UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 57048 / December 27, 2007

Administrative Proceedings
File No. 3-11818

In the Matter of **Banc of America Capital Management, LLC, BACAP Distributors, LLC, and Banc of America Securities, LLC** **Respondents.**	**ORDER APPROVING THE DISTRIBUTION PLAN**

I.

In February 2005, the Commission instituted settled administrative and cease-and-desist proceedings against Banc of America Capital Management, LLC ("BACAP"), BACAP Distributors, LLC ("BACAP Distributors"), and Banc of America Securities, LLC ("BAS") (collectively, "Respondents") for violations of the federal securities laws in connection with market timing and late trading in the Nations mutual fund complex (the "Nations Funds") and late trading in other mutual funds. The February Order[1] provided for the payment of disgorgement and civil penalties totaling $375 million and the establishment of a fair fund (the "BOA Fair Fund"). It further provided that the BOA Fair Fund be distributed pursuant to a distribution plan developed by an Independent Distribution Consultant ("IDC") retained by Respondents. In February 2005, Respondents selected Lawrence A. Hamermesh, a Professor of Corporate and Business Law at Widener University School of Law in Wilmington, Delaware, to serve as the BOA Fair Fund's IDC. Since that time, Professor Hamermesh has developed a proposed distribution plan (the "BOA Plan" or the "Plan") in consultation with the staff, the Respondents and the Independent Trustees of the Nations Funds (the "Trustees").

On July 16, 2007, the Commission published the Plan and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 56077) ("Notice")

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[1] *See* In the Matter of Banc of America Capital Management, LLC, BACAP Distributors, LLC, and Banc of America Securities, LLC, AP File No. 3-11818, Exchange Act Rel. No. 51167 (Feb. 9, 2005).

pursuant to Fair Fund Rule 1103, 17 C.F.R. § 201.1103. The Plan proposes a Fund Administrator and sets forth, among other things, procedures for the distribution of proceeds to several categories of funds including the Nations Funds, the Settling Funds and the Nonsettling Funds;[2] the identification of eligible recipients of proceeds from the BOA Fair Fund; procedures for providing notice to such recipients of the existence of the BOA Fair Fund and their potential eligibility to receive proceeds; procedures for the administration of the fund, including provisions for filing tax returns; and a proposed date for the termination of the BOA Fair Fund. The proposed Fund Administrator, Rust Consulting, Inc., has not posted the bond generally required of third-parties under Fair Fund Rule 1105(c). Rather, the Plan incorporates several layers of protection for the BOA Fair Fund. Among other things, under the Plan: (1) the Fund Administrator will have no custody, and only restricted control, of the BOA Fair Fund; (2) assets of the BOA Fair Fund will be held by the United States Department of the Treasury, Bureau of Public Debt, until no more than two business days before checks or wires are transmitted to eligible accountholders; (3) upon transfer from Treasury, funds will be held in one or more escrow accounts at the Escrow Bank[3] 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; (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; and (6) because the disbursements to investors will be made in tranches, at no time will the funds held at the Escrow Bank ever approach the amount covered by the insurance.

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 Gerald Gross, Assistant Regional Director, United States Securities and Exchange Commission, Room 4300, 3 World Financial Center, New York, NY 10281-1022. The Notice also advised that all persons desiring to comment on the Plan could submit their comments, in writing, no later than August 13, 2007.

In response to the Notice, two interested parties, the SPARK Institute ("SPARK") and Merrill Lynch & Co., Inc. ("Merrill Lynch"), submitted comments to the Office of the Secretary. As set forth in more detail below, the SPARK letter seeks modification of the Plan: (i) to provide an alternative basis of proceeds allocation; (ii) to permit retirement plan service providers to perform plan level allocations and distributions and be reimbursed for expenses associated with

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[2] The Nations Funds are mutual funds for which respondent BACAP served as adviser and for which respondent BACAP Distributors served as distributor and administrator. Respondent BAS, the clearing entity, was found to have facilitated illicit market timing in not only the Nations Funds but also in other mutual funds for which BACAP did not serve as adviser and for which BACAP Distributors did not serve as distributor and administrator. Most of the illicit market timing facilitated by BAS occurred in the Settling Funds – other mutual funds that have reached their own settlements with the Commission with respect to market timing and/or late trading and that have established their own fair funds. BAS also facilitated illicit market timing in other mutual funds that have not entered into settlements with the Commission and thus, have not established their own fair funds (the "Nonsettling Funds"). The "Settling Funds" and the "Nonsettling Funds" are collectively referred to as the "Unaffiliated Funds" in the Plan.

[3] The "Escrow Bank" refers to Deutsche Bank or such other bank selected by the IDC and acceptable to the staff pursuant to ¶ 6.21(a).

making such allocations and distributions; and (iii) to encourage the adoption of the Putnam Plan's approach to retirement plan omnibus accounts.[4] The Merrill Lynch letter suggests that the Plan be modified to provide: (i) clearer direction regarding distributions to certain mutual funds; (ii) indemnification of financial intermediaries of omnibus accounts ("financial intermediaries"); and, (iii) indemnity for financial intermediaries in the transmission of sensitive client data.

After careful consideration, the Commission has concluded that the Plan should be modified to include, among other things, an additional option in allocating proceeds for non-IRA retirement plan omnibus account service providers and additional distribution methodologies for retirement plan omnibus accounts. The Commission has determined that the Plan will be approved with such modification. 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

In its letter dated August 2, 2007, SPARK states that it "represents the interests of a broad based cross section of retirement plan service providers, including members that are banks, mutual fund companies, third party administrators and benefits consultants."[5] SPARK also indicated that its members include "most of the largest service providers in the retirement plan industry and the combined membership services more than 95% of all defined contribution plan participants."[6] In its letter, SPARK requests that the Plan permit retirement plan omnibus account service providers to allocate proceeds among retirement plans "according to average share or dollar balance of the [plan's] investment" in the affected funds during the relevant period. SPARK further requests that such retirement plan service providers be reimbursed for the expenses of making the plan level allocations themselves, if the plan service providers determine that they can do so on a more cost effective basis than the IDC. Finally, SPARK requests that the Commission encourage the adoption of a model distribution approach that substantially conforms to the modified Putnam Plan's approach in dealing with retirement plan omnibus accounts.

The Commission has concluded it is appropriate to modify the Plan in response to SPARK's first comment requesting an alternative basis for allocating proceeds among retirement omnibus plans. Paragraph 6.7(a) of the Plan has thus been modified to permit a plan service provider of a retirement plan omnibus account to allocate proceeds from the BOA Plan

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[4] *See* In the Matter of Putnam Investment Management, LLC, AP File No. 3-11317, Exchange Act Rel. No. 56115 (Jul. 20, 2007), Distribution Plan (the "Putnam Plan"), Section IV.

[5] *See* SPARK Comment Letter dated August 2, 2007 ("SPARK Letter"), at 1 n. 1.

[6] *See* SPARK Letter, at 1 n. 1.

according to an average share or dollar balance of each retirement plan's investment in the affected funds during the relevant period. This modification addresses SPARK's concern and is consistent with the distribution plans approved by the Commission in the Pilgrim Baxter and Putnam matters.[7] Moreover, it would provide retirement plan service providers an additional option in the calculation of proceeds allocations consistent with their fiduciary, legal and contractual obligations.

The Commission does not believe that the Plan requires modification in response to SPARK's second request for cost reimbursement associated with plan level allocation calculations by retirement plan service providers. In connection with the proposed Distribution Plan in *In the Matter of Pilgrim Baxter & Associates, Ltd.*, A.P. No. 3-11524, SPARK made a substantially similar comment. In that matter, 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. As was the case in *Pilgrim Baxter*, if the BOA Plan required reimbursement of these costs at or near the cost estimates provided to the staff in the *Pilgrim Baxter* matter, it simply would be cost prohibitive and unreasonable, especially in view of substantial flexibility in the BOA Plan for an intermediary or plan-level fiduciary to develop a more cost efficient method of distribution.[8] The BOA Plan provides retirement plans with options designed to significantly reduce the costs of distribution for retirement plan service providers. For instance, retirement plans may conduct their own cost-benefit analysis to determine, consistent with Department of Labor guidance and their fiduciary obligations, the most cost-effective method of distribution, including making distribution based pro rata, per capita or other algorithm. Furthermore, the IDC did not intend for the Plan to reimburse costs incurred by plan administrators of retirement plans within omnibus accounts. In light of the comparatively low cost alternatives that are included in the Plan specifically for such non-IRA retirement plans, the Commission has determined that the retirement service plan providers, and not the Fund Administrator or the IDC, are in the best position to estimate costs associated with the distribution and to determine the most cost effective way to handle the distribution. Accordingly, no modification will be made to the Plan with respect to this request.

Finally, although SPARK did not identify any particular sections of the BOA Plan that it believed should be changed, the Commission has concluded that the section of the BOA Plan dealing with retirement plan omnibus accounts should be modified to include the distribution options included in the Putnam Plan. The Putnam Plan offers retirement plan fiduciaries four options of distributing proceeds. These options include making the distribution to current participants on a pro rata or per capita basis or using such proceeds to pay reasonable expenses of the retirement plan, if the retirement plan permits such use and if the fiduciary determines, consistent with all applicable guidance from the Department of Labor, that such use is consistent

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[7] *See* the Putnam Plan ¶ 42; In the Matter of Pilgrim Baxter & Associates, AP File No. 3-11524, Exchange Act Rel. No. 54812 (Nov. 22, 2006), Distribution Plan ¶ 8.6.5.3.1.

[8] "Plan-level fiduciary," as used herein, means the retirement plan-identified fiduciary, trustee, or other entity authorized to distribute allocated funds directly to non-IRA retirement plan participants.

with the exercise of its fiduciary obligations.[9] The BOA Plan has thus been modified to include the four options identified under Putnam as alternative distribution methodologies. The BOA Plan has also been modified to include an additional option of allocating proceeds to persons who currently have a portion of their account in the retirement plan invested in the mutual fund to which the distribution relates, either on a pro rata or per capita basis.[10] By expressly including these alternative non-exclusive distribution methodologies, the Plan now provides the record keepers and plan fiduciaries additional particular methodologies for distributing plan proceeds and hence additional ways for record keepers and plan fiduciaries to conduct a distribution consistent with the relevant guidance issued by the Department of Labor.

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

In its letter dated August 13, 2007, Merrill Lynch asks that the Plan be modified to provide "more specific details and clearer direction" with regard to the distribution to Nonsettling Funds.[11] The Commission believes that the Plan contains clear direction and substantial flexibility in terms of the options provided to the Nonsettling Funds in the distribution of the BOA Fair Fund proceeds. Specifically, a Nonsettling Fund may choose to refuse the distribution in the event that the Nonsettling Fund determines that it is unable to perform the required data analysis or appropriate allocation formula or algorithm or that it would be commercially unreasonable for the Nonsettling Fund to develop the capabilities required to identify and distribute funds to beneficial owners. The Plan also permits a Nonsettling Fund to allocate the distribution to its own portfolio assets, or, at its expense, apply any distribution technique that the Fund, in the exercise of its reasonable discretion, deems to be consistent with its fiduciary, contractual or other legal obligations.[12] Accordingly, the Commission has determined that no modification is necessary.

Merrill Lynch further requests that the Plan include procedures for the indemnification of the financial intermediaries by the Respondents except in the case of a financial intermediary's gross negligence, bad faith or willful misconduct, reckless disregard of duty, or reckless failure to comply with the terms of the Plan.[13] It expressed concern that financial intermediaries may not be covered by the indemnity provision available to those considered "assistants" to the IDC and the Fund Administrator in the distribution of the fair fund.[14] The statement in the Plan is an

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[9] *See* the Putnam Plan, ¶ 43

[10] *See* the Plan, ¶ 6.7(a).

[11] *See* Merrill Lynch Comment Letter dated Aug. 12, 2007 ("Merrill Lynch Letter").

[12] See the Plan, ¶ 6.8.

[13] *See* Merrill Lynch Letter.

[14] The BOA Plan currently contains a clause which provides, in relevant part, that the IDC, Fund Administrator and their agents and assistants cannot be held liable by fund shareholders for any act or omission in the course of administering the Fair Fund distributions, except upon a finding of gross negligence, bad faith or

expression of the current state of the law. The Commission does not intend to expand or contract the liability of financial intermediaries or require the IDC to do so. If a financial intermediary is subject to any liability, that is because of the intermediary's relationship with its client. Accordingly, no modification to the Plan is warranted.

Finally, Merrill Lynch requests that the Plan require the Fund Administrator, by written agreements, to indemnify financial intermediaries for the delivery of sensitive client data by the financial intermediaries in furtherance of the distribution except in the case of a financial intermediary's gross negligence, bad faith or willful misconduct, reckless disregard of duty, or reckless failure to comply with the terms of the Plan.[15] Merrill Lynch further requests that the Plan include security and confidentiality obligations to protect financial intermediaries in the event that their clients' information is misused or mishandled.

The Commission does not believe the Plan should be modified as requested. The Plan does not require a financial intermediary to transmit client data to the Fund Administrator unless such a firm elects to have the Fund Administrator perform the distribution. In addition, paragraph 6.6(f) of the Plan provides that client "information provided by omnibus account holders shall be maintained confidentially and held exclusively by" the Fund Administrator, and "Respondents shall not have access to that information." Moreover, in one-on-one communications with financial intermediaries, such firms are free to request that the Fund

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willful misconduct, reckless disregard of duty, or reckless failure to comply with the terms of the Plan. The Plan expressly provides that such provision is an expression of the current state of the law and not intended to be a representation to or an indemnification of the IDC, the Fund Administrator and their agents, nor would it preclude the Commission or the Fair Fund from seeking redress from any applicable bond or insurance policy. *See* The Plan, ¶ 6.21(b).

[15] 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 cover 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 BOA Plan, disclosure is arguably required if the financial intermediary elects to have the Fund Administrator handle the distributions.

Moreover, Regulation S-P also imposes limits on the redisclosure and reuse of nonpublic personal information. *See* 17 C.F.R. 248.11. For example, if a financial intermediary subject to Regulation S-P were ordered by the Commission to transmit nonpublic personal information to a nonaffiliated third party for purposes of making distributions under the BOA Plan, and the intermediary did so in reliance on an exception in §§ 248.14 or 248.15, the third party receiving the information could use it only for the purpose of making the distributions.

Administrator enter into a separate confidentiality agreement.[16] Accordingly, no modification with respect to this request is necessary.

B. The IDC's Administrative Changes

1. Coordination of Settling Funds

The IDC revised and added language to ¶ 6.10(b) of the Plan and its Appendix B to clarify how distributions from this Plan will be made to Settling Funds for which no distribution to individual investors is contemplated or where a coordinated distribution by the Settling Fund IDC will not take place.[17] The Plan now provides that distributions to Settling Funds under ¶ 6.10(b) will be made pursuant to one of two options: distribution to contemporaneous shareholders of the fund or distribution to the fund itself, as determined by applying the same criteria outlined in ¶ 6.8 for Nonsettling Funds. Where the distribution is to contemporaneous shareholders, the allocations will be determined by the BOA Fund Administrator under supervision of the IDC, based on account data provided by the IDC of the Settling Fund.[18] Where the distribution is to the fund itself, the IDC has modified the plan to apply the same distribution criteria for Nonsettling Funds to Settling Funds. Where the distribution will be made to contemporaneous shareholders, the effect of the modification is that the BOA IDC, not the Settling Fund IDC, will determine the allocation of funds.

Because a coordinated distribution is no longer anticipated with approximately six Settling Funds,[19] the BOA IDC anticipates possible delays in the distribution and an increase in distribution costs. To the extent that increased distribution costs would make it impossible to make a cost effective distribution to individual shareholders, the IDC anticipates distributions being made to the funds directly rather than to the individual investors. In addition, the IDC also

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16 The Columbia Fund Administrator has already negotiated such an agreement with at least one financial intermediary.

17 These changes were made in response to suggestions and conversations that the IDC had with the staff and his colleagues, including other IDCs. For example, some Settling Funds' IDCs have recently informed the IDC that they no longer believe a coordinated distribution is appropriate and/or feasible. The main reasons provided by the these IDCs include: possible delays in distribution of funds (Massachusetts Financial Services Fund); lack of sufficient overlap between the BOA Plan and the Settling Fund in question that might cause distribution errors, investor confusion, delay, and unnecessary expense (Alliance Capital Management Fund); difficulty in reconciling analyses between the funds that might lead delay, shareholder confusion, increased call volumes and erosion of economies of scale (Federated Fund, Pilgrim Baxter Fund); and that distribution is already underway in some of these funds (Pilgrim Baxter Fund, Putnam Fund, Columbia Fund). The BOA IDC respectfully disagrees with certain of the concerns raised by other IDCs and feels that the only remaining alternative is for him to assume the responsibilities of non-coordinated distributions. See the revisions to Exhibit B to the Plan.

18 The revision of paragraph 6.10(b) also clarifies that the Settling Funds are not obligated under this Plan to gather omnibus holder data for their customers.

19 The six Settling Funds are Alliance, Columbia, Federated, Massachusetts Financial Services, Pilgrim Baxter, and Putnam.

believes that the failure to coordinate fund distributions may result in some investors receiving nothing, by virtue of the operation of the *de minimis* provisions of distribution plans instead of receiving a combined amount that could have totaled between $10.00 and $19.99.

2. Other Administrative Changes

The IDC made the following administrative changes to the Plan in order to create more clarity in the distribution process.

- To correct a typographical error in ¶ 6.6(d), the IDC has changed the cross-reference to paragraph 7.5(ii) as previously indicated, to paragraph 6.5(iii) instead.

- The IDC added language in ¶ 6.8 to clarify that where a Nonsettling Fund has entered into, or subsequently enters into, a settlement with the Commission regarding market timing or late trading, the IDC will have discretion to proceed with distributions in respect of such a fund in accordance with ¶¶ 6.9 and 6.10 of the Plan, subject to the concurrence of the Commission's staff.

- The IDC added language at the end of ¶ 6.8 to make clear that the IDC has discretion to coordinate with other IDCs the gathering of account data and the distribution of funds.

- The IDC substituted the use of the Alliance Fund in the example provided in ¶ 6.9 with the more generic term "Settling Fund."

- The IDC also added language at the end ¶ 6.10(b) to make clear that the Respondents will pay for reasonable incremental costs incurred by the Settling Funds in supplying account data to the Fund Administrator or other appropriate entity.

- The IDC deleted the first sentence in ¶ 6.11 to reflect the fact that he no longer anticipates doing a coordinated distribution with all of the IDCs for the Settling Funds.

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, generally included in ¶¶ 6.16 to 6.18 and Appendix A of the Plan, and the high cost of

bond coverage, suffice to constitute good cause for waiving the posting of the bond under Rule 1105(c).[20]

Accordingly, IT IS ORDERED that:

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

B. Pursuant to Rule 1105(a) of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1105(a), Rust Consulting, Inc., is appointed as the Fund Administrator; and

C. The bond requirement of Rule 1105(c) of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1105(c), is waived for good cause shown.

By the Commission.

Nancy M. Morris
Secretary

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