

## Guidance on the Trustee's Pursuit of Avoidance Recoveries

Irving H. Picard (the "Trustee"), as the Trustee for Bernard L. Madoff Investment Securities LLC ("BLMIS"), is responsible for recovering and distributing customer property to customers of BLMIS, assessing claims, and liquidating any other assets of BLMIS primarily for the benefit of its customers. One valuable asset that the Trustee has is so-called avoidance claims under the Bankruptcy Code and the Securities Investor Protection Act against entities that were recipients of funds from BLMIS.

Generally speaking, the Trustee has preference claims against entities that received payments within 90 days of the commencement of the bankruptcy, *i.e.*, on or after September 12, 2008. The Trustee may also recover as fraudulent transfers amounts paid within two years of December 11, 2008 under federal law and up to six years or longer under New York State law.

Decisions on whether to pursue avoidance claims are within the discretion of the Trustee. A number of questions have arisen among BLMIS customers on how the Trustee will exercise his discretion. While the decision on whether to pursue a particular claim is made on an individual basis, as the Trustee has previously announced, he will consider a number of factors when determining whether to commence a lawsuit against non-feeder fund customers.

The press has recently reported on letters transmitted by the Trustee's counsel to entities and individuals advising them that available books and records of BLMIS indicated that the recipients received payments during the relevant avoidance period and seeking the return of such funds. The purpose of the letters is to encourage the recipients, most of whom did nothing wrong, to contact the Trustee's counsel to bring relevant facts of which we may not be aware to our attention and to engage in a dialogue in an effort to reach an amicable resolution of any issues.

In an effort to provide some transparency to this process, set forth below are some of the factors that the Trustee will consider when determining whether to commence an avoidance action.

- Generally speaking, but subject to the remainder of the bullet points, all amounts recoverable as preferences must be repaid to the Trustee. It may be possible to offset amounts received as preferences against the maximum SIPC advance to the Trustee for the satisfaction of each allowed customer claim.
- As to fraudulent transfers, was the customer a net "winner" or "loser"? In other words, did the customer get back less from BLMIS over the years than it put in. If so, the Trustee is unlikely to commence an action.
- Would the commencement of an avoidance action create an undue hardship for the customer that received the potentially avoidable transfer(s)? If so, the Trustee is unlikely to commence an action. When considering whether an action would create an undue hardship, the Trustee will consider, among other things, the amount sought to be recovered and the particular facts that would give rise to the customer's hardship.
- Are there particular facts or circumstances – such as a lack of good faith – that make the conduct of the recipient of the potentially avoidable transfer susceptible to being recovered? If so, the Trustee is more likely to commence an avoidance action.
- Does the recipient of the potentially avoidable transfer have potentially valid defenses to the avoidance claims? If so, the Trustee will evaluate the defenses when determining whether to commence an action.
- Has the recipient of a demand letter contacted the Trustee's counsel to discuss the facts and circumstances giving rise to the transfer and potential settlements? If so, the Trustee will not commence an action, if at all, while such discussions are taking place. If not, the Trustee may be more likely to commence an action.
- Are there any other particular facts and circumstances brought to the attention of the Trustee's counsel that the Trustee should consider when determining whether to commence an avoidance action against a recipient of funds?

*Disclaimer: The Trustee offers the foregoing solely as guidance and nothing herein creates any binding agreement by the Trustee regarding whether he will or will not commence any particular avoidance claim. The foregoing may not be used in any way as a defense to any potential or actual avoidance claim.*