

February 24, 2009

Honorable Gary Ackerman  
House of Representatives  
2243 Rayburn House Office Building  
Washington, DC 20515

Cc: Congresswoman Carolyn McCarthy  
Congressman Steve Israel  
Senator Charles Schumer

**RE: MADOFF FRAUD – URGENT RECOMMENDATIONS & ASSISTANCE REQUESTED**

Dear Congressman Ackerman:

First, on behalf of Madoff Help.com, a website community and blog dedicated to helping the Madoff community, I wish to extend my appreciation for your efforts, and those of your colleagues regarding the Madoff fraud. I am writing to ask for additional leadership and action. To this end, I am enclosing specific suggestions and recommendations, one set of which applies to making whole the losses to Madoff victims, and another alternative option set which could provide relief through a variety of actions. I believe that my background as both financial planner and investment adviser, as well as having personally witnessed the devastation wreaked by this fraud provides additional standing to the arguments put forth. I also wish to add that today I became aware of, and appreciate your letter to the Internal Revenue Service. I enthusiastically look forward to further conversations in this matter.

I wish to state my position from the outset: that the Madoff situation is not akin to other “hedge fund” scandals and unregistered security Ponzi schemes – that the essential nature of the investment fraud, although perpetrated by Mr. Madoff, was enabled by acts of omission and commission by agencies of the US government, as you have well identified. Ironically, had the government and its agencies not been “regulating” the Madoff entities – i.e. had BLMIS been an unregulated hedge fund, for example -- far fewer investors would have participated, the investors would have been limited to those accredited investors with the financial wherewithal to participate, and far fewer charities would have participated. No hedge fund would have grown to this size. The government was (hopefully) unwittingly complicit in this fraud, and fairness dictates a more pro-active approach which seeks proper restitution. The words “bailout fatigue” that Madoff investors have heard around Congressional circles are distressing and insulting, given the enormity of this scandal, the extent of governmental responsibility, and the limitations posed by sovereign immunity.

While we hope that Congress attends to the problems that led to this debacle, we respectfully ask you now to step up and help resolve the situation. We need clarity and decisiveness, and we need extensive help more than words. The public investigations are a step in the right direction, but victims are still left hanging.

Furthermore, it is my grave concern that Congress will take the path of least resistance, one that will leave the Madoff Trustee the widest range of discretion, that will limit the recourse to a somewhat lenient Internal Revenue Service regarding the amending of returns, and not meaningfully make whole the thousands victimized by Bernard Madoff (via a fraud enabled by agencies of the US government). In other words, IRS leniency, while most helpful, is but a drop in the proverbial bucket, and not the best solution.

While the government is spending hundreds of billions seeking to help restore confidence in our financial system, we feel that your leaving the victims of the Madoff scandal largely damaged will lead to further distrust of the financial system. Moreover, the tax and legal consequences and remedies are stunningly murky and bypass so many who have been devastated. The limitations of SIPC coverage, the possibility of claw-back, the inability of many victims to recover any value are just a few aspects heaping insult upon injury. Making investors whole is frankly essential to rebuilding a trust in the financial system.

The fairest and most appropriate approach, in our opinion, would seek to make whole the Madoff investment community. Making whole emphatically does not mean making sure investors obtain their principal back. That is little comfort to those in retirement who have been relying on income from their Madoff investment over the years, charities that have been using those funds for charitable purposes, or individuals who for years were mandated to make withdrawals from their IRA accounts. There was a significant opportunity cost for those funds. Had the government and/or its agencies properly undertaken their responsibility in the early 1990's, these funds would have been moved out and invested elsewhere – perhaps in S&P 500 equities, corporate bonds, CD's, what have you. There is strong legal precedent for this position. “Making whole” means either restoring the notional value of investors’ November 2008 statements or providing a fair rate of return to the principal of the investment for the period invested.

Moreover, the enormous legal and accounting entanglements argue strongly for comprehensive reimbursement of the November 2008 statement values of investors. The costs to investors and taxpayers will be enormous as the IRS repays investors for “false profits,” enormous audit and legal costs for Internal Revenue and investors, etc. The massive ancillary financial costs of this situation will total many billions of dollars, leaving only accounting and legal firms winners. Moreover, the heaping of additional emotional pain on victims in the tax courts, via Trustee lawsuits, and even between injured Madoff victims borders on the immoral. It can only be alleviated if action is properly taken now.

We realize that in the current environment for Madoff investors who are anxiously seeking immediate IRS guidance that this comprehensive solution may not be the first step, but it is an essential issue nonetheless. A list of supplemental steps is also attached in light of this.

We ask that you urgently consider these actions, forge together the necessary alliances and, out of recognition of the government's wrongdoing in this situation, take the correct path.

## **PREFERRED OPTION 1: COMPREHENSIVE REIMBURSEMENT**

### **Key steps to take now:**

- 1. Indicate your resolve to stand with your Congressional colleagues and assist those individuals, foundations and institutions that have been victimized by the Madoff scandal *right away*.**
- 2. Announce your intention to fully reimburse all US investors for their losses, as determined by the notional value of their investments as of 11/30/2008.**
- 3. Take immediate action to modify bankruptcy regulations to clarify for the trustee the inappropriateness of claw-back in this case. Both Federal and NY State bankruptcy codes are absurdly murky and leave far too much discretion to the Trustee, who will invariably move to recover "profits", "principle" or both.**
- 4. Initiate whatever action is necessary to provide the necessary resources to the regulatory agencies to prevent this from happening again. I would like to suggest that FINRA is most likely not the appropriate regulatory agent.**

By taking this approach, you will help mitigate the enormous anxiety and truly assist your constituents. This is not only the fairest and simplest approach, in the long term, it makes economic sense. Critically, you will reduce victim's legal and tax costs, provide restitution for needy charities and foundations, avoid costly lawsuits against the government and regulatory agencies, and reduce the enormous amount of time that Internal Revenue and state agencies will be spending to resolve the amended tax returns and court costs. Equally importantly, this will help to restore confidence in our government's commitment to protect our regulated markets.

## **OPTION 2: MULTIPLE PATHS, PARTIAL REIMBURSEMENT**

**While we feel that the best and most cost effective action would be *full reimbursement of the values in US Madoff accounts*, there are other steps we ask you to consider at this time for US investors.**

Regarding a series of actions that would be helpful, but likely fall short of fully reimbursing investors, there are numerous approaches. Frankly, we recommend the creation of a panel of individuals of diverse expertise – a Madoff Task Force -- to work with existing Federal agencies to assist with identifying the different options, opportunities and long term implementation. The following are intended as guidelines, however, for rapid action.

- 1. PUBLIC COMMENT.** Indicate, again, your resolve to assist those individuals, foundations and institutions that have been victimized by the Madoff scandal *right away* by vouching for the solvency of SIPC to pay claims to \$500,000, indicating leniency and expediency by Internal Revenue, and minimizing claw-back to those investors who did not take complete “bad faith” redemptions over the last 90 days to 1 year. A public position on both these issues is important.
- 2. IRS.** Work closely with Internal Revenue to provide the maximum possible recovery of loss based on the most current statement (notional) value either by lenient, “one-off” interpretation of the very tax code and/or by providing modifying legislation. For example, require the IRS to allow maximum recovery going back the full length of the investment, eliminate the 10% AGI limitation requirements, and extend backward the statute of limitations indefinitely. Provide flexibility so that the taxpayer can choose an approach that best optimizes their particular tax and income circumstances. In addition, create a simple amending process so as to minimize paperwork and time for filers and administration.
- 3. IRS.** Require that the IRS execute refund payments to victims within a short window of time – perhaps within 60 to 90 days of request -- and insist that documentation demands and audit practices be made public, be consistent, be within a certain time frame and be minimally intrusive. A similar approach should be taken by the SIPC Trustee.
- 4. IRS.** Permit the deduction of IRA and retirement-plan based losses as ordinary theft losses in the same manner as other Madoff losses. Refunds should then be either rolled over to IRA or qualified plans within 60 days to avoid immediate taxation as a distribution, or refunds taken as a distribution and taxes paid accordingly as they would be on any retirement distribution.
- 5. SIPC.** Provide sufficient funds to SIPC to cover each loss not just to the \$500,000 limit amount established in 1970, but increased (even if temporarily) based upon an inflation adjustment, or to \$2,000,000-\$3,000,000. The original value of the SIPC guarantee is now worth a mere \$91,000 in 1970 dollars. If SIPC is not the appropriate entity, create an auxiliary fund for this purpose.
- 6. SIPC CLAIMS & TRUSTEE.** Redefine “basis” for the Trustee. Ideally, claims should not be based on “money in minus money out,” as the Trustee has proposed, but should be based upon either most current statement values or an amount that includes the opportunity cost factor of money. The latter is used extensively in many

legal situations and has ample precedent. In other words, the investment principal would have been invested elsewhere with a rate of return. Several legal rate methodologies currently in use by the IRS and other agencies can be selected from to do this. While both approaches (using statement values or incorporating a rate of return factor), in fact, have valid precedent, the ambiguity of the code will lead to a punitive approach by the Trustee as it currently stands and this must be avoided.

**7. CLAW-BACK.** Provide immediate and clear direction to the Trustee, and provide necessary legislative direction to disallow any claw-back by the Trustee or to offset such claw-back, except in cases of total account redemption within the last year or shorter period. Claw-back must not apply to either principal or “profit” except where “bad faith” clearly existed with respect to complete and large dollar amount withdrawals. The anxiety being felt by small, long-term investors is being magnified by the Trustee’s comments and the Bayou case (the latter is not fully appropriate as precedent and was a disaster in administration). As there is a difference between Federal and State bankruptcy laws and interpretations, seek to establish congruency immediately.

**8. SIPC COVERAGE FOR INDIRECT INVESTORS.** Provide at least partial SIPC coverage to those not-for-profit entities that invested in Madoff via feeder funds. The Trustee is currently taking the position that SIPC is not a recourse for indirect “feeder fund” investors. Recourse must be provided either through SIPC or other means to at least make whole those entities engaged in legitimate charitable purpose.

**9. FEDERAL & STATE COHERENCY.** Work with appropriate state entities to provide consistency between Federal and state actions, both in terms of bankruptcy law and tax code.

**10. FOLLOW UP & IMPLEMENTATION PANEL.** Provide subsequent follow up relief to find a mechanism to make victims as close to whole as possible. This may take time, but a deadline should be set for a panel to look back at the compensation efforts of Madoff victims thru 2009 and 2010 to insure fair and appropriate relief had taken place.

**11. FIX THE CAUSE.** Clearly, take whatever action is necessary to provide the necessary resources to the regulatory agencies to prevent this from happening again.

In closing, lives of Madoff fraud victims have been upturned at the worst possible time, while victims remained frightened and anxious about what may yet happen. The path of least resistance is not the best path. Existing laws – bankruptcy and tax – are woefully inadequate. Mindful of the enormity of the financial challenges facing Congress and Americans at this time, we implore your taking the right course, the fair course. Again, the government’s acts or inactions significantly contributed to this “human tragedy.” It is only fair and right that amends be made, and help provided that benefits all classes of fraud victims.

Thank you for your kind consideration. We remain available and at your convenience for any additional exchange that might be fruitful. Again, thank you for your forthrightness and efforts in this regard.

Most Respectfully,

Ron Stein, CFP  
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