ORAL ARGUMENT NOT YET SCHEDULED

12-5286

In the United States Court of Appeals for the District of Columbia Circuit

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 11-678, Judge Robert L. Wilkins)

BRIEF AMICUS CURIAE OF FINANCIAL SERVICES INSTITUTE, INC.

IN SUPPORT OF THE DISTRICT COURT'S ORDER

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April 19, 2013

Corporate Disclosure Statement Pursuant to Circuit Rule 26.1

Pursuant to FED. R. APP. P. 26.1, the undersigned counsel for the *amicus curiae* certify that the Financial Services Institute, Inc. has no parent company and further certify that no publicly-held company owns more than 10% of the Financial Services Institute, Inc. The Financial Services Institute, Inc. is a not-for-profit corporation organized under the laws of Georgia.

Certificate as to Parties, Rulings and Related Cases

A. Except for the *amici curiae* listed below, all parties, intervenors, and *amici curiae* who have appeared before the District Court and in this Court are listed in (i) the Initial Brief of the Securities and Exchange Commission, (ii) the Corrected *Amicus Curiae* Brief of the Court-Appointed Examiner, the Official Stanford Investors Committee, and the Stanford Victims Coalition, and (iii) the Response Brief of the Securities Investor Protection Corporation:

- Financial Services Institute, Inc.
- Securities Industry and Financial Markets Association
- Hon. Joseph A. Grundfest

B and C. The Rulings Under Review and Related Cases are set forth in the Initial Brief for the Securities and Exchange Commission.

Table of Contents

Table of Authorities

*Authorities upon which we chiefly rely are marked with asterisks.

Glossary

FSI	Financial Services Institute, Inc.
SEC	Securities and Exchange Commission
SIBL	Stanford International Bank, Ltd.
SIPA	Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa *et seq*.
SIPC	Securities Investor Protection Corporation

Interest of the Financial Services Institute, Inc., *Amicus Curiae*

The Financial Services Institute ("FSI") was founded in 2004 with a clear mission**:** to ensure that all individuals have access to competent and affordable financial advice, products and services delivered by a growing network of independent financial advisors and independent financial services firms.

FSI's members comprise independent broker-dealers and their independent contractor registered representatives. FSI has over 100 broker-dealer member firms with more than 138,000 affiliated registered representatives who serve more than 14 million American households. FSI also has more than 35,000 independent financial advisor members.

FSI's members' mission to provide affordable financial services to middle-class Americans is severely threatened by the interpretation of the Securities Investor Protection Act of 1970 ("SIPA") that the SEC urged on the district court. FSI files this brief to discuss briefly how that is so and to urge the Court to reject the SEC's congressionally unauthorized rewriting of SIPA's central provisions.

SUMMARY OF ARGUMENT

Since its enactment in 1970 SIPA has been understood to provide targeted protection to investors who have entrusted securities or other property to the custody of a broker-dealer that becomes insolvent. It was not intended or written nor has it been understood to provide general protection against the fraudulent *creation and marketing* of securities.[1] As SIPA has been applied without controversy for decades, the assessments levied on registered broker-dealer members of SIPC were bearable, and the system worked well to provide limited relief to those who had entrusted their property to brokers who became bankrupt. This brief *amicus curiae* is respectfully submitted to call the Court's attention to how devastating the SEC's revolutionary interpretation of SIPA would be for the independent broker-dealers and financial advisors who comprise FSI's membership, and to request the Court to reject it.

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[1] SIPC's website reflects the societal understanding that its function does not include providing general protection against investment fraud:

> "Insurance" for investment fraud does not exist in the U.S. The Federal Trade Commission, Federal Bureau of Investigation, state securities regulators and other experts have estimated that investment fraud in the U.S. ranges from $10-$40 billion a year. . . .
>
> With a reserve of slightly more than $1 billion, SIPC could not keep its doors open for long if its purpose was to compensate all victims in the event of loss due to investment fraud.

http://www.sipc.org/Who/NotFDIC.aspx (last accessed April 18, 2013). The SEC's misguided effort in this case would put SIPC on track to do exactly that.

ARGUMENT

I. SIPC Assessments Impose Significant Costs on Independent Broker-Dealer Firms.

FSI's independent broker-dealer member firms already bear significant SIPC assessments. All registered broker-dealer firms are required by SIPA to be members of SIPC and each SIPC member firm is required to pay SIPC assessments in an amount that is a function of two variables: (i) the level of that broker-dealer's net operating revenues and (ii) the total payments that SIPC has been required to make to all investors nationwide whose property was lost.

In recent years, the negative financial and investing climate has exacerbated the drain on SIPC's resources, and consequently SIPC assessments on all registered broker-dealers, including of course FSI's member firms, have grown substantially.

For example, a small independent broker dealer that had approximately $27 million in revenue in 2012 would have been required to pay a SIPC assessment of approximately $38,000, or about 250 times the assessment it paid in 2008. Likewise, a mid-sized firm with $98 million in 2012 revenue would have been assessed about $120,000, or almost 800 times its 2008 assessment. Admittedly, 2008 was a low assessment year, but it is incontestable that SIPC member firms' assessments have substantially increased versus earlier years and show no sign of

abating. The smaller broker-dealers in particular have to bear significant financial burdens as a result.

II. The SEC's Approach Would Transform SIPC's Fund and Devastate Independent Broker-Dealers.

Profit margins for FSI's independent broker-dealer firms are generally very small. From 2004 to 2011, the average annual profit margin for such firms was 1.85%.[2] These small firms simply do not have the resources to absorb large and unexpected increases in SIPC fees.

Consequently, the growth in SIPC assessments illustrated above has imposed increasing financial burdens on broker-dealers, particularly the smaller firms who comprise the FSI membership. However lamentable and burdensome, though, at least the increased assessments were the result of a duly debated and enacted legislative scheme. If SIPA were given the interpretation urged on the Court by the SEC, so as to provide a general remedy for investment fraud, SIPC's assessments would soar and harm not only many of FSI's member firms and individuals but also the individual investors who benefit from access to their advice.

In this case, the SEC admitted to the district court that the "massive Ponzi scheme" engineered by the fraudsters left their victims holding "approximately

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[2] 2012 Broker-Dealer Financial Performance Study at p. 1, Financial Services Institute, Inc., *see* http://www.financialservices.org/bdstudy.aspx (last accessed April 18, 2013).

$7.2 billion of SIBL CDs." SEC's Memorandum of Points and Authorities in Support of Application, December 12, 2011, at 7. SIPC's reserve fund at the end of 2011 totaled only $1.4 billion.[3] Covering all of the SIBL investors' losses – not to mention losses from other similar schemes – would obviously exhaust SIPC's reserve fund and result in very substantial ongoing assessments.

The results of excessively high SIPC assessments would continue to harm the ability of the smaller, independent broker-dealers to compete in an already shrinking marketplace. For example, in 2008 there were more than 5,000 broker-dealer firms; by 2012 that number had fallen to just over 4,500. Approximately 175 broker-dealer firms closed in 2009 alone, the first year of the increased SIPC assessments.

The decline of the smaller independent broker-dealer firms would be accelerated by the SEC's interpretation of SIPA, and the consequences of that decline would have a significant impact on the securities industry and many of the Nation's investors. Smaller independent broker-dealer firms and the independent financial advisors associated with them typically provide financial services and products to middle-class investors who are not served by larger firms. The smaller investors in America increasingly require the smaller firms' assistance to save for

[3] Securities Investor Protection Corporation Annual Report at p. 27, available at http://www.sipc.org/Portals/0/PDF/2011_Annual_Report.pdf (last accessed April 18, 2013).

their children's education and for their own retirements. The latter need is increasingly urgent as the country passes from the era when defined benefit pensions funded the retirements of many citizens.

Conclusion

The SEC's interpretation of the SIPA would radically expand SIPC's mission and coverage, and would bring about even more explosive growth in the assessments on SIPC members. Such a change in the statutory scheme should be mandated, if at all, only by the Congress, where the interests of all interested parties could be heard and considered before taking definitive action. In this case, at this time, the Court should decline the SEC's invitation to rewrite the statute.

Respectfully submitted,

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April 19, 2013

Certificates of Compliance

1. FRAP Rule 29(a), Circuit Rule 29(b). All parties consent to the filing of this amicus curiae brief.

2. Circuit Rule 29(d). Counsel for FSI hereby certifies that a separate brief is necessary because FSI's independent broker-dealer members and their independent contractor registered representatives and FSI's independent financial advisors would be uniquely damaged by the SEC's interpretation of SIPA.

3. FRAP Rule 29(c)(5). FSI's attorneys authored this brief without assistance, and no person other than FSI paid the expenses of its preparation.

4. FRAP 32(a)(7)(B); Circuit Rule 32(a)(2)(C). This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 1,008 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

5. FRAP 32(a). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman Type.

Dated: April 19, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief Amicus Curiae of Financial Services Institute, Inc. in support of the District Court's Order was served on April 19, 2013 upon the following individuals via ECF:

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