

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57859 / May 23, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-11701

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In the Matter of	:	
	:	ORDER APPROVING
AIM Advisors, Inc. and	:	A MODIFIED DISTRIBUTION PLAN
AIM Distributors, Inc.,	:	(“AIM Plan”)
	:	
	:	
	:	
Respondents.	:	
	:	

I.

On October 8, 2004, the Commission instituted and simultaneously settled public administrative and cease-and-desist proceedings (the “October Order”) against Commission registered investment adviser AIM Advisors, Inc. (“AIM Advisors”), and Commission registered broker-dealer AIM Distributors, Inc. (“ADI”) for violations of the federal securities laws in connection with the market timing of certain mutual funds within the AIM fund complexes (Securities Exchange Act of 1934 Release No. 50506).¹ Among other relief, the October Order required AIM Advisors and ADI to jointly and severally pay disgorgement of \$20 million and a civil penalty of \$30 million. The total amount of \$50 million was designated a Fair Fund (the “AIM Fair Fund”) under Section 308(a) of the Sarbanes-Oxley Act of 2002. The October Order further required that the AIM Fair Fund be distributed to investors injured by market timing activity pursuant to a distribution plan (the “AIM Plan”) to be developed by an independent distribution consultant (“IDC”). Professor Gordon Alexander, the John Spooner Chair in Investment Management and Professor of Finance at the Carlson School of Management at the University of Minnesota, was selected as the IDC for the AIM Fair Fund.

In accordance with the October Order, the AIM Plan provides for the allocation and distribution of the AIM Fair Fund, including any accrued interest, to eligible accountholders as compensation for their proportionate share of losses due to market timing as well as their proportionate share of advisory fees paid during the period of such

¹ The October Order also settled administrative cease-and-desist proceedings against Invesco Funds Group, Inc. That settlement resulted in a separate proposed distribution plan, which is the subject of a separate Order.

timing. Under the AIM Plan, the IDC will calculate eligible investors' proportionate share of the AIM Fair Fund based on information contained in the AIM funds' records, as well as records obtained from third-party intermediaries, obviating any need for a claim process.

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 AIM 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 AIM Plan, procedures for the administration of the AIM Fair Fund, and provisions for the termination of the AIM Fair Fund. Boston Financial Data Services, Inc. ("BFDS") is proposed in the AIM Plan as the Fund Administrator. Although Fair Fund Rule 1105(c) generally requires that third parties that handle investor distributions post a bond, the staff has recommended that BFDS post no such bond because the AIM Plan incorporates several layers of protection for the AIM Fair Fund.² Among other things, under the AIM Plan: (1) the Fund Administrator will have no custody, and only restricted control, of the AIM Fair Fund; (2) the funds will be held by the United States Department of Treasury, Bureau of Public Debt ("Treasury"), until immediately before transmittal of checks or wires to eligible investors; (3) upon transfer from Treasury, funds will be held in an escrow account, separate from bank assets, until presentation of a check, at which time funds will be transferred to a controlled distribution account; (4) presented checks or wires will be subject to "positive pay" or similar controls before being honored by the bank; and (5) both the 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 July 6, 2007, the Commission published the proposed AIM Plan and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 56027) 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/litigation/admin/2007/34-56027-pdp.pdf>, or by submitting a written request to the Commission's Fort Worth Regional Office. The Notice also advised that all persons desiring to comment on the AIM Plan could submit their comments, in writing, no later than August 6, 2007.

In response to the Notice, Merrill Lynch & Co., Inc. ("Merrill Lynch"), the Spark Institute, Inc. ("Spark"), and two individuals submitted comments to the Office of the Secretary regarding the AIM Plan. The Commission staff engaged in subsequent communications with the IDC to discuss the issues raised in these comments.

After careful consideration, the Commission has concluded that the AIM Plan should be modified to further clarify the Fund Administrator's responsibility to ensure that other parties maintain shareholder information in confidence, to include an additional

² Based on estimates provided to the staff of the Commission, the cost of a bond could be in the millions of dollars.

alternative for retirement plan service providers to distribute proceeds among retirement plans, to include a process by which certain individuals and entities can contest their otherwise ineligible status under the Plan, to create more clarity in the distribution process and to correct various typographical errors, and approved as modified. Furthermore, the Commission appoints BFDS as the Fund Administrator as proposed in the Plan, and has determined that, for good cause shown, the bond required under Fair Fund Rule 1105(c) will be waived.

II.

A. **Public Comments on the Plan**

1. **The Merrill Lynch Letter**

In its letter dated August 3, 2007, Merrill Lynch makes several comments and requests.³ First, Merrill Lynch expresses various concerns about the options for omnibus intermediaries effectuating distributions to beneficial owners. Specifically, Merrill Lynch is concerned: (1) that the AIM Plan does not provide such intermediaries with flexibility to implement alternative distribution methodologies; (2) that intermediaries, to the extent they choose to distribute the monies themselves under Step 7, do not possess the capabilities to perform the required data analysis, nor would it be commercially reasonable for them to develop or purchase such capabilities; and (3) that it is unclear whether an alternative methodology that would split responsibility for distributing the monies between the Fund Administrator and the intermediary in those situations where the intermediary wants to provide the Fund Administrator with limited client information would be a material change.

The Commission believes the Plan contains clear and substantial flexibility for intermediaries to distribute proceeds. For example, Step 7 of the AIM Plan specifically provides that intermediaries may apply any distribution technique that the intermediary, in the exercise of its reasonable discretion, deems to be consistent with its fiduciary or other legal obligations. Step 7 also provides that the IDC will provide intermediaries that elect to distribute monies themselves with information sufficient to allow the coding of the necessary computer algorithm. The IDC has confirmed with the staff of the Commission that it will furnish intermediaries with a software solution that duplicates its distribution methodology. The IDC has also informed the staff that the alternative methodology suggested by Merrill Lynch will create additional risks to the overall distribution, including the real possibility that some shareholders may receive multiple payments or no payments at all. Accordingly, the Commission has determined that no modification is necessary in response to Merrill Lynch's first comment.

Second, Merrill Lynch suggests that the AIM Plan add a clause limiting the liability of financial intermediaries in facilitating the distributions. However, the Commission does not intend to expand or contract the liability of financial intermediaries

³ In its comment letter, Merrill Lynch uses the term "Account Carrying Firms" to refer to financial intermediaries like itself that maintain omnibus accounts with mutual funds for the benefit of their clients.

or require the IDC to do so. If a financial intermediary is subject to any liability, it is based on the intermediary's relationship with its client. Accordingly, no modification to the AIM Plan has been made.

Finally, Merrill Lynch is concerned that the transmission of client sensitive information (e.g., name, address, social security number) will expose financial intermediaries to regulatory and reputation risk if the data is mishandled, disclosed, or distributed in an unauthorized manner.⁴ Merrill Lynch suggests that the AIM Plan contain security and confidentiality obligations, and indemnification of financial intermediaries for any misuse or loss of client data. Step 8(a) to the AIM Plan has been modified in response to this comment.

2. **The Spark Letter**

The Spark Institute, Inc. ("Spark") is an organization whose members include retirement plan service providers that will be responsible for reconstructing account holder balance information, making certain allocations, receiving proceeds, and making distributions to plan participants who are the intended beneficiaries of a portion of the distribution at issue.⁵ In its comment letter, Spark requests three changes to the AIM Plan which the Commission addresses below.

First, Spark seeks to add another methodology that would allow a retirement plan service provider to allocate proceeds among retirement plans according to the average share or average dollar balances of the plans' investment in the AIM funds during the relevant period. Spark contends that this approach provides a more cost effective means of calculating the allocation of payments among retirement plans that owned shares through omnibus accounts. The Commission has previously approved a similar

⁴ To the extent Merrill Lynch's comment about regulatory risk refers to the Commission's Regulation S-P (17 C.F.R. Part 248), which limits the ability of financial intermediaries regulated by the Commission to disclose nonpublic personal information to nonaffiliated third parties, Regulation S-P provides exceptions for disclosures for certain purposes, including:

- To comply with federal, State, or local laws, rules and other applicable legal requirements. *See* 17 C.F.R. § 248.15(a)(7)(i). For distributions ordered by the Commission, this exception would authorize disclosures of nonpublic personal information necessary for making the distributions.
- As necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes, including if the disclosure is required, or is a usual, appropriate, or acceptable method to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part. *See* 17 C.F.R. §§ 248.14(a), 248.14(b)(2)(ii). In the AIM Plan, disclosure is arguably required if the financial intermediary elects to have the Fund Administrator handle the distributions.

⁵ In general, Spark seeks relief on behalf of intermediaries for non-IRA Retirement Accounts eligible for a distribution under the AIM Plan. "Retirement Accounts" as used in the AIM Plan mean any accounts of any employee benefit plan, as defined in Section 3(3) of ERISA, which is not (1) an Individual Retirement Account or (2) a Section 403(b)(7) custodial account under a program not established or maintained by an employer, whether or not the employee benefit plan is subject to Title 1 of ERISA.

modification to other market timing distribution plans. Accordingly, the Commission has determined that the requested modification is appropriate for the AIM Plan.

Second, Spark seeks a modification to the AIM Plan requiring that the Fund Administrator make a single payment to the retirement plan service providers, along with a breakdown of the monies to be distributed to the first generation account-holders in the retirement plan. The retirement plan service providers would then be responsible for distributing the monies to the plan participants.⁶ Spark believes that this alternative may result in greater efficiency for all parties involved, including the Fund Administrator and the retirement plan service providers. According to Spark, this approach may be more efficient because it will eliminate the need for the retirement plan service providers to provide address information to the Fund Administrator, minimize the number of checks and payments that have to be issued, and will likely reduce the amount of time it takes to get the proceeds deposited into the plan accounts. The IDC disagrees that this approach will necessarily lead to greater efficiency since, among other things, the retirement plan service providers will still need to generate address information and issue checks to the beneficial owners. Similarly, the IDC disagrees that this approach will likely reduce the time it takes to distribute the proceeds. Because the existing AIM Plan includes reasonable options for the efficient distribution of monies to the beneficial owners of retirement accounts, the Commission has not modified this portion of the Plan.

Finally, Spark wishes to modify the AIM Plan so that retirement plan omnibus account service providers will be reimbursed for their reasonable costs in calculating and distributing the allocations themselves. Spark has made a substantially similar comment regarding other proposed distributions. In connection with the distribution plan in *In the Matter of Pilgrim Baxter & Associates, Ltd.*, Securities Exchange Act of 1934 Release No. 54812 (Nov. 22, 2006), the staff obtained cost estimate information from Spark which indicated that the costs faced by intermediaries of Non-IRA Retirement Accounts in connection with a distribution pursuant to the IDC's methodology could be substantial and significantly larger than those faced by intermediaries in connection with other types of omnibus accounts. Here, plan-required reimbursement of these costs at or near the cost estimates provided to that staff in *Pilgrim Baxter* simply would be cost prohibitive and unreasonable, especially in light of the substantial flexibility in the AIM Plan for an intermediary or plan-level fiduciary to develop a more cost efficient method of distribution. In fact, the AIM Plan provides retirement plans with options designed to significantly reduce the costs of distribution for retirement plan service providers. For example, retirement plans may conduct their own cost-benefit analysis to determine,

⁶ The AIM Plan provides four options to fiduciaries of Retirement Accounts: (a) plan fiduciaries may allocate the distribution pro rata based on total account balance of current participants; (b) plan fiduciaries may allocate the distribution per capita among current participants; (c) plan fiduciaries may allocate the distribution among current and former plan participants using the algorithm supplied by the IDC; or (d) in the event that none of the preceding alternatives is feasible, plan fiduciaries may use the distribution to pay reasonable expenses of administering the AIM Plan. Spark appears to be seeking a modification to option (c), pursuant to which the plan fiduciary would supply data so the IDC would run the algorithm and provide the results to the plan fiduciary.

consistent with Department of Labor⁷ guidance and fiduciary obligations, the most cost-effective method of distribution, including making distributions to current participants or historical participants and allocating the distribution pro rata, per capita or based on the IDC's algorithm. In view of the comparatively low-cost alternatives included within the AIM Plan specifically for non-IRA retirement accounts, the Commission has determined that the retirement plan service providers should determine the most cost effective way to handle the distribution. Accordingly, no modification will be made to the Plan with respect to this request.

3. Letters from Individuals

a. Craig Barefoot

In his comment letter, Mr. Barefoot expresses concern that the AIM Plan may potentially eliminate a Fair Fund distribution to individuals who have subsequently taken a distribution from their affected 401(k) plans. However, the AIM Plan allows intermediaries responsible for such plans to distribute proceeds to the plan participants in accordance with the intermediaries' fiduciary and legal obligations. Pursuant to the AIM Plan, intermediaries will have the option of allocating distribution proceeds to both current and former participants using the algorithm developed by the IDC.

b. Adam Borden

Because Mr. Borden liquidated his holdings within the AIM funds after the relevant period as identified by the October Order, he is concerned that the AIM Plan does not specify how he may petition the Fund Administrator to make himself eligible for a distribution. Whether an investor has liquidated AIM fund holdings will not affect the investor's eligibility to participate in the AIM Plan's distribution. The AIM Plan has adequate processes enabling the Fund Administrator and any applicable intermediaries to exercise commercially reasonable efforts or efforts consistent with the fiduciary and legal obligations of intermediaries to locate affected shareholders, including those with closed accounts. The Plan also requires the Fund Administrator to provide customer support and a communications program including a toll-free number for the public. As a result, no modification of the Plan will be made with respect to this comment.

⁷ The Department of Labor issued Field Assistance Bulletin No. 2006-01 (April 19, 2006) ("FAB") regarding Fair Fund distributions to retirement plans in market-timing and late-trading matters and the duties of IDCs and retirement plan record-keepers and plan fiduciaries. Among other things, the FAB provides that record-keepers that receive distributions on behalf of their employee benefit clients generally will assume fiduciary obligations. The FAB explains that record-keepers may consider whether the costs of effectuating a distribution outweigh any benefit to the intended beneficiaries as well as other alternatives that would be consistent with its fiduciary obligations. The FAB also describes that record-keepers may avoid assuming fiduciary status if they allocate funds according to the methodology set forth in the applicable plan or if the plan-level fiduciary approves of a distribution methodology determined by the record-keeper.

B. Additional Proposed and Considered Modifications to the Plan

1. Process for Contesting Ineligible Status

As proposed, the AIM Plan does not provide a process for those individuals and entities identified as having market timing agreements with AIM Advisors or ADI to contest their ineligible status under the Plan. To ensure that otherwise ineligible individuals and entities are afforded an opportunity to contest their designated status, the Commission concludes that it is appropriate to modify the Plan to include a process by which the IDC will notify such individuals and entities that they may submit evidence in support of any claim they may have to a distribution, while empowering the IDC to exercise his discretion in making a final determination regarding their status. In addition to any evidence they may otherwise submit, these individuals and entities will be required to provide written certification to the IDC that they did not have an agreement to market time and that their trading in excess of the relevant prospectus exchange limitation was not motivated by market timing considerations.⁸ Failure to provide the required written certification will result in the exclusion of the individual or entity from eligibility status. This modification results in revisions to the “Eligibility Investor” section and to Step 3 and 5 of the Plan, the inclusion of a new Step 7 to the Plan (with corresponding renumbering of all subsequent Plan Steps), and revisions to Step 8 of the Original Plan (which is now Step 9 in the modified Plan).

2. Other Proposed Modifications by the IDC

The IDC proposes to make the following changes to the AIM Plan to create more clarity in the distribution process and to correct various typographical errors:

- Original AIM Plan, p. 23, ¶ 1: the phrase “Under this plan, plan fiduciaries and intermediaries (as those terms are discussed in the Field Assistance Bulletin No. 2006-01) require that Retirement Accounts distribute the monies. . . .” is changed to “Under this plan, plan fiduciaries and intermediaries of Retirement Accounts (as those terms are discussed in the Field Assistance Bulletin No. 2006-01) are required to distribute the monies. . . .”
- Original AIM Plan, p. 23, ¶ 2: the phrase “set for in Step 3 above. . . .” is changed to “set forth in Step Eight above. . . .”
- Original AIM Plan, p. 23, ¶ 2: the phrase “shall be treated as beneficial owner” is change to “shall be treated as a beneficial owner”

⁸ Furthermore, as stated in the modified Plan, the certification forms will include a warning that any false statements may subject the certifying individual or entity to civil or criminal sanctions, including but not limited to, liability under 18 U.S.C. § 1001, liability for any false statements made in an unsworn certificate under penalty of perjury as permitted by 28 U.S.C. § 1746, or liability under or any other applicable law.

The proposed modifications are reasonable and therefore approved.

C. Modifications to the Plan

As discussed above, the following modifications have been made to the AIM Plan:

- language has been added to Step 8 of the AIM Plan to require confidentiality of client information shared with service providers and other parties;
- language has been added to Step 16 of the modified AIM Plan to allow retirement plan service providers to allocate the distribution proceeds among retirement plans according to the average share or average dollar balances of the plans' investment in the AIM funds during the relevant period;
- the Section entitled "Eligible Investors" has been revised and a new Step 7 has been included within the Plan to describe a process by which certain ineligible individuals and entities may contest their distribution status; and
- the AIM Plan has been revised to incorporate the IDC's proposed changes as described above.

These modifications provide additional flexibility and further facilitate distribution of the AIM Fair Fund, but do not substantially alter the previously published AIM Plan. The Commission, in its discretion, does not believe that further modifications are necessary or that the recommended changes require re-publication of the AIM Plan for further comment.

D. 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 AIM Plan and the high cost of bond coverage suffice to constitute good cause for waiving the posting of the bond under Rule 1105(c).

III.

Accordingly, IT IS ORDERED that:

- A. Pursuant to Rule 1104 of the Fair Fund Rules, 17 C.F.R. § 201.1104, the AIM Plan is modified as described above, and approved as modified;
- B. Pursuant to Rule 1105(a) of the Fair Fund Rules, 17 C.F.R. § 201.1105(a), Boston Financial Data Services, Inc. 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