Nos. 04-1242, 05-1145

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE FINANCIAL PLANNING ASSOCIATION,

Petitioner

v.

THE SECURITIES AND EXCHANGE COMMISSION,

Respondent

Petition for Review of Final Rule
of the Securities And Exchange Commission

AMICUS CURIAE BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW OF FINAL RULE OF THE SECURITIES AND EXCHANGE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to District of Columbia Cir. R. 28(a)(1), counsel for *Amicus Curiae* Public Investors Arbitration Bar Association, certifies the following:

A. Parties and *Amici*. All parties and *amici* are listed in the brief for the Petitioner.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Petitioner.

C. Related Cases. No court has previously reviewed this Rule.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Public Investors Arbitration Bar Association is a not-for-profit corporation and does not have any parent entities and there are no publicly held companies that own ten percent or more of its stock.

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GLOSSARY

IAA or Advisers Act	Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 through 80b-21
Broker Exemption	17 C.F.R. § 275.202(a)(11)-1, *published* 70 Fed. Reg. 20,424 (Apr. 19, 2005)
Commission or SEC	United States Securities and Exchange Commission
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. §§ 78a through 78mm
FPA	Financial Planning Association

IDENTITY OF *AMICUS CURIAE*, PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, ITS INTEREST IN THE CASE AND AUTHORITY TO FILE THIS BRIEF

The Public Investors Arbitration Bar Association, Inc. ("PIABA") respectfully submits this Brief as *Amicus Curiae*. Petitioner Financial Planning Association and Respondent Securities & Exchange Commission granted permission, and PIABA moved and obtained leave from this Honorable Court to file this brief on August 5, 2005.

PIABA is a national, non-profit, voluntary, public bar association with a membership of more than 650 attorneys who devote a significant portion of their practice to representing public investors in securities disputes. PIABA members have represented tens of thousands of investors in securities disputes.

PIABA's mission is to protect public investors from abuses prevalent in the securities arbitration process. PIABA advances the rights of public investors by publishing books and articles on securities law, conducting regular CLE programs, providing comment letters to the SEC, NASD, and NYSE, consulting with securities regulators on rulemaking, and submitting briefs as *amicus curiae*. PIABA has an interest in the outcome of this case because PIABA members represent public investors who relied to their detriment on brokerage firms to provide ongoing advice and management of their finances.

Petitioner Financial Planning Association has ably argued for review of the

Commission's Order from the perspective of that organization, and *amici* Consumer Federation and Fund Democracy have revealed the arbitrary and capricious manner in which the SEC wrote its rule. PIABA provides the distinct viewpoint of public investors who have relied on broker-dealers' representations of ongoing financial advice and management, only to lose their financial security. PIABA brings a unique perspective: our members have already seen the harm done to consumers when broker-dealers gain clients' trust by advertising competent advice for all aspects of their financial lives but, when things go wrong, defend themselves as merely providing trade executions. In the dispute resolution trenches, PIABA experiences the gulf between the representations that securities firms make when attracting clients, and their denial of fiduciary and other responsibilities after an investor makes a complaint. We see clearly that the SEC's rule not only exacerbates harms to the public, it will deprive investors of recourse when broker-dealers betray their trust.

ISSUES PRESENTED

Was the Commission arbitrary and capricious when it adopted the Rule?

The answer to the question is yes. The Commission was arbitrary and capricious, because it failed to consider the harm to investors resulting from substituting an ineffective "notice" provision for comprehensive fiduciary obligations and genuine ongoing disclosure.

SUMMARY OF ARGUMENT

Congress determined that broker-dealers that provide investment advice for special compensation should be regulated as investment advisers, except when such advise is "solely incidental" to brokerage services ***and*** when "no special compensation" is paid for the advice. Investment Advisors are fiduciaries whose basic function is "furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments."[1]

This is exactly what investors expect from broker-dealers who hold themselves out as financial consultants and advertise the quality of their financial advice. Stockbrokers have adopted the mantle of trusted "financial advisors." However, when called to account for their misconduct, they consistently assert that they merely work from transaction to transaction, and they owe no duty to provide clients with the objective care and ongoing advice expected of a trusted advisor.

PIABA objects to the Rule because it blurs important legal distinctions and diminishes the fiduciary obligations that Congress intended and that investors expect and deserve. In doing so, the Rule will further contribute to massive confusion that prevails in the investing public regarding the scope and nature of services and obligations of individuals who provide investment services.[2]

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[1] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 187, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963).

[2] SEC Commissioner Cynthia A. Glassman recognized widespread "investor confusion about the

Congress enacted the Advisors Act for the purpose of displacing the rule of *caveat emptor* with a regime of full disclosure and to impose on investment advisors fiduciary obligations to manage their client's investments on an ongoing basis and refrain from self-dealing. The changes proposed by the SEC will undo the work of Congress by displacing that disclosure regime and the fiduciary obligations provided by the Advisors Act and substituting in their place a notice provision that will not have any meaningful effect on consumers whose understanding of their relationship with their advisers is formed by high-impact advertising and not the legalistic boilerplate offered by the SEC.

ARGUMENT

The Broker Exemption defeats the IAA by substituting a meaningless "notice" provision for comprehensive disclosure and fiduciary obligations.

Brokerage firms heavily promote their services through advertisements portraying them as trusted family advisers, "with both the financial expertise and the concern to attend to the long-term financial well-being of the customer and his or her family."[3] The SEC has long recognized the dangers of this kind of advertising, noting that it "may create an atmosphere of trust and confidence, encouraging full reliance on broker-dealers and their registered representatives as

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obligations their financial service provider owes to them." Cynthia A. Glassman, SEC Commissioner, Remarks Before the Open Meeting Regarding the IA/BD Rule (Apr. 6, 2005), http://www.sec.gov/news/speech/spch040605cag-2.htm.

[3] Barbara Black, *Brokers and Advisers–What's in a Name?*, 11 FORDHAM J. CORP. & FINAN. L. 31, 32 (2005).

professional advisers in situations where such reliance is not merited, and obscuring the merchandising aspects of the retail securities business."[4] In adopting the Rule, the SEC ignored what it knows and reversed its prior positions.

In *SEC v. Capital Gains Research Bureau, Inc.*, the Supreme Court agreed with the SEC that the IAA rejected the philosophy of "buyer beware":

> A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation...of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry.[5]

The Court held that the statute, "in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested."[6] The SEC and the courts have reiterated the Act's origins and purposes in multiple cases:

> 'The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's.' *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186, 84 S.Ct. 275, 280, 11 L.Ed.2d 237 (1963). **The Act's general objective, as summarized by the Senate Report upon the bill amending it in 1960, is 'to protect the public and investors against malpractices by persons paid for**

[4] *Id.* at 32-33 (citing SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. No. 88- 95, pt. 1, at 248 (1963)).
[5] *Id.* at 186-87, 84 S.Ct. at 280 (citing *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 366, 83 S. Ct. 1246, 1262 (1963)).
[6] *Id.* at 201, 84 S.Ct. at 287.

> **advising others about securities.'** 1960 U.S.Code, Cong. & Admin.News p. 3503. **It 'reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,'** as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser--consciously or unconsciously--to render advice which was not 'disinterested.' *SEC v. Capital Gains Research Bureau*, *supra*, at 191-192, 84 S.Ct. at 282.[7]

The SEC's own "exhaustive study and report" concluded that, in order to preserve the integrity of the investment advisory industry, advisors must be fiduciaries in the broadest sense. The report stated that "investment advisers could not 'completely perform their basic function--furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments--unless all conflicts of interest between the investment counsel and the client were removed.'"[8]

Contrary to the Act's broad obligations and the "congressional recognition of the delicate fiduciary nature of an investment advisory relationship,"[9] the SEC has substituted a "notice" that shifts the burden of inquiry to the client and inserts *caveat emptor* into the IAA. The SEC does not have the power to undo the legislation passed by Congress, or to override decisions of the Supreme Court.

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[7] *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1376 (2nd Cir. 1970), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970) (emphasis added).

[8] Id. (*citing* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong., 2d Sess. 1 (1939)).

[9] *SEC v. Capital Gains Research Bureau*, 375 U.S. at 191-192, 84 S.Ct. at 282.

SEC's Formalistic "Disclosure" Does Not Communicate And Ultimately Backfires To Harm Investors

Amid confusing jargon that the SEC admits investors do not understand, the "notice" must state:

> "*Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time.*"[10]

You will note that the "disclosure" does not tell the investor (a) how the compensation will vary in any specific instance, (b) how much the financial consultant is being paid for pushing specific products, (c) what the actual conflicts of interest are, or importantly, (d) how to get the objective advice they were led to expect rather than conflicted salesmanship. All the "disclosures" are hypothetical, cloaked in lawyerly contingencies and hidden behind the word "may."

Moreover, the "disclosure" is a one-time event, while the conflicted advice and sales can continue for years. There is no continuing requirement that the trusted "financial consultant" make specific disclosures of actual conflicts and compensation each time he solicits a transaction.

The "notice" invented by the SEC is no substitute for the legal protections of

[10] 70 FR 20424, 20435; see 17 C.F.R. § 275.202(a)(11)-1(a)(ii) (2006).

dealing with a fiduciary. Consumers do not and will not understand (until it's too late) the statement that an account held at a brokerage firm is "a brokerage account and not an advisory account."

Investors do not and will not understand the "disclosure." SEC Chairman Arthur Levitt declared repeatedly, "Disclosure is not disclosure if it does not communicate."[11] This "notice" does not communicate. The SEC has admitted that even its focus group participants were confused and did not understand what was being "disclosed" to them.[12] Such studies are an artificial environment that focuses the participants' attention on the target text. The SEC knows that real life investors meeting with their financial consultants will <u>not</u> have their attention similarly focused on the boilerplate paragraph, and it knows that will further increase the probability of inadequate or misleading disclosure.

Worse, empirical studies of consumer behavior show that seemingly candid "disclosures" of bias actually disarm people instead of putting them on their guard. In one such study, noted behavioral researchers found that disclosure of conflicts has perverse effects.[13] People generally do not "discount advice from biased

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[11] E.g., Arthur Levitt, "Corporate finance in the Information Age," speech to the Securities Regulation Institute, San Diego, CA (Jan. 23, 1997). As Hans Georg Gadamer wrote in PHILOSOPHICAL HERMENEUTICS 65 (Berkeley, Univ. of California Press, 1977), "He who speaks a language no one understands does not speak."

[12] 70 FR 20424, 20435 ("the disclosure did not communicate what those distinctions might mean"). To make matters worse, the SEC relied solely on its own focus group study and capriciously ignored other surveys that provided additional warnings and information.

[13] Daylian Cain, George Loewenstein, Don Moore, *The Dirt On Coming Clean: Perverse Effects*

advisors as much as they should when conflicts of interest are disclosed and that, in some circumstances, disclosure may even lead [people] to put greater weight on biased advice."[14] Further, disclosure can increase the bias in advice because it leads advisors to feel licensed and encouraged to exaggerate their advice further. As a result, disclosure fails to solve the problems created by conflicts of interest and may even make matters worse. Id. The SEC's substitution of boilerplate "disclosure" for actual protection cannot be justified on legal or empirical grounds.

SEC REPLACES FIDUCIARY DUTIES WITH CAVEAT EMPTOR

The Rule relieves the fiduciary's absolute duty of loyalty to his client and obligations of full disclosure and instead imposes an obligation on the investor to seek out additional information: "The prominent statement also must identify an appropriate person at the firm with whom the customer can discuss the differences."[15] This is nothing less than a recrudescence of *caveat emptor*.

Moreover, the SEC fails to consider that a person can only ask intelligent questions if she understands what the issues are to be discussed. It is already clear that few investors will have that understanding, and fewer still will have the courage to challenge their trusted financial consultant.

Of Disclosing Conflicts Of Interest, 34 J. Legal Stud. 1 (2005).
[14] Id. at 6.
[15] 70 FR 20424, 20435.

SECURITIES INDUSTRY MARKETING HAS ALREADY NULLIFIED ANY VALUE INVESTORS MIGHT RECEIVE FROM THE SEC'S FORMALISTIC "NOTICE."

Brokerage firms are spending millions of dollars in advertisements to position themselves as the advisors you want to handle every aspect of your financial life, from investments to your mortgage, from life insurance to long-term care, estate planning, and charitable giving. "Total Merrill" is one of those concerted campaigns. Morgan Stanley portrays the trusted financial consultant sitting on the beach with his happily retired clients, taking full credit for having gotten them there. Wachovia's "once-sleepy program cranked up its [financial] plan production 76% in August from the level the previous month."[16] Critics observed that "[b]ecause Wachovia is doing this planning so openly and on such a grand scale, it makes tatters out of the Merrill Lynch rule." Id.

The advertising is paying off. Consumer surveys find that investors believe that one of their financial consultant's primary functions is to give advice. Only 26% believed that the "primary service" provided by stockbrokers is to execute transactions.[17] Other surveys find that investors seeking financial planning advice believe that the best planning and best advisors are found in big brokerage firms.

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[16] Brooke Southall, "Investment plans surge at Wachovia; some see loophole," Investment News, Sept. 19, 2005 (http://www.investmentnews.com/article.cms?articleId=53369&issueDate=2005-09-19&ht=, visited April 11, 2006). "About 5,500 of Wachovia's 7,800 financial advisers have run at least one program." Id.

[17] "Regulation of Stockbrokers and Financial Advisors: What American Investors Understand, Think Is Right," http://www.zeroalphagroup.com/news/RIvestmentZAG--CFAFINAL--102704.ppt (last visited April 1, 2006).

Notwithstanding all the glowing representations of ongoing care and quality advice that the client received up front, brokerage firms defending claims for flawed financial advice and management argue that they had only an ordinary "brokerage account" relationship and had no ongoing duties to their client:

> [A] broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. The broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice, or warnings concerning the customer's investments. [...] The client may enjoy the broker's advice and recommendations with respect to a given trade, but has no legal claim on the broker's ongoing attention. [...] We are aware of no authority for the view that, in the ordinary case, a broker may be held to an open-ended duty of reasonable care, to a nondiscretionary client, that would encompass anything more than limited transaction-by-transaction duties. Thus, in the ordinary nondiscretionary account, the broker's failure to offer information and advice between transactions cannot constitute negligence.[18]

By contrast, investment advisors owe a duty to provide advice on an ongoing basis and to manage their clients' accounts in strict adherence to their investment objectives and risk tolerance. The analysis in *Erlich v. First Nat. Bank of Princeton*, 208 N.J. Super. 264, 291-293, 505 A.2d 220, 235-236 (1984), lays out an investment adviser's duties and provides a telling contrast to the securities industry's position above:

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[18] *De Kwiatkowski v. Bear Stearns & Co.*, 306 F.3d 1293, 1303 (2nd Cir. 2002). The holding does not accurately reflect the law in states which hold that an ongoing fiduciary duty to investors does not turn solely on the discretionary or nondiscretionary nature of the account. See *Roberson v. PaineWebber, Inc.*, 998 P.2d 193, 199 (Okla.App. 1999), and the survey of jurisdictions cited therein. The SEC's Rule may undermine those investor protections as well.

> [T]he obligation of the investment manager to give prudent advice is the standard of care to be applied in this case. This is a higher standard of care than that found in the "Know Your Customer" and "Suitability" rules. Prudent advice includes: (1) knowing the customer, his assets and objectives; (2) diversifying investments; (3) engaging in objective analysis as the basis for purchase and sale recommendations and (4) making the account productive. *See Bines, The Law of Investment Management* (1979), Ch. 6 *passim.*
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> * * *
>
> The duty to give prudent advice obligates the investment manager to carefully assess the customer's circumstances, both at the outset and during the term of the account. [...] The manager has a further obligation to periodically review the customer's affairs to insure that the investment strategy remains suited to the customer's current ability to protect himself against loss.
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> * * *
>
> An investment adviser is charged with furthering the customer's investment objectives, but he has an ongoing duty to refuse to approve investment strategies that are desired by the customer but appear to the adviser to be imprudent and too risky for the customer. The adviser must keep in mind at all times "the preservation of the estate." Bines, *supra,* at 1-35, quoting *Restatement Trusts 2d,* § 227(6) (1959).

Investors feel deceived when the firm they trusted with their financial life later claims that its obligations began and ended when each trade was executed. One court opens a revealing window into what firms tell you when they want your business versus what they tell arbitrators when you bring claims for misconduct:

> The [Private Advisory Services] offered the Millars world class advisors that would work with and through the Millars' local advisors. This is what Merrill Lynch was selling. Merrill Lynch did not at any time assert to the Millars that it would not monitor their account or that it would not give them advice on an ongoing basis. [...] Yet, after selling the Millars on its experience and ability to advise, manage and achieve their financial objectives, Merrill Lynch contends its only duty was to act with diligence and competence in the execution of an

order. The Court finds such contention untenable.[19]

From the date of its enactment, the IAA has been recognized as putting an end to the philosophy of *caveat emptor*. By substituting a flimsy "notice" provision for the protections of dealing with a fiduciary, the SEC has defeated Congress' most basic goals in enacting the IAA.

The challenged Rule improperly exempts broker dealers from the Act even when they receive payment "additional compensation" for investment advice. Frequently, such compensation, in the form of ongoing management fees, creates the illusion of ongoing monitoring and protection. However, the brokers provide such monitoring and advice ***only*** on a periodic basis or at the investor's specific request and frequently do not consider themselves obliged to undertake any duty to manage the investor's funds on an ongoing and continuous basis.

The duty to register under the IAA carries with it a legal recognition that the Investment Advisor is a fiduciary and owes a duty to continually monitor the investor's accounts and manage them in strict conformity with the investor's risk tolerance and investment objectives.

The new Rule comes at a time when the enhanced protections of the IAA are critical to protect unsophisticated, public investors from being misled by an "alphabet soup" of professional designations and certifications. A recent warning

[19] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Millar*, 274 F.Supp.2d 701, 708 (W.D.Pa. 2003) (rejecting Merrill Lynch's attempt to vacate the arbitration award against it).

from state securities regulators discusses the dangers associated with financial consultants who claim special expertise in dealing with seniors.[20] Similarly, major brokerage firms are using designations, marketing slogans and promotional campaigns that suggest a promise of ongoing financial consulting, yet they do so with the hidden intention of limiting their future liability only to advice in connection with each discrete transaction.

Moreover, the problems with such a "notice" provision are dramatized by the NASD's Investor Alert[21] regarding a relatively new trend by brokerage firms to provide a customer advisory center ("call centers") staffed by securities representatives who sell securities and "may provide financial planning services." The Alert warns of failures to obtain necessary customer information, aggressive sales tactics, undisclosed conflicts of interest and a lack of supervision.

SEC CANNOT NULLIFY ACT § 215 OR PERMIT FIRMS TO WAIVE COMPLIANCE BY NOTICE

The federal securities acts have never been construed, by the courts or by the SEC, to apply only when a regulated person accepts their jurisdiction. To the contrary, the securities laws apply at all times, based on whether a particular

[20] NASAA, Regulators Urge Investors to Carefully Check Credentials of 'Senior Specialists', http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/4028.cfm) (last visited April 2, 2006).
[21] NASD Investor Alert: Customer Advisory Centers: Not Your Typical Securities Firm Call Center (March 15, 2006) (http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=1391&ssSourceNodeId=13) (last visited April 2, 2006).

conduct or activity does or does not fall within the scope of the statutes. On its face, the IAA requires registration of those who provide investment advice for compensation, regardless of whether they are registered.

> It is unlawful for an adviser who has not registered or whose registration has been revoked, suspended, or denied to practice his trade; if he does so, he may be subject to criminal penalties, or to injunction. In addition to penalizing those who would offer investment advice without registering, the Act contains provisions applicable to all investment advisers, whether registered or not.[22]

An investment advisor cannot escape the application of the IAA simply by providing a statement saying that the IAA does not apply. Such a statement would violate the provisions of the Act that voids any "condition, stipulation, or provision" waiving compliance with the Act.[23]

And yet, that is exactly what the SEC's Rule permits by exempting brokers who receive special compensation for providing investment advice, provided that they inform their clients: "Your account is a brokerage account and not an advisory account." The SEC does not have the power by rulemaking to undo Congress' express statutory prohibition.

The SEC's Rule converts the Investment Adviser Act from a law addressing "the delicate fiduciary nature of an investment advisory relationship" into a simple "disclosure" statute like the 1933 Securities Act. The SEC leaves it up to the client

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[22] *Lowe v. S.E.C.*, 472 U.S. 181, 213-214, 105 S.Ct. 2557, 2574-2575, 86 L.Ed.2d 130 (1985).
[23] IAA § 215, 15 U.S.C. § 80b-15 (section citations omitted).

to inquire further about what things mean in real terms - *caveat emptor*. The SEC's Rule turns the Act and more than 60 years of jurisprudence upside down.

Conclusion

The Rule exempting broker-dealers from compliance with the requirements of the Investment Advisors Act of 1940 does not comply with the statutory language or intent of the Act. Instead, the Rule erodes investor protections and defeats the fundamental purposes of the Act.

The Rule elevates form over substance. It restores *caveat emptor* in place of full candid disclosure and freedom from conflicts of interest. And it allows broker-dealers to self-exempt themselves from the Act through a writing given to clients, violating Congress' prohibition that voids any such stipulation or provision.

PIABA respectfully requests that the Court grant the Petition of FPA and vacate the Rule.

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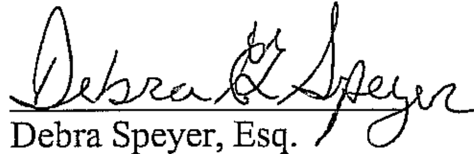
<u>**CERTIFICATE OF COMPLIANCE**</u>

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32(b), the undersigned attorney hereby certifies that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). The word processing system used to prepare this brief reflects that, excluding the portions of the brief Fed. R. App. P. 32(a)(7)(B)(iii) does not require to be counted, the brief contains 4,066 words.



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CERTIFICATE OF SERVICE

I hereby certify that on this April 11, 2007, copies of Brief of *Amicus Curiae* in Support of Petitioner were mailed first-class, postage prepaid, to:

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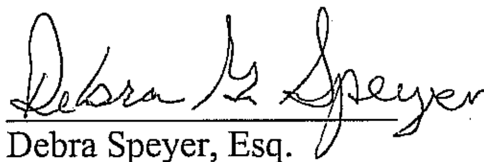
Washington, D.C. 20549-8010



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