February 20, 2009

About This Series…

A periodic update of the tax, due diligence, and business fraud issues for those clients and friends of the firm affected by the alleged fraud of Bernard L. Madoff and his business.

MADOFF MATTERS

Madoff Trustee Will Claw Back Excess Distributions

Earlier today, Friday, February 20, Irving H. Picard, the court-appointed trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") presided over the first meeting of BLMIS creditors.

The three-hour meeting covered a range of topics including SIPC claims, attempts to recover assets, and, most significantly, "clawbacks" from investors who received distributions in excess of their cash invested.

No Trades for 13 Years

To date, the trustee's investigation has determined that BLMIS did not execute any securities transactions in its customers' accounts for at least the last 13 years. Picard has not come to a conclusion as to whether or not transactions had been executed in customers' accounts before that date but has not found any affirmative evidence of such transactions.

The absence of transactions in customers' accounts could support a tax refund claim filed under the claim of right theory. Under this theory, a taxpayer is entitled to recover taxes attributable to an item that appeared to represent a right to income and was reported as such in a prior year but, in fact, did not represent income that the taxpayer was entitled to.

Picard stated that SIPC claims must be received by July 2, 2009 (the "bar date"), and not by March 4, 2009 as has been reported. The March 4 date would have been relevant if BLMIS were holding actual customer securities.

Picard recognizes that many investors will not have all of the documentation (e.g., canceled checks dating back decades in some cases) to establish the amount of their cash investment, and urged investors to file claims with the most complete information and documentation available. A customer will be deemed to have a valid claim to the extent of his net cash investment (i.e., cash invested less distributions received from the day that the relationship with Madoff was established).

Clawbacks?

Customers who received aggregate distributions in excess of their cash invested are potentially subject to a "clawback," or a demand for the return of these excess distributions. Picard characterized these distributions as "false profits" to which the account holder was not entitled.

He stated, however, that his office did not intend to pursue all customers who received such distributions, and will not spend resources to pursue "insignificant amounts". Instead, each case will be evaluated as to the scope and time of the account activity, as well as the amount involved.

Picard is refusing comment on both the ongoing criminal investigation and on the tax consequences to Madoff account holders. He stated that he would not ask either Congress or the Internal Revenue Service to take any action on behalf of the account holders, as such a request is beyond the scope of his charge.

For specific questions, contact Timothy W. Mulcahy, Chairman of Holtz Rubenstein Reminick's Tax Department and a member of the firm's Madoff Response Team, at (631) 719-3325, TMulcahy@hrrllp.com.

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