

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16017

In the Matter of :
:
LINKBROKERS DERIVATIVES LLC, :
:
Respondent. :
:

PROPOSED PLAN OF DISTRIBUTION

1. *Purpose and Background.* This proposed plan of distribution (“Plan”) has been developed pursuant to Rule 1101 of the United States Securities and Exchange Commission’s (“Commission”) Rules on Fair Fund and Disgorgement Plans (“Rules”), 17 C.F.R. § 201.1101. The Plan proposes a distribution to certain injured brokerage customers at Linkbrokers Derivatives LLC (“Linkbrokers”), a broker-dealer registered with the Commission. The distribution fund currently consists of \$14,005,000 in funds collected from *Linkbrokers Derivatives LLC*, Administrative Proceeding File No. 3-16017 and *Aaron Nowak*, Administrative Proceeding File No. 3-16999. Additional funds, if any, may be added to this fund from other enforcement actions arising from the same or substantially similar facts as those alleged in the *Linkbrokers* and *Nowak* proceedings. The Plan’s distribution will be coordinated with the distribution or distributions by the U.S. Attorney’s Office for the Southern District of New York in two related cases: *United States v. Leszczynski*, No. 12-cr-00923 (S.D.N.Y.) and *United States v. Condrón*, No. 12-cr-00768 (S.D.N.Y).

On August 14, 2014, the Commission issued a settled administrative proceeding order (“Order”)¹ related to a fraudulent scheme at Linkbrokers. The scheme involved Linkbrokers unlawfully taking secret profits at the expense of certain customers, primarily large foreign institutions and foreign banks, in certain securities transactions. Specifically, the Commission’s Order found that from at least 2005 through at least February 2009 (“Relevant Period”), in over 36,000 customer transactions, certain employees of Linkbrokers working at the firm’s “Cash Desk” perpetrated a scheme by charging certain firm customers false prices. In these transactions, Linkbrokers embedded hidden profits in the form of price markups or markdowns

¹ Exchange Act Rel. No. 72846 (Aug. 14, 2014).

into the execution price reported to the customer (“False Price Per Share”). Linkbrokers, through its Cash Desk personnel, executed customer orders purportedly charging small commissions—typically between a fraction of a penny and two pennies per share. According to the Order, the Cash Desk executed trades for Linkbrokers’ customers on a “riskless principal” basis meaning that the firm, after receiving a customer order to buy (or sell) a security, bought (or sold) the security for its own account from (or to) another person in a contemporaneous offsetting transaction and afterwards allocates the shares to the customer’s order. In the scheme, Linkbrokers’ False Price Per Share reported to its customers included an undisclosed profit (“Undisclosed Profit Per Share”) in the form of a price markup on a purchase (or a price markdown on a sale) added to (or subtracted from) the actual execution price (“Actual Execution Price Per Share”). According to the Order, the scheme was devious and difficult for Linkbrokers’ customers to detect, in part because the employees at Linkbrokers selectively engaged in the scheme when the volatility in the market was sufficient to conceal the fraud from the customer.

The Commission found that Linkbrokers willfully violated Section 15(c)(1) of the Securities Exchange Act of 1934 (“Exchange Act”), which prohibits fraudulent conduct by a broker or dealer when effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security. As a result of the scheme, the Commission found that Linkbrokers fraudulently charged customers over \$18 million.² The Commission ordered Linkbrokers to pay disgorgement of \$14 million.

On December 11, 2015, the Commission issued a settled administrative proceeding order against Aaron Nowak (“Nowak”), a registered representative associated with Linkbrokers during the Relevant Period (“Nowak Order”).³ Nowak worked as a sales trader and middle-office assistant entering orders he received from sales brokers on the Cash Desk. The Commission found that Nowak and other Linkbrokers personnel communicated false and/or misleading information to Linkbrokers customers in connection with the scheme. The Commission also found that Nowak willfully violated Sections 17(a)(2) and (3) of the Securities Act of 1933 (“Securities Act”) which prohibits fraudulent conduct in the offer or sale of securities. The Nowak Order ordered Nowak to pay a civil penalty of \$5,000 and created a Fair Fund for the penalty. The Nowak Order further ordered that the Fair Fund created for Nowak’s penalty be transferred to this administrative proceeding and combined with the funds collected in this matter. As a result, the Fair Fund in this proceeding has a total value \$14,005,000.

The Commission’s institution and settlement of the *Linkbrokers* and *Nowak* administrative and cease-and-desist proceedings followed the filings of litigated civil and criminal actions in 2012 against other Linkbrokers personnel involved in the scheme. Those cases were largely resolved in 2014 and 2015. Specifically, in *SEC v. Leszczynski*, No. 12-cv-07488 (S.D.N.Y.), a federal district court entered judgments on January 13, 2014 against Marek Leszczynski, Benjamin Chouchane, and Henry Condron, permanently enjoining them from violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule

² The staff calculated the specific amount as \$18,651,678.

³ Securities Act Rel. No. 9988 (Dec. 11, 2015).

10b-5 thereunder. Acknowledging the facts to which they have admitted as part of their guilty pleas in parallel criminal cases, Leszczynski, Chouchane, and Condrón consented to the entry of these judgments. In addition, the federal district court in the Commission's case ordered Leszczynski to disgorge \$1,500,000, Chouchane to disgorge \$2,007,408 plus prejudgment interest of \$442,169, and Condrón to disgorge \$168,336 plus prejudgment interest of \$39,339 with the amounts owed deemed satisfied based on orders of criminal restitution equal to or greater than the amounts ordered in the Commission's action.⁴ On February 9, 2015, the court entered a default judgment permanently enjoining Gregory Reyftmann from violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and ordering him to pay disgorgement of \$3,181,068, prejudgment interest of \$989,072 and a civil penalty of \$4,550,000. As of June 18, 2016, the clerk of court has recovered \$225 in restitution from Marek Leszczynski and \$81,996.12 in restitution from Henry Condrón. According to the district court's criminal restitution orders, restitution funds are to be distributed to certain named customers at Linkbrokers.⁵

Under the Commission's Plan, \$14,005,000 collected in *Linkbrokers* and *Nowak* is available for distribution ("Distribution Fund"). The Distribution Fund is subject to the continuing jurisdiction and control of the Commission and has been deposited at the United States Department of Treasury's Bureau of the Fiscal Service ("BFS") for investment. The Commission intends to distribute the Distribution Fund, less any reserve for taxes, fees or other expenses of administering the Plan ("Net Distribution Fund"), to the owners of eligible customer accounts as described in paragraph 7 below. While the Commission currently anticipates that there will be one disbursement to the owners of eligible customer accounts, it is possible that there will be additional disbursements to the extent that the Commission recovers additional funds from cases arising from the same or substantially similar facts as those alleged in this proceeding.

2. *Fund Administrator.* On August 28, 2015, the Commission appointed Rust Consulting, Inc. as the "Fund Administrator" and set its bond at \$14,000,000 as required by Rule 1105(c) of the Rules.⁶ The Fund Administrator will, among other things: oversee the administration of the Distribution Fund, confirm mailing information for the owners of eligible customer accounts, distribute money from the Distribution Fund in accordance with the Plan, resolve disputes, if any, from Linkbrokers' customers, prepare a final accounting with assistance

⁴ Condrón, Chouchane, and Leszczynski each pled guilty in parallel criminal actions arising from the same conduct on October 5, 2012, June 12, 2013, and August 20, 2013, respectively. See *United States v. Condrón*, No. 12-cr-00768 (S.D.N.Y.); *United States v. Leszczynski*, No. 12-cr-00923 (S.D.N.Y.).

⁵ Condrón's Order of Restitution at ¶ 1, *United States v. Condrón*, No. 12-cr-768 (S.D.N.Y. Feb. 21, 2014) ECF No. 20; Chouchane's Order of Restitution at ¶ 1, *United States v. Leszczynski*, No. 12-cr-923 (S.D.N.Y. Dec. 5, 2013), ECF No. 34; Leszczynski's Order of Restitution at ¶ 1, *United States v. Leszczynski*, No. 12-cr-923 (S.D.N.Y. Jan. 30, 2014), ECF No. 41.

⁶ Exchange Act Rel. No. 75784 (Aug. 28, 2015).

from the tax administrator, defined below, and provide the tax administrator with funds to pay the Distribution Fund's tax liabilities, tax compliance fees and related costs.⁷

3. *Qualified Settlement Fund.* The Distribution Fund constitutes a qualified settlement fund ("QSF") under Section 468B(g) of the Internal Revenue Code, 26 U.S.C. § 468B(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5. The QSF's legal name will be "Linkbrokers Derivatives Distribution Fund."

4. *Tax Administrator.* The Commission has appointed Damasco & Associates LLP as the "Tax Administrator" of the Distribution Fund.⁸ The Fund Administrator will cooperate with the Tax Administrator and provide information, as necessary, to the Tax Administrator for the Distribution Fund's tax compliance responsibilities. The Tax Administrator will be compensated for all reasonable costs and expenses in accordance with its 2013-2015 Engagement Letter Agreement with the Commission. The Distribution Fund's taxes will be paid out of the Distribution Fund.

5. *Distribution Fund Banking Arrangements.* The Fund Administrator will establish at a bank ("Bank") acceptable to the Commission staff an escrow account ("Escrow Account") in the name of Linkbrokers Derivatives Distribution Fund and bearing the Employer Identification Number of the QSF pursuant to an escrow agreement ("Escrow Agreement") provided by the Commission staff. The Fund Administrator will also establish with the Bank a separate distribution account acceptable to Commission staff for the purpose of making payments to the owners of eligible customer accounts.

During the term of the Escrow Agreement, funds in the Escrow Account, if invested, will be invested and reinvested in short-term U.S. Treasury securities backed by the full faith and credit of the United States Government or an agency thereof, of a type and term necessary to meet the cash liquidity requirements for payments to eligible investors, tax obligations, and/or fees of the Tax Administrator and/or Fund Administrator, including investment or reinvestment in a bank account insured by the Federal Deposit Insurance Corporation ("FDIC") up to the guaranteed FDIC limit, or in money market mutual funds registered under the Investment Company Act of 1940 that invest 100% of their assets in direct obligations of the United States Government; provided, however, that the money market mutual funds' investments in short term United States Treasury securities will not be made through repurchase agreements or other derivative products. The Fund Administrator will provide duplicate original bank and/or investment statements on any accounts established by the Fund Administrator to the Tax Administrator on a monthly basis and will assist the Tax Administrator in obtaining mid-cycle statements, as necessary.

All Distribution Fund checks presented for payment or electronic transfer will be subject to "positive pay" controls before being honored by the Bank. All checks issued to eligible

⁷ Omnibus Order Directing the Appointment of Tax Administrator in Administrative Proceedings that Establish Distribution Funds, Exchange Act Rel. No. 68683 (Jan. 17, 2013).

⁸ Exchange Act Rel. No. 73012 (Sept. 5, 2014).

investors will bear a stale date of ninety (90) days. Checks that are not negotiated within this ninety (90) day period will be voided and the Bank will be instructed to stop payment on those checks, and the funds will remain assets of the Distribution Fund. If a check reissue has been requested before the stale date, such request will be honored and the reissued check will bear a stale date of thirty (30) days. Check reissue requests may not be honored after 120 days from the original check issuance date without consultation with and direction given to reissue by Commission staff. For any electronic payment, the exact amount necessary to make a payment will be transferred from the Escrow Account directly to the payee's bank account in accordance with written instruction provided to the Escrow Bank by the Fund Administrator.

6. *No claims-made process.* Linkbrokers did not provide its customers with information necessary to determine whether Linkbrokers was taking secret profits including the amount of such profits. As a result, the Commission is not distributing the Distribution Fund according to a claims-made process. Procedures in the Commission's Rules for providing notice and for making and approving claims are not applicable.

7. *Eligible Customer Accounts.* Based on information obtained during the Commission's investigation of this matter, the Commission staff has determined that Linkbrokers Cash Desk personnel effected transactions for 157 customer accounts during the Relevant Period. For an account to be eligible, the following three conditions must be met:

- a. transactions in an account had to have been effected by one or more of the following 5 persons charged by the Commission (listed in alphabetical order): (i) sales broker Benjamin Chouchane; (ii) sales trader and middle-office assistant Henry Condron; (iii) sales broker Marek Leszczynski; (iv) sales trader and middle-office assistant Aaron Nowak; and (v) sales broker and supervisor Gregory Reyftmann (collectively the "Associated Persons");
- b. transactions in an account must have included one or more transactions specifically identified by Linkbrokers' records as containing an Undisclosed Profit Per Share; and
- c. the account must have suffered an economic harm based on the methodology described in paragraph 8 below.

Of the 157 customer accounts, six did not engage in transactions with any of the Associated Persons. Of the remaining 151 customer accounts, 47 either did not have any transactions containing an Undisclosed Profit Per Share and/or did not suffer economic harm. As a result, the Commission staff concluded that 104 customer accounts are eligible to receive compensation from the Net Distribution Fund.

8. *Methodology for Calculating Customer Account Harm.* For each Eligible Customer Account, the staff used Linkbrokers' records to calculate the account's total harm ("Total Harm") as follows:

- a. For each transaction involving a False Price Per Share, the staff calculated the value of the “Undisclosed Profit Per Transaction” by multiplying the Undisclosed Profit Per Share by the number of shares in the transaction.
 - i. For buy orders, the staff determined the Undisclosed Profit Per Share by subtracting the Actual Execution Price Per Share from the False Price Per Share.
 - ii. For sell orders, including short sales, the staff determined the Undisclosed Profit Per Share by subtracting the False Price Per Share from the Actual Execution Price Per Share.
- b. The staff then calculated the Total Harm for each customer account by summing the account’s Undisclosed Profit Per Transaction for all transactions where the Undisclosed Profit Per Transaction was a positive value.⁹

9. *Methodology for Determining Distribution Amounts.* As of the time of the publication of this Plan, the total of the Net Distribution Fund and the restitution funds to be distributed by the U.S. Attorney’s Office are less than the \$18,651,678 Total Harm for all customer accounts. As a result, the Plan provides for a *pro rata* distribution of the Net Distribution Fund that also considers the payments an Eligible Customer Account may receive from the restitution funds, as described below.

- a. The staff will calculate the Total Harm for each Eligible Customer Account as described in paragraph 8 above.
- b. The staff will sum the Total Harm for all Eligible Customer Accounts.
- c. The staff will divide 9.a. by 9.b. to obtain each Eligible Customer Account’s Pro Rata Share.
- d. The staff will add the Net Distribution Fund to the expected funds to be received by the criminal authorities (“Restitution Funds”) in the matters entitled *United States v. Leszczynski*, No. 12-cr-00923 (S.D.N.Y.) and *United States v. Condrón*, No. 12-cr-00768 (S.D.N.Y.) to determine the available funds to Eligible Customer Accounts (“Combined Available Funds”).

⁹ The Commission staff determined that in approximately 3.5% of transactions identified by Linkbrokers as containing an Undisclosed Profit Per Share, the Undisclosed Profit Per Share was a negative value, meaning that the customer was not harmed in the transaction. For example, on a buy transaction, the False Price Per Share reported to the customer was lower than the Actual Execution Price Per Share for the customer’s purchase. Because there is no way for the Commission staff to determine if these transactions were somehow part of the misconduct or the result of a bookkeeping or other type of error, the Plan’s methodology excludes them from the calculation of Total Harm.

- e. The staff will multiply the Combined Available Funds by each Eligible Customer Account's Pro Rata Share to determine the estimated combined distribution amount ("Combined Distribution Amount") for each Eligible Customer Account. This amount will not exceed the account's Total Harm.
- f. An Eligible Customer Account's distribution from the Net Distribution Fund will be calculated as the account's Combined Distribution Amount less the distributions received, if any, from the Restitution Funds.

Additional funds, if any, received by the Commission will be distributed using the above *pro rata* formula but in no event will the owner of an Eligible Customer Account receive an amount greater than the Eligible Customer Account's Total Harm. Any undistributed funds from the Distribution Fund, including funds that for any reason cannot be distributed to the intended Eligible Customer Account, will be transferred to the United States Treasury subject to Section 21F(g)(3) of the Exchange Act.

In the view of the staff and Fund Administrator, this methodology constitutes a fair and reasonable allocation of the Distribution Fund to compensate owners of Eligible Customer Accounts for the harm as a result of the violations alleged by the Commission.

10. *Procedures for Locating and Notifying Owners of Eligible Customer Accounts.* Within thirty (30) days of the Commission's approval of the Plan, the Fund Administrator will send to the owner of each Eligible Customer Account a notice ("Plan Notice") by electronic mail, United States Postal Service, or other mail delivery service regarding the Commission's approval of the Plan. This communication will include, as appropriate, a statement characterizing the distribution, including an estimated net distribution amount, a link to the Plan on the Commission's website and instructions for requesting a copy of the Plan, a description of the tax information reporting and other related tax matters, and the name of and contact information for the Fund Administrator. The owner of an Eligible Customer Account will be asked to respond and provide documentation only if they disagree with the Fund Administrator's Combined Distribution Amount or need to make a change to the account name. The Fund Administrator will coordinate with the Tax Administrator to request contact and other information from the owner of each Eligible Customer Account needed to accomplish the distribution in accordance with applicable tax requirements relating to the Distribution Fund.

If a Plan Notice is returned as undeliverable within sixty (60) days of approval of the Plan, the Fund Administrator will make all reasonable efforts to ascertain the owner of an Eligible Customer Account's correct address. If a new address is identified, the Fund Administrator will then resend the Plan Notice to the owner of the Eligible Customer Account's new address within thirty (30) days of receipt of the returned Plan Notice. If the Plan Notice is returned again with no forwarding address information, the Eligible Customer Account will be classified as ineligible and the payment to the owner of such an account will be sent to the United States Treasury.

The disposition of any funds remaining in the Net Distribution Fund that cannot be distributed for any reason will be reported in the final accounting.

11. *Distribution Timing.* The Fund Administrator will use their best efforts to start the disbursement process within one hundred and fifty (150) days of the Plan's approval.

12. *Payments to Eligible Customer Accounts.* The Fund Administrator will compile the payee information and prepare a payment file in a format approved by Commission staff for submission to the Commission. Pursuant to Rule 1101(b)(6) of the Rules, the staff will obtain an order from the Commission to disburse the Distribution Fund. All payments will be distributed with the United States Dollar (USD or US \$) as the form of currency. The Fund Administrator will maintain information about uncashed checks, any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Fund Administrator is responsible for researching and reconciling errors and reissuing payments when possible. The Fund Administrator also is responsible for accounting for all payments. The amount of all uncashed checks will continue to be held in the Escrow Account.

13. *Expenses of Administration.* Fees and other expenses of administering the Plan will be paid from the Distribution Fund.

14. *Progress Reports.* The Fund Administrator will provide Commission staff with a progress report within twenty (20) days after the end of each quarter and a final report with a final accounting once the distribution is complete.

15. *Amendments and Procedural Deadline Extensions.* The Fund Administrator will take reasonable and appropriate steps to distribute funds from the Net Distribution Fund according to the Plan. If there are any changes to the Plan that are determined to be material, Commission approval is required prior to implementation by amending the Plan, which may be done upon the motion of any party, the Fund Administrator, or upon the Commission's own motion. Immaterial changes may be made by the Fund Administrator. For good cause shown, the Fund Administrator may extend any of the procedural dates set forth in the Plan.

16. *Procedures to Request Plan Notice.* Within seventy-five (75) days after the Commission's approval of the Plan, if a person does not receive a Plan Notice and believes that they should have received a Plan Notice, the person must submit documentation to the Fund Administrator to establish why the person is the owner of an Eligible Customer Account. The Fund Administrator will contact the person within twenty-one (21) days of receiving the person's documentation, after consulting with the Commission staff, with a determination regarding the person's claim of ownership.

17. *Disputes.* Disputes will be limited to calculations of disbursement amounts to the owners of Eligible Customer Accounts. Within thirty (30) days of the date a disbursement is made, the Fund Administrator must receive a written communication detailing the dispute along with any supporting documentation. The Fund Administrator will investigate the dispute, and such investigation will include a review of the written dispute as well as any supporting documentation. The Fund Administrator may request additional information from the owner of the Eligible Customer Account needed to investigate the dispute. Within thirty (30) days of receipt of the written dispute, the Fund Administrator should notify the owner of the Eligible

Customer Account of its resolution of the dispute or the status of the dispute. The Fund Administrator's resolution of any such dispute will be final. This procedure will be set forth in the Plan Notice.

18. *Disposition of Undistributed Funds.* Funds remaining after distribution of the Net Distribution Fund has occurred will include funds reserved for future taxes and related expenses and may include funds from checks that have not been cashed, funds from checks that were not delivered and/or funds that may have been returned to the Commission for any other reason. All funds remaining in the Net Distribution Fund will be transferred to the United States Treasury subject to Section 21F(g)(3) of the Exchange Act after the final accounting (as described in paragraph 19 below) is approved by the Commission.

19. *Final Accounting and Discharge of the Fund Administrator, and Termination of the Distribution Fund.* The Distribution Fund will be eligible for termination and the Fund Administrator will be eligible for discharge after all of the following have occurred: a) a final accounting, in a standard accounting format provided by Commission staff, has been submitted by the Fund Administrator, and has been approved by the Commission; b) all taxes, final fees and expenses of the Fund Administrator and Tax Administrator, and Bureau of Fiscal Service's fees have been paid by the Distribution Fund; and c) any amount remaining in the Distribution Fund has been received by the Commission. When the Commission has approved the final accounting, the Commission staff will seek an order from the Commission to approve the termination of the Distribution Fund, the discharge of the Fund Administrator, the cancellation of the bond, and the transfer of any amount remaining in the Distribution Fund to the United States Treasury.

20. *Notice of Proposed Plan and Opportunity for Comment.* A Notice of the Proposed Plan of Distribution and Opportunity for Comment ("Notice") will be published in the SEC Docket and on the Commission's website at <http://www.sec.gov/litigation/fairfundlist.htm>. Any person wishing to comment on the Plan must do so in writing by submitting their comments to the Commission within thirty (30) days of the date of the Notice: (a) to the Office of the Secretary, United States Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; (b) by using the Commission's internet comment form (<http://www.sec.gov/litigation/admin.shtml>); or (c) by sending an email to rule-comments@sec.gov. Comments submitted by email or via the Commission's website should include "Administrative Proceeding File No. 3-16017" in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.