UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Three World Financial Center
New York, NY 10281

DIVISION OF
ENFORCEMENT

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

May 22, 2012

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 regarding the issue of coverage by the Securities Investor Protection Act of 1970 (SIPA) of the losses suffered by the victims of the McGinn Smith investment fraud. SIPA created the Securities Investor Protection Corporation (SIPC), which, subject to supervision by the Securities and Exchange Commission, maintains a fund for customer protection.

On September 30, 2011, I wrote to Your Honor and stated that we would advise the Court if the Commission made any determination regarding SIPA coverage. *See* Docket No. 391 (attached). At that time, the Commission had referred to SIPC another investment fraud involving the Stanford Group Company (SGC). Since then, several significant events have transpired.

After SIPC failed to take any action regarding SGC, on December 12, 2011, the Commission filed an Application, an Ex Parte Motion for an Order to Show Cause why the Application should not be granted, and related documents, in the United States District Court for the District of Columbia, Misc. No. 11-MC-678-RLW. The Commission requested that the court enter an order requiring SIPC to file an application for a protective decree with the federal district court for the Northern District of Texas pursuant to Section 5(a)(3) of SIPA with respect to SGC and to otherwise discharge SIPC's obligations under SIPA. The Application was filed seeking to compel SIPC to act in accordance with the Commission's conclusion that, based on the totality of the facts and circumstances, SGC failed to meet its obligations to its customers and that there are SGC customers in need of SIPA protection.

Following a hearing, on February 9, 2012, the district court granted the Commission's Ex parte Motion for an Order to Show Cause and denied SIPC's Motion to Strike. The court stated that it will evaluate the Commission's Application in a summary proceeding. The court noted that it will evaluate the Commission's Application with the understanding that the proceeding will only determine whether SIPC should be compelled to file an application for a protective decree in the Texas federal court; the Texas federal court would then determine whether such a decree should be granted. The court held a hearing on the merits of the Commission's Application on March 5, 2012. The court took the matter under advisement, and we are awaiting a decision.

Due to similar issues raised in the McGinn Smith and SGC cases, the coming decision of the U.S. District Court for the District of Columbia will have relevance to the McGinn Smith case. Consequently, we now anticipate that the Commission will consider whether to request that SIPC initiate a liquidation proceeding for the benefit of McGinn Smith investors, or to seek any relief under SIPA, after the court renders a decision in the SGC matter. At the time of any Commission determination, we will advise the Court and investors accordingly.

Respectfully submitted,

David Stoelting

David Stoelting

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

UNITED STATI
SECURITIES AND EXCHAN
New York Regional
Three World Financial
New York, NY 10:

ATTACHMENT

DIVISION OF
ENFORCEMENT

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

September 30, 2011

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