

WHITE COLLAR DEFENSE & COMPLIANCE

DEVELOPMENTS IN CRIMINAL LAW, FEDERAL CASE LAW AND STATUTORY DEVELOPMENTS.

PUBLISHED BY



Fox Rothschild LLP
ATTORNEYS AT LAW

Madoff: In the Season of Holiday Lights, Hadassah Spreads Darkness Among Its Donors - Installment 42

Posted at 10:10 AM on December 10, 2010 by Alain Leibman

Several Installments in this blog [series](#) about the long-running, global Ponzi scheme of Bernard L. Madoff (“Madoff”) have discussed Hadassah and its unfortunate involvements with Madoff. The matters covered include Hadassah’s potential “clawback” exposure, the questionable approach that Hadassah has used to disclose its investments with Madoff in Forms 990 filed with the Internal Revenue Service (the “IRS”) and other matters.

Now, on the eve of the expiration of the two-year statute of limitations for Trustee Irving Picard to bring a lawsuit for clawback against Hadassah, in the midst of the holiday season for multiple faiths and the rush to generate end-of-year donations, Nancy Falchuk, President of Hadassah, published a [letter](#) on the Hadassah website in which she reported the following:

Hadassah was introduced to Bernard Madoff Securities in 1988 by a French donor, through a \$7M gift. In addition to the gift, between 1988 and 1996, we deposited \$33M in our accounts, and by April 2007 had withdrawn \$137M. . . .

Like so many, for those who withdrew more than they had invested, we faced a “clawback.” After *many months of*

negotiation, and as a direct result of good faith cooperation of Irving Picard, the Madoff Trustee, and his counsel, we arrived at an agreement, allowing us to continue our commitment to Israel. According to that agreement, subject to approval of the bankruptcy court, Hadassah will pay back \$45M (emphasis added).

Therefore, Hadassah is voluntarily paying \$45 million to settle a potential clawback claim by Mr. Picard of as much as \$97 million. This follows two years of perplexing and conflicting public statements and filings by Hadassah. Originally, as reported in [Installment 14](#) of this series, Hadassah reported publicly a loss from Madoff investments of \$90 million. In contrast, more recently Installment 32 stated the following:

Installment 16, posted in September 2009, discussed the fact that it is alleged that Hadassah had received \$40 million more in distributions from Madoff than it had invested with him. Additionally, an [article](#) by Diana B. Henriques in The New York Times was quoted in Installment 16 as having said, “[t]here is the widespread fear among some — unfounded, Mr. [Irving] Picard [the trustee in the Madoff bankruptcy proceeding] says — that he will sue struggling charities or people of limited means for money they withdrew in the past but no longer have.”

Apparently the fear has been anything but unfounded in the case of Hadassah.

The continuous shifting of public information made available by Hadassah has been exacerbated by the mystifying disclosure or lack thereof in the Hadassah Form 990 filings with the IRS. Installment 14 of this series reported that the Form 990 of Hadassah posted on [GuideStar](#) for the fiscal year ended May 31, 2008 (the “May 2008 Form 990”) was filed with the IRS in April 2009. This filing was well after the Madoff scandal broke on December 11, 2008, and after publication of reports in the media that Hadassah had withdrawn \$130 million from its Madoff account. While the May 2008 Form 990 had no

reference to the Madoff scandal, Installment 23 of this series reported that

the [Hadassah] financial statements audited by KPMG for the fiscal year ended May 31, 2008 (and the [newly-changed] fiscal year ended December 31, 2008), disclosed in a lengthy footnote that Hadassah wrote off, as of May 31, 2008, \$88,725,362 of carrying value of Madoff-related investments.

[Installment 23](#) went on to observe that the Form 990 filed by Hadassah for its newly-designated fiscal year ended December 31, 2008 (the “December 2008 Form 990”) reported the following: in a lengthy footnote (substantially similar to those in the financial statements audited by KPMG for the years ended May 31, 2008 and December 31, 2008) . . . Hadassah wrote off, as of May 31, 2008, \$88,725,362 of carrying value of Madoff-related investments. . . . Hadassah management was unable to determine whether, or the extent to which, distributions to Hadassah from Madoff-related investments are recoverable by the trustee for Madoff.

(As an aside, for some unknown reason the December 2008 Form 990 has never been posted on GuideStar to this date, although I have brought the fact to GuideStar’s attention.)

I have this week obtained from Hadassah copies of its Form 990 for the fiscal year ended December 31, 2009 (the “2009 Form 990”) that was recently filed with the IRS. Again, as was true of the 2008 Form 990, there is perplexingly no reference to the Madoff scandal or its potential impact on Hadassah.

Along with the 2009 Form 990, I obtained from Hadassah its audited consolidated financial statements for 2009 (the “2009 Financial Statements”). The date of the Independent Auditors’ Report of KPMG in the 2009 Financial Statements was November 29, 2010, just days before the letter from Ms. Falchuk was posted and a stipulation between Mr. Picard and Hadassah on December 9, 2010. entered in the Madoff bankruptcy case (the “Stipulation”) to toll the statute of limitations on potential clawback claims against Hadassah (Case Number: 08-01789-brl Document Number: 3327 in the United States

Bankruptcy Court for the Southern District of New York). Presumably, the Stipulation was necessary to preserve Mr. Picard's right to file suit against Hadassah should the settlement not become final.

In stark contrast to the 2009 Form 990, the second paragraph in Note 14 "Contingency" to the 2009 Financial Statements gives the following information as to the Madoff scandal:

Hadassah has *begun* settlement discussions with the Trustee [Mr. Picard] with respect to any claims that the bankruptcy estate believes it can assert against Hadassah for the recovery of any amounts previously received. The Trustee has not commenced litigation at this time. These discussions are *in the early stage* and the outcome is not reasonably estimable. If a settlement is reached in the present discussions, the amount of the settlement could be material to Hadassah. Hadassah intends to defend vigorously if no settlement is reached and the Trustee attempts to enforce the claims. If Hadassah is not successful in its defense of the claims, should they be made, the amounts recoverable by the Trustee could be material (emphasis added).

The limited disclosure in the 2009 Financial Statements is better than no disclosure at all in the 2009 Form 990, especially since the December 2008 Form 990 raised a question of uncertainty as to the effect of the Madoff scandal on Hadassah's financial statements. I believe that, in light of the preliminary nature of the December 2008 Form 990 disclosure, Hadassah has a duty to make a full, fair and accurate clarification and update in the 2009 Form 990 and succeeding Form 990 filings. The lack of consistency between the 2009 Form 990 and the 2009 Financial Statements is also a concern.

Nonetheless, the limited disclosure in Note 14 to the 2009 Financial Statements is itself seriously deficient. The date of the auditors' report of KPMG is November 29, 2010. In her letter, Ms. Falchuk wrote that the discussions that led to the \$45 million settlement followed "many months of negotiation." By November 29, 2010, the discussions were

clearly no longer “in the early stage” and the outcome “not reasonably estimable” as stated in Note 14.

Many who support or even belong to this charitable organization must be acutely disappointed that Hadassah has not been more accurate and forthright with its donors in its public statements and IRS filings. During 2009 Hadassah received \$32.3 million in contributions and bequests according to the 2009 Financial Statements. How would those donors have felt had they known that their contributions would in effect fund a \$45 million settlement with Mr. Picard, and not promote the mission of Hadassah? How should 2010 donors feel about the settlement? I believe that Hadassah would be far better served to make visible, clear and consistent disclosures to regain the confidence of its loyal supporters who faithfully fund its historic mission.

[To be continued in Installment 43]

(With appreciation to [Michael J. Kline, Esq.](#), the author of this entry and author of an on-going analysis of the concerns of Madoff stakeholders. Mr. Kline is a partner with Fox Rothschild LLP, based in our Princeton, NJ office, and is a past Chair of the firm's Corporate Department. He concentrates his practice in the areas of corporate, securities, and health law, and frequently writes and speaks on topics such as corporate compliance, governance and business and nonprofit law and ethics.)