UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16652

In the Matter of

MICHAEL S. WILSON, CPA and COTTERMAN-WILSON, CPAs, INC.

Respondents.

PROPOSED PLAN OF DISTRIBUTION

ADMINISTRATIVE PROCEEDING
File No. 3-16892

In the Matter of

JAMES T. BUDDEN AND ALEXANDER W. BUDDEN,

Respondents.

I. OVERVIEW

1. The U.S. Securities and Exchange Commission's ("SEC" or "Commission") Division of Enforcement ("Division") has developed this proposed plan of distribution ("Distribution Plan") pursuant to Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans ("Rules"), 17 C.F.R. § 201.1101. As described more specifically below, if the Distribution Plan is approved by the Commission, the funds in the above-captioned proceedings will be transferred, pursuant to Rule 1102(a) of the Rules, 17 C.F.R. § 201.1102(a), to a court-appointed

receiver ("Receiver") in the related Commission action, *Securities and Exchange Commission v. Cowgill*, No. 2:14-CV-396 (S.D. Ohio) (the "District Court Action"), for distribution to injured investors who were defrauded by Douglas E. Cowgill's ("Cowgill" or "Defendant") while he served as President and Chief Compliance Office ("CCO") of Professional Investment Management, Inc. ("PIM"), an investment adviser registered with the Commission. The distribution will be in accordance with the Receiver's procedure for valuation of the PIMaccounts, approved by the Court on September 21, 2015 in the District Court action ("Receiver's Plan"). [1] Rule 1102(a) provides, in relevant part, that "[s]ubject to such conditions as the Commission . . . shall deem appropriate, a plan for the administration of a Fair Fund or a disgorgement fund may provide for payment of funds . . . to a court-appointed receiver in any case pending in federal . . . court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings."

As discussed in Section II below, the District Court Action against Cowgill for his securities law violations arises from the same facts as those at issue in the above-captioned proceedings and spans the same time period in compliance with Rule 1102(a). A distribution pursuant to the Receiver's Plan will benefit the same investors injured as a result of Cowgill's misconduct and be more cost-effective and timely than if the Commission were to undertake its own distribution of the funds; this is because, among other reasons, doing so would eliminate the duplication of work already done by the Receiver.[2] Based on these factors, the Division has concluded transferring the Fair Funds established in the Commission's above-captioned

[1] *See* Docket No. 58; *see also*, Docket No. 69 in the District Court Action.

[2] Due to PIM's poor record-keeping and the nature of the misappropriation of funds, the Receiver spent a substantial amount of time determining which investors were injured and developing an appropriate methodology for compensating the injured investors. By transferring the funds to the Receiver, the Commission staff would be able to leverage this work.

proceedings pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Act of 2010, 15 U.S.C. § 7246 (the "Fair Funds") and distributing them pursuant to the Receiver's Plan in the District Court Action meets the requirements of Rule 1102(a) and is fair and reasonable under the circumstances.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The SEC's District Court Action

2. The SEC filed a complaint against PIM, a Columbus, Ohio based investment adviser, and its President and CCO, Cowgill, under seal on April 29, 2014, which alleged, among other things, a shortfall in a money market fund account managed by PIM.[4] PIM managed approximately $120 million in assets for fifteen (15) retirement plans ("Retirement Plans").[5] PIM was registered with the SEC as an investment adviser from 1978 until September 30, 2013 and then again from June 24, 2014 until April 27, 2016.[6] PIM had custody of investor assets through various omnibus securities and cash accounts.

3. According to the complaint, unsealed on May 2, 2014, account statements sent to clients stated that PIM held a total of approximately $7.7 million in a money market fund when in fact the omnibus account holding these investments held less than $7 million. The SEC further

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[3] Consistent with the approach used by district courts when considering whether to approve a distribution plan, the Commission's objective is to distribute the Fair 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), citing *SEC v. Wang*, 944 F.2d 80, 88 (2d Cir. 1991). In *Wang*, the court held that "unless the consent decree specifically provides otherwise once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end." *Id*. at 85 (citing *SEC v. Certain Unknown Purchasers of the Common Stock and Call Options for the Common Stock of Santa Fe Int'l Corp.*, 817 F.2d 1018, 1021 (2d Cir.1987)).

[4] *See* Docket No. 2 in the District Court Action.

[5] The Retirement Plans had approximately 300 participants collectively, who in turn, owned approximately 400 individual retirement accounts.

[6] Cowgill signed and filed with the Commission a Form ADV-W on behalf of PIM after receiving a telephone call from Commission staff inquiring about PIM's failure to file a form ADV-E for several years. The Receiver re-registered PIM with the Commission for purposes of administering the PIM estate during the pendency of the litigation. On April 27, 2016, the Commission accepted PIM's offer of settlement, submitted by the Receiver, and simultaneously entered an order revoking PIM's registration as an investment adviser (Advisers Act Rel.4378 (Apr. 26, 2016)).

alleged that Cowgill attempted to disguise this shortfall and avoid detection by providing falsified account records to the SEC staff, and moving money between accounts.

4. The complaint alleged that PIM and Cowgill violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") when Cowgill misappropriated funds. In addition, the complaint alleged that PIM violated, and Cowgill aided and abetted PIM's violations of Sections 203(a) and 206(4) of the Advisers Act and Rule 206(4)-2 thereunder.

5. On April 30, 2014, the Court issued a temporary restraining order and imposed an asset freeze to protect client assets.[7] On May 15, 2014, the Court entered an order of preliminary injunction against PIM and Cowgill and a separate order, by consent, appointing a Receiver for the estate of PIM. [8]

6. The Commission filed an amended complaint on August 7, 2014 that included additional counts against Cowgill and PIM.[9]

7. The Court entered a bifurcated judgment by consent against Cowgill on August 21, 2014 as to all counts (leaving the issue of the amount, if any, of penalties, disgorgement, and prejudgment interest unresolved). On December 22, 2015, the Court entered a final judgment by consent against Cowgill, which required him to pay a total of $1,787,757.84, consisting of $840,574.42 in disgorgement, $106,609 in prejudgment interest, and $840,574.42 as a civil

[7] *See* Docket No. 9 in the District Court Action, *see also,* Litigation Release No. 22985 (May 5, 2014).
[8] *See* Docket No. 23 in the District Court Action. The court-appointed receiver, Michael O'Grady, has since passed away and David Kopech of Kopech & O'Grady, LLC, has replaced him.
[9] The amended complaint included additional allegations of violations of Section 207 of the Advisers Act by PIM and Cowgill, and alleged PIM violated, and Cowgill aided and abetted PIM's violations of Sections 203(a) and 204(a) of the Advisers Act and Rules 204-2 and 206(4)-7 thereunder. *See* Docket No. 35 in the District Court Action.

penalty.[10] On April 15, 2016, the Court entered a final judgment, granting permanent injunctive relief as to PIM.

8. On December 23, 2015, the Court authorized the Receiver to distribute funds under PIM's control in accordance with the Receiver's Plan and to dissolve PIM.[11]

9. In developing the Receiver's Plan, the Receiver took into account the circumstances under which Cowgill proceeded with his fraudulent action. The majority of PIM's holdings consisted of funds belonging to the fifteen (15) Retirement Plans that PIM had pooled together in omnibus securities accounts.[12] Cowgill received money from the different Retirement Plans for investment, typically comingled the funds in a PIM checking account, and then transferred the Retirement Plans' funds to, among other places, omnibus securities accounts. Cowgill also stole client funds, by directing transfers to his own personal accounts and Cowgill hid his theft by misrepresenting the value of the client holdings on statements PIM issued to the Retirement Plan participants. Because the investment funds were co-mingled before being diverted by Cowgill, the Receiver determined it was practically impossible to determine the specific amount of money that Cowgill stole from each Retirement Plan.

10. Therefore, in the Receiver's Plan approved by the court, the Receiver calculated the difference between the amount of the total investment funds under management control reported by PIM for each of the Retirement Plans, based on PIM's records, and the actual amount of investment funds under PIM's control on the benchmark date of June 30, 2014.

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[10] As of July 12, 2016, Cowgill has paid $18,937.25 of the $1,787,757.84 judgment. *See* Docket No. 103 in District Court Action.

[11] *See* Docket No. 70 in District Court Action.

[12] PIM also provided investment advisory services to approximately 20 to 25 individuals for their own after tax (non-retirement plan) accounts; however, these individual accounts were not consolidated into the omnibus accounts from which Cowgill stole money. Only the fifteen Retirement Plans in the omnibus account suffered a loss because of Cowgill's fraud.

11. Once the total amount of the losses was determined, the Receiver was able to allocate losses to each Retirement Plan based on each Retirement Plan's percentage of cash holdings and cash equivalents, and this methodology was approved by the Court. Thus, if Retirement Plan A's share of cash holdings and cash equivalents was 20%, it was allocated 20% of the total losses. It was left up to each Retirement Plan's Trustees to allocate its share of the distributed funds among participants.[13]

B. Administrative Proceedings

12. On June 25, 2015, the Commission issued an Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934, Section 203(k) of the Investment Advisers Act of 1940, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Accounting Firm Order") [14] against Michael S. Wilson, CPA ("Wilson") and Cotterman-Wilson CPAs, Inc., a Columbus, Ohio based accounting firm ("Cotterman-Wilson") (collectively "Accounting Firm Respondents"). The allegations in the Accounting Firm Order arose out of the Accounting Firm Respondents' failure to complete or withdraw from surprise examinations of PIM pursuant to Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder (the "Custody Rule")[15] in 2009, 2010, and 2011.[16] The Accounting Firm Respondents consented, without admitting or denying the allegations, to findings that they caused PIM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder in

[13] Because PIM contracted with the Retirement Plans and not the individual participants in the Retirement Plans, the Retirement Plan Trustees, who are fiduciaries, were free to allocate the losses within each Retirement Plan under the authority provided by each Retirement Plan's rules and regulations.

[14] Exchange Act Rel. No. 75298 (June 25, 2015) (Administrative Proceeding File No. 3-16652).

[15] 17 C.F.R. § 275.206(4)-2, the Custody Rule, sets forth certain requirements for any investment adviser registered with the Commission who has custody of client funds or securities.

[16] PIM engaged Cotterman-Wilson to perform the required surprise examinations from 1999 to 2011, as required by the Custody Rule, but the Accounting Firm Respondents failed to complete the surprise examinations or to withdraw from the surprise examinations for these years, and thus, caused PIM to violate the Custody Rule for each of those years.

2009, 2010, and 2011, and engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice in connection with the surprise examinations from 2009 through 2011. Wilson was ordered to pay a $50,000 civil money penalty and Cotterman-Wilson was ordered to pay a $25,000 civil money penalty, $10,868 in disgorgement, and $1,029 in prejudgment interest. The Accounting Firm Respondents paid the Commission, as ordered, on June 26, 2015.

13. On October 13, 2015, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("PIM Owner Order") against James T. Budden and Alexander W. Budden, the former principal owners of PIM (collectively "PIM Owner Respondents").[17] The PIM Owner Respondents consented, without admitting or denying the allegations, to findings that they failed reasonably to supervise Cowgill within the meaning of Sections 203(e)(6) of the Advisers Act with a view to preventing and detecting Cowgill's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 203(a), 204(a), 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rules 204-2, 206(4)-2, and 206(4)-7 thereunder;[18] caused PIM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 (the "Compliance Rule");[19] and, James

[17] Advisers Act Rel. No. 4225 (Oct.13, 2015) (Administrative Proceeding File No. 3-16892).

[18] Cowgill violated several antifraud provisions of the federal securities laws by misappropriating more than $840,000 in client assets.

[19] Rule 206(4)-7, 17 C.F.R. § 275.206(4)-7,the Compliance Rule imposes certain requirements on registered investment advisers, including adopting and implementing written policies and procedures to prevent violations of the Advisers Act. PIM Owner Respondents failed to adopt or implement any policies or procedures for supervising Cowgill; instead the PIM Owner Respondents merely assumed, without confirming, that Cowgill performed his responsibilities in compliance of the federal securities laws. Further, PIM Owner Respondents did not ensure that PIM established policies or procedures to prevent client assets from being misappropriated via checks or wire transfers or to ensure that client statements were reviewed for accuracy. Additionally, after the PIM Owner Respondents designated Cowgill as the CCO, they provided no funding, training or resources to support Cowgill in the CCO role. Furthermore, the PIM Owner Respondents had participated in annual compliance reviews with Cowgill in earlier years and, therefore, knew or should have known that Cowgill stopped performing compliance

T. Budden caused PIM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder (the Custody Rule).[20] James T. Budden was ordered to pay a $125,000 civil money penalty and Alexander W. Budden was ordered to pay a $75,000 civil money penalty. The PIM Owner Respondents paid the Commission, as ordered, on October 14, 2015.

14. Fair Funds were created by the Commission pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, in each of the above-captioned matters to distribute any disgorgement, prejudgment interest, and penalty payments received to injured investors.[21] The combined total of the two Fair Funds is $286,897.

15. Rule 1102(a) permits a plan of distribution for payment of funds recovered in Commission actions to be transferred to a court-appointed receiver in federal cases where the complaint alleges violations from the same or substantially similar facts and span the same time period. In the District Court Action, Cowgill was charged with defrauding the Retirement Plans and their investors by embezzling monies from PIM omnibus accounts and attempting to disguise this shortfall and avoiding detection by providing falsified account records to the Commission staff, and moving money between accounts. He also violated the securities laws by failing to carry out his compliance responsibilities. In the administrative proceeding against the PIM Owner Respondents, the allegations were that by failing to supervise Cowgill, or to take steps to ensure that PIM was complying with the federal securities laws or that Cowgill carried

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reviews after 2007, but took no steps to ensure that Cowgill or anyone else at PIM resumed conducting such reviews at least annually after 2007.

[20] Among other things, James T. Budden delegated the responsibility to Cowgill in 2009 to engage an independent accountant on behalf of PIM to conduct annual surprise examinations and to file the Form ADV-E in connection with the annual surprise examination, as required by the Custody Rule, but did not follow up with Cowgill to ensure Cowgill had fulfilled his responsibility. When the PIM Owner Respondents learned of Cowgill's failure to complete annual surprise examinations or to file the required Form ADV-E, they did not take any disciplinary action against Cowgill, but instead they each executed a stock purchase agreement in which they agreed to sell their interests in PIM to Cowgill.

[21] Administrative Proceeding File No. 3-16652 (June 25, 2015) and Administrative Proceeding File No. 3-16892 (October 13, 2015).

out his responsibilities as PIM's CCO, PIM Owner Respondents permitted the fraud and the other securities law violations to continue unabated, thus injuring the same investors. Similarly, the administrative proceeding against the Accounting Firm Respondents alleged that because PIM, a registered investment adviser, had custody of client assets held in three omnibus accounts and was required by the Custody Rule to engage an independent public accountant to conduct annual surprise examinations to verify those assets, the Accounting Firm Respondents' failure to complete the surprise examinations or to withdraw from the surprise examinations caused PIM to violate the federal securities laws. In addition, the Accounting Firm Respondents were charged with engaging in improper professional conduct and violating other securities laws in connection with its representation of PIM. Had the Accounting Firm Respondents performed their duties properly, Cowgill's fraud may have been prevented. As a result, the same investors harmed by Cowgill's conduct were further harmed by the conduct of the Accounting Firm Respondents.

III. TRANSFER OF THE FAIR FUNDS TO THE DISTRICT COURT ACTION

16. Following Commission approval of the Distribution Plan, the Commission staff will take the necessary steps to obtain a Commission order transferring the Fair Funds described in paragraph 14 to the District Court Action.

17. The Receiver has agreed to distribute the Fair Funds, totaling approximately $286,897, to the Retirement Plans. [22] The Fair Funds will be distributed using the same methodology for distribution contained in the Receiver's Plan.

18. The Receiver's costs of administering the Fair Funds will be paid from the Fair Funds. The Receiver has agreed to be responsible for all tax compliance and reporting

[22] The Receiver has also agreed to distribute any funds disgorged by Cowgill or obtained by the Commission collection efforts during the time the receivership is open.

obligations. All tax obligations, including fees and expenses of tax preparation, will be paid from the Fair Funds.

19. It is anticipated that the entirety of the Fair Funds will be distributed to the Retirement Plans by the Receiver. In the event that any portion of the Fair Funds is not distributed to the Retirement Plans, the Receiver has agreed to return any remaining funds to the Commission.

20. The Receiver has agreed to submit a final report and accounting for the disbursement of the Fair Funds to the Court in the District Court Action. When the Court has approved the final report and accounting and any remaining funds have been returned to the Commission, the Commission staff will arrange for the transfer of any remaining amounts to the U.S. Treasury.

IV. NOTICE OF PROPOSED PLAN AND OPPORTUNITY FOR COMMENT

21. The Notice of Proposed Plan of Distribution and Opportunity for Comment (the "Notice") will be published in the SEC Docket and on the Commission's website at http://www.sec.gov/litigation/fairfundlist.htm. Any persons wishing to comment on the Distribution 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 (www.sec.gov/litigation/admin.shtml); or (c) by sending an e-mail to rule-comments@sec.gov. Comments submitted by e-mail or via the Commission's website should include "Administrative Proceeding File Numbers 3-16652 and 3-16892" in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.