

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**Securities Exchange Act of 1934**  
**Release No. 57721 / April 25, 2008**

**Administrative Proceedings**  
**File No. 3-11590**

**In the Matter of**  
  
**Janus Capital Management LLC,**  
  
**Respondent.**

**ORDER APPROVING THE MODIFIED  
PLAN OF DISTRIBUTION**

**I.**

On August 18, 2004, the Commission issued an order in the above-captioned matter (the “Order”) instituting and simultaneously settling public administrative and cease-and-desist proceedings against Janus Capital Management LLC (“JCM”). The Order found that JCM 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 JCM to pay disgorgement of \$50 million and a civil money penalty of \$50 million. The total amount of \$100 million was designated a Fair Fund (the “JCM Fair Fund”) under Section 308(a) of the Sarbanes-Oxley Act of 2002. The Order further required that JCM retain an independent distribution consultant (“IDC”) to develop a plan for distributing the \$100 million to shareholders in the mutual funds affected by the market timing (the “JCM Funds”). In December 2004, JCM engaged Professor Christopher James, the William H. Dial/Sun Bank Eminent Scholar and Professor of Finance at the University of Florida, as the IDC.

The Commission’s Division of Enforcement submitted the IDC’s Proposed Plan of Distribution (the “Published Plan”) to the Commission. In accordance with the Order, the Published Plan provides for the allocation and distribution of the JCM Fair Fund, including any accrued interest, to eligible accountholders as compensation for losses suffered by the JCM 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 Published 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 Published Plan; categories of persons potentially eligible to receive proceeds from the JCM Fair Fund; and provisions for the termination of the JCM Fair Fund.

Rust Consulting Inc., proposed in the Published Plan as the Fund Administrator, has not posted the bond generally required of third-parties under Fair Fund Rule 1105(c). Rather, the Published Plan incorporates several layers of protection for the JCM Fair Fund. Among other things, under the Published Plan: (1) the Fund Administrator will have no custody, and only restricted control, of the JCM Fair Fund; (2) assets of the JCM Fair Fund will be held by the United States Department of the Treasury, Bureau of Public Debt (“Treasury”) until no more than five business days 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 payment 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 31, 2007, the Commission published the Published Plan and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (the “Notice”) (Exchange Act Release No. 55835) 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 Published Plan at <http://www.sec.gov/> or by submitting a written request to Jeffrey Oraker, United States Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, CO 80202. The Notice also advised that all persons desiring to comment on the Published Plan could submit their comments, in writing, no later than July 2, 2007.

In response to the Notice, the Commission received comments from many persons,<sup>1</sup> including more lengthy comments from: (1) the SPARK Institute, the Society of Professional Administrators and Recordkeepers (“SPARK”), and (2) Merrill Lynch & Co., Inc., a financial intermediary (“Merrill Lynch”). In its comments, SPARK raised questions concerning how the provisions of the Published Plan will apply to retirement plan accounts. In its comments, Merrill Lynch raised four issues primarily pertaining to distributions through omnibus accounts under the Published Plan. In response to public comments, the IDC, in consultation with JCM and the staff, prepared the Modified Plan of Distribution (the “JCM Plan” or “Plan”).

After careful consideration, the Commission has concluded that the Published Plan should be modified in accordance with the JCM Plan, as described herein, and the JCM Plan should be approved. The Commission has further determined that, for good cause shown, the bond required under Fair Fund Rule 1105(c) will be waived.

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<sup>1</sup> Sixteen persons submitted their comments to the SEC on or before the July 2, 2007 deadline for the submission of comments.

## II.

### A. Public Comments on the JCM Plan

#### 1. The SPARK Letter

In its letter dated June 29, 2007, SPARK requests administrative assistance by the IDC and expense reimbursement for plan level accountholders at JCM. SPARK also requests clarification that retirement plan omnibus account providers may utilize the average investment allocations specified in Section II, D (“Distribution for Plan Accounts”). SPARK further requests clarification that Section II, D (“Distribution for Plan Accounts”) generally only applies to allocations and distributions among individual participants within retirement plans.

The Commission has concluded that it is appropriate to modify the Published Plan in response to some of SPARK’s comments. Section II, D (“Distribution for Plan Accounts”) of the Published Plan has been modified to, among other things, clarify the alternatives available to intermediaries and fiduciaries of retirement plans who must allocate distributions and to add certain alternative methods of distribution that are designed to significantly reduce the costs of distribution for intermediaries and fiduciaries. JCM Plan at 14-15. These modifications address some of the SPARK comments and are consistent with other distribution plans approved by the Commission.<sup>2</sup>

The Commission does not believe that the Published Plan requires modification in response to SPARK’s request for reimbursement from JCM for costs and expenses incurred by retirement plan service providers in allocating distributions and further administrative assistance from the IDC. In connection with other proposed distribution plans, SPARK has made substantially similar requests for reimbursement for costs and expenses to retirement plan providers in its comment letters and the Commission has approved those plans without the additional reimbursement requested by SPARK.<sup>3</sup> For the same reasons, no modifications will be made to the JCM Plan with respect to this request. The JCM Plan provides fiduciaries and intermediaries of retirement plans with distribution alternatives designed to significantly reduce the costs of distribution for retirement plan service providers. In light of the comparatively low cost alternatives for intermediaries and fiduciaries of retirement plans that are included in the JCM Plan, the Commission has determined that the intermediaries and fiduciaries, 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.

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<sup>2</sup> See In the Matter of Putnam Investment Management, LLC, AP File No. 3-11317, Exch. Act Rel. No. 56115 (July 20, 2007), Distribution Plan (the “Putnam Plan”) ¶¶ 41-43; In the Matter of Banc of America Capital Management, LLP, AP File No. 3-11818, Exch. Act Rel. No. 57048 (Dec. 27, 2007), Distribution Plan Sec. 6.7;

<sup>3</sup> See In the Matter of Pilgrim Baxter & Associates, Ltd., AP File No. 3-11524, Exch. Act Rel. No. 54812 (Nov. 22, 2006), Order at 6; In the Matter of Banc of America Capital Management, LLP, AP File No. 3-11818, Exch. Act Rel. No. 57048 (Dec. 27, 2007), Order (the “BOA Order”) at 4; In the Matter of Columbia Management Advisors, Inc., AP File No. 3-11814, Exch. Act Rel. No. 55598 (Apr. 6, 2007), Order (the “Columbia Order”) at 5.

## **2. The Merrill Lynch Letter**

In its letter dated July 2, 2007,<sup>4</sup> Merrill Lynch seeks: (1) more flexibility for the IDC to approve alternative methodologies for effecting distributions; (2) additional repayment of out of pocket costs for financial intermediaries; (3) a limitation of liability for firms involved in the distribution of funds; and (4) additional protections related to data transmission.

First, Merrill Lynch notes that the Published Plan provides for only two options to omnibus accountholders for facilitating distributions from the JCM Fair Fund to beneficial owners, without any flexibility for the IDC to approve alternative methodologies. The Published Plan has been modified so that when a reasonable alternative distribution mechanism is requested by an omnibus accountholder, the IDC may consider employing the alternative mechanism so long as the mechanism does not materially increase the administrative expense or decrease the funds payable to individual investors. JCM Plan at 14. This approach provides flexibility for omnibus providers to request alternatives on a case by case basis and allows the IDC to consider using such alternatives, where reasonable.

Second, Merrill Lynch would like the Published Plan to reimburse financial intermediaries that choose to internally manage the distribution to beneficial owners for all reasonable costs, including the costs of printing and mailing any required communications under the JCM Plan. To the extent that Merrill Lynch's comment relates to omnibus accountholders, the JCM Plan as currently written reimburses such omnibus accountholders that choose to internally manage the distribution to beneficial owners for the commercially reasonable distribution expenses incurred, not to exceed the amount of the distribution. JCM Plan at 14. To allow for reimbursement of other costs is unnecessary and difficult to monitor and control. In addition, as noted above, the IDC did not intend for the JCM Plan to reimburse costs incurred by fiduciaries and intermediaries of retirement plans. This is consistent with other distribution plans approved by the Commission.<sup>5</sup>

Third, Merrill Lynch suggests that the Published Plan contain a clause limiting the liability of financial intermediaries in facilitating the distributions. The Commission does not intend to expand or contract the liability of financial intermediaries or require the IDC to do so. This is consistent with other distribution plans.<sup>6</sup> Therefore, the IDC has not modified the JCM Plan in response to this comment and the staff recommends that the JCM Plan be approved without further modification.

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<sup>4</sup> Merrill Lynch is one of the omnibus intermediaries that is expected to receive a distribution under the Plan. 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.

<sup>5</sup> The Commission has previously denied similar requests by Merrill Lynch in other distribution plans. Columbia Order at 8; In the Matter of Putnam Investment Management, LLC, AP File No. 3-11317, Exch. Act Rel. No. 56115 (July 20, 2007), Order (the "Putnam Order") at 4; In the Matter of RS Investment Management, Inc., AP File No. 3-11696, Exchange Act Rel. No. 56222 (August 8, 2007) Order (the "RS Investment Order") at 3.

<sup>6</sup> The Commission has previously denied similar requests by Merrill Lynch in other distribution plans. Columbia Order at 8; Putnam Order at 5; RS Investment Order at 3; BOA Order at 5-6.

Finally, Merrill Lynch is concerned that the transmission of client sensitive information (including name, address and social security number) will expose financial intermediaries to regulatory and reputational risks if such data is mishandled, disclosed or distributed in an unauthorized manner. Merrill Lynch suggests that the JCM Plan contain security and confidentiality obligations and indemnification of financial intermediaries for any misuse or loss of client data. These concerns are legitimate, and the Published Plan has been modified to require the Fund Administrator to use commercially reasonable efforts to maintain the confidentiality of all data. JCM Plan at 14. This is consistent with other distribution plans.<sup>7</sup>

### **3. The Other Public Comments**

No changes to the Published Plan are warranted by the remaining issues identified in the other comments submitted by the public. First, the JCM Plan provides that a check will be mailed to the last known address for customers who are entitled to receive a distribution under the JCM Plan but no longer have their investments in the JCM Funds (JCM Plan at 15); and the JCM Plan provides a process for investors in the JCM Funds who do not receive a distribution under the JCM Plan to file a dispute form to be considered by the IDC (JCM Plan at 11-12).

Second, the JCM Plan does not provide for any money from the JCM Fair Fund to be paid directly to JCM. For efficiency reasons and to ensure that all of the JCM Fair Fund is distributed to investors, the JCM Plan provides that all undistributed funds will be allocated to the JCM Funds in proportion to the losses suffered by the shareholders in each Fund. JCM Plan at 12. Furthermore, the JCM Plan expressly provides for the distribution to investors of the \$100 million paid into the JCM Fair Fund, along with the accrued interest on the JCM Fair Fund. JCM Plan at 17.

Third, the \$10 *de minimis* threshold should not be lowered to \$1 because this would dramatically increase the distribution costs and expenses. This is consistent with the threshold being used in other distribution plans.<sup>8</sup>

Finally, the JCM Plan does not provide tax advice to investors and this is a matter between the investor and the IRS.

### **B. Other Changes to the Published Plan**

The JCM Plan contains a modification that provides the nine discretionary frequent traders with a means to challenge their exclusion from the distribution. This is intended to

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<sup>7</sup> Other plans approved by the Commission contain similar provisions. See Putnam Order at 5; RS Investment Order at 3-4; Columbia Order at 8-9.

<sup>8</sup> See, e.g., In the Matter of Pilgrim Baxter & Associates, AP File No. 3-11524, Exch. Act Rel. No. 54812 (Nov. 22, 2006), Distribution Plan, Sec. 7.8; In the Matter of Columbia Management Advisors, Inc., AP File No. 3-11814, Exch. Act Rel. No. 55598 (Apr. 6, 2007), Distribution Plan Sec. 7.5; In the Matter of Banc One Advisors Corp., AP File No. 3-11530, Exch. Act Rel. No. 55730 (May 9, 2007), Distribution Plan at 13; Putnam Plan ¶ 25; In the Matter of RS Investment Management, Inc., AP File No. 3-11696, Exchange Act Rel. No. 56222 (August 8, 2007), Distribution Plan ¶ 2.4.4.

address any potential objections that may be raised by the discretionary frequent traders who are being excluded from the distribution under the JCM Plan.

In addition, the following modifications have been made to the Published Plan:

- The name of the JCM Plan has been changed to “Modified Plan of Distribution.”
- The JCM Plan contains additional language in footnote 8 to more clearly identify the individuals who are being excluded from the distribution. JCM Plan at 7.
- The first sentence of Section II.C. (“Allocation of Undistributed Funds”) has been modified for clarity. JCM Plan at 11.
- The reference to the DST/TA 2000 name and address system has been deleted because the significance of the system is not discussed in the JCM Plan. JCM Plan at 16.
- The language in footnote 12 has been amended to more clearly describe the calculations and payments being referenced. JCM Plan at 16.

Accordingly, IT IS ORDERED that:

A. Pursuant to Rule 1104 of the Fair Fund Rules, 17 C.F.R. § 201.1104, the Modified Plan of Distribution is approved.

B. Pursuant to Rule 1105(a) of the Fair Fund Rules, 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 Fair Fund Rules, 17 C.F.R. § 201.1105(c), is waived for good cause shown.

By the Commission.

Nancy M. Morris  
Secretary