

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 56222 / August 8, 2007

Administrative Proceedings
File No. 3-11696

In the Matter of

**RS Investment Management, Inc., RS
Investment Management, L.P.,
G. Randall Hecht and Steven M. Cohen,

Respondents.**

**ORDER APPROVING
MODIFIED DISTRIBUTION PLAN**

I.

On October 6, 2004, in the above-captioned matter, the Commission issued an Order instituting and simultaneously settling public administrative and cease-and-desist proceedings against respondents including RS Investment Management, Inc., and RS Investment Management, L.P. (collectively “RS”). The Order found that RS allowed certain parties to conduct market timing in mutual funds it managed and thereby violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 and Sections 17(d) and 34(b) of the Investment Company Act of 1940 and Rule 17d-1 thereunder. Among other relief, the Order required RS to pay disgorgement of \$11.5 million and a civil money penalty of \$13.5 million. The total amount of \$25 million was designated a Fair Fund (the “RS Fair Fund”) under Section 308(a) of the Sarbanes-Oxley Act of 2002. The Order further required that RS retain an independent distribution consultant (“IDC”) to develop a plan for distributing the \$25 million to shareholders in the mutual funds affected by the market timing (the “RS Funds”). In February 2005, RS engaged Alan C. Shapiro Ph.D., the Ivadelle and Theodore Johnson Professor of Banking and Finance, and past chairman of the Department of Finance and Business Economics, Marshall School of Business, University of Southern California, as the IDC.

On April 17, 2007, the Commission’s Division of Enforcement submitted a proposed distribution plan to the Commission (the “RS Plan”). In accordance with the Order, the RS Plan provides for the allocation and distribution of the RS Fair Fund, including any accrued interest,

to eligible accountholders as compensation for losses suffered by the RS Funds due to market timing.

In accordance with the Commission's Rules on Fair Fund and Disgorgement Plans (the "Fair Fund Rules"), 17 C.F.R. § 201.1100, *et seq.*, the RS Plan proposes a Fund Administrator and sets forth, among other things, procedures for the receipt of additional funds; the methodology for allocating distributions under the RS Plan; categories of persons potentially eligible to receive proceeds from the RS Fair Fund; and provisions for the termination of the RS Fair Fund.

Boston Financial Data Services, proposed in the RS Plan as the Fund Administrator, will not post the bond generally required of third parties under Fair Fund Rule 1105(c). Rather, the RS Plan incorporates several layers of protection for the RS Fair Fund. Among other things, under the RS Plan: (1) the Fund Administrator will have no custody, and only restricted control, of the RS Fair Fund; (2) assets of the RS Fair Fund will be held by the United States Department of the Treasury, Bureau of Public Debt ("Treasury") until no more than one week before checks or wires are transmitted to eligible investors; (3) upon transfer from Treasury, funds will be held in an escrow account until needed to satisfy a presented check or wire; (4) upon presentment of checks or wire instructions, funds will be subject to a "positive pay file" system before being honored by the escrow bank; and (5) both the escrow bank and the Fund Administrator will maintain throughout this process insurance and/or a financial institution bond that covers errors and omissions, misfeasance and fraud.

On May 14, 2007, the Commission published the RS Plan and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 55753) pursuant to Rule 1103 of the Fair Fund Rules, 17 C.F.R. § 201.1103. The Notice advised interested parties that they could obtain a copy of the Plan at <http://www.sec.gov/> or by submitting a written request to Michael S. Dicke, Assistant Regional Administrator, United States Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104. The Notice also advised that all persons desiring to comment on the RS Plan could submit their comments, in writing, no later than June 13, 2007.

In response to the Notice, one financial intermediary, Merrill Lynch & Co., Inc. ("Merrill Lynch"), submitted public comments to the Office of the Secretary. Merrill Lynch's letter seeks additional protections for financial intermediaries in terms of repayment of costs, limitation of liability, and transmission of account holder data, and requests flexibility for the IDC to approve alternative distribution methodologies.

After careful consideration, the Commission has concluded that the RS Plan should be modified to include, among other things, additional detail concerning flexibility for the IDC to approve alternative distribution methodologies and the transmission of account holder data, and that the RS Plan should be approved with such modifications. The Commission has further determined that, for good cause shown, the bond required under Fair Fund Rule 1105(c) will be waived.

II.

A. Merrill Lynch's Public Comments on the RS Plan

Merrill Lynch's comment letter, dated June 13, 2007, seeks additional protections for financial intermediaries in the form of repayment of out-of-pocket costs, extending the limitation of liability to include the firms involved in the distribution of funds and including protections related to the transmission of beneficial owner data. In addition, it seeks more flexibility for the IDC to approve alternative methodologies for effecting distributions.¹

Merrill Lynch notes that the RS Plan provides for only two options to omnibus account holders for facilitating distributions from the RS Fair Fund to beneficial owners, without any flexibility for the IDC to approve alternative methodologies.² Modifications to the RS Plan are appropriate to include flexibility for the IDC to approve other methodologies which do not materially affect the distribution of funds to the contemporaneous beneficial holders. In addition, omnibus account holders should have the opportunity to elect both options to facilitate distributions set forth in Paragraph 4.1.4 of the RS Plan and apply them selectively to different categories of beneficial holders (such as open and closed accounts). Therefore, Paragraph 4.1.4 has been modified and a new Paragraph 4.1.5 has been added to address such comments.

Merrill Lynch would like the RS Plan to reimburse financial intermediaries for commercially reasonable expenses beyond those incurred in gathering and providing data.³ To the extent that Merrill Lynch's comment relates to communications required by the RS Plan from brokerage firms, Paragraph 4.1.6 has been modified to clarify that the costs of communications required by the RS Plan will be reimbursed by RS. If other unspecified costs were reimbursed, it would be difficult to prevent the reimbursement of expenses between the intermediary and its clients which are not contemplated by the RS Plan. In addition, the IDC did not intend for the RS Plan to reimburse costs incurred by plan administrators of retirement accounts (a category of account that is encompassed by the term "Account Carrying Firms" as defined in Merrill Lynch's comment letter).

Merrill Lynch suggests that the RS Plan contain a clause limiting the liability of financial intermediaries in facilitating the distributions. Neither the Commission nor the IDC has authority to expand or contract the liability of financial intermediaries. If a financial intermediary is subject to any liability, that is because of the intermediary's relationship with its client. Therefore, the RS Plan does not provide for any limitation on liability of financial intermediaries.

Finally, Merrill Lynch is concerned that the transmission of client sensitive information (including name, address and social security number) will expose financial intermediaries to

¹ In its comment letter, Merrill Lynch uses the term "Account Carrying Firms" to refer to financial intermediaries like itself that maintain omnibus accounts with the mutual funds for the benefit of their clients.

² See the RS Plan at ¶ 4.1.4.

³ See the RS Plan at ¶ 4.1.6.

regulatory and reputational risks if such data is mishandled, disclosed or distributed in an unauthorized manner. Merrill Lynch suggests that the RS Plan contain security and confidentiality obligations and indemnification of financial intermediaries for any misuse or loss of client data. Modifications to the RS Plan are appropriate to clarify that sensitive information shall be maintained confidentially and shared only with those parties who need to know such information to administer the distribution. In addition, modifications are appropriate to provide that RS will not have access to any of the financial intermediaries' identifying customer information.

B. Additional Modification

The IDC made one additional administrative modification to the RS Plan in order to correct a typographical error. The IDC intended the limitation on liability provision in Paragraph 1.7 to apply to any other distributions from settlement funds received for market timing activity in the RS Funds, as provided for in Section 8. Therefore, the IDC has modified Paragraph 1.7 to correct the error.

C. The Bond Requirement of Fair Fund Rule 1105(c)

Fair Fund Rule 1105(c) provides:

Administrator to Post Bond. If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed in 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

17 C.F.R. § 201.1105(c). The Commission believes that the risk protection provisions of the RS Plan, generally included in ¶¶ 5.1, 5.2 and 5.8 of the RS Plan, and the high cost of bond coverage, suffice to constitute good cause for waiving the posting of the bond under Rule 1105(c).

Accordingly, IT IS ORDERED that:

A. Pursuant to Rule 1104 of the Fair Fund Rules, 17 C.F.R. § 201.1104, that the Distribution Plan is modified as described above, and approved with such modification;

B. Boston Financial Data Services is appointed as the Fund Administrator; and

C. The bond requirement of Rule 1105(c) of the Fair Fund Rules, 17 C.F.R. 201.1105(c), is waived for good cause shown.

By the Commission.

Nancy M. Morris
Secretary