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July 14, 2010

W. Samuel Hamrick, Jr., Clerk  
United States District Court for the  
Southern District of California  
880 Front Street  
Suite 4290  
San Diego, CA 92101

**Re: *Taylor, et al. v. Waddell & Reed, Inc., et al.* 09 CV 2909 DMS WVG**

Dear Mr. Hamrick:

Enclosed with this letter are a Pro Hac Vice application for James T. McIntyre, a motion for permission to file an amicus brief in the above captioned matter, an amicus brief, and a proof of service filing. We have also enclosed a check for \$180, pursuant to the requirements for Pro Hac Vice applications. Extra copies of the proof of service, motion, and brief have been included, along with a self-addressed stamped envelope. Upon acceptance, please provide us with a time and date stamped copy of each in the enclosed envelope.

Should there be any questions or issues with this filing, please contact me at (202) 659-3900.

Regards



Eli K. Peterson

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL E. TAYLOR, KENNETH B. )  
YOUNG, et al )  
Plaintiff )  
vs )  
WADDELL & REED, INC, et al. )  
Defendant )

Case No. 09 CV 2909 DMS WVG  
**PRO HAC VICE APPLICATION**  
Financial Services Institute, Inc.  
Party Represented

I, James T. McIntyre, Jr. hereby petition the above entitled court to permit me  
(Applicant)  
to appear and participate in this case and in support of petition state:

My firm name: McIntyre & Lemon, PLLC  
Street address: 1155 15th Street, N.W., Suite 1101  
City, State, ZIP: Washington, D.C. 20005  
Phone number: 202-659-3900

That on May 24, 1963 I was admitted to practice before State Bar of Georgia  
(Date) (Name of Court)

and am currently in good standing and eligible to practice in said court,

that I am not currently suspended or disbarred in any other court, and

that I  have)  have not) concurrently or within the year preceding this application made any pro hac  
vice application to this court.

(If previous application made, complete the following)

Title of case \_\_\_\_\_

Case number \_\_\_\_\_ Date of application \_\_\_\_\_

Application  granted  denied

I declare under penalty of perjury that the foregoing is true and correct.

James T. McIntyre  
(Signature of Applicant)

**DESIGNATION OF LOCAL COUNSEL**

I hereby designate the below named as associate local counsel.

Roger McNitt 858-551-2440  
(Name) (Telephone)  
Blanchard Krasner & French  
(Firm)  
800 Silverado Street, Second Floor La Jolla 92037  
(Street) (City) (Zip code)

James T. McIntyre  
Signature of Applicant

I hereby consent to the above designation.

---

Signature of Designee Attorney

The pro hac vice application is hereby approved for filing.

W. Samuel Hamrick, Jr.  
Clerk of Court

---

By Deputy Clerk

Received \$180.00 for Court Library fee

\_\_\_\_\_ Deputy Clerk

**Pro Hac Vice** (For this one particular occasion)

An attorney who is not a member of the California State Bar, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court or of the highest court of any State or of any Territory or Insular possession of the United States, who is of good moral character, and who has been retained to appear in this Court, be permitted to appear and participate in a particular case. An attorney is not eligible to practice pursuant to this paragraph in any one or more of the following apply to him/her: (1) he/she resides in California, (2) he/she is regularly employed in California, or (3) he/she is regularly engaged in business, professional, or other activities in California.

The pro hac vice application shall be presented to the Clerk and shall state under penalty of perjury (1) the attorney's residence and office address, (2) by what court he/she has been admitted to practice and the date of admission, (3) that he/she is in good standing and eligible to practice in said court, (4) the he/she is not currently suspended or disbarred in any other court, and (5) if he/she has concurrently or within the year preceding his/her current application made any pro hac vice application to this court, the title and the case number of each matter wherein he made application, the date of application, and whether or not his/her application was granted. He/She shall also designate in his application a member of the bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers shall be served. He/She shall file with such application the address, telephone number, and written consent of such designee.

**Fee:** \$180.00, payable to Clerk, U.S. District Court

**Application and fee should be mailed directly to:**

W. Samuel Hamrick, Jr., Clerk  
United States District Court  
Southern District of California  
880 Front Street Suite 4290  
San Diego, California 92101-8900

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA  
PRO HAC VICE

APPLICANT

(Please Print) James T. McIntyre, Jr.

STATE BAR # 494000 STATE Georgia

FIRM NAME McIntyre & Lemon, PLLC

(Mailing Address)  
1155 15th Street, N.W., Suite 1101

Washington, D.C. 20005

202-659-3900  
(Telephone)

(Signature)

*James T. McIntyre, Jr.*

✂

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(Date) (Amount)

(Initials)

**Mail to:**

U.S. District Court  
Clerk's Office  
Attention: Attorney Admissions  
880 Front Street, Suite 4290  
San Diego, CA 92101-8000

1 **McINTYRE & LEMON, PLLC**  
James T. McIntyre, *pro hac vice*  
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3 Washington, D.C. 20005  
4 Telephone: 202-659-3900  
5 FACSIMILE: 202-659-5763

6 Attorney for *Amicus Curiae*, Financial Services Institute, Inc..

7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 MICHAEL E. TAYLOR, KENNETH B.  
11 YOUNG, individuals, on behalf of  
12 themselves individually and on behalf of  
13 others similarly situated,

14 Plaintiffs,

15 v.

16 WADDELL & REED INC.; WADDELL &  
17 REED FINANCIAL, INC.; WADDELL &  
18 REED FINANCIAL SERVICES, INC.; and  
19 DOES 1 through 10 inclusive,

20 Defendants.

Case No. 09 CV 2909 DMS WVG

APPLICATION FOR LEAVE TO FILE  
AMICUS BRIEF OF FINANCIAL SERVICES  
INSTITUTE, INC.

Date: No date for hearing per chambers

Time: No date for hearing per chambers

Dept. 10  
Judge: Dana M. Sabraw

Date Action Filed: Dec. 28, 2009

21 **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

22 The Financial Services Institute, Inc. (FSI) respectfully requests leave to file the attached brief  
23 of Amicus Curiae. FSI is an advocacy and membership organization for independent broker-dealer  
24 firms ("IBDs") and independent financial advisors who choose to affiliate with those firms.

25 District courts often permit the filing of amicus briefs when, "legal issues...have potential  
26 ramifications beyond the parties directly involved or if the amicus has 'unique perspective that can  
27

28 Case No. 09 CV 2909 DMS WVG

1 help the court beyond the help that the lawyers for the parties are able to provide.”<sup>1</sup> This Application  
2 and the accompanying motion are filed with the consent of the parties.

3 FSI, as an independent association not part of this litigation, can offer the court a unique  
4 perspective on the independent broker-dealer industry in the United States that would benefit the Court  
5 in its understanding of this segment of the securities industry. A thorough discussion of the industry is  
6 germane to the litigation before the Court and was not provided by either party. As Judge Posner  
7 noted in *Ryan*:

8  
9 The term "amicus curiae" means friend of the court, not friend of a party...[courts] are not  
10 helped by an amicus curiae's expression of a "strongly held view" about the weight of the  
11 evidence but by being pointed to considerations germane to our decision...that the parties  
12 for one reason or another have not brought to our attention.<sup>2</sup>

13 FSI's brief provides the court with an explanation of how the IBD industry is organized, why it is  
14 organized in that manner, the extent to which IBD firms are required by law to supervise their  
15 affiliated independent financial advisors, and why the IBD industry is predicated upon the use of  
16 independent contractor financial advisors.

17 Beyond the information FSI can provide, it has a significant interest in the Court's resolution of  
18 this matter because it will have a direct impact on FSI and its members. FSI's membership includes  
19 121 independent broker-dealer (IBD) firms. There are more than 188,000 independent financial  
20 advisors associated with broker-dealer firms, and of those independent financial advisors, 13,700 have  
21 chosen to be members of FSI. FSI's members organize and operate their retail securities according  
22 established principles concerning federal and state legal requirements for broker-dealer supervision  
23  
24

25 <sup>1</sup> *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D.Ca. 2005) (relying on *Cobell*  
26 *v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003) and quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062,  
1064 (7th. Cir. 1997)).

27 <sup>2</sup> *Ryan*, 125 F.3d at 1063-64; see also *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d  
1196, 1198 n.3 (1st Cir. 1979).

1 and financial advisor autonomy. The resolution of this case could significantly affect the current  
2 industry *status quo*.

3 The Financial Services Institute, Inc. respectfully requests permission to file the attached brief  
4 of Amicus Curiae.  
5

6  
7 DATED: July 14, 2010  
8

9 Respectfully submitted,

10 By: James T. McIntyre  
11 James T. McIntyre  
12 Attorney for Amicus Curiae,  
13 Financial Services Institute, Inc.  
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27 Case No. 09 CV 2909 DMS WVG  
28

copy

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7 Attorney for *Amicus Curiae* Financial Services Institute, Inc.

8 UNITED STATES DISTRICT COURT

9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL E. TAYLOR, KENNETH B.  
YOUNG, individuals, on behalf of  
themselves individually and on behalf of  
others similarly situated,

Plaintiffs,

v.

WADDELL & REED INC.; WADDELL &  
REED FINANCIAL, INC.; WADDELL &  
REED FINANCIAL SERVICES, INC.; and  
DOES 1 through 10 inclusive,

Defendants.

Case No. 09 CV 2909 DMS WVG

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
APPLICATION FOR LEAVE TO FILE BRIEF  
OF AMICUS CURIAE FINANCIAL SERVICES  
INSTITUTE, INC.**

Date: No date for hearing per chambers

Time: No date for hearing per chambers

Dept. 10

Judge: Dana M. Sabraw

Date Action Filed: Dec. 28, 2009

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1 **INTEREST OF *AMICUS CURIAE* FINANCIAL SERVICES INSTITUTE, INC.**

2 The Financial Services Institute, Inc. (“FSI”) is an advocacy and membership organization for  
3 independent broker-dealer firms (“IBDs”) and independent financial advisors who choose to affiliate  
4 with those firms. FSI’s IBD members and their financial advisors, who are licensed as “registered  
5 representatives” under federal securities law and who are registered with the Financial Industry  
6 Regulatory Authority (FINRA),<sup>1</sup> form the backbone of the retail securities industry and serve many  
7 retail investors. Through their financial advisors, these IBDs deliver advice, guidance, education, and  
8 financial products and services to American consumers to assist them with their financial needs.  
9 Formed in 2004, FSI’s membership includes 122 IBD firms. There are more than 188,000 independent  
10 financial advisors associated with IBDs, and of those, 13,700 are members of FSI.<sup>2</sup>

11 FSI’s goal is to ensure that consumers of retail securities have access to competent, affordable  
12 and focused financial advice, which is made available through IBDs and their associated financial  
13 advisors. The outcome of this litigation could affect interactions between independent financial  
14 advisors and their customers. As such, FSI has a strong interest in ensuring that all aspects of the IBD  
15 business model used by FSI’s members, including Defendant Waddell & Reed, are fully explained to  
16 the Court.

17 FSI’s participation as *amicus curiae* will provide the Court with unique information and  
18 essential insights concerning the IBD business model, which primarily relies upon independent  
19 contractors. This brief discusses how independent financial advisors provide United States consumers  
20 with tailored financial advice; the IBD model’s pervasiveness in the retail securities industry; and the  
21 extent to which IBDs are legally required to supervise their financial advisors to comply with securities  
22 laws.

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1 The term “financial advisor” is a generic term used to describe a registered  
representative. A “registered representative” is an account executive of a broker-dealer who is licensed  
under federal securities law and registered with the Financial Industry Regulatory Authority (FINRA).

2 Financial Services Institute, Inc., *About the Financial Services Institute* (2010),  
*available at* <http://www.financialservices.org/content.aspx?id=40>.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 **I. A large portion of the broker-dealer business is conducted through independent broker-**  
4 **dealer firms, which use independent contractor financial advisors to serve a significant**  
5 **segment of the investing public.**

6 For more than 30 years, the IBD industry has used the independent contractor business model  
7 to provide many investors with comprehensive and affordable financial solutions. The business model  
8 used by IBDs is pervasive throughout the retail securities industry, as it serves the majority of middle-  
9 class investors. More than 15 million American households depend upon independent contractor  
10 registered representatives for their financial services needs.<sup>3</sup> Most of these clients are generated by  
11 referrals either from existing clients or other professionals who serve the individual investor  
12 community, such as accountants, lawyers, and human resources managers.<sup>4</sup>

13 The IBD business model works well for consumers because financial advisors who are  
14 independent contractors are able to focus exclusively on individual consumers and their unique  
15 investment and financial planning needs. Independent financial advisors do not balance the needs of  
16 their individual customers against those of large institutional clients; rather, they provide financial  
17 services exclusively through personal relationships with their customers. Because independent  
18 financial advisors forge close relationships with consumers and gain a deep appreciation for  
19 consumers' personal financial situations, they are inherently more focused on providing cogent and  
20 sound advice targeted at individual clients. Put differently, because independent financial advisors  
21 tend to operate in specific communities and play a central role in the financial lives of their customers,  
22 there is a significant incentive for them to make the achievement of their clients' investment objectives  
23 their primary goal.

24 It so happens that the independent contractor relationship also offers advantages to both  
25 businesses and workers. According to the Government Accountability Office, "[b]usinesses may

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<sup>3</sup> Financial Services Institute, Inc., *About the Financial Services Institute* (2010),  
available at <http://www.financialservices.org/content.aspx?id=40>.

<sup>4</sup> Public Memorandum from the Financial Services Institute, Inc., *What is an Independent  
Broker-Dealer: A Brief Summary of IBD Segment of the Securities Industry* (May 3, 2010).

1 choose to hire independent contractors for reasons such as being able to easily expand or contract their  
2 workforces to accommodate workload fluctuations or fill temporary absences. Workers may choose to  
3 become independent contractors to have greater control over their work schedules or when they pay  
4 taxes, rather than have employers withhold taxes from their paychecks.”<sup>5</sup>

5 More than 60 percent of all practicing financial advisors<sup>6</sup> operate as self-employed independent  
6 contractors associated with an IBD firm. The organizational model employed by Waddell & Reed,  
7 therefore, is the securities-industry norm. The lynchpin of that IBD model is a network of independent  
8 contractor financial advisors. The typical FSI member broker-dealer firm has relationships with more  
9 than 1,500 independent contractor financial advisors, and each firm generates on average over \$160  
10 million in annual revenue.<sup>7</sup>

11 The significant size of the IBD industry is due to the consumer base it serves. Independent  
12 financial advisors deal directly with “main street America” investors. The core of this market is  
13 individuals and families who have tens of thousands of dollars to invest, not millions. There are far  
14 more consumers in that category of investors than are in the cohort of large-dollar investors and funds  
15 served by traditional wire houses.

16 The impact of the IBD industry on the economy is broad and significant. For instance, data  
17 from 2007 indicates that the 20 largest IBD firms alone account for more than 35,000 financial  
18 advisors.<sup>8</sup> Likewise, recent research indicates that the top 20 IBD firms generate about \$18 billion a  
19 year in aggregate gross revenues.<sup>9</sup> In sum, the IBD model is an important, sizeable part of the retail  
20 securities industry, delivering much needed financial advice and services to consumers in every part of  
21 the United States.

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<sup>5</sup> GAO, *Employee Misclassification: Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention*, GAO-09-717 (Washington, D.C.: Aug. 2009), at 4.

<sup>6</sup> Report conducted by Cerulli Associates. <http://www.cerulli.com>

<sup>7</sup> *Id.*

<sup>8</sup> The Top 20 Biggest Indies, *Registered Rep.*, November 1, 2007, available at [http://registeredrep.com/mag/top\\_independent\\_firms/](http://registeredrep.com/mag/top_independent_firms/).

<sup>9</sup> *Spotlight: Independent Broker-Dealers*, Investment News, April 26-30, 2010, at 14.

1       **II. Independent broker-dealers and their financial advisors are subject to extensive**  
2       **federal and state laws that protect the interests of consumers. Compliance with**  
3       **these laws necessitates that firms exercise supervision over certain financial**  
4       **advisor activities.**

5                       *i. Federal and State laws applicable to the IBD industry*

6               To protect consumers, IBDs and financial advisors associated with them are heavily regulated.  
7       Federal and state laws require broker-dealers to closely supervise and monitor the activities of financial  
8       advisors, including those who are independent contractors. But, as discussed in greater detail below,  
9       Congress has explicitly stated that the exercise by broker-dealers of the significant supervisory  
10      functions required by law does not constitute control for purposes of worker classification.

11             The Securities Exchange Act of 1934 (“1934 Act”) mandates that anyone who effectuates  
12      securities transactions register with the Securities and Exchange Commission (“SEC”) or associate  
13      with a broker-dealer that is registered with the SEC.<sup>10</sup> There is a corresponding SEC requirement that  
14      a registered broker-dealer become a member of a self-regulatory organization, such as FINRA.<sup>11</sup> To  
15      comply with FINRA mandates and certain SEC rules, broker-dealers are responsible for overseeing the  
16      securities activities of associated registered representatives, and a broker-dealer could be liable for any  
17      violations of federal and state securities law by a registered representative.<sup>12</sup> Consequently, the broker-  
18      dealer must have written procedures that are reasonably designed to achieve compliance by the  
19      registered representatives.<sup>13</sup> These written procedures must be crafted to ensure supervision of the  
20      types of business in which the broker-dealer engages related to the activities of registered  
21      representatives, registered principals, and other associated persons.<sup>14</sup> A broker-dealer must review its  
22      operations, at least annually, to ensure compliance with Federal securities laws, including the FINRA  
23      Conduct Rules.<sup>15</sup>

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<sup>10</sup>       15 U.S.C. § 78o3(a)(1); *see also* 1999 FSA 385 (May 10, 1999) (Registration and regulation of broker-dealers).

<sup>11</sup>       15 U.S.C. § 78o(c).

<sup>12</sup>       *See for example*, NASD Rule 3010(a).

<sup>13</sup>       *Id.*

<sup>14</sup>       *Id.*

<sup>15</sup>       *Id.*

1 Compliance with FINRA's Conduct Rules necessitate that a broker-dealer exercise broad  
2 supervision over its financial advisor workforce. That is because while the Conduct Rules establish  
3 specific supervisory requirements for a broker-dealer, they also hold the broker-dealer largely  
4 accountable for the actions of its associated financial advisors. Consequently, a broker-dealer must  
5 ensure that the scope of its supervisory functions permits it to closely monitor the financial advisors'  
6 actions.

7 The Conduct Rules set forth several specific supervisory requirements. For instance, broker-  
8 dealers must limit the lines of business and operations of affiliated financial advisors.<sup>16</sup> Likewise, a  
9 broker-dealer must establish procedures for the review of all outgoing written and electronic  
10 correspondence of its registered representatives with the public relating to the broker-dealer's  
11 securities business.<sup>17</sup> Part of that supervisory role involves reviewing all advertisements and  
12 solicitations used by independent financial advisors.<sup>18</sup> Doing so involves a significant amount of  
13 operational oversight, from the approval of telemarketing scripts to the text used in print ads.  
14 Independent financial advisors are prohibited from receiving fee based compensation from customers  
15 on brokerage accounts and generally cannot earn a commission in excess of 5% on such a  
16 transaction.<sup>19</sup> And any public displays of a registered representative's name and business functions  
17 also must state his or her association with the applicable broker-dealer.<sup>20</sup>

18 To comply with securities law requirements, IBDs monitor financial advisors' activities and  
19 ensure that they are properly licensed and qualified. Ensuring proper licensure and competence  
20 requires another level of supervision. IBD firms are obligated to ensure that persons affiliated with  
21 their firm are well trained and properly qualified to offer the products they are selling. This may  
22 involve supervisory actions taken to ensure an advisor has properly obtained a securities license – i.e. a

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16 *Id.*

17 *Id.*

18 NASD Rule 2210(b)(1)(A).

19 NASD Rule 2440 and IM-2440-1.

20 NASD Rule 2210(d)(2)(C).

1 Series 6 or 7 license.<sup>21</sup> NASD Rule 1031 states that all independent financial advisors associated with  
2 an IBD firm must pass a qualifying exam. Continuing education obligations are also imposed on IBD  
3 firms.<sup>22</sup> Every IBD firm is duty bound under FINRA rules to maintain a continuing and current  
4 education program for its affiliated advisors to enhance their securities knowledge, skill, and  
5 professionalism.<sup>23</sup> Further, federal securities laws place the responsibility for the training and  
6 competence of all affiliated independent financial advisors on IBD firms.<sup>24</sup>

7 In addition to setting forth specific supervisory requirements, the Conduct Rules place an open-  
8 ended supervisory obligation on broker-dealers. To satisfy that broader obligation, a broker-dealer  
9 must tailor its supervisory functions to its specific business operations. That is because the rules hold  
10 broker-dealers responsible for the actions of affiliated financial advisors, so the broker-dealer must do  
11 more than merely “check” several boxes on a list of supervisory requirements to comply with the  
12 Conduct Rules.

13 Thus, IBD firms must review how an independent financial advisor presents his or her services  
14 to the public. When products are sold, supervisory actions must be taken to make sure advisors sell  
15 only products that are suitable and that consumers receive complete disclosures.<sup>25</sup> Beyond suitability  
16 requirements, broker-dealers and their associated independent financial advisors also have a duty to  
17 ascertain the best market for the buying and selling of securities products for consumers.<sup>26</sup> The only  
18 way an IBD firm can verify that affiliated advisors are providing best execution for consumers is to  
19 review and supervise their trading activity. IBD firms are also required by law to limit the

---

<sup>21</sup> See generally, <http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Qualifications/p011051>

<sup>22</sup> NASD Rule 1120(b).

<sup>23</sup> *Id.*

<sup>24</sup> 15 U.S.C. § 78o(b)(7); *See also* SEC Staff Legal Bulletin No. 17.

<sup>25</sup> *See, e.g.* Cal. Ins Code § 10509.8 and Tex. Ins. Code Ann. § 1115.051; NASD Rules 3010 and 2310.

<sup>26</sup> NASD Rule 2320(a)(1).

1 compensation paid to independent financial advisors – dictating the remuneration that an affiliated  
2 advisor receives.<sup>27</sup>

3 There are other requirements that compel broker-dealers to designate, where applicable, an  
4 appropriately-registered principal with authority to carry out the supervisory responsibilities of the  
5 broker-dealer. Among other duties, these principals are charged with performing the aforementioned  
6 correspondence reviews and ensuring the suitability of advisor trading activity.<sup>28</sup> A designated  
7 principal also must implement and enforce a system of supervisory control policies to ensure that  
8 registered representatives are complying with securities laws.<sup>29</sup> This includes implementing,  
9 maintaining, and enforcing a system of supervisory control policies that test and verify an IBD firm’s  
10 supervision of its affiliated independent financial advisors. The designated principal is then charged  
11 with submitting annual reports on the success of the policies to a FINRA member’s senior  
12 management.<sup>30</sup> Every member must designate one or more principals to serve as “chief compliance  
13 officers,” who will report to a firm’s chief executive officer on the compliance and supervisory  
14 practices of the member.<sup>31</sup> The importance of having a vigorous compliance program cannot be  
15 overstated. According to the SEC “vigilant supervision is a necessary component of a firm’s policies  
16 and procedures.”<sup>32</sup>

17 Likewise, state blue-sky laws, insurance regulations, and other financial laws may require  
18 certain supervisory actions be taken by IBD firms. One example would be a financial advisor who  
19 offers annuities. That advisor must abide by licensing, disclosure, suitability, and consumer protection  
20 laws.<sup>33</sup> Like many other legal requirements, IBD firms can only ensure compliance with such rules by  
21 exercising a degree of supervisory oversight. In some instances, such as the conduct of legally

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<sup>27</sup> See, e.g. NASD Rule 2440 and NASD IM-2440-1.

<sup>28</sup> NASD Rules 3010(a)(2) and 2310.

<sup>29</sup> NASD Rule 3012(a)(1).

<sup>30</sup> *Id.*

<sup>31</sup> NASD Rule 3130(a) – (b).

<sup>32</sup> SEC Staff Legal Bulletin No. 17 (Mar. 19, 2004).

<sup>33</sup> See, e.g. FINRA Conduct Rule 2330 and Cal. Ins. Code § 10509.8.

1 mandated anti-money laundering (AML) programs, the legal requirements that apply to IBD firms  
2 result in “pushing down” some operational duties to independent financial advisors.<sup>34</sup> An IBD firm  
3 cannot meet its AML obligations concerning transactions it processes without imposing certain duties  
4 on independent financial advisors.

5 In sum, securities law and the FINRA Conduct Rules place on IBD firms both specific and  
6 general supervisory responsibilities, which requires a firm to establish policies; train, monitor and audit  
7 personnel; and involve itself in the activities of its financial advisor force to the extent needed to  
8 satisfy a broad supervisory mandate.

9 *ii. The Taxpayer Relief Act of 1997*

10 Because basic compliance with federal and state laws necessitates oversight of financial  
11 advisors by IBDs to such an extent, Congress enacted legislation in 1997 stating that supervisory  
12 programs and actions designed to comply with federal and state securities laws could not be used as a  
13 basis for demonstrating employer control regarding worker classification. The Taxpayers Relief Act of  
14 1997<sup>35</sup> (“1997 Act”) states:

15 In determining for purposes of the Internal Revenue Code of 1986 whether a registered  
16 representative of a securities broker-dealer is an employee...no weight shall be given to  
17 instructions from the service recipient which are imposed only in compliance with  
18 investor protection standards imposed by the Federal Government, any State  
19 government, or a governing body pursuant to a delegation by a Federal or State  
20 agency.<sup>36</sup>

21 The 1997 Act was designed to clarify that IBDs may exercise legally-required supervisory  
22 responsibilities over associated registered representatives without having to classify them as  
23 employees. When the 1997 Act was under consideration, a Senate report noted: “Broker-dealers are  
24 required to supervise the activities of their affiliated registered representatives in order to comply with  
25 State and Federal investor protection laws. The Committee believes that compliance with duty-to-

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<sup>34</sup> NASD Rule 3011; *see also* 31 U.S.C. § 5318(g).

<sup>35</sup> Pub. L. No. 105-34, (1997).

<sup>36</sup> *Id.* at § 921 (1997).

1 supervise requirements does not constitute evidence of control for purposes of the common-law test for  
2 determining worker classification.”<sup>37</sup>

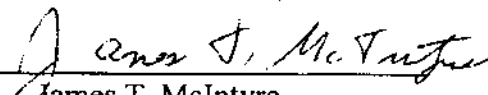
3 The 1997 Act made clear that in determining worker classifications in the securities industry,  
4 *no weight* may be given to supervision required by federal or state securities laws or regulations.  
5 Currently, the United States Congress and the Obama Administration are exploring changes to worker  
6 classification rules that may alter the impact of the 1997 Act. IBD firms and their affiliated  
7 independent financial advisors organize and operate businesses according to established principles  
8 concerning federal and state legal requirements for broker-dealer supervision and financial advisor  
9 autonomy. The resolution of this case could significantly affect the current industry *status quo*. Any  
10 alterations to the principles embodied in the 1997 Act will have seismic impacts on the retail securities  
11 business because the entire organizational structure and worker classification practices of the IBD  
12 industry will have to change. FSI believes that if settled law is to change to permit supervisory acts  
13 performed to comply with federal and state securities laws to indicate a level of control, such changes  
14 should occur through the legislative process.

### 15 **III. Conclusion**

16 The IBD business model is more flexible than other models for the segment of consumers it  
17 serves – middle class American investors. The IBDs and independent financial advisors that serve that  
18 segment of the population represent a significant part of the retail securities industry. Independent  
19 contractor financial advisors are the lynchpin of the IBD industry. To ensure consumers are protected,  
20 federal and state laws require IBD firms to exercise significant oversight over their associated financial  
21 advisors. Existing law makes clear, however, that exercising oversight to comply with investor  
22 protection laws does not create an employer-employee relationship.

23  
24 **DATED:** July 14, 2010

**McINTYRE & LEMON, PLLC**

25  
26 By:   
27 James T. McIntyre  
28 Attorney for *Amicus Curiae*

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<sup>37</sup> S. Rep. No. 105-33, at 120 (1997).

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7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 MICHAEL E. TAYLOR, KENNETH B.  
11 YOUNG, individuals, on behalf of  
themselves individually and on behalf of  
12 others similarly situated,

13 Plaintiffs,

14 v.

15 WADDELL & REED INC.; WADDELL &  
16 REED FINANCIAL, INC.; WADDELL &  
REED FINANCIAL SERVICES, INC.; and  
DOES 1 through 10 inclusive,

17 Defendants.

Case No. 09 CV 2909 DMS WVG

**AFFIDAVIT OF PROOF OF SERVICE**

Date: No date for hearing per chambers

Time: No date for hearing per chambers

Dept. 10

Judge: Dana M. Sabraw

Date Action Filed: Dec. 28, 2009

18 **AFFIDAVIT OF PROOF OF SERVICE**

19 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

20 Pursuant to CivLR 5.2, I hereby attest that on July 14, 2010, I served the foregoing document(s)  
21 described as:

- 22 1. APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE FINANCIAL  
23 SERVICES INSTITUTE, INC.;
- 24 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR  
25 LEAVE TO FILE BRIEF OF AMICUS CURIAE FINANCIAL SERVICES INSTITUTE, INC.;  
AND
- 26 3. PROOF OF SERVICE

27 on interested parties in this action as follows:  
28

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14  
15  
16  
17 Eli K. Peterson

[Print Name of Person Executing Proof]

  
[Signature]

18  
19  
20 District of Columbia : SS  
Subscribed and Sworn to before me

21 this 14<sup>th</sup> day of July, 2010

22   
23 Chrys D. Lemon, Notary Public, D.C.  
24 My commission expires August 14, 2018  
25  
26  
27  
28