[ORAL ARGUMENT NOT YET SCHEDULED]
No. 12-5286

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Petitioner-Appellant,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Respondent-Appellee

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF THE SECURITIES INVESTOR PROTECTION CORPORATION AND THE DISTRICT COURT'S ORDER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Except for the *amici curiae* listed below, all parties, intervenors, and *amici* who have appeared before the District Court and in this Court are listed in the Initial Brief of the Securities and Exchange Commission, the Corrected *Amicus Curiae* Brief of the Court-Appointed Examiner, the Official Stanford Investors Committee, and the Stanford Victims Coalition, and the Response Brief of the Securities Investor Protection Corporation:

Securities Industry and Financial Markets Association

Financial Services Institute

Hon. Joseph A. Grundfest

B and C. The Rulings Under Review and Related Cases are set forth in the Initial Brief for the Securities and Exchange Commission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel certify that the Securities Industry and Financial Markets Association ("SIFMA") has no parent company and that no publicly-held company owns more than 10% of SIFMA.

RULE 29 CERTIFICATE

Amicus curiae, the Securities Industry and Financial Markets Association ("SIFMA"), is filing a separate brief from the Financial Services Institute, Inc. ("FSI") and Professor Grundfest.

SIFMA is an industry organization that represents the shared interests of various members of the securities industry, including broker-dealers. SIFMA's brief puts before the court the policy concerns raised by SIFMA's members. SIFMA's and Professor Grundfest's briefs offer the Court two different perspectives, with Professor Grundfest focusing on SIPA's history and SIFMA focusing on certain policy considerations of importance to the securities industry. Moreover, after conferring, counsel for SIFMA and FSI determined that in light of the different concerns raised by FSI (focusing only on the concerns of independent broker-dealers) and SIFMA (focusing on the securities markets as a whole) it would be impracticable to submit a single joint brief.

Pursuant to Circuit Rule 29(d), counsel for SIFMA certifies that this separate brief is required to permit SIFMA to raise certain policy concerns of importance to SIFMA's members.

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure the undersigned counsel certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation of this brief, and no person other than the amicus curiae, its members, and its counsel contributed money to fund the preparation of this brief.

Counsel for Appellant the Securities and Exchange Commission and Counsel for Appellee the Securities Investor Protection Corporation consent to the filing of this brief. See Fed. R. App. P. 29(a); D.C. Cir. R. 29(b).

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GLOSSARY

Antiguan Bank:	Stanford International Bank, Ltd.
Antiguan CDs:	CDs issued by the Antiguan Bank
Broker Dealer:	Stanford Group Company
CD(s):	Certificate(s) of Deposit
FSI:	Financial Services Institute
SEC:	Securities and Exchange Commission
SIFMA:	Securities Industry and Financial Markets Association
SIPA:	Securities Investor Protection Act of 1970
SIPC:	Securities Investor Protection Corporation

INTEREST OF THE *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") represents the shared interests of hundreds of securities firms, broker-dealers, banks and asset managers of all sizes. These interests include ensuring the availability of an efficient and economical liquidation process, and a limited insurance scheme to protect customers of broker-dealers from the loss of any assets entrusted to a broker-dealer, in the event of a broker-dealer's insolvency. It does not include providing investors insurance protection for any loss in the value of securities due to investment risk or securities fraud. The cost of any such insurance scheme would be prohibitively expensive and undermine the stability of the SIPC Fund which is key to the Securities Investor Protection Act's ("SIPA") purpose of promoting investor confidence by assuring investors that they can safely entrust investments to a broker-dealer—an area of particular concern for SIFMA's members. Even if it were not, creating such a scheme would be unwise because it would be difficult to administer, susceptible to abuse and supportive of unwarranted risk taking. Accordingly, SIFMA and its members have an acute interest in preserving the carefully crafted and limited insurance scheme created by SIPA, which also created the Securities Investor Protection Corporation ("SIPC"). This is especially true because many SIFMA members are members of, and pay assessments to, SIPC and these assessments fund the SIPC Fund, which provides protection to the customers of an insolvent broker-dealer.

The District Court's decision—that (1) to overcome SIPC's determination that a SIPA liquidation of the Stanford Group Company (the "Broker Dealer") was not appropriate, the Securities and Exchange Commission ("SEC") had to prove by a preponderance of the evidence that SIPC has refused to act for the protection of the Broker Dealer's customers, and that (2) purchasers of certificates of deposit ("Antiguan CDs") issued by Stanford International Bank, Ltd. (the "Antiguan Bank") are not "customers" of the Broker Dealer—is not only consistent with SIPA's purpose, but is also supported by compelling public policy considerations.

Accepting the interpretation of SIPA advanced by the SEC (even if done only in this case) would not advance SIPA's goal of assuring investors that they can expect that cash or securities left on deposit or entrusted to a broker-dealer to be safely returned to them in the event of a broker-dealer's insolvency. However, it may cause the SIPC Fund to become exhausted, causing an increase in assessments borne by SIFMA's members, which would, in turn, increase the costs borne by investors (and, in some cases, result in investors losing access to the capital markets altogether).

While SIFMA agrees with all points made in SIPC's response brief, see Response Brief of the Securities Investor Protection Corporation, Appellee, dated April 12, 2013 ("SIPC Br."), it writes separately to highlight issues of particular importance to its members.

SUMMARY OF THE ARGUMENT

The District Court's decision that investors in Antiguan CDs do not qualify as "customers" of the Broker Dealer, See Mem. Op. and Order, SEC v. SIPC, No. 11-mc-00678, dated July 3, 2013, ECF No. 34 ("Opinion" or "Op."), is consistent with SIPA's limited purpose and supported by substantial public policy rationales. SIFMA therefore respectfully requests that the Opinion be affirmed.

As an initial matter, in enacting SIPA, Congress intentionally left the decision whether to commence a SIPA liquidation to SIPC and not to the SEC. The District Court's decision that the SEC cannot replace SIPC's judgment with its own, unless the SEC establishes by a preponderance of the evidence that SIPC has failed to comply with its statutory obligations, is consistent with SIPA's language, structure, legislative history, and supported by public policy considerations.

Moreover, the District Court's ruling—that when, as is the case here, investors did not have money on deposit or otherwise entrusted with the Broker Dealer for the purpose of transacting in securities, they were not "customers" of the Broker Dealer—is supported by SIPA's plain language, established precedent and legislative history. Cognizant of SIPA's goal of protecting investors from the risk that they will be unable to regain their property from their broker in the event of a broker's insolvency, courts, including the District Court below, have consistently held that to be a customer of a broker-dealer the claimant must have, at the time of the broker-dealer's insolvency, cash or securities on deposit or otherwise entrusted with the broker-dealer. Because investors in Antiguan CDs did not have cash or securities on deposit or otherwise entrusted with the Broker Dealer, they are not "customers" within the meaning of SIPA and, therefore, denying them SIPA protection in no way undermines SIPA's core policy rationale.

To the contrary, accepting the argument that investors in Antiguan CDs should be deemed "customers" would expand SIPA's mandate far beyond its intended scope to protect investors from the consequences of securities fraud that undermined the value of their investment. Stretching SIPA so far beyond its intended scope will cause a variety of adverse public policy consequences—including, inter alia, exhaustion of the SIPC Fund, creation of a protracted liquidation process for broker-dealers and incentivizing unwarranted risk taking—which should be avoided.

Finally, the District Court's ruling does not leave investors in Antiguan CDs without a remedy. To the contrary, under a recent settlement agreement between the Receiver and Stanford's Antiguan liquidators, investors in

Antiguan CDs will receive distributions from Stanford's estate. Furthermore, investors in Antiguan CDs can obtain recoveries by bringing claims under the 1933 Securities Act (the "Securities Act") or the 1934 Securities and Exchange Act (the "Exchange Act") against Stanford, the entities he controlled and those who aided and abetted him—the avenue Congress envisioned defrauded investors would take to recoup their investments.

ARGUMENT

POINT I
THE SEC'S APPLICATION IS GOVERNED BY A PREPONDERANCE OF THE EVIDENCE STANDARD

The SEC focuses its argument on the contention that the District Court erred by requiring the SEC to show by a preponderance of the evidence that SIPC has failed to comply with its statutory obligations, rather than by merely establishing probable cause supported by hearsay (a standard that all parties agree is lower than the preponderance of the evidence standard).

In crafting SIPA, however, Congress carefully "apportion[ed] responsibility" between SIPC and the SEC. SIPC v. Barbour, 421 U.S. 412, 415 (1975). Thus, while the SEC may compel SIPC to "adopt, amend, or repeal" any bylaw or to produce records and reports to the SEC, see 15 U.S.C. § 78ccc(e)(3), 78ggg(c)(1), Congress left the determination whether to commence a SIPA liquidation to SIPC alone. See 15 U.S.C. § 78eee(a)(3)(A) ("SIPC may . . .

[commence a SIPA liquidation] if SIPC determines that . . . the member . . . has failed . . . to meet its obligations to customers.") (emphasis added). Indeed, as the SEC has previously admitted, the determination of whether a SIPA liquidation should commence is SIPC's "most important responsibility." Br. for Respondent SEC, SIPC v. Barbour, 421 U.S. 412 (1974), No. 73-2055, 1974 WL 186093, at *9.

Interpreting SIPA to leave the liquidation decision in the hands of SIPC is also consistent with SIPA's legislative history. Permitting the SEC to require SIPC to commence a SIPA liquidation on a showing of only probable cause would effectively replace the judgment of SIPC's board of directors with that of the SEC's Commissioners. Importantly, in drafting SIPA, Congress considered and rejected this alternative. Specifically, an early version of SIPA contemplated the SEC Commissioners themselves serving as SIPC's board of directors with the power to determine when a SIPA liquidation should be commenced, an alternative Congress ultimately rejected at the SEC's urging.[1] Compare S. 2348, 91st Cong. § 3(b) (1969), with 15 U.S.C. § 78eee(a)(3)(A).

[1] When Congress was considering SIPA, it was the SEC that objected to the SEC's Commissioners having the authority to determine when a SIPA liquidation should commence. See Hearings on S. 2348, S. 3988, and S. 3989 Before the Subcomm. on Securities of the Comm. on Banking and Currency of the United States Senate, 91st Cong. 17 (1970) (statement of Hamer H. Budge, Chairman of the SEC) (explaining that the SEC's Commissioners should not serve as SIPC's board members because of

Accordingly, SIPA's apportionment of responsibility reflects Congressional judgment that it should be SIPC's independent board of directors that makes the decision whether a liquidation should commence—not the SEC. See 15 U.S.C. § 78ggg(b) (SEC's power in the area is limited to "apply[ing]" to a court for a determination that SIPC has failed to "discharge its obligations"). This legislative judgment is supported by substantial policy considerations. In leaving the determination of whether a SIPA liquidation is required to SIPC, an entity with its own independent source of funding, Congress successfully insulated this decision from political pressure. The neutrality of the decision is especially important when, as is the case here, private actors bear the cost of the liquidation decision. By contrast, allowing the SEC to substitute its judgment for that of SIPC would leave the decision subject to political interference, as it has been here, see SIPC Br. at 15-18, a situation best avoided.

POINT II
INVESTORS IN ANTIGUAN CDS DO NOT QUALIFY AS "CUSTOMERS" OF A SIPC MEMBER

The District Court's holding that investors in Antiguan CDs do not qualify as "customers" of a SIPC member is not only consistent with SIPA's unambiguous language, overwhelming judicial precedent and SIPA's legislative

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potential conflicts posed between the roles of a SIPC board member and an SEC Commissioner).

history, but it is also supported by compelling policy considerations. It should be affirmed.

A. Investors In Antiguan CDs Are Not "Customers" Under SIPA Because They Did Not Have Funds Or Securities Deposited Or Entrusted With The Broker Dealer

It has long been black-letter law that SIPA's protection extends only to those claimants who meet SIPA's definition of "customer," SEC v. Packer, Wilber & Co., 498 F.2d 978, 983 (2d Cir. 1974), a term that, consistent with SIPA's purpose, is interpreted narrowly. See In re Klein, Maus & Shire, Inc., 301 B.R. 408, 418 (Bankr. S.D.N.Y. 2003).

SIPA's plain language is clear: to establish a customer claim, a claimant must show that they are a "person . . . who has a claim on account of securities received, acquired, or held by the debtor" or "any person who has deposited cash with the debtor for the purpose of purchasing securities." 15 U.S.C. § 78lll(2) (emphasis added). As the District Court correctly observed, "deposit" means "'to place [property] for safekeeping' or '[to] giv[e] money or other property to another who promises to preserve it. . . '" Op. at 8.

Consequently, courts have found an investor to be a "customer" if, and only if, the investor entrusted cash or securities to a broker-dealer, and the broker-dealer held the claimant's assets in its custody. See In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 236 (2d Cir. 2011) ("BLMIS I") ("[T]he critical aspect of the 'customer' definition is [whether the investor] entrust[ed] cash or securities to the broker-dealer for the purpose of trading securities."); In re Brentwood Sec., Inc., 925 F.2d 325, 327 (9th Cir. 1991); SEC v. F.O. Baroff Co., 497 F.2d 280, 283 (2d Cir. 1974); In re Hanover Square Sec., 55 B.R. 235, 238 (Bankr. S.D.N.Y. 1985) (SIPA protects "those who had entrusted cash or securities to their broker/dealers for the purpose of securities trading"); 1-12 Collier on Bankruptcy ¶ 12.01, at 12-4 (16th ed. 2012) (explaining that SIPA protects against a broker-dealer's failure in their role "as the custodian of customer cash and securities"). In focusing the definition of "customer" on a broker-dealer's custodial function, courts have stayed true to SIPA's core purpose—protecting investors from the risk that a broker-dealer's insolvency will make it impossible for them to regain assets held for them by the broker-dealer. See Section II.B.

In making its decision, the District Court relied on facts stipulated to by the SEC—including that (1) the Broker Dealer did not physically possess the investors' funds at the time the investors purchased the Antiguan CDs, Op. at 10, and (2) that investors "never deposited [funds] into an account belonging to [the Broker Dealer]." Id. Based on these facts, the District Court correctly concluded that investors in Antiguan CDs are not "customers," a decision consistent with SIPA's plain language, 15 U.S.C. § 78lll(2), and supported by overwhelming legal authority.

For example, in a case with nearly identical facts, a court in the Middle District of Tennessee concluded that an investor who received from the debtor's affiliate the very "investment certificates" she purchased was not a "customer" because she had not deposited or otherwise entrusted her investment with the broker-dealer. See In re Atkeison, 446 F. Supp. 844 (M.D. Tenn. 1977). Specifically, in Atkeison, the investor, Ms. Burns, purchased, and received, investment certificates from an entity which was an affiliate (and, as the court held, an alter-ego) of the insolvent broker-dealer subject to a SIPA liquidation. Id. at 847-48. The Atkeison court held that because Ms. Burns had received her security, she had not deposited that security with the broker-dealer and was therefore not a "customer." Id. at 849. Moreover, the Court explained that the funds that Ms. Burns had paid for the certificates, even if later transferred to the broker-dealer, did not constitute the "entrustment" of funds to the broker-dealer. Id. Accordingly, the Atkeison court concluded that Ms. Burns was not a "customer" under SIPA. Id. This decision is entirely in line with the overwhelming majority of judicial precedent that holds that the key aspect of being a "customer" for the purposes of SIPA is having cash or securities on deposit with the broker-dealer at the time of the broker-dealer's insolvency. See also Barbour, 421 U.S. at 413 (SIPC protects "customers of failing broker-dealers with whom they [have] left cash or securities in deposit"); BLMIS I, 654 F.3d at 236 (same); Brentwood, 925 F.2d at 327 (same); Baroff, 497 F.2d at 283 (same); Hr'g Tr. at 247:10-11, In re Refco, Inc., No. 05-03331 (Bankr. S.D.N.Y. Mar. 14, 2006), ECF No. 63 (the entrustment of property to a broker-dealer "is a dispositive element [of the definition of customer] under SIPA") (emphasis added).

In re Old Naples Securities, Inc., 223 F.3d 1296 (11th Cir. 2000), and In re Primeline Securities Corp., 295 F.3d 1100 (10th Cir. 2002), do not support deviating from this line of precedent and extending SIPA protection to investors in Antiguan CDs. As an initial matter, both Old Naples and Primeline are out of circuit cases that are not controlling. Moreover, Old Naples and Primeline address the situation—not present here—of an investor giving money to an agent of the broker-dealer who then stole the investors' funds and never purchased the securities that the investor believed he was purchasing with the funds entrusted to the broker-dealer. See In re Bernard L. Madoff Inv. Sec. LLC, 708 F.3d 422, 428 (2d Cir. 2013) ("BLMIS II") (no "customer" status when the investors "could not reasonably have thought" that their funds were deposited with the broker-debtor).

The present case is distinguishable from Old Naples and Primeline in at least two ways. First, for the purposes of these proceedings, the SEC has conceded that investors intended to, and did, deposit their funds directly with the Antiguan Bank, not the Broker Dealer. See Op. at 10 ("CD investors wrote checks that were deposited into [the Antiguan Bank] accounts and/or filled out or authorized wire transfer requests asking that money be wired to the [Antiguan Bank] for the purpose of . . . purchasing the [Antiguan CDs].”). As Primeline makes clear, and as makes sense in light of SIPA’s focus on a broker’s custodial function, when investors “invest directly in a third-party company” that is not a SIPC member, they “are not protected by SIPA.” 295 F.3d at 1107 (citation omitted).[2]

Second, unlike the investors in Old Naples and Primeline, the investors here received the very security they sought: the Antiguan CD. See Op. at 10; Atkeison, 446 F. Supp. at 848 (where investor has received the securities, “she has already received the benefit of her bargain, albeit a bad one, for she has the securities themselves” (citation omitted)). Extending the reasoning of Old

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2 The fact that some of the money used to purchase the Antiguan CDs eventually made its way to the Broker Dealer is of no moment. In Old Naples, the investors had sent their funds to an agent of the broker-dealer with the intent that they would be used to purchase securities for the investors’ benefit, but the agent directed the money to a non-broker entity. 223 F.3d at 1301. Accordingly, the court found that “[c]laimants had no reason to know they were not dealing with the Debtor,” id. at 1303, which is not at all the case for investors in Antiguan CDs, who knew they were investing in CDs issued by the Antiguan Bank. Op. at 10. In any event, because SIPA is concerned with a broker’s custodial function, the dispositive question is not whether some money used by investors to purchase the Antiguan CDs made its way to the Broker Dealer, but whether investors intended to deposit their money with the Broker Dealer for the purpose of engaging in securities transactions through the Broker Dealer. 15 U.S.C. § 78lll(2)(B)(ii) (a customer is “any person who has deposited cash with the debtor for the purpose of purchasing securities”); Atkeison, 446 F. Supp. at. 847. The SEC stipulated that this did not happen here. Op. at 10.

Naples and Primeline to the case at hand would not further SIPA's goal of returning investors' deposited cash and securities but would instead allow investors a "do-over" on their Stanford investment. See SIPC v. Associated Underwriters, Inc., 423 F.Supp. 168, 171 (D. Utah 1975) (under SIPA, claimant is only entitled to return of the worthless security, not an opportunity to undo a bad investment decision).[3]

The *Amici* also argue that this Court should deem the Antiguan CD investors to be "customers" of the Broker Dealer because the Antiguan Bank and the Broker Dealer "operated as one" and should therefore be substantively

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[3] The *Amici* assert that the present case is analogous to Primeline because those investors also received the securities they sought to buy. *Amici* Br. at 18. In fact, Primeline investors received pieces of paper which purported to be securities issued by nonexistent companies. 295 F.3d at 1102. Because Primeline investors received certificates issued in the name of companies that never existed, they could not make a claim against the issuers' estate in bankruptcy on the basis of those certificates, nor could they bring a securities fraud claim against the nonexistent issuer. Here, by contrast, investors in Antiguan CDs received real (although, as it turned out, worthless) securities issued by a duly organized Antiguan bank, and which the Antiguan authorities have stated represents a valid claim against the Antiguan Bank's estate. See Stanford International Bank (SIB) Liquidation FAQ, http://www.sibliquidation.com/faq/ (CD holders are unsecured creditors with claims based on their CD purchases) ("Antiguan FAQ"). Far from elevating "form over substance," *Amici* Br. at 24, this critical distinction separates (1) investors who deposited money with an agent of a broker for the purpose of buying securities that were never bought and are therefore entitled to SIPA protection, from (2) those investors that received the securities they sought to purchase and whose remedy lies in the securities fraud claims under the Securities or Exchange Acts.

consolidated. Corrected Amicus Curiae Brief of the Court-Appointed Examiner, the Official Stanford Investors Committee, and the Stanford Victims Coalition, Supporting Petitioner-Appellant, dated January 23, 2013 at 11-14 ("*Amici* Br."). As an initial matter, substantive consolidation is an extreme remedy that should be "used sparingly." In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518 (2d Cir. 1988). It certainly should not be applied to consolidate a SIPA liquidation proceeding with that of a foreign bank over which the court has no jurisdiction and which is subject to its own liquidation proceeding in its own jurisdiction.

In any event, substantive consolidation is of no help to the holders of Antiguan CDs because substantive consolidation does not turn a creditor into a "customer." Substantive consolidation is an equitable doctrine that permits a court overseeing a liquidation of several debtor entities to group their respective assets and liabilities for the purpose of creating a single pool from which to make distributions to their creditors. See id. at 518. It does not convert an unsecured creditor into a customer. Thus, in the Madoff case, Madoff's broker-dealer, Bernard L. Madoff Investment Securities LLC ("BLMIS"), was substantively consolidated with the estate of Bernard L. Madoff, the person. See Consent Order Substantively Consolidating the Estate of Bernard L. Madoff Into the SIPA Proceeding of Bernard L. Madoff Investment Securities LLC and Expressly Preserving All Rights, Claims and Powers of Both Estates, SIPC v. BLMIS, No.

08-01789 (BRL) (Bankr. S.D.N.Y. June 10, 2009), ECF No. 252. However, substantive consolidation did not elevate Mr. Madoff's personal creditors into customers of BLMIS. Rather, Mr. Madoff's unsecured creditors became unsecured creditors of the substantively consolidated debtor. Similarly, in the event that the Antiguan Bank and the Broker Dealer were to be substantively consolidated, the investors in Antiguan CDs, who are unsecured creditors of the Antiguan Bank, see Antiguan FAQ, would at best become unsecured creditors of the substantively consolidated debtor. They would not become customers of the Broker Dealer and would not be entitled to SIPA's protection.

Finally, we agree with SIPC that the *Amici*'s attempt to re-litigate the facts of this case—to which they devote almost two-thirds of their submission—should be disregarded. See SIPC Br. at 54. The SEC and SIPC stipulated to the facts below and should be bound by the choices they made.

In any event, the factual findings of the court overseeing the Stanford receivership, the District Court in the Northern District of Texas (the "Texas Court"), should not guide this Court's interpretation of SIPA—a statute not even considered by the Texas Court. In enjoining Stanford's former employees from removing funds from certain accounts and in recognizing the Antiguan insolvency proceedings of the Antiguan Bank, the Texas court examined different factual records and addressed entirely different legal issues. As an initial matter, the

Amici's selective quotations from the Texas Court in no way support the contention—dispositive to the question of whether holders of Antiguan CDs are "customers" of the Broker Dealer—that the Broker Dealer had custody of these investors' funds or securities.[4] Moreover, contrary to what the *Amici* attempt to imply, the Texas Court made clear that investors in Antiguan CDs are unsecured creditors, not customers. See *Amici* Br., Ex. 1, Broker Injunction, at 19 (stating that the Broker Dealer's employees that suffered losses by virtue of their investments in Antiguan CDs have, "[l]ike all other Stanford investors," "unsecured creditor" claims).

B. The District Court's Holding Is Consistent With SIPA's Purpose

SIPA's legislative history further supports affirmance of the District Court's order. Congress intended SIPA to remedy a specific problem: "provid[ing] financial relief to the customers of failing broker-dealers with whom they had left cash or securities on deposit" and who "found their cash and securities" "tied up in lengthy bankruptcy proceedings." Barbour, 421 U.S. at 413, 415. As SIPA's

[4] In fact, the Receiver, who is one of the *Amici*, previously took the opposite position, stating that "in general, neither [the Broker Dealer], [nor the Broker Dealer's clearing brokers] maintained custody or possession of any physical certificates that evidenced CDs. Instead, these certificates appear to have been physically held by the owner of the CD, by [the Antiguan bank] itself or by another Stanford entity such as Stanford Trust Company (which was not a SIPC member)." Letter from Ralph S. Janvey to Stephen Harbeck, Martens First Decl. Ex. 1, at 3, SEC v. SIPC, 11-mc-00678 (D.D.C. Aug. 12, 2009), ECF No. 1-2.

legislative history makes clear, prior to SIPA, nothing "prevent[ed] the investor from losing [their] entire investment if his broker fails because of operational and, ultimately, financial difficulties." S. Rep. No. 91-1218, at 3 (1970). Congress specifically noted that the inability to obtain the return of their investments from an insolvent broker caused a "weakening of confidence in the U.S. securities markets." H. Rep. No. 91-1613, at 2 (1970). Advocating for SIPA's adoption, the Chairman of the SEC stressed the importance of investors "retain[ing] confidence in the industry's ability to safeguard [] customer funds and securities," describing such confidence as being "vital" to the securities markets. Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, and H.R. 18458 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce of the House of Representatives, 91st Cong. 149-50 (1970) (statement of Hamer H. Budge, Chairman of the SEC). As President Nixon explained: SIPA is designed to protect "the user of investment services" from "operating failure in the mechanisms of the market place." Statement by President Nixon upon signing H.R. 19333 into law, December 30, 1970, in 7 Presidential Documents 6-7 (1971).

As the SEC stipulated below, the holders of Antiguan CDs did not deposit or otherwise entrust their securities or cash with the Broker Dealer. To the contrary, they purchased and received CDs issued by the Antiguan Bank, see Op. at 10, and expected to be repaid by the Antiguan Bank at the CDs' maturity.

Accordingly, prior to the Broker Dealer's insolvency, the holders of Antiguan CDs had no expectation that the Broker Dealer would return their cash or securities "on demand." Thus, denying these investors SIPC protection would in no way undermine SIPA's goal of assuring investors that, if they deposit cash or securities with their broker, their property will be promptly returned in the event of a broker's insolvency. SIPC v. Barbour, 421 U.S. 412, 416 (1975).

On the other hand, SIPA does not, and was never intended to, protect investors from the risk of investing in a fraud. As the Ninth Circuit explained, SIPA "does not comprehensively protect investors from the risk that some deals will go bad or that some securities issuers will behave dishonestly." In re Brentwood Sec., Inc., 925 F.2d 325, 330 (9th Cir. 1991). Indeed, Congress had previously addressed the risk that investors may be defrauded with the Securities Act and the Exchange Act, which afford investors rights of action to recover any investment losses caused by fraud by a securities issuer or in the purchase or sale of securities.[5] It is thus not surprising that time and again courts have held that,

[5] "The Securities Act of 1933 requires that investors have adequate information to exercise sound judgment concerning the securities they purchase; and the Securities and Exchange Act of 1934 insures that they will not be victimized by fraudulent, manipulative, or deceptive selling schemes. But neither statute prevents the investor from losing his entire investment if his broker fails because of operational and, ultimately, financial difficulties." See S. Rep. No. 91-1218, at 3 (1970). It was this gap that SIPA was designed to fill.

where, as here, investor losses are caused by fraud, they are not covered by SIPA. See, e.g., SEC v. S.J. Salmon & Co., Inc., 375 F. Supp. 867, 871 (S.D.N.Y. 1974) (broker-dealer's customers are not entitled to recover money from SIPC for losses incurred by reason of fraud); In re Gov't Sec. Corp., 90 B.R. 539, 540 (Bankr. S.D. Fla. 1988) ("The SIPA does not protect customer claims based on fraud or breach of contract.") (quoting SEC v. Howard Lawrence & Co., Inc., 1 B.C.D. 577, 579 (Bankr. S.D.N.Y. 1975)).[6]

Recognizing that SIPA's limited mandate is solely to protect investors from the risk of losing assets entrusted to a broker-dealer upon its insolvency, rather than losses in the value of their investments caused by securities fraud like that orchestrated by Allen Stanford, in each of the last three years Congress has considered whether to expand SIPA protection to cover the holders of Antiguan CDs. See Ponzi Scheme Investor Protection Act of 2011, H.R. Doc. No. 112-1987 (1st Sess. 2011); Improving Security for Investors and Providing Closure Act of 2012, H.R. Doc. No. 112-4002 (2d Sess. 2012); Improving Security for Investors and Providing Closure Act of 2013, H.R. Doc. No. 113-826 (1st Sess. 2013)

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6 See also SIPC v. Oberweis Sec., Inc. (Matter of Oberweis Sec., Inc.), 135 B.R. 842, 846 (Bankr. N.D. Ill. 1991) (SIPA does not protect against fraud or breach of contract, because damage would have occurred even if the debtor had not become insolvent); In re MV Sec., Inc., 48 B.R. 156, 160 (Bankr. S.D.N.Y. 1985) ("[I]t seems plain that SIPA's primary intent and policy are to protect customers who have cash and securities being held for them by a broker dealer, rather than to serve as a vehicle for the litigation of claims of fraud or violations of Rule 10b-5 . . . .").

(currently before the House Committee on Financial Services). Each time, Congress has refused to do so, instead requiring these investors to seek relief by pursuing their claims for securities fraud.

In short, neither the Congress that enacted SIPA, the President who signed it, nor the courts that have interpreted it for forty-plus years have understood SIPC protection to extend to victims of securities fraud such as the holders of Antiguan CDs. Expanding SIPA's scope to protect such investors would likely bankrupt the SIPC Fund and cause instability in the capital markets—a result that should be avoided.

C. Policy Considerations Support The Affirmance Of The District Court's Order

The SEC contends that because investors purchased the Antiguan CDs on the recommendations of the Broker Dealer's agents and wound up losing their money as a result of Stanford's fraud, they are entitled to protection as "customers" of the Broker Dealer under SIPA because the broker-dealer with whom they dealt has become insolvent. Under the SEC's reasoning, an investor who chose to invest in Enron on the advice of a broker-dealer's agent and purchased Enron's securities through a broker-dealer that happened to go insolvent would have been entitled to SIPC protection for the net amount of their investment if they could have established fraud by the broker-dealer or its agent. In other words, the SEC's purported interpretation of "customer" would convert SIPC into an insurer against securities fraud by a broker-dealer—a function that SIPC was never designed to serve. Moreover, requiring SIPC to do so would not only result in the exhaustion of the SIPC Fund, which has already been seriously taxed by the recent bankruptcies of Lehman Brothers, BLMIS, and MF Global, but would be difficult to administer, promote reckless investing and increase the cost of accessing the capital markets. This would undermine the very goals SIPA was designed to promote. This Court should decline the SEC's attempt to redefine who qualifies as a customer under SIPA.

1. Converting SIPC To Fraud Insurance Will Bankrupt The SIPC Fund And Increase The Cost Of Investing

As explained above, see supra Part II.B, SIPC's mandate is limited to protecting investors from the harm caused by a broker-dealer's insolvency. To further this goal, SIPC maintains the SIPC Fund, on which it can draw to offer investors limited protection (up to $500,000 with a $250,000 limit for cash claims) in the event that an insolvent broker-dealer is unable to satisfy the customers' net equity claims for cash and securities entrusted to the broker-dealer. The SIPC Fund is funded by assessments levied by SIPC on its members, and at the end of 2011 it had less than $1.5 billion in assets. SIPC, Annual Report 2011 at 8. Notably, merely fulfilling its obligations to cover the expenses of the liquidations and to compensate investors for losses caused by the insolvencies of Lehman Brothers, BLMIS, and MF Global has already challenged SIPC, forcing it to substantially increase the amount of assessments it charges its members, which include many SIFMA members. See Randall Smith, Assessment to Bolster Depleted SIPC Fund Draws Opposition, Wall St. J., April 6, 2009, http://online.wsj.com/article/SB123897994852291525.html.

The SIPC Fund's limited assets are nowhere near sufficient to protect investors from securities fraud—which is estimated to cost investors $40 billion per year. See SEC Whistleblower http://www.secwhistleblowerprogram.org/whistleblower-fraud/securities-fraud/ (last visited Apr. 11, 2013). If SIPC's mission is extended to cover not only the risks posed by the insolvency of a broker-dealer, but also to protect investors from the risk of securities fraud, the SIPC Fund will quickly be exhausted (even if such exposure is capped at $500,000, the maximum amount of SIPC protection). In the short term, SIPC may attempt to sustain the SIPC Fund by further increasing the assessments it levies on its members, but that action is not without consequence. See Dan Jamiesson, B-Ds Reel From Higher SIPC Fees, Investment News, August 9, 2009, http://www.investmentnews.com/article/20090809/REG/308099981 (noting that the assessments raised in 2009 "represent a staggering increase in both percentage and dollar terms. . . ."). SIPC member firms would pass these costs on to their customers, thus increasing the cost of investing. Further, as explained at length in the *amicus* brief submitted by FSI, such incremental increases in assessments may result in small investors losing access to the securities markets—the very opposite of what SIPA was designed to accomplish. Brief Amicus Curiae of Financial Services Institute, Inc. in Support of the District Court's Order, dated April 19, 2013 at 4-6. Moreover, if the trigger for SIPC insurance coverage was securities fraud, it is also likely that more failed investments will be blamed on fraud in order to access such insurance. The need to determine whether it was securities fraud or some other cause that caused the investment to lose its value will add delay and complexity to SIPC proceedings, which are supposed to be conducted quickly. See SIPC v. Barbour, 421 U.S. 412, 416 (1975) (SIPC's goal is to ensure the "speedy return of most customer property").

Insuring the risk of securities fraud would also incentivize unwarranted risk taking. At present, SIPC protects investors from a very specific risk: the potential loss of their investment caused by a broker-dealer's insolvency. This makes sense. As courts have recognized, even a diligent and sophisticated investor is unlikely to be able to investigate the financial well-being of its broker-dealer. See SEC v. Ambassador Church Fin./Dev. Grp., Inc., 679 F.2d 608, 614 (6th Cir. 1982) (finding that a broker-dealer's internal operations "are matters over which the broker has complete control" and investors should not "be penalized for choosing a careless, unethical or dishonest broker"); Hr'g Tr. at 29:9-30:23, Picard v. Mets Ltd. P'ship, No. 11 Civ. 3605 (JSR) (S.D.N.Y. Mar. 12, 2012) (explaining that an investor could not possibly hope to perform effective due diligence on a broker-dealer).

By contrast, investors can and should be held responsible for investigating their own investments, and the securities laws provide them with ample opportunities to do so. Basic Inc. v. Levinson, 485 U.S. 224, 239-41 (1988) (holding that the securities laws require the disclosure of all material information to investors). Based on this information, investors are empowered to make investment decisions, and may, for example, choose to make a relatively more risky investment in exchange for greater potential upside. Far from promoting confidence in the stability of the capital markets, Barbour, 421 U.S. at 415, incentivizing risk taking by offering fraud insurance may actually increase fraud by diminishing investor vigilance and protecting investors when they chase yield.

In sum, expanding SIPC coverage to insure the risk of securities fraud is likely to exhaust the SIPC Fund, thereby causing SIPC to charge increased assessments and resulting in higher fees (and, in some cases, lost investment opportunities) faced by investors. It would also be susceptible to abuse and incentivize unwarranted risk taking. Doing so is not only undesirable, it is unnecessary to ensuring that investors in Antiguan CDs have an avenue to obtain recoveries.

2. Investors In Antiguan CDs Have Avenues Of Recovery

Last, but not least, affirming the District Court's holding does not mean that holders of Antiguan CDs will be left without an avenue of recovery. The opposite is true.

As an initial matter, the Receiver has recently resolved a dispute with Antiguan authorities that will pave the way for the Receiver to distribute as much as $300 million to investors in Antiguan CDs. See Am. Joint Mot. To Approve Settlement Agreement and Cross-Border Protocol and Br. in Support at 1, SEC v. Stanford Int'l Bank Ltd. (In re Stanford Int'l Bank Ltd.), No. 09-CV-0298-N (N.D. Tex. Mar. 12, 2013), ECF No. 1793. Investors in Antiguan CDs will also be eligible to obtain distributions from the forfeiture proceedings brought against Mr. Stanford by the U.S. criminal authorities. See Indictment, U.S. v. Robert Allen Stanford, No. 09-cr-00342 (S.D. Tex. June 18, 2009).

Moreover, like other victims of securities fraud, investors in Antiguan CDs can assert conversion and securities fraud claims under the Exchange Act against Stanford and those who allegedly aided-and-abetted his fraud. Indeed, many Stanford investors have already done so. See, e.g., Plaintiffs' Second Amended Class Action Complaint, Troice v. Proskauer Rose, LLP, Civ. A. No. 3:09-cv-01600-F (N.D. Tex. Oct. 9, 2009). In the past, such cases have brought defrauded investors billions of dollars in recoveries. Enron Investors Obtain

Record-Breaking $7+ Billion Recovery, The Enron Fraud, Sep. 27, 2005 http://www.enronfraud.com/enr-cgi-bin/mil?templ=news/articles/7_billion.html (last visited Feb. 28, 2013); Bloomberg News, Judge Approves $3.56 Billion Settlement for WorldCom Investors, N.Y. Times (Sept. 22, 2005), http://www.nytimes.com/2005/09/22/business/22worldcom.html (last visited Apr. 8, 2013) (noting that the total $6.1 billion recovery for investors was second only to Enron); Floyd Norris, Tyco to Pay $3 Billion to Settle Investor Lawsuits, N.Y.Times, May 16, 2007, http://www.nytimes.com/2007/05/16/business/16tyco.html (last visited Apr. 8, 2013).

CONCLUSION

For the foregoing reasons and those expressed in SIPC's brief, SIFMA respectfully submits that the Court should affirm the decision of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,291 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure and this Circuit because it has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman Type.

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CERTIFICATE OF SERVICE

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