UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CUTTER FINANCIAL GROUP, LLC, AND JEFFREY CUTTER,

Defendants.

Civil Action No. 1:23-cv-10589-DJC

BRIEF FOR *AMICUS CURIAE* INVESTOR CHOICE ADVOCATES NETWORK IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae submits the following corporate disclosure statement: Investor Choice Advocates Network ("ICAN") is a nonprofit, public interest organization working to expand access to markets by underrepresented investors and entrepreneurs.[1] ICAN has no parent corporation, and no publicly held company has a 10% or greater ownership in ICAN

[1] Defendants have consented to the filing of this brief. Plaintiff's counsel stated that they "have no position on your motions to leave to file briefs or any dates associated with those motions." No party or party's counsel, and no person other than ICAN and its counsel, authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST

Amicus Curiae is the Investor Choice Advocates Network ("ICAN"). ICAN is a nonprofit organization that advocates for expanding access to markets including access for underrepresented investors and entrepreneurs who do not share the same access and market power as those with more assets and resources.

ICAN has a significant interest in limiting the scope of the SEC's regulatory power to those functions authorized by statute and permissible under the United States Constitution. As an organization speaking on behalf of underrepresented market participants, ICAN also has a significant interest in ensuring the SEC's power to regulate securities markets does not improperly hamper the ability of individuals and organizations seeking to engage in transactions that might be impacted by this Court's orders.

Retail investors often rely on intermediaries for information and execution of transactions. This is true whether the investors are purchasing homes, stocks, or insurance products. Often these intermediaries are required to be licensed and regulated by one or more regulators at the federal, state, and sometimes local level. Each of these regulatory requirements imposes a cost on the intermediary in terms of time, effort, and expense to register and maintain compliance with the specifics of each regulatory regime. As the costs on intermediaries increase, the number of intermediaries willing and able to shoulder those costs decreases.

In this case, the SEC is seeking to impose a regulatory obligation on the Defendants that the law does not require. The Defendants have very ably moved to dismiss the SEC's insufficient allegations, and *amicus* will not repeat those arguments here. Instead, *amicus* will highlight the adverse impact the SEC's claims will have on the very people it ostensibly aims to protect: purchasers of insurance products.

I. INTRODUCTION

By the SEC's own admission, this case is about insurance products, not securities. Defendant Cutter is "a licensed insurance agent in Massachusetts," and he allegedly "steered his advisory clients to certain insurance products" while allegedly concealing "commissions he received from the insurance companies" and making "false statements to the insurance companies." (Amended Complaint at ¶¶ 13 & 2). To be sure, defendant Cutter Financial Group LLC ("CFG") is registered with the SEC as an investment adviser, and the SEC alleges that this "dual registration" capacity provides the Commission with jurisdiction to bring these claims. (Amended Complaint at ¶ 14). As the Defendants have argued in their motion to dismiss the amended complaint, the SEC's allegations fail to establish jurisdiction here.

Amicus respectfully submits this brief to bring to the Court's attention the (presumably unintentional) harm the SEC's position would inflict on the very people it purports to be protecting: investors. The fact that Defendants operate subject to two independent regulatory regimes does not mean that that either regulatory body may claim jurisdiction over every transaction on which the Defendants provided advice. Some investors may elect to receive advice and assistance in connection with insurance product transactions from intermediaries registered as insurance agents but *not* to the regulatory obligation imposed on "investment advisers" under the Investment Advisers Act of 1940 (the "Advisers Act"). The SEC's allegations in this case, if permitted to stand, would improperly reduce or foreclose that option for investors.

II. ARGUMENT

A. The SEC Recognizes The Cost To Investors Of Imposing Investment Advisor Standards On Other Intermediaries.

The SEC recently had the opportunity to consider how imposing investment advisor standards on other intermediaries would reduce investor choice. Regulation Best Interest ("Reg BI") imposes certain standards of care on securities brokers, who (like insurance agents) perform different functions and have historically been subject to different regulatory obligations than investment advisers. In determining *not* to subject brokers to the same fiduciary standards imposed on investment advisers, the SEC cited the adverse impact such a decision would have on investors:

> We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act. . . . we believe (and our experience indicates), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations. . . .
>
> Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances.[2]

Imposition of investment adviser fiduciary standards on insurance agents, which is what the SEC's amended complaint seeks to do here, would increase costs and reduce investor choices in the market for insurance products. Imposing investment advisor fiduciary obligations on

[2] Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 FR 33318, 33320-21 (June 5, 2019) ("Reg BI Adopting Release") at 19 -21 (available at https://www.sec.gov/rules/final/2019/34-86031.pdf).

insurance agents would be harmful to investors, is against public policy, and should be rejected by the Court.

B. The Court Should Not Permit the SEC to Accomplish In this Litigation What Congress and Courts Have Already Rejected

Congress and the Courts have repeatedly rejected the notion that fixed index annuities ("FIAs") are securities within the scope of the federal securities laws.

Congress has certainly given the SEC no reason to believe it should be regulating FIAs or insurance products generally. Section 1012(b) of the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq*.), passed by Congress in 1945, explicitly bars the SEC from regulating insurance sales, which are a matter of state—and not federal—law. Similarly (and more recently), in 2010, Congress clarified in Section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") that FIAs are not securities subject to SEC regulation.

Courts have expressed similar skepticism about the SEC's attempt to assert jurisdiction over insurance products, precisely because the SEC has failed to assess the costs associated with imposing such jurisdiction. In 2007, at a time when the FIA market had an annual sales volume of $24.8 billion, the SEC promulgated Rule 151A, which purported to deem FIAs securities under the Securities Act of 1933. *See American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-79 (D.C. Cir. 2010). In enacting Rule 151A, the SEC noted costs that would be associated with SEC regulation of FIAs. Specifically, insurance companies would bear costs up to $800 million associated with SEC registration and disclosure requirements, such as preparing and filing required SEC registration statements and printing prospectuses for investors. *See Indexed Annuities And Certain Other Insurance Costs*, 74 Fed. Reg. 3138, 3164-3168 (Jan. 6, 2009). In addition, many commentators opined that *investors* would bear indirect costs of a diminished availability of FIAs due to reduced competition resulting from insurance companies who would cease to sell FIAs, and broker-dealers who would not be willing to incur the start-up costs associated with selling FIAs. *Id* at 3168-3172. Despite these costs and the harm to investors, the SEC finalized Rule 151A.

Shortly thereafter, American Equity Investment Life Insurance Company and others challenged Rule 151A in the D.C. Circuit. In *American Equity*, the court invalidated Rule 151A precisely because the SEC had failed adequately to assess the costs created by the rule. The *American Equity* court held in relevant part:

> [T]he SEC's analysis is incomplete because it fails to determine whether, under the existing regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors. The SEC's failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency.

Id. at 179.

In seeking to assert jurisdiction over FIAs in this case, the SEC has not alleged anything that would indicate the Commission has performed the analysis the D.C. Circuit found lacking in *American Equity*. Requiring insurance agents that wish to sell FIAs to register with the SEC as investment advisers would come at considerable burden and expense—a burden and expense that would ultimately be borne by investors. *See, e.g.,* Securities Industry Association, *The Costs of Compliance In the U.S. Securities Industry* (Feb. 2006) ("Perhaps the most significant costs are… the opportunity costs borne by firms and their impact on investors, who may end up paying either higher prices or who may perceive a reduction in the choices available to them.").[3]

[3] Available at https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.

In light of the costs and reduced investor choices that would result, the Court should not permit the SEC to accomplish in this litigation what Congress and the D.C. Circuit have previously rejected: SEC jurisdiction over FIAs and FIA transactions.

C. The SEC Silences Investors When it Seeks to Expand Its Jurisdiction Through Piecemeal Litigation.

Given the SEC's lack of success in obtaining jurisdiction over FIAs through rulemaking or Congressional statutory authorization, it is perhaps not surprising that the Commission would attempt instead to obtain that jurisdiction through piecemeal litigation involving FIAs such as this case.

As demonstrated by the history of Rule 151A, when the SEC attempts to increase or decrease its jurisdiction through rulemaking, the public (including investors) has the opportunity to comment, and challenge in court, the extent of applicable statutory authority in a transparent and predictable manner. *See also Digital Realty Trust, Inc. v. Somers*, 583 U.S. ___ (2018) (SEC promulgated rule expanding "whistleblower" beyond statutory limitations in Dodd-Frank Act); *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873 (D.C. Cir. 2006) (SEC promulgated rule expanding "client" beyond statutory authority in Investment Advisers Act of 1940); *Financial Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (SEC promulgated rule defining "investment adviser" in a manner inconsistent with the Investment Advisers Act of 1940).

By proceeding by way of this litigation, the SEC has denied the public and investors the opportunity to evaluate and weigh in on whether to impose investment adviser regulatory obligations on insurance agents selling FIAs. In SEC litigation, as opposed to SEC rulemaking, the SEC actively excludes third parties, such as investors, from intervening. *See, e.g., SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (upholding order granting SEC's opposition to investors' motion to intervene in SEC enforcement action). Even when considering whether to consent to the filing of this amicus brief, the Commission did not consent but rather "took no position."

To give the Court some idea of the public's interest in providing input on proposals to expand Adviser Act obligations over non-securities, consider a rule recently proposed by the SEC that would do just that. On February 15, 2023, the SEC proposed rule changes that would, among other things, "expand the advisers' custody rule to apply to all assets, not just funds or securities."[4] As of August 2023, members of the public had submitted over 100 comments on the proposed rule.[5] Some of the comments raise concerns directly relevant to the SEC's attempt to assert jurisdiction over non-securities in this case.

The Investment Adviser Association warned that the burdens of imposing obligations over non-securities "will affect all advisers but could be particularly challenging for smaller advisers. And investors may ultimately bear new or increased costs and/or decreased choices as a result of this new regime."[6] Similarly, the U.S. Chamber of Commerce commented that the proposed rule "will interfere with an underlying client's ability to engage preferred service providers and to invest in preferred asset types."[7] Finally, the Insured Retirement Institute noted:

> The Proposed Rule would disrupt and interfere with the ability of such retail investors to decide how best to purchase products that can help them achieve their financial objectives. This result would be detrimental to retail investors and would run counter to one of the SEC's top policy objectives: to preserve retail investor access to a variety of "choices regarding the types of relationships they

[4] SEC Proposes Enhanced Safeguarding Rule for Registered Investment Advisers (Feb. 15, 2023) (available at https://www.sec.gov/news/press-release/2023-30).

[5] Safeguarding Advisory Assets, Submitted Comments (available at https://www.sec.gov/comments/s7-04-23/s70423.htm).

[6] Investment Adviser Association comment letter (May 8, 2023) (available at https://www.sec.gov/comments/s7-04-23/s70423-189019-370362.pdf).

[7] U.S. Chamber of Commerce comment letter (May 8, 2023) (available at https://www.sec.gov/comments/s7-04-23/s70423-186079-340122.pdf).

> can have [with investment advisers and broker-dealers], the services they can receive, and how they can pay for those services.[8]

When given the opportunity to provide input on proposed SEC rulemaking that would expand the scope of Adviser Act obligations over non-securities, the public responds, and often those responses point out ways in which such expansion would harm investor choice. However, in this case, the Commission has decided to pursue Adviser Act jurisdiction expansion over non-securities by way of litigation without soliciting public comment.

III. CONCLUSION

The position taken by the Commission in its amended complaint is against public policy because it will impose costs, restrict investor choices, and expand Adviser Act jurisdiction in ways not authorized by statute; accordingly, *amicus* Investor Choice Advocates Network urges the Court to dismiss the Commission's complaint for the foregoing reasons and for the reasons stated in Defendants' motion to dismiss.

Respectfully submitted,

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[8] Insured Retirement Institute comment letter (May 8, 2023) (available at https://www.sec.gov/comments/s7-04-23/s70423-189901-374183.pdf).