

114TH CONGRESS
2D SESSION

H. R. 5852

To amend the Securities Investor Protection Act of 1970 to confirm that a customer's net equity claim is based on the customer's last statement and that certain recoveries are prohibited, to provide the Securities and Exchange Commission with oversight of the Securities Investor Protection Corporation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 2016

Mr. LUETKEMEYER (for himself, Mr. SESSIONS, and Mrs. CAROLYN B. MALONEY of New York) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To amend the Securities Investor Protection Act of 1970 to confirm that a customer's net equity claim is based on the customer's last statement and that certain recoveries are prohibited, to provide the Securities and Exchange Commission with oversight of the Securities Investor Protection Corporation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SECURITIES INVESTOR PROTECTION ACT OF**
2 **1970 AMENDMENTS.**

3 (a) NET EQUITY BASED ON LAST STATEMENT.—
4 Section 16(11) of the Securities Investor Protection Act
5 of 1970 (15 U.S.C. 78lll(11)) is amended to read as fol-
6 lows:

7 “(11) NET EQUITY.—

8 “(A) IN GENERAL.—The term ‘net equity’
9 means the dollar amount of the account or ac-
10 counts of a customer, to be determined by—

11 “(i) calculating the sum which would
12 have been owed by the debtor to such cus-
13 tomer if the debtor had liquidated, by sale
14 or purchase on the filing date—

15 “(I) all securities positions of
16 such customer (other than customer
17 name securities reclaimed by such
18 customer); and

19 “(II) all positions in futures con-
20 tracts and options on futures con-
21 tracts held in a portfolio margining
22 account carried as a securities account
23 pursuant to a portfolio margining pro-
24 gram approved by the Commission, in-
25 cluding all property collateralizing
26 such positions, to the extent that such

1 property is not otherwise included
2 herein; minus

3 “(ii) any indebtedness of such cus-
4 tomer to the debtor on the filing date; plus

5 “(iii) any payment by such customer
6 of such indebtedness to the debtor which is
7 made with the approval of the trustee and
8 within such period as the trustee may de-
9 termine (but in no event more than sixty
10 days after the publication of notice under
11 section 8(a)).

12 “(B) TREATMENT OF CERTAIN COM-
13 MODITY FUTURES CONTRACTS.—A claim for a
14 commodity futures contract received, acquired,
15 or held in a portfolio margining account pursu-
16 ant to a portfolio margining program approved
17 by the Commission or a claim for a security fu-
18 tures contract, shall be deemed to be a claim
19 with respect to such contract as of the filing
20 date, and such claim shall be treated as a claim
21 for cash.

22 “(C) TREATMENT OF ACCOUNTS HELD BY
23 A CUSTOMER IN SEPARATE CAPACITIES.—In de-
24 termining net equity under this paragraph, ac-
25 counts held by a customer in separate capaci-

1 ities shall be deemed to be accounts of separate
2 customers.

3 “(D) RELIANCE ON FINAL CUSTOMER
4 STATEMENT.—

5 “(i) IN GENERAL.—In determining
6 net equity under this paragraph, the posi-
7 tions, options, and contracts of a customer
8 reported to the customer as held by the
9 debtor, and any indebtedness of the cus-
10 tomer to the debtor, shall be determined
11 based on—

12 “(I) the information contained in
13 the last statement issued by the debt-
14 or to the customer before the filing
15 date; and

16 “(II) any additional written con-
17 firmations of the customer’s positions,
18 options, contracts, or indebtedness re-
19 ceived after such last statement but
20 before the filing date.

21 “(ii) EXCEPTION WHEN DEBTOR’S
22 RECORDS INDICATE HIGHER VALUE.—Not-
23 withstanding clause (i), if the books and
24 records of the debtor indicate that the net
25 value of a customer’s positions, options,

1 and contracts reported to the customer as
2 held by the debtor, and any indebtedness
3 of the customer to the debtor, is greater
4 than the net value of the customer as cal-
5 culated under clause (i) using the cus-
6 tomer's last statement, then the determina-
7 tion of the net equity of the customer
8 under this paragraph shall be done using
9 the books and records of the debtor instead
10 of the customer's last statement.

11 “(iii) FRAUD EXCEPTION.—The provi-
12 sions of this subparagraph shall not apply
13 to any customer that—

14 “(I) knew the debtor was in-
15 volved in fraudulent activity with re-
16 spect to any customer of the debtor
17 which reasonably indicated a fraud
18 adversely affecting a substantial num-
19 ber of customers; or

20 “(II) was a person that—

21 “(aa) was, or was required
22 to be, registered—

23 “(AA) as a broker or
24 dealer under the Securities
25 Exchange Act of 1934; or

1 “(BB) as an investment
2 adviser under the Invest-
3 ment Advisers Act of 1940,
4 or that would have been re-
5 quired to register as an in-
6 vestment adviser under the
7 Investment Advisers Act of
8 1940 but for section 203(m)
9 of such Act;

10 “(bb) knew, or, due to the
11 activities of such person causing
12 such person to be described
13 under item (aa), should have
14 known, that the debtor was in-
15 volved in fraudulent activity with
16 respect to any customer of the
17 debtor; and

18 “(cc) did not notify SIPC,
19 the Commission, or law enforce-
20 ment personnel that the debtor
21 was involved in such fraudulent
22 activity.”.

23 (b) ALLOCATION OF CUSTOMER PROPERTY TO CUS-
24 TOMERS.—Section 8(c) of the Securities Investor Protec-
25 tion Act of 1970 (15 U.S.C. 78fff–2(c)) is amended—

1 (1) in paragraph (1), by amending subpara-
2 graph (B) to read as follows:

3 “(B) second, to customers of such debtor,
4 as described under paragraph (4);” and

5 (2) by adding at the end the following:

6 “(4) ALLOCATION OF CUSTOMER PROPERTY TO
7 CUSTOMERS.—

8 “(A) IN GENERAL.—Allocations of cus-
9 tomer property to customers under paragraph
10 (1)(B) shall be made such that customers share
11 in customer property based on a methodology—

12 “(i) based on the net equity of a cus-
13 tomer, as determined using the last state-
14 ment issued by the debtor to the customer
15 before the filing date;

16 “(ii) determined by the trustee, in
17 consultation with the Commission; and

18 “(iii) approved by the court.

19 “(B) ALTERNATE METHODOLOGY.—If the
20 trustee determines that allocating customer
21 property in accordance with subparagraph (A)
22 would be unfair and inequitable to a substantial
23 segment of customers and would not fully serve
24 the remedial purposes of this Act, allocations of
25 customer property to customers under para-

1 graph (1)(B) shall be made such that customers
2 share in customer property based on a fair and
3 reasonable methodology, with special consider-
4 ation for the typical, non-professional investor,
5 that—

6 “(i) if the trustee determines that it is
7 necessary in order to reach a fair and rea-
8 sonable result, is determined without re-
9 gard to section 16(11)(D);

10 “(ii) is determined by the trustee, in
11 consultation with the Commission; and

12 “(iii) is approved by the court.

13 “(C) PUBLIC NOTICE AND COMMENT.—Be-
14 fore approving a proposed methodology under
15 subparagraph (A)(ii) or subparagraph (B)(ii),
16 the court shall—

17 “(i) notify customers and other inter-
18 ested parties that the court is considering
19 the proposed methodology; and

20 “(ii) provide the customers and inter-
21 ested parties an opportunity to provide
22 comments on the proposed methodology.”.

23 (c) PROHIBITION ON CERTAIN RECOVERIES.—

24 (1) IN GENERAL.—Section 8 of the Securities
25 Investor Protection Act of 1970 (15 U.S.C. 78fff-2)

1 is amended by adding at the end the following new
2 subsection:

3 “(g) PROHIBITION ON CERTAIN RECOVERIES.—Not-
4 withstanding any other provision of this Act, a trustee
5 may not recover any property transferred by the debtor
6 to a customer before the filing date unless, at the time
7 of such transfer, such customer—

8 “(1) knew the debtor was involved in fraudulent
9 activity with respect to any customer of the debtor
10 which reasonably indicated a fraud adversely affect-
11 ing a substantial number of customers; or

12 “(2) was a person that—

13 “(A) was, or was required to be, reg-
14 istered—

15 “(i) as a broker or dealer under the
16 Securities Exchange Act of 1934; or

17 “(ii) as an investment adviser under
18 the Investment Advisers Act of 1940, or
19 that would have been required to register
20 as an investment adviser under the Invest-
21 ment Advisers Act of 1940 but for section
22 203(m) of such Act;

23 “(B) knew, or, due to the activities of such
24 person causing such person to be described
25 under subparagraph (A), should have known,

1 that the debtor was involved in fraudulent ac-
2 tivity with respect to any customer of the debt-
3 or; and

4 “(C) did not notify SIPC, the Commission,
5 or law enforcement personnel that the debtor
6 was involved in such fraudulent activity.”.

7 (2) CONSTRUCTION.—Nothing in this Act, or
8 the amendments made by this Act, shall be con-
9 strued as prohibiting a trustee appointed under the
10 Securities Investor Protection Act of 1970 from re-
11 covering property transferred by a debtor to a per-
12 son who is not a customer of the debtor.

13 (d) DEFINITION OF CUSTOMER STATUS.—Section
14 16(2)(B) of the Securities Investor Protection Act of 1970
15 (15 U.S.C. 78lll(2)(B)) is amended—

16 (1) in clause (ii), by striking “; and” and in-
17 serting a semicolon;

18 (2) in clause (iii), by striking the period at the
19 end and inserting a semicolon; and

20 (3) by adding at the end the following new
21 clauses:

22 “(iv) any person that had cash or se-
23 curities that were converted or otherwise
24 misappropriated by the debtor (or any per-
25 son who controls, is controlled by, or is

1 under common control with the debtor, if
2 such person was operating through the
3 debtor), irrespective of whether the debtor
4 held or otherwise had custody, possession,
5 or control of such cash or securities; and

6 “(v) any other person that the Com-
7 mission, in its discretion and without any
8 need for court approval, deems a customer
9 of the debtor.”.

10 (e) COMMISSION OVERSIGHT OF SIPC.—Section 3 of
11 the Securities Investor Protection Act of 1970 (15 U.S.C.
12 78ccc) is amended by adding at the end the following:

13 “(f) COMMISSION OVERSIGHT OF SIPC.—The Com-
14 mission may—

15 “(1) direct SIPC to take any action pursuant to
16 this Act that the Commission determines is nec-
17 essary or appropriate in the public interest, for the
18 protection of investors, or otherwise in furtherance
19 of the purposes of this Act.; and

20 “(2) issue or revise any regulation under this
21 Act.”.

22 (f) FUND REPLENISHMENT.—Section 4 of the Secu-
23 rities Investor Protection Act of 1970 (15 U.S.C. 78ddd)
24 is amended by adding at the end the following:

25 “(j) FUND REPLENISHMENT.—

1 “(1) REPLENISHMENT PLAN.—If the balance of
2 the Fund decreases by 50 percent or more during a
3 fiscal year, SIPC, in consultation with the Commis-
4 sion, shall establish and carry out a fund replenish-
5 ment plan, under which SIPC shall borrow in the
6 public debt markets on terms and conditions which
7 permit debt repayments and the reasonable buildup
8 of fund reserves to be covered from existing annual
9 assessments.

10 “(2) TRANSFER OF AMOUNTS WITH RESPECT
11 TO FRAUDULENT DEBTORS.—If the Commission de-
12 termines that payments from the SIPC Fund will be
13 required because the management of a debtor (or
14 any person who controls, is controlled by, or is under
15 common control with the debtor, if such person was
16 operating through the debtor) committed fraud, the
17 Commission may transfer amounts from a fund es-
18 tablished under section 308 of the Sarbanes-Oxley
19 Act of 2002 (15 U.S.C. 7246) to the SIPC Fund,
20 if the Commission determines that such transfer
21 will—

22 “(A) enable prompt assistance to cus-
23 tomers of the debtor (or person); and

24 “(B) allow for the maintenance of ade-
25 quate resources in the SIPC Fund.”.

1 (g) COMMISSION REPORT ON LIQUIDATION PRO-
2 CEEDINGS.—Section 11(c) of the Securities Investor Pro-
3 tection Act of 1970 (15 U.S.C. 78ggg(c)) is amended by
4 adding at the end the following:

5 “(3) REPORT ON LIQUIDATION PRO-
6 CEEDINGS.—The Commission shall, after the end of
7 the 90-day period beginning on the date that a liq-
8 uidation proceeding is commenced under this Act,
9 promptly issue a report to the Committee on Finan-
10 cial Services of the House of Representatives and
11 the Committee on Banking, Housing, and Urban Af-
12 fairs of the Senate providing the status of customer
13 claims in such proceeding, including amounts paid
14 under this Act to settle such claims and the amount
15 of outstanding claims.”.

16 **SEC. 2. EFFECTIVE DATE; RULE OF APPLICATION.**

17 (a) IN GENERAL.—The amendments made by section
18 1 shall take effect with respect to a liquidation proceeding
19 under the Securities Investor Protection Act of 1970
20 that—

21 (1) was in progress on the date of the enact-
22 ment of this Act; or

23 (2) is initiated after the date of the enactment
24 of this Act.

1 (b) ONGOING PROCEEDINGS.—Notwithstanding sub-
2 section (a), with respect to a liquidation proceeding under
3 the Securities Investor Protection Act of 1970 that was
4 in progress on the date of the enactment of this Act—

5 (1) section 8(c)(4) of the Securities Investor
6 Protection Act of 1970, as added by this Act, shall
7 not apply to such liquidation proceeding; and

8 (2) the amendments made by section 1 shall not
9 apply with respect to a customer involved in such
10 proceeding if the trustee in such proceeding deter-
11 mines that the customer’s claims under the Securi-
12 ties Investor Protection Act of 1970, as in effect on
13 the day before the date of enactment of this Act,
14 have been fully satisfied.

15 (c) PAYMENT REQUIREMENTS FOR CERTAIN PRO-
16 CEEDINGS.—

17 (1) IN GENERAL.—The trustee with respect to
18 a liquidation proceeding of a debtor under the Secu-
19 rities Investor Protection Act of 1970 shall make
20 such delivery of securities or payment of amounts to
21 the customers of the debtor as are necessary to sat-
22 isfy the net equity claims of such customers before
23 the end of the 60-day period beginning on the date
24 of the enactment of this Act—

1 (A) in the case of any proceeding that was
2 in progress on the date of the enactment of this
3 Act; and

4 (B) in the case of any proceeding—

5 (i) initiated after the date of the en-
6 actment of this Act; and

7 (ii) with respect to which the Securi-
8 ties Investor Protection Corporation had
9 been asked to initiate a proceeding against
10 such debtor before the date of the enact-
11 ment of this Act and had refused.

12 (2) REPORT ON FAILURE TO SATISFY
13 CLAIMS.—If, with respect to a proceeding described
14 under paragraph (1), the net equity claims of the
15 customers of the debtor in such proceeding are not
16 satisfied within the 60-day period required under
17 such paragraph, the Securities and Exchange Com-
18 mission shall issue a report to the Committee on Fi-
19 nancial Services of the House of Representatives and
20 the Committee on Banking, Housing, and Urban Af-
21 fairs of the Senate explaining why such claims were
22 not satisfied before the end of such period.

23 (d) DEFINITIONS.—For purposes of this section, the
24 terms “customer”, “debtor”, “net equity”, and “security”
25 have the meaning given those terms, respectively, under

1 section 16 of the Securities Investor Protection Act of
2 1970.

○