

## **INVESTORS COMMITTEE STATEMENT**

### **Regarding Claims against the SEC**

Dallas, Texas

January 7, 2011

The Investors Committee is regularly asked questions concerning the potential liability of the United States government for the damages caused to investors by the Stanford fraud. In particular, the Committee is asked whether it is possible to have the Securities and Exchange Commission (“SEC”) compensate investors for their losses and/or pay the expenses being incurred through the Receivership.

These questions are understandable – there is little doubt that the SEC failed in its oversight and regulation of the Stanford entities. The SEC’s own Inspector General confirmed that conclusion in reports detailing the various ways in which the SEC failed to act to stop the Stanford fraud. In light of those well-documented failings, many Stanford investors have indicated their desire to sue the SEC in a civil lawsuit and seek to hold the agency responsible for investor losses.

The Investors Committee issues this statement to address both the process of filing an administrative claim with the SEC and the possibility of suing the SEC in a civil lawsuit.

#### **I. Can Stanford Investors Successfully Sue the SEC?**

Generally speaking, governmental agencies cannot be sued and are protected by the doctrine of “sovereign immunity.” The U.S. Government (and its various agencies) can only be sued if the government agrees to be sued. Under certain narrow circumstances, individuals can bring lawsuits against the U.S. Government (and its agencies) pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (the “FTCA”).

The FTCA does not permit a lawsuit against the government arising out of “the exercise or performance or failure to exercise or perform a discretionary duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. §2680(a). The “discretionary function” exception to the FTCA is one of many significant (and possibly insurmountable) hurdles that any lawsuit against the SEC would have to clear.

There is (and can be) no guarantee that Stanford investors would achieve any recovery from an FTCA lawsuit against the U.S. Government. In fact, there is (and can be) no guarantee that such a lawsuit would survive a motion to dismiss. Perhaps the only thing that can be said with relative confidence about an FTCA lawsuit against the U.S. Government is that such a lawsuit would be incredibly difficult to prosecute successfully and would require many years to reach a final resolution.

#### **II. Overview of the FTCA Administrative Claim Process.**

Prior to filing suit against the SEC under the FTCA, an investor **must** present his claim to the SEC. 28 U.S.C. § 2675. The filing of such a claim is **mandatory**. A lawsuit cannot be filed under the FTCA unless a valid, timely claim has been presented to the SEC. Claims must be filed within two years after the claim accrues. 28 U.S.C. § 2401.

An investor may present his claim on a standard, government-issued form (Form 95) or by letter. The claim must include enough facts to allow the SEC to investigate the merits of the claim. It must also include the exact amount of money damages the investor is claiming. The claim must be submitted to the SEC.

Once a claim is submitted, the SEC has up to six months to make a decision. If the SEC rejects an investor's claim, the investor has the right to file a lawsuit against the SEC but must do so within six months after the claim is denied. If the SEC does not respond to the claim within six months, an investor may either wait for the SEC to respond to the claim or proceed with a lawsuit. Until the SEC makes a decision on an investor's claim, there is no deadline for proceeding with a lawsuit.

### **III. When Does the Two-Year Filing Period Expire?**

Under the FTCA, an investor must file his/her claim within two years after he/she "discovered both his injury and its cause." *United States v. Kubrick*, 444 U.S. 111, 120 (1979). Ultimately, a court will likely have to decide when Stanford investors "discovered" their injury and its cause. Arguably, the two year period began to run on February 16, 2009, when the SEC filed its lawsuit against the Stanford entities, such that the two year period will expire on February 16, 2011. While arguments might be made for a later deadline, no one can predict how a court might ultimately rule on such arguments. **Accordingly, any investor wishing to submit an administrative claim to the SEC should do so no later than February 16, 2011.**

### **IV. Do Investors Need a Lawyer to File Claims Against the SEC?**

It is not necessary for investors to retain a lawyer to file an administrative claim against the SEC, but it is certainly advisable to consult with counsel regarding the process. The FTCA is a complex statute. While the standard claim form appears relatively straightforward, there are certain requirements that must be met in order to present a valid claim. An unrepresented investor's failure to properly file his/her administrative claim may well bar that investor from participating in any lawsuit that is brought against the SEC.

The Investors Committee urges investors to consult with counsel of their choosing before filing an administrative claim. Investors who are currently represented by counsel with respect to their Stanford investments should consider consulting, in the first instance, with those lawyers concerning the filing of these administrative claims.

The Investors Committee is aware of at least one lawyer who is attempting to assemble a group of Stanford investors for the purpose of submitting administrative claims to the SEC. **The Investors Committee has not, and will not, endorse or recommend any particular lawyer (or lawyers) – including the lawyers who serve on the Investors Committee – to assist investors with respect to the filing of administrative claims.**

### **V. Is the Investors Committee Going to Submit Claims or Sue the SEC?**

**No, as to both parts of the question.**

The Investors Committee will not be filing any administrative claims with the SEC. That is so for two separate reasons. First, administrative claims under the FTCA are individual claims that

must be filed by individual Stanford investors (or their counsel). The Investors Committee (including the Examiner) does not represent, and cannot act on behalf of, any individual investor. Second, the Order establishing the Investors Committee does not authorize the Committee to act with respect to matters (like the filing of FTCA claims) outside of the Stanford receivership.

The Investors Committee does not anticipate filing a lawsuit against the SEC (or any other governmental agency). That is so for three separate reasons. First, it is doubtful that the Investors Committee would have the authority or the legal standing to bring an FTCA action against the SEC. Second, various members of the Investors Committee have devoted considerable time, research and analysis to the viability of a civil lawsuit against the SEC. In order to succeed, a lawsuit against the SEC pursuant to the FTCA would have to overcome substantial (and potentially insurmountable) legal hurdles, including the “sovereign immunity” that typically shields the government from lawsuits. Third, the role of the Investors Committee is to work with the Receiver to investigate (and prosecute) claims against various third parties for the benefit of the Receivership Estate.

#### **VI. What is the Point of Submitting Administrative Claims?**

While the Investors Committee does not intend to bring a civil action against the SEC, it is possible that one or more Stanford investors will ultimately file a class action lawsuit against the SEC under the FTCA. Only those investors who timely filed an administrative claim with the SEC would be eligible to participate in any such class action lawsuit (should one ultimately be filed). Accordingly, **submitting an administrative claim before February 16, 2011, preserves an investor’s ability to participate in any class action lawsuit brought against the SEC in the future.**

#### **VII. Do Individual Investors Have to File Lawsuits Against the SEC?**

Individual investors who have timely submitted a valid administrative claim have the right to file a lawsuit against the United States government under the FTCA under two circumstances: (i) if the claim was denied, or (ii) if no decision was made with respect to the claim within six (6) months after its filing. It may not be necessary for individual investors to file individual lawsuits because (as noted above) it is likely that one or more class action lawsuits may be filed against the SEC pursuant to the FTCA. The Investors Committee anticipates that any such class action lawsuits would be filed on behalf of all investors who timely submitted valid administrative claims under the FTCA.

#### **VIII. Final Thoughts.**

The foregoing statement is not intended to convey legal advice to any Stanford investor. While the Examiner and several members of the Investors Committee are lawyers, this statement is not being issued for the purpose of, and should not be construed as, legal advice as to any matter addressed herein. If individual Stanford investors believe they require legal advice with respect to the matters addressed in this statement, such investors should consult with a lawyer they have selected for that purpose.