

July 2 bar date for Madoff investors to file a SIPC claim approaches

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Investors who have suffered losses as a result of investments in Bernard L. Madoff Investment Securities LLC (“BLMIS”) are reminded that the July 2, 2009 claim bar date is fast approaching. No claim received by the BLMIS Trustee after the bar date will be considered for recovery under the Securities Investor Protection Act (“SIPA”) or as an unsecured creditor claim against BLMIS, even if the claim is postmarked on or before the July 2 bar date. As such, BLMIS investors who have decided to make a SIPA claim are encouraged to submit their claims several days in advance of the bar date to ensure that they arrive at the offices of the Securities Investor Protection Corporation (“SIPC”), the entity established to process SIPA claims, on or before the July 2 bar date.

While the claim form process is fairly straightforward, the legal and practical ramifications of doing so should be considered carefully before making a SIPC claim.

Has the SIPA “customer” criteria been changed to allow recovery by indirect BLMIS customers?

As of the date of this Alert, the definition of “customer” for purposes of recovering under SIPA remains limited to persons or entities who made a “direct” investment with BLMIS. Thus, those who invested in BLMIS indirectly through a fund or feeder fund do not technically qualify as customers under the express language of SIPA. Because there are relatively few “direct” BLMIS investors, there has been a call for change in the BLMIS bankruptcy proceedings to expand the definition of a “customer” to include indirect investors, so that investors in feeder funds can qualify for a recovery under SIPA. The issue, however, remains an open one that is not likely to be resolved by the July 2 SIPA claim bar date.

The BLMIS Trustee has nonetheless recommended that all investors — direct and indirect — who have BLMIS exposure file claim forms by the July 2 deadline so as to preserve whatever rights they may have to recover under SIPA, should they later be determined to be eligible¹. Since there presently is only the potential for recovery by indirect investors under SIPA, BLMIS investors should consider carefully the potential impact to them for filing a SIPA claim.

Are SIPC filings confidential or will they be a matter of public record?

For some BLMIS investors, confidentiality is a paramount consideration for reasons of security and reputation management. While SIPC has confirmed that it treats the submitted claim forms as confidential filings, there remains the risk that a SIPA claim would be shared with governmental agencies investigating BLMIS or discovered by third parties through a request under the Freedom of Information Act or through pre-trial discovery in an action commenced in the U.S. Whether such efforts to discover SIPA claim forms would be successful depends on a fact-based review of an investor’s particular circumstances.

By filing a SIPA claim, do I increase the risk of being subject to a “clawback” claim?

Under U.S. bankruptcy laws, the BLMIS Trustee is empowered to commence legal proceedings to “claw back” certain payments made by BLMIS within 90 days of the bankruptcy filing (i.e., a preference action) if the payment was not made within the ordinary course of BLMIS’ business, or within 2 years from the filing date if the payment was made with the actual intent to hinder, delay or defraud BLMIS creditors (i.e., a fraudulent conveyance action). While the BLMIS Trustee has indicated publicly that he only intends to pursue “clawback” claims where there is a reasonable prospect of a significant recovery², the possibility of pursuing a large class of investor clawback claims remains. The extent to which the Trustee will be successful in asserting such “clawback” claims to recover sums paid to indirect investors who invested through funds, feeder funds, trusts or other structures is a complex issue that depends on a fact-intensive, case-by-case analysis, and thus, is beyond the scope of this Alert. Investors are encouraged to seek legal advice on this issue, regardless of whether they file a SIPA claim.

Whether an investor files a SIPA claim generally has no effect on the substantive merits of any “clawback” claim the BLMIS Trustee may have against an investor. However, the filing of a SIPA claim could have unintended procedural consequences for a SIPA claimant.

Will the filing of a SIPA claim subject the claimant to the jurisdiction of U.S. courts?

As a general rule, U.S. courts have no jurisdiction over foreign investors, who are not otherwise subject to the general jurisdiction of the U.S. courts through business dealings and other regular contacts with the U.S. There appears to be legal precedent, however, for the proposition that

the filing of a SIPA claim or a proof of claim in the BLMIS bankruptcy may subject foreign investors to the jurisdiction of U.S. courts, and thus to the risk of being forced to defend a “clawback” claim in the U.S., as opposed to the investor’s “home” jurisdiction where additional defenses and protections may be available to the foreign investor. As jurisdictional issues depend on facts and circumstances unique to each foreign investor, they should be carefully considered before filing any claims in the BLMIS bankruptcy.

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