

Recovery Now Available To Madoff Feeder Fund Victims

Law360, New York (November 25, 2013, 7:04 PM ET) -- A new avenue of recovery has just been opened to Madoff victims. The United States Attorney for the Southern District of New York recently announced that the Madoff Victim Fund (“MVF”) would begin accepting claims. Those who lost money invested with Madoff — indirectly or directly — should be aware of several aspects of the MVF so that they can maximize their recovery.

Background

In December 2008, the world learned that Bernard L. Madoff Investment Securities (“BLMIS”) was a Ponzi scheme and investors realized that, in aggregate, they had lost billions of dollars. In the nearly five years since, investors have pursued many avenues to recoup their losses, including class action litigation and claims made against the BLMIS bankruptcy estate administered by Trustee Irving H. Picard, which to date has collected more than \$9 billion.

While the bankruptcy estate has offered compensation to many Madoff victims, others have been shut out. Those who, to date, have been unable to recover include thousands of investors whose money was indirectly invested with BLMIS through feeder funds, investment partnerships, bank commingled funds, family trusts or other pooled investment accounts. In February 2013, the Second Circuit Court of Appeals confirmed the trustee’s position that these indirect investors were not BLMIS “customers” under the Securities Investor Protection Act and thus could not pursue SIPA claims of their own. In *re Bernard L. Madoff Investment Securities LLC*, 708 F.3d 422 (2013). Other investors had their claims denied in the bankruptcy proceeding because their money was invested in a common account that withdrew more from BLMIS than it invested, even though the individual investor never made any withdrawals.

For these indirect investors, the announcement that the MVF was beginning to accept claims is excellent news. The MVF currently has approximately \$2.35 billion, which will provide compensation to Madoff victims, even if their investment in BLMIS was through a feeder fund or other conduit. This is money that the U.S. Attorney’s office has recovered from various civil and criminal forfeiture actions, including \$2.2 billion from the estate of deceased Madoff investor Jeffrey Picower, as well as funds from Bernard L. Madoff, Peter B. Madoff, and their co-conspirators. The MVF is administered by a special master, Richard C. Breeden, a former chairman of the U.S. Securities and Exchange Commission, and is separate from and independent of the BLMIS estate.

The MVF will attempt to look to the economic reality of an investor’s loss, rather than the formalities of whether an investor’s money was placed into BLMIS directly or indirectly. This is welcome news for the thousands of investors whose bankruptcy and SIPA claims were denied, many of whom lost money

when their investment vehicles, which had large stakes in BLMIS, plummeted in value following the revelation of Madoff's fraud.

How Recovery Will Be Calculated

Like the bankruptcy trustee, the special master will use a "cash-in, cash-out" methodology to determine how much a given claimant can recover. This requires a claimant to show how much cash she invested in BLMIS (whether directly or indirectly), how much she withdrew, and how much she has received from other sources (e.g., from the BLMIS bankruptcy estate or class action recovery). Like the trustee, the MVF will only make payments to "net losers" from BLMIS. Those who got more money out of BLMIS than they put in will not be eligible to recover from the MVF, regardless of how large their "paper losses" were. The MVF will not compensate investors for the time value of money or any opportunity cost incurred as a result of investing with BLMIS. No matter how much an investor could have made had their money been somewhere other than with BLMIS, they are only entitled to claim the money actually invested with BLMIS.

The MVF will calculate losses on an individual level. Therefore, even if investors in a single fund withdrew more from BLMIS than the fund had invested, any investor who personally put in more than she took out can make a claim on that amount to the MVF. The MVF will, however, consider whether several investors have a "unity of interest" such that their accounts should be consolidated for the purpose of determining whether the investors are net winners or net losers.

How Claims Will Be Made

Investors must file a claim with the special master and document their losses to recover from the MVF. Forms are available on the MVF website, which is www.madoffvictimfund.com. They must be able to document how much they invested, how much they withdrew, and how much they have already received from other sources. Where a claimant invested indirectly with BLMIS, she has to document each transaction along the chain, from her own funds to BLMIS. Furthermore, because the MVF's objective is to compensate victims regardless of whether they invested directly or indirectly in Madoff securities, claimants must be able to demonstrate that the money really was theirs and not invested on someone else's behalf. The burden of proving loss is on the claimant, so claimants must be sure to carefully document all transactions related to their BLMIS investments, using their investment statements, K-1s, bank statements, tax returns, copies of checks or wires, and conduit payout reports. This may be relatively straightforward for direct investors, but a more daunting process for investors who invested in funds that invested in other funds that invested with Madoff.

Pooled investment vehicles may file claims on behalf of their underlying investors, which may help with the processing of individual claims for indirect investors. In such circumstances, payment generally will be made directly to the investors, not to the conduit. Such pooled investment vehicles can only recover money they invested in BLMIS securities on their own behalf, not money invested for others.

Claims may be filed immediately. All claims must be received by the special master no later than Feb. 28, 2014. The special master has warned claimants not to delay — the process of collecting documentation to support a claim can be time consuming.

How Payments Will Be Made

The payment process has not yet been determined, but the special master has given potential claimants

some preliminary guidance on how he expects payouts to be made. He has said that he expects to make an initial round of payments to ensure that all victims have received a baseline percentage recovery of loss before making any payments to victims who have already recovered a greater percent of their losses. Therefore, those who have already received payouts from other sources can expect to wait in line behind those who have yet to receive any compensation. Even still, investors whose cash losses from BLMIS have not been fully compensated are eligible to recover money from the MVF and should consider making a claim. The special master has given no indication of when payments will begin.

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The Madoff Victim Fund represents a step toward ensuring that indirect investors in BLMIS receive some recovery. Time will tell whether the magnitude of this recover is considered sufficient.

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