

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 99016 / November 22, 2023**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-20060**

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**In the Matter of**

**Bayerische Motoren Werke  
Aktiengesellschaft, BMW of North  
America, LLC and BMW US  
Capital, LLC,**

**Respondents.**

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**ORDER APPROVING PLAN OF  
DISTRIBUTION**

On September 24, 2020, the Commission issued a settled cease-and-desist order (the Order)<sup>1</sup> against Bayerische Motoren Werke Aktiengesellschaft (“BMW”), BMW of North America, LLC (“BMW NA”), and BMW US Capital, LLC (“BMW US”) (collectively, the “Respondents”) for violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 (“Securities Act”). The Respondents were enjoined from future violations of the securities laws and ordered to pay an \$18,000,000 civil penalty. The Commission ordered the funds paid pursuant to the Order to be held in an account at the United States Treasury pending a decision whether the Commission, in its discretion, would seek to distribute funds.

On April 7, 2022, the Commission issued an order creating a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002.<sup>2</sup> The Fair Fund consists of the \$18,000,000 paid by the Respondents and accrued interest. The Fair Fund is deposited in a Commission-designated account at the United States Department of the Treasury.

On August 4, 2022, the Division, pursuant to delegated authority, appointed Miller Kaplan Arase LLP as tax administrator for the Fair Fund.<sup>3</sup>

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<sup>1</sup> See Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order, Securities Act Rel. No. 10850 (Sept. 24, 2023).

<sup>2</sup> Order Establishing a Fair Fund, Exchange Act Rel. No. 94623 (Apr. 7, 2022).

<sup>3</sup> See Order Appointing Tax Administrator, Exchange Act Rel. No. 95427 (Aug. 4, 2022).

On September 14, 2022, the Division, pursuant to delegated authority, appointed Kurtzman Carson Consultants, LLC as the fund administrator (the “Fund Administrator”) for the Fair Fund and set the fund administrator’s bond at \$18,000 in accordance with Rules 1105(a) and (c) of the Commission’s Rules on Fair Fund and Disgorgement Plans (the “Commission’s Rules”), 17 C.F.R. §§ 201.1105(a) and (c).<sup>4</sup>

On April 21, 2023, the Division, pursuant to delegated authority, published a Notice of Proposed Plan of Distribution and Opportunity for Comment<sup>5</sup> and simultaneously posted the Proposed Plan of Distribution (the “Proposed Plan”), pursuant to Rule 1103 of the Commission’s Rules.<sup>6</sup> The Notice advised all interested persons that they may obtain a copy of the Proposed Plan from the Commission’s public website at <http://www.sec.gov/litigation/fairfundlist.htm> or by submitting a written request to Keshia W. Ellis, United States Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5876. All persons who desired to comment on the Proposed Plan could submit their comments in writing, no later than May 22, 2023. The Commission received one comment during the comment period (the “Comment Letter”).

After considering the Comment Letter received on the Proposed Plan, the Commission staff, working with the Fund Administrator, recommends that the Proposed Plan be approved without modification.

After careful consideration, the Commission concludes that the Proposed Plan should be approved without modification.

## I.

### A. Public Comments on the Proposed Plan

By letter dated May 19, 2023, Chicago Clearing Corporation (“CCC”), objected to Paragraphs 15(h) and 83 of the Proposed Plan which excludes parties that have purchased an investor’s claim from participating in the distribution of the Fair Fund and prohibit Third-Party Filers<sup>7</sup> from directly receiving their compensation from distribution payments, respectively.

#### 1. Objection to Paragraph 15(h)

By its comment letter, CCC, contends that the exclusion in Paragraph 15(h) of the Proposed Plan could eliminate the opportunity for many harmed investors to receive value from the Fair Fund, as well as, from other distribution funds with similar provisions. CCC requests that Paragraph 15(h) be modified to permit purchasers of claims to be eligible for a distribution from the Fair Fund. .

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<sup>4</sup> See Order Appointing Fund Administrator and Setting Administrator’s Bond Amount, Exchange Act Rel. No. 95766 (Sept. 14, 2022).

<sup>5</sup> Exchange Act Rel. No. 97345 (Apr. 21, 2023).

<sup>6</sup> 17 C.F.R. § 201.1103.

<sup>7</sup> All capitalized terms used herein but not defined have the same meanings ascribed to them in the Proposed Plan.

The Commission has considered this objection and concludes that no modification of the Proposed Plan is required for the same reasons set forth in prior orders approving distribution plans containing provisions similar to Paragraph 15(h). *See e.g., In the Matter of Baxter International Inc.*, Exchange Act Rel. No. 98512 (Sept. 25, 2023) (finding plan provisions excluding claims purchasers is the best way to ensure that distribution payments are made for the benefit of investors who suffered the harm). The purpose of a Commission plan of distribution is to distribute a fund established for the benefit of harmed investors. *See* Section 308(a) of the Sarbanes-Oxley Act of 2002 (stating that, in the context of Fair Funds, a fund is “established for the benefit of victims of” violations of the federal securities laws). The Commission believes that the best way to ensure that distribution payments are made for the benefit of investors is to relate the harm caused by the violations of the federal securities laws to the specific investors who suffered the harm, and to compensate those investors for as much of their harm as the distribution fund will permit. By including Paragraph 15(h), the Commission does not take a position on investors selling their claims. Rather, the Proposed Plan specifies to whom the distribution payment will be made. Based on these considerations, the Commission has determined that the payment restriction in Paragraph 15(h) fair and reasonable and necessary to protect the Fair Fund.

## 2. Objection to Paragraph 83

CCC also objects to paragraph 83 of the Proposed Plan, prohibiting the deduction of Third-Party compensation from the distribution payments made to harmed investors and the requirement that payments be made directly to such investors. CCC proposes a process for reporting information to the claims administrator that includes sending a report reflecting the name of recipient, amount of the filing fee, net balance to be sent to the claimant, and address of where the payment was sent. CCC would also report information on which payments were cashed and which ones were not. The Commission has considered this objection and concludes that it does not require modification to the Proposed Plan.

The Commission has considered this comment and, for the reasons set forth in prior orders approving the substance of the paragraph at issue, has determined that the requirements of Paragraph 83 are necessary to protect the Fair Fund. *See* the Baxter Order (finding that the requirements of paragraphs 83 and 84 is necessary to protect the Baxter Fair Fund); *See In the Matter of MagnaChip Semiconductor Corporation, et al.*, Exchange Act Rel. No. 97470 (May 10, 2023) (finding Plan provisions precluding the sending of payments to third-party filers and the offset of third-party filer compensation from distribution payments to be appropriate as a “means to protect the integrity of Commission distributions”). The Commission finds Paragraph 83 of the Proposed Plan to be fair and reasonable and approves its inclusion without modification.

## **B. Approval of the Proposed Plan**

For the reasons stated above, the Commission finds that the Proposed Plan is fair and reasonable and should be approved without modification.

**II.**

Accordingly, it is hereby ORDERED, pursuant to Rule 1104 of the Commission's Rules, that the Proposed Plan is approved, and the approved Plan of Distribution shall be posted simultaneously with this order on the Commission's website at [www.sec.gov](http://www.sec.gov).

By the Commission.

Vanessa A. Countryman  
Secretary