II

113TH CONGRESS
1ST SESSION

S. 1725

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

NOVEMBER 19, 2013

Mr. VITTER (for himself, Mr. SCHUMER, and Ms. LANDRIEU) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Restoring Main Street Investor Protection and Confidence Act''.

SEC. 2. SECURITIES INVESTOR PROTECTION ACT OF 1970 AMENDMENTS.

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

"(11) NET EQUITY.—

"(A) IN GENERAL.—The term 'net equity' means the dollar amount of the account or accounts of a customer, to be determined by—

"(i) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date—

"(I) all securities positions of such customer (other than customer name securities reclaimed by such customer); and

"(II) all positions in futures contracts and options on futures contracts held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission, including all property collateralizing such positions, to the extent that such property is not otherwise included herein; minus

"(ii) any indebtedness of such customer to the debtor on the filing date; plus

"(iii) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 8(a)).

"(B) TREATMENT OF CERTAIN COMMODITY FUTURES CONTRACTS.—A claim for a commodity futures contract received, acquired, or held in a portfolio margining account pursuant to a portfolio margining program approved by the Commission or a claim for a security futures contract, shall be deemed to be a claim with respect to such contract as of the filing date, and such claim shall be treated as a claim for cash.

"(C) TREATMENT OF ACCOUNTS HELD BY A CUSTOMER IN SEPARATE CAPACITIES.—In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

"(D) RELIANCE ON FINAL CUSTOMER STATEMENT.—

"(i) IN GENERAL.—In determining net equity under this paragraph, the positions, options, and contracts of a customer reported to the customer as held by the debtor, and any indebtedness of the customer to the debtor, shall be determined based on—

"(I) the information contained in the last statement issued by the debtor to the customer before the filing date; and

"(II) any additional written confirmations of the customer's positions, options, contracts, or indebtedness received after such last statement but before the filing date.

"(ii) EXCEPTION WHEN DEBTOR'S RECORDS INDICATE HIGHER VALUE.—Notwithstanding clause (i), if the books and records of the debtor indicate that the net value of a customer's positions, options, and contracts reported to the customer as held by the debtor, and any indebtedness of the customer to the debtor, is greater than the net value of the customer as calculated under clause (i) using the customer's last statement, then the determination of the net equity of the customer under this paragraph shall be done using the books and records of the debtor instead of the customer's last statement.

"(iii) FRAUD EXCEPTION.—The provisions of this subparagraph shall not apply to any customer that—

"(I) knew the debtor was involved in fraudulent activity with respect to any customer of the debtor which reasonably indicated a fraud adversely affecting a substantial number of customers; or

"(II) was a person that—

"(aa) was, or was required to be, registered—

"(AA) as a broker or dealer under the Securities Exchange Act of 1934; or

"(BB) as an investment adviser under the Investment Advisers Act of 1940, or that would have been required to register as an investment adviser under the Investment Advisers Act of 1940 but for section 203(m) of such Act;

"(bb) knew, or, due to the activities of such person causing such person to be described under item (aa), should have known, that the debtor was involved in fraudulent activity with respect to any customer of the debtor; and

"(cc) did not notify SIPC, the Commission, or law enforcement personnel that the debtor was involved in such fraudulent activity.".

(b) ALLOCATION OF CUSTOMER PROPERTY TO CUSTOMERS.—Section 8(c) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78fff–2(c)) is amended—

(1) in paragraph (1), by amending subparagraph (B) to read as follows:

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

(2) by adding at the end the following:

"(4) ALLOCATION OF CUSTOMER PROPERTY TO CUSTOMERS.—

"(A) IN GENERAL.—Allocations of customer property to customers under paragraph (1)(B) shall be made such that customers share in customer property based on a methodology—

"(i) based on the net equity of a customer, as determined using the last statement issued by the debtor to the customer before the filing date;

"(ii) determined by the trustee, in consultation with the Commission; and

"(iii) approved by the court.

"(B) ALTERNATE METHODOLOGY.—If the trustee determines that allocating customer property in accordance with subparagraph (A) would be unfair and inequitable to a substantial segment of customers and would not fully serve the remedial purposes of this Act, allocations of customer property to customers under paragraph (1)(B) shall be made such that customers share in customer property based on a fair and reasonable methodology, with special consideration for the typical, non-professional investor, that—

"(i) if the trustee determines that it is necessary in order to reach a fair and reasonable result, is determined without regard to section 16(11)(D);

"(ii) is determined by the trustee, in consultation with the Commission; and

"(iii) is approved by the court.

"(C) PUBLIC NOTICE AND COMMENT.—Before approving a proposed methodology under subparagraph (A)(ii) or subparagraph (B)(ii), the court shall—

"(i) notify customers and other interested parties that the court is considering the proposed methodology; and

"(ii) provide the customers and interested parties an opportunity to provide comments on the proposed methodology.".

(c) PROHIBITION ON CERTAIN RECOVERIES.—

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

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

"(g) PROHIBITION ON CERTAIN RECOVERIES.—Notwithstanding any other provision of this Act, a trustee may not recover any property transferred by the debtor to a customer before the filing date unless, at the time of such transfer, such customer—

"(1) knew the debtor was involved in fraudulent activity with respect to any customer of the debtor which reasonably indicated a fraud adversely affecting a substantial number of customers; or

"(2) was a person that—

"(A) was, or was required to be, registered—

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

"(ii) as an investment adviser under the Investment Advisers Act of 1940, or that would have been required to register as an investment adviser under the Investment Advisers Act of 1940 but for section 203(m) of such Act;

"(B) knew, or, due to the activities of such person causing such person to be described under subparagraph (A), should have known, that the debtor was involved in fraudulent activity with respect to any customer of the debtor; and

"(C) did not notify SIPC, the Commission, or law enforcement personnel that the debtor was involved in such fraudulent activity.".

(2) CONSTRUCTION.—Nothing in this Act, or the amendments made by this Act, shall be construed as prohibiting a trustee appointed under the Securities Investor Protection Act of 1970 from recovering property transferred by a debtor to a person who is not a customer of the debtor.

(d) APPOINTMENT OF TRUSTEES.—

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

"(3) APPOINTMENT OF TRUSTEE AND ATTORNEY.—

"(A) IN GENERAL.—If the court issues a protective decree under paragraph (1), such court shall forthwith appoint, as trustee for the liquidation of the business of the debtor and as attorney for the trustee, such persons as the court determines best fit to serve as trustee and as attorney from among the persons selected by the Commission pursuant to subparagraph (B). The persons appointed as trustee and as attorney for the trustee may be associated with the same firm.

"(B) COMMISSION CANDIDATES.—The Commission shall maintain a list of candidates for the position of trustee and attorney for the trustee for a debtor in a liquidation proceedings, and shall periodically update the list, as appropriate. With respect to a debtor and upon the court issuing a protective decree under paragraph (1), the Commission shall forthwith provide the court with such list.

"(C) DISINTEREST REQUIREMENT.—No person may be appointed to serve as trustee or attorney for the trustee if such person is not disinterested within the meaning of paragraph (6), except that for any specified purpose other than to represent a trustee in conducting a liquidation proceeding, the trustee may, with the approval of SIPC and the court, employ an attorney who is not disinterested.

"(D) QUALIFICATION.—A trustee appointed under this paragraph shall qualify by filing a bond in the manner prescribed by section 322 of title 11, United States Code, except that neither SIPC nor any employee of SIPC shall be required to file a bond when appointed as trustee.

"(E) PROHIBITION ON TRUSTEE SERVING IN MULTIPLE LIQUIDATIONS.—A trustee may not be appointed under this paragraph if the trustee is currently serving as trustee for the liquidation of the business of another debtor under this Act.".

(2) COMPENSATION FOR TRUSTEE AND ATTORNEY.—Section 5(b)(5) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(b)(5)) is amended—

(A) in subparagraph (A), by adding at the end the following: "The court shall publicly disclose all such allowances that are granted.";

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

"(C) AWARDING OF ALLOWANCES.—Whenever an application for allowances is filed pursuant to subparagraph (B), the court shall determine the amount of allowances, giving due consideration to the nature, extent, and value of the services rendered."; and

(C) by adding at the end the following:

"(F) SIPC DISCLOSURES.—SIPC shall issue quarterly public reports on—

"(i) all payments made by SIPC to the trustee;

"(ii) all other costs in connection with the liquidation proceeding, including legal and accounting costs; and

"(iii) all additional expenses incurred by SIPC, and the nature of such expenses.".

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

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

(1) in clause (ii), by striking "; and" and inserting a semicolon;

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

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

"(iv) any person that had cash or securities that were converted or otherwise misappropriated by the debtor (or any person who controls, is controlled by, or is under common control with the debtor, if such person was operating through the debtor), irrespective of whether the debtor held or otherwise had custody, possession, or control of such cash or securities; and

"(v) any other person that the Commission, in its discretion and without any need for court approval, deems a customer of the debtor.".

(f) DETERMINATION OF NEED OF PROTECTION.—Section 5 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee) is amended—

(1) in subsection (a)(3)—

(A) by amending the heading for such paragraph by inserting "THE COMMISSION OR" before "SIPC";

(B) in the first subparagraph (A)—

(i) by inserting "The Commission or" before "SIPC may"; and

(ii) by inserting "the Commission or" before "SIPC determines"; and

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

(2) in subsection (b)(1), by striking "application by SIPC" and inserting "application by the Commission or SIPC".

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

"(f) TIMING OF SIPC ADVANCES; RESULT OF DELAY.—

"(1) IN GENERAL.—SIPC advances made to satisfy customer claims pursuant to subsection (a) shall be made before the end of the 3-month period beginning on the date that is the end of the 6-month period described under section 8(a)(3), plus the amount of any extension granted under such paragraph.

"(2) RESULT OF DELAY.—If SIPC fails to make advances to the trustee in the period specified in paragraph (1), then for purposes of calculating a customer's net equity under this Act, interest shall accrue beginning on the date that is the end of the 3-month period specified in paragraph (1).

"(3) COURT DETERMINATION.—If the trustee determines that enough information has been provided to SIPC to make an advance pursuant to subsection (a), the trustee may petition the court to have the court direct SIPC to make such advance.".

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

(1) in paragraph (1), by striking "and" at the end;

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

(3) by inserting after paragraph (2) the following:

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

"(4) if the court determines that the trustee has improperly delayed carrying out the obligations of the trustee under this subsection, impose financial sanctions on the trustee.".

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

"(b) COMMISSION AUTHORITY TO REQUIRE SIPC ACTION.—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may require SIPC to discharge its obligations under this Act without court approval.".

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

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

(1) IN GENERAL.—The Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) is amended—

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

"(e) INSPECTION OF SIPC MEMBERS BY SEC.—The Commission shall carry out periodic inspections of SIPC members to ensure that the information such members provide to customers, including information contained in account statements and transaction confirmations, is accurate."; and

(B) in section 13(c)—

(i) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and moving such subparagraphs 2 ems to the right;

(ii) by striking "The self-regulatory organization" and inserting the following:

"(1) IN GENERAL.—The self-regulatory organization"; and

(iii) by adding at the end the following:

"(2) INSPECTION OF INFORMATION PROVIDED TO CUSTOMERS.—Under such regulations as the Commission may prescribe, the self-regulatory organization of which a member of SIPC is a member or in which it is a participant shall inspect or examine such member to—

"(A) assess the financial stability of such member; and

"(B) ensure that the information such member provides to customers, including information contained in account statements and transaction confirmations, is accurate.".

(2) REPORT.—Not later than the end of the 1-year period beginning on the date of the enactment of this Act, the Securities and Exchange Commission shall issue a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on the implementation of the amendments made by this subsection.

SEC. 3. EFFECTIVE DATE.

Except as provided under section 2(d)(3), the amendments made by section 2 shall take effect with respect to a liquidation proceeding under the Securities Investor Protection Act of 1970 that—

(1) was in progress on the date of the enactment of this Act; or

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

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