

**WASHINGTON LEGAL FOUNDATION**  
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**Washington, DC 20036**  
**202-588-0302**

January 26, 2006

**Via U.S. Mail and email [rule-comments@sec.gov]**

Office of the Secretary  
United States Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-9303

Re: *Securities Exchange Act of 1934 Release No. 53025 (Dec. 27, 2005)*

Sirs:

The Washington Legal Foundation (WLF) is submitting these comments in response to the Commission's Securities Exchange Act of 1934 Release No. 53025 dated December 27, 2005 (the "Notice"). The Notice invited comments on the proposed plan for the distribution of moneys placed into seven Fair Funds established pursuant to the Commission's settlement with seven New York Stock Exchange ("NYSE") specialist firms on March 30, 2004, and July 26, 2004. WLF applauds the proposed Distribution Plan as far as it goes. WLF notes, however, that the Distribution Plan is silent regarding how the Commission intends to distribute funds remaining after completion of distributions set forth in the Plan, despite the fact that the Notice states that such remaining funds "could total anywhere between fifty to seventy million dollars." WLF urges the Commission to amend the Distribution Plan to spell out how the Commission intends to distribute any remaining funds. WLF further urges that remaining funds be used to ensure that Injured Customers (as defined by the Distribution Plan) receive interest on their losses, calculated through the date on which they receive compensation.

**Interests of WLF.** The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In pursuit of those objectives, WLF has initiated its Investor Protection Program, a program designed to protect stock markets from manipulation and to protect employees, consumers, pensioners, and investors from stock losses caused by abusive litigation. As part of that program, WLF regularly monitors the Commission's implementation of the Fair Funds for Investors provision of federal law.

**The Distribution Plan.** The Distribution Plan proposed by the Plan Administrator will make distributions to investors identified by the NYSE for trades identified by the NYSE in amounts of loss calculated by the NYSE, including interest to the dates the seven Specialist Firms made their settlement payments pursuant to the Commission's March 30, 2004 and July 26, 2004 Orders (the "Orders"). The proposed Distribution Plan explains that those payments were deposited in escrow accounts and invested in interest-bearing instruments. WLF has no objection to the distributions or the means the Fund Administrator proposes to carry out the distributions as described in the Distribution Plan.

The Notice states that, following the proposed distribution described in the Distribution Plan, it is estimated that there will be remaining funds (the "Remaining Funds") that "could total anywhere between fifty to seventy million dollars." The Notice and Distribution Plan do not state how or when the Remaining Funds will be distributed; the Distribution Plan merely

notes, correctly, that “Section IV.E of the Specialist Firm Orders state that the Commission shall determine the appropriate use for the benefit of the investors of any funds left in the Distribution Funds following all payments.”

**Fair Funds for Investors.** Under the Fair Funds for Investors provision of the Sarbanes-Oxley Act, 15 U.S.C. § 7246, and the Commission’s rules implementing the Fair Funds legislation, 17 C.F.R. §§ 201.1101, *et seq.*, the Distribution Plan is required to include “provision for the disposition of any funds not otherwise distributed.” *See* 17 U.S.C. § 201.1101(b)(5). Particularly when, as here, the Fund Administrator anticipates that the Remaining Funds will be very substantial, WLF respectfully submits that a distribution plan does not meet the requirements of § 201.1101(a)(5) when it provides merely that the Commission will determine an “an appropriate use” for those funds at some unspecified future date. It is the role of the Distribution Plan to set forth just what those “appropriate use[s]” are and to provide interested parties an opportunity to comment on the proposed plan. WLF urges the Commission to provide more detail regarding how it intends to distribute Remaining Funds.

WLF has several suggestions regarding how the Remaining Funds should be distributed. The Commission’s regulations provide that Fair Funds should be used to compensate investors for their injuries arising from the matters set forth in the Commission’s Orders *or* in complaints alleging violations arising from the same or substantially similar facts as those alleged in the Orders. *See* 17 C.F.R. §§ 201.1100, 201.1102(a). Injuries claimed in

such separate complaints could be the same in nature and amount as those defined for purposes of the Distribution Plan, or they could be somewhat different. For example, the Distribution Plan provides that Injured Customers should be paid interest on their losses only through the date on which the Specialist Firms made their settlement payments under the Orders. Given that that provision is going to leave the Fair Funds with substantial remaining balances, WLF submits that it would be wholly appropriate for the Commission to award additional interest – calculated through the date of distribution – for the Injured Customers. Injured Customers may assert other damages claims, or other customers not identified by the Commission may assert that they have been injured.<sup>1</sup>

WLF submits that if any investors believe they have sustained, and are able to establish, injuries from the same or similar facts as those alleged in the Orders and that are in addition to those compensated by the Distribution Plan, those investors should make claim on the Fair Funds. The Remaining Funds should be used to compensate those investors for such injuries, as the Fair Funds legislation and the Commission's rules provide. So long as there remain any plausible injury claims that have not been fully satisfied, the Remaining Funds should not be distributed to *anyone* other than injured investors – and certainly not to the

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<sup>1</sup> WLF notes that several putative class actions have been filed in the United States District Court for the Southern District of New York that seek damages for alleged violations arising from the same or substantially similar facts as those alleged in the Orders. *In re NYSE Specialists Secs. Litig.*, Case No. 03 Civ. 9264 (RWS). The damages sought by the plaintiffs on behalf of themselves and the putative class have not been specified. It is, of course, possible that the definition and calculation of damages sought in that action will differ from those used for purposes of the Distribution Plan.

Office of the Secretary  
United States Securities and Exchange Commission  
January 26, 2006  
Page 5

United States Treasury. *See* 17 C.F.R. § 201.1102(b) (a distribution plan may not provide for payment to the U.S. Treasury unless “the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors.”).

**Conclusion.** Although the Distribution Plan appears to propose December 31, 2006 as the date for termination of the Fair Funds, it does not set forth any provisions for the disposition of the Remaining Funds as directed by the Commission’s rules. *See* 17 C.F.R. § 201.1101(b)(5). WLF urges the Commission to include such provisions, and to provide WLF and other interested members of the public an opportunity to comment on them.

Respectfully submitted,

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