

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5863 / September 16, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20563

<p>In the Matter of</p> <p>BFC PLANNING, INC.,</p> <p>Respondents.</p>

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO 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**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against BFC Planning, Inc. (“BFC” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to 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 (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to BFC’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. These proceedings arise out of breaches of fiduciary duty by BFC, a registered investment adviser, in connection with its mutual fund share class selection practices that resulted in receipt by its affiliate Berthel Fisher & Company Financial Services, Inc. (“BFCFS”), a dually-registered broker-dealer and registered investment adviser, of two types of fees from BFC’s advisory clients’ investments at times from January 2014 through March 2018. These fees included: (1) fees BFCFS received when BFC purchased, recommended, or held for BFC’s advisory clients mutual fund share classes that paid fees pursuant to Rule 12b-1 under the Investment Company Act of 1940 (“12b-1 fees”) instead of lower-cost available share classes of the same funds that did not charge these fees; and (2) fees BFCFS received from its unaffiliated clearing broker as a result of BFC’s advisory clients’ uninvested cash being swept into share classes of certain money market mutual funds (“money market funds”) instead of lower-cost share classes of the same money market funds that did not result in the payment of fees to BFCFS that were available to clients.

2. First, from January 2014 through March 2018 (the “Relevant 12b-1 Period”), BFCFS and its registered representatives who were also investment advisory representatives (“IARs”) of BFC received 12b-1 fees from mutual fund share classes that BFC had purchased, recommended, or held for advisory clients mutual fund share classes that charged 12b-1 fees instead of lower-cost share classes of the same funds that were available to the clients. BFC did not adequately disclose this conflict of interest in its Forms ADV or otherwise. BFC, although eligible to do so, did not self-report this 12b-1 fee related conflict of interest to the Commission pursuant to the Division of Enforcement’s (the “Division”) Share Class Selection Disclosure Initiative (“SCSD Initiative”).²

3. Second, from September 2016 through March 2018 (the “Relevant Cash Sweep Period”), BFCFS received revenue sharing payments from the clearing broker based on the amount of Respondents’ advisory client assets invested in certain share classes of money market funds used as cash sweep vehicles. During the Relevant Cash Sweep Period, BFCFS’s agreement with the clearing broker provided options to sweep BFC’s clients’ cash into share classes of the same money market funds that had lower costs to fund investors and did not pay revenue sharing. BFC selected higher-cost revenue sharing money market fund share classes instead of lower-cost share classes of the same money market funds that did not pay revenue sharing to BFCFS and were available to advisory clients. BFC did not adequately disclose this conflict of interest in its Forms ADV or otherwise.

4. From at least January 2014, BFC also, by causing certain of its advisory clients to invest in higher-cost share classes of mutual funds that paid 12b-1 fees and money market funds that resulted in revenue sharing payments when fund share classes were available to the clients that

² See Div. of Enforcement, U.S. Sec. & Exch. Comm’n, *Share Class Selection Disclosure Initiative*, <https://www.sec.gov/enforce/announcement/scsd-initiative> (last modified Feb. 12, 2018).

presented a more favorable value under the particular circumstances in place at the time of the transactions, breached its duty to seek best execution for those transactions.

5. During each of the relevant periods, BFC also failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with mutual fund and money market fund share class selection practices.

Respondent

6. Respondent BFC Planning, Inc. (“BFC”) is an Iowa corporation based in Cedar Rapids, Iowa. BFC has been registered with the Commission as an investment adviser since January 3, 2007. In its March 31, 2021 Form ADV, Part 1 BFC reported regulatory assets under management of \$1,274,830,615. BFC provides advisory services through its IARs, all of whom are registered representatives of BFCFS.

Related Parties

7. Berthel Fisher & Company is an Iowa corporation based in Cedar Rapids, Iowa. BFC is a subsidiary of Berthel Fisher & Company.

8. Berthel Fisher & Company Financial Services, Inc. (“BFCFS”) is an Iowa corporation based in Cedar Rapids, Iowa. BFCFS has been registered with the Commission as an investment adviser since August 27, 2003 and has been registered with the Commission as a broker-dealer since June 1983 (CRD #13609). BFCFS is also a subsidiary of Berthel Fisher & Company, and, therefore, BFCFS and BFC are under common control with each other.

Mutual Fund Share Class Selection and 12b-1 Fees

9. Mutual funds typically offer investors different types of shares or “share classes.” Each share class represents an interest in the same portfolio of securities with the same investment objective. The primary difference among the share classes is the fee structure.

10. For example, some mutual fund share classes charge 12b-1 fees to cover certain costs of fund distribution and sometimes shareholder services. These recurring fees, which are included in a mutual fund’s total annual fund operating expenses, vary by share class, but typically range from 25 to 100 basis points. They are deducted from the mutual fund’s assets on an ongoing basis and paid to the fund’s distributor or principal underwriter, which generally remits the 12b-1 fees to the broker-dealer that distributed or sold the shares.

11. Many mutual funds also offer share classes that do not charge 12b-1 fees (e.g., “Institutional Class” or “Class I” shares (collectively, “Class I shares”)).³ An investor who holds Class I shares of a mutual fund will usually pay lower total annual fund operating expenses over time – and thus will generally earn higher returns – than one who holds a share class of the same fund that charges 12b-1 fees. Therefore, if a mutual fund offers a Class I share, and an investor is eligible to own it, it is often, though not always, better for the investor to purchase or hold the Class I share.

12. During the Relevant 12b-1 Period, BFC and its IARs purchased, recommended or held⁴ for clients mutual fund share classes that charged 12b-1 fees when lower-cost share classes of those same funds were available to those clients. BFCFS received 12b-1 fees that it would not have collected had its advisory clients been invested in the available lower-cost share classes. BFCFS shared a portion of these fees with its registered representatives who were IARs of BFC.

13. The payments BFCFS received from the clearing broker created an incentive for BFC to recommend its advisory clients buy or hold share classes that paid 12b-1 fees over other share classes of the same mutual funds that did not pay 12b-1 fees when rendering investment advice to BFC’s advisory clients. In April 2018, BFC began to credit to advisory client accounts on a going-forward basis 12b-1 fees received on share classes held by the advisory clients.

Cash Sweep Share Class Selection and Revenue Sharing Payments

14. A sweep account (“Sweep Account”) is a money market mutual fund or bank account used by broker-dealers to hold uninvested cash (e.g., incoming cash deposits, dividends, or certain investment returns) until the investor or its adviser decides how to invest the money. During the Relevant Cash Sweep Period, BFC recommended that clients choose certain money market fund share classes to hold uninvested cash in the clients’ Sweep Accounts. A money market fund is a type of mutual fund registered under the Investment Company Act of 1940 and regulated pursuant to Rule 2a-7 under that Act. Money market funds generally invest in short term, highly liquid securities with limited credit risk, and are frequently used in Sweep Accounts as cash sweep vehicles. The investment yields and expense ratio of a money market fund will differ from fund to fund.

15. During the Relevant Cash Sweep Period, the clearing broker agreed to share with BFCFS a portion of the revenue the clearing broker received in connection with certain share classes of money market funds offered to Sweep Accounts. Another share class of the same money market funds was available to BFC’s clients that did not pay BFCFS any revenue sharing for client assets and had lower expenses and higher yields for BFC’s clients than the revenue sharing money market fund share classes.

³ Share classes that do not charge 12b-1 fees also go by a variety of other names in the mutual fund industry, such as “Class F2,” “Class Y” and “Class Z” shares. As used in this Order, the term “Class I shares” refers generically to share classes that do not charge 12b-1 fees.

⁴ In many cases, mutual funds permit certain advisory clients who hold shares in classes charging 12b-1 fees to convert those shares to Class I shares without cost or tax consequences to the client.

16. The amount of revenue sharing BFCFS received from the clearing broker differed depending on the share class of the money market fund that BFC recommended to its advisory clients and the amount of assets advisory clients, who were BFCFS brokerage customers, held in the share class. During the Relevant Cash Sweep Period, even though a share class of the same money market fund that did not result in revenue sharing payments was always available to its clients, BFC routinely purchased, recommended or held for clients share classes of money market funds for cash sweep vehicles that paid revenue sharing to BFCFS rather than those that did not.

17. The payments BFCFS received from the clearing broker for higher-cost revenue sharing money market fund share classes created an incentive for BFC to recommend advisory clients purchase or hold a money market fund share class that paid revenue sharing over share classes of the same money market funds that did not pay revenue sharing. In April 2018, BFC began to credit to BFC advisory client accounts on a going-forward basis revenue sharing received on money market fund share classes in Sweep Accounts held by BFC advisory clients.

Disclosure Failures

18. As an investment adviser, BFC was obligated to disclose all material facts to advisory clients, including any conflicts of interest between the adviser and its clients, that could affect the advisory relationship and how those conflicts could affect the advice BFC provided its clients. To meet this fiduciary obligation, BFC was required to provide advisory clients with full and fair disclosure that is sufficiently specific so that the advisory clients could understand the conflicts of interest concerning BFC's advice about investing in different share classes of mutual funds or money market funds, and could have an informed basis on which advisory clients could consent to or reject the conflicts.

19. During the Relevant 12b-1 Period, BFC's Form ADV Part 2A brochures disclosed that advisory clients "may incur" 12b-1 fees, and that because IARs "may receive 12b-1 fees ... there is a potential conflict of interest." BFC did not disclose the conflicts of interest that arose when it invested advisory clients in a mutual fund share class that would generate 12b-1 fee revenue for BFCFS and for BFC's IARs, while share classes of the same funds that did not pay 12b-1 fees were available to its clients.

20. During the Relevant Cash Sweep Period, BFC's Form ADV Part 2A brochures disclosed that BFC "... and our affiliated broker-dealers may have entered into various arrangements ... referred to as revenue sharing arrangements," and that "these situations present a conflict of interest that may affect the judgment of our affiliated persons." BFC did not disclose the conflicts of interest that arose when it invested advisory clients in a money market fund share class that would generate revenue sharing for BFCFS, while share classes of the same funds that did not generate this revenue were available to its clients.

Best Execution Failures

21. An investment adviser's fiduciary duty includes, among other things, an obligation to seek best execution for client transactions.⁵

22. From at least January 2014, by causing certain of its advisory clients to invest in share classes of mutual funds that paid 12b-1 fees and money market funds that resulted in revenue sharing payments from the clearing broker to BFCFS when share classes were available that presented a more favorable value under the particular circumstances in place at the time of the transactions, BFC violated its duty to seek best execution for those transactions.

Compliance Deficiencies

23. During each of the Relevant Periods, BFC failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund and money market fund share class selection practices.

Disgorgement

24. The disgorgement and prejudgment interest ordered in Section IV.C. is consistent with equitable principles and does not exceed net profits from its violations, and will be distributed to harmed investors to the extent feasible. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors, and any amounts returned to the Commission in the future that are infeasible to return to investors, may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Violations

25. As a result of the conduct described above, BFC willfully⁶ violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to “engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.” Scienter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5

⁵ See, e.g., Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Rel. No. 23170 (Apr. 28, 1986).

⁶ “Willfully,” for purposes of imposing relief under Section 203(e) of the Advisers Act, “means no more than that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has “willfully omit[ed]” material information from a required disclosure in violation of Section 207 of the Advisers Act).

(D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180,194-95 (1963)).

26. As a result of the conduct described above, BFC willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

Undertakings

27. BFC has undertaken to:
- a. Within 30 days of the entry of this Order, review and correct as necessary all relevant disclosure documents concerning mutual fund share class selection, cash sweep vehicle selection, 12b-1 fees and revenue sharing.
 - b. Within 30 days of the entry of this Order, evaluate whether existing clients should be moved to a lower-cost mutual fund share class or lower-cost cash sweep vehicle and move clients as necessary.
 - c. Within 30 days of the entry of this Order, evaluate, update (if necessary), and review for the effectiveness of their implementation, BFC's policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act in connection with disclosures regarding mutual fund share class selection and cash sweep vehicle selection and in connection with making recommendations of mutual fund share classes or cash sweep vehicles that are in the best interests of BFC's advisory clients.
 - d. Within 30 days of the entry of this Order, BFC shall notify affected investors (*i.e.*, those former and current clients who were financially harmed by the practices discussed above (hereinafter, "affected investors") of the settlement terms of this Order by sending a copy of this Order to each affected investor via mail, email, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.
 - e. Within 40 days of the entry of this Order, certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Division of

Enforcement, Securities and Exchange Commission, 100 F. Street, NE,
Washington, DC 20549.

- f. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

IV.

In view of the foregoing, the Commission deems it appropriate, and in the public interest to impose the sanctions agreed to in BFC's Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

- A. BFC cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder.
- B. BFC is censured.
- C. BFC shall pay disgorgement, prejudgment interest, and a civil penalty, as follows:
 - (i) BFC shall pay disgorgement of \$103,001.97 and prejudgment interest of \$17,810.72, consistent with the provisions of this Subsection C.
 - (ii) BFC shall pay a civil money penalty in the amount of \$185,000, consistent with the provisions of this Subsection C.
 - (iii) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest referenced in Section C.(i) – (ii) above. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, BFC agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of BFC's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, BFC agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought

against BFC by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

(iv) BFC shall pay the disgorgement, prejudgment interest and civil penalties ordered in this Subsection C in the following installments:

- a. within ten (10) days of the entry of this Order, BFC shall pay \$120,812.69, representing the full amount of disgorgement and prejudgment interest, and shall pay \$61,666.66 of the civil penalty amount within 90 days of the Order, \$61,666.67 of the civil penalty amount within 180 days of the entry of the Order, and \$61,666.67 of the civil penalty amount within 270 days of the entry of the Order, plus all accrued interest.
- b. BFC shall deposit the payments of the disgorgement, prejudgment interest, and civil penalty (the “Fair Fund”), into an escrow account at a financial institution not unacceptable to the Commission staff, and shall provide the Commission staff with evidence of such deposits in a form acceptable to the Commission staff. Payments shall be applied first to post order interest, which accrues pursuant to SEC Rule of Practice 600 on unpaid amounts of disgorgement and prejudgment interest and/or pursuant to 31 U.S.C. 3717 on unpaid amounts of the civil penalty. Prior to making the final payment set forth herein, BFC shall contact the staff of the Commission for the amount due. If BFC fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

(v) BFC shall be responsible for administering the Fair Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by BFC and shall not be paid out of the Fair Fund.

(vi) BFC shall pay from the Fair Fund to each affected investor an amount representing the affected investor’s pro rata share of the 12b-1 fees attributable to the affected investor during the Relevant 12b-1 Period and the revenue sharing payments attributable to the affected investor during the Relevant Cash Sweep Period pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection C. No portion of the Fair Fund shall be paid to any affected investor account in which BFCFS, BFC, or Berthel Fisher & Company, or any of their current or former officers or directors, has a financial interest.

(vii) BFC shall, within thirty (30) days of the completion of the payments in Section IV.C.vi., submit a Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the staff, BFC shall make itself available, and shall require any third-parties or professionals retained by BFC to assist in formulating the methodology for its Calculation and/or administration of the distribution to be available, for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the staff with an opportunity to ask questions. BFC also shall provide the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to BFC's proposed Calculation or any of its information or supporting documentation, BFC shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within ten (10) days of the date that the Commission staff notifies BFC of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

(viii) BFC shall, within sixty (60) days of the written approval of the Calculation by the Commission staff, submit a payment file (the "Payment File") for review and acceptance by the Commission staff demonstrating the application of the methodology to each affected investor. The Payment File should identify, at a minimum, (1) the name of each affected investor; (2) the exact amount of the payment to be made; and (3) the amount of any *de minimis* threshold to be applied.

(ix) BFC shall complete the disbursement of all amounts payable to affected investors within ninety (90) days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in Paragraph (xiii) of this Subsection C. BFC shall notify the Commission staff of the date and the amount paid in the initial distribution.

(x) If BFC is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an affected investor or a beneficial owner of an affected investor or any factors beyond BFC's control, BFC shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Exchange Act when the distribution of funds is complete and before the final accounting provided for in Paragraph xii of this Subsection C is submitted to the Commission staff. Payment must be made in one of the following ways:

(a) BFC may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(b) BFC may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(c) BFC may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying BFC as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide.

(xi) A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§1.468B.1-1.468B.5. BFC shall be responsible for all tax compliance responsibilities associated with the Fair Fund, including but not limited to tax obligations resulting from the Fair Fund's status as a QSF and the Foreign Account Tax Compliance Act ("FATCA"), and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by BFC and shall not be paid out of the Fair Fund.

(xii) Within one hundred fifty (150) days after BFC completes the disbursement of all amounts payable to affected investors, BFC shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection C. BFC shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (1) the amount paid to each payee; (2) the date of each payment; (3) the check number or other identifier of the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that BFC has made payments from the Fair Fund to affected investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to Commission staff, shall be sent to Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide. BFC shall

provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request, and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

(xiii) The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Fair Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

D. BFC shall comply with the undertakings enumerated in Section III, paragraph 27.a. – 27.e. above.

By the Commission.

Vanessa A. Countryman
Secretary