專題研究

論美國「龐氏騙局」對華人社會的影響 Ponzi Scheme（含法學英文）

張瑋心*

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關鍵詞

投資詐騙、市場操作、龐氏騙局、通貨膨脹、回郵票券

摘要

2010年12月美國打擊詐欺執行小組對外發布[1]：破獲一起發生在2010年8月至12月間的基金詐騙案，估計有120,000人受害，損失超過80億美元。以檢察長Eric Holder為首的偵查小組在記者會上，宣誓根除詐騙集團的決心、呼籲民眾小心此類的詐騙手法，並強調美國聯邦調查局已經注意到「投資詐騙」(investment frauds)呈現穩定增加的趨勢，特別是龐氏和市場操作模式(Ponzi and market manipulation schemes)，即台灣俗稱

* 中國河南科技大學法學院特聘教授；台灣法官學院講座。

1 FBI, https://www.fbi.gov/news/stories/2010/december/fraud_120610, visited on Dec. 20, 2016.

的「老鼠會」、中國大陸的「傳銷」。自2009年1月，美國聯邦調查局起訴超過200件類似案件，許多民眾指稱被詐騙的金額高達20萬美元。從目前的案件觀察，全美排名前五位的龐氏詐騙熱點集中在洛杉磯、紐約、達拉斯、鹽湖城、舊金山等地區，惟殊值留意的是，這些詐騙可能隨時在任何地方發生。不過猶言在耳之際，中國2012年陸續傳出多起類似的詐騙案件，其中廣西南寧向來被視為前進東協的入口，已先一步淪為詐騙傳銷集團吸金據點，業務人員以30萬回收3千萬作噱頭，誘使海內外投資人前往「上課繳費」，台灣據悉也有10萬多名民眾受騙上當[2]。本文欲探討此種推陳出新、生生不息的詐騙行徑，源可溯及美國聯邦犯罪史上一種詐欺手法一「金字塔銷售模式」(Pyramid Sales Scheme)，另輔以美國現代「馬多夫騙局」(Madoff Scheme)的裁判以為說明。

壹、金字塔銷售模式

回顧台灣曾於1981年發生「鴻源吸金案」，由沈長聲、劉鐵球、於勇明等人以投資公司名義成立鴻源機構，假借高利率的社群行銷方式，實為非法吸集民間游資的「老鼠會」。鴻源機構在1990年突然倒閉，留下16萬債權人與新台幣900餘億元負債的殘局，一時間造成台灣金融體系動盪不安[3]。台灣俗稱的「老鼠會」，美國曰之金字塔銷售模式(Pyramid Sales Scheme)、或龐氏計畫(Ponzi scheme)。「龐氏」的稱呼就是以美國二十世紀初著名的詐騙首腦查理斯．龐氏(Charles Ponzi)為名而來。

金字塔銷售模式是一種變相的多層次傳銷手法，其利用倍數作基礎去倍增時間、空間、以及營業額的滾雪球銷售方式。金字塔銷售類似一場騙局，設下高紅利為誘餌，簡單地透過誇大吹噓的獎金制度使銷售額達到幾何增長，讓少數人相信收入可以在短期內達到天文數字。它的目的在不斷要吸取新會員的加入，而資深的會員旗下會只有一組固定會員，普遍經個人介紹親友再去拓展社群網絡；而會員下還有新會員，一層一層的紅利累積，以能攤平加入會員時已購入產品的成本花費。萬一公司突然倒閉，新的會員大多數虧損，因為購買的產品很難短時間內賣出，從而，最後的會員(老鼠)可能承受巨額損失。

美國聯邦貿易委員會(Federal Trade Commission; FTC)為提供民眾辨識龐式騙局的簡

2 三立新聞網，http://www.setn.com/News.aspx?NewsID=78881, 瀏覽日期：2016年12月20日。
3 華視新聞，http://news.cts.com.tw/cts/society/201108/201108110798690.html, 瀏覽日期：2016年12月27日。

單方法，特別定義金字塔銷售的手法[4]：㈠加入者付錢給公司以換取兩種權利，一是銷售貨品的權力；㈡介紹他人加入而獲取酬勞的權利，而引導他人加入會員所獲取的報酬與實際銷售貨品的商業行為無關。換言之，只要滿足前述二個要件，一是繳交入會費，二是賺取根本無實體商品買賣的人頭費，即可斷定陷入金字塔銷售模式。分析龐式騙局的操作，係以高獎勵方式增加新會員的投資，而非來自於合法商業模式的銷售和配銷真實商品給消費者的行為，故而，從事金字塔銷售的組織並不打算永續經營，因為公司內部根本沒有生產線、營運的實體項目、或進行中的土地開發，而召募的會員終將隨著時間產生疑問而人數開始減少。一旦累積相當財富後，該集團組織便隨時準備人去樓空。

另外，參照1995年Hirsch v. Arthur Andersen & Co.案判決，美國聯邦上訴審法院定義龐氏詐騙[5]：係一項藉由公司處於虧損狀態卻仍繼續經營的計畫。公司故意包裝成有盈利的外觀去吸引新投資人並保證獲利，再利用新投資人的資金去支付允諾先前投資人的高溢價。這項計畫的影響是讓公司不斷舉債並且承擔更多的責任，而公司必須維持獲利假像以吸收新的投資人。誠如Securities and Exchange Commission v. Credit Bamcorp, Ltd.案判決揭示[6]：龐氏騙局的本質，係投資人的獲利來自於不合法的商業活動，再者，該商業活動其實就是透過不知情的新投資人不斷湧入的資本去運作。

貳、「龐氏騙局」的源起

考究「龐氏騙局」的起源發現[7]，創始人查理斯．龐氏(Charles Ponzi)，出生於1882年3月3日的義大利帕爾馬城，後來移民加拿大成為加國公民，他曾因搞垮了Zrossi & Company公司，一間位於加拿大Montreal銀行的醜聞事件而被判處三年有期徒刑，在服刑二十個月後假釋出獄。幾個星期後他再次被捕，這次是因為從義大利非法走私外國人到美國。他被判入獄兩年，在喬治亞州的聯邦監獄服刑完畢後，定居波士頓，在那裡他開始運作龐氏計畫，而我國耳熟能響的老鼠會便是源自他的姓—「龐氏騙局」。

龐氏建立證券交換公司(Securities Exchange Company)，是由單人操作的方式，提供反映投資在國際回郵票券上(international reply coupons; IRCs)。回郵票券在許多國家

4 MBA library, http://wiki.mbalib.com/zh-tw/%E9%87%91%E5%AD%97%E5%A1%94%E9%94%80%E5%94%AE%E8%AE%A1%E5%88%92, visited on Dec. 20, 2016.
5 Hirsch v. Arthur Andersen & Co., No.1121, Docket 94-7669 (1995).
6 Securities and Exchange Commission v. Credit Bamcorp, Ltd., 195 F.Supp.2d 475 (2002).
7 NNDB, http://www.nndb.com/people/504/000179964/

的郵局都有販售，例如加拿大一張售價6元加幣，惟台灣的郵局沒有收受此種郵資兌換券[8]。它的目的在使寄件人於國際信件中附上回郵(return postage)，方便他國的收件人可以將票券贖回郵資(redeemed for)，即兌換成郵票再回信給寄件人。當時IRCs 的賣價為一毛錢，低於郵票的價格，還可以贖回郵票，因此相當吸引投資人。而實際上，利潤很低(the profit margin was so slim)，必須買進百萬單位的IRCs，才能賺進幾塊美元。然龐氏先生卻向他的客戶保證投資獲利50%，並且公司會於每90天支付紅利。

龐氏的郵資券賣得很快，竟使他能夠在短短45天內支付幾輪的紅利，而無庸待至原先對外允諾的90天。於茲，關於郵資券的消息傳得很快，越來越多的民眾加入購買行列。龐氏先生於茲開始向銀行貸款$200美元，而不過幾個月裡，他已經擁有兩間位於波士頓的辦公室，且僱用了十多名員工從事回郵資券業務的銷售，隨後，他又買了一間價值$35000美元的豪宅。當然，龐氏公司根本沒有實際的收益進帳，龐氏也從沒買過IRCs，他只是口頭允諾，並利用早期客戶投資的資金去支付後期投資者的紅利(he paid early investors with the funds derived from later investors.)。截至龐氏計畫崩解前的收入，平均每週高達$1百萬美元，估計後期投資人被詐取(latecoming investors were defrauded)的金額約計$700萬~$1500萬美元之間。大部分龐氏的不法所得(ill-gotten gains)在非自願性破產的聽證會上被查封扣押(were seized in an involuntary bankruptcy hearing)，而僅剩餘的錢則花費在他後來的幾件官司中。

龐氏先生被指控多達86件的郵政欺詐罪名，經陪審團裁斷有罪後，進入聯邦監獄服刑五年，而服刑期間，他又被麻塞諸塞州的檢察官依詐欺罪名起訴。龐氏聲稱，這違反了禁止雙重危險的保護(violated his protection against double jeopardy)，於是一路上訴至美國最高法院。美國最高法院判決聯邦和州政府同時對詐欺罪擁有管轄權(both the state and federal government had jurisdiction)，故而龐氏因觸犯州的詐欺罪名再度被起訴。州法院判決龐氏罪名成立，應入州監獄服刑7~9年。當他從聯邦監獄出獄後，他尋求保釋並以被州法院重複定罪的理由提起上訴(sought bail to appeal his state conviction)。接著，他獲得保釋，逃到了佛羅里達州，在那裡他推出了另一個金字塔傳銷計畫(launched another pyramid scheme)，這回賣的是房地產，採口耳相傳的隱密方式進行。

有了前車之鑑，龐氏先生企圖捲款回到義大利，於是訂好了從水路搭船經坦帕市，一座位於美國佛羅里達州西海岸的港口，再繞轉至羅馬。當船隻在紐奧爾良短暫停留時，龐氏先生遭到逮捕，然該次的逮捕行動不在管轄權範圍內，而且執行行動的

8 Canada Post, https://www.canadapost.ca/cpo/mc/business/productsservices/atoz/irc.jsf, visited on Dec. 25, 2016.

德州警方也沒有拘捕令(arrest warrant)。龐氏被帶往德州後不久即被遣送麻薩諸塞州，很快地他又被麻薩諸塞州法院判刑，嗣後入獄服刑至1934年。出獄後，龐氏被列為美國不受歡迎的外國人，並被驅逐出境(deported as an undesirable alien)返回義大利。回到義大利後，他開始寫作，並自行出版了一本自傳(self-published an autobiography)[9]。晚年，龐氏定居巴西，從事英語教學的工作，過世時身邊剩有的財產僅能勉強支付他的喪事。而美國犯罪史上開創「老鼠會」的頭號領袖一龐氏先生，1949年入土。

參、「馬多夫騙局」的簡介

2008年美國爆發史上規模最浩大的龐氏騙局[10]，由前那斯達克證券交易所(NASDAQ)主席柏尼．馬多夫(Bernie Madoff)一手策劃主導，不法吸金約計650億美元。檢方表示，馬多夫涉嫌龐氏騙局，以新客戶的本金，支付給舊客戶作為回報，而非把錢用作投資。長達20年的詐騙形跡不被披露，馬多夫的詐騙技術足證已遠遠超越了查理斯．龐氏，也使得二十一世紀版的「馬多夫騙局」取代了上一世紀的「龐氏騙局」，成為老鼠會的新名詞。

柏尼．馬多夫，出生於1938年4月29日美國紐約市的猶太家庭，22歲時即以$5000美元的資本創立了伯尼馬多夫證券投資公司(Bernard L. Madoff Investment Securities LLC)，從事股票仲介的生意。1970年代，股票交易是透過人工方式，所以證券交易員的佣金很高，而馬多夫證券投資公司已經開始利用電腦自動交易系統，可謂現代華爾街交易系統的先驅之一。1980年代，馬多夫的公司是全美證券經紀商協會(National Association of Securities Dealers, Inc.; NASD)中非常活躍的證券經紀商，而馬多夫的名號也很快地在納斯達克交易所竄起。1991~1993年，馬多夫曾擔任納斯達克交易所主席，並一直擔任全美證券經紀商協會董事和證券服務業協會董事，在美國證券投資界佔有舉足輕重的地位。二十一世紀初，美國經濟正邁入一個不穩定的艱困期，但是伯尼馬多夫證券投資公司卻安然挺過了2000年的網際網路泡沫，以及2008年的金融風暴。此外，馬多夫的人脈網絡相當堅固，平日樂衷參與慈善活動也助他積累了好聲譽，進而獲取遍及五大洲政商名流的信任[11]。

9 The Rise of Mr. Ponzi, http://pnzi.com/, visited on Dec. 25, 2016.
10 BBC, http://news.bbc.co.uk/chinese/trad/hi/newsid_7780000/newsid_7780900/7780909.stm, visited on Dec. 27, 2015.
11 Supra note 9.

其實早在1999年，波士頓城堡投資管理公司一名研究員哈利．馬科波洛斯(Harry Markopolos)，在老闆的指示下展開對馬多夫投資致勝策略的研究，未料卻意外發現馬多夫公司的證券投資不論市場處於何種條件狀態下，卻始終保持獲利，他想不透如何模擬完全不受市場漲跌幅波動的影響，且能絕對產生穩賺不賠的結果。馬科波洛斯認為，投資也會有小賠，投資人不可能永遠打敗所有的市場，於是質疑馬多夫公司的證券投資是一場龐氏騙局，遂接下來的幾年內陸續向美國證券交易委員會(U.S. Securities and Exchange Commission; SEC)舉發，然他的懷疑不獲採信。2005年，馬科波洛斯再次向證券管理委員會遞交了一份長達19頁的舉發信，標題為一全球最大的避險基金是場騙局，並詳列了21條馬多夫證券投資公司的操作疑點[12]。

2007年，馬多夫的投資王國逐漸出現崩裂，2008年金融海嘯醞釀形成，同年9月15日美國百年銀行雷曼兄弟聲請破產，同年12月8日在金融海嘯的衝擊下，各地投資客戶紛紛向馬多夫提領巨額資金。其中，一名歐洲投資人突然要求贖回70億美元的投資金。該次事件導致資金周轉問題，而馬多夫卻突然表示有意提早發放紅利，讓其任職公司的兒子感到不解。隔日，馬多夫於寓所向兩個兒子坦承，他複製巨型金字塔銷售模式，前後共詐騙客戶500多億美元，而他已準備自首，所以希望把僅餘的2億至3億美元發給員工及朋友。2008年12月10日、11日，馬多夫的兒子將整起事件轉知律師，接著向聯邦調查局告發，馬多夫隨即遭到逮捕。2009年6月29日，馬多夫坦承11項罪名，當庭認罪收押，嗣後聯邦法院判處他150年有期徒刑[13]。2010年12月11日，馬多夫的長子馬克自殺身亡[14]。

肆、投資人的救濟

當馬多夫空前的詐欺被揭發後(Madoff's unprecedented fraud was discovered)，SEC向美國聯邦紐約南區地方法院提起民事訴狀(civil complaint)，指述馬多夫及馬多夫證券投資公司從事龐氏詐騙(alleging that Madoff and Bernard Madoff Investment Securities LLC were operating a Ponzi scheme.)。證券投資者保護公司(Securities Investor Protection Corporation; SIPC)根據證券投資保護法第78aaa條以下(Securities Investor Protection Act,

12 http://data.book.hexun.com.tw/chapter-4152-2-10.shtml, visited on Dec. 27, 2015.
13 BBC, http://news.bbc.co.uk/chinese/trad/hi/newsid_7930000/newsid_7939500/7939598.stm, visited on Dec. 27, 2015.
14 http://finance.sina.com/bg/juhengwang/20101212/1702192586.html, visited on Dec. 27, 2015.

SIPA; 15 U.S.C. §§78aaa et seq.)為馬多夫證券公司的投資人尋求救濟。法院指定艾文・皮卡德(Irving H. Picard)為馬多夫證券投資公司清算的財產受託人(trustee)，次按證券投資保護法規定，Picard享有破產受託人的概括性權利(has the general powers of a bankruptcy trustee)，以及將馬多夫證券投資公司的剩餘財產分配給投資人的責任權利。換言之，皮卡德作為馬多夫證券投資公司業務清算的受託人(as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC)，將擔負起解開數十年馬多夫騙局的巨大任務。

囿於馬多夫騙局持續至少三十年，多位債權人不服原審裁判受託人參照證券投資保護法(SIPA)，按客戶本金比例去分配清算後的財產，遂要求賠償金額能真實反映通貨膨脹，上訴請求法院解釋SIPA並命受託人調整投資人本金比例；又其中一名債權人要求調整利息，以符合貨幣的時間價值。原破產法院根據SIPA規定，認為受託人不須因通貨膨脹或利息而為任何調整的決定。原審裁判認定，SIPA不允許對權益淨值的決議做調整。債權人依據美國法典第28卷158(d)(2)條[15]上訴。上訴審法院同意受理本案直接上訴的審查聲請。本文爰引介In Re: Bernard L. Madoff Investment Securities LLC.案說明，如次判決要旨，略以：

一、事實經過

緣賠償聲請人把錢交給馬多夫投資，馬多夫卻從未將客戶的資金用於投資。為了掩蓋他完全沒有確實代客操作的交易行為，馬多夫偽造不實的客戶對帳單和交易記錄(To conceal his complete lack of trading activity on behalf of his investors, Madoff created fictitious paper account statements and trading records.)。亦即，客戶對帳單所列出的股票交易，實際上馬多夫代表客戶卻未持有相對應的股票。相反地，馬多夫在面對客戶解約贖回時，係以現有客戶和新客戶的投資金去支付。而投資人帳戶中唯一正確的紀錄是本金的匯入與提領。

馬多夫證券投資公司(BLMIS)崩解後，Picard被指定為資產清算受託人。SIPA則是為因應證券商不當投資導致投資人蒙受重大損失，而為代表投資人於破產程序中爭取回復財產的目的下建立，又依據 In re New Times Sec. Servs., Inc.裁判要旨所揭，證券公司依法進入清算程序並提供其客戶特殊保護。易言之，SIPA的設計係要返還客戶本金。按權益淨值決議(Net Equity Decision)，馬多夫公司於SIPA下進行清算後，顧客財產的專款建立被用以優先分配給客戶，而該資金與證券經紀商的一般資產分開。客戶的

15 28 U.S.C. § 158(d)(2).

財產排除個人名義登記的股票，包括已收取或持有的現金和股票。立於證券經紀商和各別客戶財產淨值的基礎上按比例均分剩餘資產。客戶的本金越多，其所占客戶財產基金的份額越大。SIPA明確劃分財產權益淨值，相關部分如帳戶內資金，股票買進賣出日加總計算後，確定債務人尚欠客戶的權益淨值。就如何分配給客戶的權益淨值，主要依據權益淨值法則，從債務人帳冊和記錄之查明為準。SIPA保證客戶資金最低額的賠償，不足支付客戶權益淨值部分，客戶可以請求證券投資人保護公司(the Securities Investor Protection Corporation ; SIPC)補助。SIPC補助給SIPA下每個投資人最高$500,000美金。至SIPC補助仍不足支付客戶權益淨值者，便具備作為不受擔保客戶的條件，可以再參與公司資產的分配請求。

二、上訴爭點

本件上訴案爭點在於證券投資者保護法(Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq.)以下稱SIPA或the Act，對於客戶權益淨值的索賠，是否允許通貨膨脹或時間長短因素而為本金比例及利息的調整？又SEC支持通貨膨脹的考量得為權益淨值調整的意見，法院是否應依從？

三、裁判理由

本院（上訴審法院）從新檢視破產法庭的法律結論，包括其對於SIPA的解釋。債權人聲稱破產法院因適用法律錯誤，而為SIPA不允許對客戶財產的權益淨值索賠按通貨膨脹調整的裁判。債權人更進一步確信美國證券交易委員會(SEC)的支持觀點，可作為權益淨值應反映通貨膨脹的依據。對此，本院不表認同。

㈠ 在SIPA規定下客戶權益淨值的賠償不允許通膨的調整。

根據債權人主張，欠缺通貨膨脹的調整，馬多夫早期投資人的資金與後期投資人的資金相比會被不公平地低估。雖然 SIPA 字面上不提供對權益淨值為通膨的調整，債權人仍敦促本院解釋SIPA允許受託人自由裁量做出調整。然在SIPA下，本院的結論是權益淨值為通膨之調整是不容許的，蓋其超出了 SIPA所欲保護的範圍且與SIPA的立法框架不一致。SIPA沒有明文對權益淨值為通膨調整的可能性。法條本身就權益淨值的定義沒有提及通貨膨脹。縱然，於不相關的情形下，SIPA可以允許通膨部分的考慮，SIPA也強調客戶的證券價值，就是為了計算權益淨值，如同他們在破產申請日上進行資產清算。參照15 U.S.C. §78lll (11)(A)(B)，條文並未指出那些從沒有投資的現金存款須要加入通貨膨脹因素去做任何調整。

SIPA的沉默並不令人吃驚。在一個典型證券經紀商的錯誤中，去對權益淨值做通膨調整是毫無意義的；蓋證券是由證券經紀商代客操作所購買，而當下購入的證券已

經具備反映通貨膨脹經濟條件下的價值。SIPA的推定是對證券經紀商破產時給予投資人補償，而不問證券經紀商有否為詐騙方能符合要件。SIPA的主要目的是當投資人交易的證券經紀商遇到財務困難時，提供對投資人保障。因此，在權益淨值決議中，SIPA沒有明確表示當一個不誠實證券經紀商沒有確實將客戶資金用於投資的情況下，該如何去計算客戶的權益淨值。我們爰確定了法定語言沒有計算權益淨值的規定，又其適用於無數案件的情況下，當然也可能出現在 SIPA下的清算事件，而不同事實模式將不可避免地採取不同方法以確定最接近公平。

正如前述說明的，SIPA旨在加快返還客戶的財產。少了SIPA，客戶資金和證券被失敗的證券經紀商所持有，將可能於破產程序中耗盡或陷入困滯而動彈不得。又，誠如SEC v. SIPC案裁判所揭[16]，SIPA強調監督證券經紀商的功能，並且進一步補充SIPA在以保護投資人因證券經紀商不當代客操作現金與證券託管時能免於遭受更大損失。同樣地，當清算懸而未決時，SIPA便不能為客戶被不當使用證券或現金所遭受的損失提供賠償。客戶的證券是否能回復或返還等值帳戶設立時所存入的現金之疑問，與其後續任何價格的波動無關。參見美國法典第15卷第78fff–2(b)(c)(1)條之規定，倘若證券價格貶值，也可能會傷害投資人，要超越回復破壞前的現狀去避免損失並不是SIPA的目標。固然清算期間證券和現金被拒絕有機會成本的考量，再者，相同的現金可能因通貨膨脹而喪失經濟購買力，SIPA 返還給客戶的資金畢竟是名義上為清算前的餘額分配（非全額賠償）。

另債權人主張，為反映通貨膨脹去調整權益淨值的賠償請求是確定權益淨值最公平的方法。然而，本院已經解釋，SIPA目的不是在證券經紀商崩潰時去提供受害人充分保護，更遑論單方面立於客戶權益淨值的論點不具說服力，SEC v. Packer, Wilbur & Co.案供參[17]。此外與債權人說法相左的，還有未經考慮通膨因素而維持客戶資金的分配不一定不公正。事實上，本院最近發現下級審法院在核准一個歷時十三年龐氏騙局的受害者接收分配計畫，即使沒有提供通貨膨脹的調整，法院也無濫用裁量權限之虞。可以確定的是，SIPA所定義的權益淨值目的，在以加速處理證券經紀商上手裡持有客戶的資金能按比例返還給客戶，而不是回復客戶最初所投資的全部金錢。

㈡ 美國證券交易委員會的觀點非為必要之服從。

然我們同意SIPA下受託人及破產法庭的決定，對於客戶權益淨值索賠不允許通膨或利息的調整。對於該決定之作成，本院認為無須服從SEC(證券交易委員會)的觀點。

16 SEC v. SIPC, 758 F.3d 357, 362–63 (D.C.Cir.2014).
17 SEC v. Packer, Wilbur & Co., 498 F.2d 978, 983 (2d Cir.1974).

SEC提出了一個簡短陳述並參與破產法院的口頭辯論，以表示支持SIPA規定允許權益淨值賠償按通貨膨脹調整的立場。然而，這一問題在破產法院的聽證會上，SEC也聲明不請求雪佛龍法則的依從(Chevron deference)。此所指雪佛龍法則，乃行政法上重要的一項原則，係美國最高法院於Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.裁判中創建。其裁判要旨闡示[18]：法院對於行政法規的條文解釋應優先尊重行政機關的解釋，除非他們的解釋不合理。SEC甚至法庭上申明，其出庭陳述非為請求尊重雪佛龍法則，而係如果要採雪佛龍法則者，那就更應採斯吉德莫爾依從法則(Skidmore deference)。況且SEC在本件上訴中並沒有對於原審裁判提出異議聲明，即便SIPA賦予SEC可以自行提出動議聲請，或為當事人一方代表參加本案相關的任何程序，債權人仍聲稱SEC的立場已解釋SIPA，從而法院應採斯吉德莫爾法則去依從其解釋。

所謂斯吉德莫爾法則，乃美國最高院於Skidmore v. Swift & Co.裁判中創設的一項行政法原則[19]，機關的解釋值得一些尊重它的形式，蓋其賦予了專業經驗、廣泛調查和資訊的取得，同時也提供了行政上與司法上能理解國家法律要求一致性的價值。職是，行政機關若曾於非正式的文件上針對某法規條文做出解釋，且具說服力者，該解釋便具備了依從之效力。斯吉德莫爾依從法則相較於雪佛龍依從法則，係更為嚴謹的標準，蓋於斯吉德莫爾依從法則下行政機關的解釋值得去尊重，但只有那些具說服力的解釋範圍而言。在決定是否要採斯吉德莫爾法則去依從一個機關解釋，我們要考慮機關的專門知識、其得出結論的用心、條文解釋公布的形式、以及隨著時間推移該解釋的一致性和最終其論點的說服力。United States v. Mead Corp.案裁判供參。

上開列舉的因素並不支持法院去依從SEC的解釋。本案中SEC在破產法院上採取的立場是新穎的，與其他案件不一致，最終其論理不具說服力。SEC v. SIPC案裁判要旨已經指出，SEC的解釋與其經年累月一貫的觀點產生了矛盾[20]。

㈢ SIPA亦不允許客戶的權益淨值請求附帶利息的調整。

本件上訴案中，除反映通貨膨脹的調整外，只有一名債權人要求調整利息。簡言之，所有請求賠償的債權人欲尋求通貨膨脹作為權益淨值的調整，而SEC亦為相同之主張。如同上文所述關於通貨膨脹的調整說明，本院認為客戶要求權益淨值賠償加上利息的調整，不是SIPA所欲保護的範圍。

四、裁判結果

18 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
19 Skidmore v. Swift & Co., 323 U.S. 134 (1944).
20 SEC v. SIPC, 872 F.Supp.2d 1, 10 (D.D.C.2012).

據上理由，我們維持破產法庭的決定，並裁判SIPA的條文解釋關於權益淨值的賠償，不允許為通膨或利息的調整。

伍、台灣相關裁判

衡諸所謂「老鼠會」等吸金組織之運作方式，係由會員吸收下線，該下線又輾轉找尋其他下線，下線要繳錢給上線，如此循環累積，最上線者將會獲取豐厚之利潤。本件上訴人甲○○不服原審有罪判決，上訴意旨略稱[21]：…果上訴人為ＯＭＥ歐美互助會之負責人或上線，應獲有下線會員所繳付之金錢。惟上訴人並未收取會員所繳付之金錢，亦未代收會員所繳付之金錢或從ＯＭＥ歐美互助會獲得利益。而各該會員所繳款項，是匯到美國Jorden Peng之帳戶，並非匯入上訴人之帳戶，與上訴人何干？況公平交易委員會及檢調單位曾對上訴人跟監、搜索，但未查扣有關ＯＭＥ歐美互助會之申請書、會員名冊、帳冊等。原審未究明真相，即聽信劉○○、洪○○片面、卸責之詞，而認上訴人有參與ＯＭＥ歐美互助會之經營甚或為主謀，違背論理、經驗法則。又銀行法之收受存款，其「收受存款」與「利息給付」間有直接之對價關係，且該利息給付乃是一可得確定之金額，此觀銀行法第五條之一規定：「本法稱收受存款，謂向不特定多數人收受款項或吸收資金，並約定返還本金或給付相當或高於本金之行為。」自明。而ＯＭＥ歐美互助會會員，每一單位繳交美金(下同)一百三十五元後，僅能取得帳號、密碼及會員編號，尚不能立即取得獎金及紅利，會員欲取得獎金及紅利尚須透過其他新會員之加入。易言之，會員能取得多少獎金及紅利，於訂約之初並無法特定，此與銀行法所規範之收受存款業務有別，自無違反銀行法第二十九條第一項、第二十九條之一非銀行不得經營收受存款業務問題。原判決認定上訴人違反銀行法，有適用法則不當之違法。況銀行法第二十九條第一項之構成要件，應指非銀行，經營同法第五條之一所規定之收受存款業務方屬之。本件ＯＭＥ歐美互助會雖有收受款項之行為，但其對於資金之運用並無投資、市場流通、轉貸生息或其他圖利之行為。公訴人對此亦無法提出上訴人有將該資金用於投資、市場流通、轉貸生息或其他圖利之行為，自無違反銀行法第二十九條第一項之規定。另依卷附之「OME FOUNDATlON」手冊記載：「本基金會為一非營利性之組織，致力於人類財務規劃之研究，使人們免於貧窮、失業、倒閉、破產之恐懼」等語觀之，其對於資金之運用並

21 102年台上字第4290號

無投資、市場流通、轉貸生息或其他圖利之行為，其運作類似民間互助會。故「OME FOUNDATlON」或ＯＭＥ歐美互助會應非金融商品。既非金融商品，自無使用金融商品之對價關係，亦無原判決所認定之給付與本金顯不相當之紅利、獎金等情形。上訴人聲稱並非ＯＭＥ歐美互助會在台灣之負責人，亦未加入ＯＭＥ歐美互助會。

惟查：原判決綜合全案卷證資料，本於事實審法院之推理作用，認定上訴人甲○○前曾犯詐欺罪，經原審法院判決處有期徒刑三月確定，於民國九十年八月十五日執行完畢。明知自稱Jorden Peng 之成年男子所經營之ＯＭＥ歐美互助會並無實際商品交易，純以繳納入會款再介紹他人入會之方式，支付會員與本金顯不相當之紅利、獎金，從中牟利，竟與 Jorden Peng及劉○○、洪○○共同基於非銀行(以其他名義)非法收受款項(吸收資金)經營「以收受存款論」業務之犯意聯絡，自九十年十月間起，由上訴人提供位於台北市○○○路六十五號十二樓，即其所任職並擔任執行長之太平洋電訊公司辦公室，由劉○○、洪○○以ＯＭＥ歐美互助會名義對外向不特定之人招攬入會。嗣為擴大業務，又…已敘明：(1)依ＯＭＥ歐美互助會之作業方式，凡加入ＯＭＥ歐美互助會者，以一百三十五元為一單位，繳納入會款（依個人資力，可繳納多單位），該一百三十五元中，公司分得十元、服務中心分得五元、介紹人分得十元、「十代獎金」各一元、「互助金」一百元。加入會員後即取得會員帳號、密碼及每單位之會員編號，嗣後依據編號領取前述之基金紅利、直接推薦循環獎金及組織獎金。其間並無實際商品交易，純以吸收會員入會所繳納之入會款，用以支付資深會員之獎金、紅利等情，業據證人即共同正犯劉○○、洪○○供述甚詳，核與證人即被吸收之會員張○○、張○○、吳○○、廖○○、曾○○、賴○○、林○、陳○○、乙○○，及證人即ＯＭＥ歐美互助會行政人員吳○○證述之情節相符。…其以招募會員方式吸收入會款，並以推薦新會員及新會員再輾轉推薦新會員入會之方式，依會員編號順序支付基金紅利、直接推薦循環獎金及組織獎金。以編號十號之會員為例，於繳納一百三十五元(即一單位)之會款後，至編號第一七五號會員入會時，已可領回二百八十元之基金紅利(其餘之組織獎金、直接推薦循環獎金尚不計算在內)，該紅利為本金之二倍有餘，顯不相當。前揭情形，即屬銀行法第二十九條之一所稱「以其他名義向多數人或不特定之人收受款項或吸收資金，而約定或給付與本金顯不相當之紅利或其他報酬(獎金)」之「以收受存款論」之行為。(2)…劉○○係聽命於上訴人之指示執行業務，業據劉○○於第一審供述：「甲○○(上訴人)是互助會老闆，我聽命於他」。核與乙○○證述：ＯＭＥ歐美互助會負責人是甲○○，而實際推動業務者是劉○○、洪○○。及黃○○證述：甲○○(上訴人)原在作網路，後來在經營互助基金，自稱是Ｏ

ＭＥ的負責人，他說是美國登記合法的公司，且「請劉○○擔任公司之重要會員」等語相符。再者，陳○○、黃○○且於第一審證述：上訴人為ＯＭＥ之負責人，公司人員及會員均稱上訴人為「徐總」，祇有上訴人有獨立之辦公室，劉○○、洪○○無自己之辦公室。足證劉○○、洪○○係聽命於上訴人共同招募會員，吸收資金。(3)上訴人於第一審及原審法院已承認：劉○○、洪○○向伊反應總公司發放紅利、獎金有遲延情形，伊乃向 Jorden Peng反應，Jorden Peng 就將空白支票交伊，由伊簽發ＯＭＥ歐美互助會名義之支票交予會員羅○○(蕭○○以其名義入會)、曾○○、劉○○等人，用以支付獎金、紅利。劉○○、曾○○、羅○○等人亦為相同之證述。並有上訴人所簽發，交付給各該會員之支票影本六紙在卷可稽。上訴人雖辯稱，因美國總公司未能按期支付獎金、紅利，伊基於「熱心」代洪○○、劉○○向Jorden Peng索討，Jorden Peng乃交給空白支票，授權伊代為簽發，用以支付會員之獎金、紅利云云。乃卸責之詞，不可採信。(4)劉○○於第一審呈庭之台北網路電視台帳號儲值卡，其背面即有ＯＭＥ歐美互助會之英文名稱及其電子郵件信箱，業據第一審法院勘驗明確。而台北網路電視台即為上訴人所任職並擔任執行長之太平洋電訊公司所經營，亦據上訴人供述在卷。另上訴人所呈庭之台北網路電視台儲值卡，其內容之說明亦與劉○○呈庭之儲值卡完全相同，並經第一審法院勘驗屬實。上訴人辯稱劉○○呈庭之儲值卡係偽造，ＯＭＥ歐美互助會與伊無關云云，自無可採。…況劉○○、洪○○於參與犯罪之前，最初加入為會員時，其入會款即由上訴人收繳，亦據劉○○、洪○○證述明確。益徵上訴人確有參與前揭行為，而與Jorden Peng 及嗣後亦參與犯罪之洪○○、劉○○有犯意聯絡、行為分擔。因認上訴人有前揭共同違反銀行法之犯行，而以上訴人嗣後否認犯罪，辯稱未參與ＯＭＥ歐美互助會之經營，其僅「熱心」協助云云，乃卸責之詞，不可採信。另本件事證已臻明確，無再傳喚太平洋電訊公司之董事長邱○○、總經理鍾○○為無益調查之必要等情，已逐一說明及指駁。上訴意旨對於原判決所為前揭論斷，並未依據卷內資料，具體指摘有何違背法令情形。其上訴違背法律上之程式，應予駁回。

陸、結論

早期由於金融衍生性商品稀少，讓詐騙者有機可趁，投資人受到高利引誘，便奮不顧身瘋狂的追逐投資，希望短時間快速致富，從上上一世紀或更早前的荷蘭鬱金香熱，英國南海泡沫，在在顯示人心的貪婪，乃是人類最原生型的動力之一。當人們找

到某一種致富的方法，人們就會被這個方法所驅動而奮不顧身的向前，「老鼠會」是算得上最寫實的形容。據聞18世紀的牛頓也曾瘋狂追趕股票，後來「南海泡沫」讓他損失了積蓄2萬英鎊，現值約計140萬英鎊。似乎印證了牛頓對自我的描述，儘管他能計算天體的運行，對於人心的瘋狂也無技可施[22]。

按我國詐欺罪法條內容，詐欺罪之構成要件，分成客觀與主觀兩要件。客觀要件係指行為人施用詐術，使人陷於錯誤而交付財物者；主觀要件則須行為人具故意與不法所有之意圖。因此，「施用詐術」與「財物不法所有」互為因果關係之要素，惟前項所謂之「詐術」意涵為何？法律上雖未具體規範，學理上通說認為凡足以使人限於錯誤之方法即是。由是觀之，刑法上所謂詐術，並無特別之意義，其不外指欺罔之方法，亦即以欺騙之手段，不論採何種形式，只要足以使人陷於錯誤交付財物，均屬之。從而，本文中列舉之龐氏詐騙、馬多夫騙局、中國南寧的老鼠會傳銷模式，不論銷售郵資券、代客買賣股票、投資房地產等名目，皆是謊稱有實際標的物的交易品項內容，然事實上投資人的錢卻從來沒有用於投資，而為了取信投資人以吸引資金匯入，除了豐厚的紅利外，詐騙首腦還會刻意將投資公司打造一個亮麗美幻的外觀、合法註冊在案、並製作虛偽帳冊、獲利營收等資料供參考。又基於非銀行(以其他名義)非法收受款項(吸收資金)經營「以收受存款論」業務之犯意聯絡，除行為觸犯詐欺罪外，亦違反銀行法。

次就詐術具體行為之態樣，實務上台灣刑法第三百三十九條第一項詐欺取財罪，係將所謂之詐術行為依具體方式劃分為兩種情形：一為「締約詐欺」，二為「履約詐欺」：前者「締約詐欺」，是謂行為人於訂約之際，使用積極或消極詐騙手段，讓告訴人對締約基礎事實發生錯誤之認知，而締結一客觀上、對價上顯失均衡之契約，而詐欺罪成立與否之 判斷，亦著重在行為人取得交易標的物之過程，有無實施該當於詐騙之行為。實務上案例常見於買賣過程，例如房仲業者消極不予告知交易相對人委買的房屋是海砂屋、兇宅，因其所隱瞞的事實部份，可能影響交易結果。基於買賣契約當事人之地位，明知其欲出賣不動產，已有瑕疵，能否評價為應盡告知義務，竟消極不予告知交易相對人，其不作為得否與作為等價之判斷為要。其消極不盡告知義務該當於施用詐術之作為，該作為亦逾交易上所 容認之限度，核其被告所為，係犯刑法第三百三十九條第一項之詐欺取財罪。89年易字第96號判決供參。後者「履約詐欺，係指被告於取得財物之際，自始欠缺於將來履約之意思，所計算者僅在取得財物，將之

22 顧淑馨譯，作者Diana B. Henriques，謊言教父馬多夫，時報文化，2012年1月，導讀頁。

據為己 用，並無意依約償債，其行為方式多屬不純正不作為犯，詐術行為之內容多屬告知義務之違反，故在詐欺成立與否之判斷，是偏重在被告取得物品後之作為，而由事後之作為逆向推判其取得財物之初，是否即持將來不履約之故意，取得物品之具體方式在詐欺認定上反而不具重要性。實務上案例常見於允諾履約與取得財物間有相當因果關係，然被告在取得財物之初與末皆無有履行之意。援引98年度桃簡字第3002判決要旨說明：「告訴人確因被告施用詐術，誤信被告將利用借款購買施工所用器具，因而陷於錯誤而交付款項，又被告得款後並未依約購買上開機器，事後又拒不清償借款，其具有不法所有之詐欺意圖昭甚明，本案事證明確，被告犯行堪以認定。」

果爾，從上開案例觀察，行為人若符合故意隱瞞事實使人陷於評估錯誤而交付錢財者，此際詐欺行為成立締約詐欺之要件。反之，行為人取得相對人財物後，自始欠缺將來履約之意思者，構成履約詐欺。締約詐欺強調的是有無隱瞞任何可能影響交易結果之訊息，即有無不作為情事，然此部份的適用著重於具體之交易或契約形式之建立，尚未有擴及其它抽象適用的討論。履約詐欺則是行為人自始到未來皆無履行相對人所期待之意思，而只為取得財物為目的之行為。如斯，馬多夫詐騙模式與台灣老鼠會的定義，別無二異，我國實務上判斷上亦非不可曰履約詐欺之一種。

柒、法學英文

一、原文裁判摘要

United States Court of Appeals, Second Circuit.

IN RE: BERNARD L. MADOFF INVESTMENT SECURITIES LLC. Securities Investor Protection Corporation, Plaintiff–Appellee, v. 2427 Parent Corporation et al., Estate of Doris M. Pearlman (IRA), Harold J. Hein et al., …The Kostin Co., Marsha Peshkin et al., Claimants–Appellants, Irving H. Picard, Trustee–Appellee.

Nos. 14–97–bk(L), 14–509–bk(con), 14–510–bk(con), 14–511–bk(con), 14–512–bk(con).

Decided: February 20, 2015

Before STRAUB, WESLEY, and LIVINGSTON, Circuit Judges. P. Gregory Schwed, (Walter H. Curchack, Daniel B. Besikof, Michael Barnett, on the brief), Loeb & Loeb LLP, New York, NY, for Claimants–Appellants MBE Preferred Limited Partnership et al. Richard

A. Kirby, (Laura K. Clinton, Scott P. Lindsay, on the brief), K & L Gates LLP, Washington, DC, for Claimant–Appellant Estate of Doris M. Pearlman (IRA)., etc. on the brief), Baker & Hostetler LLP, New York, NY, for Plaintiff–Appellee Irving H. Picard, as Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff.

The issue presented in this appeal is whether the Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq. ("SIPA" or "the Act"), permits an inflation or interest adjustment to "net equity" claims for customer property. We hold that it does not.

Claimants–Appellants ("Claimants") are former investors of Bernard L. Madoff Investment Securities LLC ("BLMIS"). Trustee–Appellee Irving H. Picard ("Trustee") was appointed, pursuant to SIPA, as trustee for the liquidation of BLMIS.

SIPA prioritizes the distribution of customer property in a broker-dealer liquidation. The Act creates a fund of customer property for priority distribution exclusively among a failed broker-dealer's customers, and customers share in the fund proportionally, according to each customer's "net equity."

Because Madoff's fraud lasted at least three decades, Claimants ask that the Trustee adjust their proportional share of customer property to reflect inflation; one Claimant also asks for an interest adjustment, to reflect the time-value of money. We agree with the Trustee and the Bankruptcy Court, however, that SIPA does not permit an inflation or interest adjustment to net equity claims. Accordingly, we affirm the order of the United States Bankruptcy Court for the Southern District of New York (Burton R. Lifland, Judge), approving the Trustee's unadjusted net equity calculation and overruling Claimants' objections.

BACKGROUND

We described Bernard Madoff's fraud in a previous appeal in this case. See In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 231–33 (2d Cir.2011) ("Net Equity Decision "), Briefly stated, although Claimants gave money to Madoff for investment, Madoff never invested the customer funds. Id. at 231. To conceal his complete lack of trading activity on behalf of his investors, Madoff created fictitious paper account statements and trading records. Id. The customer account statements listed purported securities transactions, but they did not reflect any actual trading or holdings of securities by Madoff on behalf of the customer. Id. at 231–32. Madoff instead funded customer withdrawals with the principal investments of new

and existing customers. Id. at 232. The only accurate entries in Madoff's customer statements were those that reflected the customers' cash deposits and withdrawals. Id.

After the collapse of BLMIS, the Trustee was appointed pursuant to SIPA. Id. at 233. SIPA was enacted in 1970 as a response to "a rash of failures among securities broker-dealers" that caused significant losses to customers whose assets "were unrecoverable or became tied up in the broker-dealers' bankruptcy proceedings." In re New Times Sec. Servs., Inc., 371 F.3d 68, 84 (2d Cir.2004) (internal quotation marks omitted) ("New Times I"). The Act creates procedures for liquidating failed broker-dealers and provides their customers special protections. Net Equity Decision, 654 F.3d at 233.

SIPA is designed to return customer property to customers. See 1 Collier on Bankruptcy ¶12.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.2014) (noting that the return of customer property is SIPA's "fundamental premise"). In a SIPA liquidation, a fund of customer property, separate from the broker-dealer's general estate, is established for priority distribution exclusively among customers. Net Equity Decision, 654 F.3d at 233. Customer property consists of "cash and securities, received, acquired, or held" by the broker-dealer "for the securities accounts" of customers, except securities registered in the names of individual customers. 15 U.S.C. §78lll (4).

Customers of the broker-dealer "share ratably in" the fund of "customer property on the basis and to the extent of their respective net equities." Id. §78fff–2(c)(1)(B). The larger the customer's net equity, the greater the customer's share of the fund of customer property. SIPA defines net equity, in relevant part, as:

[T]he dollar amount of the account or accounts of a customer, to be determined by calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer, minus, any indebtedness of such customer to the debtor on the filing date.

15 U.S.C. §78lll (11). Payments to customers based on net equity are made insofar as the amount owed to the customer is "ascertainable from the books and records of the debtor or [is] otherwise established to the satisfaction of the trustee." Id. §78fff–2(b); see also Net Equity Decision, 654 F.3d at 237.

SIPA guarantees customers a minimum amount of recovery. When a customer's ratable share of the recovered customer property is insufficient to satisfy his or her net equity claim,

the customer's claim can be supplemented by the Securities Investor Protection Corporation ("SIPC"), which was created by SIPA and administers a fund capitalized by the brokerage community. See 15 U.S.C. §§78ccc, 78ddd. The SIPC advances to the SIPA trustee up to $500,000 per customer, see id. §78fff–3(a), except that the advance for a customer's "claim for cash" cannot exceed $250,000, see id. §§78fff–3(a)(1), (d). To the extent that "customer property and SIPC advances" are insufficient to satisfy a customer's full net equity claim, the customer is "entitled to participate in the general estate" as an unsecured creditor. Id. §78fff–2(c)(1).

In the Net Equity Decision, we held that Madoff's investors are "customers" with "claims for securities" under SIPA. 654 F.3d at 236. We also addressed how net equity should be calculated in this case, given that SIPA's definition of net equity references "securities positions" but Madoff never invested customer funds. We rejected the argument of various customers that their claims should be based on the amounts listed in their last BLMIS account statement. Id. We observed that reliance on Madoff's false statements to determine net equity "would have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff's machinations." Id. at 235. Instead, we upheld as a matter of law the Trustee's determination that net equity should be calculated by the amount that a customer deposited into his or her BLMIS account, less any amount that he or she withdrew from the account. Id. at 233, 236–42 & 238 n. 7. We declined to address, however, whether the calculation of net equity should be adjusted to account for inflation or interest, because the Bankruptcy Court had not yet addressed the issue. Id. at 235 n. 6.

Afterward, the Trustee and the SIPC argued to the Bankruptcy Court that SIPA does not permit adjustments for inflation or interest to customers' net equity claims. Various claimants objected, some seeking just an inflation adjustment, others an interest adjustment. The Securities and Exchange Commission ("SEC"), which has "plenary authority to supervise the SIPC," SIPC v. Barbour, 421 U.S. 412, 417, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) (internal quotation marks omitted), disagreed with the Trustee and the SIPC and contended that net equity could be adjusted to account for inflation. The SEC argued before the Bankruptcy Court that adjusting for inflation would be "an accurate way to calculate customer net equity under the narrow set of factual circumstances presented here," although it acknowledged that "the decision to make such an adjustment must rest on the Court's consideration of the costs and benefits of doing so." SEC Mem. of Law at 4, SIPC v. Bernard L. Madoff Inv. Sec. LLC,

08–01789–smb (Bankr.S.D.N.Y. Dec. 10, 2012), ECF No. 5142. However, in a colloquy with the Bankruptcy Court, the SEC's lawyer, when asked what kind of deference he sought, stated that the SEC was "actually not asking for deference."

The Bankruptcy Court upheld the Trustee's determination that no adjustment for inflation or interest could be made under SIPA. The court ruled that, as a matter of law, SIPA did not permit a time-based adjustment to net equity. It then certified an immediate appeal of its decision pursuant to 28 U.S.C. §158(d)(2). We granted the petition for direct appeal.

DISCUSSION

We review de novo the legal conclusions of the Bankruptcy Court, including its interpretation of SIPA. Net Equity Decision, 654 F.3d at 234. Claimants contend that the Bankruptcy Court erred in concluding that SIPA does not allow an inflation adjustment to net equity claims for customer property. They also assert that the SEC's support for an inflation adjustment is entitled to Skidmore deference. We disagree.

I. An Inflation Adjustment to Customer Net Equity Claims Is Impermissible Under SIPA

According to Claimants, without an inflation adjustment, the claims of Madoff's earlier investors are unfairly undervalued when compared to the claims of Madoff's later investors. Although SIPA's text does not provide for an inflation adjustment to net equity, Claimants urge us to construe SIPA to permit trustee discretion to make such an adjustment. But we conclude that an inflation adjustment to net equity is not permissible under SIPA. An inflation adjustment goes beyond the scope of SIPA's intended protections and is inconsistent with SIPA's statutory framework.

SIPA does not address the possibility of an inflation adjustment to net equity. The Act's definition of net equity makes no mention of inflation, see 15 U.S.C. §78lll (11), whereas other, albeit unrelated, portions of SIPA do, see, e.g., id. §78fff–3(e) (providing procedures for the SIPC to periodically "determine whether an inflation adjustment to the standard maximum cash advancement amount is appropriate"). And although SIPA instructs that customer securities are valued, for purposes of calculating net equity, as though they were liquidated "on the filing date," id. §§78lll (11)(A), (B), this does not indicate that cash deposited but never invested is to be adjusted for inflation.

SIPA's silence is unsurprising. In a typical broker-dealer failure, an inflation adjustment to net equity would be nonsensical; where securities are actually purchased for a broker-

dealer's customers, the securities have values that already incorporate economic circumstances such as inflation. SIPA's supposed purpose was to remedy broker-dealer insolvencies—not necessarily broker-dealer fraud. See H.R.Rep. No. 91–1613, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5254, 5255 ("The primary purpose of [SIPA] is to provide protection for investors if the broker-dealer with whom they are doing business encounters financial troubles."). Hence, as we noted in the Net Equity Decision, SIPA does not specify how net equity should be calculated in a case like this, in which a dishonest broker failed to invest customer funds. We determined that "the statutory language does not prescribe a single means of calculating 'net equity' that applies in the myriad circumstances that may arise in a SIPA liquidation," and "[d]iffering fact patterns will inevitably call for differing approaches to ascertaining the fairest method for approximating 'net equity.' " Id. at 235.

As we emphasized previously, SIPA is intended to expedite the return of customer property. Id. at 240. Without SIPA, customer funds and securities held by a failed brokerage could become "depleted or enmeshed in bankruptcy proceedings." See SEC v. SIPC, 758 F.3d 357, 362–63 (D.C.Cir.2014). SIPA "addresses that issue by protecting the custody function of brokers." Id.; see also 1 Collier, supra, ¶12.01 (explaining that SIPA protects investors against losses "resulting from the failure of an insolvent or otherwise failed broker-dealer to properly perform its role as the custodian of customer cash and securities"). Net equity claims are thus linked directly to the customer property held by a broker-dealer; SIPA instructs a trustee to process claims to the extent that they are ascertainable from the broker-dealer's books and records or otherwise established to the trustee's satisfaction. See 15 U.S.C. §78fff–2(b). BLMIS's books and records reflected only funds deposited and withdrawn, without any time-based adjustment, see Brief for Trustee–Appellee at 7, 23, and these deposits, less withdrawals, constitute customer property in this case, see Net Equity Decision, 654 F.3d at 240; 15 U.S.C. §78lll (4) (defining "customer property," in relevant part, as "cash and securities received, acquired, or held" by the broker-dealer "for the securities accounts" of customers).

Although SIPA defends investors from a broker-dealer's failure to perform its custodial role over customer property, it does not otherwise shield investors from loss. Instead, the Act merely restores investors to what their position would have been in the absence of liquidation. We have noted that SIPA's scheme "assumes that a customer—as an investor in securities—wishes to retain his investments despite the liquidation of the broker; the statute thus works

to expose the customer to the same risks and rewards that would be enjoyed had there been no liquidation." In re New Times Sec. Servs., Inc., 463 F.3d 125, 128 (2d Cir.2006) ("New Times II") (internal quotation marks omitted). Hence, SIPA instructs a trustee, in many circumstances, to provide customers with securities in kind instead of a cash equivalent. See 15 U.S.C. §§78fff–1(b)(1), 78fff–2(b)(2); see also id. §78fff–2(d) (providing that the trustee "shall, to the extent that securities can be purchased in a fair and orderly market, purchase securities as necessary for the delivery of securities to customers in satisfaction of their claims for net equities").

SIPA likewise provides customers with no compensation for the lost use of their securities or cash while liquidation is pending. Customer securities, whether returned in kind or as a cash equivalent, are valued as of the filing date, regardless of any subsequent fluctuations in value. See 15 U.S.C. §§78fff–2(b), (c)(1). This may harm an investor if the securities fall in value, but avoidance of loss beyond restoration of the pre-failure status quo is not SIPA's goal. Although the securities and cash have opportunity costs that are denied to the investor during liquidation, and although the cash similarly may have lost purchasing power in an inflationary economy, SIPA returns to the customer the nominal pre-liquidation balance.

Claimants assert that adjusting net equity claims for inflation is the fairest method of determining net equity. Yet, we have explained that "SIPA was not designed to provide full protection to all victims of a brokerage collapse," and "arguments based solely on the equities are not, standing alone, persuasive." SEC v. Packer, Wilbur & Co., 498 F.2d 978, 983 (2d Cir.1974). Contrary to Claimants' assertion, moreover, an unadjusted distribution of customer property is not unjust. In fact, we recently found no abuse of discretion in a district court's approval, over objection, of a receiver's distribution plan to the victims of a Ponzi scheme that lasted thirteen years, even though the distribution provided no adjustment for inflation. See Commodity Futures Trading Comm'n v. Walsh, 712 F.3d 735, 738–39, 754–55 (2d Cir.2013); cf. also New Times I, 371 F.3d at 88 (agreeing that net equity was "properly calculated as the amount of money" initially placed with the Ponzi scheme brokerage, without noting the possibility of an inflation adjustment).

Because it is doubtful that the full amount of customer property will be recovered in this case, each dollar allocated to earlier investors in recognition of inflation reduces the amount of principal recovered by later investors. Even if all customer property were miraculously

recovered, it would be insufficient to satisfy customer claims to the extent such claims were increased to reflect inflation. An inflation adjustment to net equity claims could allow some customers to obtain, in effect, a protection from inflation for which they never bargained, in contravention of the text and purpose of SIPA, and at the expense of customers who have not yet recovered the property they placed in Madoff's hands.

The purpose of determining net equity under SIPA is to facilitate the proportional distribution of customer property actually held by the broker, not to restore to customers the value of the property that they originally invested. We thus previously concluded that in this case net equity could not be based on fictitious customer statements but instead should be determined based on customers' actual deposits and withdrawals. See Net Equity Decision, 654 F.3d at 235. These deposits, net withdrawals, constitute customer property here. Under SIPA, Claimants' net equity claims cannot be adjusted to reflect inflation.

II. The SEC's View is Not Entitled to Deference

In reaching this decision, no deference is owed to the SEC's view. The SEC submitted a brief and participated in oral argument before the Bankruptcy Court in support of the position that SIPA permits adjustments for inflation to net equity claims. At the hearing on this issue before the Bankruptcy Court, however, the SEC stated that it was "not claiming Chevron deference." The SEC even said more generally that it was "not asking for deference here," but that, "[i]f [it] were asking for deference, it would be Skidmore deference." The SEC has not filed a brief in this appeal, even though SIPA provides that the SEC "may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party." 15 U.S.C.§78eee(c). Claimants nonetheless contend that the SEC's position warrants Skidmore deference.

In Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), the Supreme Court held that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." United States v. Mead Corp., 533 U.S. 218, 234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (internal citation omitted) (quoting Skidmore, 323 U.S. at 139). Skidmore deference is a "more limited standard of deference" than Chevron deference. New Times I, 371 F.3d at 83. An agency's interpretations "are 'entitled to respect'

“ under Skidmore, “but only to the extent that those interpretations have the ’power to persuade.’ “ Christensen v. Harris Cnty., 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting Skidmore, 323 U.S. at 140). In determining whether to defer to an agency’s interpretation under Skidmore, we consider “the agency’s expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments.”

These factors do not support deference to the SEC’s interpretation. The position that the SEC took before the Bankruptcy Court in this case is novel, inconsistent with its positions in other cases, and ultimately unpersuasive. Cf. SEC v. SIPC, 872 F.Supp.2d 1, 10 (D.D.C.2012) (holding that the SEC’s view on a distinct issue of SIPA interpretation was entitled “to little, if any, deference” where it contradicted the SEC’s longstanding view), aff’d, 758 F.3d 357 (D.C.Cir.2014).

The SIPC explains that, in more than three hundred SIPA liquidations prior to this one, the SEC has not once suggested that the amount of customer claims subject to satisfaction with cash should be adjusted to reflect inflation. See Brief for Plaintiff–Appellee SIPC at 43. In this case, the SEC asserted that adjusting claims for inflation would provide the most accurate valuation, yet it recently opposed an inflation adjustment in a different long-lasting Ponzi scheme. See Walsh, 712 F.3d at 744. In Walsh, which addressed a court-appointed receiver’s proposed distribution, the SEC argued that an unadjusted distribution was “the best and most fair approach” under the circumstances, “because it yields a substantial recovery for all investors.” Id.

III. An Interest Adjustment to Customer Net Equity Claims Is Also Impermissible Under SIPA

In this appeal, only one Claimant seeks an adjustment for interest, in addition to inflation; all other Claimants seek an adjustment solely for inflation. The SEC likewise argued only for an inflation adjustment. For the same reasons stated above with respect to an inflation adjustment, supra Section I, we find that that an interest adjustment to customer net equity claims is impermissible under SIPA’s scheme.

CONCLUSION

For the foregoing reasons, we affirm the order of the United States Bankruptcy Court for the Southern District of New York and hold that SIPA does not permit an inflation or interest adjustment to “net equity” claims.

二、實用法律語彙

1. 投資詐騙：investment frauds
2. 市場操作模式：market manipulation schemes
3. 金字塔銷售模式：Pyramid Sales Scheme
4. 馬多夫騙局：Madoff Scheme
5. 龐氏計畫：Ponzi scheme
6. 美國聯邦貿易委員會：Federal Trade Commission; FTC
7. 龐氏詐騙：係一項藉由公司處於虧損狀態卻仍繼續經營的計畫。公司故意包裝成有盈利的外觀去吸引新投資人並保證獲利，再利用新投資人的資金去支付允諾先前投資人的高溢價。這項計畫的影響是讓公司不斷舉債並且承擔更多的責任，而該公司維持獲利假像以吸收新的投資人。A scheme whereby a corporation operates and continues to operate at a loss. The corporation gives the appearance of being profitable by obtaining new investors and using those investments to pay for the high premiums promised to earlier investors. The effect of such a scheme is to put the corporation farther and farther into debt by incurring more and more liability and to give the corporation the false appearance of profitability in order to obtain new investors.
8. 龐氏騙局的本質：法院指出，投資人的獲利來自於不合法的商業活動，再者，該商業活動其實就是透過不知情的新投資人所湧入的資本以能運作。The court stated that it is in the nature of a Ponzi scheme hat customer returns are generated not from legitimate business activity but, rather, through the influx of resources from fresh capital invested by unwitting newcomers.
9. 龐氏建立證券交換公司：Securities Exchange Company
10. 國際附回郵的票券上：international reply coupons; IRCs
11. 回郵：return postage
12. 贖回：redeemed for
13. 利潤很低：the profit margin was so slim
14. 利用早期客戶投資的資金去支付後期投資者的紅利：he paid early investors with the funds derived from later investors.
15. 後期投資人被詐取：latecoming investors were defrauded.
16. 不法所得：ill-gotten gains

17. 在非自願性破產的聽證會上被扣押（財產查封）：were seized in an involuntary bankruptcy hearing
18. 違反了禁止雙重危險的保護：violated his protection against double jeopardy
19. 聯邦和州政府皆對於詐欺罪擁有管轄權：both the state and federal government had jurisdiction
20. 尋求保釋：sought bail
21. 推出了另一個金字塔計畫：launched another pyramid scheme
22. 拘捕令：arrest warrant
23. 被視為不受歡迎的外國人並驅逐出境：deported as an undesirable alien
24. 自行出版了一本自傳：self-published an autobiography
25. 那斯達克證券交易：Nasdaq Stock Market; NASDAQ
26. 投資證券公司：Investment Securities LLC
27. 全美證券交易商協會：National Association of Securities Dealers, Inc.; NASD
28. 美國證券交易委員會：U.S. Securities and Exchange Commission; SEC
29. 馬多夫空前的詐欺被揭露：Madoff's unprecedented fraud was discovered
30. 民事訴狀：civil complaint
31. 指述馬多夫及馬多夫證券投資公司從事龐氏詐騙：alleging that Madoff and Bernard Madoff Investment Securities LLC were operating a Ponzi scheme.
32. 證券投資者保護公司：Securities Investor Protection Corporation; SIPC
33. 證券投資保護法：Securities Investor Protection Act
34. 財產受託人：trustee
35. 享有破產受託人的概括性權利：has the general powers of a bankruptcy trustee
36. 作為馬多夫證券投資公司業務清算的受託人：as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC
37. 為了掩蓋他完全沒有確實代客操作的交易行為，馬多夫偽造不實的客戶對帳單和交易記錄：To conceal his complete lack of trading activity on behalf of his investors, Madoff created fictitious paper account statements and trading records.
38. 雪佛龍依從法則：Chevron deference
39. 斯吉德莫爾依從法則：Skidmore deference