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EXPLAINER

Madoff's "Information"

Why didn't the Ponzi schemer get indicted instead?

By Harlan J. Protass

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Bernie Madoff is expected to [plead guilty Thursday](#) in response to an 11-count [information](#) (PDF) alleging crimes ranging from securities fraud to money laundering to perjury. How does an "information" differ from an indictment?

It doesn't come from a grand jury. Criminal cases formally begin with either an indictment or an information, both of which set forth accusations of wrongdoing. A prosecutor can obtain an indictment only by convincing a [grand jury](#) that there is enough evidence to warrant the filing of formal charges. A defendant, however, can voluntarily give up his right to have a grand jury consider the evidence against him. If that happens, a prosecutor can skip the indictment and bring charges by way of an information—a simple court filing that details the charges. In practical terms, there is no difference between an indictment and an information, once the document has been filed with the court.

So why would you ever waive your right to a grand jury? Typically, defendants do this because they've entered into plea agreements spelling out, among other things, a sentencing calculation under [federal guidelines](#). That's not the case with Madoff, though. The government said yesterday that it "has not entered into any agreement with Mr. Madoff about his plea or sentencing." It may be that Madoff consented to the list of charges but disputed the government's guidelines calculation. In that case, he'd still be better off passing on the grand jury for the certainty of an agreed-upon information.

On Tuesday, Madoff's lawyers also received a [letter](#) (PDF) from the government explaining that the charges in the information would likely result in a sentence of life imprisonment under federal guidelines. That's called a "Pimentel letter," and one just like it is generally sent whenever a defendant agrees to plead guilty without the benefit of a plea agreement. The practice dates to 1991, when the U.S. Court of Appeals for the Second Circuit suggested that defendants should be protected from the "unfair surprise" of entering their guilty pleas before knowing what range of sentences their admissions will authorize.

Of course, the judge to whom Madoff's case was assigned does not have to follow the federal guidelines. Under the Supreme Court's landmark decision in [United States v. Booker](#), he has substantial discretion to fashion a fair, just, and reasonable sentence short of what the guidelines endorse. Indeed, some judges have done just that in similar circumstances. For example, in 2006 a judge sentenced Richard Adelson, the former president of Impath, to [42 months in prison](#) for securities fraud and filing false documents, even though the guidelines recommended life. Likewise, the former CEO of reinsurer General Re, Ronald Ferguson, faced life imprisonment for his role in a rotten deal to artificially inflate the balance



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sheet of insurance giant AIG, but he received a sentence of [two years in prison](#) last year.

Given the magnitude of Madoff's crimes, the amount of money that investors lost, and the level of public outrage, though, anything short of an effective life sentence in this case seems unlikely.

Got a question about today's news? [Ask the Explainer](#).

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