

The BAWAG Banking Scandal:

*How Over a Billion in Concealed Currency Trading Losses
Caught Up With an Austrian Bank Almost a Decade Later*



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I. Introduction

BAWAG, the Bank für Arbeit und Wirtschaft (“Bank for Employment and Commerce”), und Österreichische Postsparkasse Aktiengesellschaft (BAWAG P.S.K. Group)¹ sowed its seeds in 1922, among the smoldering ashes of the World War I aftermath.² Karl Renner, an outspoken Socialist visionary and the post-war Austrian Chancellor, established BAWAG with the utopian vision of a “workers’ bank,” intended to manage and lend money to members of Austria’s labor unions,³ and by extension, to promote Austria’s post-war commercial growth, primarily for the benefit of Austrian workers,⁴ serving as the “bank of the ‘little man.’”⁵ However, nepotism, corruption, greed, grotesque excesses, and conspiratorial concealment all combined with what seems to have been a complete lack of appropriate controls and regulatory oversight that eventually distorted Renner’s utopian banking vision beyond all recognition.⁶

The fictitious *laissez-faire* über-capitalist, Gordon Gekko, boldly proclaimed in *Wall Street* that “greed is good.”⁷ However, the BAWAG saga and its sinister conspiracy with the rogue U.S. commodities broker, Refco, convincingly rebuked Gekko’s ultra-rapacious cinematic notion, at least until a massive U.S. hedge fund stepped in and scooped up the remaining “worker’s bank” assets on the cheap. No amount of Basel-inspired “soft law,” or any other financial regulations or aspirational banking ideals could possibly prevent such a disaster, absent the willingness of the gatekeepers entrusted to enforce those provisions. BAWAG apparently possessed too much political currency in the Austrian power structure to be properly scrutinized, and billions were lost on both sides of the Atlantic, concealed with accounting trickery *via* secretive Caribbean entities.

This paper details the catalyst of the BAWAG collapse, including its incestuous Refco relationship; examines the role of Austrian financial regulators that existed before, during, and after the scandal; and speculates about potential systemic flaws that may have contributed to the eventual implosion of Austria’s fourth largest bank, as well as its distressed sale to a U.S. hedge fund now headed by former Bush administration Treasury Secretary, John W. Snow.

II. BAWAG’s Shadowy Background – Past is Not Always Prologue



BAWAG was owned for its near century of existence by the Austrian Federation of Trade Unions (“ÖGB”), a national labor union similar to the AFL-CIO,⁹ and at its peak, claimed to have roughly 1.3 million customers¹⁰ with €56 billion in assets around 2004.¹¹ Its bank network included 167 retail branches and 1,334 mini-bank outlets located at Austrian post offices and was the fourth-largest Austrian bank in terms of assets.¹² In 2004 a “former 46% owner of BAWAG, the Bayerische Landesbank, sold it

minority equity stake to the bank's majority shareholder, Österreichischer Gewerkschaftsbund (Austrian Federation of Trade Unions) . . . which is the sole shareholder of BAWAG.”¹³ Through the OeGB labor union, BAWAG P.S.K. holds a profound competitive market advantage in the form of “direct access to 7,324 employee representatives for distribution of financial products in 6,500 companies in Austria, 4,600 savings clubs serving 311,000 customers with savings deposits of more than €500 [million].”¹⁴ BAWAG always had a reputation for creative banking, and were even the first European financial institution to offer “internet loans.”¹⁵

The U.S. Department of State has noted that Austrian banks play a prominent role within the Central, Eastern and Southeastern Europe banking systems.¹⁶ BAWAG has certainly been one of those major participants, and with little apparent reported regulatory scrutiny or opposition, it acquired a leading Czech banking subsidiary (Bank CZ) in March 2005,¹⁷ combining Interbanka CZ and Dresdner Bank CZ into a wholly-owned BAWAG subsidiary,¹⁸ with “14 branches in 10 major Czech cities,”¹⁹ that reportedly held assets worth Kč 33.6 billion (€1.17 billion),²⁰ and reported a net profit from operations of “Kč 180 million for the 18-month financial period starting July 2004,”²¹ as the ninth-largest banking network in the Czech Republic.²²

Also in 2004, BAWAG and the Austrian postal service, Österreichische Postsparkasse Aktiengesellschaft (“P.S.K.”), formally merged to create Bawag P.S.K., and provided the bank another substantial competitive advantage.²³ Meanwhile, despite all the superficial appearances of organic and acquisitive successes, and what seems to have been the Social Democrat party (“SPÖ”) controlled Austrian government's official *imprimatur*, the bank's financial foundation was crumbling.

BAWAG management had apparently sought to accelerate its revenue growth in the early 1990s, beyond what its depositor asset base had traditionally provided. CEO Walter Flöttl, and later his successor Helmüt Elsner, both reportedly authorized BAWAG to finance aggressive investments in highly volatile currency derivatives trading by a Bermuda-based hedge fund (and related entities) known as Ross Capital Markets, Ltd., a secretive pooled investment vehicle managed by Flöttl's son, Wolfgang.²⁴

The junior Flöttl, a Manhattan black-tie socialite since the 1980s with his wife, Anne Eisenhower-Flöttl, the grand-daughter of a former U.S. President,²⁵ did have an initial stint of profitable trades with his risky leveraged derivative strategies.²⁶ Beginning some time in 1995, after the Austrian Central Bank had probed the father-son activities, BAWAG loaned Flöttl's hedge fund, and other Flöttl-controlled entities, hundreds of millions of dollars, a practice that continued even after he reportedly incurred a \$759 trading loss during the summer of 1998.²⁷ Flöttl faced massive margin calls from Wall Street brokerages as his dollar-yen trades turned against him, and "according to an Arthur Andersen audit of Mr. Flöttl's trading records ordered by the bank's board," he lost roughly \$640 million of BAWAG's funds over the span of about six trading sessions.²⁸

BAWAG's CEO at the time, Helmüt Elsner, later told Austrian criminal investigators that "he began to worry that Bawag's losses would be revealed," and the bank shoveled more money at the problem, loaning Flöttl another \$90 million in the fall of 1998 that was also apparently lost in bad derivative trades.²⁹ After Flöttl's 1998 trading debacle, BAWAG feared that Flöttl's failures would soon become public, and possibly expose the bank's concealed losses, and loaned Flöttl another \$18 million, this

time, however, to keep his Gulfstream jet flying (and apparently to keep up appearances), according to a 2006 Austrian Central Bank audit as reported by the *Wall Street Journal*.³⁰

By 2000, Flöttl was loaned another €350 million, reportedly “on the condition that Mr. Flöttl shared his trading profits with the bank,” however, there would be no profits, and by that December of that year, “substantially all” of the borrowed funds had been lost.³¹ After BAWAG realized roughly €1B in losses from the off-shore derivatives disaster, Elsner had apparently had enough. Mr. Flöttl later described to authorities a December 2000 meeting between he and Elsner in London, where, “Mr. Elsner terminated our business relations,” Mr. Flöttl reportedly told Austrian prosecutors, “he said he doesn’t want to have anything more to do with me.”³² Curiously, criminal charges against Flöttl were reportedly later withdrawn by an Austrian judge in 2006.³³

Elsner and BAWAG sought to permanently conceal the losses beginning in 2000, reportedly with the assistance of BAWAG auditor, KPMG Alpen-Treuhand GmbH,³⁴ in a series of complex “sham” transactions that effectively converted the Flöttl loans into dubious “assets” on BAWAG’s balance sheet purportedly worth far more, Austrian National Bank auditors later concluded.³⁵ Mr. Flöttl later reportedly told prosecutors that he “felt awful” about losing more than a billion dollars in BAWAG assets, and explained, “that’s why I was willing to sign a major part of my private wealth to BAWAG, even though I didn’t need to do so,” and he has reportedly been attempting to sell off assets to pay down the losses since some time in 2000.³⁶ Around the same time that BAWAG and the junior Flöttl were parting ways, Mr. Elsner was forging a joint venture between BAWAG and Refco to allegedly conspire to conceal billions in currency derivative trading losses, reportedly with substantial assistance from Robert Reiter, a

former partner and head of KPMG's Vienna-based auditing subsidiary, KPMG Alpen-Treuhand GmbH,³⁷ as part of a conspiratorial scheme that would eventually end in ruin.³⁸

III. The Ill-Fated Alliance Between BAWAG and Refco



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The comparison between BAWAG and the Refco-creditors is perfect.

BAWAG acquired a ten percent equity stake in Refco in May 1999, a New York-based commodity futures brokerage with a lengthy pedigree of market predation traveling down a similar road to perdition.⁴⁰ BAWAG later sold its Refco equity in 2004 to, of all people, Walter Flöttl, BAWAG's long-running former chief executive who was reportedly known as "Mr. BAWAG" during his tenure as the bank's CEO from 1972 to 1995.⁴¹ The elder Flöttl had stepped down in the mid-90s presumably as internal pressure built regarding the non-disclosure of his son's Bermuda hedge-fund trading on BAWAG's dime.⁴² Flöttl's Ross Capital Markets, Ltd. used Refco as its broker during

the financial crisis of the late 1990's and reportedly incurred significant losses, similar to Victor Neiderhoffer, another high-roller Refco customer in the late 1990s.⁴³

Ross Capital's heavily leveraged trading miscues had quickly compounded, however, and as losses continued to mount, hundreds of millions in BAWAG funds⁴⁴ were used to cover margin calls as bank executives threw caution to the wind and apparently ignored John Maynard Keynes' maxim,⁴⁵ with the apparent hope that the Asian and Russian currency crises would quickly recover and the staggering losses would reverse,⁴⁶ but the Japanese yen's prolonged slump continued for years.⁴⁷ Mr. Flöttl's bad derivative bets were reportedly concentrated on Asian currencies, including the yen as well as interest rate spread movements,⁴⁸ and were not entirely unlike the leveraged losses realized by other traders and hedge funds during the same Asian and Russian currency crises, such as; Henryk de Kwiatkowski, Long-Term Capital Management, U.K. Barings Bank's Nick Leeson, and Refco client Victor Niederhoffer, among other less publicized well-heeled traders.⁴⁹ Flöttl, however, has insisted that Refco was not left with any bad debts as a result of his risky and errant trading strategies.⁵⁰

BAWAG management feared admission of the scheme would trigger a depositor run,⁵¹ and bank executives instead allegedly concealed its growing uncollectable loan portfolio, much like the Enron and Parmalat schemes, through the use of various "shell" companies located on the British West Indies island of Anguilla.⁵² BAWAG also continued to secretly provide funds to Ross Capital in Bermuda, in order to allow Flöttl to continue trading, ultimately resulting in even deeper losses.⁵³ Moody's Investor's Service senior analyst Nicola Venedey once characterized the BAWAG

corporate culture in grossly understated tones as one where “[t]heir risk appetite was very high, and their transparency was very low.”⁵⁴

After selling its Refco equity to the senior Flöttl, BAWAG’s 2004 Annual Report stated: “successful cooperation with the REFCO Group will be continued without an equity stake, so that the BAWAG PSK Group will continue to benefit from this access route to international customers in the future.”⁵⁵ Refco had sought to expand its European clientele, and the BAWAG / Refco joint venture conveniently included certain securities clearing services for European exchanges futures and options trading in which BAWAG handled trades for Refco customers, including up to 20,000 financial institutions.⁵⁶ This cozy clearing relationship seems to have afforded both sides of the alleged conspiracy the possibility to prolong the concealment, and perhaps even to facilitate the commission of additional violations of banking and securities laws.

According to allegations made by the SPhinX Funds, a series of S&P Index mutual funds managed by former Refco executive vice-president Christopher Sugrue, in pleadings filed in the Southern District of New York, “Refco, in its pleadings, admitted that [Refco CEO Phillip R.] Bennett and BAWAG had a close business relationship that gave BAWAG ‘substantial control and influence over Refco’s affairs. . . .’ [and] BAWAG exercised control over Refco’s affairs through the placement of high-ranking officers and employees in positions of influence at Refco.”⁵⁷ Just like BAWAG, Refco was teetering on the brink of insolvency, with roughly a billion dollars in near decade-old concealed currency trading losses that were being shuffled back and forth on and off of Refco’s balance sheet every quarter in order to continue its ruse.⁵⁸

Refco's reckoning came just months after it had completed its Initial Public Offering on the New York Stock Exchange.⁵⁹ The public revelation of BAWAG's disastrous casino investment with Arafat's investment group; its enormous currency derivative trading losses; and its clandestine off-balance sheet chicanery with Refco all became public on the same day, October 10, 2005, marking the onset of the scandal that threatened BAWAG's very existence.⁶⁰ It was also reported at that time that Refco (through the Anguilla "shell" companies) had apparently held the purported bonds as custodian for the benefit of BAWAG that were assets supposedly worth roughly \$525 million on BAWAG's balance sheet, although the stated identification numbers of those securities did not correspond with any registered bonds.⁶¹

Facing a mountain in uncollectible trading loss debts, and perhaps aware that U.S. law enforcement was quickly closing in, Refco admitted its dirty secret, and just a week after the lengthy cover-up conspiracy unraveled, Refco and its twenty-three affiliates and subsidiaries filed the fifteenth largest bankruptcy (\$16.8B) in U.S. history,⁶² where it was also revealed that BAWAG had reportedly "loaned" €350 million (\$410 million) to Refco CEO Phillip R. Bennett just hours before the brokerage admitted the cover-up of its massive derivative trading-related losses.⁶³ Bennett had reportedly pledged his personal holdings in Refco equity (34 percent of the firm's total common stock) as collateral for the BAWAG loan with stock that had traded at roughly \$28 to \$29 the day the loan was granted, but quickly became almost worthless.⁶⁴ Two days after Refco admitted the cover-up, U.S. authorities arrested Bennett, and charged him with multiple counts of securities fraud, wire fraud, and filing false reports with the SEC on October 12, 2005.⁶⁵

Bennett pleaded not guilty and has been under house arrest at his Park Avenue apartment since his 2005 arraignment.⁶⁶

After concealing bank losses for roughly a decade,⁶⁷ a crisis of confidence quickly unfolded at the Vienna-based bank that eventually led to less than graceful executive exits; indictments and extraditions; widespread depositor withdrawals; the disappearance of Austrian labor unions “strike fund;” and an increasingly hostile political landscape in the highly-publicized scandal’s aftermath.⁶⁸

Austrian prosecutors issued an arrest warrant for Refco’s Bennett,⁶⁹ and charged former BAWAG CEOs, Wolfgang Flöttl, and Helmut Elsner,⁷⁰ Supervisory Board Chairman Gunter Weninger, as well as numerous other bank executives with a variety of criminal charges.⁷¹ Messrs. Weninger and ÖGB President Fritz Verzetnitsch both quickly resigned their posts,⁷² as did Johann Zwettler, CEO Elsner’s replacement, in October 2005.⁷³ Half of BAWAG’s eight member board also resigned on the heels of the widely reported revelations that BAWAG-controlled companies in Anguilla held what the financial press characterized as “fake” and “phantom” bonds in secretive Refco-managed off-shore accounts and the €350 million “loan” to Bennett, as Refco was on the cusp of the largest Wall Street collapse “since junk bond scandals felled Drexel Burnham Lambert Inc. in 1990.”⁷⁴

BAWAG insiders have attributed the scheme to the corporate culture at the bank, reportedly fostered by Elsner’s arrogance.⁷⁵ According to Harald Raffay, head of BAWAG’s international banking department since 1996, top BAWAG executives simply ignored internal procedures when investing in (and lending to) both the Palestinian casino “Oasis” and to Refco, “decisions regarding Refco never crossed my desk, even though it

was the most international business. . . . [w]e're working like dogs, and then it turns out *there's a bank within the bank.*"⁷⁶ Managing director of BAWAG Malta Bank, Otto Karasek, was among those to blame the culture of corruption on Elsner, "[a] lot had to do with the culture of the time and the CEO, Elsner, . . . You didn't dare speak against him."⁷⁷ Mr. Elsner was recently extradited from the South of France back to Austria to face prosecution, after unsuccessfully resisting his return to face criminal charges on purported health grounds.⁷⁸ The bank is reportedly seeking damages of eleven million euros against "several former senior executives of the bank including Johann Zwettler and Wolfgang Flöttl."⁷⁹

BAWAG's alleged role in the conspiracy with Refco to hide hundreds of millions in bad debts was perceived as especially egregious according to U.S. law enforcement "because the bank was planning to profit by unloading its own stake in Refco," SEC Enforcement official Scott Friestad told *Bloomberg*, "the bank's former executives understood that the deceptive year-end transactions would help Phillip Bennett and BAWAG cash out their ownership interests at the expense of innocent investors."⁸⁰

The U.S. Department of Justice and Securities and Exchange Commission both brought enforcement actions against BAWAG, and the bank quickly settled, agreeing to pay Refco creditors a reported \$683 million and waive its near half-billion dollar claims against Refco's bankruptcy estate.⁸¹ U.S. law firms filed a slew of now consolidated class-action suits⁸² seeking to recover funds invested in Refco on behalf of Refco shareholders, creditors and customers, alleging, *inter alia*, that BAWAG was "an active participant in the accounting fraud that led to the collapse of the once-dominant commodities brokerage."⁸³

Meanwhile Refco's \$16.8 billion bankruptcy case continues to grind its way through Chapter 11 proceedings the Manhattan Bankruptcy Court.⁸⁴ BAWAG was identified as Refco's largest unsecured creditor in its October 17, 2005 voluntary Chapter 11 bankruptcy petition Fed. R. Bankr. P. 1007(d) "fifty largest unsecured claims" list, with a stated debt of \$451,158,506 as of "approximately October 13-18, 2005."⁸⁵ Despite reports that Refco CEO Bennett had pledged his nearly 34% Refco equity stake to secure BAWAG's eleventh hour "loan" to him, the bankruptcy petition schedule notes that the list of unsecured creditors excludes: ". . . secured creditors *unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 50 largest unsecured claims.*"⁸⁶ Refco's Fed. R. Bankr. P. 1007(a) "corporate ownership statement," attached to the aforementioned Rule 1007(d) unsecured creditor schedule, disclosed in a footnote that former CEO Phillip R. Bennett was, at least as of the filing of the Chapter 11 petition, still the beneficial owner "directly and indirectly through each of Refco Group Holdings, Inc. and The Phillip R. Bennett Three Year Annuity Trust hold[ing] 43,052,000 [Refco] shares (33.8%)."⁸⁷ At recent prices, those same Refco shares, now trading on the "pink sheets," were worth less than \$11 million.⁸⁸

As part of Refco's bankruptcy maneuvers, it sought an eleventh hour sale of its brokerage unit, negotiated on the eve of Chapter 11, with U.S. private equity firm JC Flowers, but that deal fell through.⁸⁹ Refco ultimately liquidated the scandal-plagued brokerage unit, at a fraction of the price it had previously negotiated with JC Flowers, to the U.K.-based financial conglomerate, Man Group, PLC, who was accused of having indirect organized crime connections in an April 10, 2007 civil RICO complaint filed in a Florida court related to an alleged stock manipulation scheme.⁹⁰ Incidentally, Man Group

recently announced that the Refco brokerage unit it acquired just a year earlier will again become a publicly held concern in 2007, and it is widely expected to again be a New York Stock Exchange listed issue, just as it was when the scandal first surfaced.⁹¹

After sale of the brokerage, the former flagship, Refco LLC, held a reported \$664.6 million in assets, and curiously, Refco Capital Markets Ltd., the Bermuda-based subsidiary tied to many of Bennett's allegedly fraudulent dealings, including those with BAWAG, held the bulk of the dilapidated firm's remaining assets (\$2.44 billion).⁹² Refco's bankruptcy estate administrator announced on April 2, 2007 that there was "about \$450 million left to distribute to the brokerage's customers and creditors."⁹³

IV. A Beleaguered Bank on the Auction Block



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After the huge bank scandal Austria's trade union federation disassociates from its BAWAG

Billions in customer deposits were withdrawn in response to the combined scandals, and in response, Austrian Parliament provided a €900 million guaranteed bailout

in May 2006⁹⁵ in order to stave off a total collapse, Austrian Chancellor Wolfgang Schüssel even opened a BAWAG savings account in May 2006, “in a show of support aimed at preventing a run on the bank.”⁹⁶ The Austrian National Bank also contributed an additional €450 million in June 2006,⁹⁷ and Nowotny called upon former European Investment Bank associates to commit €100 million as “an expression of confidence and of orientation towards the future.”⁹⁸ BAWAG’s performance began to bounce back after its near-collapse, with net income climbing more than six-fold in 2006 to €40.4 million after 2005 results of €6.2 million, results apparently “helped by lower provisions for risky loans,” according to a bank spokesperson, and “[g]iven the difficult environment in the last business year, this is a satisfactory result, . . . [b]usiness in the first months of 2007 shows a very positive picture.”⁹⁹ Moody’s upgraded its rating of BAWAG in late 2006 from “stable” to “positive,” apparently in response to the combined capital infusions.¹⁰⁰

Zwettler’s successor as BAWAG CEO, Dr. Ewald Nowotny, is a prominent former European Investment Bank¹⁰¹ vice president and Social Democratic (“SPÖ”) party politician, who had also been Chairman of the Austrian Post Office Savings Bank (PSK) Board of Directors at the age of twenty-nine.¹⁰² Dr. Nowotny took the fragile bank’s helm in March 2006, pledging to bring BAWAG’s scandalous era to an end and promising to rid the bank of its “exotic trading” of the past, and stated, “Mr. Flöttl influenced these investments and he is to be held responsible.”¹⁰³

With Dr. Nowotny in BAWAG’s Vienna executive suite, the Austrian Trade Union Federation engaged the U.S. Investment Bank Morgan Stanley to serve as its investment banking consultant and announced plans to sell the bank in late March 2006, and cautioned prospective bidders that substantial losses were expected following

depositor withdrawals.¹⁰⁴ According to Federal President of Austria, Heinz Fischer, “the recent turbulence in the [Trade Union Federation] had been painful but, hopefully, probably and surely, healthy and would lead to a new chapter in history.”¹⁰⁵



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US Fund Cerberus buys Austrian Bank for Labour and Economy (BAWAG)

At least four binding offers were made for the scandal-plagued Austrian financial services group,¹⁰⁷ which includes BAWAG’s Czech subsidiary “BAWAG Bank CZ.”¹⁰⁸ The New York-based U.S. hedge fund, Cerebus Capital,¹⁰⁹ now headed by former U.S. Treasury Secretary John W. Snow, an advocate for “lighter” hedge fund regulation,¹¹⁰ and, perhaps designed to soothe any nationalist political dissent, a private group of Austrian industrialists including former Austrian Finance Minister Dr. Hannes Androsch,¹¹¹ and along with Austrian corporate partners Gruppe Generali, and Wüstenrot, as a consortium, logged a heavily discounted (and winning) reported bid for BAWAG in December 2006 between €2.6 and 3.2 billion (the bank reportedly had combined savings deposits estimated at roughly €14.6 billion at the end of fiscal 2006),

with a purchase agreement signed on February 1, 2007, and the sale expected to formally close by the end of May 2007, and ÖGB, the Austrian Trade Union Association, optimistically proclaimed in response to the sale of the “bank of the ‘little man’” to the huge American hedge fund that “a new era for BAWAG P.S.K. will begin.”¹¹²

The heavy-handed impact of Cerberus ownership became quickly apparent as BAWAG recently began to refuse banking customers that are Iran-based companies, or individuals of Cuban descent, even those who are now Austrian citizens, the latter was reportedly attributed to the Helms-Burton Act,¹¹³ the legislation that established the basis of a U.S. economic embargo against Fidel Castro’s communist island state.¹¹⁴

BAWAG also reportedly told Austrian media recently that its purchase by Cerberus requires the bank to comply with the economic and trade sanctions administered by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC).¹¹⁵ A U.S. Embassy spokesman, William H. Wanlund, remarked that a “foreign subsidiary of a U.S. corporation is considered a U.S. corporation for the purposes of the law.”¹¹⁶ Meanwhile, BAWAG is reportedly a recent member of a \$1.1B debt securities underwriting syndicate for a five-year Murabaha financing facility to benefit the Arcapita Bank, B.S.C., headquartered in Bahrain. According to Arcapita vice-chairman Abdulaziz Hamad Aljomaih, the funds raised from the sale of the debt securities “support Arcapita’s growing footprint globally.”¹¹⁷

Among the hundred or so rejected BAWAG customers of Cuban ancestry is Maria Cajigal-Ramirez,¹¹⁸ who fled Cuba and her Guantanamo Bay birthplace in 1978, (married an Austrian national, who incidentally is serving with E.U. troops stationed in Bosnia), was a BAWAG customer for nine years, and an Austrian citizen for seven, and

considers BAWAG's unilateral April 10, 2007 account closure to be "a question of violating my human rights."¹¹⁹ BAWAG CEO and General Director, Ewald Nowotny, told Austrian the press that the "bank was forced to close the accounts to comply with a U.S. embargo on business with Cuba, or lose the [Cerebus] sale."¹²⁰

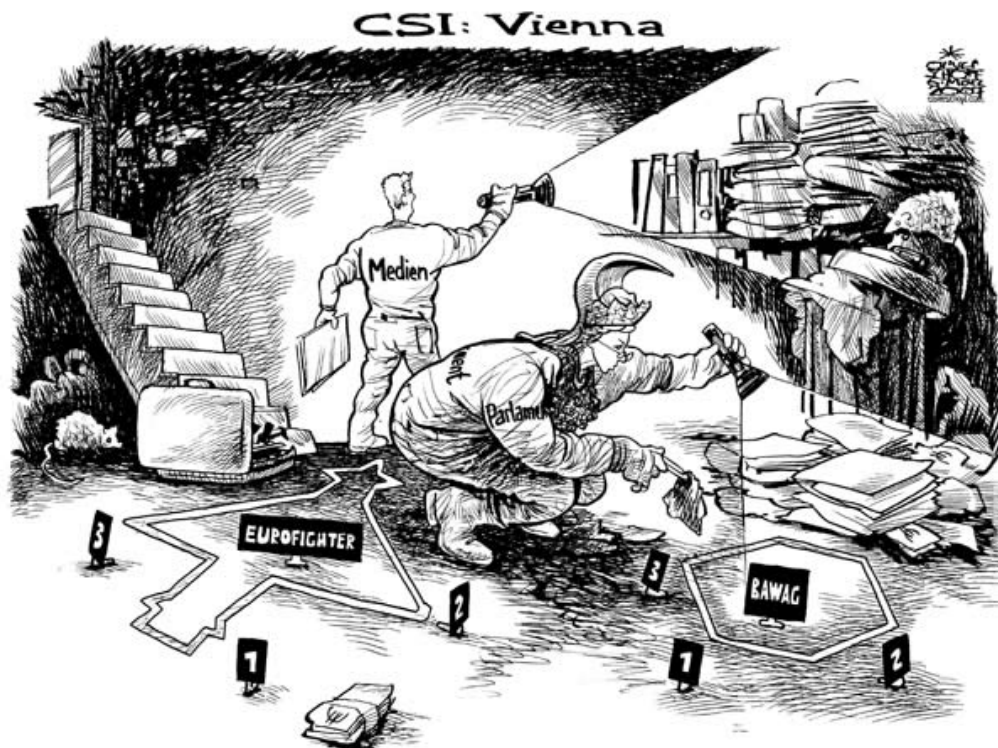
Austrian Minister of Social and Consumer Affairs, Erwin Buchinger, said he was "outraged by the behavior of BAWAG toward Cuban clients," and noted that closing Ms. Cajigal-Ramirez' bank account was discriminatory, and perhaps illegal under Austrian laws, and the rival Green Party called BAWAG's move "appalling."¹²¹ However, a BAWAG spokesman, Thomas Heinhofer, told the *Austria Press Agency*, that the decision was a mistake, and claimed BAWAG didn't know Ms. Cajigal-Ramirez was an Austrian citizen (for the last seven years).¹²² According to recent reports, "many Austrian politicians are calling on the government to withdraw all state business from the Bawag bank," though the Austrian Finance Ministry "has said it is not considering withdrawing its business from Bawag at the moment."¹²³

Fortunately for the New York Yankees, and more recently the New York Mets, Cerebus Capital is not in the respective owner's boxes, or neither ball club could have ever featured Cuban-born pitcher, Orlando "El Duque" Hernandez, nor could his brother, Livan Hernandez, former Florida Marlins pitcher, have been the 1997 World Series Most Valuable Player, and literally dozens and dozens of other examples of Cubans who fled the Castro regime, could not have meaningfully contributed to American society.¹²⁴ It is almost unfathomable how the lucrative high-profile professional sports careers of these two successful Major League Baseball players (and many others) has managed to elude the U.S. Treasury Department's Office of Foreign Assets Control (OFAC), and the Mets,

Yankees and other ball clubs have managed to avoid the penalties of the Helms-Burton Act for all these years.

The onset of the Cerebus era for BAWAG seems to have begun as some sort of a Bush Administration initiative designed to rattle foreign policy sabers. *Forbes* reported that by April 20, 2007, BAWAG had begun to back-peddle from its controversial position, and bank spokesman Thomas Heimhofer said, “the bank was in contact with several specialized accounting firms to see if and how it could obtain permission from U.S. authorities to resume serving Cubans,” and by late April 2007, BAWAG had been charged by the Austrian government in administrative proceedings for alleged violation of European Union rules and had reversed its ban of Cuban bank customers.¹²⁵

V. Too Little, Too Late? Austria Established its Financial Market Authority Agency in 2002, But Party Politics and Internal Power Struggles Continue



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Austria's Financial Markets Supervisory Agency Act (FMABG)¹²⁷ served as the enabling act that established and empowered Finanzmarktaufsichtsbehörde (Österreich), or, the Austrian Financial Market Authority ("FMA"),¹²⁸ to commence its regulatory functions as an independent agency on what is perhaps an appropriate date, April 1, 2002. The scope of the Vienna-based FMA's duties and responsibilities¹²⁹ are divided in four major financial areas: banking supervisory oversight (in cooperation with the Austrian National Bank ("ÖeNB"));¹³⁰ securities supervisory oversight; insurance supervisory oversight; and, pension fund supervisory oversight¹³¹ are not entirely dissimilar to the major financial industry components contemplated by the U.S. Graham-Leach Bliley Act,¹³² but unlike the U.S., which regulates these key areas of finance through separate dedicated state and federal agencies,¹³³ the FMA oversees all of these financial activities, and includes the added socialist emphasis of labor unions in Austria with the FMA's fourth area of oversight, pension funds.

Several Austrian statutes serve as the legal underpinnings for FMA authority, key statutes include: Financial Markets Supervisory Agency Act (das Finanzmarktaufsichts behördengesetz (FMABG));¹³⁴ Banking Business Act (das Bankwesengesetz (BWG)); Securities Exchange Act (das Börsegesetz (BörseG)); Securities Supervisory Act; (das Wertpapieraufsichtsgesetz (WAG)); Investment Funds Act (das Investmentfondsgesetz (InvFG)); Insurance Supervisory Act (das Versicherungsaufsichtsgesetz (VAG)).¹³⁵

The FMA consists of a two-person executive board, as well as a board of directors with six members, and a financial market committee, the latter of which is technically not a body of the FMA.¹³⁶ The FMA executive board as well as the supervisory board is nominated by the Minister of Finance and the ÖeNB. Additionally to the six supervisory members, the Austrian

Chamber of Commerce suggest to additional members without voting rights. The FMA is also a member of a variety of international collaborations (“Zusammenarbeit”), and a member organization of a number of different international committees, including the International Organization of Securities Commissions (IOSCO); the Committee of European Securities Regulators (CESR); and International Association of Insurance Supervisors (IAIS).

As a regulatory organization, the FMA is a public law authority with inherent regulatory power, and is considered an independent agency not bound by political orders in the execution of its regulatory charges. However, the Federal Ministry of Finance maintains authority to order (or not order) certain audits, and is somewhat similar to the function of the Securities and Exchange Commission’s oversight of its regulatory staff, the Finance Ministry oversees the execution of certain FMA regulations.

The Social Democrat Party (“SPÖ”) was in power for much of the time-frame when the BAWAG scandal unfolded, and the SPÖ narrowly edged out a slim 68-to-66 seat legislative plurality over the rival Austrian People’s Party (“ÖVP”), in recent National Council elections. Struggle for control of the FMA, in no small part as a result of the BAWAG scandal, continues between the two political factions. The SPÖ has made demands that the FMA be consolidated into the Austrian National Bank (“ÖeNB”), claiming that a reduction in bureaucratic operating costs is the party’s basis for the demanded reform and consolidation of power within the ÖeNB.¹³⁷

Such a move would dramatically increase SPÖ power over the FMA, and the Austrian finance sector in general, because current BAWAG Chief Executive Nowotny, a former ranking SPÖ leader, would reportedly be the likely candidate to replace current ÖeNB president, Klaus Liebscher, who is also an ÖVP confederate.¹³⁸ According to recent Austrian

press accounts, Liebscher himself has called for more oversight by ÖeNB.¹³⁹ Not surprisingly, Austrian Finance Minister, Wilhelm Molterer, who also serves as ÖVP Vice Chancellor, has insisted that the FMA remain an “independent” agency, albeit under the auspices of the ministry he controls.¹⁴⁰ However, a special committee of the Austrian Parliament currently investigating the Austrian banking industry is expected to “call for closer ties between FMA and ÖeNB in the interest of avoidance of duplication of efforts and of friction between them.”¹⁴¹

But how likely is it that any political party could have prevented the BAWAG scandal, considering Austria’s incestuous tradition of socialist politics, labor union influence and easy credit access? And why didn’t Austrian bank regulators anticipate the near-collapse of one of its largest financial institutions as it engaged in increasingly suspect activities? Perhaps one possible explanation is that BAWAG acquired the Post Office Savings Bank (Österreichische Postsparkasse Aktiengesellschaft) from the Austrian government in 2000, with the apparent blessing of the controlling SPÖ, all while BAWAG’s currency trading loss cover-up was already well underway.¹⁴²

Six years prior to BAWAG’s Österreichische Postsparkasse Aktiengesellschaft takeover, hints of what was lurking beneath already began to surface. Director of financial markets in the Austrian National Bank, Erwin Schmidbauer, said the central bank first began to suspect that BAWAG’s unorthodox Caribbean trading activities in 1993, by studying Bank for International Settlements (BIS) bank exposure statistics, and initiated an investigation in 1994 following press reports of the previously undisclosed money transfers from BAWAG to Wolfgang Flöttl and his Ross Capital Markets, Ltd.¹⁴³

The Austrian Central Bank probe determined that the elder Flöttl had concealed from BAWAG’s supervisory board approximately \$2 billion in “investments” with his son’s Bermuda firm, according to unidentified sources close to the investigation, who cited confidentiality agreements as a basis for anonymity.¹⁴⁴ The results of that 1994 regulatory inquiry were never publicly disclosed, but according to a BAWAG statement the following year, it “didn’t find anything illegal.”¹⁴⁵ It wasn’t until December 2000, after Flöttl had already lost at least another €350 million loaned to him by BAWAG, that former Finance Minister Karl-Heinz Grasser (a ranking member of the conservative Austrian People’s Party “ÖVP”) commissioned the Austrian National Bank to audit BAWAG.¹⁴⁶ It was highlighted in the report that the banking system and national banking laws had been violated, but there was reportedly no mention of the roughly \$1 billion in concealed Caribbean derivatives losses or the ÖGB loan guarantees.¹⁴⁷



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Wilhelm Molterer, successor of Treasury Minister Karl-Heinz Grasser, formerly Parliamentary group boss of the People’s Party whose post now receives the bowl.

Only BAWAG executives and unidentified banking oversight authorities in the Austrian Finance Ministry reportedly received copies of the investigation findings, and former Finance Minister Grasser reportedly claimed to have never actually seen a copy of the report.¹⁴⁹ Political opponents virulently called for Grasser's resignation in response to the BAWAG scandal. Among them was Norbert Hofer, vice-president of the conservative rival, Freedom Party of Austria ("FPOe").¹⁵⁰ Mr. Hofer reportedly remarked in Austria's *Profil* magazine that the results of the BAWAG investigation, which apparently claimed that Austrian National Bank officials knew about various details of the BAWAG cover-up as it was underway, was the equivalent of a "political death sentence for Minister of Finance Grasser. He cannot stay in this position because he is involved and knew about BAWAG's losses of billions. The Minister of Finance [Grasser] is as guilty as . . . the bosses of BAWAG."¹⁵¹

Perhaps due to the bank's broad political influence, and possibly because BAWAG continued to adamantly make false claims of strong earnings tied to Flöttl's off-shore derivative trading by way of its creative accounting, Austrian officials did not undertake subsequent comprehensive audits of BAWAG books and records, or even launch any sort of formal inquiry into the matter (beyond the non-public 1994 and 2000 inquiries) until *after* the scandal became headline financial news.¹⁵² And even after the rampant banking, accounting and securities frauds were exposed, BAWAG has reportedly remained "the main banker for the Austrian state, bringing it around five billion euros worth of transactions a year."¹⁵³

It remains unclear whether the absence of any measurable regulatory presence during the BAWAG cover-up was due to garden-variety cronyism, apathy, or possibly

more nefarious and conspiratorial *quid-pro-quo*s of sorts, but whatever the reason, it remains a troubling fact that Austrian banking authorities did not perform audits of BAWAG's financials during the years leading up to the unraveling of the scandal.¹⁵⁴

However, the bank's "arrogant" opacity, and the wholesale lack of regulatory action from Grasser's Finance Ministry are somewhat shocking, especially considering that "there are two State Commissioners nominated to oversee the affairs" of the bank's holding corporation parent, BAWAG Group; for BAWAG the bank, it is "none other than the Chef de Cabinet of the Finance Ministry," and for BAWAG's Austrian postal subsidiary (PSK), "the Head of Directorate General III in the Federal Chancery" has regulatory oversight authority.¹⁵⁵ Oesterreichische Post AG officials reportedly told the Austrian press recently that its "supervisory board had unanimously authorised the management board to enter into final negotiations regarding the [Cerebus] acquisition of a minority stake in Austrian bank BAWAG."¹⁵⁶

Perhaps the absence of appropriate gatekeeping functions was somehow connected to the exercise of undue influence related to personal relationships¹⁵⁷ or perhaps the many "gifts" BAWAG's then chief executive, Helmüt Elsner, reportedly lavished upon those with oversight authority, as well as other Austrians with political influence.¹⁵⁸ For example, Klaus Liebscher, National Bank of Austria Governor,¹⁵⁹ and his then-deputy, Gertrude Tumpel-Gugerell,¹⁶⁰ both reportedly considered audits of BAWAG to be an unnecessary exercise.¹⁶¹ Perhaps years of sweeping the dirty secrets under the rug was simply designed to avoid international embarrassment?

Gertrude Tumpel-Gugerell was Austrian National Bank Executive Director (from 1997 to 2003) and was appointed as Deputy-Governor in 1998, responsible for financial

markets regulation.¹⁶² When the FMA was created in 2002, Mrs. Tumpel-Gugerell joined its initial Supervisory Board and was also Chair of the European Union Banking Advisory Committee.¹⁶³ Mrs. Tumpel-Gugerell was also a Member of the Banking Supervision Committee of the European Central Bank (“ECB”),¹⁶⁴ and served as an Alternate Governor of Austria to the International Monetary Fund (“IMF”) from 1997-2003, and relinquished these various esteemed posts in 2003 to join the ECB’s Executive Board,¹⁶⁵ where she and five other members are responsible for day-to-day Eurozone operations, reporting to the Governing Council (the Executive Board and the European National Central Banks Governors).¹⁶⁶

Gertrude Tumpel-Gugerell is clearly a person of substantial power and influence in European banking circles, and one with direct connections to BAWAG who was apparently in a position to have presumably prevented continuation of the banking fraud. Tumpel-Gugerell’s husband is president of the Chamber of Workers (formerly known as the Socialist Party), and an SPÖ political ally, Herbert Tumpel,¹⁶⁷ who also served as BAWAG’s Supervisory Board Chairman¹⁶⁸ during the same period in which Walter and Wolfgang Flöttl had been undertaking the risky derivative trading activity reportedly code-phrased, “Special Business.”¹⁶⁹ However, FMA officials did not even commence an investigation into the facts and circumstances of the BAWAG / Refco conspiracy until almost a month *after* Refco’s widely publicized collapse and bankruptcy.¹⁷⁰ Political rivals have demanded that Mr. Tumpel resign from the Chamber of Economy and answer for alleged complicity in the alleged BAWAG cover-up.¹⁷¹ Austrian Freedom Party (FPÖ) vice-president Norbert Hofer told *Austria Today*:

[Tumpel] has also been a member and director of the supervisory board of BAWAG and knows almost everything about the Caribbean deals and transactions. The defence strategy of Tumpel is falling down as house of cards, . . . Tumpel's wife [Gertrude Tumpel-Gugerell] also knows everything about the deals and I cannot believe that both of them didn't inform each other about all problems of BAWAG. Tumpel must resign as a president of Chamber of Economy because he has already lost the right to represent the members of the Chamber.¹⁷²

While the Austrian government was still mired in the process of political wrangling during the formation of the FMA, and while BAWAG was reportedly operating without any significant regulatory oversight, certain trading activities connected to: Refco; an unregistered New York investment advisor known as Rhino Advisors, Inc.; and AMRO International, S.A., (a Panamanian hedge fund client of Rhino located in Switzerland), had all been under SEC scrutiny for at least a year, and that investigation later implicated BAWAG and its staggering concealed losses as part of a larger scheme.¹⁷³

The U.S. Attorney for the Southern District of New York had also commenced a parallel criminal investigation sometime just after the formation of the FMA.¹⁷⁴ According to a November 2005 *Time Magazine* report, Rhino Advisors president, an Austrian national named Thomas Badian, then 36 years old, fled the United States and returned to Europe after criminal conspiracy to commit securities fraud charges were filed against him by the U.S. Attorney in the Southern District of New York, and was reportedly a fugitive residing in, of all places, Vienna.¹⁷⁵ And while Austrian officials recently managed to extradite former BAWAG Chief Helmüt Elsner from his posh Côte d'Azur villa in the South-of-France hills outside Cannes, for whatever reason, U.S.

officials have still not been able to retrieve Rhino Advisors' Badian from Austrian soil, and federal charges are still pending against him in the Manhattan District Court.¹⁷⁶

The SEC investigation into alleged market manipulation related to Rhino Advisors later extended to Badian's brother Andreas, also an Austrian national, and Pond Equities, a boutique Long Island brokerage firm with a history of disciplinary actions for alleged misconduct and levied against it,¹⁷⁷ as well as a number of Pond Equities' NASD registered representatives who apparently acted on behalf various entities owned and/or controlled by BAWAG, and allegedly executed fraudulent and manipulative trades through the broker Refco.¹⁷⁸ According to tape recorded conversations between Andreas Badian and Refco brokers, the younger Badian brother asked, *inter alia*, "want to short something illegally for twelve months? You got my number."¹⁷⁹

The connections between BAWAG, Refco, Rhino and Pond Equities might be more extensive than the *SEC v. Badian, et al.*, case would first suggest. A central figure in the scandal is a Geneva, Switzerland resident named Thomas Hackl, who was a BAWAG employee from 1991 through 2002, the time-frame during which Flöttl's off-shore trading led to over a billion dollars in BAWAG losses, and later a Refco executive.¹⁸⁰ Hackl's firm, Acies Asset Management, S.A., was reportedly "backed by Refco" and provided unspecified services for "a Liechtenstein bank that was part owned by BAWAG until May, 2006," court filings show.¹⁸¹

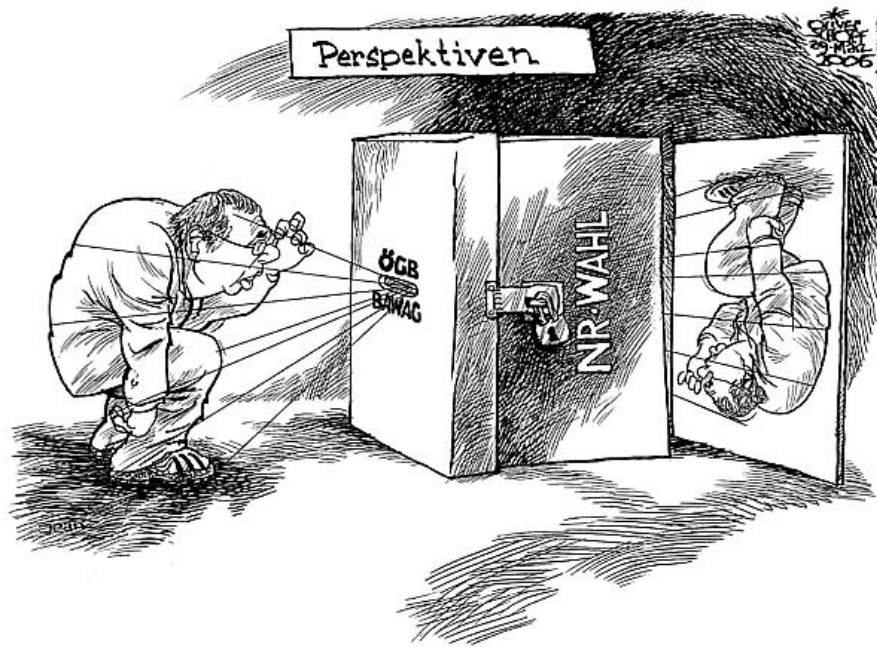
Mr. Hackl is a former head of BAWAG treasury and investment banking, and also acted as a BAWAG representative while he was head of Refco's international banking department, and signed off on dozens of so-called "death spiral" convertible

debenture PIPE (“private investments in public equities”) deals made by a handful of Liechtenstein-based hedge funds that BAWAG controlled, according to SEC filings.¹⁸²

Hackl was also apparently instrumental in at least one of the six alleged “round trip loans” made between Refco and BAWAG to perpetrate the concealment scheme, according to an e-mail obtained by prosecutors.¹⁸³ Mr. Hackl has not been formally charged in the BAWAG / Refco matter, and his lawyer has claimed he was merely a pawn in the scheme, that “[e]verything [Mr. Hackl] did was at the direction of his superiors, either at BAWAG or at Refco.”¹⁸⁴

BAWAG it and its Liechtenstein hedge funds now claim to be no longer involved in any PIPE financing deals in U.S. over-the-counter securities.¹⁸⁵ Texas tobacco litigator, John O’Quinn, has filed over a dozen civil actions in the last few years on behalf of issuers who claim they were defrauded in PIPE schemes alleging a “short-selling conspiracy” that “is nothing more than an illegal electronic printing press for stock certificates,” and some of these lawsuits have involved Rhino Advisors and certain of BAWAG’s Liechtenstein hedge funds. Although a number of the suits brought by Mr. O’Quinn, were dismissed, some are still pending.¹⁸⁶

VI. Conclusion: *Coulda—Woulda—Shoulda*



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After the huge scandal of Austria's trade union bank BAWAG, Alfred Gusenbauer, leader of the country's social Democrats, watches new perspectives for the forthcoming elections in fall.

There can be little debate that the BAWAG scandal was preventable. However, when a culture is created that includes no reasonable check and balances, those in control are almost certain to abuse their power, no matter the realm. Lord Acton's observations are no less relevant today: power tends to corrupt; absolute power corrupts absolutely.¹⁸⁸

This dysfunctional dynamic can be traced back directly to “Mr. Bawag” himself, Walter Flöttl, who first foolishly authorized his then thirty-two year old son to have access to billions in depositor funds without any approval or debate. “Mr. Bawag” compounded what might have been an avoidable calamity by “throwing good money after bad,” and initially concealing the dilemma from the bank's directors. It seems that once the major damage had been done, multiple parties went along with the ruse, hopeful

that it would work itself out, or at least that the public would never know of the egregiousness of the breaches of trust – the best laid plans of mice and men it seems.¹⁸⁹

The folly of Flöttl's avarice could not be undone as the yen's decline worsened, and it appears that BAWAG took increasingly desperate measures, attempting to extricate itself from the financial equivalent of a Chinese finger-trap. And as the desperation increased, the laws and principles violated mounted almost exponentially and the widely accepted banking ideal of "safe and sound" was apparently abandoned. It simply became a matter of time before sufficient critical mass would build to bring the carefully concealed scheme to the surface.

However, it is perhaps most troubling that numerous factual accounts of the BAWAG scandal in American and European published reports indicate that many who held positions of public trust became knowingly, or at a minimum, recklessly, complicit in the cross-continental conspiracy. No amount of laws, rules, regulations, standards, principles or the like, can ever possibly prevent the sorts of acts and omissions described herein, when those charged with "minding the store" simply look the other way.

Fortunately, American authorities were apparently immune to the network of influence assembled by the alleged BAWAG co-conspirators, and brought their resources to bear in a manner that revealed the closely-guarded Viennese secrets on Wall Street. Regrettably, Austrian officials appear to be all too willing to sweep much of the debacle under the rug, and public servants who were in a position to thwart the ongoing fraud continue to hold positions of power. Similarly, one of the alleged wrongdoers who still faces criminal charges and a host of civil actions in the U.S. has apparently been effectively insulated from liability by the Austrian government, and granted some sort of

unreported illicit asylum or sanctuary, free to bring financial harm to still others and not be held accountable for an almost sociopathic pursuit of ill-gotten gains.

Unless and until a financial system regulatory framework is devised that sufficiently removes the “human element” from the equation, the frailties of man will tarnish the well-meaning ideals and principles promulgated into law. Greed and political influence are mainstays of humanity, and when left to their own devices, men will all too often seek to satisfy their own avarice while debasing all that surrounds them.

Chancellor Renner’s utopian vision of a bank for the “little man” proved to be the ultimate irony, as those few entrusted to honorably provide financial services as the “worker’s bank” sought to enrich themselves at the cost of the many, and the end result of BAWAG’s deep-discount acquisition by one of America’s largest hedge funds, run by a former Bush-era Treasury Secretary, must be the epitome of a socialist’s nightmare, especially for any Cuban socialist who might have a BAWAG savings account. And it seems that Vienna is much further from Bretton Woods than any map might suggest.

The BAWAG Banking Scandal: Endnotes

1. See BAWAG Web page, available at http://www.bawag.com/bawag/home/nav_en.html. BAWAG was first named “Arbeiterbank” and renamed “Bank für Arbeit und Wirtschaft” in 1963.” BAWAG web page, “Bawag History,” available at http://www.bawagpsk.com/bawagpsk/UeberUns/UeberUns_en/Firmengeschichte_en,templateId=render,setId=bawagpsk,path=_2A125984_2A_2F126866_2F125984_2F122828_2FCR122828_2FCD121012.html (last visited April 4, 2007); see also DER STANDARD (Oliver Schopf) political cartoon (cover page), available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/bawag.jpg (last visited April 5, 2007) (Caption reads: “Die Vogelgrippe!!” Translated: “The Bird Flu!!”).

2. See *supra* note 2, BAWAG Web page, “Bawag History,” (“1922: ‘Arbeiterbank’ is founded by acting Federal Chancellor Dr. Karl Renner. The objective of the bank is the pooling and prudent management of the financial means of the unions and cooperative societies.”). *Id.*

3. *Id.* (“1947: The bank reopens after the war. Arbeiterbank resumes financial administration for the unions and cooperative societies. All liabilities are fulfilled in full.”). *Id.*

4. *Id.* (In 1934 Bawag was “subjected to forced liquidation for political reasons,” and reopened in 1947.). *Id.*

5. *Id.*

6. See David Crawford and Carrick Mollenkamp, *Bad Bet: How a Hedge-Fund Mogul Disrupted an Austrian Bank --- Mr. Floetl's Big Losses Triggered a Coverup: Selling the Van Gogh*, WALL ST. J., Jan. 25, 2007, available at http://online.wsj.com/article/SB116186493590604582.html?mod=hps_us_pageone (last visited Jan. 29, 2007).

7. See Michael Noer and Dan Ackman, *America's Richest, The Forbes Fictional Fifteen*, FORBES.COM, Sept. 13, 2002, available at http://www.forbes.com/2002/09/13/400fictional_15.html (last visited April 6, 2007); see also “Gordon Gekko” (portrayed by Michael Douglas) delivers the now infamous “greed is good” speech at the Teldar Paper shareholders meeting from the 1987 Oliver Stone film “Wall Street,” available at http://www.youtube.com/watch?v=_icgdMQ4MdQ (last visited April 6, 2007); see also *Wall Street (1987) Memorable Quotes*, Internet Movie Database (IMDb.com), available at <http://www.imdb.com/title/tt0094291/quotes> (last visited April 6, 2007).

8. DER STANDARD (Oliver Schopf) political cartoon, available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/sandbank.jpg (last visited April 5, 2007). The (translated) caption reads:

Sandbank for labor and economy: Fritz Verzetnitsch president of Austria's trade union federation (OEGB) that is owner of the BAWAG- Bank Für Arbeit Und Wirtschaft AG (bank for labor and economy) had to resign in his function. The bank incurred losses of 1 billion € through the financing of investment companies mainly engaged in interest rate and currency derivative transactions in the Caribbean. Verzetnitsch posted a guarantee for the losses; without this guarantee BAWAG would have been at risk of insolvency.

Id.

9. See Vernon Silver, Otis Bilodeau, Matthias Wabl, Julia Werdigier, and Allan Dodds Frank, *Refco's Bad Bank*, BLOOMBERG MARKETS, August 2006 available at <http://www.bloomberg.com/news/marketsmag/bawag.pdf> (last visited April 8, 2007) (The Austrian Federation of Trade Unions “consists of 13 groups, including metalworkers, agricultural workers, artists and sports teams”). *Id.*, see also APPENDIX (CD-ROM). The ÖGB was the owner of BAWAG until 2006

(“Austrian Federation of Trade Unions (ÖeGB) (“an association representing the interests of the working population within the Austiran ‘Social Partnerships,’” and related trusts” are [BAWAG’s] “100% Shareholder[s].”) *Bawag P.S.K., Eastern Europe and CIS Conference in Vienna, 2-3 February, 2006*, pp. 4-5, available at http://www.eurogiro.com/Public-docs/EE_CIS_Conference2006/03_Jochen%20Bottermann_BAWAG%20PSK.pdf (last visited April 5, 2007); see also Tom Becker, *Movers: New bidder for Brazilian airline offers \$450 million*, INT’L HERALD TRIBUNE, June 14, 2006, available at <http://www.ihf.com/articles/2006/06/13/bloomberg/bxmove.php> (last visited April 6, 2007).

10. Bawag P.S.K., *Eastern Europe and CIS Conference in Vienna, 2-3 February, 2006*, available at http://www.eurogiro.com/Public-docs/EE_CIS_Conference2006/03_Jochen%20Bottermann_BAWAG%20PSK.pdf (last visited April 6, 2007). In fact in 2006, BAWAG stated that “ÖeGB has currently about 1.4mn members.” *Id.* at p. 5.

11. See BAWAG 2004 Annual Report, available at http://www.bawagpsk.com/bawag/Service/Downloads__Antraege/PDF/Ueber__uns/Geschaeftsberichte/Geschaeftsberichte__en/GSKonzern2004__en.property=Data.pdf (last visited April 4, 2007).

12. Lenka Ponikelská, *Bid deadline passes*, CZECH BUSINESS WEEKLY, Nov. 20, 2006, available at <http://www.cbw.cz/phprs/2006112020.html> (last visited April 4, 2007); see also U.S. Dept. of State, *2007 Investment Climate Statement – Austria*, available at <http://www.state.gov/e/eeb/ifd/2007/80676.htm> (last visited April 6, 2007).

Total assets of Austria’s five largest banking groups (Bank Austria Creditanstalt (BA-CA), Erste Bank, Raiffeisen Zentralbank (RZB), Bank fuer Arbeit und Wirtschaft und Oesterreichische Postsparkasse (BAWAG PSK), and Oesterreichische Volksbanken) amounted to approximately Euro 518 billion (\$648 billion) in 2005, representing 71% of Austria’s total bank assets.

Id.

13. The Austrian Financial Markets, A Survey of Austria’s Capital Markets, Facts and Figures, Oesterreichische NationalBank & Financial Markets Austria Services Ltd., Revised Edition 2004, at p. 2, available at http://www.oenb.at/en/img/f_market_2004_tcm16-20191.pdf (last visited April 5, 2007).

14. Bawag P.S.K., *Eastern Europe and CIS Conference in Vienna, 2-3 February, 2006*, p. 5, available at www.eurogiro.com/Public-docs/EE_CIS_Conference2006/03_Jochen%20Bottermann_BAWAG%20PSK.pdf (last visited April 5, 2007).

15. Chris Gillibrand, *Austrian Bank Scandal: When Socialists Play With Money*, BRUSSELS JOURNAL, April 4, 2006, available at <http://www.brusselsjournal.com/node/955> (last visited April 8, 2007).

16. U.S. Dept. of State, *2007 Investment Climate Statement – Austria*, available at <http://www.state.gov/e/eeb/ifd/2007/80676.htm> (last visited April 6, 2007).

Austria has a highly developed banking system with worldwide correspondent banks, and representative offices and branches in the United States and other major financial centers. Large Austrian banks also have a huge network in many of the twelve new EU members and other countries in Central and Eastern Europe (CEE) and in Southeastern Europe (SEE). **Austrian banking groups dominate CEE/SEE banking markets.** Six out of the seven largest Austrian banks hold sizeable investments in CEE/SEE. [emphasis added].

Id.

17. Lenka Ponikelská, *Austria's Bawag bank group officially up for sale*, CZECH BUSINESS WEEKLY, July 17, 2006, available at <http://www.cbw.cz/phprs/2006071713.html> (last visited March 30, 2007).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Lenka Ponikelská, *supra* note 12.

23. See Bawag P.S.K., *Eastern Europe and CIS Conference in Vienna, 2-3 February, 2006*, p. 6, available at www.eurogiro.com/Public-docs/EE_CIS_Conference2006/03_Jochen%20Bottermann_BAWAG%20PSK.pdf (last visited April 6, 2007) see also BAWAG web page, "About Us" section, available at http://www.bawag.com/bawagpsk/_UeberUns/Unternehmen/Firmengeschichte/nav__en.html (last visited April 6, 2007).

BAWAG and P.S.K. are merging. The merged bank will be operating under the name BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft.

The granting of a major loan to the American futures trading company Refco that later turned out to be uncollectible brought a new chairman to the Managing Board. Univ. Prof. Dr. Ewald Nowotny becomes the new CEO of BAWAG P.S.K. on 1 January 2006.

After fraudulent practices by Refco were uncovered, a class-action suit in the USA caused considerable difficulties for BAWAG P.S.K. A guarantee granted by the Republic of Austria stabilised the bank and made it possible to continue business as before.

Together with Accenture, BAWAG P.S.K. implements one of the largest IT projects in Europe. Over 1,500 branches have a common core banking system.

The competent bodies of the Austrian Trade Union Association, ÖGB, resolve to sell the shares in BAWAG P.S.K. to the U.S. investment company Cerberus and its Austrian partners Generali, Wüstenrot, and a private group of industrialists including Dr. Androsch. Thus, a new era for BAWAG P.S.K. will begin.

24. Roddy Boyd, *Jerry's Bad Tie – Trade for Refco Figure Gave NYSE Black Eye*, N.Y. POST, Apr. 27, 2006; see also Liz Chong, *Refco boss sought in Austrian inquiry*, THE TIMES (LONDON), Mar. 29, 2006 ("The bank said that it ran up the losses between 1995 and 2000 by investing in funds run by Wolfgang Flöttl, whose father was head of Bawag. The losses were hidden in offshore accounts run by Refco.").

25. See, e.g., David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6; see also David Patrick *Columbia's New York Social Diary*, http://www.newyorksocialdiary.com/partypictures/2004/10_26_04/partypictures10_26_04.php (last visited March 17, 2007); includes a photo of Wolfgang Flöttl and Anne Eisenhower-Flöttl dancing, available at http://www.newyorksocialdiary.com/partypictures/2004/10_26_04/images/DSC_4004.jpg (last visited March 17, 2007).

26. See *Flöttl Charged With Improper Use of Bank's Funds*, AUSTRIA TODAY, Oct. 27, 2006. Elsner, Bawag's chief executive "in 1995 hired Flöttl to invest money on behalf of the bank. While making profits

in the first three years, the investments went sour between 1998 and 2000, mainly because of wrong bets on the Japanese Yen and interest rate movements.” *Id.* See also David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6.

27. Chris Gillibrand, *supra* note 15.

28. David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6.

29. *Id.*

30. *Id.*

‘Mr. Flöttl has very prominent friends,’ Mr. Elsner told [Austrian] prosecutors. ‘We had a lively discussion in the [BAWAG] management board meeting and decided to prevent the situation from becoming public. That required Bawag to ensure Mr. Flöttl’s economic survival.’

Id.

31. *Id.*

32. *Id.*

33. See *Refco boss facing Austrian arrest Former chief executive of commodities brokerage Refco, Phillip Bennett Mr Bennett is already facing fraud charges in the US Authorities in Austria have issued an arrest warrant for Phillip Bennett, former head of US brokerage Refco*, BBC News, Mar. 28, 2006, available at <http://news.bbc.co.uk/2/hi/business/4853092.stm> (last visited April 7, 2007). See also Chris Gillibrand, *supra* note 15.

34. See David Crawford and Carrick Mollenkamp, *Inquiry of Bank Expands To KPMG Austria’s Staff*, Wall St. J., Sept. 21, 2006, available at <http://users2.wsj.com/lmda/do/checkLogin?mg=evo-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB115877803929169131.html> (last visited April 8, 2007).

35. David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6. See also generally, *Austrian News Excerpts – Austrian National Bank – BAWAG Audit Report (2006)*, at APPENDIX (CD-ROM).

36. David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6; see also Carl Swanson, *Squeeze Play - As a dearth of Hamptons houses pushes the magic number to \$25 million, would-be buyers have to bid up, tear down, and -- gasp -- buy modern*, NEW YORK MAGAZINE, May 29, 2000, available at <http://nymag.com/nymetro/travel/hamptons/features/3257/> (last visited March 17, 2007) (“Next up might be Keewaydin, the Halsey Neck Lane, Southampton, estate of Anne Eisenhower Flöttl and Wolfgang Flöttl that’s on the market for \$23 million (they bought it from former Sony USA chief Mickey Schulhof for \$5.6 million).”). See also Scott Neil, *Flöttl sells his Tucker’s Town home for \$20m*, BERMUDA ROYAL GAZETTE, April 2, 2007, available at <http://www.theroyalgazette.com/siftology.royalgazette/Article/article.jsp?articleId=7d7413b30030006§ionId=65> (last visited April 3, 2007).

37. See David Crawford and Carrick Mollenkamp, *Inquiry of Bank Expands To KPMG, supra* note 34. (“[A] KPMG representative agreed not to mention the loss in KPMG’s statement in the bank’s annual report if the Austrian Trade Union Federation, Bawag’s majority shareholder, gave a guarantee to cover the loss, according to an Austrian National Bank audit.”). *Id.*

38. David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6.

39. DÉR STANDARD (Oliver Schopf) political cartoon, *available at* http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/Ablass.jpg (last visited April 5, 2007) (Caption reads: “Dër Vergleich zwischen BAWAG und den Refco-Gläubigern ist perfekt.” Translated: “The comparison between BAWAG and the Refco-creditors is perfect.”).

40. See Refco website archive, May 20, 1999 Refco press release headline, *available at* <http://web.archive.org/web/19991117040513/www.refco.com/news/news.asp> (last visited April 4, 2007).

41. Richard Beales, Doug Cameron, Jeremy Grant, Andrew Parker, James Politi, Haig Simonian, Peter Thal Larsen, and David Wighton, *A crisis of confidence: how Refco veered from a Wall Street debut into bankruptcy* SECURITIES MARKETS: *The dramatic implosion of the world's biggest independent futures broker has left investors facing losses of more than Dollars 3bn and raised concerns that warning signs may have been missed, say FT reporters*, FINANCIAL TIMES, Nov. 11, 2005. See also *Refco Collapse May Force Austria's Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, *available at* <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007); see also Lars Toomre, *Austria Issues Arrest Warrants for Wolfgang Floetl and Phillip Bennett*, March 28, 2006, *available at* <http://www.toomre.com/node/332/> (last visited April 5, 2007).

With recent news that Wolfgang Floetl also incurred unreported losses at Bawag during the period of 1996-2000, one has to seriously question just how ‘arm’s length’ all transactions between Refco and Bawag ever were subsequent to mid-year 1997. For instance, since Wolfgang Floetl was the son of the head of Bawag bank (widely known as “Mr. Bawag”) and he is rumored to have incurred serious losses that were concealed by both institutions, one might reasonably question why and at what price Bawag agreed to purchase 10% of Refco in 1999.

Id.

42. See Richard Beales, *et al.*, *supra* note 41.

43. Laura Jereski and Aaron Lucchetti, *The Market Calms Down: Niederhoffer Is Sunk By Market Maelstrom*, WALL ST. J., Oct. 30, 1997. (In 1997 Victor Niederhoffer, money manager and author of “The Education of a Speculator,” “wiped out” his entire equity positions of \$130,000, after a “ballooning lossess in an option position prompted a margin call.) *Id.*, see also Aaron Lucchetti, *CFTC Plans Monitor of Brokers After Losses by Fund Manager*, WALL ST. J., Jan. 6, 1998 (Niederhoffer was a “hedgefund manager who made a bet on S&P 500 futures-options at the Chicago Mercantile Exchange.” “After taking a leveraged options position that would have gained in value if the S&P index rose or stayed relatively stable, Mr. Niederhoffer received a margin call for about \$50 million from his clearing broker, Refco Inc., when the Dow Jones Industrial Average fell 554.26 points, or 7.18%, on Oct. 27.”), *Id.*; Laura Jereski and Aaron Lucchetti, *The Market Calms Down: Niederhoffer Is Sunk By Market Maelstrom*, WALL ST. J., Oct. 30, 1997. (Niederhoffer Investments Inc., marketing manager Albert Hallac, said that “Refco Inc. -- through which Mr. Niederhoffer executed his trades -- has taken effective control of what remains of the portfolio.” To counteract :”rumours” that Refco would be on the hook for millions as a result of Niederhoffer’s loses, Refco issued a statement that “it was financially fine,” however Refco President Tone Grant refused to comment on the conditions of Niederhoffer’s portfolio and whether he still owed Refco money.) *Id.* See also Aaron Lucchetti, *CFTC Plans Monitor of Brokers After Losses by Fund Manager*, WALL ST. J., Jan. 6, 1998. (It was confirmed later that Niederhoffer did owe Refco “millions of dollars,” and regulators belived the amount “exceeded \$40 million at its peak.” Refco denied any financial trouble.)

44. *Id.*

Refco and Bawag had strong ties. In 1999, the bank had bought a 10 per cent stake in Refco, which it sold in 2004. Bawag’s long-time chief executive had been Walter Flöttl, who stepped down in 1994 after it emerged that the bank had lent Dollars 2bn to Ross Capital, his son Wolfgang’s Bermuda-based hedge fund. Ross Capital used Refco as its broker and ran up some losses during the financial crises of the late 1990s. But Wolfgang

Flöttl, a prominent figure in the New York social scene, insists it did not leave Refco with any bad debts.

Id.

45. John Maynard Keynes wrote in 1931, “markets can remain irrational far longer than you or I can remain solvent,” *available at* <http://www.maynardkeynes.org/> (last visited April 7, 2007).

46. Haig Simonian, *Bawag concealed Euros 1.3bn losses for five years*, FINANCIAL TIMES, Mar. 25, 2006 (The bank’s “Caribbean losses arose from business with Ross Capital, a derivatives specialist run by Walter Flottl, son of a former Bawag chief executive. The biggest loss stemmed from a massive misplaced bet on Japanese rate swaps during the Asian financial crisis.”). *Id.* Niederhoffer’s losses were also incurred during the Asian financial crisis, in 1997. *See* Richard Beales *et al.*, *A crisis of confidence: how Refco veered from a Wall Street debut into bankruptcy Securities Markets: The dramatic implosion of the world’s biggest independent futures broker has left investors facing losses of more than Dollars 3bn and raised concerns that warning signs may have been missed, say FT reporters*, FINANCIAL TIMES, Nov. 11, 2005.

47. *See, e.g., Bawag Used Refco to Help Mask Almost EU1 Billion Loss (Update7)*, BLOOMBERG, March 24, 2006, *available at* http://www.bloomberg.com/apps/news?pid=10000085&refer=europe&sid=aDqt_Mdn6iwU (last visited April 8, 2007) (“The Japanese yen fell for eight straight weeks in 2000, the longest continuous decline in half a decade. It fell 11 percent against the euro and 5.6 percent against the dollar during the last quarter of the year.”). *Id.* [emphasis added].

48. *Flottl Charged with Improper Use of Bank’s Funds*, AUSTRIA TODAY, Oct. 27, 2006.

49. *See supra*, note 43; *and see generally: De Kwiatkowski v. Bear Stearns*, 306 F.3d 1293 (2d Cir. 2002); Roger Lowenstein, *When Genius Failed: The Rise and Fall of Long-Term Capital Management – How One Small Bank Created a Trillion-Dollar Hole*, (Fourth Estate Publishing 2001) ISBN-10: 1841155047; *see also* Nick Leeson, *Rogue Trader*, (Time-Warner Books 1997) ISBN-10: 0751517089 (“Trusted with the finances of royalty and aristocracy for over two hundred years, Barings had apparently been brought down by the covert trading activities of just one man, leaving the bank with losses of around £850 million.”). *Id.*

50. Richard Beales, Doug Cameron, Jeremy Grant, Andrew Parker, James Politi, Haig Simonian, Peter Thal Larsen And David Wighton, *A crisis of confidence: how Refco veered from a Wall Street debut into bankruptcy Securities Markets: The dramatic implosion of the world’s biggest independent futures broker has left investors facing losses of more than Dollars 3bn and raised concerns that warning signs may have been missed, say FT reporters*, FINANCIAL TIMES, Nov. 11, 2005.

51. *See Bawag Used Refco to Help Mask Almost EU1 Billion Loss (Update7)*, BLOOMBERG, March 24, 2006, *available at* http://www.bloomberg.com/apps/news?pid=10000085&refer=europe&sid=aDqt_Mdn6iwU (last visited April 7, 2007).

‘A public debate would have impeded our efforts to minimize the damage,’ [Guenther Weninger, [65, the chairman of Bawag’s supervisory board] said at the press conference, explaining why the losses weren’t revealed sooner. ‘I saw a danger that customers would leave, that jobs might be lost and that the bank would be harmed.’

Id.; *see also* David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6.

Bawag agreed to lend Mr. Floettl money to invest through his hedge fund, according to a prosecutor. The loans would be unsecured: If his investments went bad and he couldn’t repay the loans, Bawag had no right to go after his other assets, the prosecutor says. What

made the arrangement attractive to Bawag is that he would pay higher interest rates than customers in Austria, Mr. Elsner later told police and prosecutors.

Beginning in late 1995, Bawag lent hundreds of millions of dollars to entities Mr. Floetl controlled, according to Bawag records. In the summer of 1998, with markets volatile, Mr. Floetl placed a big bet that the yen would fall against the dollar. 'But that didn't happen,' Mr. Floetl told Austrian prosecutors early last year, according to a transcript. 'The dollar weakened because of a crisis in the American financial market.'

As his trading positions deteriorated, Wall Street firms issued margin calls, demanding cash to cover his positions, Mr. Floetl later told police. Selling off the positions to meet the calls would have left him broke, Mr. Floetl said. He met the margin calls primarily with money he had borrowed from Bawag, according to an Austrian National Bank audit conducted during the investigation last year.

'The margin calls over a period of six business days reduced our investment to almost nothing,' Mr. Floetl said in his statement to prosecutors and police. He lost about \$759 million over a short period in 1998, including about \$640 million borrowed from Bawag, according to an Arthur Andersen audit of Mr. Floetl's trading records ordered by the bank's board.

Mr. Elsner later told police investigators that he began to worry that Bawag's losses would be revealed. That October, Bawag lent Mr. Floetl another \$90 million, according to a written statement by Mr. Elsner to other bank executives.

Id.; see also *Daily Briefing*, ATLANTA JOURNAL-CONSTITUTION, Nov. 23, 2006. Ironically a depositor run occurred in May 2006. ("In May, the Austrian government and other banks and insurance companies teamed up on a plan to rescue BAWAG, Austria's fourth-largest bank, after it lost more than 1 billion euros (\$1.28 billion) in currency speculation deals in the Caribbean. The bank came close to liquidation in the spring as depositors withdrew large amounts after news broke of the bank's losses.") *Id.*

52. *Refco Bank Hid USD 1 Billion Loss from Hedge Funds, Arafat Casino*, June 22, 2006, AUSTRIA TODAY.

Bawag dumped uncollectible loans into the Refco brokerage account of a British Virgin Islands fund called Liquid Opportunities and then into companies based on the Caribbean island of Anguilla.

The day was October 10, when Refco went public with the news it had a hidden deficit. Bawag sold its stake that day in offshore Liquid Opportunities and the related Anguilla companies Bawag used to hide losses, according to evidence gathered by Austrian investigators. The buyer was Thomas Hackl, Bawag's former head of treasury and investment banking, three people close to the investigation say.

Id.; See also *Arrest warrant is denied*, INT'L HERALD TRIBUNE, May 4, 2006 ("Bawag disclosed March 24 [2006] that it used offshore companies in the Caribbean island of Anguilla and accounts at the collapsed futures broker Refco to mask the losses."); see also Roddy Boyd, *Jerry's Bad Tie – Trade for Refco Figure Gave NYSE Prez Black Eye*, N.Y. POST, April 27, 2006 ("Floetl's hedge fund trading activities from the 1990s have come under scrutiny given the disclosure last month that Bawag - the bank that loaned him nearly \$2 billion - hid more than \$1 billion in losses sustained by his fund, Ross Capital. Some of the losses were stashed in accounts at Refco, according to Bawag, while others were funneled into shell companies in Anguilla."). See also Otis Bilodeau and Allan Dodds Frank, *Refco Probes Lead to \$525 Million in Phantom Bonds (Update2)*, Bloomberg, March 15, 2006, available at <http://www.bloomberg.com/apps/news?pid=10000103&sid=aCvbrleoyRVE> (last visited April 9, 2007).

New York-based Refco held the securities for Bawag P.S.K. Bank, Austria's fourth-largest bank, and Liquid Opportunity, an offshore hedge fund, under identification numbers that don't correspond to registered bonds, said the people, who declined to be identified because the investigations are ongoing. One person said Bawag and Liquid Opportunity had shares in six Anguilla companies, which in turn held the bonds.

The U.S. Attorney in Manhattan and the Securities and Exchange Commission are trying to find out where the bonds originated and how they were valued, the people said. . . .

Bawag plans to file a claim for the money 'shortly' in Refco's bankruptcy case, Heimhofer said. He declined to comment further.

Refco's creditors are hunting for information about six companies based in the British West Indies that may be linked to the bonds that prosecutors are scrutinizing.

Liquid Opportunity and Bawag held shares in the six companies, which in turn held the bonds, according to a person with knowledge of the Refco accounts who didn't want to be identified because of the ongoing investigations by the Justice Department and the SEC.

The companies, named for islands in the South Pacific and regions of Argentina, were incorporated on July 26, 2004, by a local agent, according to government records in Anguilla.

They were initially listed as Refco creditors with a combined claim of \$543 million, according to court filings prepared by Refco's lawyers. Unlike other creditors identified by Refco, none of the companies filed any legal papers in the bankruptcy case. Refco has since dropped four of the six from its creditors list and now says that it doesn't owe any money to the remaining two.

Vanished

In December, a judge overseeing Refco's bankruptcy authorized the creditors to subpoena former Refco executives, including Bennett, and Bawag for details about the six companies, court filings show.

'All of a sudden, half a billion dollars of liabilities just vanished,' said Howard Seife, a lawyer at Chadbourne & Parke in New York who represents Refco creditors. 'No one appeared on their behalf in court. It was as if they didn't exist.'

A woman who answered the phone at the office of the agent for the six companies, Anguilla Offshore Management Ltd., declined to give her name and said she couldn't provide any information about them. 'You'll have to contact the customers directly for that,' she said. . . .

PlusFunds Connections

Through a Liechtenstein-based partnership, Bawag and Liquid Opportunity's Jonathan Knight are co-investors in at least two dozen companies, according to SEC filings. They also share a connection to Refco through PlusFunds Group Inc., a New York-based money manager that sells investments based on hedge fund indexes. U.S. officials haven't accused PlusFunds or any related individuals of wrongdoing in connection with the bond accounts.

PlusFunds Chairman Christopher Sugrue worked at Refco as a senior vice president from 1993 to 1998. A biographical note formerly posted on PlusFunds' Web site said he was 'involved' in Bawag's purchase of the stake in Refco in 1999.

Last year, Sugrue, 35, pledged his controlling interest in PlusFunds to Refco as collateral for a loan of more than \$200 million, according to a Dec. 16 lawsuit by Refco creditors against a client of PlusFunds and a person with direct knowledge of the loan, who asked not to be identified while the suit is pending. Neither Sugrue nor PlusFunds is a party to that lawsuit. . . .

PlusFunds helped draw investors to Liquid Opportunity, and Liquid Opportunity in turn was a participant in the PlusFunds "platform," International Portfolio Analytics said in its 2001 statement. PlusFunds made money by investing client assets in all or some of the 41 hedge funds in the Standard & Poor's Hedge Fund Index. The company filed for bankruptcy protection on March 6.

Offshore companies played central roles in the accounting frauds at Enron Corp. and Parmalat Finanziaria SpA, according to prosecutors in those cases.

MIT Doctorate

Houston-based Enron allegedly used subsidiaries in the Cayman Islands to cut the company's U.S. taxes and hide losses, before collapsing in the U.S.'s second-largest bankruptcy in 2001. Parmalat, the Italian food company that in 2003 filed the country's biggest-ever bankruptcy case, inflated sales, fabricated assets and funneled debt through units in the Netherlands Antilles and the Cayman Islands, according to Italian court documents.

Refco lawyers told Esseks, one of Garcia's prosecutors handling the Refco probe, about Liquid Opportunity as early as Oct. 21, according to court filings in Refco's bankruptcy case.

Gamma, Alpha

Liquid Opportunity's Knight, who holds a doctorate from the Massachusetts Institute of Technology in Cambridge, Massachusetts, made investments for other clients through offshore entities including Gamma Capital Opportunity Partners, Siam Capital Management and Regenmacher Holdings Ltd., SEC filings show. Regenmacher is the German word for 'rainmaker.'

Alpha Capital AG, a Liechtenstein-based investment firm part-owned by Bawag, participated in many of the same investments, according to the filings.

Id.

53. *See also* David Crawford and Carrick Mollenkamp, *Bad Bet: supra* note 6. (Bawag also "lent Mr. Flöttl an additional \$18 million to keep his Gulfstream jet aloft, according to the central bank audit last year.")

54. *Refco, Bank Hid USD 1 Billion Loss from Hedge Funds, Arafat Casino*, June 22, 2006, AUSTRIA TODAY; *see also* Vernon Silver, *et al.*, *supra* note 9. ("Venedey says Bawag management's inability to provide checks and balances led Moody's to downgrade the bank's financial strength rating on May 31 to E+, meaning 'very modest' strength, two notches above the lowest grade, from C+, defined as 'adequate.'"). *Id.*

55. See BAWAG 2004 Annual Report, *available at* http://www.bawagpsk.com/bawag/Service/Downloads__Antraege/PDF/Ueber__uns/Geschaeftsberichte/Geschaeftsberichte__en/GSKonzern2004__en.property=Data.pdf (last visited April 4, 2007), *available at* APPENDIX (CD-ROM),

56. Vernon Silver, *et al.*, *supra* note 9.

57. See, e.g., SPhinX, Ltd., *et al.* v. Phillip R. Bennett and BAWAG, Case No. 1:06-CV-05013, filed June 26, 2006 (SDNY), ¶ 49 at (numerated) page 12 of Complaint (later dismissed voluntarily on Jan. 23, 2007 pursuant to FRCP 41(a)). See also Vernon Silver, *et al.*, *supra* note 9, both *available at* APPENDIX (CD-ROM).

58. *U.S. Indicts Former Owner of Refco and Expand Charges in Refco Fraud*, U.S. Attorney Southern District of New York, Press Release, Jan. 16, 2007, *available at* <http://www.usdoj.gov/usao/nys/pressreleases/January07/bennetttrostengrantrefcoS3indictmentpr.pdf> (last visited April 5, 2007).

According to the superseding Indictment, from as early as the mid-1990s, Refco --which was then privately-held and controlled in part by Bennett and Grant -- sustained hundreds of millions of dollars of losses through its own and its customers' trading. In order to hide the existence of the losses, Bennett and Grant transferred many of them to appear as a debt owed to Refco by Refco Group Holdings, Inc. ('RGHI') -- the holding company that controlled Refco and was, in turn, controlled by Bennett and [Refco president Tone] Grant.

59. U.S. Attorney Southern District of New York, Release, Jan. 16, 2007, *U.S. Indicts Former Owner of Refco and Expand Charges in Refco Fraud*, *available at* <http://www.usdoj.gov/usao/nys/pressreleases/January07/bennetttrostengrantrefcoS3indictmentpr.pdf>. ("In August 2005, Refco conducted an initial public offering ('IPO') . . . On October 10, 2005, Refco issued a press release announcing, in substance, that it had discovered that it was owed a debt of approximately \$430 million by an entity controlled by Bennett."). See also *Bawag Used Refco to Help Mask Almost EU1 Billion Loss (Update7)*, BLOOMBERG, March 24, 2006, *available at* http://www.bloomberg.com/apps/news?pid=10000085&refer=europe&sid=aDqt_Mdn6iwU (last visited April 8, 2007) ("Refco and 23 affiliates filed the 15th-biggest bankruptcy in U.S. history on Oct. 17, after saying CEO Phillip Bennett concealed about \$430 million in loans the company couldn't collect from customers. Creditors are trying to recoup \$16.8 billion."). *Id.*

60. See Vernon Silver, *et al.*, *supra* note 9.

61. *Bawag PSK linked to collapse at Refco*, INT'L HERALD TRIBUNE, March 25, 2006 ("The U.S. investigation of Refco's collapse found as much as \$525 million in securities linked to Bawag with identification numbers that did not correspond with registered bonds, four people with direct knowledge of evidence gathered in the investigation said this month."); see also *Selling heavy on Refco debt*, CREDIT INVESTMENT NEWS (EUROMONEY INSTITUTIONAL INVESTOR, PLC), March 20, 2006.

Trading volume was heavy on Refco's bank loan last week after a news report that the company held offshore accounts with \$525 million in fake bonds. The bond accounts were reportedly at Refco's Bermuda-based unit, according to a Bloomberg report. Refco's term loan 'B' was down a point to 98 1/2. The loan had been trading slightly north of par at the end of last month. Its bonds fell five-and-a-half points to 51.

Id.; see also *Selling heavy on Refco debt*, CREDIT INVESTMENT NEWS (EUROMONEY INSTITUTIONAL INVESTOR PLC), March 20, 2006. And interestingly enough, \$525 million was also the precise amount that BAWAG had to pay (after one year, or if Bawag is taken over), “split equally between the [DOJ] and the Refco creditors.” See Greg Burns, *Refco collapse casts shadow on ‘point’ man*, CHICAGO TRIBUNE, Feb. 18, 2007, available at <http://www.chicagotribune.com/business/chi-0702180337feb18,1,1378231.story?coll=chi-news-hed> (last visited Feb. 18, 2007). See also Vernon Silver, *et al.*, *supra* note 9.

The day was Oct. 10 [2005], when Refco went public with the news it had a hidden deficit. Bawag sold its stake that day in offshore Liquid Opportunities [operated by former Refco executive Christopher Sugrue] and the related Anguilla companies Bawag used to hide losses, according to evidence gathered by Austrian investigators. **The buyer was Thomas Hackl, Bawag’s former head of treasury and investment banking, three people close to the investigation say. Hackl, 41, left Bawag to work at Refco as head of global asset management from 2002 to ’04.** [emphasis added].

Id.

62. See Refco Inc. Form 8K, Ex. 99.1, filed on Oct. 11, 2005, available at http://sec.gov/Archives/edgar/data/1321746/000110465905048112/a05-17426_1ex99d1.htm (last visited March 17, 2007).

63. See also Tom Bawden, *Bawag gets start to start sale as US settlement draws near*, THE TIMES (LONDON), May 23, 2006.

Bawag, a largely domestic retail bank, shot to international prominence when it approved a \$410 million loan to Phil Bennett, Refco’s chief executive, just hours before the brokerage announced that it had hidden \$430 million of bad debt, triggering its demise.

Id.

64. See *Refco Collapse May Force Austria’s Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007); see also Chris McMahon, Daniel Collins, and Steve Zwick, *It’s a mess! Refco implodes*, FUTURES (FUTURES MAGAZINE GROUP), Dec. 1, 2005.

Bawag got whacked twice: once by selling a 10% stake in Refco just prior to the company’s IPO, missing out on the surge in share prices after going public; and then by loaning \$424 million to Phillip Bennett, who used Refco stock as collateral, as well as loaning \$100 million to Refco itself.

Id.; see also *Ex-Bawag CEO is extradited*, INT’L HERALD TRIBUNE, Feb. 14, 2007.

Elsner helped to cover up the losses over many years in offshore accounts at Refco, the now collapsed U.S. broker, and by using the assets of OeGB, the Austrian trade union federation, as collateral, according to the central bank’s investigation. Bawag, formally known as Bank für Arbeit und Wirtschaft, has also been under investigation for lending Phillip Bennett, Refco’s former chief executive, several hundred million dollars just before the brokerage firm filed for bankruptcy in 2005.

Id. Refco’s common stock (formerly NYSE: RFX, now OTC Pink Sheets: RFXCQ) is at a price 99 percent lower than it did on the date of the final BAWAG loan to Bennett, currently trading at approximately twenty-six cents (\$0.26) per share. RFXCQ Quote available at <http://finance.yahoo.com/q?s=RFXCQ.PK&d=t> (last visited April 9, 2007).

65. Greg Burns, *Refco collapse casts shadow on 'point' man*, CHICAGO TRIBUNE, Feb. 18, 2007; See also United States Attorney Southern District of New York, Press Release, *U.S. Indicts Former Owner of Refco and Expands Charges in Refco Fraud*, January 16, 2006, available at www.usdoj.gov/usao/nys/pressreleases/January07/bennetttrostengrantrefcoS3indictmentpr.pdf; See also United States of America v. Phillip R. Bennett, Oct. 12, 2005, available at http://www.refcoclassaction.com/Criminal_Complaint.pdf

66. Terry Brennan, *Judge Approves Refco Settlement*, DAILY DEAL, June 9, 2006.

67. *Bawag Agrees to be Acquired by Cerberus*, AUSTRIA TODAY, Dec. 15, 2006 (Bawag “admitted using accounts at the broker to hide hedge-fund losses of more than 1 billion euros.”)

68. See generally, *Bawag Agrees to be Acquired by Cerberus*, AUSTRIA TODAY, Dec. 15, 2006.

69. *Arrest Warrant for Flottl in the Works*, AUSTRIA TODAY, April 19, 2006.

70. Bruce Zagaris, *France Extradites Former Bank Head to Austria*, INTERNATIONAL ENFORCEMENT LAW REPORTER, April 2007, Vol 23, No. 41, Money Laundering and Bank Secrecy.

71. *Flottl Charged with Improper Use of Bank's Funds*, AUSTRIA TODAY, Oct. 27, 2006.

Ex-Bawag PSK Bank chief executive Helmut Elsner and Wolfgang Flottl, who traded on the bank's behalf, were among nine people charged by Austrian prosecutors over EUR 1.44 billion in failed hedge-fund investments. Elsner, 72, faces charges of improper use of funds, fraud and accounting violations, while Flottl, 51, is charged with involvement in the improper use of funds. Walter Geyer, a spokesman for the Vienna-based public prosecutor, said. Seven others, including ex-KPMG auditor Robert Reiter and ex-supervisory board head Guenter Weninger, are also charged.

Id.

72. Eric Frey, *Bawag Admits closer Refco link*, FINANCIAL TIMES, April 29, 2006 (Weninger resigns); see also Eric Frey, *Decision to sell Bawag brings relief*, FINANCIAL TIMES, April 1, 2006 (“(Verzetnitsch resigns); see also *Union president forced to resign over bank scandal*, UNIV. OF VIENNA - EIRONLINE, May 15, 2006, available at <http://www.eurofound.europa.eu/eiro/2006/04/articles/at0604019i.html> (last visited Mar. 18, 2007).

73. Eric Frey, *Decision to sell Bawag brings relief*, FINANCIAL TIMES, April 1, 2006 (“Last October, Johann Zwettler, Mr. Elsner's successor, was forced to resign after he approved a Euros 425m loan to Refco's chief executive Phillipp Bennett only a day before [he] was forced out of the brokerage.”). *Id.*

74. *Refco Probes Lead to \$525 Million in Phantom Bonds (Update2)*, BLOOMBERG, March 15, 2006, available at http://www.bloomberg.com/apps/news?pid=10000087&refer=top_world_news&sid=aCvbrleoyRVE (last visited April 4, 2007); see also Vernon Silver, *et al.*, *supra* note 9.

75. Vernon Silver, *et al.*, *supra* note 9. (BAWAG insider Harald “Raffay blames the arrogance of Elsner for the bad investments and coverups. ‘You speak against him and you were shot at dawn,’ he says.”). *Id.*

76. Vernon Silver, *et al.*, *supra* note 9. [emphasis added].

Bawag's hidden dealings also included an investment company founded by the late Palestinian leader Yasser Arafat, more than \$1.3 billion in secret hedge fund losses and a tangle of Caribbean holdings, including phantom bonds Bawag used to disguise bad loans as an investment the bank valued at 350 million euros (\$443 million). These findings

come from interviews and documents gathered in Anguilla, Austria, the Bahamas, France, Israel, Libya, Liechtenstein, Malta, the Palestinian territories and the U.S.

Id.

77. *Id.*

78. *Ex-Bawag boss Elsner extradited to Austria*, NEWS FROM AUSTRIA, No. 04/07, Federal Chancellery, Federal Press Service, Vienna, p. 2, available at bkacms.bka.gv.at/Docs/2007/2/22/info4_en.pdf.

On 13 February 2007 Helmut Elsner (71), former head of the BAWAG bank, was extradited to Austria in an overnight operation of the French and Austrian judicial authorities (Justice Minister Maria Berger) and based on a European arrest warrant. He was taken to the Vienna Regional Court. On the following day the competent judge ruled that Elsner should remain in custody as he might flee the country. On 15 February 2007 Elsner was admitted to Wilheminen Hospital in Vienna for heart troubles. He will undergo heart surgery. The bypass operation will be performed in Vienna's General Hospital. The judge will soon rule on Elsner's request to be released from custody.

The ex-banker is considered a key figure in the biggest financial scandal of the Second Republic and the main suspect in the criminal proceedings in the BAWAG case. The prosecution has charged him with false accounting, severe fraud and fraudulent breach of trust causing losses of more than 1.4 billion euro to the bank. The principle "innocent until proven guilty" must be applied. The BAWAG bank severely affected by the speculation deals in the Caribbean of more than a billion euro, and its former owner, the Austrian Federation of Trade Unions (ÖGB), are seeking damages from Elsner.

Id.

79. Pat Maadi, *Anger over Bawag closure of accounts*, WIENERZEITUNG.AT, April 17, 2007, available at <http://www.wienerzeitung.at/DesktopDefault.aspx?TabID=4082&Alias=wzo&cob=280033> (last visited April 17, 2007).

80. See Vernon Silver, *et al.*, *supra* note 9, at p. 3.

81. See Austrian Bank "Bawag" to Pay \$337.5 million for Restitution to Victims of Refco Fraud, U.S. DOJ PRESS RELEASE, June 5, 2006, available at <http://www.usdoj.gov/usao/nys/pressreleases/June06/bagwagnon-prosecutionagreementpr.pdf> (last visited April 5, 2007) ("against BAWAG arising from its involvement with the fraud at Refco. In total, BAWAG and the ÖGB will pay at least \$675 million in connection with the non-prosecution agreement and to settle the bankruptcy estate claims against them. The Government will distribute half of the \$337.5 million in forfeited funds to the Refco bankruptcy estate, and half to other victims of the Refco fraud."). *Id.*; see also *SEC Files Settled Action Against Major Austrian Bank for Aiding And Abetting Refco Fraud*, SEC Litigation Release No. 19716, June 5, 2006, available at <http://www.sec.gov/litigation/litleases/2006/lr19716.htm> (last visited March 17, 2007); and SEC civil enforcement complaint in the matter captioned *SEC v. BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft*, Case No. 06 CV 04222 (DC) (J. Chin, S.D.N.Y.), filed June 5, 2006, available at <http://www.sec.gov/litigation/complaints/2006/comp19716.pdf> (last visited March 17, 2007). See also *Summary of Proposed Settlement Among Refco, Official Committee of Unsecured Creditors, And BAWAG, P.S.K., Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft*, June 7, 2006 U.S. Bankruptcy Court (SDNY) statement, available at [http://www.refcocommittee.com/Refco/RefcoCC.nsf/AllWebEditSelect/DA8E2BB0C208FFCF8525718700066984/\\$File/BAWAG%20Notice.pdf?OpenElement](http://www.refcocommittee.com/Refco/RefcoCC.nsf/AllWebEditSelect/DA8E2BB0C208FFCF8525718700066984/$File/BAWAG%20Notice.pdf?OpenElement) (last visited April 17, 2007). Numerous other relevant documents available at <http://www.refcodocket.com> (last visited April 17, 2007).

82. See *In Re Refco, Inc. Securities Litigation* (First Amended Consolidated Class Action Complaint), Case No. 05 Civ. 8626, filed May 5, 2006, *available at* <http://refcosecuritieslitigation.com/courtbox/RefcoAmCplt5.5.06.pdf> (last visited April 3, 2007); *see also* Amended Refco Class Action Complaint at APPENDIX (CD-ROM); *and see* Refco Securities Litigation, *available at* <http://refcosecuritieslitigation.com/> (last visited April 5, 2007).

83. See Matthew Goldstein, *Refco Suit Targets Austrian Patron Bawag*, THESTREET.COM, April 25, 2006, *available at* http://www.thestreet.com/_tscs/stocks/brokerages/10281417.html (last visited April 8, 2007).

84. *In re Refco, LLC*, Chapter 11, U.S. Bankruptcy Court Southern District of New York, Case No. 05-60134, docket *available at* <http://www.pacer.org>, *see also* Refco Bankruptcy Petition at APPENDIX (CD-ROM), and *available at* <http://www.refcoclassaction.com/CH11.pdf> (last visited April 8, 2007);

85. See APPENDIX (CD-ROM), Refco Oct. 17, 2005 Ch. 11 Bankruptcy petition (SDNY) at p. 10.

86. See *Id.* (“The list of unsecured creditors excludes: “(1) persons who come within the definition of “insider” set forth in 11 U.S.C. 101 or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 50 largest unsecured claims.”)

87. *Id.* at p. 19, *n.1.*

88. Shares of Refco common stock closed at \$0.25 on April 13, 2007 (43,052,000 x \$0.25 = \$10,763,000.00). See <http://finance.yahoo.com/q?s=RFXCQ.PK&d=t> (last visited April 9, 2007).

89. James Politi and David Wighton, *JC Flowers team quits auction of Refco brokerage unit*, FINANCIAL TIMES, Oct. 25, 2006 (“A consortium led by private equity group JC Flowers last night pulled out of the bidding for the futures brokerage unit of bankrupt Refco, the firm’s lawyer told a bankruptcy hearing.”). See also Oct. 17, 2005 Memorandum of Understanding between Refco, Inc. and JC Flowers, *available at* http://www.sec.gov/Archives/edgar/data/1321746/000095017205003277/ex99_2.txt (last visited April 3, 2007).

90. Alistair Barr, *Man Group Wins Refco LLC; price set at \$323M*, MARKETWATCH, Nov. 10, 2005.

Refco LLC’s decision to transfer accounts to Man Group under a Chapter 7 bankruptcy filing may help the hedge-fund firm shield itself from litigation, according to one legal expert.

‘In a Chapter 7 filing, you get a court order that pretty much protects the buyer from liabilities of the seller, with a few exceptions,’ Fred Lipman, a partner at law firm Blank Rome LLP, said. ‘It’s not perfect, but it’s the most protective way of selling assets in a situation like this.’

Id. See also Civil RICO Complaint in the matter captioned *EagleTech Communications, Inc., et al. v. Citigroup, Inc., et al.*, Case No. 07007880 Florida Circuit Court (17th Judicial Circuit, Broward County), Complaint filed April 10, 2007 (Naming Man Group, PLC as a defendant and alleging it has indirect connections to the Luchese organized crime family as the clearing broker in a series of trades related to an alleged “PIPE” stock manipulation scheme), *see* p. 26, (numerated ¶ 2), Complaint *available at* http://www.internationalshareholdersgroup.com/pdf/EagleTech_v_Citigroup_Complaint_Filestamped.pdf (last visited April 13, 2007).

91. See, e.g., Julia Werdigier, *Man Group, the Large British Hedge Fund, Plans to Spin Off Its Brokerage Unit*, N.Y. TIMES, Mar. 31, 2007, *available at* <http://www.nytimes.com/2007/03/31/business/worldbusiness/31hedge.html> (last visited April 3, 2007); *see also* *Man Financial NYSE IPO*, BANKING NEWSLINK, GLOBAL NEWS WIRE, Apr. 3, 2007.

Man Group confirmed that it would float Man Financial on the New York Stock Exchange subject to shareholder and regulatory approvals. Man Financial is the US derivatives brokerage business. The business will be renamed MF Global at the time of the separation. Man Group do not say what holding they will maintain, only that a majority shareholding will be offered in the IPO. They expect the IPO to happen during the third quarter [of 2007].

Id.

92. *Judge says he will OK Refco's plan for leaving bankruptcy*, CHICAGO TRIBUNE, Dec. 16, 2006, available at <http://www.chicagotribune.com/business/chi-0612160043dec16,0,2949965.story?coll=chi-business-hed> (last visited April 9, 2007).

NEW YORK -- A federal judge Friday signed off on Refco Inc.'s Chapter 11 plan, clearing the way for the commodities brokerage to exit bankruptcy by paying creditors a fraction of the \$16.8 billion they were owed.

Judge Robert Drain of the U.S. Bankruptcy Court in Manhattan said at a hearing that he would confirm the plan. 'The settlements embodied in the plan are in the best interests of the various debtors . . . and are also fair and equitable,' Drain said.

Refco, once one of the country's biggest commodity brokerages, entered bankruptcy protection in October 2005 amid allegations that its chief executive hid \$430 million in bad debt. The executive, Phillip Bennett, has pleaded not guilty to fraud charges. Refco has since sold its flagship business and is winding down its remaining operations.

In the bankruptcy plan Refco settled objections from all parties save for Sphinx Funds, a group of class-action plaintiffs and an individual creditor. Drain overruled those remaining objections. The company has said it expects to exit bankruptcy proceedings by the end of the month if the plan is approved. However, after a conference in his chambers with attorneys, Drain agreed to delay a decision on converting the case to a liquidation until a later date. . . .

The company has \$3.65 billion in cash that could be available for distribution to creditors if the company wins court authorization for its bankruptcy reorganization plan, according to court documents.

Refco LLC, which once housed Refco's flagship brokerage business, has \$664.6 million in assets, according to company documents. Refco Capital Markets Ltd., a Bermuda-based unit that was tied to many of the allegedly fraudulent transactions attributed to Bennett, has \$2.44 billion in assets. At the time it filed for Chapter 11 protection, Refco estimated its debt at \$16.8 billion. . . .

On Thursday [Dec. 14, 2006] the Austrian bank that nearly collapsed as a result of its links to Refco, Bawag PSK, said it was sold to a consortium led by Cerberus Capital Management for more than \$3 billion, of which \$200 million will go to Refco's creditors.

Id.

93. *Refco Trustee Looks to Distribute \$450M*, FORBES, April 2, 2007, available at <http://www.forbes.com/feeds/ap/2007/04/02/ap3575819.html> (last visited April 8, 2007); see also *Judge says he will OK Refco's plan for leaving bankruptcy*, CHICAGO TRIBUNE, Dec. 16, 2006, available at <http://www.chicagotribune.com/business/chi-0612160043dec16,0,2949965.story?coll=chi-business-hed> (last visited April 9, 2007). See also *Goldin Forgoes a \$2.4M Fee on Refco Work*, Forbes, April 10, 2007, available at <http://www.forbes.com/feeds/ap/2007/04/10/ap3599979.html> (last visited April 11, 2007).

("In January, Refco said it paid at least \$145.3 million to the army of lawyers and restructuring professionals working on its bankruptcy case.").

94. DÈR STANDARD (Oliver Schopf) political cartoon, *available at* http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/bawag2.jpg (last visited April 5, 2007).

95. *See EUR 450 Million Capital Injection for BAWAG P.S.K. Austrian Banks and Insurance Companies Agree to Provide Support*, Austrian National Bank Press Release, June 16, 2006, *available at* http://www.oenb.at/en/presse_pub/aussendungen/2006/2006q2/eur_450_million_capital_injection_for_bawag_psk.jsp#tcm:16-42617 (last visited April 8, 2007) ("In a first move to bail out BAWAG P.S.K., the Austrian parliament approved a federal act in mid-May that provided the basis for a EUR 900 million government guarantee."). *Id.*

96. *See* Vernon Silver, *et al.*, *supra* note 9.

97. *See EUR 450 Million Capital Injection for BAWAG P.S.K. Austrian Banks and Insurance Companies Agree to Provide Support*, Austrian National Bank Press Release, June 16, 2006, *available at* http://www.oenb.at/en/presse_pub/aussendungen/2006/2006q2/eur_450_million_capital_injection_for_bawag_psk.jsp#tcm:16-42617 (last visited April 8, 2007).

The Oesterreichische Nationalbank (OeNB), the largest Austrian banks and insurance companies as well as the Austrian federal government have agreed on a support deal to ensure normal operations at BAWAG P.S.K. until the group's planned sale. Prior to this decision, several key legal issues had been clarified by the Austrian Financial Market Authority and the Federal Ministry of Finance.

Under the deal agreed upon, the four credit institutions BA-CA, Erste Bank, ÖVAG and RZB and the four insurance corporations Allianz, Generali, Uniqa and Wiener Städtische founded two corporations on Wednesday to provide support for BAWAG P.S.K. While BA-CA, Erste Bank and RZB will each contribute EUR 100 million and ÖVAG EUR 50 million in capital to one corporation, each of the four insurance companies will contribute EUR 25 million to the second corporation. BAWAG P.S.K. will hold a controlling stake of 20% in both corporations.

This arrangement enables BAWAG P.S.K. to increase its eligible capital (tier 1 capital) by EUR 450 million. As a group, BAWAG P.S.K. thus again achieves an adequate capital ratio. To limit the risk exposure for the participating banks and insurance corporations as much as possible, the funds provided maybe invested exclusively in top-rated euro government bonds.

Id.

98. Matthias Wabl, *€3.6 billion withdrawn from Bawag deposits*, INT'L HERALD TRIBUNE, April 4, 2007, *available at* <http://www.iht.com/articles/2007/04/03/bloomberg/bxmmove.php> (last visited April 5, 2007).

Customers of Bawag Bank, the Austrian lender that was sued by creditors of the bankrupt futures trader Refco, last year withdrew €3.6 billion from their savings accounts. Savings deposits dropped to €14.6 billion, or \$19.5 billion, at the end of last year, the bank, based in Vienna, said Tuesday.

Bawag almost collapsed in May because of its ties to Refco. The bank admitted using accounts at the broker to hide hedge fund losses from 2000 to 2006. The Austrian government agreed to a € 900 million bailout in May to save the bank after customers withdrew money. The bailout followed an agreement by the bank to pay at least \$683 million to Refco creditors for its role in the broker's bankruptcy. The creditors accused

Bawag of helping Refco to defraud investors. Bawag has not admitted or disputed the claims. Bawag in December agreed to be bought by a U.S. private equity firm, Cerberus Capital Management, for €2.6 billion.

Id.; see also *BAWAG P.S.K. Closes an Eventful 2006 with Positive Results (03.04.2007)*, BAWAG Press Release, April 3, 2007, available at http://www.bawag.com/_Contentpool/UeberUns/Presse/Presse_en/03_04_2007_en,templateId=renderCluster,setId=bawag,31196=Home,120994=Current_20Press_20Releases,120994=clusterRoot,199736=currentDoc.html (last visited April 6, 2007).

Consolidation and stabilization of the Balance Sheet

The Group had assets of € 50.8 billion at 31 December 2006. This was roughly € 7.1 billion or 12.2 per cent less than at year-end 2005, which was attributable to extraordinary events during the first half of 2006 and the remedial measures that followed.

Under liabilities, savings deposits fell by € 3.6 billion to € 14.6 billion; payables to banks were reduced by € 2.4 billion to € 5 billion.

On the assets side, the Bank sold liquid securities, diminishing its holdings of current financial assets by € 5.3 billion to € 8.3 billion. The personal loans portfolio grew by 5 per cent to € 6.2 billion; lending to SMEs also developed well. In total, receivables from customers decreased by € 1.7 billion to € 27.6 billion.

The BAWAG P.S.K. Group recorded total equity of € 3,514 million at 31 December 2006. The equity ratio was 12.5 per cent. The core capital (Tier I) of the BAWAG P.S.K. Group was € 2,573 million, or 9.1 per cent. [bolds in original].

Id.; see also *BAWAG P.S.K. signs Agreement on Global Loan with the European Investment Bank in Luxembourg (12.12.2006)*, BAWAG PRESS RELEASE, Dec. 12, 2006, available at http://www.bawag.com/_Contentpool/UeberUns/Presse/Presse_en/12_12_2006_en,templateId=renderCluster,setId=bawag,31196=Home,120994=Current_20Press_20Releases,120994=clusterRoot,189090=currentDoc.html (last visited April 6, 2007).

99. Matthias Wabl, *€3.6 billion withdrawn from Bawag deposits*, INT'L HERALD TRIBUNE, April 4, 2007, available at <http://www.ihf.com/articles/2007/04/03/bloomberg/bxmove.php> (last visited April 5, 2007).

100. See *Moody's changes outlook for BAWAG P.S.K. Financial Strength Rating to positive (18.12.2006)*, BAWAG Press Release, Dec. 18, 2006, available at http://www.bawag.com/_Contentpool/UeberUns/Presse/Presse_en/18_12_2006_en,templateId=renderCluster,setId=bawag,31196=Home,120994=Current_20Press_20Releases,120994=clusterRoot,189748=currentDoc.html (last visited April 6, 2007).

101. The European Investment Bank characterizes itself as the “[l]ending institution set up to finance capital investment furthering European integration by promoting EU economic policies.” See <http://www.eib.europa.eu/> (last visited April 7, 2007).

102. Chris Gillibrand, *supra* note 15.

103. BAWAG lost its estimated \$13.2 million stake in a gambling casino in Jericho in the Palestine West Bank. Run by an investment group allegedly fronting for PLO Chairman, Yasser Arafat, the casino raked in large profits, but closed about a month after a violent Palestinian uprising in October 2000 that caused significant damage to the casino's exterior and drove tourist money to other gambling locales. *Refco Bank Hid USD 1 Billion Loss from Hedge Funds, Arafat Casino*, AUSTRIA TODAY, June 22, 2006;

see also *Bawag Used Refco to Help Mask Almost EU1 Billion Loss (Update7)*, BLOOMBERG, March 24, 2006, available at http://www.bloomberg.com/apps/news?pid=10000085&refer=europe&sid=aDqt_Mdn6iwU (last visited April 8, 2007); see also Vernon Silver, *et al.*, *supra* note 9. (“BAWAG also jeopardized the deposits of 1.3 million school teachers, mechanics and other workers across Austria by funneling undisclosed loans to Refco and becoming entangled in Yasser Arafat’s casino.”). *Id.*

104. Eric Frey, *Bawag admits closer Refco Link*, FINANCIAL TIMES, April 29, 2006; see also Haig Simonian, *Bawag suitors warned about likely loss due to withdrawals*, FINANCIAL TIMES, Oct. 9, 2006, available at <http://search.ft.com/iab?queryText=BAWAG&y=0&aje=true&x=0&id=061009000956&location=http%3A%2F%2Fsearch.ft.com%2FftArticle%3FqueryText%3DBAWAG%26y%3D0%26aje%3Dtrue%26x%3D0%26id%3D061009000956&referer=http%3A%2F%2Fsearch.ft.com%2Fsearch%3FqueryText%3DBAWAG> (last visited April 6, 2007).

Prospective buyers of Bawag have been warned the embattled Austrian, trade union-owned bank faces a big loss this year after heavy withdrawals by depositors. A 500-page memorandum sent by Morgan Stanley forecasts Austria's fourth-biggest bank will lose a net €20.3m (\$25.5m) in 2006, according to today's *Profil* news magazine.

105. Gusenbauer pressures ÖGB to renew itself, Austria Today, Jan. 23, 2007 (“Earlier, ÖGB Acting President Rudolf Hundstorfer pledged that ÖGB would make a new start after having been victimised in the BAWAG scandal, which had almost put the organisation ‘on our knees.’”).

106. DËR STANDARD (Oliver Schopf) political cartoon, available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/cerberus.jpg (last visited April 5, 2007) (Caption reads: “US Fund Cerberus buys Austrian Bank for Labour and Economy (BAWAG)”).

107. David Carey and Adrew Bulkeley, *Cerberus Group to Acquire Bawag*, DAILY DEAL, Dec. 18, 2006.

108. Lenka Ponikelská, *Bid deadline passes*, *supra* note 12.

109. Cerebus Capital is also the 51 percent owner of U.S. consumer credit outfit, General Motors Acceptance Corp. (“GMAC”), see e.g., Chris Isidore, *GM profitable but misses forecasts*, CNNMONEY.COM, March 14, 2007, available at <http://money.cnn.com/2007/03/14/news/companies/gm/index.htm?postversion=2007031412> (last visited April 7, 2007).

110. See Former U.S. Treasury Secretary John W. Snow’s official biography, available at <http://www.treas.gov/organization/bios/snow-e.html> (last visited April 8, 2007); see also Kevin Carmichael, *Funds: In new role, Snow urges ‘lighter’ regulatory touch*, INT’L HERALD TRIBUNE, Nov. 21, 2006, available at <http://www.iht.com/bin/print.php?id=3349226> (last visited Mar. 26, 2007).

111. See *Refco Collapse May Force Austria’s Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007).

‘Bawag may need to tighten its lending procedures,’ said Hannes Androsch, 67, a former finance minister and ex-CEO of Creditanstalt-Bankverein AG, which merged with Bank Austria AG in 1997 to form the country’s biggest bank. . . .

Bawag and the Austrian regulator may need to do more to restore confidence, said Androsch, the former finance minister who's now an investor in Vienna-based online gambling firm Betandwin.com Interactive Entertainment AG.

'In a critical situation, a bank should publish all the information that is necessary to ensure confidence,' he said.

Id.; see also Dec. 15, 2006 BAWAG CEO Nowotny letter to customers, available at http://www.bawagpsk.com/bawagpsk/Verkauf/Verkauf__en/Kundenbrief__en__pdf,property=Data.pdf (last visited April 7, 2007); see also Dec. 15, 2006 statement of Generali Gruppe CEO Sergio Balbinot, noting the sale of insurance of as a strategic aspect of Generali's investment in BAWAG, available at http://www.generali.at/_C1256A6F0044EA06.nsf/ie/83C71D66376CAAC6C12572450052031E?OpenDocument (last visited April 7, 2007).

The CEO of the world-wide Generali Group, Sergio Balbinot, congratulated its Austrian subsidiary on this 'strategically most important success in the last 15 years.' Balbinot: 'In this way General will achieve its strategic aim of getting a bank as distribution partner that covers the entire area. BAWAG P.S.K. and Austrian Post Office offer a significant supplement to the distribution channel mix of Generali in Austria, above all regarding personal insurance. Generali is going to increase its dynamics considerably.'

Id.

112. Lenka Ponikelská, *Bid deadline passes, supra* note 12; see also Haig Simonian, *Sale does not close Bawag scandal*, FINANCIAL TIMES, Dec. 15, 2006, available at <http://search.ft.com/ftArticle?queryText=BAWAG&y=0&aje=true&x=0&id=061215007121> (last visited April 6, 2007); see also *New owners bring BAWAG P.S.K. security, stability and interesting opportunities for development (15.12.2006)*, BAWAG Press Release, Dec. 15, 2006, available at http://www.bawag.com/_Contentpool/UeberUns/Presse/Presse__en/15__12__2006__en,templateId=renderCluster,setId=bawag,31196=Home,120994=Current_20Press_20Releases,120994=clusterRoot,189424=currentDoc.html (last visited April 6, 2007).

'With the investment company Cerberus, BAWAG P.S.K. will have a financially strong owner that is active internationally and has succeeded in an intensive bidding competition,' emphasized CEO Ewald Nowotny. 'The involvement of the Austrian partners, Wüstenrot, Generali and group of industrialists including Dr. Androsch, offers many strategically interesting opportunities for the future development of BAWAG P.S.K. The close cooperation with the Austrian Post Office will of course be continued. . . .'

About Cerberus:

Established in 1992, Cerberus Capital Management, L.P. is one of the world's leading private investment firms with approximately \$22 billion under management in funds and accounts. Through its team of more than 275 investment and operations professionals, Cerberus specializes in providing both financial resources and operational expertise to help transform undervalued companies into industry leaders for long-term success and value creation. Cerberus is headquartered in New York City, with affiliate and/or advisory offices in Chicago, Los Angeles, Atlanta, London, Baarn, Frankfurt, Tokyo, Osaka and Taipei. More information on Cerberus can be found at www.cerberuscapital.com.

Id.; see also Matthias Wabl, *€3.6 billion withdrawn from Bawag deposits*, INT'L HERALD TRIBUNE, April 4, 2007, available at <http://www.iht.com/articles/2007/04/03/bloomberg/bxmove.php> (last visited April 5, 2007) ('[BAWAG] [s]avings deposits dropped to €14.6 billion or \$19.5 billion, at the end of last year,...'); see also *BAWAG P.S.K. - Purchase Contract Signed (02.01.2007)*, BAWAG Press Release, February 1,

2007, available at

http://www.bawag.com/_Contentpool/UeberUns/Presse/Presse_en/02_01_2007_en.templateId=renderCluster,setId=bawag,31196=Home,120994=Current_20Press_20Releases,120994=clusterRoot,190610=currenrentDoc.html (last visited April 6, 2007).

113. *Austrian bank with U.S. owners closes Cuban's account*, MIAMI HERALD, April 13, 2007, available at <http://www.miamiherald.com/579/story/72851.html> (last visited April 14, 2007).

114. *Austrian bank bought by U.S.-headed consortium tells Cuban-born customer to go elsewhere*, INT'L HERALD TRIBUNE, April 13, 2007, available at <http://www.iht.com/articles/ap/2007/04/13/europe/EU-GEN-Austria-Cuban-Penalized.php> (last visited April 14, 2007).

In an e-mailed statement, the bank said that U.S. sanctions prohibit 'U.S. companies or consortiums to maintain business contacts with Cuba, Cuban companies or individuals of Cuban nationality, wherever these may be located or be domiciled.'

'This prohibition extends also to non-U.S. ... companies that are owned or controlled by U.S. individuals or U.S. companies. The latter applies to BAWAG P.S.K. as well, through its acquisition by Cerberus.'

A U.S. official, who asked for anonymity in exchange for commenting on the issue, said 'about 100 dual nationals were affected,' adding those who retained Cuban citizenship even while acquiring a new one were still subject to The Cuban Assets Control Regulations prohibiting United States citizens and corporations from doing business with Cuba or Cuban nationals.

Id.

115. *BAWAG closes Cuban, Iranian accounts to enable acquisition by Cerberus of US*, ABCMONEY.CO.UK (U.K.), April 16, 2007, available at <http://www.abcmoney.co.uk/news/16200756577.htm> (last visited April 16, 2007).

116. *Austrian bank bought by U.S. consortium tells Cuban-born customer to go elsewhere*, DAILY MAINICHI NEWS (Japan), April 14, 2007, available at <http://mdn.mainichi-msn.co.jp/international/europe/news/20070414p2g00m0in014000c.html> (last visited April 14, 2007).

117. *See Arcapita raises USD1.1 billion in oversubscribed Murabaha offering*, AMEINFO (Arcapita Press Release) April 16, 2007, available at <http://www.ameinfo.com/116876.html> (last visited April 16, 2007). ("The Mandated Lead Arrangers were then joined in general syndication by BAWAG P.S.K AG,..."). *Id.*

118. George Jahn, *Austrian bank won't serve Cubans*, BUSINESSWEEK, April 13, 2007, available at <http://www.businessweek.com/ap/financialnews/D8OFTMV80.htm> (last visited April 14, 2007).

119. *See Id.*; *see also Austrian Bank Won't Serve Cubans*, GUARDIAN UNLIMITED (UK), April 13, 2007, available at <http://www.guardian.co.uk/worldlatest/story/0,-6556120,00.html> (last visited April 14, 2007). *See also US-owned bank shuns Cuban-born customer*, THE SCOTSMAN, April 14, 2007, available at <http://thescotsman.scotsman.com/international.cfm?id=572822007> (last visited April 14, 2007) ("A bank spokeswoman was quoted as saying that the bank's policy 'affects only a few dozen customers.'"). *Id.*

120. Pat Maadi, *supra* note, 79.

121. George Jahn, *Austrian Bank Won't Serve Cubans*, FORBES, April 13, 2007, available at <http://www.forbes.com/feeds/ap/2007/04/13/ap3611656.html> (last visited April 14, 2007).

122. George Jahn, *Austrian Bank Won't Serve Cubans*, WASHINGTON POST, April 13, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041301357.html> (last visited April 14, 2007).

123. Pat Maadi, *supra* note, 79.

124. *See, e.g., U.S. accepts Cuban defector's pitch for asylum*, CNN.COM, Dec. 31, 1997, available at <http://www.cnn.com/WORLD/9712/31/cuba.defectors/> (last visited April 14, 2007).

125. *Bank to Ask U.S. for Cuban Exemption*, FORBES, April 20, 2007, available at <http://www.forbes.com/feeds/ap/2007/04/20/ap3635474.html> (last visited April 20, 2007). *See also BAWAG intends future acquisitions*, THOMPSON FINANCIAL via HEMSCOTT NEWS, May 25, 2007, available at <http://www.hemscott.com/news/latest-news/item.do?newsId=43853763921892> *see also Austria charges bank after Cuban accounts cancelled*, Reuters, April 27, 2007, available at <http://www.reuters.com/article/governmentFilingsNews/idUSL2711446820070427> Austrian foreign minister Ursula Plassnik informed reporters on April 26, 2007:

BAWAG, Austria's fifth-largest bank, told around 100 Cuban clients earlier this month that it had to cancel their accounts because U.S. sanctions against Cuba meant Cerberus could not buy BAWAG if it kept them as clients.

Plassnik told Austria's parliament late last evening that BAWAG had violated EU rules against implementing the U.S. Cuban sanctions on European soil, and that she had therefore launched proceedings against BAWAG.

'U.S. law is not applicable in Austria. We are not the 51st of the United States,' Plassnik said. 'Neither the EU nor the U.N. have implemented a general economic or contact embargo against Iran or Cuba.'

Id.

126. DÈR STANDARD (Oliver Schopf) political cartoon, available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/csi.jpg (last visited April 5, 2007) (Caption reads: In Sachen Eurofighter und Banken wird jetzt fieberhaft in alle Richtungen ermittelt. Translated: "In things Eurofighter and banks is determined now feverish into all directions.").

127. Financial Markets Supervisory Agency Act of 2002, available at <http://www.fma.gv.at/cms/site/EN/einzel.html?channel=CH0378#anker1> (last visited April 4, 2007).

128. The Austrian Bank Committee is investigating the role of the FMA in the BAWAG debacle, *see Bank Committee Investigates BAWAG Affair*, AUSTRIA TODAY, Dec. 19, 2006.

The bank committee launched an investigation into the BAWAG affair at its last meeting before Christmas. In particular, the committee investigates the role of the Financial Market Authority (FMA). One of the responsible persons is the former BAWAG general manager Helmüt Elsner. The chairman of the committee Martin Graf (FPOe) pleaded to the responsible district court in Vienna to issue a criminal verdict against Elsner. SPOe was pleased with the suggestion, unlike the OeVP. The Greens already expressed doubts regarding this suggestion. The next prominent witness was Gertrude Tumpel Gugerell. The director of the European Central Bank was also involved in the Caribbean business of the bank. Against Gertrude Tumpel Gugerell stands a reproach from the former member of BAWAG board of directors, Christian Buettner. Tumpel Gugerell already disclaimed all reproaches. Christian Buettner also testified before the committee as a member of the Executive Board of the Financial Market Authority (FMA). The witnesses' line-up wrapped up Heinrich Traumueller and several top officials of the Treasury.

Id.

129. Finanzmarktaufsichtsbehörde (Österreich) (Austrian Financial Market Authority (FMA)) website (English version), “About Us,” *located at* <http://www.fma.gv.at/cms/site/EN/einzel.html?channel=CH0036> (last visited April 8, 2007).

130. Oesterreichische Nationalbank (OeNB) (“Austrian National Bank”), website (English version) *located at* http://www.oenb.at/en/ueber_die_oenb/about_the_oenb.jsp (last visited April 8, 2007).

The Oesterreichische Nationalbank (OeNB) is the central bank of the Republic of Austria and, as such, an integral part of both the European System of Central Banks (ESCB) and the Eurosystem. In the public interest, the OeNB contributes to monetary and economic policy decision making in Austria and in the euro area. In line with the Federal Act on the Oesterreichische Nationalbank (1984 Nationalbank Act – NBG), the OeNB is a stock corporation. Given its status as a central bank, it is, however, governed by a number of special provisions, as laid down in the Nationalbank Act. The OeNB’s capital totals EUR 12 million, 70% of which is held by the federal government and 30% of which is owned by employer and employee organizations as well as banks and insurance corporations.

Id.

131. Austrian Financial Market Authority, *located at* <http://www.fma.gv.at/cms/basel2/EN/index.html> (last visited April 8, 2007).

132. *See generally*, Gramm-Leach-Bliley Act of 1999, 15 U.S.C. 6801, *et seq.*

133. *See, e.g.*, Carl Felsenfeld, *Banking Regulation in the United States*, p. 17 (see diagram illustrating the U.S. “dual banking” system and overlapping regulatory functions), Juris Publishing (2004).

135. *See* Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance - Bundesgesetz, mit dem das Versicherungsaufsichtsgesetz, das Kartellgesetz 1988, das Versicherungssteuergesetz 1953, das Versicherungsvertragsgesetz 1958, das Atomhaftungsgesetz 1999, das Bundesgesetz über den erweiterten Schutz der Verkehrssopfer, das Finanzmarktaufsichtsbehördengesetz, das Börsegesetz und das Bankwesengesetz geändert werden (VAG-Novelle 03). BGBl für Österreich Teil I n.33 vom 11/06/2003 p. 159; *see also* Bundesgesetz, mit dem das Bankwesengesetz, das Finanzmarktaufsichtsbehördengesetz, das E-Geldgesetz, das Sparkassengesetz, das Wertpapieraufsichtsgesetz, das Finanzkonglomeratengesetz, das Börsegesetz 1989, das Pensionskassengesetz und das Betriebliche Mitarbeitervorsorgegesetz geändert werden; *available at* <http://www.fma.gv.at/cms/op/EN/einzel.html?channel=CH0457> (last visited April 20, 2007); *see also* BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH (German only) *available at* <http://www.fma.gv.at/cms/op/attachments/4/9/3/CH0256/CMS1155291004561/findbgbl.pdf> (last visited April 20, 2007); *see also* Bundesgesetz, mit dem das Investmentfondsgesetz, das Immobilien- ... Außerkrafttreten der Börsenumsatzsteuer und über das Investmentfondsgesetz *available at* <http://www.rcm.at/de/g1000/g1200.contentpar.0004.file1.tmp/InvFG%202006.pdf> (last visited April 20, 2007); *see also* Artikel II. Änderung des Versicherungsaufsichtsgesetzes. Das Versicherungsaufsichtsgesetz, BGBl. Nr. 569/1978, *available at* http://www.parlinkom.gv.at/pls/portal/docs/page/PG/DE/XXIII/ME/ME_00037/fname_073973.pdf (last visited April 20, 2007).

136. FMA web site, Organisation Description, *available at* <http://www.fma.gv.at/cms/site/EN/detail.html?doc=CMS1144401750029&channel=CH0041> (last visited April 20, 2007).

137. *Red-black struggle over financial market oversight authority*, AUSTRIA TODAY, Jan. 29, 2007.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Kurt Pribil, one of FMA's two chiefs, will remain in office, but Heinrich Traumüller, the other, is expected to be replaced by Helmut Ettl, close to the SPÖ. If ÖeNB were to become partially responsible for bank oversight, it could raise a question of conflict of interest since many banks have an interest in ÖeNB. BAWAG bank and its former owner, the Austrian Trade Union Federation, had to sell their interests in OeNB last year because of the scandal at BAWAG. The state has a 70-per-cent interest in OeNB, which it has become involved in bank oversight and would welcome more, which the SPÖ and some Austrian banks would also support.

Id.

142. *Bawag in Rescue Battle for Osterreichische Post Staff*, FINANCIAL TIMES, Sept. 19, 2000.

143. *See Refco Collapse May Force Austria's Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007).

144. *See Id.*

145. *See* Ian Rodger, *Bawag spotlight shifts offshore – How the Austrian bank bolstered its earnings*, FINANCIAL TIMES, May 26, 1994.

146. Chris Gillibrand, *supra* note 15.

147. *Id.*

148. DER STANDARD (Oliver Schopf) political cartoon, available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/krot.jpg (last visited April 5, 2007).

149. Chris Gillibrand, *supra* note 15. (When the FMA was created in 2002, various Finance Ministry staff members were transferred to the FMA but the incriminating report resulting from the 2000 audit was not provided to the new agency). *Id.*

150. *FPOe wants the resignation of Grassler and Tumpel*, AUSTRIA TODAY, July 3, 2006.

151. *Id.*

152. *See* Edward Taylor, Carrick Mollenkamp, and Wall Street Journal Staff Reporters, *Bawag Scrutiny Mounts, Putting CEO to the Test*, Wall St. J., Oct. 21, 2005, available at http://users1.wsj.com/lmda/do/checkLogin?mg=wsj-users1&url=http%3A%2F%2Fonline.wsj.com%2Farticle_print%2F5B1129847485 (last visited Jan. 27, 2007).

An unwelcome spotlight is suddenly shining on Johann Zwettler, chief executive and 39-year veteran of Bawag P.S.K. Group, the Austrian bank caught up in the Refco Inc. scandal. On Monday [Oct. 24, 2005], officials from the Austrian National Bank and the Financial Market Authority plan an on-site examination of Bawag, a person familiar with the situation said, as they seek to uncover the circumstances that led the bank earlier this

month to provide a thinly collateralized loan of some \$420 million to Refco Chief Executive Phillip R. Bennett and an entity he controlled.

Id.

153. Pat Maadi, *Anger over Bawag closure of accounts*, WIENERZEITUNG.AT, April 17, 2007, available at, <http://www.wienerzeitung.at/DesktopDefault.aspx?TabID=4082&Alias=wzo&cob=280033> (last visited April 17, 2007).

154. *See Refco Collapse May Force Austria's Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007).

Austrian banks have attracted foreign investments because of banking secrecy laws that withstood calls from the European Union for more transparency. More than a third of the industry's assets, or 234 billion euros, originated from foreign clients, according to Austria's central bank. That compares with about 20 percent in Germany.

'Austria has always been somewhat opaque,' said Ingo Walter, a professor at New York University's Stern School of Business and the author of 'Global Banking' published in 2003 by Oxford University Press. In Austria, 'personal relationships play an important role.'

Id.

155. Chris Gillibrand, *supra* note 15.

156. *See* Fiona Flanagan, *Oesterreichische Post to enter into final talks for minority stake in BAWAG*, FORBES, Apr. 17, 2007, available at <http://www.forbes.com/markets/feeds/afx/2007/04/17/afx3621118.html> (last visited April 17, 2007).

157. *See also Refco Collapse May Force Austria's Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007).

Regulators ultimately may decide that the matter is an example of a once-productive relationship gone sour, said Wolfgang Ulrich, CEO of Bank Burgenland, an Austrian regional lender. 'Sometimes, there are customers whom you've trusted for 20 years and then it turns out that you had a wrong picture of that person for the entire period,' said Ulrich, who has known Zwettler since the early 1970s.

Id.

158. Herbert Trumpel is the Labour Chamber President. *See* Elsner gave gifts to many politicians, Austria Today, Mar. 16, 2007. The largest gift was to Labour Chamber President Herbert Tumpel.

159. Dr. Klaus Liebscher is the Governor of the Austrian Central Bank (OeNB). *See Welcomes Agreement on Capital-strengthening Measures*, AUSTRIA TODAY, June 16, 2006.

160. *Bank Committee Investigates Bawag Affair*, AUSTRIA TODAY, Dec. 19, 2006. (Gertrude Tumpel-Gugerell, "director of the European Central Bank was also involved in the Carribean business of the bank [BAWAG]."). *See also ECB Tumpel-Gugerell CLD Quit ECB for Austrian Bank Job*, MARKET NEWS INTERNATIONAL.

European Central Bank Executive Board member Gertrude Tumpel-Gugerell is considered a favourite to become the new head of Austrian Bank Bawag, Austrian daily Die Presse reported over the weekend.

Previous Director-General Johann Zwettler resigned his post last week and Tumpel-Gugerell is seen as a likely replacement given her close links to the Social Democrat party in Austria, in turn seen as politically close to Bawag.

Although Tumpel-Gugerell has reportedly said she does not want to move from Frankfurt, she could give in to political pressure from the Social Democrats, Die Presse reports, speculating that this might improve her chances of clinching the job as Governor of the National Bank of Austria if there is a change of government.

Id.

161. Chris Gillibrand, *supra* note 15. (“No more audits were performed on BAWAG in the following years. Neither the Governor of the National Bank of Austria, Klaus Liebscher who is near to the Austrian People’s Party nor his Deputy, Gertrude Tumpel-Gugerell, who was responsible for financial market oversight thought them necessary.”); *see also* Ian Rodger, *Bawag spotlight shifts offshore – How the Austrian bank bolstered its earning*, FINANCIAL TIMES, May 26, 1994. The Austrian Government first learned in 1994 about Bawag’s:

... offshore investment structures operated secretly for several years by the bank’s chief [Walter Flöttl] executive and his son [Wolfgang] have progressed, the explanation for this exceptional performance has become much clearer.

Austrian bankers have pointed out that the amounts involved were more than double Bawag’s own capital. If something had gone wrong, the bank could have been wiped out.

Austrian banking supervisors are embarrassed by the whole affair. They admit that it exposes not only failures of the bank’s own risk management and internal audit functions but also lacunae in the regulatory apparatus.

Mr Erwin Schmidbauer, director of financial markets in the Austrian National Bank, said the central bank first noticed that Bawag was up to something unusual last year by studying Bank for International Settlements (BIS) bank exposure statistics.

Id.

162. Chris Gillibrand, *supra* note 15.

163. *Id.*

164. *See* European Central Bank website, *located at* <http://www.ecb.int/> (last visited April 8, 2007).

165. *See* Executive Board Member of the European Central Bank (biography), *available at* <http://www.ecb.int/ecb/orga/decisions/html/cvtumpel-gugerell.en.html> (last visited April 8, 2007).

166. Chris Gillibrand, *supra* note 15; *see also* Gertrude Tumpel-Gugerell, Executive Board Member of the European Central Bank (biography), *available at* <http://www.ecb.int/ecb/orga/decisions/html/cvtumpel-gugerell.en.html> (last visited April 8, 2007). The remaining five members of the ECB Executive Board are: (President) Lucas D. Papademos; (Vice-President) Lorenzo Bini Smaghi; Jean-Claude Trichet; José Manuel González-Páramo; and, Jürgen Stark. *Id.*

167. Herbert Trumpe is the Labour Chamber President. *See Elsner gave gifts to many politicians*, AUSTRIA TODAY, Mar. 16, 2007.

'Die Presse' reported Friday that BAWAG P.S.K. bank during the time when Helmut Elsner was its chief gave gifts to many politicians and other Austrians from 1995 to 2005. The 368 recipients received gifts worth 200 to 300 euros, on average. Labour Chamber President Herbert Tumpel heads the list in terms of value, having received gifts worth 2,166 euros. Private employees union chief Wolfgang Katzian, civil servant union boss Fritz Neugebauer and union official Rudolf Kaske are close behind. All have received gifts worth more than 2,000 euros. Even President Heinz Fischer has received gifts worth a few euros. The newspaper added that its list was not complete. Suspended police chief Roland Horngacher, for example, is listed as having received gifts worth only eight euros, but Die Presse said that he had gotten travel vouchers worth more than 8,000 euros from BAWAG.

Id.

168. Tumpel is "the former chairman of Chamber for Labor (AK) [and] was also chairman of BAWAG's supervisory board." *OGB Dismisses Verzetnitch*, AUSTRIA TODAY, May 3, 2006; *see also BZÖ deals sweeping blow to Tumpel, SPÖ and ÖNB*, March 30, 2006, AUSTRIA TODAY.

While behind thick clouds a partial eclipse of the sun took place around midday, the BZÖ posed 13 questions in parliament aimed at shedding light on the Bawag financial scandal which, according to the BZÖ, might have caused considerable damage to Austria's financial sector as a whole. They demand a full investigation by the Finance Ministry into the bank's investments.

The BZÖ identifies the major perpetrators in the scandal to be the former head of the Bawag supervisory board Günther Weninger and the president of the chamber of labour Herbert Tumpel. The party also sees Tumpel's wife, former Vice governor of the Austrian National Bank (ÖNB) Gertrude Tumpel-Gugerell, as having failed to reveal the Bawag's high-risk investments in the course of various audits. Mainly, however, the BZÖ blames the opposition party SPÖ for its "entanglement in union-owned banks". This scandal was just another example of the SPÖ's bad financial policies, the BZÖ which is junior partner in the government coalition said. The SPÖ warned the BZÖ against making it a scapegoat in the financial scandal and denied any wrongdoing. Similarly Tumpel, who was a member of the Bawag's supervisory board, and the ÖNB denied having known about any of the bank's illegal dealings.

Id.

169. Chris Gillibrand, *supra* note 15. ("Gertrude Tumpel-Gugerell is herself 'near' to the Socialist Party; so near in fact that her husband is Herbert Tumpel, President of the Chamber of Workers. Herr Tumpel has a past-life as Chairman of the Supervisory Board of BAWAG when the Flöttl were undertaking transactions under the codeword 'Special Business.'"); *see also FPOe wants the resignation of Grasser and Tumpel*, AUSTRIA TODAY, July 3, 2006.

[Tumpel] has been also a member and director of the supervisory board of BAWAG and knows almost everything about the Caribbean deals and transactions. Now the defence strategy of Tumpel is falling down as house of cards, the FPOe-vice-president said. 'Tumpel's wife also knows everything about the deals and I cannot believe that both of them didn't inform each other about all problems of BAWAG.'

Id.

170. *See Refco Collapse May Force Austria's Bawag to Tighten Loan Rules*, BLOOMBERG, Nov. 16, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000085&sid=aoEKr.KLPMi4&refer=europe> (last visited April 7, 2007).

The Financial Markets Authority on Nov. 11 [2005] started an investigation into why Bawag, Austria's fourth-biggest bank, loaned 350 million euros (\$410 million) to Refco Chief Executive Officer Phillip Bennett hours before the U.S. futures broker started to collapse. Bawag spokesman Thomas Heimhofer said the Vienna-based company wants the inquiry to be wrapped up as quickly as possible. . . .

The FMA conducts about 50 investigations a year. About 20 percent are caused by 'unusual events' such as the Bawag loan, said FMA spokesman Klaus Grubelnik. The agency was set up in 2002 to help regulate banks and insurers.

Id.

171. *FPOe wants the resignation of Grasser and Tumpel*, AUSTRIA TODAY, July 3, 2006.

172. *Id.*

173. *See SEC Files Settled Action Against Major Austrian Bank for Aiding And Abetting Refco Fraud*, SEC Litigation Release No. 19716, June 5, 2006, available at <http://www.sec.gov/litigation/litreleases/2006/lr19716.htm> (last visited March 17, 2007); and SEC civil enforcement complaint in the matter captioned *SEC v. BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft*, Case No. 06 CV 04222 (DC) (J. Chin, S.D.N.Y.), filed June 5, 2006, available at <http://www.sec.gov/litigation/complaints/2006/comp19716.pdf> (last visited March 17, 2007); *see also* APPENDIX (CD-ROM).

174. *See Austrian Bank "Bawag" to Pay \$337.5 million for Restitution to Victims of Refco Fraud*, U.S. DOJ PRESS RELEASE, June 5, 2006, available at <http://www.usdoj.gov/usao/nys/pressreleases/June06/bagwagnon-prosecutionagreementpr.pdf> (last visited April 5, 2007) ("against BAWAG arising from its involvement with the fraud at Refco. In total, BAWAG and the ÖGB will pay at least \$675 million in connection with the non-prosecution agreement and to settle the bankruptcy estate claims against them. The Government will distribute half of the \$337.5 million in forfeited funds to the Refco bankruptcy estate, and half to other victims of the Refco fraud."). *Id.*, *see also* APPENDIX (CD-ROM). Refco first disclosed these U.S. investigations in an October 12, 2004 Form S4 Registration Statement related to the public issuance and sale of \$600 million in senior subordinated notes related to the financing of a partial leveraged buyout of a portion of Refco's equity by private equity firm Thomas H. Lee Partners, available at <http://www.sec.gov/Archives/edgar/data/1305464/000104746904030948/a2144492zs-4.htm> (last visited April 4, 2007). Refco specifically disclosed:

SEC Investigation

In 2001, the Division of Enforcement of the SEC commenced an informal investigation into short sales of the stock of Sedona Corporation. The SEC requested that we produce documents relating to any of our accounts that traded in the stock of Sedona. In June 2001, the SEC issued a formal order of investigation into short sales of Sedona stock and other transactions. In 2002 and 2003, we received subpoenas from the SEC and a request for a written statement. Generally, the subpoenas and the request required the production of documents, tapes and information regarding two of our former brokers who handled the account of Amro International, S.A., one of our former customers that engaged through its account with us in short sales of Sedona stock and whose financial advisor settled SEC charges with respect to such short sales in February 2003; our relationship with Amro and its two principals; other securities traded by Amro; and our record keeping, supervisory and short sale policies and restrictions. Although there were issues previously raised by the SEC with respect to document production and retention by us, we believe that we have now substantially complied with those subpoenas and requests.

In October 2003, we received a subpoena from the U.S. Attorney's Office for the Southern District of New York, which called for the production of documents we had produced to the SEC. In addition to producing documents in response to the foregoing subpoenas, we have made our employees available to testify before the SEC and to be interviewed by the U.S. Attorneys' office. Refco Securities, LLC has been advised that it is not currently the subject of the U.S. Attorneys' investigation. At the present time, it is not possible to predict the outcome of the foregoing investigations with certainty.

Id. [italics in original]; *see also* SEC v. Rhino Advisors, Inc. and Thomas Badian, Feb. 27, 2003 settled SEC Enforcement complaint, at APPENDIX (CD-ROM) and available at <http://www.sec.gov/litigation/complaints/comp18003.htm> (last visited Jan. 27, 2007) (The SEC had brought (and settled) an enforcement action against the unidentified "financial advisor settled SEC charges with respect to such short sales in February 2003.") *Id.*

175. Thomas Badian fled the United States after the U.S. Attorney brought criminal charges in the Southern District of New York alleging a criminal conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 against him in this District on or about December 3, 2003 *see* USA v. Badian *et al.*, Case No. 1:03-mj-02355-UA (SDNY). Mr. Badian's last reported whereabouts were, of all places, Vienna, Austria, according to *Time Magazine*. *See* Daniel Kadlec, *Watch Out, They Bite!*, TIME, Nov. 09, 2005, available at <http://www.time.com/time/printout/0,8816,1126706,00.html> (last visited April 7, 2007).

Thomas Badian was expecting a package, just not this one. Standing in his doorway, smiling, he opened the envelope a courier handed to him. Then he froze, and the color drained from his face. It was over: after two years overseas, the former New York City hedge-fund operator had been located. Badian slammed the door of his posh Vienna, Austria, apartment in the heart of the city's embassy quarter--but not before being officially served with a civil lawsuit linking him to the beleaguered U.S. commodities firm Refco and tying him and Refco to a type of fraud that some argue has destroyed thousands of companies and bilked investors out of billions of dollars.

Id.

176. *Ex-Bawag CEO is extradited*, INT'L HERALD TRIBUNE, Feb. 14, 2007.

Elsner helped to cover up the losses over many years in offshore accounts at Refco, the now collapsed U.S. broker, and by using the assets of OeGB, the Austrian trade union federation, as collateral, according to the central bank's investigation. Bawag, formally known as Bank fur Arbeit und Wirtschaft, has also been under investigation for lending Phillip Bennett, Refco's former chief executive, several hundred million dollars just before the brokerage firm filed for bankruptcy in 2005.

Id. see also Vernon Silver, *et al.*, *supra* note 9.

Elsner, 72, [spent] his time on France's Côte d'Azur, where he dr[ove] a red Ferrari and live[d] in a villa in the hills outside Cannes. He entertain[ed] guests at the nearby restaurant Le Moulin de Mougins, which has been awarded two stars by the Michelin Guide. His lunches typically include[d] mature Bordeaux at about £500 a bottle, according to a restaurant staff member who asked not to be named because Elsner [wa]s a regular customer.

Id.

177. *See, e.g.*, NASD BrokerCheck re Pond Equities (CRD# 30934), available at <http://www.brokercheck.nasd.com> (at least 13 different state and/or federal regulatory events cited) *see also* http://www.nasd.com/web/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_015733.pdf (last visited April 5, 2007).

178. See SEC Litigation Release in the matter of SEC v. Badian, *et al.*, Case No. 06-CV-2621 (SDNY), available at <http://www.sec.gov/litigation/litreleases/2006/lr19639.htm> (last visited April 8, 2007); see also SEC Complaint filed April 3, 2006, see, e.g., Complaint at ¶¶ 35-38, p. 10, available at <http://www.sec.gov/litigation/complaints/2006/comp19639.pdf> (last visited April 8, 2007); see also APPENDIX (CD-ROM).

179. See SEC v. Badian, *et al.*, Case No. 06-CV-2621 (SDNY), Complaint filed April 3, 2006, available at <http://www.sec.gov/litigation/complaints/2006/comp19639.pdf> (last visited April 8, 2007); see also APPENDIX (CD-ROM).

180. Vernon Silver, *et al.*, *supra* note 9, particularly “Thomas Hackl: Man in the Middle,” at p. 6.

181. *Id.*

182. *Id.*; see also SEC filings where Mr. Hackl acted as signatory for various Liechtenstein-based hedge funds controlled by BAWAG, available at [http://www.secinfo.com/\\$/SEC/Name.asp?X=thomas+hackl&List=S#Signatory](http://www.secinfo.com/$/SEC/Name.asp?X=thomas+hackl&List=S#Signatory) (last visited April 8, 2007).

183. Vernon Silver, *et al.*, *supra* note 9, particularly “Thomas Hackl: Man in the Middle,” at p. 6.

Thomas Hackl was running the treasury and investment banking units at Austria’s Bawag PSK Bank on Feb. 21, 2002, when an e-mail from Santo Maggio, a top executive at U.S. futures broker Refco Inc., appeared on his computer. ‘Good Morning Thomas,’ Maggio began, according to the e-mail, which was obtained by U.S. investigators. He then outlined a transaction prosecutors say was central to the multibillion-dollar fraud that caused New York–based brokerage Refco to collapse in bankruptcy last year.

Maggio wanted to confirm the wire instructions for two cash transfers. Bawag was to cable \$300 million to Refco. The same day, Refco would send \$210 million back to Bawag, Austria’s fourth-largest bank. ‘If you have any questions, please contact me,’ Maggio wrote in the e-mail, a copy of which was used as evidence in a lawsuit filed against Bawag by Refco’s creditors on April 21. He signed off, ‘Regards, Sandy.’

The transaction was one of six so-called round-trip loans that Maggio’s boss, Refco Chief Executive Officer Phillip Bennett, used to mask the company’s true financial condition, U.S. prosecutors said as part of a June 2 settlement that allowed Bawag to avoid criminal charges. Bennett, 57, borrowed \$1.6 billion from Vienna-based Bawag over six years to conceal debts he kept off Refco’s balance sheet, the U.S. said in the non-prosecution agreement. Maggio’s lawyer, Paul Shechtman, declined to comment.

Id.

184. Vernon Silver, *et al.*, *supra* note 9, at p. 6.

Hackl hasn’t been accused of wrongdoing. In an e-mail response to questions, Hackl said he left Bawag as an employee in 2002 and remained affiliated with Bawag until the end of 2004. He declined to elaborate. Avraham Moskowitz, a New York–based lawyer who represents him, says Hackl took orders from others. ‘He acted at all times as a functionary,’ Moskowitz says. ‘Everything he did was at the direction of his superiors, either at Bawag or at Refco.’

Wittingly or not, Hackl played a key role in the web of dealings between Refco and Bawag, including the bank’s efforts to hide a loss of almost €350 million from hedge fund investments in 2000, according to four people with direct knowledge of investigations in Austria and the U.S.

One former top executive at Bawag told investigators that Hackl proposed shifting the loss to an offshore fund called Liquid Opportunities. On Dec. 28, 2000, Bawag wired €364 million to a Liquid Opportunities account at Refco, according to the U.S. non-prosecution agreement. The fund sent Bawag €364 million on the same day, wiping the loss off its books, the agreement says. Five years later, Hackl bought Bawag's stake in Liquid Opportunities and seven Anguilla-based companies the bank also used to hide losses.

Id.

185 See Matthew Goldstein, *Bawag Quits PIPEs Market*, TheStreet.com, March 17, 2006, available at <http://www.thestreet.com/pf/stocks/brokerages/10274371.html> (ast visited April 8, 2007).

In January, TheStreet.com reported that Bawag had quietly become a key player in the PIPEs market by becoming either a significant investor or controlling shareholder in at least four foreign hedge funds that invest in such deals. The four hedge funds with close financial ties to Bawag are Alpha Capital, Austinvest Anstalt Balzers, Austost Anstalt Schaan and Celeste Trust, all of which are based in the tiny European country of Lichtenstein.

TheStreet.com also reported that Bawag has a financial interest in LH Financial Services Corp., an obscure New York investment firm that has sunk more than \$70 million over the past two years into about 150 different PIPEs deals, almost all of them penny-stock companies.

In 2004, LH Financial was the second-most prolific PIPEs investor in the country based on the number of transactions, placing money in 102 different deals, according to PlacementTracker, a research firm. The pace slowed in 2005, when LF invested in about 45 deals -- still good enough to rank in the U.S. top 10.

LH Financial is the official investment adviser to Alpha Capital, the main vehicle through which Bawag has invested in the PIPEs market the past two years.

Id.

186. *StockGate: NASD and SEC Seemingly At Odds Over NASD's Short Selling Proposal*, INVESTORS BUSINESS DAILY, Aug. 9, 2004, available at <http://www.investors.com/breakingnews.asp?journalid=22565366&brk=1> (last visited April 9, 2007); see also *StockGate: London Companies on Berlin Exchange Ask for Investigation, Reg SHO Hearing Reset*, INVESTORS BUSINESS DAILY, June 16, 2004, available at <http://www.investors.com/breakingnews.asp?journalid=21660437&brk=1> (last visited April 9, 2007).

187. DER STANDARD (Oliver Schopf) political cartoon, available at http://www.oliverschopf.com/ir/pol_kar/oester/o603x486/gusi.jpg (last visited April 5, 2007) (Translated caption reads: "After the huge scandal of Austria's trade union bank BAWAG Alfred Gusenbauer, leader of the country's Social Democrats, watches new perspectives for the forthcoming elections in fall.").

188. THE NEW DICTIONARY OF CULTURAL LITERACY (Third Edition). Edited by E.D. Hirsch, Jr., Joseph F. Kett, and James Trefil, (Houghton Mifflin Co. 2002), available at <http://www.bartleby.com/59/13/powertendsto.html> (last visited April 8, 2007).

189. John Steinbeck, *Of Mice and Men*, (Spangler Publishers 1937), ISBN 0-14-017739-6.