March 2002
Volume 50
Number 2

United States
Department of Justice
Executive Office for
United States Attorneys
Office of Legal Education
Washington, DC
20535

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Director

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The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b)

The United States Attorneys' Bulletin is published bi-monthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201. Periodical postage paid at Washington, D.C. Postmaster: Send address changes to Editor, United States Attorneys' Bulletin, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201

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Fraud in the Corporate Context

In This Issue

before Congress on securities litigation reform.✠

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Prime Bank/High Yield Investment Schemes

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I. Introduction

Ever since Breton Woods and the formation of the International Monetary Fund and World Bank in the late 1940's, the major banks in the world have engaged in trading programs among themselves, yielding returns ranging from 10% to 100% per month, at little or no risk. Only these banks, and a few select traders authorized by the Federal Reserve, are allowed to participate in these trading programs, which are principally designed to generate funds for humanitarian and other worthwhile projects. On occasion, particular traders allow individual investors to participate in these secret trading programs by pooling the individual's funds with funds from other investors until a certain amount, usually a minimum of $100 million, is accumulated for a trade. However, these individuals must enter non-disclosure agreements with the traders and agree to contribute half of their profits to a designated charitable cause.

Interested? Your investment advisor never told you about this? Maybe that's because all of what you have just read is false. Nevertheless, thousands of people during the past decade have fallen prey to scams based on similar claims and lost billions of dollars believing they were investing in such mythical trading programs. Despite repeated warnings over the years from various regulatory agencies and international organizations that such trading programs do not exist, these prime bank or high-yield investment schemes have continued to proliferate and are now nearing epidemic levels.

Various agencies or organizations, such as the Federal Reserve Board, Office of Comptroller of Currency, Department of Treasury, Securities and Exchange Commission (SEC), International Chamber of Commerce, North American Securities Administrators Association, International Monetary Fund, and World Bank have all issued explicit warnings to the public about prime bank fraud. Occasionally, you will find copies of these among the items seized during execution of a search warrant at a fraudster's

office. A number of good reference materials are publicly-available relating to these schemes, including PRIME BANK AND RELATED FINANCIAL INSTRUMENTS FRAUD issued by the SEC in 1998. Two others are PRIME BANK INSTRUMENT FRAUDS II (THE FRAUD OF THE CENTURY), prepared in 1996 by the ICC Commercial Crime Bureau, and THE MYTH OF PRIME BANK INVESTMENT SCAMS, by Professor James Byrne of the Institute of International Banking Law & Practice, George Mason University Law School.

Prime bank fraud first appeared in the early 1990's, waned somewhat in the mid 1990's in response to aggressive enforcement actions and media coverage, then reemerged as a significant problem in the late 1990's. At present, over one hundred pending federal criminal investigations involve prime bank fraud. In addition, the Securities and Exchange Commission and various state law enforcement agencies have a number of active investigations. Moreover, as the problem has become worldwide, more foreign law enforcement agencies, particularly in English-speaking countries, have actively investigated and prosecuted this type of fraud.

The purpose of this article is primarily two-fold: first, to alert readers to the existence of this particular type of fraudulent scheme, and second, to offer some suggestions for investigating a prime bank scheme.

II. Common characteristics of the scheme

"Prime bank" schemes — "prime bank instrument" schemes, "high yield trading programs" or "roll programs"— are essentially Ponzi schemes, in which the perpetrators claim exists a secret trading market among the world's top banks or "prime banks." Perpetrators claim to have unique access to this secret market. The "top" or "prime" banks purportedly trade some form of bank security such as bank guarantees, notes, or debentures. These instruments can supposedly be bought at a discount and sold at a premium, yielding greater than market returns with no risk. In reality, no such market exists. Furthermore, high-yield "prime bank notes," as described by these perpetrators, do not exist.

They often claim that there are only a few "traders" or "master commitment holders" who are authorized to trade in these securities and that the securities must be traded in large blocks, typically millions of dollars or more. Promoters tell potential investors that they have special access to a trading program, and that by pooling their money with that of other investors, they can participate in the program. Promoters also tell investors that the programs participate in some humanitarian cause and that they are giving the investors a special opportunity to participate in the program, but only if they agree to give a share of the profits to the cause. They also typically require investors to execute a "non-disclosure" and "non-circumvention agreement" because , as they are told, banks and regulatory agencies will deny the existence of these trading programs.

III. Case law involving prime bank schemes

Over the past few years, a number of reported decisions affirmed convictions of prime bank schemers. For example, this past summer the Fourth Circuit affirmed defendants' convictions in *United States v. Bollin,* 264 F.3d 391 (4th Cir. 2001), for conspiracy, wire fraud and money laundering. As described by the Court of Appeals:

> This case arose out of a wide-ranging investment fraud scheme, carried out by a network of conspirators, who bilked millions of dollars from investors across the country. The investments were programs that promised enormous profits, supposedly derived from secret trading in debentures issued by European "prime" banks.
>
> The programs involved supposed trading of European "prime bank" debentures and promised very high rates of return with little or no risk to investors. According to the ... literature that they distributed, the programs were available on a limited basis to groups of investors whose money would be pooled and delivered to a "prime" bank. The investment principal was supposedly secured by a bank guarantee and, therefore, was never at risk. Millions of dollars in profits were to be generated within a few months from the trading of debentures. For example, one program ... offered a profit of $73,000,000 in ten months, based on an investment of $400,000.

Id. at 399-400.

In *United States v. Polichemi*, 201 F.3d 858, *aff'd on rehearing*, 219 F.3d 698 (7th Cir. 2000), defendants defrauded nearly thirty investors out of more than $15 million by marketing "prime bank instruments," which they described as multi-million-dollar letters of credit issued by the top fifty or one-hundred banks in the world. As the Seventh Circuit explained, defendants

> told their victims that they could purchase these instruments at a discount and then resell them to other institutions at face value; the difference in price represented the profits that would go to the defendants and their "investors." This was nothing more than a song and dance: the trades were fictional; there was no market for the trading of letters of credit; and nothing capable of generating profits ever occurred. Somehow, notwithstanding the implausibility of "prime bank instruments" to one familiar with normal business practice for letters of credit, they managed to persuade their victims to give them money to finance the purchase of phantom discounted instruments. While this did not earn a cent for any of the investors, it definitely changed the defendants' own lifestyles.

Id. at 859-860. Among those convicted in *Polichemi* were attorneys, salespeople, an individual who acted as a reference, and *Polechemi*, who claimed to be one of the few people in the world with a license to trade prime bank securities.

In a related case, *United States v. Lauer*, 148 F.3d 766 (7th Cir. 1998), Lauer, the administrator of an employee pension fund, plead guilty to diverting millions of dollars to the prime bank scheme prosecuted in the *Polichemi* case. In rejecting Lauer's appeal on the loss calculation for sentencing purposes, the Seventh Circuit upheld the trial court's use of an intended loss figure, rather than a lower actual loss amount.

In another recent case, *S.E.C. v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995), Chief Judge Posner declared

> Prime Bank Instruments do not exist. So even if [a co-schemer] had succeeded in raising money from additional investors, it would not have pooled their money to buy Prime Bank Instruments. It would either have pocketed all of the money, or, if what its masterminds had in mind was a Ponzi scheme, have pocketed most of the money and paid the rest to the investors to fool them into thinking they were making money and should therefore invest more (or tell their friends to invest).

In *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000), the Fifth Circuit upheld defendants' convictions for conspiracy, wire fraud, mail fraud and interstate transportation of stolen property. At trial, the government presented the following evidence describing how defendants induced participants to invest in a "roll program":

> Potential investors were told that their money would be pooled with that of other investors and used to buy letters of credit. The letters of credit would be "rolled"-- sold, repurchased, and resold -- to European banks frequently and repeatedly. Each "roll" would generate a large profit to be distributed among the investors, in proportion to their investment. The investors were told that their funds would be safe at all times, held either in an account at a nationally-known brokerage firm or invested with a "prime" or "top 50" international bank. Investors were also told that they would receive at least the return of their initial investment, with interest, and would likely make substantial profit. In fact, the defendants took the invested funds for their own use, bought no letters of credit, and, except for a small payment to one participant, returned no money to the investors.

Id. at 185.

In *United States v. Rude,* 88 F.3d 1538, 1548 (9th Cir. 1996), defendants were charged with engaging in a prime bank scheme. In affirming their convictions, the Court of Appeals found, among other things, that the government had proved beyond a reasonable doubt "that the very

notion of a 'prime bank note' was fictitious," and cited other evidence that the term "prime bank" was not used in the financial industry "and was commonly associated with fraud schemes." *Id.* at 1545.

In *Stokes v. United States*, No. 97-1627, 2001 WL 29997, at *1 (S.D.N.Y. Jan. 9, 2001), defendant was convicted of conspiracy, wire fraud, money laundering and interstate transportation of fraudulently obtained money. Defendant claimed that "through various personal connections in the banking industry, he could purchase and sell 'prime bank guarantees' or letters of credit and make a substantial profit in a short period of time, with no risk to the investor." As is typical in these kinds of cases, the defendant attempted, unsuccessfully, to portray himself as a victim, as someone unwittingly conned by co-conspirators to carry out the fraud.

A number of other criminal cases involving prime bank schemes have also been reported. *See e.g., United States v. Wonderly,* 70 F.3d 1020 (8th Cir. 1995); *United States v. Hand*, No. 95-8007, 1995 WL 743841 (10th Cir. Dec. 15, 1995); *United States v. Aggarwal*, 17 F.3d 737 (5th Cir. 1994); *United States v. Gravatt*, No. 90-6572, 1991 WL 278979 (6th Cir. Dec. 27, 1991); *United States v. Lewis,* 786 F.2d 1278 (5th Cir. 1986). There are also a number of reported civil cases brought by the S.E.C. *See*, e.g. *S.E.C. v. Milan Capital Group, Inc.,* No. 00 Civ. 108 (DLC), 2000 WL 1682761 (S.D.N.Y. Nov. 9, 2000); *S.E.C. v. Kenton Capital, Ltd.,* 69 F. Supp.2d 1 (D.D.C. 1998); S.E.C. v. Infinity Group., 993 F. Supp. 324 (E.D. Pa. 1998), *aff'd,* 212 F.3d 180 (3d Cir. 2000); *S.E.C. v. Deyon*, 977 F. Supp. 510 (D. Me 1997); *S.E.C. v. Bremont*, 954 F. Supp. 726 (S.D.N.Y. 1997).

Assistant U.S. Attorney Michael Schwartz in Houston prepared an excellent memorandum titled "United States' Memorandum of Law Concerning Fraudulent High-Yield or International 'Prime Bank' Financial Instrument Schemes," a copy of which can be obtained from either him or the Fraud Section. Appropriately modified versions of this memorandum can not only be used to educate your trial judge on the legality of such schemes, but also excerpted for use in search warrant affidavits.

IV. First steps

While the particular facts presented in each case will obviously dictate which steps you should first take in investigating a prime bank or high yield investment program (HYIP) scheme, we have found the following to be generally very useful:

- **Check subject's background:** Check to see if the subject has a criminal record, or if his name appears anywhere in FBI indices. Check with other agencies as well, since these types of investigations are handled not only by the FBI, but also by Customs, Secret Service, IRS-CID, or the Postal Inspection Service. Many prime bank scammers are career cons who have been previously convicted of fraud. Prime bank scammers also seem to operate within an extensive network, using each other to broker or solicit investments in particular HYIP schemes, to backstop some fraudulent claim, or to help create a "plausible deniability" defense. Therefore, your subject may have been interviewed in the past by an agent in another matter and made statements that could prove useful in your case. If you are fortunate, you will find that an agent expressly put your subject on notice in the past as to the fraudulent nature of prime bank trading programs. Such notice would substantially aid your efforts in establishing probable cause for a search warrant and generally in proving the subject's fraudulent intent.
- **Contact the Securities and Exchange Commission:** The SEC actively investigates and prosecutes prime bank fraud as securities fraud. Your subject may be, or has been, involved in a SEC investigation. If so, this would also help build probable cause for an eventual search warrant, and prove intent at trial. If the SEC has not investigated your subject, you should consider asking them to do so. Contact either your regional SEC office or Brian Ochs, Assistant Director, Division of Enforcement, SEC at (202) 942-4740 in Washington, D.C. (*See* Tips below).

- **Contact Jim Kramer-Wilt and Bill Kerr:** Jim Kramer-Wilt is an attorney in the Treasury Department's Bureau of Public Debt and has taken a very active role in attempting to expose and combat prime bank fraud. He has compiled an extensive database on known and suspected prime bank scammers and will readily share with you the database, as well as other useful materials. In all likelihood he will have, or can get, some background information about your subject. He may be reached at (304) 480-8690. Bill Kerr, with the Enforcement and Compliance Division, Office of the Comptroller of Currency, may also provide some valuable information about your subject, particularly if a bank has filed a Suspicious Activity Report (SAR) with the OCC, or has otherwise made an informal inquiry to the OCC or Federal Reserve about a particular financial transaction or investment. His number is (202) 874-4450.
- **Locate subject's bank accounts and/or assets:** These cases typically involve millions of dollars of victims' funds, and are often directed at wealthy individuals or institutions, with minimum investment levels (e.g., $25,000) and representations that "trades" can not be entered until $100 million has been pooled. Although offshore accounts are frequently used in these schemes, surprisingly enough, you will often find that the subject still has large sums on deposit in accounts at United States banks under his control. This may be because he has not yet transferred the funds offshore, or perhaps because, as part of his scheme, the funds are being maintained in an alleged trust account so he can assume the persona of a well financed investment manager with the bank employees. At any rate, to locate the accounts is important, in order to determine the scope and nature of the fraud, as well as prepare for ultimate seizure of the funds. A subject's account can usually be identified by asking a victim for the wiring instructions that he received from the subject. Accounts can also be located through other means, including mail drops, trash runs, the clearing process of a victim's check, and grand jury subpoenas. Of course, the likelihood that the subject has used more than one account is high. In determining whether to seize the account, informally contact the financial institution's security officer to get a rough idea of how much is in the account.
- **Consider initiating a proactive approach:** The most difficult element to prove in a prime bank case, as with most investment frauds, is fraudulent intent. The most common defense is, "I didn't know those trading programs didn't exist. I believed Mr. X when he told me they did." Therefore, it is important at the start of an investigation to plan how to overcome this defense. The FBI has developed a number of different proactive approaches that have proven successful in establishing the requisite intent that will substantially assist you in prosecuting your case. Indeed, in most instances, the defendant will enter a plea after being confronted with such evidence. For one successful prosecution resulting from a sting operation, see *United States v. Klisser*, 190 F.3d 34 (2d Cir. 1999).
- **Execute search and seizure warrants:** As soon as you have been able to determine the nature and scope of the fraud, you should consider applying for search and seizure warrants.
- **Victim questionnaires:** Many of these cases involve hundreds, if not thousands, of potential victims. Questionnaires sent out to victims have proven to be an excellent way to quickly collect evidence, including witness statements and documents, which you can then review for possible in-depth interviews later. Obviously, this should be done only once the existence of the investigation becomes public. Questionnaires are also a good way to gauge the degree of cooperation you can expect to receive from victims,

who oftentimes in these Ponzi type schemes do not feel "victimized". (See Section VII below).

V. Pssst... here are a few good "tips"

Identifying the existence of a prime bank investment scheme is clearly easier than determining the scope of the scheme, or trying to explain to a jury precisely what is meant by (or supposedly meant by) such terms as "prime bank discounted negotiable debenture" or "World Bank high-yield humanitarian trading program." The following tips will hopefully help you build and prove a case.

- **Keep it simple**: Once you determine the target or targets, focus your investigative efforts on building the strongest case against them without trying to uncover every transaction or proving every illegal act they may have committed. First, as a practical matter, you simply can not include every transaction. These schemes are often quite broad in scope and can often meld into other investment schemes. Stay focused on the heart of the case you are developing. Attempting to be all-inclusive can be a waste of time and resources. By focusing on the key transactions, you can present a case that the average juror will understand. Second, you need not include each and every victim. More than likely, the majority of the scheme can be proven through a handful of victims. Use your best witnesses. Often these are people who retained investment contracts they executed with the targets or who remember specific misrepresentations. The details regarding the other victims can be saved for the sentencing phase. Third, you need not endeavor to disprove the myriad of misrepresentations made to the victims. Prime bank schemes are often based on a series of misrepresentations that seem, at least to the investors at the time, to have some basis in reality. You are better off focusing on the material misrepresentations that establish the nature of the scheme than disproving each of the various ancillary misrepresentations. Proving that the subject did not invest investor funds, but instead spent for his personal benefit, is easier than disproving a tale about the World Bank, the IMF, or the yield on prime bank notes from an emerging nation. In short, do not argue on the defendant's terms. Just show that the defendant did not invest the money as promised.
- **Get a financial analyst assigned to the matter**: Reaching out and utilizing the full range of tools available to a prosecutor can go a long way towards turning an investigation into a prosecutable case. Having an FBI Financial Analyst (FA) assigned early in the investigation can help in a number of ways. First, an FA can review the pages and pages of bank records and determine how the subject transferred, concealed and eventually spent the victim's invested funds. Second, in many of these cases, checks and wire transfers go back and forth between the accounts of targets, investor-victims, and brokers who bring victims into the scheme. A thorough review by an FA can help determine who's who. Further, an early review will most likely unearth additional victims, either because they sent funds into a target's account or because they received lulling payments from the target's accounts. Interviews of these witnesses may yield additional counts of fraud and money laundering pursuant to 18 U.S.C. §§ 1956 (lulling payments) and 1957 (spending of proceeds from a "specified unlawful activity"). Third, the FA will generally be able to identify additional bank accounts into which the subject is secreting proceeds. Such information will provide additional accounts to subpoena, including foreign accounts of which you may not have known. Identifying the foreign accounts as early as possible is important because of the time involved in attempting to obtain that information.
- **Get MLATs out early**: If you anticipate

needing evidence from abroad, you should contact the Office of International Affairs (OIA) in Washington, D.C. at (202) 514-0000 to initiate the steps necessary to obtain such information. The United States has Mutual Legal Assistance Treaties (MLAT) with many nations, establishing a framework for obtaining evidence from another country. For those countries with which we have no MLAT in force, OIA can advise you on the appropriate means by which to obtain the requested information. OIA will provide you with a format-request for your particular country, which you will need to complete and return to OIA. MLATs can be used to obtain authenticated foreign documents and testimony abroad, execute search warrants, and seize funds.

- **Get started soon:**

  Once OIA has forwarded your request on to the foreign country, the requested evidence can take months to arrive. As discussed above, bank security officers can often tell you if an account is active and if there are funds in the account. Obtaining this information through informal channels can help determine if you need to wait for a response to an MLAT request. In the meantime, you may receive the collateral benefit of encouraging the foreign authorities to open their own investigation, which may later provide you with an invaluable level of cooperation.

- **Don't go it alone**: Coordinating with other agencies can save time and effort. While you must be mindful of the non-disclosure obligations of Rule 6(e), working with the SEC, IRS, NASD, and other federal and state regulatory agencies can save a great deal of time. These agencies and regulators may have investigations underway and may have collected useful information about your targets as well as potential victims. Often victims complain to the SEC or their particular state regulator, and, as a result, civil enforcement actions may already be underway. Working with the regulators and other arms of law enforcement is always preferable to working at cross purposes. Additionally, civil cases may already be in the works. Not knowing the full scope of the scam, victims often retain lawyers to pursue civil claims for breach of contact. These civil attorneys can also be a useful source of information. Finally, requesting information from FinCEN and the IRS may also prove to be useful.

- **Helpful websites**: A number of websites can be consulted in investigating a prime bank scheme. Two of the most useful are the Treasury Department's www.treasuryscams.gov and the SEC's www.sec.gov/divisions/enforce/primebank.shtml, both of which list numerous other very helpful links.

- **Don't reinvent anything**: More than likely, the target is operating in a similar, if not identical, manner to that of a number of other prime bank scammers. Consulting with other prosecutors who have handled these types of cases may save you time and effort. Furthermore, these prosecutors can provide you with materials such as sample indictments and search warrant affidavits. The Fraud Section, Criminal Division, in Washington D.C., (202) 514-7045, also has some guidance materials.

VI. Countering defenses - "It wasn't me"

Echoing the lyrics of a recent reggae-pop hit, when caught red-handed, even on camera, defendants will often claim simply "It wasn't me." The participants and funds of a particular prime bank schemes are often intertwined with other schemes. For the target or targets to send funds back and forth to other brokers or "traders" who are running similar schemes either in this country or offshore is not uncommon. Those brokers or traders often return the favor. The precise reason for these intermingled transactions is not entirely clear, but it does make tracing funds more difficult and sometimes gives defendants a built-in defense.

Defendants may claim that they sent an investor's money to Mr. X on the Isle of Man, and thus, like everyone else, were fooled by Mr. X, *i.e.*, "it wasn't me."

On March 15, 2001, in a case prosecuted by AUSA Linda M. Betzer of the Northern District of Ohio and Fraud Section Trial Attorney Glen G. McGorty of the U.S. Department of Justice, defendants Geoffrey P. Benson, Susan L. Benson and Geoffrey J. O'Connor were found guilty of twenty-one counts including conspiracy, mail and wire fraud, and tax evasion. The defendants were the former operators of The Infinity Group Company ("TIGC"), which collected over $26.6 million from over 4,400 victim investors across the country over a one and one-half year period. Through their *Financial Resources* newsletter, the defendants promised investors up to 181% return on their money, depending on the principal invested. The defendants claimed successful investment experience and business associations with individuals providing access to prime bank programs "ordinarily unavailable to the individual investor." The defendants promised the victims that their money would be pooled to purchase "prime bank instruments" in the European market with high guaranteed rates of return.

In reality, the defendants sold no product and offered no service. They had no investment experience, nor did they have any success with "prime bank investment" programs in Europe. In typical Ponzi/pyramid scheme fashion, they paid some investors in TIGC's "Asset Enhancement Program" with money collected from new investors, but the great majority of victims never received any money back from TIGC. In 1997 the State of Ohio, Department of Commerce, Division of Securities, and the federal Securities and Exchange Commission halted the TIGC operations, resulting in a court-ordered injunction of TIGC's sales activities. Of the $26 million collected by the defendants, a court-appointed trustee and forensic accountant collected almost $12 million in assets, which was subsequently returned to the victims. The alleged investments yielded no profits for the investors for over a year and a half, though TIGC allegedly sent approximately $11 million out of the $26 million to "investment programs" run by Geoffrey Benson's associates located around the world.

Though the defendants did not testify at trial, their attorneys argued through government witnesses and exhibits that the $11 million sent to these programs was evidence that the defendants believed the money they solicited from the investors was being invested in the prime bank programs they promoted in the newsletters. This defense attempted to convince the jury that the defendants were themselves victimized by Benson's associates and that they were acting in good faith in operating TIGC's Asset Enhancement Program. To refute this argument, the government demonstrated that the only assets the defendants enhanced were their own. As part of its case, the government called several expert witnesses, including an expert on international banking, who testified that the prime bank instruments and programs promoted by the defendants do not exist. The government highlighted the fact that only part of the received funds were invested, while the balance was placed in off-shore bank accounts or used by defendants to purchase an eighty-six acre plot of lakefront property, build a multi-million dollar home, and pay for many personal expenses. The government's fraud case focused on the misrepresentations contained in the *Financial Resources* newsletters. In these monthly mailings, the defendants not only lured investors with guarantees of high returns, but also lulled them by claiming successful investments and even starting a grant program using the "profits" of the trust's investments abroad. Over the period of the Asset Enhancement Program, TIGC's alleged $11 million investments yielded no profits — a clear inconsistency with what TIGC told its investors. The government succeeded in convincing the jury to focus on these lies and to understand that TIGC never intended any monies sent to its business associates to return a profit, but rather only to be hidden from any future investigating authority.

The jury found that the defendants were not victims as they claimed, but were guilty on all charged counts. Geoffrey Benson was ultimately sentenced to 360 months' incarceration, while Susan Benson and Geoffrey O'Connor each were

sentenced to 121 months' incarceration. All were ordered, jointly and severally, to pay $12,975,341 in restitution. All of the sentences reflected guideline enhancements for a fraud loss of over $20 million, more than minimal planning, mass marketing, violation of a judicial order, use of sophisticated means, and obstruction. Geoffrey Benson's sentence also reflected enhancements for his leadership role, an offense affecting a financial institution, and abuse of a position of trust.

Defeating this defense and proving intent can be accomplished in a number of ways. First, one of the proactive approaches discussed above can be used. After a target is put on notice by the government that prime bank trading programs do not exist and that claims to the contrary would be false, subsequent involvement by the target would not survive the "I too was duped defense." Second, circumstantial evidence can be used to establish intent. In most cases, an analysis by the FA will be able to show that a majority of investors' money did not go directly to the so-called "bigger fish," but instead went to accounts controlled by the target(s). Moreover, the amount of money sent to these other traders/brokers, the so-called "bigger fish," rarely coincides with the amounts invested. The lulling payments sent to other investors as interest also demonstrate intent since the fraudster misrepresents the true source of funds, *i.e.*, fellow investors. Intent can also be circumstantially proven through evidence of the defendant's conscious avoidance of various indicia of fraud or red flags associated with prime bank schemes. Third, experts can help show that the representations made to investor/victims were false on their face and that the lingo used to induce investors was made from whole cloth. *United States v. Robinson*, No. 98 CR 167 OLC, 2000 WL 65239 (S.D.N.Y. Jan. 26, 2000), contains a discussion of the use of an expert in a prime bank case.

Among government officials who have testified as experts in such cases are James Kramer-Wilt (Department of Treasury, Bureau of Public Debt (304) 480-8690); Bill Kerr (Office of the Comptroller of Currency (202) 874-4450); Herb Biern and Richard Small (Federal Reserve Board (202) 452-5235). There are also a number of private persons who provide expert testimony in these cases, *e.g.*, John Shockey (retired OCC official (703) 532-0943); Professor James Byrne (George Mason University Law School (301) 977-4035); and Arthur Lloyd (retired Citibank senior counsel (802) 253-4788). In addition, Jennifer Lester of the International Monetary Fund (202) 623-7130 and Andrew Kircher of the World Bank (202) 473-6313 may be able to provide assistance.

VII. Dealing with uncooperative victims

Unlike victims of some other crimes, victims of prime bank schemes often do not know or want to believe that they have been scammed. Often fraudsters have told them up front not to believe the government. Some prime bank victim/investors may, at least initially, refuse to cooperate with agents or prosecutors.

Many victim/investors are "true believers," who have received "interest payments" in a timely fashion and are often talked into "rolling over" or "reinvesting" their principal. While much of the principal has been secreted away by the fraudster, true believers remain convinced (or want to remained convinced) that the "high yield prime bank market" does exist and that their proverbial ship has come in. This belief, coupled with the non-disclosure, secret nature of the investment, prevents them from cooperating with the investigation, their reasoning being: "why risk breaching the non-disclosure provision of the contract by talking to the government when I'm getting paid?"

Most investors have been told that the government will deny the existence of the "programs," and that speaking to an FBI agent or other government agent will jeopardize the success of the secret programs, as well as bar them from any future opportunity to invest in these trading programs.

However, some investors may recognize the Ponzi scheme but want it to continue for just a few more payment periods so they can get their money back. These investors have little interest in seeing a speedy investigation and would rather be left alone so that they can get their money out before the roof caves in.

Dealing with each of these types of investors

can be difficult. However, being forewarned that you may encounter some of them will allow you to plan ahead. In our experience, a few low key meetings or phone calls from the agent will allow at least the first two categories of witnesses time to come to grips with reality. If they remain uncooperative, simply move on and concentrate on counts centered around more helpful witnesses.

VIII. Conclusion

Over the past decade, prime bank schemes have proven to be an incredibly durable form of Ponzi scheme by being able to adapt to changing conditions and obstacles. We can expect the scheme to continue to morph into whatever form necessary in an attempt to lure victims and evade detection. A vigorous and coordinated effort on the part of federal and state law enforcement and regulatory agencies is clearly needed. ❖

ABOUT THE AUTHORS

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Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs

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Increasingly prosecutors must decide whether, in specific cases, a corporation should be prosecuted for crimes committed by one of its officers, employees, or agents. Since 1999, the Department's *Principles of Federal Prosecution of Corporations* have provided a framework for making this decision and have identified factors relevant to the determination. In the end, however, as in every criminal case, the essential question remains: should *this* corporation be prosecuted for *this* conduct?

I. Corporate criminal liability

Every law student learns early on of the concept known as the "legal person," *i.e.*, corporations. In law school, we are taught that to have a legal personality means that a corporation can be served with process and sued for tort damages and in contract disputes, and that the corporate form protects individual shareholders, including other legal persons, from liability except in those limited circumstances in which the "corporate veil" can be pierced. However, there was little discussion as to what the consequences