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S. 67

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 change how trustees are appointed, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 7, 2015

Mr. VITTER introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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 change how trustees are appointed, 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restoring Main Street
5 Investor Protection and Confidence Act”.

1 **SEC. 2. SECURITIES INVESTOR PROTECTION ACT OF 1970**
2 **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) APPOINTMENT OF TRUSTEES.—

14 (1) IN GENERAL.—Section 5(b)(3) of the Secu-
15 rities Investor Protection Act of 1970 (15 U.S.C.
16 78eee(b)(3)) is amended to read as follows:

17 “(3) APPOINTMENT OF TRUSTEE AND ATTOR-
18 NEY.—

19 “(A) IN GENERAL.—If the court issues a
20 protective decree under paragraph (1), such
21 court shall forthwith appoint, as trustee for the
22 liquidation of the business of the debtor and as
23 attorney for the trustee, such persons as the
24 court determines best fit to serve as trustee and
25 as attorney from among the persons selected by

1 the Commission pursuant to subparagraph (B).
2 The persons appointed as trustee and as attorney
3 for the trustee may be associated with the
4 same firm.

5 “(B) COMMISSION CANDIDATES.—The
6 Commission shall maintain a list of candidates
7 for the position of trustee and attorney for the
8 trustee for a debtor in a liquidation pro-
9 ceedings, and shall periodically update the list,
10 as appropriate. With respect to a debtor and
11 upon the court issuing a protective decree under
12 paragraph (1), the Commission shall forthwith
13 provide the court with such list.

14 “(C) DISINTEREST REQUIREMENT.—No
15 person may be appointed to serve as trustee or
16 attorney for the trustee if such person is not
17 disinterested within the meaning of paragraph
18 (6), except that for any specified purpose other
19 than to represent a trustee in conducting a liq-
20 uidation proceeding, the trustee may, with the
21 approval of SIPC and the court, employ an at-
22 torney who is not disinterested.

23 “(D) QUALIFICATION.—A trustee ap-
24 pointed under this paragraph shall qualify by
25 filing a bond in the manner prescribed by sec-

1 tion 322 of title 11, United States Code, except
2 that neither SIPC nor any employee of SIPC
3 shall be required to file a bond when appointed
4 as trustee.

5 “(E) PROHIBITION ON TRUSTEE SERVING
6 IN MULTIPLE LIQUIDATIONS.—A trustee may
7 not be appointed under this paragraph if the
8 trustee is currently serving as trustee for the
9 liquidation of the business of another debtor
10 under this Act.”.

11 (2) COMPENSATION FOR TRUSTEE AND ATTOR-
12 NEY.—Section 5(b)(5) of the Securities Investor
13 Protection Act of 1970 (15 U.S.C. 78eee(b)(5)) is
14 amended—

15 (A) in subparagraph (A), by adding at the
16 end the following: “The court shall publicly dis-
17 close all such allowances that are granted.”;

18 (B) by amending subparagraph (C) to read
19 as follows:

20 “(C) AWARDING OF ALLOWANCES.—When-
21 ever an application for allowances is filed pur-
22 suant to subparagraph (B), the court shall de-
23 termine the amount of allowances, giving due
24 consideration to the nature, extent, and value of
25 the services rendered.”; and

1 (C) by adding at the end the following:

2 “(F) SIPC DISCLOSURES.—SIPC shall
3 issue quarterly public reports on—

4 “(i) all payments made by SIPC to
5 the trustee;

6 “(ii) all other costs in connection with
7 the liquidation proceeding, including legal
8 and accounting costs; and

9 “(iii) all additional expenses incurred
10 by SIPC, and the nature of such ex-
11 penses.”.

12 (3) EFFECTIVE DATE.—The amendment made
13 this subsection shall take effect with respect to
14 trustees and attorneys appointed after the date of
15 the enactment of this Act.

16 (e) DEFINITION OF CUSTOMER STATUS.—Section
17 16(2)(B) of the Securities Investor Protection Act of 1970
18 (15 U.S.C. 78lll(2)(B)) is amended—

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

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

23 (3) by adding at the end the following new
24 clauses:

1 “(iv) any person that had cash or se-
 2 curities that were converted or otherwise
 3 misappropriated by the debtor (or any per-
 4 son who controls, is controlled by, or is
 5 under common control with the debtor, if
 6 such person was operating through the
 7 debtor), irrespective of whether the debtor
 8 held or otherwise had custody, possession,
 9 or control of such cash or securities; and

10 “(v) any other person that the Com-
 11 mission, in its discretion and without any
 12 need for court approval, deems a customer
 13 of the debtor.”.

14 (f) DETERMINATION OF NEED OF PROTECTION.—

15 Section 5 of the Securities Investor Protection Act of 1970
 16 (15 U.S.C. 78eee) is amended—

17 (1) in subsection (a)(3)—

18 (A) by amending the heading for such
 19 paragraph by inserting “THE COMMISSION OR”
 20 before “SIPC”;

21 (B) in the first subparagraph (A)—

22 (i) by inserting “The Commission or”
 23 before “SIPC may”; and

24 (ii) by inserting “the Commission or”
 25 before “SIPC determines”; and

1 (C) by redesignating the second subpara-
2 graph (A) and the first subparagraph (B) as
3 clauses (i) and (ii), respectively, and moving
4 such clauses 2 ems to the right; and

5 (2) in subsection (b)(1), by striking “applica-
6 tion by SIPC” and inserting “application by the
7 Commission or SIPC”.

8 (g) TIMING OF SIPC ADVANCES; RESULT OF
9 DELAY.—Section 9 of the Securities Investor Protection
10 Act of 1970 (15 U.S.C. 78fff–3) is amended by adding
11 at the end the following:

12 “(f) TIMING OF SIPC ADVANCES; RESULT OF
13 DELAY.—

14 “(1) IN GENERAL.—SIPC advances made to
15 satisfy customer claims pursuant to subsection (a)
16 shall be made before the end of the 3-month period
17 beginning on the date that is the end of the 6-month
18 period described under section 8(a)(3), plus the
19 amount of any extension granted under such para-
20 graph.

21 “(2) RESULT OF DELAY.—If SIPC fails to
22 make advances to the trustee in the period specified
23 in paragraph (1), then for purposes of calculating a
24 customer’s net equity under this Act, interest shall

1 accrue beginning on the date that is the end of the
2 3-month period specified in paragraph (1).

3 “(3) COURT DETERMINATION.—If the trustee
4 determines that enough information has been pro-
5 vided to SIPC to make an advance pursuant to sub-
6 section (a), the trustee may petition the court to
7 have the court direct SIPC to make such advance.”.

8 (h) TIMING OF PAYMENTS TO CUSTOMERS.—Section
9 8(b) of the Securities Investor Protection Act of 1970 (15
10 U.S.C. 78fff–2(b)) is amended—

11 (1) in paragraph (1), by striking “and” at the
12 end;

13 (2) in paragraph (2), by striking the period at
14 the end and inserting a semicolon; and

15 (3) by inserting after paragraph (2) the fol-
16 lowing:

17 “(3) upon petition by a customer, order the
18 trustee to carry out the obligations of the trustee
19 under this subsection with respect to such customer;
20 and

21 “(4) if the court determines that the trustee
22 has improperly delayed carrying out the obligations
23 of the trustee under this subsection, impose financial
24 sanctions on the trustee.”.

1 (i) COMMISSION AUTHORITY TO REQUIRE SIPC AC-
2 TION.—Section 11(b) of the Securities Investor Protection
3 Act of 1970 (15 U.S.C. 78ggg(b)) is amended to read as
4 follows:

5 “(b) COMMISSION AUTHORITY TO REQUIRE SIPC
6 ACTION.—In the event of the refusal of SIPC to commit
7 its funds or otherwise to act for the protection of cus-
8 tomers of any member of SIPC, the Commission may re-
9 quire SIPC to discharge its obligations under this Act
10 without court approval.”.

11 (j) LIMITATION ON SEC LOANS TO SIPC.—Section
12 4(g) of the Securities Investor Protection Act of 1970 (15
13 U.S.C. 78ddd(g)) is amended by inserting after “this Act”
14 the following: “and the Commission, in consultation with
15 the Secretary of the Treasury, determines that SIPC is
16 unable to borrow in the public debt markets at reasonable
17 terms (both as to yield and maturity)”.

18 (k) INSPECTION OF SIPC MEMBERS BY SEC AND
19 SELF-REGULATORY ORGANIZATIONS.—

20 (1) IN GENERAL.—The Securities Investor Pro-
21 tection Act of 1970 (15 U.S.C. 78aaa et seq.) is
22 amended—

23 (A) in section 11, by adding at the end the
24 following:

1 “(e) INSPECTION OF SIPC MEMBERS BY SEC.—The
2 Commission shall carry out periodic inspections of SIPC
3 members to ensure that the information such members
4 provide to customers, including information contained in
5 account statements and transaction confirmations, is ac-
6 curate.”; and

7 (B) in section 13(e)—

8 (i) by redesignating paragraphs (1)
9 and (2) as subparagraphs (A) and (B), re-
10 spectively, and moving such subparagraphs
11 2 ems to the right;

12 (ii) by striking “The self-regulatory
13 organization” and inserting the following:

14 “(1) IN GENERAL.—The self-regulatory organi-
15 zation”; and

16 (iii) by adding at the end the fol-
17 lowing:

18 “(2) INSPECTION OF INFORMATION PROVIDED
19 TO CUSTOMERS.—Under such regulations as the
20 Commission may prescribe, the self-regulatory orga-
21 nization of which a member of SIPC is a member
22 or in which it is a participant shall inspect or exam-
23 ine such member to—

24 “(A) assess the financial stability of such
25 member; and

1 “(B) ensure that the information such
2 member provides to customers, including infor-
3 mation contained in account statements and
4 transaction confirmations, is accurate.”.

5 (2) REPORT.—Not later than the end of the 1-
6 year period beginning on the date of the enactment
7 of this Act, the Securities and Exchange Commis-
8 sion shall issue a report to the Committee on Finan-
9 cial Services of the House of Representatives and
10 the Committee on Banking, Housing, and Urban Af-
11 fairs of the Senate on the implementation of the
12 amendments made by this subsection.

13 **SEC. 3. EFFECTIVE DATE.**

14 Except as provided under section 2(d)(3), the amend-
15 ments made by section 2 shall take effect with respect to
16 a liquidation proceeding under the Securities Investor Pro-
17 tection Act of 1970 that—

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

20 (2) is initiated after the date of the enactment
21 of this Act.

○