UPSHER-SMITH
Pharmaceuticals Since 1919

Statement of Joel H. Green
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Committee on Financial Services
Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises

December 9, 2009

Chairman and Members of the Subcommittee:

Thank you for the opportunity to address your Committee. My name is Joel Green and I am Vice President – Legal Affairs & General Counsel of Upsher-Smith Laboratories, Inc., Maple Grove, Minnesota.

I am here today in support of legislation that will protect the employees of Upsher-Smith Laboratories and working people throughout America, whose retirement security is imperiled by the Madoff fraud.

I urge you to support the Investor Protection Act of 2009 to expand SIPC protection to cover the losses of individual participants in pension plans, profit sharing plans, and other qualified retirement plans.

Some background is in order:

Upsher-Smith Laboratories is a family-owned pharmaceutical company based in Maple Grove, Minnesota. We were formed in 1919, and have approximately 550 employees, approximately 435 located in the Twin Cities, 65 in Denver and the rest around the country.

We established a profit sharing retirement plan for our employees in 1974, and beginning in 1995, plan assets were invested with Bernard L. Madoff Investment Securities LLC, a registered broker-dealer based in New York.

Over the next twelve years, the Company contributed over $8,000,000 to the plan for the benefit of our employees and invested these funds with Madoff. We believed these funds were invested by Madoff, a broker-dealer regulated by the SEC, in a diversified pool of high grade securities and treasury investments. The monthly reports we received from Madoff confirmed this investment structure, and the returns obtained were consistent, if unspectacular. We believed the investment was safe and prudent.

On December 11, 2008, Bernard Madoff, president and founder of Bernard L. Madoff Investment Securities LLC, was arrested and charged with engaging in a massive Ponzi scheme involving thousands of investors who invested billions of dollars for decades.

The fact that Madoff will spend the rest of his life in prison provides little comfort to our current and former employees or to the other victims of his fraud. Any recovery from the bankruptcy estate will likely yield only pennies on the dollar, and even then, will take years to resolve.

The principle source of recovery for our employees, as participants in our profit sharing plan, is SIPC.

We have filed a timely claim with SIPC on behalf of the plan and also on behalf of our 615 plan participants. Yet under the position adopted by the President of SIPC, only the plan is considered a "customer" for SIPC purposes, and only one recovery is available to the plan, despite the fact that over 600 of our current and former employees, and countless other pension plan participants throughout the country, have suffered real losses due to the Madoff fraud.

The legislation proposed by Congressman Ellison (and others) would protect these employees and their retirement security, and that of countless working men and women throughout America who rely on their retirement benefits for a secure and dignified retirement.

Congress created SIPC to protect the investments of a broad range of average Americans. Today, a vast percentage of the wealth of average working men and women is held in their retirement plans. The importance of these funds is heightened when our economy is struggling, homes are declining in value and being foreclosed, and jobs are lost or at risk.

Congress created ERISA to protect the retirement assets of working people. Under the rules imposed by ERISA, plan assets must be held in trust in the name of the plan trustee, and not in the names of individual plan participants.

When the public policies of both SIPC – to protect the interests of ordinary investors – and ERISA – to protect the retirement interests of ordinary working men and women – are considered together, a compelling argument exists that the only way to fairly accomplish these objectives is to expand SIPC coverage for pension plans to provide meaningful relief for the losses incurred by individual plan participants. Without such expanded coverage, the retirement security of these working people is lost.

Congress has already adopted a protection for average citizens who participate in retirement plans with respect to the plan's investment in FDIC-insured deposits. Even though the deposit is held in the name of the trustee of the plan, as with all plan assets, the FDIC rules provide that the interest of each participant is insured up to $250,000. The Congressional policy decision embodied in ERISA was to protect the retirement benefits of working men and women. The same policy decision should apply to protection of the retirement benefits of working men and women in pension plan investments in federally-regulated broker-dealers through SIPC coverage. Two lower courts reached this very conclusion in the case of Morgan v. Kennedy, only to be overruled by an appellate court.

We believe that the appellate decision is bad law, bad public policy and should be reversed by the legislation proposed by Congressman Ellison and others. Congress intended SIPC to protect the investments of average American investors. For most average American workers, their primary investments are held in their retirement plans. Unless SIPC covers these workers' investments in their retirement accounts, it fails to protect the investments of the average American worker, as Congress intended.

We have been asked whether it is possible to afford such SIPC protection to cover the losses of individual participants of pension plans invested with Madoff, and not also extend such protection to individual investors of "feeder funds" who invested with Madoff. We believe the answer is "yes." ERISA prevents individual plan participants from investing their retirement accounts directly in their own names – all assets are titled with the plan trustee. The situation differs for individual investors in feeder funds. Those individuals are not prevented from investing directly in their own names, nor is their investment governed by a public policy of encouraging worker retirement savings. For these reasons, expanding SIPC coverage to cover the losses of individual plan participants would not require also expanding SIPC coverage to individual investors of feeder funds.

This proposed legislation would protect the retirement savings for average working men and women. We have worked with three other Minnesota companies whose retirement plans also suffered loss because of the Madoff fraud. Collectively, our companies have 735 participants who lost over $19,000,000 in company contributions due to Madoff – real cash contributions, excluding the illusory profits reported by Madoff. Of these 735 participants, over 640 had account balances of less than $50,000. These plans cover the average worker and do not focus on highly paid executives. A modest retirement benefit which is critical to the retirement security of these working men and women would fall well below the SIPC ceiling for coverage that would apply under this legislation.

We believe that our employees are representative of pension plan participants throughout the country who have been hurt by Madoff and who will benefit by the proposed legislation that will expand SIPC coverage to them.

We believe the Department of Labor can assist the Committee in identifying the number of plans and participants who were hurt by Madoff and who would be helped by this legislation. We have visited with companies throughout the country whose plans and employees have been hurt by Madoff. The DOL has extensive data in this matter that will assist the Committee in determining the scope of the loss and the cost of correction.

On behalf of our 615 current and former affected employees, we urge the passage of this bill, and thank you very much for your time and attention to this very important legislation.