What’s Relevant?
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ABOUT THE E.A.C.

At AST, we strive to propel our industry forward. In 2011, we responded to the demand for a neutral group that could exchange and discuss industry-wide challenges and ideas by forming the Executive Advisory Council (EAC). Comprised of executives from leading organizations in North America, the EAC works to further our industry.

The EAC meets on a regular basis to provide a forum for leadership and constructive feedback, to share best practices and insights on industry trends, to address issues and concerns that various stakeholders may have, and to shape the future of the industry. The EAC also launched an in-depth Industry Study of leading issuer executives across North America. The study is intended to provide meaningful insights into what investors and corporations need across the broad spectrum of issuer and shareholder services. While the EAC is sponsored by AST, it works independently for the benefit of the industry as a unified whole.

For more information, please visit the Executive Advisory Council webpage.

If you have questions or comments, please email EAC@astfinancial.com.
2017 Proxy Season: Key Takeaways
Written By: Zally Ahmadi, Director, Corporate Governance & Executive Compensation, D.F. King, an AST Company

In our last publication, D.F. King provided a pre-season outlook. Below is a brief summary of the outcome.

Proxy Access

As the evolution of the proxy access provision has led to the creation of a market practice in terms of proxy access components, there has been a significant reduction in the number of shareholder proposals being submitted to a vote to adopt proxy access. In fact, over 50% of the S&P 500 has now adopted some form of proxy access provision. Proposals to amend pre-existing proxy access provisions initially created a buzz at the beginning of proxy season, however, they have all ultimately failed to gain traction, and none were successful in 2017.

Board Composition and Diversity

Board diversity remains a key theme, with large institutions such as BlackRock and State Street renewing their intentions this year to place pressure on companies regarding this issue. The number of shareholder proposals regarding board diversity in 2017 has been higher than what we’ve seen in the last five years, and we believe this will continue to be a point of focus for the 2018 proxy season.

ESG-Related Proposals on the Rise

Whereas environmental proposals didn’t even make our top 10 most common submitted shareholder proposal chart last year, both the Sustainability Reporting and Climate Change proposal categories have made the list for 2017 – these topics are currently in the spotlight.

Decline in Traditional Governance-Related Proposals

These types of proposals have diminished in numbers over the past five years; this list includes traditional governance proposals such as the de-classification of boards, the adoption of majority voting for the election of directors, the elimination of supermajority vote requirements, etc. As more large-cap companies adopt these traditional best practices in corporate governance provisions, the number of shareholder proposals has continued to decline.

Continued Support for Say-on-Pay and Equity Plans

Less than 1% of companies received less than majority support for Say-on-Pay proposals, and average support remains above 90%. These statistics also apply to companies that sought approval for equity plans in 2017. Notably, most companies had their second advisory vote on the frequency of Say-on-Pay on the ballot this year, and support for annually-held Say-on-Pay votes was further emphasized by shareholders.
T+2: 5 Best Practices for a Successful T+2 Transition

The transition to a shortened time frame for securities transactions settlement – reducing to 2 days from 3 – is virtually upon us. September 5 of this year is the first effective date, with September 7 the first 2-day settlement date. You probably began a comprehensive project to ready your systems and people for the switch long ago. Here are 5 Best Practices to help you make sure nothing falls between the cracks.

Best Practice 1
Do a complete inventory and update of all internal and external documents

Everything that refers to or specifies a three-day settlement period must be updated – from critical, legally binding contracts, SLAs and equity plan documents to shareholder communications and marketing materials. Consider, for example, tender offers and corporate actions notices. Typically the associated documentation and materials will specify the current 3-day guarantee period after the expiration of the tender. Now that will of course reduce to 2 days. All tender materials and notices of guaranteed deliveries will need to reflect that. And don’t forget all “internal use only” materials like training and call center scripts. Also, please make sure that Equity Authorization Forms are updated to reflect all appropriate parties, especially for DWAC delivery requests. If you have not already, look into using the transfer agent’s electronic authorization solution rather than relying on scanned PDFs. You may want to consider providing the DWAC authorization to your captive broker in an effort to reduce time delays with the information flow.

*Data represents statistics gathered from January 1, 2017 through July 31, 2017.
Best Practice 2
Avoid penalties – ensure brokers’ representation letters are complete and accurate

Work closely with brokers to ensure they provide complete and accurate representation letters up-front. The shortened settlement period means one day less to review and return letters. You can’t lose time for minor corrections like missing signatures or incomplete information. What makes this even more critical – beyond the mandated 2-day settlement – are the potential financial penalties in the form of interest charges the corporate issuer or the employee must pay due to any delay in settlement. The broker is still obligated to deliver shares to the purchaser on time. Absent possession of shares to deliver, the broker may take shares from inventory, or borrow them from another client or broker. The broker can charge margin interest – currently around 8 percent – until clean shares are delivered. Ideally, arrange for brokers to provide letters on the trade date, allowing time for counsel to review and issue an opinion, and for you to process and deliver shares. Or negotiate the fee with the broker, who sets it.

Best Practice 3
Beware clearing restricted securities early

Due to the risk of incurring margin interest until delivery occurs, brokers may request that issuers have restricted securities pre-cleared and delivered. Don’t bypass consulting counsel before acting on such requests. Removing the affiliate restriction requires issuing an opinion. If there’s no qualification to satisfy the removal of a restriction, counsel will be understandably reluctant to render such an Opinion. As a result of a visible case where the SEC found a transfer agent lacking sufficient controls with releasing legends off restricted stock, transfer agents have been tasked to become “gatekeepers” by the SEC to flag and prevent potential securities fraud and may have higher standards for Opinions.

Best Practice 4
Tax to the max – and pay on time

Avoid post-trade date corrections on tax rates and earnings – use the maximum tax rate and true up later. Any necessary adjustments can be done later, either via payroll or when the participant does their annual tax filing. Tax deposits with the IRS must occur the next business day after settlement if all employees’ cumulative tax withholding is $100,000 or more – even if you generally deposit on a monthly or semi-monthly schedule. That requirement remains in effect after T+2. With penalties for late deposits ranging from 2% to 15%, depending on how many days late the deposit is, err on the side of caution and pay – or overpay – on time.

Best Practice 5
Prepare for double settlement day

Mark Thursday, September 7, 2017 as “double settlement day” – it’s both the last day of T+3 settlement and the first day of T+2 settlement. Friday, September 1 is the last trade date with a 3-day settlement. Tuesday, September 5 is the first trade date with a 2-day settlement. This means trades on both dates will settle on September 7. It’s not only a critical period of time for processing and delivery. It also makes September 8 a “double deposit day” to pay taxes to the IRS, for trades made on both September 1 and September 5.
5 Readiness Steps for Unclaimed Property Audits

Written By: Jennifer C. Borden, Borden Consulting Group, LLC

Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the views of AST. This article is provided for general information and discussion purposes only and may not be relied upon as legal advice.

Once upon a time, the nation’s largest companies were plagued with tedious, time-consuming and over-reaching unclaimed property audits which utilized questionable audit methodologies that strained company resources and produced staggering estimates of “unclaimed property exposure.” Luckily, these audits applied solely to general ledger property such as outstanding checks and credits. The states’ contingent fee auditors typically limited their audits of a company’s equity to confirming that the transfer agent was responsible for escheatment and that the transfer agent’s balance on a certain date reconciled with the company’s books and records.

The Emergence of Equity Audits

This passive policy ended when one contingent fee audit firm decided that equity reporting must be put under the same audit microscope as general ledger property. Equity audits to determine compliance with state unclaimed property laws got off to a rocky start. First, one audit firm attempted to audit all of a transfer agent’s clients via one audit of the transfer agent. This attempt failed for several reasons, including that the audit is supposed to be of the “holder’s books and records” and the records that the auditors sought belonged to the issuer clients, not the transfer agent. Additionally, some states specifically define the issuer as the holder of securities. As such, an audit of securities conducted by states with such statutory provisions must be an audit of the issuer, not of the transfer agent. Thus, these audit attempts by one of the smaller audit firms representing just a handful of states eventually fizzled out.

One audit firm that was conducting general ledger audits of more than one hundred public companies watched with interest the attempts to audit corporate issuers via audits of the transfer agents. On one fateful day in 2010, dozens of holders who were close to completing multi-year general ledger audits suddenly received information requests that applied to securities. And thus began a new era of pain in the unclaimed property world, with the latest victims being investor relations professionals and transfer agents. These audits were anything but cursory.

Broad Requests Seeing Precise Details

The initial information requests for the securities audits were extremely broad, seeking every corporate action; every shareholder, regardless of whether or not the shareholder lived in a state that the auditor represented; and every instance of contact, instead of simply the date of last contact. Other requests were equally burdensome. For example, some issuers were asked to provide the recordings of shareholder phone calls in lieu of the system entry indicating the shareholder had called on a given date. One issuer was asked to provide the return receipts from certified mail in order to decipher whether the shareholder had signed for the letter or someone else had.

Equally of concern was the level of detail requested, such as Social Security numbers and account numbers, account opening date, and shareholder date of birth, even for accounts that were not deemed abandoned and reportable. Finally, the auditors demanded reports from DTCC, even though the United States Supreme Court has held that where a financial intermediary holds property in its own name, it is the financial intermediary who is the holder of property, not the original issuer.
Double Audits

These audits of companies already under audit were the norm for several years. They caused a tremendous amount of work for issuers and transfer agents, without any remarkable audit findings. In 2014, the states’ agents again attempted to audit issuers via an audit of the transfer agent. These audits were conducted under the authorization of states with statutes that did not define the issuer as the holder of securities. Further, some states, such as Arkansas, specifically allow for the audit of a record keeper, so long as the issuer has been provided notice. As such, direct to transfer agent audits have been revived, this time on more solid statutory ground due to the states’ participation.

Recently issuers have begun to receive audit notices which purport to be “securities only” audits. While this is encouraging and will hopefully be less burdensome on company resources, some issuers have reported being told that if they do not cooperate with the securities only audit, the audit will be expanded to the general ledger. Any state agent who threatens further action in order to incent certain behavior is clearly suspect.

Delaware Statute Pluses and Minuses

There was a bit of a bright spot in February 2017, when the State of Delaware completely revamped its unclaimed property statute. The new statute provides that holders who are currently under audit can opt to terminate the audit and enter into a voluntary disclosure agreement with the state, whereby the holder would conduct a self-examination and report any findings to the state. Alas, this option is specifically not available to securities audits. This provision may explain the recent “securities only” audit notices. If the issuers had received audit notices which covered all property types, then they would have had the option to end the audit and instead participate in Delaware’s Voluntary Disclosure Program. This would also have ended the securities portion of the exams.

Another questionable audit practice has apparently been memorialized in the new Delaware statute. Specifically, Section 1176(g) provides, “Any examination under this section may include the State Escheator utilizing any and all reliable external data including electronic databases deemed relevant by the State Escheator.” This provision directly contradicts the fact that the audit is supposed to be an audit of the holder’s books and records. Further, it contradicts long-standing Delaware case law that rejected the state’s use of information not contained in the holder’s book and records when demanding property. Nellius v. Tampax, Inc., 394 A2d 233 (1978). However, this authority was apparently deemed desirable, since many issuers under audit report that their shareholder files are being compared to the Social Security Administration’s (“SSA”) Death Master File (“DMF”). The auditors then demand that all shares belonging to deceased shareholders be remitted, since dead shareholders cannot generate activity. Not surprisingly, this audit practice is troubling both for its lack of legal basis as well as its unpredictable and inaccurate results.
5 Audit Readiness Steps

No matter how the audit notice arrives, it appears that audits continue to be inevitable and an incredible burden on company resources. Here are five ways to help keep you on top of the process:

1. Issuers are encouraged to familiarize themselves with the laws of the particular states authorizing the exam, as well as the precise audit methodologies to be employed.

2. Issuers should negotiate with auditors to provide standard reports, as opposed to costly custom programming.

3. Issuers may choose not to provide Social Security numbers, since such data is not necessary to determine compliance with unclaimed property law (though may be required to be included on abandoned property reports if the account is deemed to be reportable).

4. A close working relationship with the transfer agent is key. Frequently, only the transfer agent can provide information on prior reporting and shareholder contact, which are the two most important components in the defense of a securities audit.

5. Significant outreach to shareholders is advisable, since the states cannot escheat property if there is contact with the shareholder. Like all proactive measures, there is some expense involved in owner outreach, but it is a best practice that will reap rewards in shareholder retention and reduction in audit demands.

About the Author

Jennifer C. Borden, founder of Borden Consulting Group, LLC, has specialized in all facets of unclaimed property law, including audit defense, litigation, compliance and consulting for over twenty years. In response to the demands of auditors, her practice has expanded to regulatory compliance for the securities and insurance industries, due to the often conflicting demands of the regulators and auditors. She regularly develops strategies to communicate with lost owners, defends multi-state audits, and advises clients on all elements of the complex area of escheat law. As an official observer to the Uniform Law Commission’s Revised Uniform Unclaimed Property Act (“UUPA”) Drafting Committee, she is assisting with revisions which will improve and modernize the UUPA. Jennifer was privileged to file an amicus curiae brief with the United States Supreme Court on behalf of the Shareholder Services Association and the Securities Transfer Association in the case of Taylor v. Yee. Additionally, she assisted the SSA in its thoughtful response to the Securities and Exchange Commission’s request for input relating to the Commission’s proposed regulation of transfer agents.

Jennifer was previously a Partner at Holland & Knight LLP, where she was responsible for litigating unclaimed property issues in Massachusetts, Delaware, and Georgia; counseling companies on multi-state escheat compliance; defending state abandoned property audits; and implementing strategic restructurings. Prior to joining Holland & Knight, Jennifer was a leader in the State and Local Tax Practice for Ernst & Young, providing Unclaimed Funds services to Fortune 1000 companies throughout the country. With the Unclaimed Funds Practice, Jennifer assisted her clients in mitigating millions of dollars in escheat liability, and as the leader of the New England Incentives Practice, she secured millions of dollars in state tax credits, property tax abatements, sales tax exemptions, training grants and wage subsidies.

Jennifer served for four years as General Counsel for the Abandoned Property Fund of the Commonwealth of Massachusetts, Office of the Treasurer. In this capacity, she resolved disputes arising out of abandoned property audits, negotiated settlements with major corporations as well as state agencies, defended all actions against the Division, and annually approved several million dollars in returns of unclaimed funds to taxpayers. Her knowledge of audit practices and administrative policies enables her to provide clients with unique insight into process and exposure.
Before representing the Unclaimed Property Division, Jennifer was counsel to the Commonwealth’s largest public pension fund, where she was responsible for defending all claims against the fund before the Division of Administrative Law Appeals, Superior Court, and the Massachusetts Appeals Court; insuring the fund’s compliance with state and federal law; and serving as counsel to the State Board of Retirement.

Jennifer is a frequent speaker on state and local tax issues, and author of the Lexis State Tax Insights series on Unclaimed Funds. She has chaired several panels on developments in unclaimed property law for Lorman Seminars and spoken before the Securities Transfer Association (STA), Shareholder Services Association (SSA), the Unclaimed Property Professionals Organization (UPPO), the Compliance and Ethics Forum for Life Insurers (CEFLI), National Investment Company Service Association (NICSA), the Council on State Taxation (COST), the National Retail Federation (NRF), and other industry groups.

Jennifer is a featured speaker for ReedLogic’s Video Leadership Seminars, appearing in the DVD The Business Side of Growing Your Tax Practice, as well as the Unclaimed Property DVD series distributed by the Financial Management Network, and has been quoted frequently in the press, including The Wall Street Journal.

Jennifer graduated cum laude from Suffolk University School of Law, cum laude from the University of Massachusetts, and from the Boston Latin School, where she is a member of the Board of Trustees.

Jennifer is a graduate of the 2008 Class of Boston’s Future Leaders, recognized by Harvard Business School for her work in Business Leaders as Change Agents.
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IF YOU HAVE QUESTIONS OR COMMENTS, PLEASE EMAIL EAC@ASTFINANCIAL.COM.