

June 28, 2006

Clerk of the Court of Appeals
U.S. Court of Appeals, District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *Financial Planning Association v. United States Securities and Exchange Commission*, Nos. 04-1242, 05-1145: Citation of Supplemental Authorities pursuant to FRAP 28(j) and Circuit Rule 28(h)

Dear Sir/Madam:

This letter cites *Phillip Goldstein v. SEC*, No. 04-1434 (June 23, 2006), as supplemental authority to our *amicus curiae* brief filed April 10, 2006.

In the instant case, the SEC exempted certain broker-dealers from regulation under the Investment Advisers Act based primarily on its interpretation of the meaning of the term “solely incidental” in Section 202(a)(11) of the Act.¹ The SEC’s interpretation of “solely incidental” bears no rational relationship to the plain meaning of that term, just as in *Goldstein* the court found that the SEC’s interpretation of the term “client” in Section 203(b)(3) of the Act was arbitrary and capricious. In both cases, the arbitrarily interpreted term relates to the types of persons who are subject to regulation under the Act.

The SEC argues that the court should defer to the agency’s interpretation of “solely incidental” because the term is susceptible of more than one meaning. As *Goldstein* states, however,

[i]f Congress employs a term susceptible of several meanings, as many terms are, it scarcely follows that Congress has authorized an agency to choose *any* of those meanings.²

¹ See *Amicus Curiae* Brief at 13.

² *Goldstein* at 8.

The meaning of a term must reflect the context.³ *Goldstein* interpreted the term “client” in light of Congress’s intent that the Act regulate “person-to-person . . . personalized advice attuned to a client’s concerns.”⁴ It is precisely such person-to-person, personalized advice that cannot reasonably be considered solely incidental.

The SEC’s position that investment advice provided “in connection with and reasonably related to the brokerage services provided”⁵ can be considered solely incidental mirrors the kind of “manipulation of meaning” that the court found in *Goldstein*.⁶ “At best it is counterintuitive to characterize the investors in a hedge fund as the ‘clients’ of the adviser.”⁷ Similarly, it is counterintuitive to characterize any investment advice provided “in connection with and reasonably related to the brokerage services provided” as solely incidental.

Just as in *Goldstein* the court rejected the SEC’s attempt to extend the coverage of the Act to persons Congress intended to exclude, the court should not permit the SEC to exempt from the Act persons Congress specifically intended to cover.

Respectfully submitted,

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³ *Id.*

⁴ *Id.* at 13 (citing *Lowe v. SEC*, 472 U.S. 181, 208, 210 (1985)).

⁵ 70 Fed. Reg. 20,436.

⁶ *Id.* at 16.

⁷ *Goldstein* at 14.

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