UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 55730 / May 9, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-11530

In the Matter of BANC ONE INVESTMENT ADVISORS CORPORATION and MARK A. BEESON, Respondents.	Order Approving a Modified Distribution Plan

I.

On June 29, 2004, the Commission issued an Order in the above-captioned matter instituting and simultaneously settling public administrative and cease-and-desist proceedings against Banc One Investment Advisors Corporation ("BOIA") and Mark A. Beeson (the "BOIA Order"). The BOIA Order found, among other things, that BOIA allowed excessive short-term trading (or market timing) in certain One Group mutual funds ("One Group") from June 1999 through May 2003 that was contrary to mutual-fund prospectuses and potentially harmful to One Group shareholders. The BOIA Order directed that BOIA pay disgorgement of $10 million and civil penalties of $40 million, for a total payment of $50 million, and established a Fair Fund to provide for the distribution of those funds to injured investors. The Order further directed that BOIA retain an Independent Distribution Consultant ("IDC") and that BOIA require the IDC to "develop a Distribution Plan for the distribution of all of the disgorgement and penalties to be paid by BOIA pursuant to this Order, and any interest or earnings thereon, according to a methodology developed in consultation with BOIA and acceptable to the staff of the Commission and the independent Trustees of the One Group [Mutual] funds." Under the BOIA Order, BOIA retained Professor Joseph A. Grundfest to serve as the IDC.

On June 20, 2006, Professor Grundfest submitted a proposed distribution plan (the "Plan") that provides for the distribution of the $50 million paid by BOIA, plus accumulated interest, to investors who held shares in at least one of the One Group mutual funds in which the market timing occurred, on the days on which the market timing occurred, between June 1999 and May 2003. As required by the BOIA Order, the Plan, among other things, "provide[s] for investors to receive, in order of priority, (i) their proportionate share of losses from market timing, and (ii) a proportionate share of advisory fees paid by funds that suffered such losses during the period of such market timing." (BOIA Order at ¶34(b)). In determining each investor's proportionate share of the Fair Fund, Professor Grundfest has developed an Allocation Algorithm to determine the amount of the Fair Fund each investor will receive.

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 Plan proposed a Fund Administrator and sets forth, among other things, procedures for the receipt of additional funds; categories of persons potentially eligible to receive proceeds from the BOIA Fair Fund; procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds; procedures for the administration of the fund; and a proposed date for the termination of the BOIA Fair Fund.

Under the Plan, Boston Financial Data Services, Inc. ("BFDS"), proposed in the Plan as the Fund Administrator, would not be required to post the bond generally required of third parties under Fair Fund Rule 1105(c). Rather, the Plan incorporates several layers of protection for the BOIA Fair Fund. Among other things, under the Plan: (1) the Fund Administrator will have no custody, and only restricted control, of the BOIA Fair Fund; (2) the BOIA Fair Fund will be held by the United States Department of the Treasury, Bureau of Public Debt ("Treasury") until immediately before checks or wires are transmitted to eligible investors; (3) upon transfer from Treasury, funds will be held in an escrow account, separate from the assets of the bank identified in the Plan (the "Bank"), until presentment of a check or wire; (4) upon presentment of checks or wire instructions, funds will be subject to "positive pay" or similar controls before honored by the Bank; (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; and (6) the Bank will not control at any one time any portion of the BOIA Fair Fund greater than the Bank's insurance coverage.

On August 7, 2006, the Commission published the Plan and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 54280) pursuant to Rule 1103 of the Fair Fund Rules, 17 C.F.R. § 201.1103. In response to the Notice, the SPARK Institute, Inc. ("SPARK"), the Coalition of Mutual Fund Investors ("CMFI"), Mr. W. Theodore Kuck ("Kuck") and Merrill Lynch & Co., Inc. ("Merrill Lynch") submitted public comments to the Office of the Secretary. In general, the SPARK letter seeks relief on behalf of intermediaries for Non-IRA Retirement Accounts eligible for a distribution under the Plan from fiduciary obligations and costs that may arise from distributions under the Plan. The CMFI letter, written on behalf of individual mutual-fund investors, expresses concern that the Plan's procedures for identifying and distributing funds to the beneficiaries of omnibus accounts are insufficient, and may result in investors not receiving their distributions. The Kuck letter, written by a beneficiary of a trust account managed by Bank One Trust Company ("BOTC"), expresses concern regarding the identification and compensation of the beneficiaries of BOTC managed accounts. The Merrill Lynch letter requests that it be allowed to credit distribution funds electronically to customer accounts and the addition of a limitation-of-liability provision to the Plan.

After careful consideration, the Commission has concluded that the Plan should be modified to include additional procedures applicable to Non-IRA Retirement Accounts and a provision concerning limitation of liability, and 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. Public Comments on the Plan

1. The SPARK letter

SPARK is an organization whose members include "retirement plan service providers ["RSPs"] that will be responsible for reconstructing accountholder balance information, making allocations, receiving proceeds, and making distributions to plan participants who are the intended beneficiaries of a substantial portion of the distribution at issue." SPARK representatives raised two primary concerns in the comment letter: (1) the fiduciary obligations that the Plan may impose on RSPs by requiring that "…the record holder shall distribute the funds in accordance with applicable guidance …issued by the Department of Labor [DOL][1]"; and (2) the potentially burdensome costs that RSPs may have to bear in allocating distribution funds to the beneficiaries of those accounts.

The Commission staff, Professor Grundfest, and SPARK's General Counsel met to discuss SPARK's concerns regarding Non-IRA Retirement Accounts (which represent less than 4% of the BOIA Fair Fund). Based on these discussions, Professor Grundfest recommends modifying the Plan to: (1) provide Non-IRA Retirement Accounts and plan-level fiduciaries with alternative methodologies for distribution that will likely significantly reduce the costs of the distribution; and (2) inform Non-IRA Retirement Accounts of their distribution amounts before the funds are actually distributed to them, to allow them time to determine an appropriate distribution methodology and to advise the plan fiduciary accordingly.

[1] The DOL 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 Plan or if the plan-level fiduciary approves of a distribution methodology determined by the record-keeper.

2. <u>The Merrill Lynch letter</u>

Merrill Lynch, one of the omnibus intermediaries that is expected to receive a distribution under the Plan, raised two concerns in a comment letter. First, the comment letter noted that the Plan did not provide a "protocol" for distributing funds to the subset of opaque omnibus intermediaries that opt to have BFDS [Boston Financial Data Services, Inc.] calculate distribution amounts for its beneficiaries. The comment letter further stated that mailing checks to those beneficiaries would require the unnecessary disclosure of personal identifying information and other sensitive customer data and requested that Merrill Lynch be allowed to credit funds electronically to customer accounts. Professor Grundfest and BOIA are working with Merrill Lynch to implement its request to electronically credit customer accounts, for which changes to the Plan are unnecessary.

Second, Merrill Lynch's comment letter noted that the Plan does not contain a limitation-on-liability provision for intermediaries "authorized to assist in the administration of the Fair Fund" and that Merrill Lynch would expect any such intermediaries to be covered by a limitation-on-liability provision. Professor Grundfest has added a limitation-on-liability provision to the Plan. However, the Commission cannot advise any such intermediary whether or under what circumstances this provision would apply, because whether the limitation would apply would depend upon the individual facts and circumstances for each intermediary. The provision at page 8 of the Plan further notes that "this paragraph … is not intended, nor should it be deemed to be, a representation to or an indemnification of the IDC or the Fund Administrator or their designees, agents and assistants by the Commission or the QSF [Qualified Settlement Fund]…."

3. <u>The CMFI letter</u>

CMFI represents the interests of individual mutual-fund investors. In the comment letter, the Executive Director of CMFI expressed a concern that the Plan's procedures for identifying and distributing funds to the beneficiaries of omnibus accounts are insufficient, and may result in investors not receiving their distributions. He further commented that the Plan does not consider potential market-timing activities by others who are not the subject of the BOIA administrative proceeding.

The Commission staff and Professor Grundfest met with CMFI's Executive Director to address these concerns. Professor Grundfest represented that BFDS and BOIA have already approached all known opaque omnibus intermediaries and obtained account information representing 99.5% of the Fair Fund. This information rendered the bulk of CMFI's concerns moot. Further, the concern that the Plan does not evaluate possible market-timing activities of others outside of the administrative proceeding misinterprets the directive of the Order, which does not require Professor Grundfest to determine whether others engaged in market timing in the One Group mutual funds.

4. **The Kuck letter**

Mr. Kuck is a beneficiary of a trust account managed by Bank One Trust Company (BOTC), which invested in the One Group mutual funds at issue in the Order. In his comment letter, Mr. Kuck expressed his concern that those beneficiaries may not receive a distribution to which they are entitled because the Plan does not specifically provide assurances that the beneficiaries of the trust account will be identified and properly compensated. In addressing this concern, Professor Grundfest has represented that BFDS and BOIA have identified the underlying beneficiaries of the accounts managed by BOTC and that these beneficiaries will receive a distribution.

B. **Recommended Modifications to the Plan**

In summary, Professor Grundfest recommends adding the following provisions to the Plan:

- a procedure for notifying Non-IRA Retirement Accounts entitled to $1,000 or more of their respective final distribution amount in advance of distributing funds to those accountholders (Plan, ¶15(d)(a));
- language specifying the timing of distributions to Non-IRA Retirement Accounts (Plan, ¶15(d)(b));
- alternative, less costly, distribution methodologies for Non-IRA Retirement Accounts (Plan, ¶¶15(d)(c)(i)(ii)); and
- a limitation-of-liability provision (Plan, p. 8).

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

C. **The Bond Requirements 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 Plan, discussed on page 5 in the "Appointment of an Administrator for the Fair Fund" section, 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 Distribution Plan is modified as described above, and approved with such modification;

B. Pursuant to Rule 1105 of the Fair Fund Rules, 17 C.F.R. § 201.1105(a), Boston Financial Data Services, Inc. is appointed as the Administrator of the Plan in accordance with the terms of the Plan; 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