TRANSCRIPT

December 09, 2009

COMMITTEE HEARING

REP. PAUL E. KANJORSKI

CHAIRMAN

HOUSE COMMITTEE ON FINANCIAL SERVICES, SUBCOMMITTEE ON CAPITAL MARKETS, INSURANCE AND GOVERNMENT SPONSORED ENTERPRISES

WASHINGTON D.C.

REP. PAUL E. KANJORSKI HOLDS A HEARING ON SECURITIES INVESTOR PROTECTION REFORM, PANEL 2

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EX OFFICIO
WITNESSES:
MICHAEL CONLEY,
DEPUTY SOLICITOR,
SECURITIES AND EXCHANGE COMMISSION
STEVE HARBECK,
PRESIDENT,
SECURITIES INVESTOR PROTECTION CORPORATION

KANJORSKI: This hearing will come to order.

I'm pleased to welcome our second panel. But before I introduce members of the panel, may I caution the audience that it's against the rules to have demonstrations of emotions. We understand how feelings run high, but we would appreciate that you extend the same courtesies to the witnesses in this second panel as you did to the witnesses in the first panel -- with the absence of cheering. And that being said, we'll address it no more.

And now I'm pleased to first recognize Mr. Michael Conley, deputy solicitor for the Securities and Exchange Commission. Mr. Conley?

CONLEY: Chairman Kanjorski, Ranking Member Garrett and members of the subcommittee, thank you for the opportunity to appear before you today on behalf of the Securities and Exchange Commission. My name is Michael Conley, and I am the SEC's deputy solicitor. There are a number of issues being discussed here today, but I wish to focus my limited time on explaining the commission's views regarding the (inaudible) -- the liquidation of Bernard Madoff's securities firm. We at the SEC are keenly aware of the devastating losses incurred by the thousands of investors who entrusted their money to Madoff. Many, if not most, of his victims have had their lives upended.

At the SEC, Chairman Shapiro has urged all of us to learn from that experience and reform the way we operate. Over the past year we've taken significant steps in that regard -- reinvigorating the enforcement division, enhancing our inspections, bolstering our training program, revamping our tips and complaints process, and hiring personnel with new skill sets. And we will continue to reform.

With regard to the Madoff liquidation, the commission and its staff have been analyzing SIPA, its legislative history and case law to determine how to properly value the claims of the investors. While claims for losses suffered by investors are determined under SIPA, the statute does not expressly address how to address the net equity in a customer's account when a broker-dealer has engaged in the sort of fraudulent scheme Madoff perpetrated.

As a result, the bankruptcy court will soon hear arguments on the various theories proposed for valuing customer claims. In the end, the court will decide how the investors' claims should be valued.

The Madoff liquidation raises a new question. Specifically, how does SIPA apply when a customer's brokerage statements show non-existent positions in real securities that the broker concocted after the fact to support pre-determined fictional investment returns?

Two primary approaches have been proposed. The first is known as the final account statement method. Under this method, the net equity in customer accounts would be based on the securities positions shown on the final account statements customers received before the firm was placed in liquidation.

The second principal approach is the cash-in cash-out method. Under this approach, net equity is determined by crediting the amount of cash the customer deposited in the account and subtracting any amounts withdrawn from the account.

Based on our analysis, the commission will recommend to the bankruptcy court the customer claims in this case should be determined through the cash-in cash-out method advocated by the trustee in SIPC.

However, we believe that the amount should be adjusted to constant dollars to ensure that investors' claims in this long-running scheme are valued most accurately and fairly. The commission decided not to recommend the final account statement method on the facts of this case because it believed it would result in claims based on account balances that Madoff himself concocted and that bore no relation to reality.

Madoff essentially promised customers that he would pick winning stocks for them, did not tell them which stocks he would purchase, waited to see which stocks did well, and then falsely reported that he selected stocks that met their investment expectations. Through no fault of investors the account statements Madoff sent were illegitimate tallies of a fraudulent scheme.

Neither SIPA nor any of the cases interpreting it can be read to support an approach that would value claims based on the fictitious investment returns of such a scheme.

As a result, the commission has concluded that the fairest and most reasonable way to measure the value of the Madoff customers' net equity is to look to the money those customers invested with Madoff as a proxy for the unspecified investments in securities Madoff told them he would make for their accounts.

To do otherwise would have the effect of favoring early investors, many of whom withdrew all or more than the principal they invested with Madoff, over later investors -- some of whom will not receive a distribution equal even to their principal.

At the same time, the commission is sensitive to fairness concerns raised by the cash-in cash-out method. That method favors later customers at the expense of earlier customers by treating a dollar invested in 1987 as having the same value as a dollar invested in 2007.

In our view, it is appropriate to convert the dollars invested into constant dollars. We believe that approach, rooted in the economic concept of time value of money, will result in greater fairness across different generations of Madoff investors, in effect treating early and later investors alike in terms of the real economic value of their investments.

The commission understands that the total pool of money available to distribute to claimants is limited, and that there will not be enough to compensate all victims. That means that money allocated to one Madoff victim will affect the amount of money available to compensate other victims.

The bankruptcy court's task and the commission's goal in making its recommendation is to arrive at the fairest way, consistent with the law, of dividing that limited pool.

I thank you again for the opportunity to appear before you today, and would be pleased to answer any questions you may have.

KANJORSKI: Thank you very much, Mr. Conley.

And next we will hear from Steve Harbeck, president and chief executive officer of the Securities Investor Protection Corporation. Mr. Harbeck?

HARBECK: Thank you, Mr. Chairman.

Chairman Kanjorski, Ranking Member Garrett and members of the committee, thank you for giving me an opportunity to discuss SIPC's work over the last year and to discuss possible amendments to the Securities Investor Protection Act.

My name is Stephen Harbeck. I am the (inaudible). I have worked at SIPC for 34 years, and I became president in 2003.

SIPC has no role in the investigation and regulation of brokerage firms. That duty falls to the SEC and the self-regulators. When SIPC is informed that a brokerage firm has failed, we institute a customer protection proceeding in district court, and then refer it to the bankruptcy court. Customers of brokerage firms are protected within statutory limits.

The first such source of protection is a pro-rated distribution of customer property. As Professor Coffee noted this morning, that makes it a zero sum game. SIPC can supplement customer property by as much as $500,000 per customer, with a limit of $100,000 for cash.

SIPC has overseen the return of approximately $160 billion to customers, and has advanced more than $323 million prior to the -- to the Madoff case to do so.

About 11 months ago I appeared before you to report on the two largest brokerage firm failures in history -- Lehman Brothers and Madoff. I would refer you to my written comments for progress with respect to Lehman Brothers, which I think is substantial.

In the Madoff case, unlike the Lehman case, a transfer of accounts was simply impossible. Through the claims process, the following is the status of the claims. The trustee has allowed $4.6 billion worth of claims. There -- that represents returns to 1,600 claimants. SIPC has committed and has advanced most of $559 million. This is more than in all previous SIPC liquidation proceedings combined in the past. There have been 16,000 claims filed, and there have been 11,500 claims determined, or 71 percent of the claims.

The trustee has thus far collected $1.1 billion, and he's filed 14 lawsuits seeking the return of $14.8 billion -- and we will discuss that again in just a moment.

The subcommittee has asked specifically for information on the fees in this case. As you heard this morning, the trustee has been paid $1.275 million; and the law firm of Baker & Hostetler has received $37.5 million.

I remind you that this is the largest Ponzi scheme in history, and most of the trustees and legal fees efforts that are being expended here are for the purpose of recovering assets.

In terms of the legislative initiatives that are before you, SIPC has proposed a number of amendments to SIPC. And these include increasing the amount that SIPC can advance for claims for cash to $215,000, and to index that dollar figure through inflation with a specific formula. We would increase SIPC's line of credit with the Treasury from $1 billion, where it's been since 1970, to $2.5 billion.

We would increase the number of cases where SIPC can use a streamlined procedure. And I would suggest to you that the members of this morning's panel should agree with all those changes.

But there are other proposals that I must address. One is extended coverage for participants in pension funds, which was extensively discussed this morning.

On a going forward basis this certainly deserves study. However, the proposal lacks any analysis in terms of risk management or possible cost to either SIPC or the Treasury. And as both the chairman and ranking member implied this morning, it -- it is imprudent to enact a measure without that analysis, and knowing -- and knowing that -- what it will cost as a possible drain on the Treasury.

SIPC cannot take a position on this without the appropriate due diligence, and my written statement contains a great deal more on that issue.

SIPC is a complex law, but the pension fund issue shows that the current state of the law is somewhat in accord with common sense. If you have an account and you can call your broker and make a purchase or trade and get a statement, you're a customer. Granted the statute was drafted in a simpler time when that was the -- the standard, but that is still the law.

In terms of extended coverage for other indirect claimants, one of this morning's panel members testified that he is an indirect victim, and he certainly is. But I think I have to elaborate. He placed his money with -- he placed his money with a -- a hedge fund, which invested in another hedge fund, which invested in another hedge fund, which invested in Madoff.

Again, as Professor Coffee said, it would be very, very difficult to craft legislation that would -- would cover that situation and expand the coverage of the statutes beyond what was ever intended to be.

Now I'd like to address a point that I feel personally very strongly about, and that is depriving a trustee and the perspective legislation of the right to recover preferences in fraudulent transfers in certain instances. Ms. Chaitman testified about this issue.

Mr. Chairman and members of the subcommittee, I cannot urge you strongly enough to reject this amendment. If enacted, it would deprive the victims Ms. Chaitman represents of literally millions of dollars. Mr. Coffee noted that this morning, and he is absolutely correct in that regard.

The Madoff trustee has used the awarding powers granted him by SIPA and the Bankruptcy Code judiciously. He has not sued small investors. He's sued 14 large investors. He has urged any Madoff customer who has received more money than he placed with Mr. Madoff to open discussions with him. And he is open to reason.

This is a man who is extraordinarily practical. He's served as a trustee in more of these cases than any other human being ever. He's instituted preference in fraudulent transfer proceedings against larger investors who receive disproportionate returns. But the weapons in the trustee's arsenal include the fact that all he must prove is disparate return without any issue of legitimate expectation arising.

Ms. Chaitman's written statement, at page 17, says that the trustee in Madoff has already sued several elderly, virtually destitute investors. Ms. Chaitman is a vigorous advocate, but she's factually incorrect. The only situation in the Madoff case where small investors have been sued were three instances where the claimants ignored the claims filing procedure that has been in place for 39 years and initiated a lawsuit against the trustee.

In short, the trustee was required to institute mandatory counter claims, and those are the only small investors who have been sued. In short, the proposed legislation addresses a problem which has not arisen, will not arise in this case, or in any other, and would do extensive damage to the very people it seeks to help.

Indeed, it would actually encourage Ponzi schemes in a real sense, because it would allow people to be free of the prospect of what you have heard today, called clawback, and what are more accurately described as congressionally mandated equitable distributions.

It would deprive the trustee of the ability to get money back from someone who has gotten all of their money back, someone who has kept stolen money from others and who will share in that common pool of assets at the directexpense of other people who have not gotten all their money back. That is wrong as a matter of both law and policy.

In the written questions submitted by the subcommittee you have asked if extending SIPC coverage to the victims in situations such as the Stanford Financial Group makes sense. And there is legislation to deal with that situation.

SIPC protects the custody function the brokerage firms perform. And in the Stanford case, investor assets were not located at the SIPC member firm. Instead, in the Stanford case, investors sent money at their own request to a bank in Antigua.

The bank issued certificates of deposit. The investors have physical possession of those C.D.s, and the bank defaulted due to fraud. These investors are not covered by SIPC. I do not believe the subcommittee should make the SIPC fund and the United States Treasury the insurer of the underlying value of any security. And I don't believe the subcommittee wants the United States Treasury to guarantee the debts of an offshore bank.

Retroactive application of any of those amendments, particularly with respect to the Madoff case, would change the advantage from one group to another in a completely arbitrary way for the reasons given in my written statement, any amendments should you consider them should be prospective.

I'd like to address Mr. Conley's mention of the constant dollar theory. The first time SIPC was presented with this theory was November 23rd. The concept simply isn't in the statute. Congress knows how to write a law in constant dollars. And in fact we have in our amendments asked for an index to inflation with respect to the cash protection under our statute. It creates arbitrary results -- different arbitrary results from the -- from the ones that the statute
now has.

The consequences for your constituents are that if you back a concept of constant dollars, you would have to say that a person who received all his money back and who received stolen money will get even more at the direct expense of people who have not been made whole.

In a limited sample of about 2,000 of those accounts, we located in New York 138 people who had received net, given what we expect the trustee to recover, $19 million less. So we don't think that is the best of all possible worlds. It is a zero sum game.

That said, you know, because this is an issue of first impression, we will continue discussions with the SEC on that matter.

So with that, I'd be pleased to answer your questions.

KANJORSKI: Well. thank you very much, Mr. Harbeck.

I'm just going to ask a few questions, perhaps unrelated to the testimony this morning. But in the particular instance you were mentioning about the Stanford Financial, did they at any time advertise that they were insured?

HARBECK: I -- they -- the SIPC member may have, but the SIPC member with respect to actual customer assets custodied them at a clearing brokerage firm. And the -- and the people who -- people who had their assets at the clearing firm now have them all back.

The folks who are -- the folks who are missing -- and I met with the -- the receiver for Stanford last weekend to discuss this matter with him. And I've had extensive discussions at -- at various levels with the SEC on this subject.

And the problem is that since SIPC protects the custody function the brokerage firms perform, and since those people have physical possession of the C.D. that is the security, what you would be giving them back is the initial purchase price of a fraudulent security. And that has never been the law.

KANJORSKI: I understand. But those that bought the securities in the offshore banks, in their place of business or on their stationery did they indicate that -- to the customer that they were insured by your corporation?

HARBECK: I don't know the answer to that.

KANJORSKI: Don't you think it would be sort of important that you do know that?

HARBECK: On the facts of this case, no. Because the -- the fact...

(CROSSTALK)

HARBECK: The determining factor -- go ahead. I'm sorry.

KANJORSKI: Yes. Why isn't it important for you to find out whether or not there are some people fraudulently using your potential insurance to entice customers into their establishment?

HARBECK: It would be interesting. But we -- we could do nothing about that, because we don't have any enforcement powers. That's -- that's the SEC.

KANJORSKI: Well...

(CROSSTALK)

HARBECK: The fact of the matter is, even if people are defrauded into believing they have coverage, that does not make it so.

KANJORSKI: Now, that's true. But I don't recall -- and I've been sitting here a long time and sometimes we miss all the mail that comes into the committee or into our various subcommittees. But I don't recall any letters from your organization indicating that you needed additional authorities, you felt there were loopholes in the law, that there were failures in the system in all 25 years that I'm sitting here.

HARBECK: Yes.

(CROSSTALK)

KANJORSKI: Did I miss a lot of that communication?

HARBECK: Of course you didn't, Mr. Chairman. And the reason you didn't is until -- until September of last year, the system was gliding along very, very well. And we had protected 99 percent of the investors who went into liquidation.

KANJORSKI: While times were good, there was no problem. When times get bad, that's usually the case -- when the water goes down in the flood, that's when we find the bodies. Wouldn't anyone in your organization anticipate that the water wasn't going to stay up all the time, and that in fact there may be some victims to the flood?

HARBECK: The -- well, and again, if you're referring to Stanford, the fact of the matter is that if Stanford would -- even if -- even if the bank was in the United States, the -- the -- I -- I don't think you want us to, and we never have been in the business of, giving people back money when they -- the value of their investment goes down for any reason.

KANJORSKI: No. And -- and I'm sympathetic to that. And we want fairness to the whole system as best as possible.

I guess what I'm getting to is did you hear the outrage of the panel that we had earlier this morning? And...

HARBECK: Mr. Chairman, I hear it every day.

KANJORSKI: OK. Well, I have -- I have to believe that that outrage was sincere, and somewhat based on reason. There -- there was a statement there by these people that they felt there were representations made by the individuals they dealt with, whether they were dealers, whether they were banks, whoever they were, that the United States government in some way was watching out for their best interest and, in fact, in some instances under the law, insuring them.

And it wasn't until after the fact they found out that they were totally misinformed or they misunderstand, or that they just weren't supported. And prospectively, I guess, they're asking us to look at this. And that's one of the things we clearly can do.

HARBECK: Certainly.

KANJORSKI: What we can do to -- to prevent or -- or to re- compensate them for some of their losses is very questionable. I don't know how far we're going to get there. But there are probably some things we can do. And we'll be directed toward that end.

I think what I'm particularly disturbed about, this whole last 15 -- 18-month disaster that we've been in, is an attitude at the governmental level, or quasi governmental level, that it's not our problem, we don't have to take preventative steps, investigative steps. And I think you do. It -- it is our -- our problem. It's the committee's problem. It's the Congress' problem. It's the president's problem.

You know, we -- we just, as a matter of course, cannot accept in this country that some people feel that their government let them down -- wrongly so -- and that they weren't acting in it's (inaudible).

And in many of these instances -- and I hear their testimony -- there's very little that they could have done. I mean, you know, I raised the question (inaudible), and I'm a great believer in that. But, by God, in some of these instances, I don't care how they -- what actions they took -- somebody mentioned to me, and I won't identify Mr. Ackerman by name...

(LAUGHTER)

... that during the stock market crash, Mr. Madoff was getting calls from officials of the United States government and asked what his recommendation -- should they close the market? What should happen? Well -- and that's understood. He was -- wasn't he president of the NASDAQ at one time? He was a pretty substantial person in this country.

That after we see what happened, what are we doing to prevent this in the future? Are we checking up some of the things that, quote, "Some of these very substantial people," are involved in? Are they trading on that? Are they enticing relatively innocent people to -- to trust them and give them their life savings and their pension funds, and everything else?

What have we done -- for instance, what has your corporation done?

(CROSSTALK)

KANJORSKI: ... across the country, all these workers' pension funds, and ask them, how -- how are they getting advice as to where to invest, what advice is being made? Who are they using? Are we finding some method to check these people out? Or are we just willy nilly, don't give a damn, and it's up to them, and -- and if they get cleaned, they get cleaned.

It seems to me that once you see something like this happening, being either in the government or quasi in the government, we have more of a responsibility to do something.

You know, we can't cure it all. We can't save everybody. We can't prevent all the injury. But obvious injury -- obvious things that are at fault -- or failures that exist, we have an obligation.

And that's when I first started this long discourse on my part -- and I see my time is up.

I feel offended that more federal agencies or quasi federal agencies, such as your own, aren't coming forward to tell us what they need. What authorities do you need? What could we do better? How can we change the law? How can we better educate people?

You know, it's not enough just to say, "Gee, tough luck." $50 billion, $60 billion, 13,000, 15,000 people got took by a very professional artist.

We've got to learn from that and we've got to take actions to find out there aren't other Madoffs out -- out there, there aren't other Stanford Financials out there.

And I'm not sure I'm getting the impression that the two agencies are doing that. And I'm not putting all my weight on you, Mr. Harbeck. I -- I think I've taken some action. The legislation is on the floor today against the SEC on that very substance.

And you all have to -- and, you know, and let me point out (inaudible) that -- what I found so damn offensive in this whole thing. That you're so channeled over there; that you have no chain of command. I cannot believe that you can do three, four investigations over more than a decade and come up with some really, I think, important questions of the credibility and viability of a person, although very highly thought of on the street, that it never goes up beyond one or two levels in an organization that has 10 levels. You have no chain of command.

What the hell would we do to a four-star general that put a lieutenant in the field that killed 150 innocents? If he didn't know about it within 24 hours and take action, he'd be gone -- or should be gone. Now, sometimes when I think about it, we haven't had them disciplined in any way.

And we've got to have a chain of command, whether it's in the military or whether it's in civilian life. If it's the government, we've got to find out what's happening at the lowest level. If it's really violative of good sense and -- and acceptable practices, we've got to take action. And we've got to make sure that that chain of command has good communications up and down.

And I think the SEC -- I saw the commissioner the other night -- or the chairman. And, you know, Mary and I are very good friends, so we had a heart-to-heart discussion on that very subject. We wrote into this law something I want you all to take back to the SEC. We want you to do a study -- not inside -- but outside, of the most thorough type, to study where the dysfunctional nature of the SEC exists.

And if there's anybody over there that doesn't seem to think the organization is dysfunctional, then read the inspector general's report on Madoff. I mean, it's the most classic bit of evidence I've ever seen that shows dysfunctional operation. And it's just not Madoff, it's in other areas of the organization.

We've got to clean that up. And I don't know that -- I don't believe you can do it from the inside. I -- I'm not going to speak for the chairman, but I -- my impression is that she tends to agree too; that you really got to go out and do an honest thing here.

And -- and as I said to her last night, I don't want to even stop at the SEC. All related agencies around the SEC should be so studied, investigated, and disclosed, and the reports sent to Congress for remedial action.

But I think that should be the beginning point for what I'm sensing from the American people. They are not going to take it any more that we in government just said, "Well, we can't do anything about it. It happened. We're sorry."

Well, that's nice. We didn't lose. These people lost. That -- that doesn't make them feel too damn good. It wouldn't make me feel good if I lost $5 million, $10 million or $50 million. It doesn't matter. I lost it, and I shouldn't have.

If everybody had been performing their function in the ideal way it wouldn't have happened -- that they obviously weren't. And -- and the number of security people that were sleeping on the switch were -- were incredible in this instance.

So I want you to take that message back. I've eaten up more than my five minutes. And I'll be very lenient -- since we have no Republicans, look how lenient I can be to my friend from New York?

(LAUGHTER)

Gary?

ACKERMAN: Notice, Mr. Chairman, I didn't tell you your time was up.

(LAUGHTER)

I -- I could not agree with more of what you said and the way you put it, Mr. Chairman.

Everybody, including the people who are testifying in -- in this panel have -- have been trying to -- to get us out of this muddle somehow. And -- and I think all of their intentions are beyond question.

I think there's a -- this is a very difficult Gordian knot to -- to untie. And -- and trying to make some sense and understanding it -- listening to what you have just said, Mr. Chairman, I -- I just wanted to note that for a long number of years nobody came to us, from our obligations and responsibilities, from any federal agency, including that which is before us today -- or those which are before us today, saying that we need more resources.

As a matter of fact, the previous administration seemed to have a -- a philosophy, if not an agenda, for deregulation rather than more regulation and did not want to provide the resources. Chairman Frank, as a matter of fact, had a proposal to more fully provide assets to the SEC and -- and SIPC for additional resources to be able to do the kinds of investigations that were obviously needed. And that was moving forward until it was scuttled at the time by Mr. DeLay during a different congressional leadership.

It wasn't until Chairman Shapiro came along and, doing the fine job that -- that she's doing, started asking for additional resources so that we could do a better job prospectively. But that does not necessarily resolve the situation that's before us right now, as it has already, regrettably, occurred.

I -- I think there's a difference between the average citizen investor being told that they didn't do due diligence, which certainly many of them did to at least 100 percent of their capability, ability and -- and legal limits of what they could do for due diligence.

But certainly our agencies could have been doing a little bit more of a better job, including coming to us and telling us over a large number of years -- a long number of years that they couldn't handle the workload. That with the complications and the large number of investments and investors and the complications of the system that they needed additional assets. We did not see that. We did not hear that.

And we rely upon the administration. We don't have the tools. That's not the function of -- of the Congress. We do oversight, which means we rely heavily on what the agencies tell us -- and ask and try to supervise whether they're applying their resources, which -- which they didn't ask for in this case.

I -- I have -- I have several questions to -- to ask. In -- in what we just heard in our -- in our testimony from -- from this panel about the smaller investors versus the larger investors, is -- is there a distinction in either of your minds in the morality of larger investors versus middle size investors versus small -- are one more immoral than the other?

(LAUGHTER)

(CROSSTALK)

ACKERMAN: I'm not talking about the specific individual...

HARBECK: No, I -- I simply ...

ACKERMAN: I'm talking about...

(CROSSTALK)

HARBECK: ... answer the question.

ACKERMAN: If you're wealthier and make investments, does that make you immoral?

HARBECK: Absolutely not.

ACKERMAN: Are they -- are they more suspect, because they had...

HARBECK: Absolutely not. I think that's why the trustee, in the Madoff case in particular, has done a rigorous investigation of very complicated facts, and started 14 lawsuits.

Some of those lawsuits assert knowledge or -- or -- or a knew or should have known standard. Others do not.

So certainly with respect to the former, the trustee is doing his job. And he is trying to return to the common pool of assets -- defined in this case as customer property -- the largest amount to distribute to the greatest number of people consistent with the law. And he's doing that.

To get to your point on morality, I'd like to turn it to a case of practicality and compassion. The trustee has taken the position that you -- that he sent a letter to everyone who received more than they put into this scheme, and said, "Come and talk to me." If you're -- you know, if it's something that you withdrew over time and you can't pay (inaudible) the trustee isn't going after you. That makes no sense in any...

(CROSSTALK)

ACKERMAN: What's the difference if you withdrew it over time or if you -- if you withdrew it late in the game rather than earlier in the game?

HARBECK: The -- the answer to that is, in all Ponzi schemes, going back to the original Ponzi scheme with Charles Ponzi, people who get out the day before and -- the day before, and -- and the -- Professor Coffee spoke to this rather eloquently -- should do no better than the person who didn't have that good luck. And -- and that's just been the law as enacted by Congress since at least the '20s.

ACKERMAN: So it's a matter of luck?

HARBECK: No, it should not be a matter of luck, sir. It is -- that's the whole concept behind bringing money back in. And I think in this case the trustee has exercised his avoidance authority with discretion and compassion. He hasn't reached back to the small investors, particularly people who have no wherewithal...

(CROSSTALK)

ACKERMAN: Is it -- is it -- is it possible in -- in your mind, speaking of compassion, that there are large investors -- and I'm not advocating for anybody here. I'm just trying -- and there's a problem, because this is a zero sum game, when somebody gets somebody -- coming out of the same pot of -- of money of people who are all losers.

Is it possible in your mind that you can conceive of -- of situations, many of them, where larger investors are more desperate than some of the smaller investors?

HARBECK: I haven't seen that in this case, sir.

ACKERMAN: You think there are no larger investors -- say someone with $100 million, who's doing something and invested the rest of another $100 million, because they're that big an investor, is now upside down in their real estate or house or business or property, despite the fact that they took money out? And now they wind up paying -- having paid $50 million in taxes to which the government should not be entitled, have borrowed from the banks to do things on a -- on a business, have invested other people's money along with their own to do something, and that are now being told that not only do they have nothing, but they owe back $200 million.

HARBECK: I could speak to a number of those points.

ACKERMAN: That's -- that's -- that's at least as desperate as -- as the other people, for whom I have great sympathy, who had $200,000 and invested $100,000 and lost it. They only lost $100,000. A lot of people aren't sympathetic, because they think that's a lot of money. But they might still have some.

You know, it's -- it's -- how do you -- how do you morally make a distinction here? And is -- is it possible in all this formulation that -- that somehow you -- you can come up with a -- a solomonic kind of solution and -- and splitting, according to some formulaic way, how to deal with all of these people?

HARBECK: Congressman Ackerman, I don't think a formula is the answer. I think analyzing individual situations is the answer. And I think that's...

(CROSSTALK)

ACKERMAN: Each case individually?

HARBECK: Yes, sir. I think that's exactly what the trustee is...

(CROSSTALK)

ACKERMAN: If I was getting paid $1 million a week, I'd like that.

(APPLAUSE)

HARBECK: I believe that this trustee is...

(CROSSTALK)

ACKERMAN: I'm not -- I'm not questioning the trustee. I'm just pointing out the irony in this -- in this situation.

HARBECK: Two points. First, no customer money goes to pay attorneys' fees or -- or trustee's fees. That's point number one.

ACKERMAN: Where -- where is that money coming from?

HARBECK: It comes from the Securities Investor Protection Corporation. We've taken the view that every paper clip that gets sold would be -- would be designated to monies that go to the victims.

The second point is that, you know, looking at these cases individually, our statute was designed to protect the small investor. And I think that's exactly what Mr. Picard is doing.

ACKERMAN: As -- as I understand it, brokers, investment advisors are required to put into the fund, to be covered by SIPC, $150.

HARBECK: That is not correct. Currently the assessments by our bylaw require each brokerage firm to -- to be assessed one-quarter of 1 percent of their net operating revenues. When we started paying Madoff claims, we instituted, effective April 1st, assessments based on revenues rather than...

(CROSSTALK)

ACKERMAN: Beginning when?

HARBECK: April 1st.

ACKERMAN: April Fool's Day?

HARBECK: Yes, sir.

(LAUGHTER)

ACKERMAN: Some people think that's -- that's when you identify to people who have been April-fooled. That's after the Madoff Ponzi scheme fell apart, because he turned himself in.

HARBECK: Well...

(CROSSTALK)

ACKERMAN: And it -- you know, before that it was $150?

HARBECK: When we reached $1 billion, which our risk...

(CROSSTALK)

ACKERMAN: Yes, but before -- before Madoff it was $150?

HARBECK: When we reached the figure of one...

(CROSSTALK)

ACKERMAN: I -- I don't have a lot of time left. So if we could just focus on a couple of more questions...

(CROSSTALK)

HARBECK: The answer was based on revenues until 1990 when we reached $1 billion, then from 1990 through April of this year, it was a flat fee.

ACKERMAN: Of?

HARBECK: One hundred and fifty dollars. And we have spent -- we will have...

(CROSSTALK)

ACKERMAN: That wasn't -- that wasn't hard. So before then, it was $150. So if -- so if I was one of those brokerage firms or investment advisors, I would have to pay $150 to get that $500,000 worth of insurance?

HARBECK: Investment advisors are not part of this statutory program at all.

ACKERMAN: OK. So if I was a brokerage, I'd have to pay $150 at that time?

HARBECK: At that time, yes.

ACKERMAN: So if I had, say, like 600 clients or customers, that would -- give me a second. I'm a junior high school math teacher. But 25 cents an account. So for each of my accounts I was -- in premium I was paying, I'd get $500,000 by charging people two bit each?

HARBECK: Yes.

ACKERMAN: Somebody should have come down here and -- and sounded the alarm and say, "I'm paying too little for insurance. How much insurance can I really buy for $150 -- for 25 cents an account?" I mean, if somebody was charging me 25 cents an account for my car insurance I would suspect that I wasn't getting a lot of coverage.

No? I mean...

(CROSSTALK)

ACKERMAN: Let me -- let me -- let me go on to something else.

HARBECK: OK.

ACKERMAN: If I may, Mr. Chair?

KANJORSKI: (OFF-MIKE)

ACKERMAN: OK. Thank you.

People relied heavily on SIPC and the SEC, very heavily, for stuff that you can't expect them to be able to do themselves. That's the reason for SIPC and that's the reason for the SEC. People can't become attorneys and investigators, and spend their whole life investigating something whether or not.

So, you know, if you don't know if something's kosher, you ask the rabbi. And if the rabbi says it's kosher, by me, it's kosher. You guys are the rabbi to all these people. When -- when you say the guy was legitimate, he was legitimate. They relied on that. It was -- it was the indicia (ph) of -- of your agency and your agency and my government that was on these products that -- and -- and the person who presented them that said that -- that they were fine.

People thought they had the insurance on money -- whether or not it was the interest. If my account is insured, I don't differentiate between how much I put in. I -- I figure my account is insured for up to $100,000 in my bank -- now it's $250,000 for the rest of this year, or whatever. And I don't think my interest isn't insured, only my principal is insured. Everything is insured.

So it becomes a different number for everybody who had an investment over a long period of time. And as a matter of fact it was -- it was you, and -- and your agency that -- that testified -- and your testimony in the New Times case, where you say were a claimant or -- this is a -- this is a quote, "Reasonable and legitimate claimant's expectations on the filing date are controlling even when inconsistent with transaction reality" -- I'm quoting you. "Thus, for example, where a claimant orders a security purchase and receives a written confirmation" -- which every Madoff victim did with every statement -- "reflecting that purpose, the claimant generally has a reasonable expectation that he -- she or -- he or she holds securities identified in the confirmation, and therefore generally is entitled to recovery of those securities within the limits imposed by SIPA" -- that's a financial limitation of $500,000, or whatever it is -- "even when the purchase never actually occurred and the debtor instead converted the cash deposited by the claimant to fund the purchase."

It seems that these people were -- were again reassured that the way we wrote the law, the way the regulations existed and the way you interpreted them, telling them that they're entitled to that money, even if -- and I won't go on reading -- even if the -- their money tripled and there was no money there, even if they didn't have real money in the account that somebody fraudulently stole it.

Now what's happened is we go to a different court case and you change your view, saying that the money was stolen and not invested. I mean, you're -- this is a shell game that you're playing with investors who have -- I mean, this is -- this is over the -- the heads of most of the people on -- on our committee, I would think, how -- how this happened and that this is being done.

The people relied on you, and -- and they were let down. And we have to all collectively figure out a way to make all of them as whole as we can make them.

KANJORSKI: Thank you, Mr. Ackerman.

Now hear from the gentleman from New Jersey, Mr. Garrett?

GARRETT: Thank you. And appreciate it.

I think I just have a couple questions, because I understand some of the other questions were covered.

Mr. Harbeck, you raised just as I was walking in the (inaudible) you're here to help the small investor. And I think that's what the message is throughout the hearing, that that's what we're trying to look out for.

I raise the three questions, time, money and who. The time aspect of it is, if we're really trying to help out the small investor, and I guess we need to define who that is later, how long does it take and still say that we're helping them out? Obviously if it takes 10 years to do it, then we're not helping out the small investor. Obviously if it takes five years -- now it's been about a year. And at some point in time you can just say we are not helping the small investor.

So what is the timeline that if we were to say, "We invite you back here for another hearing such as this," you can say that, "We're done and the folks have been compensated to a large extent"?

HARBECK: There's two -- there's two points to that response. First, in the two largest cases prior to the Madoff case, the overwhelming majority of investors were in complete control of their accounts within 10 days of the failure. And we're very proud of that result. In both Lehman Brothers and in MJK Clearing, which collapsed...

(CROSSTALK)

GARRETT: And I -- I understand that...

HARBECK: Right -- right after. In this case, the utter lack of records makes it very, very difficult to answer your question. There are still 7,000 boxes of records in the controls of the prosecutor. That it's -- it's difficult to -- to access, and they aren't digital records. We're working with that as fast as we can.

(CROSSTALK)

GARRETT: So you haven't...

HARBECK: Seventy-one percent of the people have been -- have had their claims determined. And we will -- we will get the rest of them out as fast as we can.

GARRETT: Around...

(CROSSTALK)

HARBECK: ... complications involved when accounts are tied to others, when accounts are tied to insiders, when accounts are split. And those are very, very difficult accounting procedures.

GARRETT: So there's problems just getting those records from the prosecutor? Is that what I'm hearing?

HARBECK: I think we have transparency back to some time in -- in the '80s. But we don't have complete transparency on all the records.

GARRETT: Because?

HARBECK: The sheer volume, and -- is one answer.

GARRETT: OK. And what about the prosecutor? You said 7,000 records are...

HARBECK: I -- I believe the prosecutor still has -- you know, on their ongoing criminal investigation, still has a -- a large segment of the records.

GARRETT: And...

(CROSSTALK)

HARBECK: We accessed those, but we don't have complete access to them.

GARRETT: All right. So (inaudible) to give me a short answer, which I'm sure the folks behind you and watching would be (inaudible) in light of all the constraints, in light of the fact this is the largest case you've sever handled like this, in light of all the difficulties, a reasonable answer to the -- a reasonable time frame would be, in light of all those hardships would be?

HARBECK: A year.

GARRETT: Secondly with regard to the money -- and I think I was just coming in on this question, as well. And the gentleman from New York was asking about the -- the old fee, and the new fee, and what have you.

The new fee that is out there -- two questions. One, based on what you know now -- and I understand from your last answer you don't have all the information -- but based on what you know now, is that fee an adequate fee to compensate as you're planning to pay out?

HARBECK: The answer to your question is yes.

GARRETT: OK.

HARBECK: The fee is adequate to pay on what we anticipate paying as we understand the claims.

GARRETT: OK. You've heard the testimony of the panel before you, and I think some of the questions were along this line of -- and some of us would take that view that it should probably -- to go back to your point of helping the small investor, it should be more expansive than what you're intending to pay out right now.

If the -- the definition of who -- third point of who should be paid, who -- the questions are saying that it should -- I forget the gentleman who was sitting over here before. I'm sorry. It's not that it's just the direct investor, but one who has gone through a fund and what have you. And so to that point of saying that it's not just for this -- each -- each case could be a small investor, right? Each -- each case you'd only have (inaudible) $10,000 in the fund either direct or through one of these funds. If the -- the definition is broadened as to who you should pay out, as some would suggest that it should be, would that fee be adequate to cover for that?

HARBECK: If it is -- if the definitions are expanded in some of the ways we heard this morning, the answer is no.

GARRETT: OK. And then would you be able to come up with an estimation of what the fee should be to adequately cover that?

HARBECK: It's probably doable, but it would be difficult because of the way some of the large hedge funds have their claims. And how -- how often -- how many iterations you would have to go down in terms of treating individuals. So it would be very hard.

GARRETT: OK. I -- I would suggest if you could -- I know that some -- is to try to give some sort of ballpark -- or at least I would go to one or the other questions that you heard. I invited (inaudible) broker-dealers and others to -- to come in.

If we were to go down that road, that would have impact not only on what you have to do -- would impact upon who the fees would be assessed against. And they like might want to have some input on that, as well. So if you're able to do that.

I believe -- well, I see my time is up. I think some of the other questions were touched on before I got into the netting aspect of clawback provision. And I don't want to repeat myself on other comments that I made earlier; that we're obviously not looking necessarily for fairness, because I don't know that you can fairness.

But what we're looking for (inaudible) the folks here is -- is justice and reliance that they made, not on independent investment decisions that they were making in the normal course of things, but on their reliance on what the government assured them through -- both through this program after the fact and through the assurances that
these being registered, and the fund -- this fund coming under the SEC, as well.

Thank you.

KANJORSKI: Gentlelady from California, Ms. Speier?

SPEIER: Thank you, Mr. Chairman.

I guess my first question is for you, Mr. Harbeck.

I've only been around here for less than two years, but my take on what happened is basically -- the industry gets a license to do a lot of things and then fails at it, and we're left to pick up the pieces.

If you look at why SIPC was created, it was created because there were these huge bankruptcies that occurred in the early '70s and money was taken from investors, and we wanted to make investors whole.

So then SIPC is created. And, as you pointed out, for a long period of time, because you thought you had ample funds, these brokers were only paying $150 a year. For 19 years they were paying $150 a year.

Now you've increased it recently because of the Madoff scandal. But I have one question which is, I think the insurance product is out of date. And I think that it's very important for you to go back and reformulate an insurance product that reflects the way people invest today.

And people invest today through mutual funds and hedge funds. And if you're going to offer a product that has no relevance today that had relevance in 1970, I don't believe you're doing your job.

Now, secondly, I have a question for you. Which is if now you're charging one-quarter of 1 percent of the revenue -- the net revenue that's generated by a broker -- to refill the -- the fund, what would prevent you from coming up with a one-eighth of 1 percent of revenue to create a fund to pay the Madoff victims some kind of compensation?
There's nothing that precludes you from doing that, is it -- is there?

HARBECK: It would have to be statutory, Congresswoman.

SPEIER: It would have to be. Well, how -- you were able to make this change from $150 to one-quarter of 1 percent with no trouble, right?

HARBECK: Yes, by bylaw.

SPEIER: You did that by law?

HARBECK: By bylaw.

SPEIER: By bylaw? Well, could you create a new bylaw?

HARBECK: We -- we can only extend our money in one particular way -- to supplement the fund of customer property in the way that the statute describes. Our bylaw says that when -- when our fund is in danger of reaching $1 billion or less that we can reinstitute for that purpose. But what you're saying is that we would have to re-purpose the statute --- and that -- to -- to create a fund specifically for these victims.

SPEIER: And you're saying that that would require statutory -- not something that you could do -- you're -- you're a separate corporation. That's -- I'm -- I'm having a hard time understanding why you as a corporation can't just decide that because of this travesty that -- and because the insurance product that you offer is inadequate today, and it should have been reformulated anyway, that you cannot create a -- a new fee that would be imposed. It would be a modest fee, but it could help immeasurably a lot of people.

HARBECK: We are -- we are in fact a creature of statute. We are not a government organization, but the -- the statute creating us was a federal statute.

SPEIER: But, you know, that's the problem. We do -- we're real great at passing laws, creating these entities outside of government to operate. FINRA is another one that I can't quite understand. And yet you have to come back to government to fix things.

Either you should be a federal agency where we have responsibility -- the ability to act immediately or you should be an independent corporation and then would have the ability to do things that -- that you do independent of statute.

But having said that, I have a question for Mr. Conley -- and we're about to go for a vote.

Mr. Conley, from my perspective -- and this may predate your involvement at the SEC -- but having observed over the course now of these two years, the Madoff fiasco, the travesty that it has -- has created, just not for the American people, but for the federal government, the SEC failed. It failed miserably.

When you -- when we had the whistleblower before us, I was astonished at the -- the degree by which he continued to pursue this. I mean, he came before the SEC five or six times seeking the SEC to take some action against Mr. Madoff.

And even when the SEC went out to see Mr. Madoff, Mr. Madoff has now admitted that when he -- the question was asked of him, "Who was your custodian?" and he rattled off a name. And he was convinced that within the next three days he'd be shut down because their -- the custodian did not provide those services to Mr. Madoff, but then the SEC never even made the phone call to find out whether or not Mr. Madoff was operating through that custodian.

So from my perspective, the government, the federal government failed miserably -- and the SEC in particular.

So my question to you is this. Since we were responsible for this travesty, shouldn't we take some responsibility now in trying to make the people that were impacted by our incompetence and by our malfeasance by creating a fund to make them somewhat whole? And what would prevent the SEC from doing that?

CONLEY: Well, Congresswoman, thank you.

I can respond in two ways. The fund that you talk about is certainly something that Congress could do. If it determined that that was the appropriate thing to do here, certainly you could do that.

With respect to the shortfall that the -- the failures that you've identified, that is something which the commission has recognized, and takes extremely seriously.

And since Chairman Shapiro has come to the (inaudible) in fact, there have been numerous reforms that have been put in place that are directly responsive to what you've identified, which is the inspector general's report, which identified very serious failings at the commission.

And among the things that have changed that -- on a going forward basis -- make sure that something like this will not happen again, is that there has been the training of hundreds of employees to be certified fraud examiners. There is the requirement now -- addressing something you raised here -- in all examinations of third party verification of customer assets that are held at the -- by the investment advisor or broker-dealer.

And we're -- also have been hiring more people with particularized expertise that will make the examination teams much more effective.

And we're working to deploy more people to the front lines. More investigators who will be there, and be able to root out this fraud in an effective way. So all that has happened. And there are greater reforms that are even coming down the road.

Next week, for example, the commission will be voting on rules designed particularly to address the situation of investment advisors and the custody situation, you know, that would -- that would encourage investment advisors not to have custody of customer assets. Of the -- and instead to have them with third parties to prevent the exact kind of stuff that went wrong here.

SPEIER: My time has expired, Mr. Chairman, but I -- I certainly think that we need to appreciate that going forward doesn't fix those who have been injured by government inaction, and that we should really reflect on what we can do to -- to make whole some of these people.

(UNKNOWN): (OFF-MIKE)

KANJORSKI: And just a couple of questions. I think you're absolutely correct, Ms. Speier. And we're going to work toward that end, I hope, as a committee.

But I -- I notice you're talking about increasing the premiums in the future. Why haven't you thought about making a back assessment? You're -- you're really punishing the people that are going to come into the business or may not even have been in the business when Madoff was around.

Why shouldn't we put the assessment on the people that were in the business when it happened, and with the law professor, Coffee, indicating that would put an incentive on the dealers to be working more in conjunction with the SEC and with your organization to see that this doesn't happen, because there would be a payment that they would have to make.

(CROSSTALK)

KANJORSKI: Why -- why -- in order to accomplish an assessment instead of a future increase in premiums, would you need legislation to do that?

HARBECK: Yes, we would, Mr. Chairman.

KANJORSKI: Well, will you prepare that request so you get it to the committee and we can look at it.

The second request I have of you -- it's not totally unrelated to this hearing. But I've spent a number of days meeting with -- about representatives -- legal representatives -- about 1,300 claimants that are in 23 countries around the world.

And they tell me that, under present conditions to handle the claims that are out there -- because they're under all the various laws of the 23 nations involved -- that it's going to take something like 30 years to resolve these claims. And I was going through the -- the roughly $100 million a year of the trustee's fees.

Are you prepared to pay out $3 billion over the next 30 years to the trustee so that he can be around to settle these claims? Because, quite frankly, I think it's going to end up -- his fees are going to be a hell of a lot larger than the claims.

Now, what I'm saying to you is, what are you doing in terms of establishing some sort of method of arbitration for international settlement of claims? And why shouldn't that be -- be before the Congress? And shouldn't that recommendation be coming from your organization?

You know what you face. You know what your problems are. You know that we are going to be doing more international business, and not less. These frauds will continue to occur in the future. Why don't we have a simplified way of getting the issue before an arbitration board or somebody on a relatively uniform basis instead of just spending this inordinate fees for trustees?

I'm not against lawyers. I'm one on my own. But, damn, that's a big one. I -- I don't think there's any member of this panel that would (inaudible) for a $1.5 million a week maybe they would leave the Congress and take that trusteeship. I'm being facetious.

Naturally we would never do that.

But, seriously -- can you make recommendations to the committee as to what should be done to facilitate international claims of this sort that will occur in the future, are existent now, that we can act on?

HARBECK: The -- the one thing that we have done prospectively on an international basis is to enter into memorandum of understanding with our foreign counterparts to SIPC in case a brokerage firm fails with a footprint in more than one jurisdiction. We have those agreements with Canada, the United Kingdom, China, Korea and Taiwan.

We -- we seek to expand that. What you've -- what you've suggested is far more -- is far more complex, but I'd be certainly willing to discuss it with any international expert that we can find.

KANJORSKI: It's not a one-time deal. We're going to have these transactions. We're going to have these occurrences. Let's not end up (inaudible) fees to trustees and lawyers that -- that take money away from the basic account that could be paid to the claimants. And -- and that's going to happen in this case. And it's going to be a tragedy.

Let me give Mr. Ackerman one question, and then...

(CROSSTALK)

ACKERMAN: Yes. I -- I just wanted to follow up on the first question that the chairman just asked. Your response was that -- that you're a creature of legislation. Under the legislation under which you act, you have a line of credit of $1 billion, as I understand, which can be accessed if the fund is depleted. And there's still a lot of money in the fund.

If -- if you did, and therefore can act by resolution, why can't you generously and liberally pay out to the greatest number of people promptly, as the statute requires, whatever money is in there, access your -- your line of credit and at least have $1 billion. You don't have to wait for all this legislative process to take place.

You know, everybody working on this -- who are working hard and are entitled to whatever money they're entitled to -- to earn on being trustees and whatever, all this money every week, they expect to be paid promptly.

If -- if the people who are victims were paid promptly a couple of months ago, some of them could have ridden the 40 percent rise, because they're all investors -- or at least were -- investors without money, some of them, could have -- could have gotten 40 percent in the market right now. I mean, everybody's losing and double losing and triple losing here because of the delay.

Can you spend that out and -- and request it by resolution or whatever?

HARBECK: No. And the reason is the only people we can protect are those people who fit within the statutory definitions. And we believe that people who have...

(CROSSTALK)

ACKERMAN: Which of your interpretations of that statutory definition?

HARBECK: The same -- the same cases that had uniformly, since 1973, held that with respect to fraudulent statements that are back- dated -- all of the cases uniformly, including the New Times case, hold that those claims are not customer claims and that -- and that the fraudulent documents should be ignored.

KANJORSKI: (OFF-MIKE)

OK. Thank you.

Ms. Speier, do you have any further there? Because we're -- we're down to less than five minutes now for the vote on...

(CROSSTALK)

SPEIER: OK. I'll be very brief.

Mr. Harbeck, I would like for you to come back to the committee with a proposal of providing an insurance product that really is going to reflect the kind of investing done by average American investors today that do most of their investing through funds and who do not have the sophistication to know whether or not the actual stocks they've purchased are indeed being purchased.

That's where the SEC comes to play, but I -- we need a different product. The product that exists just doesn't meet the needs of -- of the American people.

And then if you could just provide to us what does one-quarter of 1 percent of revenue actually generate?

HARBECK: This year -- and again, because it fluctuates with the brokerage firm...

SPEIER: Yes.

HARBECK: ... from revenues, I believe it's $480 million.

SPEIER: $480 million? And you came up with the one-fourth of 1 percent on your own? It could have been a half a percent or it could have been...

KANJORSKI: Yes. May I suggest that calculation be made and supplied to Ms. Speier so we can get this wound up and get our members over to vote?

The chair notes that some members may have additional questions for this panel, which you may wish to submit in writing.

Without objection, the record will remain open for 30 days for members to submit written questions to today's participants and to place their responses in the record.

Thank you gentlemen for participating. We appreciate it.

And may I just make the request that I think that all the members present here right now (inaudible) -- let's have a little better interaction between your respective organizations and the committee to get to the bottom of the substantive questions that have to be answered.

Thank you very much for participating in today's hearing. The panel is dismissed, and this meeting is adjourned.

END

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