

No. 13-20213

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**United States Court of Appeals**  
*for the*  
**Fifth Circuit**

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BRENDA TOLBERT; JOSEPH R. NEUHAUS, JR.;  
LAWRENCE GIFT, JR.,

**PLAINTIFFS-APPELLANTS,**

v.

RBC CAPITAL MARKETS CORPORATION, now known as RBC Capital  
Markets, L.L.C.; RBC CENTURA BANK, now known as RBC Bank, (USA);  
RBC U.S. INSURANCE SERVICES, INC.,

**DEFENDANTS-APPELLEES.**

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On Appeal from the United States District Court for the  
Southern District of Texas, Houston Division, 4:11-cv-107,  
The Honorable Keith P. Ellison, Presiding

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**BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS  
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES  
AND AFFIRMANCE**

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Anton Metlitsky  
O'MELVENY & MYERS LLP  
Times Square Tower  
7 Times Square  
New York, New York 10036  
(212) 326-2000

Gregory F. Jacob  
Raghav Ahuja  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 383-5300

*Counsel for Amicus Curiae*

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

## **SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES**

Defendants have set forth the interested parties in this case at page i of their opening brief. Pursuant to Fifth Circuit Rule 29.2, which requires “a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief,” undersigned counsel of record certifies that, in addition to those persons listed in the parties’ statements, the following listed persons have an interest in this amicus curiae brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1) Securities Industry and Financial Markets Association, amicus curiae in this case;
- 2) Attorneys for amicus curiae: Gregory F. Jacob, Anton Metlitsky, and Raghav Ahuja (O’Melveny & Myers LLP).

/s/ Anton Metlitsky  
Anton Metlitsky

## TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES.....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF IDENTITY AND INTEREST .....	1
PRELIMINARY STATEMENT .....	2
ARGUMENT .....	5
A.    The WAP Does Not Expressly Provide Retirement Income Or Result In A Deferral Of Income Until Termination Of Employment .....	5
B.    The Purpose In The Financial Services Industry Of Deferred Compensation Plans Like The WAP Is Not To Provide Retirement Benefits But Rather To Encourage Employee Retention .....	6
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE .....	18

## TABLE OF AUTHORITIES

Page(s)

### Cases

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brennan*,  
No. 1:07CV475, 2007 WL 632904 (N.D. Ohio Feb. 23, 2007) .....7

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Silcox*,  
No. 01-8800-CIV, 2001 WL 1200656 (S.D. Fla. Oct. 4, 2001) .....11

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wertz*,  
298 F. Supp. 2d 27 (D.D.C. 2002) .....10

*Murphy v. Inexco Oil Co.*,  
611 F.2d 570 (5th Cir. 1980).....5, 15

*Tolbert v. RBC Capital Mkts. Corp.*,  
No. H-11-0107, 2013 WL 3503286 (S.D. Tex. Mar. 27, 2013) ..... 2, 3, 5

### Statutes

29 U.S.C. § 1021 .....4

29 U.S.C. § 1053 .....4

29 U.S.C. § 1082 .....4

### Rules

Fed. R. App. P. 29 .....1

### Regulations

29 C.F.R § 2530 .....4

### Other Authorities

Christopher P. Strief et al., *Industry Behemoths Merrill Lynch, Citigroup  
and UBS Financial Call a Truce on Non-Compete Litigation*, 2 Empl.  
Defection & Recruitment Monitor (Issue No. 1, Winter 2005).....10

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
Helen Kearney & Lee Conrad, <i>The War for Talent, On Wall Street</i> (Mar. 1, 2008) .....	13
James L. Komie, Jin-Ho Chung, <i>The Protocol After Five Years, 2 Securities Arbitration in the Market Meltdown Era: Achieving Fairness in Perception and Reality</i> 223, 225-26 (Practising Law Institute ed., 2009).....	10
Jamie L. Pessin, <i>Your Adviser is Changing Firms. Should You Follow?</i> , Wall St. J. (July 6, 2010).....	7
Karen E. Lahey & Mary Quist-Newins, <i>What do Financial Services Producers Need for Success in Their Careers</i> , J. Fin. Serv. Prof'l 40 (Oct. 2010).....	6, 7, 9
Kimberly P. Cronin, <i>Transitioning Within the Financial Services Industry: What Brokers Must Know Before They Go</i> , Investment News (Oct. 14, 2010) .....	12
Lorie Konish, <i>Competition for Talent in Wealth Industry Stays Strong</i> , On Wall Street (Feb. 1, 2013) .....	8
Lorie Konish, <i>Morgan Stanley Nabs 9 Advisors from Rival Firms</i> , On Wall Street (April 8, 2013) .....	8
Lorie Konish, <i>Wells Fargo Hires 9 Advisors</i> , On Wall Street (June 17, 2013).....	8
Matt Krantz, <i>Changing Financial Advisers Can Be Easy, But Expensive</i> , USA Today (August 26, 2008) .....	9
Paul Sullivan, <i>When Advisers Change Jobs, Ask Questions Before Tagging Along</i> , N.Y. Times (Oct. 12, 2012) .....	9
Shu-hui Lin, <i>Why Firms Award Stock Options -- Examining the Design of Employee Stock Options</i> , 5 Asian Soc. Sci. 85 (Issue No. 7, July 2009) .....	14

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
Sijun Wang & Lenita Davis, <i>Stemming the Tide: Dealing With the Imbalance of Customer Relationship Quality With the Key Contact Employee Versus With the Firm</i> , 22 J. Serv. Mrktg. 533 (2008) .....	13
Suzanne Barlyn, <i>How to Switch Firms... and Not Get Sued</i> , Wall St. J. (Sept. 20, 2010) .....	11
Zeke Faux, <i>Brokers Must Disclose Signing Bonuses as FINRA Board Passes Rule</i> , On Wall Street (Sept. 19, 2013).....	9

## STATEMENT OF IDENTITY AND INTEREST<sup>1</sup>

The Securities Industry and Financial Markets Association (“SIFMA”) is a trade association that brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association.

An important function of SIFMA is to represent the interests of its members in cases addressing issues of widespread concern in the securities and financial industry. SIFMA has an interest in this case because the issues before the Court are vitally important to the operation and continued viability of deferred compensation arrangements of the sort used by its members, and across the financial services industry. In particular, a holding by this Court that plans, like the plan at issue here, are governed by ERISA, would severely hamper SIFMA members’ efforts to combat employee turnover—a result that would be particularly

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<sup>1</sup> Under Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* certifies that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amicus* contributed money intended to fund the preparation or submission of the brief. Pursuant to Federal Rule of Appellate Procedure 29(b), *amicus curiae* has sought permission to file this brief by the accompanying motion for leave to file.

damaging in light of significant recent increases in the industry's labor market fluidity, such as the widespread adoption of the SIFMA-administered Protocol for Broker Recruiting, that have made the retention of productive employees increasingly difficult.

### **PRELIMINARY STATEMENT**

The principal issue in this case is whether the Amended and Restated Wealth Accumulation Plan (the "WAP") is governed by ERISA. The district court correctly concluded that it is not, because neither its express terms nor the surrounding circumstances suggest that it is designed to be a retirement or termination plan. The district court did not doubt that WAP participants may elect to receive plan benefits after retirement, but the court also correctly concluded that this is not enough to make the WAP an ERISA plan: "That some participants may receive their account balances at or after termination, or even use the proceeds for retirement purposes, is a function of their individual election, not of the WAP's express terms, operation, administration or surrounding circumstances." *Tolbert v. RBC Capital Mkts. Corp.*, No. H-11-0107, 2013 WL 3503286, at \*15 (S.D. Tex. Mar. 27, 2013). That conclusion is unassailable, and should be affirmed for the reasons explained by the district court and in defendants' answering brief.

A deeper understanding of the role that deferred compensation arrangements like the WAP play in the financial services industry reveals that the district court's

analysis was, if anything, not emphatic enough. The court concluded that “[n]either retirement nor termination/post-termination income was an expressly stated purpose or goal of the plan.” *Id.* at \*6. That is true, but it is not all: even a quick study of compensation arrangements in the financial services industry reveals that plans like the WAP are widespread and have an affirmative purpose that is completely unrelated to the provision of retirement or termination/post-termination benefits (i.e., a non-ERISA-related purpose)—*viz.*, the retention of productive employees.

Financial services firms have traditionally faced a problem retaining revenue-generating employees. To combat this problem, firms have adopted a variety of deferred compensation arrangements designed to promote loyalty and longevity. Among the most common and effective features of such arrangements is the use of vesting periods—like those mandated by the WAP—requiring employees to serve the firm for a certain period of time prior to receiving a guarantee of deferred pay. A firm seeking to poach a financial advisor from a competitor, and thereby gain access to the advisor’s client relationships, will face difficulty if the advisor has accrued significant unvested benefits. In order to successfully recruit the advisor, the firm will, as a practical matter, have to remunerate him for the future compensation he will forfeit by jumping ship.

The WAP’s employee-retention purpose—and, thus, its non-retirement

purpose—demonstrates that it is not an ERISA plan, which is enough to resolve this case. But recognizing this purpose also demonstrates the severe negative consequences to the financial services industry that would ensue if the district court were to be reversed and plaintiffs’ position adopted. Subjecting deferred compensation arrangements like the WAP to ERISA would prohibit financial services firms from using discretionarily determined vesting periods in the compensation packages of their financial advisors, and would instead force upon firms the rigid vesting schedule required by ERISA’s regulations. *See* 29 U.S.C. § 1053; 29 C.F.R. § 2530. It would further subject the deferred compensation arrangements to funding and reporting requirements that are entirely incompatible with their flexible use by financial services industry employers. *See* 29 U.S.C. § 1082 (funding requirements); 29 U.S.C. § 1021 (reporting requirements). That would in effect eliminate such plans, and thereby strip the financial services industry of an important tool in its efforts to combat the problem of employee turnover.

Certainly, ERISA does not require that result. ERISA was not meant to place restraints on employers’ abilities to combat industry-specific problems—especially problems wholly unrelated to the provision of retirement or termination/post-termination benefits—through tailored compensation arrangements. As this Court has previously stated, the phrase “provides retirement

income,” as used in ERISA’s definition of “employee pension benefit plan,” is “not to be read as an elastic girdle that can be stretched to cover any content that can conceivably fit within its reach.” *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980). To be sure, “[a]ny outright conveyance of property to an employee might result in some payment to him after retirement.” *Id.* But “the words ‘provides retirement income’ patently refer only to *plans designed for the purpose of paying retirement income* whether as a result of their express terms or surrounding circumstances.” *Id.* (emphasis added). And as explained, the WAP and similar plans were designed for an entirely different purpose, wholly unrelated to ERISA—to retain financial advisors. Thus, this Court should affirm the judgment of the district court.

## ARGUMENT

### A. The WAP Does Not Expressly Provide Retirement Income Or Result In A Deferral Of Income Until Termination Of Employment

As the district court correctly concluded, “[c]lose inspection of the WAP provisions themselves reveals no express terms for providing retirement or termination/post-termination income to employees.” *Tolbert*, 2013 WL 3503286, at \*6. Indeed, plaintiffs’ brief makes no effort to dispute the fact that the only way a participant could receive WAP benefits during retirement (or at or after termination) would be by *electing* to receive benefits at this time. In other words,

whether an employee receives WAP benefits during retirement or at or after termination does not depend *in any way* on either the employer's decisions or the plan terms—the only relevant variable is the *participant's* choice. For the reasons stated in the decision below, and in defendants' answering brief, the WAP does not provide retirement income or result in a deferral of income until termination of employment, and is thus not covered by ERISA.

**B. The Purpose In The Financial Services Industry Of Deferred Compensation Plans Like The WAP Is Not To Provide Retirement Benefits But Rather To Encourage Employee Retention**

Not only do the WAP's text and surrounding circumstances fail to demonstrate a purpose to provide retirement or termination/post-termination income, but an analysis of compensation arrangements in the financial services industry reveals an entirely different purpose, unrelated to ERISA—the retention of productive employees. Indeed, plaintiffs' brief implicitly recognizes this purpose, describing the broader employer strategy of which the WAP was a part as “succeed[ing] by using unvested balances ... to encourage retention.” Brief of Appellants 8.

1. Financial services firms have traditionally faced a problem retaining revenue-generating employees, such as financial advisors. Karen E. Lahey & Mary Quist-Newins, *What do Financial Services Producers Need for Success in Their Careers*, J. Fin. Serv. Prof'l 40 (Oct. 2010). *See also Merrill Lynch, Pierce,*

*Fenner & Smith, Inc. v. Brennan*, No. 1:07CV475, 2007 WL 632904, at \*2 (N.D. Ohio Feb. 23, 2007) (noting “fluid nature” of financial services industry, where “brokers routinely switch firms and take their client lists with them”); Jamie L. Pessin, *Your Adviser is Changing Firms. Should You Follow?*, Wall St. J. (July 6, 2010)<sup>2</sup> (noting that “12% to 13% of financial advisors change firms in a typical year”); Press Release, Robert Half Fin. & Accounting, Robert Half Global Survey Reports on Fin. Servs. Hiring Env’t (Apr. 30, 2013)<sup>3</sup> (“Eighty-three percent of financial services executives are at least somewhat concerned about their ability to hang on to top performers.”); Press Release, Deloitte Dev. LLC, Deloitte’s “Talent 2020” Report Reveals 80 Percent of Emps. Plan to Stay with Current Emp’r in the Next Year (Sept. 12, 2012)<sup>4</sup> (“[T]he Financial Services industry runs the highest risk of losing talent.”).

Financial advisors, like many other financial services industry employees, are usually compensated based on the amount of revenue they generate for their firms. *See Lahey & Quist-Newins, supra*, at 40-41. As in other service industries, a financial services firm’s assets consist, in large part, of their revenue-producers’

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<sup>2</sup> Available at <http://online.wsj.com/article/SB10001424052748704324304575306640879967532.html>.

<sup>3</sup> Available at <http://www.prnewswire.com/news-releases/robert-half-global-survey-reports-on-financial-services-hiring-environment-205367811.html>.

<sup>4</sup> Available at [http://www.deloitte.com/view/en\\_US/us/press/Press-Releases/0b6decf9c69b9310VgnVCM2000001b56f00aRCRD.htm](http://www.deloitte.com/view/en_US/us/press/Press-Releases/0b6decf9c69b9310VgnVCM2000001b56f00aRCRD.htm).

client-relationships. As a result, advisors who have developed extensive client networks are often the target of competition between firms. *See, e.g.,* Lorie Konish, *Morgan Stanley Nabs 9 Advisors from Rival Firms*, On Wall Street (April 8, 2013)<sup>5</sup> (reporting that Morgan Stanley hired nine advisors with “more than \$765 million in assets and \$9.2 million in fees and commissions” from various “rival firms” including Merrill Lynch and Wells Fargo) ; Lorie Konish, *Wells Fargo Hires 9 Advisors*, On Wall Street (June 17, 2013)<sup>6</sup> (“Wells Fargo Advisors has hired nine financial advisors from Morgan Stanley, Merrill Lynch and RBC Capital Markets with \$1.12 billion in assets under management.”). *See also* Lorie Konish, *Competition for Talent in Wealth Industry Stays Strong*, On Wall Street (Feb. 1, 2013)<sup>7</sup> (“Financial advisors looking to switch firms have their pick among the wirehouses, regional, boutique, and independent firms who are eager to embrace them.”). Among other incentives, advisors are often offered large “signing bonuses” for jumping ship to competing firms, with the expectation that they will bring their clients along with them. *See, e.g.,* Zeke Faux, *Brokers Must Disclose Signing Bonuses as FINRA Board Passes Rule*, On Wall Street (Sept. 19,

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<sup>5</sup> Available at <http://www.onwallstreet.com/news/Morgan-Stanley-Hires-Nine-Advisors-From-Rival-Firms-2684211-1.html>

<sup>6</sup> Available at <http://www.onwallstreet.com/news/wells-fargo-adds-9-advisors-2685372-1.html>

<sup>7</sup> Available at [http://www.onwallstreet.com/ows\\_issues/23\\_2/competition-for-talent-in-wealth-industry-stays-strong-2682948-1.html](http://www.onwallstreet.com/ows_issues/23_2/competition-for-talent-in-wealth-industry-stays-strong-2682948-1.html)

2013) (noting that “signing bonuses often amount to more than a year’s salary”).<sup>8</sup>

Needless to say, excess turnover can be costly both to firms—which invest large sums in developing their human capital and helping advisors develop client networks—and to their clients, who, upon departure of an advisor, must either rebuild relationships with different firm employees, or transfer their business elsewhere. *See, e.g.*, Paul Sullivan, *When Advisers Change Jobs, Ask Questions Before Tagging Along*, N.Y. Times (Oct. 12, 2012), at B5 (noting that “clients who have become accustomed to a certain investment philosophy will need to ask themselves whether the new adviser will be able to continue that strategy,” and quoting an industry executive who explains “[i]f you’re going from someone with very specific investment knowledge and they’re delivering it in a precise way, that’s very difficult to replicate”); Matt Krantz, *Changing Financial Advisers Can Be Easy, But Expensive*, USA Today (August 26, 2008)<sup>9</sup> (explaining potentially high costs of changing financial advisers). *See also* Lahey & Quist-Newins, *supra*, at 40 (explaining that the most difficult period in the career of a financial services producer is “the initial years, when the individual must discover how to successfully find clients, as well as identify, analyze and address their needs”).

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<sup>8</sup> Available at <http://www.onwallstreet.com/news/brokers-must-disclose-signing-bonuses-as-finra-board-passes-rule-2686681-1.html>

<sup>9</sup> Available at [http://usatoday30.usatoday.com/money/perfi/columnist/krantz/2008-08-26-changing-financial-advisers\\_N.htm](http://usatoday30.usatoday.com/money/perfi/columnist/krantz/2008-08-26-changing-financial-advisers_N.htm).

Historically, however, the costs associated with departing employees were often borne, not only by the firms that they left, but also by the departing employees themselves. When a financial advisor switched firms, litigation would often ensue concerning the advisor's and new firm's right to use client lists and account information maintained by the old firm. *See* James L. Komie, Jin-Ho Chung, *The Protocol After Five Years*, 2 Securities Arbitration in the Market Meltdown Era: Achieving Fairness in Perception and Reality 223, 225-26 (Practising Law Institute ed., 2009) ("Komie Article") (describing environment where "[a]fter years of bitter recruiting litigation it seemed unlikely ... that brokerage firms would simply allow advisors to walk out the door with their clients" and noting that "past practice in the industry, ... under which the advisor often took a wide variety of client information, including account statements, holding pages and copies of client files," was "well-documented in case law"); Christopher P. Strief et al., *Industry Behemoths Merrill Lynch, Citigroup and UBS Financial Call a Truce on Non-Compete Litigation*, 2 Empl. Defection & Recruitment Monitor (Issue No. 1, Winter 2005) ("Since the early 1980s, securities firms have been fighting each other over stockbroker non-solicitation covenants in hundreds of cases per year."). *See also, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wertz*, 298 F. Supp. 2d 27, 29-30 (D.D.C. 2002) (ordering temporary restraining order against departing advisors who were allegedly "soliciting []

former clients ... through telephone calls and mailings paid for by their new employer” and who allegedly disclosed to their new employer “client lists; customers’ names, addresses, telephone numbers; and other confidential and proprietary information of Merrill Lynch regarding client accounts, in order to persuade those customers to transfer their accounts”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Silcox*, No. 01-8800-CIV, 2001 WL 1200656 (S.D. Fla. Oct. 4, 2001) (ordering preliminary injunction against departing advisor who allegedly took customer names, addresses, telephone numbers, Merrill Lynch account numbers, and trust documents). The prospect of litigation, and of advisors being deprived of access to the client information that made them valuable assets to outside employers, served as an impediment to migration.

2. Today, however, industry dynamics are different. In 2004, a number of prominent financial services companies executed the “Protocol for Broker Recruiting.” *See* Komie Article, *supra*, at 225. This agreement, which has become an industry-standard to which defendant is now a party, specifies the type of information a departing advisor may take with him to a new firm, and the manner in which he must do so. *See, e.g.*, Suzanne Barlyn, *How to Switch Firms... and Not Get Sued*, Wall St. J. (Sept. 20, 2010)<sup>10</sup> (noting that over 500 firms participate

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<sup>10</sup> Available at <http://online.wsj.com/article/SB10001424052748703846604575447924199878014.html>.

in the Protocol); Komie Article, *supra*, at 225 (noting that the Protocol has “effectively become an industry standard,” has been acknowledged by the SEC, and has been signed by Merrill Lynch, UBS, Wells Fargo, Morgan Stanley, RBC, Credit Suisse, and Raymond James, among others). The Protocol—administered by SIFMA—allows for much smoother transitions of employees, and furthers clients’ interests of privacy and freedom of choice. *See, e.g.*, Komie Article, *supra*, at 227, 239 (explaining that “[t]he Protocol has [] substantially reduced recruiting litigation between member firms,” and “courts are being called upon far less to issue injunctions prohibiting advisors from freely communicating with their clients”); Kimberly P. Cronin, *Transitioning Within the Financial Services Industry: What Brokers Must Know Before They Go*, Investment News (Oct. 14, 2010)<sup>11</sup> (noting that “[t]here has been more movement recently by financial advisers within the financial services industry than there has been in years” and “[i]t is clear that a current trend toward transitioning from one firm to another within the financial industry exists for financial advisers at every level of production.”).

Thus, while the Protocol has provided significant benefits to the industry, it has also exacerbated a preexisting employee retention problem. Because one

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<sup>11</sup> Available at <http://www.investmentnews.com/article/20101014/FREE/101019941>.

effect of the Protocol was to make it easier for financial advisers to leave their firms, it placed even greater stress on industry members to structure compensation packages so as to provide alternate incentives for employee loyalty and longevity. *Compare id.* (noting that in the 2009-2010 period “[f]inancial advisers ... are reporting that 70-80% of clients are transitioning with them to their new firm) *with* Sijun Wang & Lenita Davis, *Stemming the Tide: Dealing With the Imbalance of Customer Relationship Quality With the Key Contact Employee Versus With the Firm*, 22 J. Serv. Mrktg. 533, 534 (2008) (noting study from 1998 article “project[ing] that on average, 30 percent of a financial advisor’s clients would move with their advisor if he or she were to leave the firm”). *See also* Helen Kearney & Lee Conrad, *The War for Talent, On Wall Street* (Mar. 1, 2008)<sup>12</sup> (“2008 On Wall Street Study”) (explaining that “[f]inancial advisory firms want to grow, but there are fewer newer advisers coming into the industry,” “forc[ing] broker-dealers to boost their ranks by cherry-picking from competitors,” and noting potentially interesting “lab experiment of a supply-demand imbalance”).

One of the principal ways in which financial institutions have dealt with this market dynamic—both before and after the widespread adoption of the Protocol—

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<sup>12</sup> Available at [http://www.onwallstreet.com/ows\\_issues/2008\\_3/war-talent546401-1.html?zkPrintable=true](http://www.onwallstreet.com/ows_issues/2008_3/war-talent546401-1.html?zkPrintable=true). Additional financial advisor compensation information is available at [http://www.onwallstreet.com/global/payout\\_grids.html](http://www.onwallstreet.com/global/payout_grids.html), referred to herein as the “2012 On Wall Street Study.”

is through deferred compensation packages with vesting periods like those in the WAP. Such plans are especially effective in discouraging turnover, because firms seeking to poach financial advisers must, as a practical matter, compensate their target for unvested holdings that would be forfeited on the target's departure from his current firm. *See, e.g.,* Shu-hui Lin, *Why Firms Award Stock Options -- Examining the Design of Employee Stock Options*, 5 *Asian Soc. Sci.* 85, 87 (Issue No. 7, July 2009) (citing John E. Core & Wayne R. Guay, *Stock Option Plans For Non-Executive Employees*, 61 *J. Fin. Econ.* 253-287 (2001)). It is thus no surprise that so many major industry participants include some form of unvested deferred compensation in their financial advisers' pay packages. For example, in 2008, Morgan Stanley increased the vesting period of certain awards granted under its financial advisor deferred compensation programs from four-and-a-half years to eight years, and Morgan Keegan offered a program under which awards did not vest until five years after their grant date. *See* 2008 On Wall Street Study. Similarly, in 2012, Wells Fargo and Janney Montgomery Scott offered programs under which certain awards did not begin vesting for five years and seven years after their grant date, respectively. *See* 2012 On Wall Street Study. *See also* Merrill Lynch & Co., Inc., Merrill Lynch Financial Advisor Capital Accumulation Award Plan (Form 10-K, Ex. 10.27) (Feb. 25, 2008) (stating that awards granted after January 2003 will be subject to eight year cliff vesting).

3. The industry dynamics discussed above confirm what the WAP's text and surrounding circumstances already make clear—the plan's purpose has nothing to do with providing retirement benefits, and everything to do with employee retention, a purpose with which ERISA is wholly unconcerned. A holding to the contrary would subject all such employee-retention plans to ERISA's rigid vesting and funding requirements, and would thus essentially eliminate a crucial employee-retention tool in the financial services industry. Moreover, it would undo a bargain made between firms and financial advisors, and result in substantial liability for employers across the financial services industry.

All that would, of course, be no argument against ERISA's application if that statute were intended to cover such arrangements, but it decidedly was not. ERISA was not meant to place restraints on employers' abilities to combat industry-specific problems—especially problems wholly unrelated to the provision of retirement or termination/post-termination benefits—through tailored compensation arrangements. As stated earlier, the phrase “‘provides retirement income’ ... patently refer[s] only to plans designed for the purpose of paying retirement income whether as a result of their express terms or surrounding circumstances.” *Murphy*, 611 F.2d at 575.

Here, the WAP was designed to increase employee retention, not to provide retirement income. For these reasons, as well as those stated by the district court

and in defendants' answering brief, the WAP is not governed by ERISA.

**CONCLUSION**

The judgment of the district court should be affirmed.

Respectfully submitted,

ANTON METLITSKY  
O'MELVENY & MYERS LLP  
Times Square Tower  
7 Times Square  
New York, New York 10036  
(212) 326-2000

/s/ Gregory F. Jacob  
GREGORY F. JACOB  
RAGHAV AHUJA  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 383-5300

*Counsel for Amicus Curiae*

Dated: October 23, 2013

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure Rules 29(d) and 32(a)(7)(B) because:

1. This brief contains 3,368 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared using proportionally-spaced typeface using Microsoft Word with Times New Roman 14-point font.

*/s/ Anton Metlitsky* \_\_\_\_\_

Anton Metlitsky

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Securities Industry and Financial Markets Association as *Amicus Curiae* in Support of Appellees and Affirmance was filed using this Court's CM/ECF system and thus served by the Court's CM/ECF system by delivery to the following on October 23, 2013:

Joe B. Harrison  
William G. Whitehill  
Stacy R. Obenhaus  
GARDERE WYNNE SEWELL LLP  
1601 Elm Street, Suite 3000  
Dallas, Texas 75201  
[sobenhaus@gardere.com](mailto:sobenhaus@gardere.com)  
[bwhitehill@gardere.com](mailto:bwhitehill@gardere.com)

Geoffrey H. Bracken  
GARDERE WYNNE SEWELL LLP  
1000 Louisiana Street, Suite 3300  
Houston, Texas 77002  
[gbracken@gardere.com](mailto:gbracken@gardere.com)

Sari M. Alamuddin  
Christopher Joseph Boran  
MORGAN LEWIS & BOCKIUS  
77 WestWacker, Suite 500  
Chicago, Illinois 60601  
[salamuddin@morganlewis.com](mailto:salamuddin@morganlewis.com)  
[cboran@morganlewis.com](mailto:cboran@morganlewis.com)

Allyson Newton Ho  
MORGAN LEWIS & BOCKIUS  
1717 Main Street, Suite 3200  
Dallas, Texas 75201-7347  
[aho@morganlewis.com](mailto:aho@morganlewis.com)

/s/ Anton Metlitsky

Anton Metlitsky