UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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DIVISION OF
ENFORCEMENT

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BY ECF

The Honorable David R. Homer
United States Magistrate Judge
United States District Court
Northern District of New York
United States Courthouse
Albany, New York 12207

Re: *SEC v. McGinn, Smith & Co., Inc., et al.*, 10 CV 457 (GLS)(DRH)

Dear Judge Homer:

I write in connection with the letter from Diana and Vincent Gentile to Your Honor and to the Receiver dated September 23, 2011 (Dkt. 389). The Gentiles' letter concerns coverage for victims of the McGinn Smith investment fraud by the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq*., which is administered by the Securities Investor Protection Corporation ("SIPC"), a nonprofit, membership corporation funded by its members. As the question of SIPC coverage is of interest to all the victims in this case, I would like to make several points.

In general, SIPA provides narrow protections for customer assets held by failed broker-dealers. SIPA is not the equivalent of the FDIC, and it does not provide blanket coverage for investment losses. Under SIPA, the Commission has the power to file an application in federal district court to require SIPC to initiate a liquidation proceeding to protect customers of an insolvent broker-dealer. If the Board of Directors of SIPC fails to take such action, the Commission can authorize the Division of Enforcement to compel SIPC to bring a liquidation proceeding. Only the Commission has standing to initiate an action to compel a SIPA liquidation. Neither a private plaintiff nor a Court can independently take such action.

The issue of when the Commission will make a referral to SIPC depends on the facts and circumstances of each case. The question of whether a liquidation is appropriate under the SIPA involves a complex factual inquiry which considers, *inter alia*, the nature of the securities purchased, the type of fraudulent conduct involved, whether securities were custodied at the broker-dealer and the broker-dealer's relationship with affiliated unregistered entities.

The Commission staff takes the concerns of the McGinn Smith victims very seriously, and our focus in this litigation is to hold the wrongdoers accountable and to work with the Receiver to maximize recovery of assets. We are investigating closely the victims' status under SIPA, especially in light of the Commission's recent decision to refer the Stanford matter to SIPC (to date, the SIPC Board has not indicated whether it will take action). *See* Press Release 2011-129, SEC Concludes That Certain Stanford Ponzi Scheme Investors Are Entitled to Protections of SIPA, available at www.sec.gov (June 15, 2011). We anticipate that the Commission will make a determination regarding these issues and will advise the Court and the investors accordingly.

Respectfully submitted,

/s
David Stoelting

cc (by e-mail and ECF): All counsel
Nancy McGinn