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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

Clawback!

Madoff Investors Asked to Return Withdrawn Funds

One of the worst possibilities for Madoff investors has come to pass.

This week, the Trustee in the Madoff case, Irving Picard, sent out letters to hundreds of “direct” investors asking that any money withdrawn within the six years before the discovery of the fraud be returned. Such so-called clawback provisions are based on the premise that the withdrawals were paid using other investors' money. The Trustee's intention is to recover \$735 million from these investors.

Investors are being asked to return all withdrawals made during this time period even if, in aggregate, they put in more than they had taken out – meaning they're being included in the clawback even if they lost money while investing with Madoff.

The letter threatens that the Trustee could bring suit against investors to recover the money and asks that they contact him to negotiate a settlement. Six years is the longest time period allowed under the statute of limitations.

This move adds yet another layer of complexity to the tax treatment of Madoff losses. The IRS has not yet issued any guidance on clawbacks. It is unclear how the use of the “claim of right” or other tax treatments will be viewed by the IRS.

It also is unclear if they would taint the “safe harbor” election for a theft loss. This could affect a taxpayer's decision on whether to use the “safe harbor” provision. *(For more on this, see the March 17, 2009 Madoff Matters bulletin, at www.holtzrubenstein.com/ebulletin.php.)*

We do not believe that any investors in Madoff feeder funds (“indirect” investors) received a clawback letter from the Trustee.

Due to the complex legal issues related to the clawback provisions it is important that any investor receiving such a letter contact his/her attorney to discuss legal options.

For more information on the tax aspects of this development, contact Stephen Aponte, Senior Tax Manager and a member of the firm's Madoff Response Team, at (212) 697-6900, SAponte@hrrllp.com.



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