client may be solicited, depending largely on whether there is a written

agreement and on who "introduced" the client to the team or partnership.

Where there is a team or joint production agreement, the Protocol provides that such agreement "will govern for which clients the departing team members or partners may take Client Information and which clients [they] can solicit." The Protocol also provides, however, that the departing team members or partners may always solicit clients they "introduced" to the team or partnership, no matter what the team or joint production agreement states.

Similarly, where there is no team or joint production agreement and the departing advisor has been part of the team or partnership "in a producing capacity" for less than four years, he or she may only solicit clients he or she "introduced" to the team. Clients developed by other team members are off-limits. By contrast, if there is no team or joint production agreement and the departing advisor has been a member in a producing capacity for four years or more, then he or she may solicit all clients serviced by the team in the joint number.

Retiring Advisor Agreements

The second exception to the Protocol's general rule (that a departing advisor may solicit all clients he or she serviced) relates to clients covered by a retiring advisor agreement. Many firms have programs under which a retiring advisor can transition his or her book of business to another advisor in exchange for a percentage of the commissions generated by the book over a period of years.

The advisor inheriting the accounts is typically required to sign a non-solicitation agreement. Such non-solicitation agreements remain enforceable under the Protocol. The inheriting advisor must omit the retired advisor's clients from his or her Protocol list and may not contact the clients while the agreement remains in force.

Stock Benefits Plans

The final exception to the Protocol's general rule permitting solicitation of clients relates to clients an advisor obtained in connection with a stock benefits plan, such as an employee stock option plan. Such plans typically appoint one broker-dealer as the

servicing agent for the plan and require the firm, along with the advisors doing the day-to-day work, to sign agreements containing confidentiality and non-solicitation restrictions. The Protocol provides that such restrictions remain enforceable.[8] The Protocol similarly provides that agreements relating to "prospecting IRA rollover business" may be enforced against the departing advisor.

3. The Day of Resignation

The Protocol establishes procedures to be followed on the day of resignation. Resignations must be in writing and must be delivered to local branch management. The Protocol does not impose any requirements with respect to the content of the resignation letter, but it is typical for the letter to identify the hiring firm and to refer to the Protocol. Sometimes the resignation letter identifies counsel for the advisor and asks that any questions or concerns be directed to counsel.

The Protocol requires that, in addition to a written resignation letter, the advisor must provide his or her prior employer with a copy of the client information the advisor is taking pursuant to the Protocol. For example, if the advisor has created an Excel spreadsheet with client names, contact information and account titles, he or she should submit a copy of that Excel spreadsheet. The Protocol further requires that the clients' account numbers be included, upon resignation, with the list being submitted to the prior firm. This requirement sometimes leads to confusion, since it is somewhat counterintuitive. But it is actually quite simple - the advisor cannot take account numbers; the list he or she submits to the prior firm upon resignation must include them.

The requirement that thc advisor hand in a copy of the client information the advisor is taking would seem to serve two purposes.

- It creates a record for compliance purposes of what client information was taken.
- It gives the prior firm an opportunity to review the client list and potentially object to either the types of client information taken or, more typically, the inclusion of certain clients the prior firm may consider off limits under the Protocol.

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8. Such agreements often distinguish between clients who have full-service accounts serviced by the advisor and clients whose only relationship with the firm is the stock options exercise account.

Once the advisor has resigned and turned in his or her client list to the prior firm, the advisor may begin employment with the new firm, become registered and provide the Protocol client information to the new firm. The Protocol specifies that the new firm "will limit the use of the Client Information to the solicitation by the RR of his or her former clients. ..." It further prohibits the use of such client information by any other advisor or for any purpose other than solicitation by the transitioning advisor of his or her clients.

D. RIGHTS RETAINED BY PRIOR FIRM

A firm does not lose its legal rights in its restrictive covenant agreements and trade secrets by joining the Protocol. To begin with, the Protocol is generally considered a forbearance agreement rather than a waiver or relinquishment of legal rights. A member firm agrees to forbear from enforcing a non-solicitation agreement against an advisor who follows the Protocol, but still retains its rights under the non-solicitation agreement.

The Protocol also specifies certain other legal rights member firms retain. It states that it does not "bar or otherwise affect the ability of a prior firm to bring an action against the new firm for 'raiding.'" Under this provision, member firms have continued to file raiding claims against each other, even where the advisors who were part of the alleged raid complied with the Protocol. The individual advisors, however, should continue to be immune from injunctive relief or other liability with respect to their solicitation of their clients provided they followed the Protocol.

The Protocol also specifies that member firms retain the right to bring suit if the advisor engages in pre-resignation solicitation. Firms "continue to be free to enforce whatever contractual, statutory or common law restrictions exist on the solicitation of customers to move their accounts by a departing RR before he or she has left the firm." Thus, an advisor may not solicit his or her clients under the Protocol *until* after he or she has resigned from the prior firm. In this regard, the Protocol is not a change from prior industry practice.

E. THE PROTOCOL IN THE COURTS

While the volume of recruiting litigation has decreased substantially, courts have occasionally been called upon to construe the Protocol in the five years since its adoption. Some such cases involve transitions

between member firms and allegations that the Protocol was not followed. But the Protocol has also been raised in cases involving transitions between member firms and non-members, with the defendant asserting the Protocol as a defense to an injunctive action (with varying degrees of success).

1. Cases Involving Transitions between Protocol Firms

From time to time, member firms have found it appropriate to go to court against an advisor who has resigned to join another member firm. In such instances, the plaintiff firm alleges that the advisor breached the Protocol, thereby relieving the firm of its forbearance obligation and allowing the firm to enforce any restrictive covenant signed by the advisor. The firm typically seeks an injunction requiring the advisor to refrain from soliciting clients and to return any client information taken, including Protocol information.

It is hard to state definitively how courts have responded to such claims since most recruiting cases do not go beyond the TRO state and seldom result in published opinions. In the few cases that have been published or are available on-line, the result appears to depend on the evidence submitted to the court regarding the alleged Protocol violation.

For example, in *Merrill Lynch v. Reidy,*[9] Merrill Lynch filed a motion for a TRO against three advisors who resigned to join Morgan Stanley. Both Merrill Lynch and Morgan Stanley are signatories to the Protocol. Merrill Lynch claimed that defendants violated the Protocol by failing to leave a proper copy of their Protocol list upon resignation, by taking non-Protocol information, by deleting client information from Merrill Lynch's computer system and by soliciting clients in advance of their resignations. Merrill Lynch submitted affidavits in support of its allegations. Defendants responded with counter-affidavits denying the allegations or explaining their conduct. On the record before it, the Court denied Merrill Lynch's request for a TRO. Although there were some minor problems with the Protocol list left behind, defendants "substantially complied with the Protocol requirement of providing customer information to Merrill Lynch." As for the allegations regarding taking of non-Protocol information, deleting computer information and pre-soliciting clients, the evidence was in dispute – defendants having countered Merrill Lynch's

9. 477 F.Supp.2d 472 (D.Conn. 2007).

allegations with their own affidavits. As such, Merrill Lynch did not carry its burden of showing a likelihood of success on the merits.

Similarly, in *A.G. Edwards & Sons, Inc. v. Martin,*[10] A.G. Edwards sought a preliminary injunction against four advisors who resigned and joined Raymond James. Both A.G. Edwards and Raymond James are signatories to the Protocol. The defendants admitted that they had taken certain non-Protocol documents, but claimed that they had done so inadvertently. Defendants further claimed that they had already returned all such prohibited records. A.G. Edwards disputed this assertion, but the Court found that A.G. Edwards had failed to show that defendants still possessed any non-Protocol information. Under these circumstances, the Court found that defendants had "substantially complied with the Broker Protocol" and, accordingly, denied A.G. Edwards' motion for preliminary injunction.

The court in *A.G. Edwards & Sons, Inc. v. McCreanor*[11] took a different approach – granting limited injunctive relief instead of denying the request outright. A.G. Edwards filed a motion for TRO against four advisors who resigned to join Morgan Stanley. It claimed that the defendants had taken client information not authorized under the Protocol. The court granted A.G. Edwards' motion for TRO, requiring defendants to return any non-Protocol information in their possession. The court specifically permitted the defendants to retain and continue using client names, addresses, telephone numbers, e-mail addresses and account titles (i.e., the Protocol information).

2. Cases Involving Transitions between Members and Non-Members

The Protocol has sometimes been invoked in cases where only one of the involved firms was a Protocol member. In such cases, defendants assert the Protocol as a defense, arguing that the Protocol shows that client information is not deserving of trade secret protection and that firms are not irreparably injured by the taking of such information or its use to solicit clients. Such arguments have met with mixed results.

In *Merrill Lynch v. Brennan,*[12] Merrill Lynch filed a motion for TRO against three advisors who resigned from Merrill Lynch and

10. 2007 WL 4180943 (N.D. Fla. 2007).
11. 2007 WL 2696570 (M.D. Fla. 2007).
12. 2007 WL 632904 (N.D. Ohio 2007).

joined Bear Stearns, which was not a Protocol member. Each of the defendants had signed non-solicitation agreements in favor of Merrill Lynch. Nevertheless, the *Brennan* court denied Merrill Lynch's motion for TRO, finding that "[a]lthough Bear Stearns is not a signatory to [the Protocol], Merrill Lynch's signature [on the Protocol] indicates that they understand the fluid nature of the industry; brokers routinely switch firms and take their client lists with them. By setting up such a procedure for departing brokers to take client lists, Merrill Lynch tacitly accepts that such an occurrence does not cause irreparable harm." The *Brennan* Court also concluded that "given the existence of the Protocol, it appears that Merrill Lynch and industry peers are well aware of, and content with, the idea that brokers will leave and take client lists with them. Such an agreement significantly undercuts the notion that such behavior destroys customer goodwill."

Brennan has subsequently been used by departing advisors in several other cases to successfully argue that signatories to the Protocol cannot assert they have been irreparably harmed when the departing advisors use customer information to solicit clients on behalf of a non-signatory firm. For example, in *Smith Barney v. Griffin*,[13] Smith Barney filed a motion for preliminary injunctive relief against an advisor who resigned and joined N.Y. Life, which was not a signatory to the Protocol. The defendant advisor had entered into a non-solicitation agreement with Smith Barney. The defendant, citing *Brennan*, argued that since Smith Barney had signed the Protocol, it could not enforce the non-solicitation agreement. The *Griffin* Court agreed, finding that "[u]nder the Protocol, Smith Barney permits Client Information to be freely taken by departing financial advisors who leave for another signatory financial institution, even though this information is characterized as confidential information in its Contract with [the defendant]... Smith Barney cannot have it both ways—it cannot declare this information to be confidential and, at the same time, permit this information freely to be taken to 38 other financial institutions by departing advisors."

Similarly, the court in *Smith Barney v. Burrow*[14] cited *Brennan* in support of its conclusion that by agreeing to the Protocol, Smith Barney tacitly accepted that a departing advisor's solicitation of Smith Barney customers will not cause it irreparable harm. In

13. 23 Mass.L.Rptr. 457 (Mass. 2008).
14. 558 F.Supp.2d 1066 (E.D. Cal. 2008).

Burrow, Smith Barney filed a motion for preliminary injunctive relief against two advisors who resigned and joined Valley Wealth, which was not a signatory to the Protocol.[15] Both defendants had signed non-solicitation agreements in favor of Smith Barney. The *Burrow* Court nevertheless concluded that "[g]iven the Protocol, Smith Barney is hard pressed to convince this Court that information regarding clients whom [the defendants] serviced qualify as Smith Barney's confidential trade secrets."[16]

Other courts, however, have squarely rejected the argument that signatories to the Protocol are barred from obtaining injunctive relief to enforce a non-solicitation agreement against advisors who jump to a non-member firm. For example, the court in *Wachovia Securities, LLC v. Stanton*[17] acknowledged but disagreed with the rulings in *Brennan* and *Griffin*, holding that the existence of the Protocol does not make non-solicitation agreements unenforceable. In *Stanton*, Wachovia Securities filed a motion for TRO against a former advisor who joined Century Securities Associates ("CSA"), a subsidiary of Stifel Financial Corporation ("Stifel"). Although Wachovia was a signatory to the Protocol, CSA and Stifel were not. The *Stanton* Court reasoned[18] that since neither CSA nor Stifel were signatories to the Protocol, the Protocol is irrelevant.[19]

Similarly, in *Hilliard Lyons v. Clark*,[20] Hilliard Lyons filed a motion for preliminary injunction against seven advisors and their new employer, Raymond James, a signatory to the Protocol. Five of the former Hilliard Lyons advisors had signed non-solicitation agreement in favor of Hilliard Lyons. Those five defendants, citing *Brennan*, argued that their non-solicitation agreements cannot be

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15. Valley Wealth signed an agreement to join the Protocol on the same day it hired the defendants. However, by the time Valley Wealth's joinder agreement was sent to the attorney who administers new Protocol members, Smith Barney had already informed the defendants that it would seek injunctive relief against them.
16. *See also* Merrill Lynch v. Baxter, 2009 WL 960773 (D. Utah 2009) (denying on similar grounds Merrill Lynch's motion for TRO against two advisors who resigned and joined Ameriprise Financial Services, which has not signed the Protocol); *Smith Barney v. Darling*, 2009 WL 1544756 (E.D. Wis. 2009) (citing the Protocol in opinion denying Smith Barney's motion for TRO).
17. 571 F.Supp.2d 1014 (N.D. Iowa 2008).
18. The Court denied Wachovia's motion for TRO on other grounds.
19. *See also* Merrill Lynch v. Brinkman, 2008 WL 4534299 (D. Ariz. 2008) (finding that the Protocol did not undermine Merrill Lynch's request for a TRO against five advisors who resigned and joined R.W. Baird, which has not signed the Protocol).
20. 2007 WL 2589956 (W.D. Mich. 2007).

enforced because they are inconsistent with the Protocol. The Court rejected this argument, concluding that the Protocol only binds those firms who opt to sign it, and that *Brennan* is inapplicable because Hilliard Lyons was not a signatory to the Protocol.

F. THE PROTOCOL UNDER THE SEC'S PROPOSED REG S-P AMENDMENTS

Federal Regulation S-P ("Reg S-P") implements legislation requiring securities firms to maintain the privacy of customer information. In March 2008 SEC published proposed changes to its privacy regulations that would, among other things, clarify that a firm does not violate Reg S-P by allowing departing advisors to take limited customer information when they join another securities firm.

These proposed changes to Reg S-P would "permit one firm to disclose to another only the following information: the customer's name, a general description of the type of account and products held by the customer, and contact information, including address, telephone number and e-mail information."[21]

Significantly, the limited customer information a firm may permit departing advisors to take under the proposed changes to Reg S-P is virtually identical to the limited information they are permitted to take under the Protocol. The only difference is that under the proposed changes to Reg S-P, departing advisors could also take a general description of the type of account and products held by their customers. Further, consistent with the Protocol, the proposed changes to Reg S-P would prohibit the departing advisors from taking their "customer's account number, Social Security number, or securities positions... In addition, a representative could solicit only an institution's customers that were the representative's clients."[22]

The SEC specifically acknowledged the existence of the Protocol in its proposed changes to Reg S-P.[23] However, the SEC also noted that in the wake of the increasing number of securities firms that have agreed to the Protocol, "there may be some confusion in the securities industry regarding what information may be disclosed to a departing representative's new firm consistent with the limitations in Reg S-P, and

21. *See* 17 CFR Part 248, Release Nos. 34-57427; IC-28178; IA-2712; File No. S7-06-08, at p. 42.

22. *Id.* at p.43.

23. *Id.*, at p. 42, fn 91.

that at times these limitations may cause inconvenience to investors."[24] The SEC made clear that its proposed changes to Reg S-P are designed, in part, to address this confusion.[25]

The proposed changes to Reg S-P provide clarity concerning what client information departing advisors are permitted to take when they join a new securities firm without violating Reg S-P. Indeed, the SEC in proposing the modifications to Reg S-P stated that:

> the proposed exception is designed to facilitate the transfer of client contact information that would help broker-dealers and registered investment advisers offer clients the choice of following a departing representative to a new firm. At firms that choose to rely on it, the proposed exception also should reduce potential incentives some representatives may have to take information with them secretly when they leave. By specifically limiting the types of information that could be disclosed to the representative's new firm, the proposed amendments are designed to help firms safeguard more sensitive client information. This limitation also would clarify that a firm may not require or expect a representative from another firm to bring more information than necessary for the representative to solicit former clients.[26]

However, the SEC noted that the "proposed exception would not…affect firm policies that prohibit the transfer of any customer information other than at the customer's specific direction."[27] In other words, firms would be free to maintain policies that prohibit the transfer of any customer information without the express consent of the customer in question.

The SEC has invited the public to provide comments and discussion about its proposed changes to Reg S-P. As of this writing, the SEC has not issued any further notices or action concerning its proposed changes to Reg S-P.

G. CONCLUSION

The movement of advisors between firms is a fact of life in the securities industry. It is equally a fact of life in the industry that most advisors take information relating to clients when they change firms. For years firms either turned a blind eye to this practice or else hypocritically went to court feigning outrage over such conduct even though the firm almost certainly had its own recruits do the very same thing.

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24. *Id.*
25. *Id.* at pp. 41-42.
26. *Id.* at pp. 43-44.
27. *Id.* at p. 45.

The Protocol takes a more practical approach by acknowledging that advisors take information when they change firms and by seeking to control the process. By doing so, the Protocol almost certainly has changed industry practices for the better and substantially improved the industry's record on protecting customer privacy.

The Protocol has also substantially reduced recruiting litigation between member firms. As the list of Protocol members has expanded, the number of recruiting cases filed as a matter of routine has diminished. This has presumably benefited the court system, firms, advisors and clients.

The Protocol has thus been a success by almost any measure in the five years since it was introduced. And with the SEC's proposed amendments to Reg S-P confirming that a firm does not breach its privacy obligations by allowing an advisor to take Protocol information, the principal excuse put forward by non-members has been nullified. It thus seems clear that the Protocol's list of member firms will continue to expand. In short, the Protocol is here to stay.