

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12114**

**In the Matter of**

**American Express Financial  
Corporation (now known as  
Ameriprise Financial, Inc.)**

**Respondent.**

**PROPOSED PLAN OF DISTRIBUTION**

**SUMMARY**

This is a plan for the distribution of approximately \$9 million to investors who owned shares between January 1, 2002 and September 30, 2003 in the following four mutual funds and variable annuity products offered by American Express Financial Corporation<sup>1</sup> (“AEFC” or “Respondent”): VP Diversified Equity; Equity Select; New Dimensions and VP International. In December 2005, the Securities and Exchange Commission (the “Commission” or “SEC”) agreed to a settlement with AEFC in which the Commission alleged AEFC did not adequately disclose to investors market-timing activities that were inconsistent with certain prospectus disclosures. The Commission created a fund from monies paid by AEFC for investors injured by the alleged misconduct. Market-timing activities at issue in the settlement impaired the value of investor holdings and this plan provides for payments from the Fair Fund (defined below) intended to restore that impaired value. Investors do not need to take any action to participate in this plan as investor records will be used to identify injured investors.

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<sup>1</sup> American Express Financial Corp. is now known as Ameriprise Financial, Inc.

## I.

On December, 1, 2005, the Commission issued a settled order (the “Order”)<sup>2</sup> against AEFC for violations of the federal securities laws resulting from improper “market timing”.<sup>3</sup> The Order found that,

[f]rom at least January 1, 2002 to August 31, 2002, AEFC allowed certain identified market timers to continue to market time, contrary to the [AEFC] Funds’ new prospectus disclosures that indicated that the [AEFC] Funds prohibited market timing. From May 2002 to October 2003, AEFC also allowed one identified market timer to market time variable annuity products contrary to the variable annuity products’ prospectus disclosures. Finally, from January 1, 2002 to September 30, 2003, AEFC failed to implement procedures to detect and prevent market timing in 401(k) plans for employees of AEFC and related companies or disclose that there were no such procedures in place to prevent a number of past and present employees of AEFC and related companies from market timing various [AEFC] Funds through their 401(k) retirement plans contrary to prospectus disclosures.<sup>4</sup>

The Order required Respondent to pay disgorgement and prejudgment interest in the total amount of \$10,000,000 and a civil money penalty of \$5,000,000 and established a Fair Fund in the total amount of \$15,000,000 pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 (“Fair Fund”) for distribution to injured investors. On January 24, 2006, Respondent paid the \$15 million ordered. This Fair Fund has been deposited at the U.S. Treasury Bureau of the Fiscal Service (“BFS”) for investment in government obligations. As of March 31, 2015, the approximate value of the Fair Fund including accrued interest was \$16.1 million. The Commission has custody of the Fair Fund and shall retain control of the assets of the Fair Fund. The Fair Fund is still currently deposited at BFS for investment in government obligations. Other than interest from its investments, it is not anticipated that the Fair Fund will receive additional funds.

## II.

The staff of the Commission developed this proposed Plan of Distribution (“Plan”), which is submitted by the Respondent for distribution of the Fair Fund. This Plan sets forth the methodology for allocating the Fair Fund among investors and the process by which the Fair Fund

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<sup>2</sup> See Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Advisers Act Release No. 2451 (December 1, 2005).

<sup>3</sup> “Market timing” refers to (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal *per se*, can harm other mutual fund shareholders because it can dilute the value of their shares if the market timer is exploiting pricing inefficiencies, disrupt the management of the mutual fund’s investment portfolio or cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

<sup>4</sup> See Order, paragraph 3.

will be distributed. The Plan is subject to approval by the Commission, and the Commission retains jurisdiction over the implementation of the Plan.

**A. Distribution Methodology**

1. This Plan calculates the total harm to AEFC fund and variable annuity product investors as a result of the market-timing violations using a “dilution” methodology based upon changes in each fund and product’s next-day net asset value per share (“NAV”).<sup>5</sup> According to this approach, the harm to investors on a given day by a market timer is equal to the timer’s first-day gains generated by the timer’s purchases plus the timer’s first day losses avoided from timer sales on that day.<sup>6</sup>

2. The methodology is represented by the following calculations where “t” represents the day of the timer’s purchase or sale:

$$\text{Investor Dilution}_t = \text{Timer First Day Gains}_t + \text{Timer First-Day Losses Avoided}_t.$$

“Timer First Day Gains” are the product of the number of shares purchased by the timer and the one-day change in NAV, represented by the following calculation:

$$\text{Timer First Day Gains}_t = \text{Shares Purchased}_t \times (\text{NAV}_{t+1} - \text{NAV}_t).$$

“Timer First-Day Losses Avoided” are the product of the number of shares sold by the timer and the one-day change in NAV, represented by the following calculation:

$$\text{Timer First-Day Losses Avoided}_t = -\text{Shares Sold}_t \times (\text{NAV}_{t+1} - \text{NAV}_t).$$

3. On some days, dilution was negative, because timer transactions accreted, rather than diluted, the fund. Accordingly, some market-timing transactions resulted in losses for the timer and gains for investors.

4. AEFC provided the Division with certain transaction data during the Division’s investigation of market timing, including the transactions of market timers and their accounts identified by AEFC. The calculations of dilution rely upon the data provided to the Division by AEFC.

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<sup>5</sup>NAV represents the value of a mutual fund’s assets minus any liabilities per share and is calculated at least once per business day.

<sup>6</sup>The methodology for calculating each eligible investor’s share of the Fair Fund is intended to result in a payment to each eligible investor that restores the impaired value of the investor’s investment in the harmed funds and variable annuity products resulting from the Respondent’s conduct described in the Order. Some of this impaired value is susceptible to calculation, while some of this impaired value is not. The methodology is intended to estimate fairly and reasonably each eligible investor’s harm and to calculate a payment in proportion to that amount. The Fair Fund is not intended to compensate investors for losses they incurred because of fluctuations in securities markets that were unrelated to Respondent’s conduct, as set forth in the Order.

5. Based on the data provided to the Division, it has been determined that investors in four funds and variable annuity products will be included in the distribution.<sup>7</sup>

6. For the investors of the four mutual funds and variable annuity products, the aggregate dilution (accretion) to investors from market timing will be computed for each fund and for each day during the period. An individual investor's dilution (accretion) on a given day in a given fund will be the investor's pro-rata share of the aggregate dilution (accretion) that day. The investor's pro-rata share on a given day will be computed as the number of shares of the fund the investor owns divided by the total number of shares held by all eligible accounts. An individual investor's dilution (accretion) will be estimated as the net of the investor's dilution and accretion across all days between January 1, 2002 and September 30, 2003. An effort will be made to identify, by common social security number or other administratively feasible mechanism, instances in which an individual investor's dilution (accretion) can be aggregated across all four funds and variable annuity products. If, after calculating dilution, an individual investor is determined to have received a net benefit (accretion) from market-timing trades, such an investor will not be eligible for a distribution and the value of such investor's dilution will be set to zero. If an individual investor is determined to have experienced a net loss (dilution) from market-timing trades, such investor will be deemed an "Eligible Investor."

7. To account for the time-value of money, the dilution losses incurred by Eligible Investors will be adjusted for the accumulation of interest, on a compounded basis, from the time the losses were incurred through a date shortly before the distributions are made. The interest rate used for this calculation is the federal short-term rate, which is determined from a one-month average of market yields from marketable obligations of the U.S. federal government with maturities of three years or less

8. Eligible Investors will receive a distribution equal to their estimated dilution plus their foregone interest. Eligible Investors will not have to pay fees to receive their distribution.

9. NAVs for the variable annuity products are provided by AEFC.

## **B. Distribution of the Fair Fund**

### **1. Appointment of Administrators**

The Order provides that "AEFC shall take all necessary and appropriate steps to administer the final plan for distribution of disgorgement and penalty funds," which, for purposes of this Plan, means that AEFC shall cooperate with the Fund Administrator and the Tax Administrator (each defined below) and provide information necessary to administer the Plan, as discussed further below. The fees and expenses of administering this Plan, including the fees and expenses of the Fund Administrator and the Tax Administrator and tax liabilities shall be paid from the Fair Fund,

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<sup>7</sup> Some funds that were market timed are being excluded from the distribution, such as those funds that experienced net accretion due to market-timing activity and situations where dilution was negligible.

according to Rule 1105(e) of the Commission's Rules on Fair Fund and Disgorgement Plans ("Commission's Rules"), 17 C.F.R. 201.1105(e), first from interest and then from principal.

a. The Commission has appointed Damasco & Associates LLP as the Tax Administrator of the Fair Fund.<sup>8</sup> The Fund Administrator and Respondent have agreed to cooperate with the Tax Administrator in providing information necessary to accomplish the income tax compliance, ruling and advice work assigned to the Tax Administrator by the Commission. The payment of taxes and the fees and expenses of the Tax Administrator will come from the Fair Fund.

b. The Division proposes that Rust Consulting, Inc. ("Rust"), a third-party service provider, serve as the administrator of the Fair Fund ("Fund Administrator"). The Respondent has agreed to cooperate with the Fund Administrator in providing information necessary to assist the Fund Administrator in fulfilling its duties and obligations described in paragraph II.B.1.c. *infra*. The Fund Administrator will be compensated from the Fair Fund for administering the distribution pursuant to this Plan and may submit an invoice for completed services to Commission staff for filing with the Commission; upon approval of an application by the Commission, the Fund Administrator will be paid its reasonable fees and expenses for those services.

c. Under the supervision of the Commission staff, and subject to customary confidentiality and information security protections for the transmission of client data, the Fund Administrator will perform the duties and obligations set forth herein, including overseeing the administration of the Fair Fund, establishing bank accounts, calculating and processing distribution payments, arranging for the issuance of checks and/or wires, attempting to locate shareholders, assisting intermediaries such as brokers to facilitate their calculations and distributions, cooperating with the Tax Administrator in providing the information necessary to accomplish income tax compliance, providing accountings as discussed herein to the Commission, and setting up and staffing a call center and website (per Section II.B.15.b.) to address shareholder questions or concerns regarding the distribution. The Fund Administrator will maintain all documents, including documents in any media, six (6) years after approval of the final accounting and thereafter will transfer the documents to the Commission, pursuant to Commission direction. In addition, the Fund Administrator will shut down the toll-free phone number and website established specifically for the administration of the Fair Fund upon the transfer of any remaining funds to the Commission.

d. The Fund Administrator will obtain a bond in accordance with Rule 1105(c) of the Commission's Rules, 17 C.F.R. 201.1105(c). The bond amount will cover the total amount to be distributed to investors. The cost of the bond premium will be paid from the Fair Fund, first from the interest earned on the invested funds, then, if not sufficient, from the corpus.

e. U.S. Bank will hold Fair Fund assets during the check-cashing period. U.S. Bank maintains a Financial Institutions (FI) Bond, plus errors and omissions coverage and excess professional liability coverage, with an aggregate limit of \$175 million. The primary insurer is

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<sup>8</sup> See Order Directing Appointment of Tax Administrator, Advisers Act Release No. 2452 (December 1, 2005).

Indian Harbor Insurance Company, a company which, as of its most recent renewal, was rated A by A.M. Best.

## **2. Rules and Procedures for the Distribution Process**

a. The Plan is designed to distribute the Fair Fund among investors who held shares in AEFC funds and variable annuity products that were diluted by market timers, subject to the provisions in Sections II. A. 1. through II. A. 8. Investors identified as market timers are excluded from the distribution (“Excluded Timers”).

b. The monies to be distributed under this Plan are not being distributed according to a claims-made process, so the procedures for providing notice and for making and approving claims are not applicable.

c. Excluded Timers are those Eligible Investors identified by AEFC who engaged in market-timing activities that were inconsistent with the disclosures in the AEFC Funds’ prospectuses. Excluded Timers may also include Eligible Investors who, upon the Fund Administrator’s analysis of the trade data in connection with effectuating distributions under the Plan and in consultation with the Commission staff, are determined to have engaged in impermissible market-timing activities that were not previously identified by AEFC. Not later than 60 days after the Commission’s final approval of the Plan, the Fund Administrator will notify the Excluded Timers that they are excluded from the distribution of the settlement funds. The notice will also inform the excluded timers that they can review the Plan through the Fund Administrator’s website. An Excluded Timer may dispute its exclusion from the distribution by submitting to the Fund Administrator a sworn statement under penalty of perjury containing information about why it should not be excluded from the distribution. Any submission must be made/postmarked to the Fund Administrator within 45 days after the date on the notice of exclusion. The Fund Administrator, upon consulting with the Commission and the Respondent, will resolve any dispute as to eligibility in its sole discretion and its decisions will be final.

Any submissions may be shared with the staff of the Commission. False statements in connection with any submissions may subject the certifying individual or entity to civil or criminal sanctions, including but not limited to, liability under 18 U.S.C. §1001, liability for any false statements made in an unsworn certificate under penalty of perjury as permitted by 28 U.S.C. §1746, or liability under any other applicable law.

## **3. Categories of Potentially Eligible Investors**

There are many forms of mutual fund share ownership, which vary depending on whether the “shareholder of record” is the same as the “beneficial owner” (also referred to as the “ultimate investor”). For example, a shareholder of record may be an individual, a joint account, a trust, a retirement or 529 plan sponsor, a broker who administers an Omnibus Account or a Network Account, or an investment company. Certain shareholders of record such as plan sponsors and brokers hold shares on behalf of one or more ultimate investors. In intermediated relationships, the shareholder of record may have certain pre-existing contractual and/or fiduciary duties to the

ultimate investors. For purposes of this Plan, four categories of shareholder accounts are distinguished:

- 1) “Direct Accounts” are retail shareholders and joint ownership accounts that are held directly with the Respondent. In these accounts, the shareholder of record and the beneficial owner are the same.
- 2) “Omnibus Accounts” are accounts in which a financial institution is the shareholder of record, serving as an intermediary, and holding shares on behalf of clients who are the beneficial owners. Accounts of Retirement Plans, as defined below, are not considered Omnibus Accounts for purposes of this Plan, although a Retirement Plan could be a shareholder (of record or otherwise) with other shareholders within an Omnibus Account.
- 3) “Network Level Account” is an account that represents one beneficial owner but for which name, address and other necessary identifying information may be maintained by an intermediary.
- 4) Accounts of “Retirement Plans” are accounts of any “employee benefit plan”, as defined in Section 3(3) of ERISA, 29 U.S.C. §1002(3), which is not: (1) an Individual Retirement Account, including a traditional IRA, a Roth IRA, a SEP IRA, a SARSEP IRA, or a SIMPLE IRA, or (2) a Section 403(b)(7) custodial account under a program not established or maintained by an employer, whether or not the employee benefit plan is subject to Title 1 of ERISA. The Retirement Plan may be the shareholder of record or the beneficial owner.

#### **4. Distributions to Direct Accounts**

- a. All Eligible Investors with Direct Accounts are eligible to receive payment. This includes both current and former investors in these funds.
- b. There will be a *de minimis* threshold of \$10 for Direct Accounts, since it will not be cost effective to distribute amounts of less than this amount. If there are sufficient funds available, the Fund Administrator will increase, i.e., “gross-up,” payment amounts to \$10 for Eligible Investors whose initial payment amounts are calculated to be less than \$10. The Fund Administrator, in consultation with Commission staff, will determine an appropriate methodology in order to fairly and efficiently implement a gross-up for Eligible Investors.
- c. With the reasonable assistance of the Respondent, the Fund Administrator will seek to identify all Eligible Investors. The Fund Administrator will exercise commercially reasonable care to determine that the name and address information for each Eligible Investor is current.
- d. Once the relevant data has been collected, the Fund Administrator will calculate the payment amounts for each Eligible Investor. These payment amounts, upon request of Commission staff, may be independently reviewed and verified by an independent third party

proposed by the Fund Administrator and not unacceptable to Commission staff. The cost of an independent third-party review will be paid from the Fair Fund.

e. After payment amounts have been verified, a payee file will be prepared as described in Section II.B.8.c. *infra*. The Fund Administrator will compare the payee file against the United States Postal Service (“USPS”) records for updated address information and update the payee file as necessary. The Fund Administrator will set up a database of all Eligible Investors and track updates to addresses, name changes, etc.

f. The Fund Administrator will contract with a vendor to print and mail individual checks. Any returned checks will be traced for updated contact information, reissued and remailed pursuant to Section II.B.9. *infra*.

g. In addition to the above efforts, the Fund Administrator will establish a toll-free phone number and website to answer investor questions and for miscellaneous administrative requests.

h. Payments that are not claimed by investors by the void date on the check with respect to Direct Accounts will remain in the Fair Fund and considered part of the Undistributed Pool (described in Section II.B.11 *infra*).

i. The Fund Administrator will report on the resolution of unclaimed investor monies in its periodic accounting to the Commission, as described in Section II.B.13.a. *infra*.

## **5. Distributions to Omnibus Accounts**

a. This Plan seeks, to the extent practicable and commercially reasonable, to distribute funds through intermediary accounts to beneficial owners. The Fund Administrator will use its best efforts to identify Omnibus Accounts by use of transfer agent records and other resources of the Respondent. The Fund Administrator will, in accordance with the Plan, determine net shares held in each Omnibus Account on a daily basis. The Fund Administrator will calculate the total amount due to each Omnibus Account using the methodology set forth in this Plan.

b. If the aggregate amount due to the Omnibus Account is less than \$1,000, it will be considered a *de minimis* amount, and the Fund Administrator will so inform the Omnibus Account holder that the Omnibus Account will not be entitled to a distribution.

c. Omnibus Account holders that are due to receive \$1,000 or more will have three options with respect to administering the Plan:

Option 1: The Fund Administrator will calculate payments to beneficial owners and execute the distributions, based on account data and address files provided by the Omnibus Account holder.



The Omnibus Accountholder may provide the necessary data to the Fund Administrator to calculate payments to beneficial owners. The reasonable out of pocket costs incurred by the Omnibus Accountholder in conjunction with preparing the data that would enable the Fund Administrator to calculate the payments and execute the distribution will be reimbursed by the Fair Fund as described in paragraph II.B.1. *supra*. In no case should the Omnibus Accountholder be reimbursed more than the amount that would be distributed to the Omnibus Accountholder if it were treated as a Direct Account investor.

Option 2: The Fund Administrator will calculate the payments to beneficial owners, based on account data and address files provided by the Omnibus Accountholder, but the Omnibus Accountholder will execute the distributions.

The Omnibus Accountholder will provide the necessary data to the Fund Administrator to calculate payments to beneficial owners. The reasonable out of pocket costs incurred by the Omnibus Accountholder in conjunction with preparing the data that would enable the Fund Administrator to calculate the payments will be reimbursed by the Fair Fund as described in paragraph II.B.1. *supra*. In no case should the Omnibus Accountholder be reimbursed more than the amount that would be distributed to the Omnibus Accountholder if it were treated as a Direct Account shareholder. The Fund Administrator will issue a single payment to the Omnibus Accountholder for the total amount to be distributed. The Omnibus Accountholder will bear the costs of executing the distribution to beneficial owners.

Option 3: The Fund Administrator will provide the algorithm for calculating the individual payments to the Omnibus Accountholder, but the Omnibus Accountholder will both calculate the payments to beneficial owners and execute the distributions to beneficial owners.

The Fund Administrator shall issue a single payment to the Omnibus Accountholder for the total amount to be distributed. The Omnibus Accountholder will bear all costs of calculating individual payments and distributing such payments to beneficial owners.

d. Whether the funds are distributed by the Fund Administrator (Option 1), distributed by the Omnibus Accountholder based on the Fund Administrator's calculations (Option 2), or both calculated and distributed by the Omnibus Accountholder (Option 3), the procedures to be employed should be substantially the same as those employed for Direct Accounts, except as described below:

1) The Fund Administrator will engage in an "Outreach Process" by which the Fund Administrator will use its best efforts to contact each Omnibus Accountholder and request records of the beneficial owners (i.e., shares held by each beneficial owner on each day). The beneficial owner's name and address, as well as the tax identification number, for each account within the Omnibus Account, will be requested from the Omnibus Accountholder. The Omnibus

Accountholder will have no more than 30 days from the time that it is contacted by the Fund Administrator to select one of the options described in Section II.B.5.c. *supra*, and no more than 60 days thereafter to provide the requested data to the Fund Administrator once an option is selected.

2) The Omnibus Accountholder will be required to develop and execute a program similar to that described for Direct Accounts, including a *de minimis* amount no larger than the *de minimis* threshold for the beneficial owner of \$10.

3) For current accounts, the Omnibus Accountholder has the option to write a check or to credit the account of the beneficial owner.

4) If an Omnibus Accountholder is unable to identify a beneficial owner after receipt of the payment from the Fund Administrator, such beneficial owner's payment shall be returned to the Fund Administrator and will remain in the Fair Fund and considered part of the Undistributed Pool as detailed in Section II.B.11. *infra*.

5) In the course of calculating payments in the distribution phase of this Plan, the Fund Administrator or Omnibus Accountholder may determine that payments due to an Omnibus Account's beneficial owners may differ from the amounts calculated pursuant to Section II.A. of this Plan. If the Fund Administrator's payment to an Omnibus Accountholder exceeds the payments due to beneficial owners (e.g., there are beneficial owners who fail to meet the Direct Account investor *de minimis* threshold), the excess shall be returned to the Fund Administrator and will remain in the Fair Fund and considered part of the Undistributed Pool as detailed in Section II.B.11. *infra*. If the Fund Administrator's payment to an Omnibus Accountholder is less than the payments to a plan's beneficial owners that exceed the *de minimis* levels (e.g., due to netting at the Omnibus Account level that obscured damages due to beneficial owners), the amount distributed to those beneficial owners will be proportionate to the funds actually received by the Omnibus Accountholder.

e. If the Omnibus Accountholder seeks to alter any of the procedures described herein, they may apply to do so in writing to the Fund Administrator within 30 days of receiving notice from the Fund Administrator. Any such application should explain (a) the alteration in procedure they plan to employ and (b) the reasons for this request. The Fund Administrator, in consultation with the Commission staff, will rule on these requests within 60 days of their receipt, but may request additional information from the Omnibus Accountholder. If the Fund Administrator determines that the proposal would not materially affect the distribution of funds to the beneficial owners, the proposal will be accepted. If the proposal is not accepted, the Omnibus Accountholder will be given another opportunity to select among the three options identified in Section II.B.5.c. *supra*. Otherwise, the monies that would have

otherwise been owed to the Omnibus Accountholder will remain in the Fair Fund and considered part of the Undistributed Pool described in Section II.B.11. *infra*.

f. If an Omnibus Accountholder: (1) does not respond to the Fund Administrator's Outreach Process or (2) does not provide to the Fund Administrator the requested records of beneficial owners within 60 days of selecting one of the three options identified in Section II.B.5.c. *supra.*, the Fund Administrator will offer to the Omnibus Accountholder to make the distribution in accordance with Option 3 of this Plan, which is set forth above, and will ask the Omnibus Accountholder to certify that it will make commercially reasonable efforts consistent with its legal, fiduciary and contractual duties to make the distribution to the beneficial owners in accordance with the methodology and deadlines set forth in this Plan, and that the Omnibus Accountholder will return to the Fund Administrator any undistributed money, which will remain in the Fair Fund and considered part of the Undistributed Pool described in Section II.B.11. *infra*.

g. The Fund Administrator will maintain records of each offer to an Omnibus Accountholder regarding performing the functions in Option 3 and any certifications provided in accordance with this Plan. These records will be provided to the Commission staff at least 30 days before the scheduled distribution is made.

## **6. Distributions to Network Accounts**

a. This Plan seeks, to the extent practicable and commercially reasonable, to distribute funds through intermediary accounts to beneficial owners. The Fund Administrator will use its best efforts to identify Network Level Accounts (i.e., an account that represents one beneficial owner but for which name, address and other necessary identifying information may be maintained by an intermediary) by use of records and other resources of the Respondent.

b. If the amount due to the Network Level Account is less than \$10, it will be considered a *de minimis* amount, and will not be entitled to a distribution. If there are sufficient funds available, the Fund Administrator will gross-up payment amounts to \$10 for Network Level Accounts whose initial payment amounts are calculated to be less than \$10. The Fund Administrator, in consultation with Commission staff, will determine an appropriate methodology in order to fairly and efficiently implement a gross-up for Network Level Accounts.

c. The Network Level Accountholder with network level accounts of \$10 or more will have two options with respect to administering the Plan:

Option 1: The Fund Administrator will execute the distributions, based on account data and address files provided by the Network Level Accountholder.

The Network Level Accountholder may provide the necessary data to the Fund Administrator to make a distribution to beneficial owners. The reasonable out-of-pocket costs incurred by the Network Level Accountholder in conjunction with preparing the data that would enable the Fund Administrator to execute the

distribution will be reimbursed by the Fair Fund as described in paragraph II.B.1.*supra*. In no case should the Network Level Accountholder be reimbursed more than the amount that would be distributed to the aggregate of all the network level accounts for the Network Level Accountholder.

Option 2: The Fund Administrator will provide the individual beneficial owners' payments to the Network Level Accountholder, but the Network Level Accountholder will execute the distributions to beneficial owners.

The Fund Administrator shall issue a single payment to the Network Level Accountholder for the total amount to be distributed. The Network Level Accountholder will bear all costs of distributing such payments to beneficial owners.

d. Whether the funds are distributed by the Fund Administrator ( Option 1) or distributed by the Network Level Accountholder based on the payments provided by the Fund Administrator (Option 2), the procedures to be employed should be substantially the same as those employed for Direct Accounts, except as described below:

1) The Fund Administrator will engage in an "Outreach Process" by which the Fund Administrator will use its best efforts to contact each Network Level Accountholder and request records to identify and locate the beneficial owner for each network account. The Network Level Accountholder will have no more than 30 days from the time that it is contacted by the Fund Administrator to select one of the options described in Section II.B.6.c. *supra*, and no more than 60 days thereafter to provide the requested data to the Fund Administrator once an option is selected.

2) For current accounts, the Network Level Accountholder has the option to write a check or to credit the account of the beneficial owner.

3) If a Network Level Accountholder is unable to identify a beneficial owner after receipt of the payment from the Fund Administrator, such beneficial owner's payment shall be returned to the Fund Administrator and will remain in the Fair Fund and considered part of the Undistributed Pool as detailed in Section II.B.11. *infra*.

e. If a Network Level Accountholder: (1) does not respond to the Fund Administrator's Outreach Process or (2) does not provide the Fund Administrator with the requested records of beneficial owners within 60 days of selecting one of the two options identified in Section II.B.6.c. *supra*, the Fund Administrator will offer the Network Level Accountholder the option to make the distribution in accordance with Option 2 described in Section II.B.6.c. *supra*. The Fund Administrator will request the Network Level Accountholder to certify that it will make commercially reasonable efforts consistent with its legal, fiduciary and contractual duties to make the distribution to the beneficial owners in accordance with the methodology and deadlines set forth in this Plan, and that the Network Level Accountholder will

return to the Fund Administrator any undistributed money, which will remain in the Fair Fund and considered part of the Undistributed Pool described in Section II.B.11. *infra*.

f. The Fund Administrator will maintain records of each offer to a Network Level Accountholder to make a distribution pursuant to Option 2 described in Section II.B.6.c. and any certifications provided in accordance with this Plan. These records will be provided to the Commission staff at least 30 days before the scheduled distribution is made.

## **7. Distributions to Retirement Plans**

a. Accounts of Retirement Plans may be entitled to a distribution pursuant to this Plan. In some cases, the Retirement Plan will be the shareholder of record and will receive its distribution directly. In other cases, an intermediary, e.g., a broker-dealer, underwriter, and/or record-keeper, may be the shareholder of record. Under this Plan, Individual Retirement Accounts (“IRAs”) are treated as Direct Accounts, and distributions to IRAs will be made in accordance with Section II.B.4. of this Plan.

b. Distributions will be made to a Retirement Plan if the amount of the distribution to the Retirement Plan meets the \$1,000 *de minimis* threshold.

c. Assets of Retirement Plans are held in trust by a trustee, and the trust is the legal owner of the assets. This Plan requires the plan fiduciaries and intermediaries as defined in Department of Labor Field Assistance Bulletin No. 2006-01, April 9, 2006 (the “Field Assistance Bulletin”), of Retirement Plans to distribute the monies received in accordance with their legal, fiduciary, and contractual obligations and consistent with guidance issued by the Department of Labor, including, but not limited to, the Field Assistance Bulletin.

d. Subject to Section II.B.7.c., an intermediary to one or more Retirement Plans may allocate the distribution it receives pursuant to this Plan among eligible Retirement Plans participating in an Omnibus Account administered by such intermediary according to the procedure set forth in Section II.B.5. *supra*, provided, however, that for the purposes of such allocation each Retirement Plan itself (and not the individual plan participants) shall be treated as the beneficial owner. The fiduciary of a Retirement Plan receiving such a distribution should then further distribute it as described below.

e. Subject to Section II.B.7.c., this Plan proposes four alternatives (which are not necessarily the only methods available) for Retirement Plan fiduciaries to follow in allocating amounts received by or on behalf of Retirement Plans pursuant to this Plan:

- 1) The Fund Administrator will make available the algorithm for calculating the amounts owed to beneficial owners to assist those Retirement Plans that intend to allocate their payments to individual plan participants;
- 2) Retirement Plan fiduciaries may allocate the distribution *pro rata* (based on total account balance) among the accounts of all persons who are

currently participants in the Retirement Plan (whether or not they are currently employees);

3) Retirement Plan fiduciaries may allocate the distribution amount *per capita* among the accounts of all persons who are currently participants in the Retirement Plan (whether or not they are currently employees);

4) To the extent that none of the three preceding alternatives is administratively feasible because the costs of effecting the allocation exceed the amount of the distribution, Retirement Plan fiduciaries may, to the extent permitted by the Retirement Plan, use the distribution amount to pay reasonable expenses of administering the plan (the distribution amount should not be used to offset expenses otherwise payable by the employer).

f. In view of, among other things, alternative distribution methodologies available to Retirement Plans, plan fiduciaries and/or intermediaries will not be reimbursed the costs and expenses associated with administering the distribution received pursuant to this Plan.

## **8. Execution of the Distribution**

a. The Fair 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.

b. Upon approval of the Plan, and after consultation with Commission staff, the Fund Administrator shall establish account(s) described as follows at U.S. Bank. The Fund Administrator shall establish with U.S. Bank an escrow account pursuant to an escrow agreement (the “Escrow Agreement”) to be provided by the staff of the Commission, in the name of and bearing the Employer Identification Number (“EIN”) of the QSF as defined in Section II.B.8.a. *supra*. The Fund Administrator shall also establish with U.S. Bank a separate deposit account (e.g. controlled distribution account, managed distribution account, linked checking and investment account) for the purpose of funding distribution payments to be distributed to Eligible Investors by the Fund Administrator pursuant to the Plan. The name of each account shall be in the following form: “American Express Financial Corporation Distribution Fund, as custodian for the benefit of investors allocated a distribution pursuant to the Plan in *In the Matter of American Express Financial Corporation*, Administrative Proceeding File No. 3-12114.”

During the term of the Escrow Agreement, if invested, the Escrow Account shall be invested and reinvested in short-term United States 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 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. The Fund Administrator shall 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 shall assist the Tax Administrator in obtaining mid-cycle statements, as necessary.

In consultation with the staff of the Commission, the Fund Administrator shall work with U.S. Bank on an ongoing basis to determine an allocation of funds between the escrow and the deposit accounts.

All Fair Fund checks presented for payment or electronic transfer will be subject to “positive pay” controls before being honored by U.S. Bank.

c. In order to distribute funds, the Fund Administrator will submit a validated list of payees, the payment amounts, and addresses to the assigned Commission staff, who will obtain authorization from the Commission to disburse pursuant to Rule 1101(b)(6) of the Commission’s Rules, 17 C.F.R. 201.1101(b)(6). The payees and amounts will be validated by the Fund Administrator. The validation will state that the list was compiled in accordance with the Plan and provides all information necessary to make disbursement to each distributee. Unless otherwise directed by the Commission, the Commission staff will obtain an Order Directing Disbursement that releases funds to the bank account established by the Fund Administrator based upon the validated list and representation by the Fund Administrator that the checks or electronic transfers will be issued within the next five business days.

## **9. Fund Administrator’s Procedure for Handling Returned Checks**

a. All mail returned by the USPS for which a new forwarding address has been provided by the USPS will be handled as follows: (1) coded as forwarded mail; (2) the address will be updated in the master database; (3) the check will be voided; and (4) a replacement check will be sent to the new address. All mail returned by the USPS for the first time, without a new forwarding address, will be handled as follows: (1) coded as returned mail; (2) the check will be voided; and (3) current address information will be forwarded to a nationally recognized address search service for address research. If a new address is found, that address will be updated to the master database and a new check will be issued. This new check may be issued with a stale date of 30 or 60 days after issuance. If no new address is found, the original check will remain voided. Additional efforts to identify the addresses of recipients will be conducted as is commercially reasonable in the view of the Fund Administrator and the Commission staff, where the costs of further research and the amount to be distributed will be considered, subject to a presumption that the additional costs of distribution will not exceed the amount to be distributed.

b. All mail returned by the USPS from a second attempt mailing, without a new forwarding address, will be coded as returned mail and the check will be voided. Additional efforts to identify the addresses of recipients will be conducted as is commercially reasonable in the view of the Fund Administrator and the Commission staff, where the costs of further research and the amount to be distributed will be considered, subject to a presumption that the additional costs of distribution will not exceed the amount to be distributed.

c. Funds attributable to any voided checks where no replacement is sent will remain in the Fair Fund and considered part of the Undistributed Pool (described in Section II.B.11. *infra*).

#### **10. Procedures for Handling Appeals**

The appeals process will be detailed in communications to investors and on the website. Appeals will be accepted only for failure to execute this Plan in accordance with its terms for purposes of determining eligibility or for mechanical errors in determining eligibility or calculating the payment to an investor. The Fund Administrator will not consider appeals other than those identified in this Section.

Appeals are to be submitted in writing to the Fund Administrator, within 240 days of the final approval of the Plan by the Commission. The Fund Administrator, in consultation with the Commission staff, will resolve all appeals within 270 days of final approval of the Plan. The Fund Administrator's determination shall be final. Available funds from the Undistributed Pool may be used to pay investors with successful appeals. Communications with investors about the distribution may include a statement notifying investors that appeals are available through the procedure specified in Section B.10. of this Plan. .

#### **11. Undistributed Pool**

All undistributed funds, including but not limited to those resulting from Eligible Investors that cannot be located, Excluded Timers, investors who decline payment, and amounts that do not meet the *de minimis* threshold discussed in Sections II.B.4.b., 5.b., 6.b., and 7.b. *supra*, will be aggregated into an Undistributed Pool. Upon termination of the Fair Fund as described in Section II.B.12.b. *infra*, all undistributed funds will be returned to the Commission for transfer to the U.S. Treasury.

#### **12. Timing of the Distribution Process**

a. The Fund Administrator shall complete the distribution as quickly as commercially reasonable following the final approval of this Plan.

b. The Fair Fund shall be eligible for termination, and the Fund Administrator shall be eligible for discharge, after all of the following have occurred: (1) a final accounting, in an SEC standard accounting format provided by the staff, has been submitted by the Fund Administrator for approval of, and has been approved by, the Commission, (2) all taxes, fees and expenses have been paid, and (3) any amount remaining in the Fair Fund has been received by the Commission. When the Commission has approved the final accounting, the staff shall seek an order from the Commission to transfer any amount remaining in the Fair Fund to the U.S. Treasury, to terminate the Fair Fund, and discharge the Fund Administrator.

c. For good cause shown, the Commission staff may extend any of the procedural deadlines set forth in this Plan.



d. The Fund Administrator shall take reasonable and appropriate steps to distribute the Fair Fund according to the Plan. The Fund Administrator will inform the Commission staff of any changes needed in the Plan. Upon agreement with Commission staff, the Fund Administrator may implement immaterial changes to the Plan to effectuate its general purposes. If a change is deemed to be material by the Commission staff, Commission approval is required prior to implementation by amending the Plan, which may be done upon the motion of any party or the Fund Administrator or upon the Commission's own motion.

### **13. Accounting**

a. Once the Fair Fund has been transferred to U.S. Bank, the Fund Administrator will file an accounting with the Commission during the first ten days of each calendar quarter on a standardized form provided by the Commission staff.

b. Upon final distributions to Eligible Investors pursuant to the procedures described herein, the Fund Administrator will submit a final accounting for approval by the Commission on a standardized form provided by the Commission staff prior to the discharge of the Fund Administrator and cancellation of the Fund Administrator bond.

### **14. Tax Implications of the Distribution**

This Plan does not provide tax advice to parties receiving payments. Eligible Investors are advised to consult their own tax advisors. The Fund Administrator shall obtain from the Tax Administrator an opinion as to the reporting and withholding obligations of the Fair Fund, if any, with respect to the distribution.

### **15. Public Information**

a. Eligible Investors receiving payments under this Plan shall receive and/or be provided access to a communication that includes, as appropriate: (a) a statement characterizing the distribution; (b) a description of the tax information reporting required of the QSF and related tax consequences; (c) a statement that checks will be void 120 days after issuance; and (d) contact information to be used in the event of any questions regarding the distribution. This communication will either precede or accompany payments, and/or be made available on the website established by the Fund Administrator for this distribution (see Section II.B.15.b. below for more information on the website). Any such communication to recipients relating to their distributions shall be submitted to the assigned Commission staff for review and approval. Such communications will clearly indicate that the money is being distributed from a Fair Fund established by the SEC.

b. The Fund Administrator will provide customer support and communications programs which will become active at least by the time the first distribution occurs. These services shall include a toll free number and a website to the public. The Commission retains the right to review and approve any material posted on the website. The website will be publicized in communications to shareholders and in the media. The content may include descriptive information and instructions, telephone numbers for customer service, links to the Plan, and a

description of the dispute process (see Section II.B.10. *supra*). No login will be required to access the website. The website shall not contain any shareholder-specific information. The Fund Administrator will set up and staff a dedicated call center with operators trained and dedicated to responding to investor inquiries about the distribution process. The Fund Administrator shall report on this activity periodically to the Commission staff.

## **16. Notice and Comment**

The 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](mailto:rule-comments@sec.gov). Comments submitted by email or via the Commission’s website should include “Administrative Proceeding File No. 3-12114” in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.