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1ST SESSION

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 capac-

ities 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,

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) 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 para-

graph (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)

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 attor-
3 ney 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-

tion 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

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:

“(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

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(c)—

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.

○