



September 6, 2006

Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

VIA ELECTRONIC MAIL

Subject: Proposed Distribution Plan for Banc One Investment Advisors Corporation and Mark A. Beeson (Administrative Proceeding File Number 3-11530)

Dear Ms. Morris:

The Coalition of Mutual Fund Investors ("CMFI" or "Coalition") is pleased to submit the following comments to the U.S. Securities and Exchange Commission ("Commission"), regarding the proposed plan of distribution ("Distribution Plan") in the Banc One administrative proceeding noted above.

CMFI is an Internet-based shareholder advocacy organization representing the interests of individual mutual fund investors. The Coalition is located in Washington, D.C., with a Web site that can be accessed at [www.investorscoalition.com](http://www.investorscoalition.com).

The proposed Banc One Distribution Plan is the third of several Distribution Plans to be adopted and implemented as a result of earlier Commission enforcement actions to address market timing schemes and other trading abuses. As one of the initial Distribution Plans, this Plan may establish precedent for other administrative proceedings, at least where similar facts exist.

1. The Methodology Used to Develop the Distribution Plan is Reasonable Despite the Paucity of Information from Omnibus Accounts.

In the view of CMFI, the Independent Distribution Consultant, Professor Joseph A. Grundfest, and the Commission staff have developed a sound methodology for identifying and evaluating market timing activity in the Banc One/One Group Funds ("Funds") for the time period covered by this proceeding.

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In a manner similar to the approach taken in the Pilgrim Baxter Distribution Plan<sup>1</sup> and the Columbia Funds Distribution Plan,<sup>2</sup> the Independent Distribution Consultant has estimated the net gains received from market timing activities by several identified short-term traders (i.e., the “profits” method). However, unlike the two previous Plans, the analysis does not appear to evaluate market timing activities by others who are not the subject of this administrative proceeding.

Professor Grundfest’s analysis intends to estimate the dilution and related harm to shareholders on a daily basis. This is the proper time period to evaluate market timing gains, as mutual fund shares are priced once a day, usually on or after the close of the major U.S. exchanges at 4 P.M., Eastern Time. Professor Grundfest also has estimated the proportionate share of advisory fees paid by funds that suffered losses during the period of such market timing and has adjusted all of his calculations to take into account the time value of money.

In reviewing the Distribution Plan, it appears that Professor Grundfest was only able to receive and evaluate investor level account records from direct purchase shareholders in the Funds. If this observation is accurate, the Funds and/or its transfer agent were not able to provide account records for investors transacting through omnibus accounts managed by third-party financial intermediaries.

As the Commission is well aware, many investors choose to transact in mutual funds through brokers, retirement plan providers, financial advisers, and other intermediaries. These investors do not deal directly with a fund; instead, shareholder statements and recordkeeping are handled by each intermediary, as well as all other aspects of the customer relationship. During each trading day, financial intermediaries aggregate all purchase, redemption, and exchange requests from their customers and send one consolidated order to each mutual fund. A mutual fund handles this consolidated order as a single transaction, recording the third-party intermediary on its books as one shareholder or omnibus account. Each omnibus account order may represent the transactions of thousands of customers of a particular third-party financial institution; however, no information is generally disclosed to the compliance personnel at a mutual fund about the individual trading activities of these omnibus account investors, nor are the actual identities of the investors known to anyone but the financial intermediary.

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<sup>1</sup> Proposed Plan of Distribution, In the Matter of Pilgrim Baxter & Associates, Ltd., Administrative Proceeding File No. 3-11524, available at <http://www.sec.gov/litigation/admin/2006/34-54073-pdp.pdf>.

<sup>2</sup> Proposed Plan of Distribution, In the Matter of Columbia Management Advisers, Inc. and Columbia Funds Distributor, Inc., Administrative Proceeding File No. 3-11814, available at <http://www.sec.gov/litigation/admin/2006/34-54175-pdp.pdf>.

As a result of the lack of transparency within omnibus accounts, Professor Grundfest was not able to evaluate market timing activity at the investor level within these accounts.

While the disclosure of transactions at the sub-account level would not change the total amount of money to be distributed from the Fair Fund in this administrative proceeding, Professor Grundfest would have been able to develop a more precise estimate of market timing profits by evaluating *all* account data at the investor level for the time period involved, instead of relying only on direct purchaser account records and aggregate trading data from omnibus accounts. A better estimate of market timing gains would have resulted in a more accurate allocation formula to compensate investors harmed by these activities.

2. The Procedures for Identifying Investors and Distributing Fair Fund Monies in Omnibus Accounts Should Be Improved.

The problems presented by omnibus accounts become more pronounced in the twenty-five step process proposed by the Plan, where it is clear that individual investors in the Funds may receive different treatment depending on the distribution channel they selected to transact in these Funds.

Under the Distribution Plan, an investor who purchased and redeemed shares directly with the Funds (referred to as a "direct account") will be identified through Fund and transfer agent records. The identity and transactions of these investors are available from these records. On the other hand, investors in most omnibus accounts are unknown to the Funds, as are their transactions. To address this problem, the Distribution Plan proposes to divide omnibus account holders into two categories: (1) transparent omnibus accounts, and (2) opaque omnibus accounts. An omnibus account will be considered "transparent" if the Funds have access to account records identifying the actual beneficial owners. An omnibus account will be considered "opaque" if the Funds do not have access to such account records. Under Steps 5 and 7 of the Plan, the Funds will contact each financial intermediary holding an opaque omnibus account entitled to a distribution of \$1,000 or more. These account holders will be asked to provide all investor level data necessary to allow opaque omnibus accounts to be treated the same as those which are transparent omnibus accounts. According to Step 7 of the Plan, the expenses incurred in gathering and providing the necessary data will be paid for by the Respondents to this administrative proceeding; however, the amount of the reimbursement to any intermediary will not exceed the aggregate amount of the estimated distribution to such account holder.

As the “omnibus account outreach” process unfolds, intermediaries with opaque omnibus accounts appear to be facing four options. The first option is to supply the Independent Distribution Consultant with identity and transaction information at the investor level for each shareholder within such omnibus account, with the Independent Distribution Consultant then making the distribution to these investors directly.

The second option involves supplying the same identity and transaction information to the Independent Distribution Consultant, but with the distribution being made by the financial intermediary after the amounts have been calculated by the Independent Consultant. The third option requires the intermediary to make the distribution itself, using an allocation methodology developed by the Independent Consultant. The fourth option for an intermediary involves a refusal to participate in this process either by returning a distribution check or refusing to cash a distribution check.

While the options for opaque omnibus accounts presented to each financial intermediary represent a reasonable approach to distributing these funds, there are several scenarios in which individual investors within omnibus accounts may not receive any distribution. The most unfair scenario is the one in which an intermediary can refuse to accept a distribution on behalf of its omnibus investors. Under the Plan, an intermediary can simply refuse to cooperate with the outreach process. An intermediary also can drop out of the outreach process if the cost of identifying beneficial owners and distributing these funds exceeds the distribution amount. These potential outcomes penalize investors who are customers of intermediaries with recordkeeping systems that may be less efficient than other third-party institutions, something that is totally outside the control of each investor. With the Respondent remaining responsible for this distribution expense, CMFI urges that the Commission and the Independent Distribution Consultant consider a more precise approach to evaluate when a distribution should not be made for cost reasons. The simple exercise of measuring the intermediary cost against the proposed distribution amount should be refined to ensure that more investors within omnibus accounts receive distributions.

A second scenario involves the \$1,000 distribution threshold for any particular omnibus account. Since an omnibus account can range in size from a very small group of retirement plan investors to a brokerage account with tens of thousands of sub-accounts, CMFI believes that it is possible that investors within a small omnibus account may be left without a distribution because of a potential distribution of less than \$1,000. It may be fair and reasonable to make a distribution of \$950 to an omnibus account consisting of five beneficial owners, but not feasible to make the same distribution to an omnibus account with two hundred investors. The Commission and the Independent Distribution Consultant should consider whether there should be an exception to this rule for small omnibus accounts and/or intermediaries with a small number of investors.

On a more positive note, the proposal by the Independent Distribution Consultant to use a "Gross-Up Algorithm" to address *de minimis* distributions is a reasonable and fair approach to the problem of distributions that are less than \$10. Under this proposal, all provisional distributions of less than \$10 will be ranked in descending order based on the size of the proposed distribution. The Independent Distribution Consultant then will calculate the total amount of these distributions. Each of these individual distributions will be recomputed as \$10 units, in descending order from largest to smallest, until the total amount allocated for these distributions is depleted. This approach seems to be a very equitable way to ensure that as many small investors as possible receive some distribution amount.

3. The Commission Should Permit More Than 90 Days for Intermediary Information Sharing in the Distribution Plan.

The omnibus account disclosure issue is a complex one, as financial intermediaries use a myriad of computerized recordkeeping systems to manage customer account information. The requirement in the Distribution Plan that only 90 days will be permitted for the "outreach process" for opaque omnibus accounts may not be enough time for intermediary compliance.

It has taken more than 18 months (March 2005 through October 2006) for the financial services industry to develop compliance systems for the intermediary information-sharing requirement referenced above, and the Commission may still need to grant an extension because of the technical difficulties involved. As a result of the complexity in providing this information, the Commission should consider extending this outreach process time period, to permit intermediaries adequate time to provide the identity and transaction information needed under the Distribution Plan.

4. The Commission Should Use Rule 22c-2 to Facilitate Intermediary Information-Sharing with the Independent Consultant.

It is CMFI's view that investors in the Banc One/One Group Funds who chose to use third-party intermediaries are not adequately protected by the procedures outlined in the Distribution Plan involving "opaque" omnibus accounts. Through no fault of the Independent Consultant, the current distribution procedures rely heavily on the cooperation of financial intermediaries to obtain identity and transaction information. If a financial intermediary is unwilling to provide the information or is unable to do so in a manner in which the cost is less than the distribution amount, then the individual investors within these accounts may not receive a distribution.

As an alternative, the Commission should use its authority to require all financial intermediaries to disclose the necessary identity and transaction information at the investor level to the Independent Distribution Consultant, to facilitate a more uniform process of identifying and compensating individual investors within omnibus accounts.

Specifically, CMFI recommends that the Distribution Plan for this proceeding require that the Funds request this information for all omnibus accounts, pursuant to section 270.22c-2 of the Investment Company Act regulations.

In order to provide omnibus account transparency for mutual funds using redemption fees to deter short-term trading abuses, the Commission adopted new Rule 22c-2 in March of 2005, requiring that funds enter into written information-sharing agreements with all financial intermediaries to provide, upon request, the same type of identity and transaction information needed under the Distribution Plan.<sup>3</sup>

In order to ensure that mutual funds and financial intermediaries comply with this rule, the Commission placed responsibility for implementing this rule on the funds, prohibiting any one fund's ability to redeem shares unless compliance has been achieved.<sup>4</sup> The Commission also made the intermediary information-sharing rule a separate requirement from the decision by a fund to impose (or not impose) a redemption fee. The only funds which are exempted are: (1) money market funds; (2) funds issuing securities listed on a national securities exchange; and (3) funds that permit short-term trading through proper prospectus disclosure.<sup>5</sup> None of these exceptions would apply to the Funds covered by this administrative proceeding.

In the spring of this year, the Commission issued a proposed rule to modify Rule 22c-2 by exempting small intermediaries from the shareholder information agreement provision and proposing certain clarifying amendments.<sup>6</sup> Even if these proposed changes are adopted, the requirement of an intermediary information-sharing agreement is left intact for most intermediaries. This Rule should be used by the Commission as a resource to improve the process of receiving investor level information from intermediaries so that eligible investors can receive their distribution payments from the Fair Funds. Unless the Commission extends the compliance date for this Rule, the information-sharing provisions will become effective on October 16, 2006.<sup>7</sup>

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<sup>3</sup> 70 Fed. Reg. 13328 (March 18, 2005).

<sup>4</sup> 17 C.F.R. § 270.22c-2(a).

<sup>5</sup> 17 C.F.R. § 270.22c-2(b).

<sup>6</sup> 71 Fed. Reg. 11351 (March 7, 2006).

<sup>7</sup> 70 Fed. Reg. 13328 (March 18, 2005).

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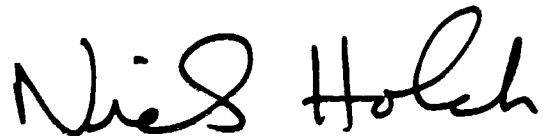
5. Conclusion.

CMFI appreciates the amount of time, effort, and thought which went into the preparation of this Distribution Plan, especially from the perspective of the individual investors in these Funds who were harmed by the activities of the Respondents and, potentially, other market timers. The Commission should use its authority to require intermediaries to provide identity and transaction information at the investor level so that Banc One/One Group omnibus account investors can be treated in the same manner as direct purchase shareholders.

Individual investors deserve a system in which there is no difference in how mutual fund rules and regulations are applied as a result of the distribution channel used for fund transactions. Mutual fund shareholders expect uniform treatment; it is important that investor trust in funds not be eroded further because of omnibus accounts and the economic needs of financial intermediaries.

My organization is happy to provide further information or clarification regarding the recommendations in this comment letter if it would be helpful to the Commission's deliberations regarding this matter.

Sincerely,

A handwritten signature in black ink that reads "Niels Holch". The signature is written in a cursive, flowing style.

Niels Holch  
Executive Director  
Coalition of Mutual Fund Investors

cc: The Honorable Christopher Cox  
The Honorable Paul S. Atkins  
The Honorable Kathleen L. Casey  
The Honorable Roel C. Campos  
The Honorable Annette L. Nazareth  
Linda C. Thomsen, Division of Enforcement  
Andrew Donahue, Division of Investment Management  
Robert Plaze, Division of Investment Management