

HOW DOES UNCLAIMED PROPERTY AFFECT YOUR COMPANY?

Unclaimed property is property which the owner has not claimed or cannot be located. Much of this unclaimed property is in the hands of businesses in the form of payroll or dividend checks that are not cashed, unredeemed gift certificates, stock certificates and so on.

In general, state unclaimed property laws require a holder of unclaimed property that has been held for a certain period of time (usually between one and 15 years depending on the type of property) to report and remit that property to the state in which the last known address of the owner is located. If the holder does not have any records of the owner or his or her last known address, then the holder must report to the state in which the holder is domiciled. A business entity is domiciled in the state of its incorporation or formation.

Generally less than 20% of all unclaimed property collected by the states is ever returned to the rightful owner and reverts to the state government.

As a result, many state

governments are increasing their focus on unclaimed property as a way to increase their non-tax revenue streams. State governments routinely hire auditors to assist them in ferreting out unclaimed property held by businesses. If your business has failed to report unclaimed property, it could be assessed with penalties and interest for every day it is in violation of these laws. In addition, if your business fails to maintain adequate records of unclaimed property, states are authorized to estimate the amount of unclaimed property they believe



In general, states have large amounts of unclaimed property, including money

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should have been reported and assess penalties on these amounts.

In order to avoid these problems, businesses need to familiarize themselves with unclaimed property laws that apply to them and to develop a compliance program designed to identify and report unclaimed property to the appropriate state authorities.

Even if your company uses a third party, such as a stock transfer agent or payroll administrator, to make unclaimed property reports, you need to be sure that this service covers all types of unclaimed property that your business may hold.■

GUIDANCE ISSUED ON BOARD OF DIRECTORS INDEPENDENCE PROPOSALS

The staff of the Division of Corporate Finance of the Securities and Exchange Commission (SEC) recently provided guidance on certain issues with respect to Rule 14a-8 of the Securities and Exchange Act of 1934. Among other things, the SEC staff provided examples of the application of Rule 14a-8(i)(6) to shareholder proposals calling for director independence.

According to the SEC, the determination of whether a company

Rule 14a-8(i)(6) provides that a company can exclude from its proxy materials any shareholder proposal which the company lacks the authority to implement.

can exclude an independent director proposal will focus on whether the proposal mandates director independence most of the time or *at all times*. If the latter applies, then a shareholder proposals may be rightfully omitted by the company. For example, the SEC deemed the following proposal excludable: "The shareholders . . . urge the Board of Directors . . . to amend the by-laws to require that an independent director who has not served as the chief executive of the Company serve as Board Chair."

However, if the proposal mandates director independence at all times, but also provides the company with the opportunity to cure the loss of independence, it cannot be excluded.

As an example, the SEC stated that the following proposal could not be omitted by the company: "[T]he shareholders . . . urge the Board of Directors to amend the Corporate Governance Guidelines, and take whatever other actions are necessary to set as a company policy that the Chairman of the Board of Directors will always be an independent member of the Board of Directors, except in rare and explicitly spelled out, extraordinary circumstances."

With the increased focus on board of directors independence, companies should consider this guidance when determining whether shareholder proposals could be excluded.■

TIMELY-MAILED AND TIMELY-FILED?

In a recent tax court case, a taxpayer learned firsthand the difference in credibility between an office postage meter stamp and a hand-stamped postmark received at the post office.

The taxpayer wanted to appeal a \$34,000 assessment in the U.S. Tax Court and hired an attorney to file a petition. The deadline for this petition was April 5, 2004; however, the tax court did not receive the petition until May 25, 2004 – significantly past the deadline. Therefore, the IRS moved to dismiss the taxpayer's appeal.

The taxpayer's attorney argued that although the petition did arrive significantly later than expected, it was still valid under the "timely-mailed, timely-filed" rule because the envelope containing the petition was sent by certified mail with a postmark date of March 30, 2004. In general, the "timely-mailed, timely-filed" rule provides that if correctly addressed

mail sent to the IRS has a postmark on or before the filing deadline, then the mail is considered to have been filed on time even if the IRS received it past the actual deadline.

However, the IRS argued that even though the postmark date was before the deadline for filing, the petition was in fact not sent on time. According to the IRS, the petition arrived significantly later than it normally would have if it had been sent in a timely manner, and the postmark was from a privately metered postage machine and so did not bear a U.S. Postal Service postmark and so could have been tampered with.



Not all postmarks are created equal

To counter this argument, the taxpayer's attorney submitted:

- canceled checks sent before, on, and after March 30, including one dated March 30, 2004 addressed to the U.S. Tax Court;
- correspondence from the U.S. Postal Service stating that the envelope in question had inadvertently been incorrectly scanned and therefore delayed; and
- testimony from an office manager that she sent the envelope on the postmarked date.

The Tax Court held that the petition satisfied the "timely-mailed, timely-filed" rule (Grossman v. Commissioner, T.C. Memo. 2005-164).

The lesson learned from this case is that it is best to mail any important documents from an actual U.S. Postal Service office rather than using a privately-metered postage machine. ■

SEC ENFORCES AUDITOR INDEPENDENCE

The SEC recently announced that it had settled an enforcement action against KPMG Canada, as well as the audit engagement partner and the concurring and SEC reviewing partner on the account at issue. According to the SEC, KPMG Canada and the two partners lacked independence when they audited financial statements for now-bankrupt Southwestern Water Exploration Co. (Southwestern).

The SEC stated that KPMG Canada prepared certain of the basic accounting records and financial statements for Southwestern from 1999 through 2002 and then issued purportedly independent audit reports on those financial statements. The audit reports were included in Southwestern's annual reports filed with the SEC. According to the SEC, the two partners knew, and approved of, the purportedly independent audit reports,

notwithstanding the bookkeeping work that KPMG Canada provided.

As a result, the SEC found that KPMG Canada and the two partners engaged in "improper professional conduct" within the meaning of Rule 102(e) of the SEC's Rule of Practice. As part of the settlement, KPMG

Canada agreed to a number of remedial acts, including adopting and implementing new auditor independence policies and procedures. The two partners were temporarily barred from appearing or

practicing before the SEC. KPMG Canada and the two partners did not admit or deny the SEC's findings.

As in many previous SEC settlements, the SEC specifically noted KPMG Canada's cooperation and its prompt remedial action when determining to settle the enforcement action. ■

Rule 102(e)(1)(ii) provides that the SEC may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it any person who is found by the Commission . . . to have engaged in unethical or improper professional conduct

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