

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 83123 / April 27, 2018

ADMINISTRATIVE PROCEEDING

File No. 3-16757

In the Matter of

**Citigroup Alternative Investment LLC and
Citigroup Global Markets Inc.**

Respondents.

**ORDER APPROVING PLAN OF
DISTRIBUTION**

I.

On August 17, 2015, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b)(4) of the Securities Exchange Act of 1934, and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”) against Citigroup Alternative Investments LLC and Citigroup Global Markets Inc. (collectively, “Respondents”). Pursuant to the Order, the Respondents have paid a total of \$179,562,328 (the “Distribution Fund”). The Order further provided that the Respondents will be responsible for paying all reasonable costs and expenses of the distribution.

On April 14, 2016, the Commission issued an order appointing Garden City Group, LLC (“GCG”) as fund administrator of the Distribution Fund.¹ On September 11, 2017, the Notice of Proposed Plan of Distribution and Opportunity for Comment (the “Notice”) and the Proposed

¹ Exchange Act Rel. No. 77624 (Apr. 14, 2016).

Plan of Distribution (the “Proposed Plan”) were published.² The Notice advised interested persons that they could obtain a copy of the Proposed Plan by printing a copy from the Commission’s public website or by submitting a written request to Nancy Chase Burton, Esq., United States Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5876. All persons who desired to comment on the Proposed Plan could submit their comments, in writing, no later than October 11, 2017. Three (3) comments were submitted within the thirty (30) day comment period.

After considering the comments to the Proposed Plan, Commission staff, working with the Commission-appointed fund administrator, GCG, have added modifications that address the comments received (the “Plan”).

After careful consideration, the Commission concludes that the Plan should be approved.

II.

A. Public Comments on the Proposed Plan

1. Comments from Steven B. Caruso, Maddox Hargett & Caruso, P.C.

Mr. Caruso submitted a letter dated October 3, 2017 (“Caruso Letter”), on behalf of unnamed investor clients.³

A. Objections to Data Used

Mr. Caruso objects to the Proposed Plan’s use of investor information provided solely by Respondents. He maintains that there must be a full and fair disclosure of the information provided by Respondents to have any possibility of independent verification of the accuracy of that data.

B. Objections to Definitions Used

² Exchange Act Rel. No. 81570 (Sept. 11, 2017).

³ The Caruso Letter contained several comments that do not pertain to the Plan. Only the substantive objections to the Plan are outlined herein.

The Caruso Letter identifies the definition and description of “purported advisory fees” as another defect in the Proposed Plan because there is no transparency as to whether the fees include placement fees, transfer fees, incentive/performance fees, or other costs such as margin loan interest or swap fees that were paid, directly or indirectly, by investors to Respondents for each of the targeted funds.

C. Objections to Total Payments Being Applied at the Fund Level

Mr. Caruso objects to the inclusion of the arbitration awards and settlements, the redemptions and the tender offer amounts at the fund level in the definition of Total Payments to Investors,⁴ stating that such inclusion is prejudicial to all of the investors who did not receive or accept such payments. Further, he objects to payments being applied at a fund level as opposed to an individual level.

D. Objections to Plan of Allocation

Mr. Caruso objects to the Plan of Allocation (Exhibit A to the Proposed Plan), stating that “thousands of defrauded investors in three of the Respondents’ funds (ASTA/MAT, ASTA/MAT 2 and ASTA/MAT 3) will *not* be eligible for *any* distribution” because the methodology is “based on faulty predicate calculations.”

Mr. Caruso’s comments raise issues regarding the aggregated fund-level fee and payment data that the Plan was designed to address: preparing an equitable distribution plan based on investor net losses without complete investor-level data about fees and payments. Applying an equal-recovery-of- losses allocation methodology is appropriate for the nature of the fund level payment data that Respondent was able to provide .⁵

With only fund-level data available for management fees and all categories of payment,

⁴ All capitalized terms used herein but not defined, shall have the same meanings ascribed to them in the Plan.

⁵ .

the most equitable, fair and reasonable distribution will be achieved by adopting a methodology that attempts to equalize recovery of losses across the nine Potentially Eligible Funds, and then allocates the Distribution Fund among the harmed investors in proportion to their investment amount within a specific fund.⁶

Acknowledging the limitations of the lack of comprehensive investor-level information, the Commission has considered Mr. Caruso's first comment, and concludes that it is fair and reasonable to retain the proposed distribution methodology, but agrees that a modification to the distribution procedure is appropriate. The modification to the Plan appears at ¶¶ 39-41, under the designation Investment Verification Process, and at ¶ 42, with related definitional modifications at ¶¶ 11, 18, 19, 21, 25, 26, 30, 35, 36, and 37 to address Mr. Caruso's concern with respect to the inability of investors to independently verify the data provided by Respondents, particularly, the capital investment data and the identification of every investor in each of the nine funds. The addition of the Investment Verification Process will add about 120 days to the timeline for distributing funds, but will provide every investor with the opportunity to review and object, if necessary, to the capital investment data which is the foundation of the distribution methodology.

The Commission has considered Mr. Caruso's second and third comments and concludes no modification to the methodology is warranted. In its equal-recovery-of-losses methodology, the fees, as presented in the Plan, are management fees, based on assets under management, paid to Respondents, at the fund level. The Plan includes every fee amount and every payment category reported by Respondents at the fund level. As discussed above, based on available data at the individual level, the methodology equalizes the recovery across all nine of the Potentially

⁶ Since there is no established securities market for this hedge-fund trading or any other mandated system for reporting this type of data, the Commission staff and GCG had to rely on Respondents' counsel for producing complete information about the capital investments of all investors, including the fees investors paid, and the returns on those investments that they received from Respondents. Only fund-level data is available for all categories of payment.

Eligible Funds by using fund-level data. Without an independent source of data and without complete payment data from each investor, the Total Payments to Investors must be calculated at a fund level; otherwise the fund administrator would be unable to evaluate an investor's submission for completeness and accuracy. However, to improve the transparency of the payment data and investor understanding of the categories of payment and their respective amounts, Table 3 at pg. 23 of the Plan has been added. The table shows the categories of Total Payments to Investors and the amounts for each category.

The Commission has considered Mr. Caruso's fourth comment and finds that no modification to the Plan of Allocation is warranted. As explained in the Plan of Allocation (Exhibit A to the Plan), if investors in all funds had been compensated equally, through the various payment efforts and through the Distribution Fund, all investors would have received 69 cents on the dollar invested or paid in fees. This Equal Recovery Ratio (0.69) then is compared to the recovery ratio from payments calculated for each of the nine funds individually. These ratios range from 0.29 to 1.01. *See* Plan, Exhibit A, Table 1, Column 5. Three of the funds have a ratio larger than 0.69; meaning that they already received more compensation from the various payment efforts (that is, even before allocating the Distribution Fund) than the Equal Recovery Ratio. The Commission concludes it would not be feasible to claw back the "overpayments" to those funds' investors, and that the fairest treatment is to eliminate those three funds (ASTA/MAT, ASTA/MAT 2 and ASTA/MAT 3) from the distribution. In the aggregate, investors in each of the three eliminated funds have already received a much greater recovery to date than investors in the other six funds. And one fund ASTA/MAT, received total payments in excess of the investors' total investment and fees with a return of \$1.01 per dollar spent in investments and fees. When the three funds are removed from the distribution, the Net Available

Distribution Fund is allocated to the remaining six funds in such a way as to equalize the recovery per dollar of losses across the six funds. *See* Plan, Exhibit A at ¶ 3 and at Table 2, Column 5. As a result, the harmed investors in each of the six Eligible Funds will be paid a distribution payment of \$0.57 on each dollar invested. Thus, even after the distribution, the investors in each of the three eliminated funds, at the fund level, will still have received a greater recovery than the investors in the other six funds.

The Commission’s objective is to distribute Fair Funds and Disgorgement Funds in a fair and reasonable manner, taking into account relevant facts and circumstances. *See Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006). The Commission, like district courts, may, within their discretion, approve a plan so long as it “proposes a *fair and reasonable* allocation of recovered funds to investors.” *See SEC v. E-Smart Techs., Inc.*, 1139 F. Supp. 3d 170,193 (D.D.C. 2015) (emphasis added). Some investors will invariably be excluded from a distribution plan. However, so long as the Commission is satisfied that “in the aggregate, the plan is equitable and reasonable,” the SEC may engage in the “kind of line-drawing [that] inevitably leaves out some potential claimants,” *See Worldcom*, 467 F.3d at 83 quoting *SEC v. Wang*, 944 F.2d 80, 88 (2d Cir. 1991); *also see SEC v. CR Intrinsic Investors, LLC*, 164 F. Supp. 3d 433, 435 (S.D.N.Y. 2016) (“[N]early every plan to distribute funds obtained in an [SEC] enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered.”) The proposed methodology provides for an equitable, fair and reasonable distribution of the Distribution Fund.

2. Comment from Robert Pommer, Kirkland & Ellis

Mr. Pommer submitted a comment letter dated October 9, 2017, on behalf of his investor

client, Ted Berghorst. His comment pertained to “*the Commission may exercise its discretion*” provision in the procedures for a residual distribution, outlined in ¶ 61 of the Proposed Plan (now ¶ 66 of the Plan). Mr. Pommer argues that the Eligible Investors will not get anywhere near a full recovery of their investment losses and thus the Plan should require an additional distribution of any residual as a default position, unless the administrative costs of such disbursement exceed the amount of the Residual.

After consideration of Mr. Pommer’s comment and taking into consideration that Respondents are responsible for bearing the costs and expenses associated with the distribution, the Proposed Plan has been modified to state that Commission staff will seek an order for an additional distribution of a Residual to investors who cashed their distribution checks or received an electronic payment in the initial disbursement of the Distribution Fund, unless, the Commission staff determines in its discretion that the administrative costs of such disbursement exceed the amount of the Residual. Should the administrative costs of such a distribution exceed the amount of the Residual, the Commission staff retains discretion to determine whether such a Residual distribution should be implemented. Otherwise, the Residual will be transferred to the Treasury after the final accounting is approved by the Commission. *See Plan at ¶ 66.*

3. Comment from Investor Marty L. Krueger

Mr. Krueger’s comment focuses on the settlement payments that were negotiated by individual investors with the Respondents, but are included in the definition of Total Payments to Investors, aggregated at a fund level and attributed to all investors in the relevant Eligible Fund. Mr. Krueger suggests that it would be more equitable to treat all investors individually within a fund and that settlement information should be available as Respondents would have prepared an individual form K-1 for each investor.

Upon receipt of Mr. Krueger's comment, GCG did follow-up with Respondents' counsel to obtain any K-1s prepared on behalf of Respondents that were provided to investors. On or about January 2, 2018, Respondents' counsel reported to GCG that no K-1s were found. Consequently, no changes to the Proposed Plan are recommended with respect to settlement payments.

B. Modification and Approval of the Plan

The three comment letters raise some valid arguments in support of modifying certain provisions of the Proposed Plan while leaving the equal-recovery-of-losses allocation methodology in place. In particular, the concerns regarding the transparency of the data supplied by Respondents and the inability of investors to verify the individual investment data merit the addition of an Investment Verification Process, and an additional table of data that identifies at a fund-level the categories and amounts of payments. Also, the concern about requiring a residual distribution merited a change to stronger language that requires staff to seek a disbursement order to distribute the Residual, unless the administrative costs of such a distribution exceed the amount of the Residual.

For the reasons stated above, the Commission finds that the Plan with the recommended modifications incorporated, as submitted herewith, should be approved.

The foregoing modifications do not affect the Proposed Plan's equal-recovery-of-losses allocation methodology and, as a result, do not substantially modify the Proposed Plan; therefore, the Commission concludes that an additional notice and comment period is neither necessary nor required by the Rules. Under Rule 1104 of the Commission's Rules, 17 C.F.R. § 201.1104, "[i]n the discretion of the Commission, a proposed plan that is *substantially* modified prior to adoption may be republished for an additional comment period. . . ." (emphasis added). In determining

whether a plan is substantially modified, the Commission considers, among other things, whether modifications revise the distribution plan's methodology, in particular whether such modifications could have a negative effect on the proposed eligible recipients, and whether the modifications affect the group of persons eligible to participate in a plan. In this case, there is no "substantial" modification because the Plan retains the proposed distribution methodology and both the distribution payment amounts and the ultimate recipients remain unaffected. As a result, the Commission exercises its discretion to not republish the Plan for additional comment.

III.

Accordingly, IT IS HEREBY ORDERED that, pursuant to Rule 1104 of the Commission's Rules, 17 C.F.R. § 201.1104, the Plan for this matter is approved, and it shall be posted simultaneously with this Order on the Commission's website at www.sec.gov.

By the Commission.

Brent J. Fields
Secretary