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VIA OVERNIGHT MAIL & EMAIL

Office of the Secretary
United States Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

Re: *Securities Exchange Act of 1934 Release No. 43-60403; Administrative Proceeding File Nos. 3-11445, 3-11446, 3-11447, 3-11448, 3-11449, 3-11558, 3-11559*

To the Commission:

The California Public Employees' Retirement System ("CalPERS") submits this comment letter in response to the Securities and Exchange Commission's (the "Commission") Notice of Closing the Distribution Funds and Opportunity for Comment as to the Use of Remaining Funds (the "Notice"), set forth in Release No. 60403, dated July 30, 2009. The Notice announced the Commission's decision to close the distribution of $135 million in remaining funds recovered by the Commission from the seven Specialist Firms operating on the New York Stock Exchange ("NYSE")and escheat the entire amount to the United States Treasury.

CalPERS is thankful for the opportunity to offer its input on this important matter and appreciates the Commission's consideration of this letter and for the time Mr. Sanjay Wadhwa of the Commission took to speak with CalPERS and a representative of the Specialist Firms earlier today. CalPERS respectfully submits that all appropriate efforts to identify those customers injured by the Specialist Firms' conduct have not been made, and that there are several methods the Commission and its fund administrator, Heffler, Radetich & Saitta LLP ("Heffler"), did not use to identify and compensate the victims of the Specialist Firms' violative conduct.

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.*, any 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). Only under certain circumstances may a plan provide for funds to be paid to the general fund of the United States Treasury, rather than to claimants. *See* 17 C.F.R. §201.1102(b) (a distribution plan may not provide for payment to the United States 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"). CalPERS submits plans to escheat the remaining funds to the United States Treasury fail to satisfy the standards set forth in 17 C.F.R §201.1102(b). Moreover, the value of remaining funds far exceeds any cost of administering the plan of disgorgement.

CalPERS requests the Commission allow CalPERS to assist it in the distribution of the remaining funds. CalPERS would welcome the opportunity to work with the Commission, as well as the Specialist Firms, to determine how the funds should be used and to develop a more robust and thorough notice procedure so that all Injured Investors have an opportunity to be made whole. As courts have recognized, "once the primary purpose of disgorgement has been served by depriving the wrongdoer of illegal profits, the equitable result is to return the money to the victims of the violation." *SEC v. Drexel Burnham Lambert*, 956 F. Supp 503, 507 (S.D.N.Y. 1997).

The SEC Action Against the Specialist Firms

In 2003, the Commission brought civil actions against each of the Specialist Firms for failing to refrain from dealing on their own accounts while in possession of executable buy and sell public orders. At the direction of the Commission, the NYSE designed and created surveillance software to identify specific stock transactions where Specialist Firms had unlawfully traded ahead of marketable public orders; interpositioned themselves between two public orders that should have been matched against one another; and failed to execute public limit orders because they instead traded for their own principal accounts. The Commission then took this software and its pre-set parameters and ran the program against five years of historical stock trading data for over 2,800 stocks that traded on the NYSE from January 1, 1999 to December 31, 2003. Using the software, the Commission found more than 2.6 million instances of trading ahead and interpositioning by the Specialist Firms.

On March 30 and July 26 of 2004, each of the Specialist Firms entered into consent decrees whereby each agreed to cease and desist from their alleged conduct. The Specialist Firms agreed to pay $157 million in disgorgement and pre-and-post judgment interest. The Specialist Firms also paid approximately $90 million in penalties. These settlements provided that disgorgement and civil penalties paid by the Specialist Firms were to be placed in seven Fair Funds (the "Distribution Funds") to be distributed pursuant to a distribution plan drawn up by a fund administrator. Heffler was appointed the fund administrator in October 2004. Heffler's distribution plan was approved by the Commission in May 2006 and was modified by the Commission in Orders dated June 15, 2007 and June 26, 2008.

The SEC Distribution Plan

The Distribution Plan was divided into three separate phases. The initial phase of the Distribution Plan was to identify using certain parameters, the customers who were injured as a result of the Specialist Firms' trading violations. To determine injured customers, Heffler used data derived from a retroactive surveillance conducted by the NYSE at the request of the Commission's Office of Compliance, Inspections and Examinations. In determining which trades to include, the surveillance used certain time parameters depending on the type of trading violation and the time frame in which the trading occurred. The database included over 2.6 million transactions and included the information for each transaction, including Clearing Member number, Clearing Member name, trade date, security symbol, firm mnemonics, branch & sequence codes, turn around code, transaction type, number of shares, time of the trade, the Specialist Firm number, the Disgorgement Amount, the execution price, the CUSIP number and the principal/agency code. According to Heffler, the database was then indexed by Clearing Member so those Clearing Members could be contacted with requests for specific information on injured customers. Responses from Clearing Members provided additional names of customers and nominees. Heffler reported that it identified more than 2,500 nominees to contact as part of its identification phase.

The second phase of the Distribution Plan was to calculate the amount each injured customer would receive. The Disgorgement Amounts with respect to each of the 2.6 million Violative Transactions were determined by the Commission staff and the NYSE, and calculated by the NYSE, in connection with the Specialist Firms orders. Heffler also provided a means by which it would calculate prejudgment interest and post-judgment interest.

The final phase of the Distribution Plan consisted of distributing the Distribution Funds to injured customers. To date, there have been five rolling distributions, with Heffler stating that it may make a sixth and final distribution in the coming months. *See* Securities Exchange Act of 1934 Release No. 60402 at 3. These distributions were as follows:

- The initial distribution was made on July 19, 2006, pursuant to a Commission Order dated July 5, 2006. *See* Securities Exchange Act Release No. 54102. This initial distribution involved a total disbursement of $52,732,921.43, which was comprised of $42,082,144.95 in disgorgement, $6,101,253.76 in prejudgment interest, and $4,549,522.72 in post-judgment interest.

- On November 30, 2006, Heffler made a second rolling distribution under the Plan, pursuant to a Commission Order dated November 24, 2006. *See* Securities Exchange Act Release No. 54815. This second distribution involved a total disbursement of $42,765,263.59, which was comprised of $33,548,991.43 in disgorgement, $4,942,721.04 in prejudgment interest, and $4,273,551.12 in post-judgment interest.

- On June 19, 2007, Heffler made a third rolling distribution under the Plan, pursuant to a Commission Order dated June 15, 2007. *See* Securities Exchange Act Release No. 55915. This third distribution involved a total disbursement of $14,305,053.02, which was comprised of $10,923,205.08 in disgorgement, $1,606,357.24 in prejudgment interest, and $1,775,490.70 in post-judgment interest.

- On December 19, 2007, Heffler made a fourth rolling distribution under the Plan, pursuant to a Commission Order dated December 12, 2007. *See* Securities Exchange Act Release No. 56944. This fourth distribution involved a total disbursement of $10,733,490.40, which was comprised of $7,935,062.94 in disgorgement, $1,267,325.27 in prejudgment interest, and $1,531,102.19 in post-judgment interest.

- On June 30, 2008, Heffler made a fifth rolling distribution under the Plan, pursuant to a Commission Order dated June 26, 2008. *See* Securities Exchange Act Release No. 58035. This fifth distribution involved a total disbursement of $2,885,895.39, which was comprised of $2,069,722.41 in disgorgement, $354,784.94 in prejudgment interest, and $461,388.04 in post-judgment interest.

According to Heffler's calculation there will be approximately $135 million of remaining funds "after all payments to the injured customers and for administrative expenses have been made." Securities Exchange Act Release No. 60402 at 3.

The *In re NYSE Specialists Securities Litigation*

CalPERS is the largest public retirement system in the United States, managing pension and health benefits for more than 1.5 million California employees, retirees, and their families. CalPERS purchased and/or sold almost 3 billion shares of NYSE listed stock between October 1998 and October 2003.

In December 2003, CalPERS filed a class action on behalf of all public investors who purchased and/or sold shares listed on the NYSE between January 1, 1999 through October 15, 2003 against each of the Specialist Firms for violations of the Securities Exchange Act of 1934. The action seeks to recover investor losses from illegal trading of stocks on the NYSE by the Specialist Firms. CalPERS is the Lead Plaintiff in the litigation styled *In re NYSE Specialist Securities Litigation*, Case No. 03-CV-8264 (RWS) currently pending in the United States District Court, Southern District of New York, before the Honorable Judge Robert Sweet.

On March 14, 2009, the Judge Sweet granted Lead Plaintiff CalPERS' motion for class certification and appointed CalPERS and Market Street Securities, Inc. to represent "all persons and entities who submitted orders (directly or through agents) to purchase or sell NYSE-listed securities during the Class Period, which orders were listed on the Specialist's Display Book and subsequently disadvantaged by Defendants. . . ." *In re NYSE Specialists Sec. Litig.*, No. 03 Civ. 8264 (RWS), 2009 U.S. Dist. LEXIS 53255, at *34-*35 (S.D.N.Y. Mar. 14, 2009).

As such, CalPERS is uniquely situated to assist the Commission in its distribution efforts.

Additional Methods to Identify Injured Customers Should Be Utilized

Because such a large percentage of the Distribution Funds remain undistributed, the inadequacy of the original Distribution plan is now apparent. While the Distribution Plan did provide some recovery to certain Injured Customers, an examination of the Plan demonstrates that a number of time-tested methods of distributing large settlement funds were not utilized in this situation. CalPERS can assist the Commission in formulating additional methods of identifying Injured Customers. Until all of these methods have been exhausted, it would not be in the best interest of the Injured Customers to escheat the remaining Distribution Funds to the United States Treasury.

CalPERS' Proposal

CalPERS has a significant interest in ensuring that Injured Investors are fully compensated for their injuries. As the court-appointed Lead Plaintiff in the only pending civil litigation regarding the allegedly massive fraud perpetrated by the Specialist Firms upon potentially millions of class members, CalPERS strongly urges the Commission to decline to adopt the current fund administrator's recommendation which would result in escheating $135 million to the United States Treasury.

Instead, CalPERS proposes that the Commission work with CalPERS and the Specialist Firms to determine how the remaining funds should be used and to develop a more robust and thorough notice procedure.

CalPERS wishes to discuss these issues in person with the Commission and is available to further address the foregoing at the Commission's convenience.

Very truly yours,

DARREN J. ROBBINS

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