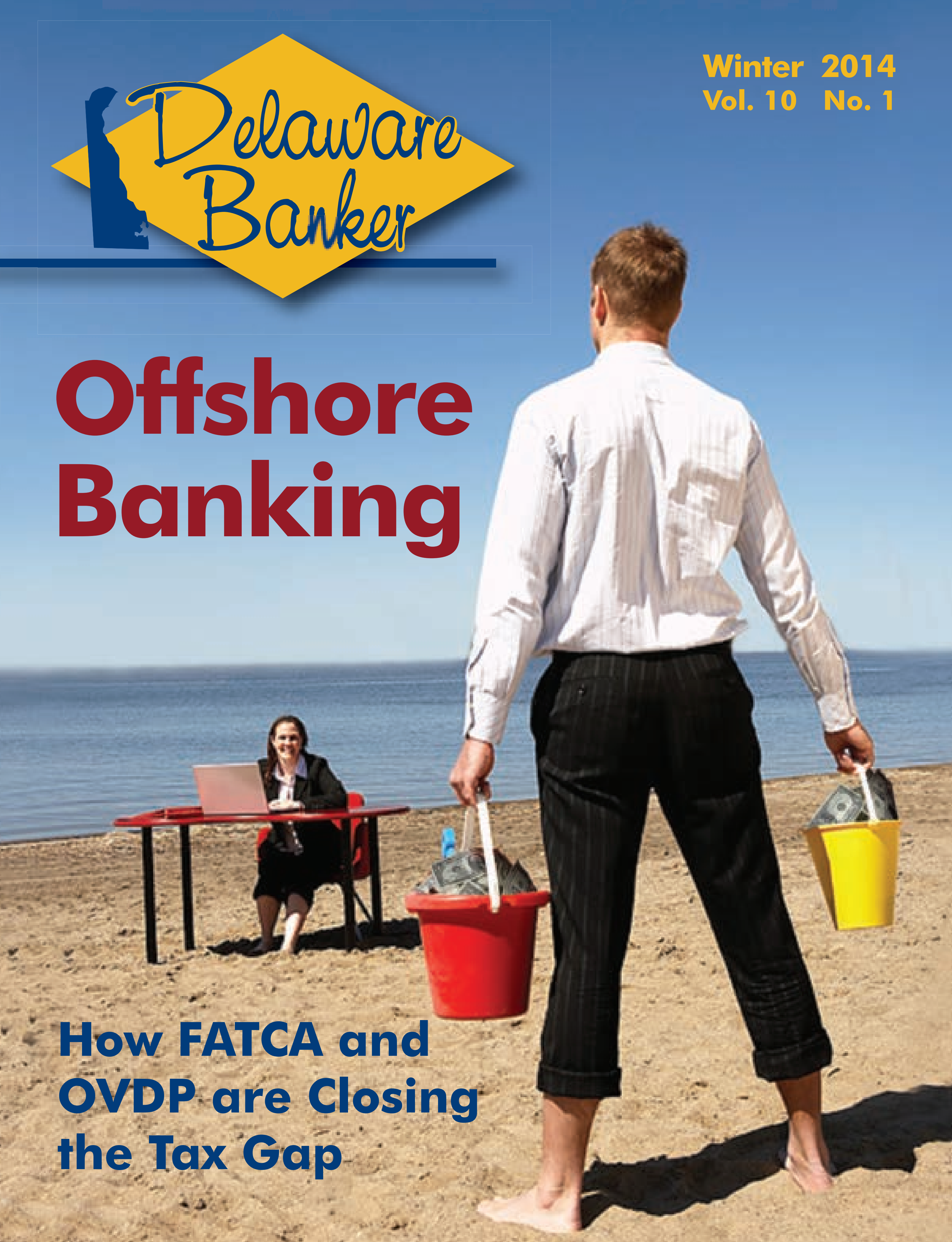
Delaware Banker
Winter 2014
Vol. 10 No. 1
Offshore Banking
How FATCA and OVDP are Closing the Tax Gap

Art by renowned illustrator Alex Nabaum.

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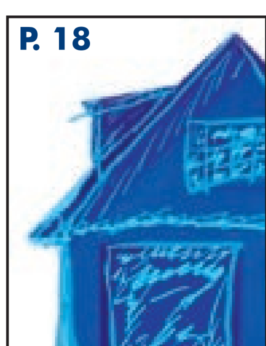

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View from the Chair

by
David E. Gillan
Chairman of the Board and CEO
County Bank

Chairman
Delaware Bankers Association

"The key point to remember is that although we are competitors, we have many shared concerns."

A new year! As we sit in our individual banks contemplating what we will face in the year ahead, we probably have some of the same things on our collective minds. Although Delaware has some of the most diverse institutions of any state in the country, we probably have more thoughts in common than we realize.

Many thoughts include:

What's going on in Washington and Dover?

How are we going to handle the regulatory environment?

Are we prepared strategically?

What's going on with our competitors?

The key point to remember is that although we are competitors, we have many shared concerns. It pays to communicate with each other. This is why we invest in bankers associations. Whether at the national or the state level, there is a benefit to shared experiences.

The DBA Board is about as divergent as you can get. It is made up of large card companies, large commercial institutions, community banks, and trust companies from all three counties. Yet, I often come away from Board meetings learning something about the other entities that helps me in my planning process. In addition, talking to other members at DBA events, gives you a sense of what they are hearing, seeing, or doing to plan for the future. The scale of operations may be different, but the issues are generally related.

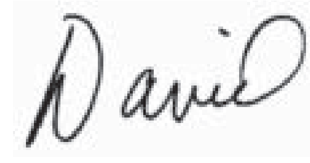
Again, when I attend national association events I get the same perspective from regional, national and even global environments. What's going on in Oklahoma, Illinois, New York, or London may seem light years away from Delaware, but conversation usually reveals a common thread that helps drive strategy in my bank. These meetings also provide common policy interests that we can all get behind and speak with a unified voice. No doubt, we don't agree on everything, but unlike many industries, bankers recognize unity on selected issues can be very beneficial. I can't tell you how many times I've heard elected officials say "... please don't bring anything before us until you've reached an agreement."

My point in all of this is you cannot operate in a vacuum! If you do, you may not be around very long.

Being involved in a bankers association, whether through conferences, committees, or even social events pays dividends that benefit us all in the long run. Please get involved.

Here's to a great 2014!

Sincerely,



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President's Report

by
David G. Bakerian
President, CEO & Treasurer
Delaware Bankers Association

"The Association will also look at expanding our education programs and schools, shoring up our committee system and increasing our social and peer interaction events."

When we last spoke in the Fall, we were wrapping up a very successful year for the Association. We began last year with record attendance at our Washington Visit. This 3-day event received one of the highest ratings ever from participants. That was followed in late March with our Legislative Reception, where our bankers and legislators turned out in large numbers. Both the Washington Visit and the Legislative Reception are important events as they provide key opportunities to meet with federal and state lawmakers and demonstrate the importance of our industry to the First State. We appreciate your participation and support of these events.

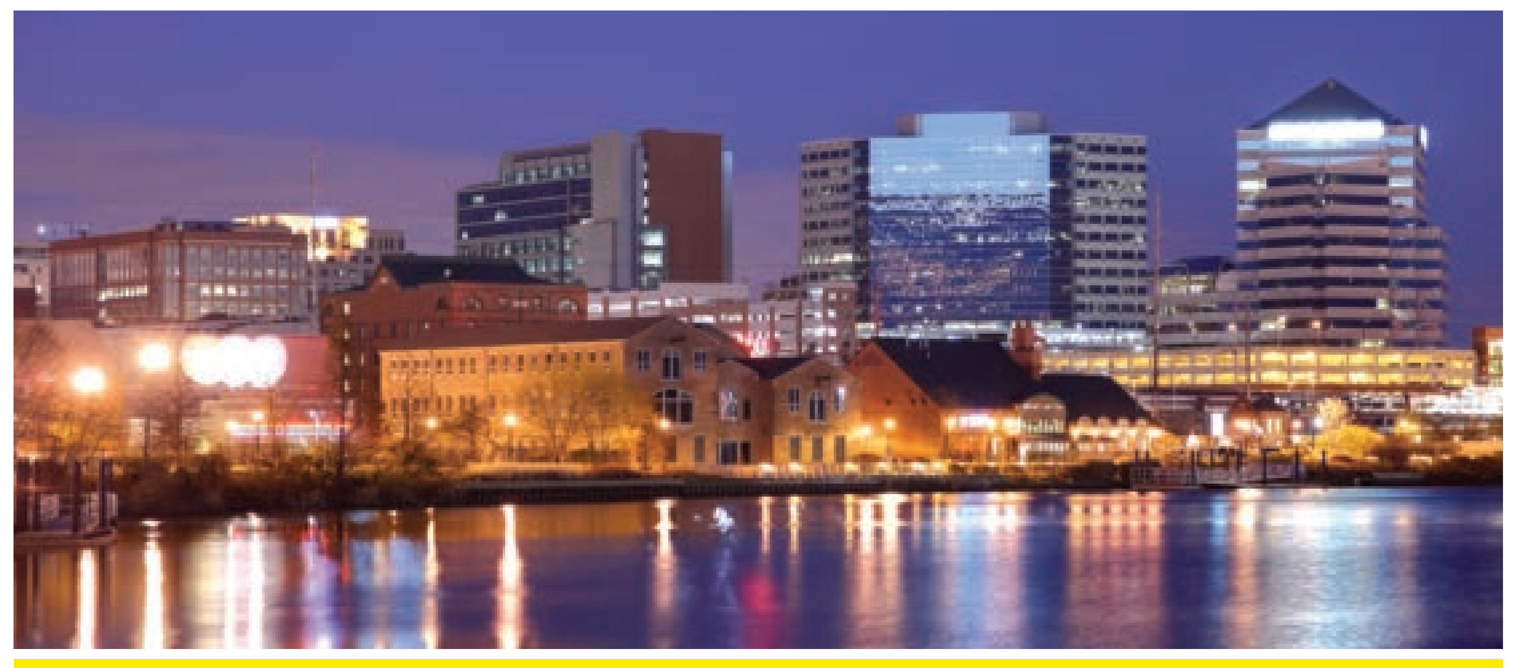
April saw Teach your Children to Save Day where hundreds of bankers taught over 10,000 elementary school children in public and private schools in the State. The Delaware Bankers Association Teach Children to Save Day effort is unique in the nation. Our partnership with the University of Delaware's Center for Economic Education and Entrepreneurship has created a product second to none in the field. Though we developed our program for use in Delaware, banks around the country have come to us to purchase it for use in their local areas.

Our Annual Meeting in May drew three hundred attendees to the Hotel duPont for an entertaining evening that featured a speech and book signing by "Manhunt" author Peter Bergen. That evening we also honored two high-school students from our Keys to Financial Success Program with $2,500 scholarships. Record attendance at our Annual Trust Conference in October, and a highly successful Compliance School in November put the icing on a memorable year of events.

While all of this was going on, we were actively involved with the Delaware General Assembly, meeting with legislators, crafting bills, and testifying in committee meetings. We were successful in promoting financial industry issues and opposing negative legislative efforts. When the session was over on June 30, we felt we had managed a positive balance between consumer protection and a pro-business atmosphere.

From July 1, through the end of 2013, Tom Collins, our new EVP for Government Relations, and I, launched a CEO Call Program. Tom and I met with 95% of our member CEO's to discuss banking related issues and strategies. We also met with staff members of our Congressional delegation, and elected state officials to stress the importance of our industry to economic development in the State.

As we move into 2014 our focus will be evident on many fronts. Legislatively, Tom will be busy monitoring bills related to environmental regulation, elder financial protection, trust administration, and consumer protection among other items. The Association will also look at expanding our education programs and schools, shoring up our committee system and increasing our social and peer interaction events. We hope you enjoyed last year as a member of the Delaware Bankers Association, and we encourage you to comment, suggest, and above all participate in our programs in 2014.



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What's New at the DBA

Regulatory Compliance School

Over 20 compliance professionals attended the **Delaware Bankers Assocation 2013 Regulatory Compliance School**, November 12th, 13th, and 14th at the Christiana Hilton in Newark. The annual event was facilitated by **FIS Enterprise Governance, Risk and Compliance (EGRC) Solutions** and featured a comprehensive review of the federal laws and regulations affecting the financial services industry. **Alice Judd** and **Rhonda Whitely** taught sessions on deposit compliance the first day. Wednesday's session focused on lending compliance and were taught by **Lorraine Williams** and **Elizabeth Rozsa** (pictured above). The school's final day concentrated on credit card lending compliance and were taught by **Robert Cardwell** and **Susi Robeson**.

Trust Committee

Thomas R. Pulsifer, partner, **Morris, Nichols, Arsht & Tunnell LLP** (pictured above) and **W. Donald Sparks, II**, director, **Richards Layton & Finger** were the featured speakers at the meeting of the Delaware Bankers Association Trust Committee, December 13th at the offices of Richards Layton & Finger. The duo provided a legislative update and a summary of the Peierls decisions and their impact upon the trust industry in Delaware.

2014 Teach Children to Save Day

Preparations are under way for **2014 Teach Children to Save**. This year's event, the 16th annual, will take place on Tuesday, April 8, with additional classes taking place throughout the week. Teach Children to Save Day features volunteer bankers teaching lessons on the importance of thrift in public, private, and parochial schools throughout Delaware. Banker registration began February 3rd on the Delaware Bankers Association website (debankers.com). This year's Teach Children to Save Day lesson is taken from the new book ***The Great Investo and the Secret Saver***. The book, the fourth in the series, features the inept Money Wizard and his assistant Penny on a mission to save money. Penny wisely saves her money in an interest-earning bank account. Investo rubs his magic piggy bank to conjure up the Secret Saver genie to manage his savings goals. The book was written and illustrated by **Greg Koseluk** of the Delaware Bankers Association and was made possible by a grant from **Capital One**. Teach Children to Save Day is a part of a national program developed by the American Bankers Association's Education Foundation to teach children about the importance of saving. The Delaware Bankers Association coordinates the program in partnership with the University of Delaware's **Center for Economic Education and Entrepreneurship** (CEEE). The CEEE develops the lessons which meet Delaware's state economic education standards. In addition to lesson development, CEEE also plays a vital role in preparing the lesson packets for each volunteer and classroom teacher, as well as matching the bankers to the schools. Each year approximately 350 banker volunteers teach over 13,000 students in 115 public, private, and parochial schools throughout the state.

Brooks Courier Service Partners With Community Based Organizations

Brooks Courier Service recently announced their program of community based charitable vehicle advertising. Brooks Courier has chosen Blood Bank of Delmarva (BBD) to promote a new marketing initiative to complement their current efforts. These efforts have enabled BBD to have their branded advertising placed on vehicles owned by Brooks Courier Service as a community service. Subsequently, two additional community based organizations, the Nemours Foundation as well as the Boys and Girls Club,have partnered with Brooks Courier to enjoy the donated advertising space. "I'm very excited to be working with the Blood Bank of Delmarva in regards to introducing this marketing initiative" states Brooks Courier President **Daniel Conaty**. "As well, we're looking forward to enhancing our presence and expanding in new markets," he continues. Brooks Courier Service was founded by **William F. Brooks Sr.** in 1951 and provides delivery of banking materials, interoffice mail, pharmaceuticals, legal documents & magnetic data tapes. With 60+ years experience, Brooks Courier Service also provides warehousing, mailroom management, data storage and medical deliveries to locations in New York, New Jersey, Pennsylvania, Delaware, Virginia and Maryland.

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Cover Story

Offshore Banking

How FATCA and OVDP are Closing the Tax Gap

By Stephanie L. Chapman, CPA
Belfint, Lyons & Shuman, P.A.

The IRS and Congress are wise to the age-old plan of the wealthy to park their financial legacies in offshore bank accounts anonymously, typically in the Caymans or Switzerland due to the discretion in those areas. Previously, it was thought that since the money was out of the country, it was safe from US reporting requirements and therefore "free" from tax. This exclusion from taxation contributed to what is known as the "Tax Gap," or the difference between the amount of estimated tax revenue the US believes it is entitled to compared with what it is actually paid.

In 2010, however, Congress fought back with the HIRE Act by developing a two-pronged approach to harvesting offshore accounts and claiming the portion of taxes that were rightfully theirs. They are working with global tax administrators to remove the anonymity of foreign accounts, while simultaneously offering a deal to those account holders "in hiding" to voluntarily come clean before they are identified.

Background

To understand the theory involved in developing a means of identifying undisclosed foreign income, one must first understand how domestic income is identified. Using banks as an example, US banks are required to disclose on Form 1099 any payments made to a US account holder that represent income (interest, dividends, etc.). These forms are filed in triplicate; one goes to the account holder to notify them of the calculated year-to-date income, one to the Internal Revenue Service (IRS) and one is kept on file for the bank. Taxpayers dutifully report their income from the bank on their annual return (1040). The IRS uses its copy to match each item reported by every taxpayer on their 1040; omissions or misreportings are identified through a correspondence notice and rectified as needed. This is partly why a social

security number is needed for account openings and failure on the part of the withholding agent (in this case, the bank) to obtain one places them in the unenviable position of being required to withhold taxes on the payments to the account holder until they become compliant and provide such number.

So, what was the IRS to do about a bank that does not fall under such withholding requirements (namely, one that is not within the United States)? Such a bank does not have a requirement to report to the IRS its payments to account holders, and those account holders frequently failed to report the income and the IRS had no way of working its matching-mojo to be sure it was receiving all the tax it was supposed to. This became the first part of the two-pronged approach to rectifying this problem via the global tax administrators, within the HIRE Act of 2010, known as Foreign Account Tax Compliance Act (FATCA). Congress knew that they had no jurisdiction over banks overseas… but figured this was a way to effectively convince these banks to identify their account holders.

How It Works:

- The Treasury established two Models for Intergovernmental Agreements (IGAs), creatively named Model I and Model II A Model I agreement is one in which a foreign government agrees to require its foreign financial institutions (FFIs) to report back to its parent government the identity of US account holders. That foreign government will then gather that information and report it to the IRS directly. This model agreement comes in two flavors: reciprocal for countries that hold a double tax treaty with the US and a non-reciprocal agreement for those who do not. A Model II Agreement, on the other hand, takes the government out as the middle-man, and requires the foreign banks to report directly to the IRS.

- The goal is tax transparency on a global scale, so although many governments were hesitant (and some downright resistant) to enter these agreements, reports are that most are warming up to the sale. While it might have seemed like strong-arming initially, these foreign governments also stand to gain disclosure from the IRS to their country of accounts held in the US by any of their nationals (note this courtesy is extended only to Model I Reciprocal Agreements).

- The current deadline for FFIs and governments to register with the IRS for compliance is July 1, 2014, according to Notice 2013-43. After that date, withholding agents will be required to begin the withholding regime. Reporting requirements will be gradually phased in thereafter.

Who's Covered:

- At the time of this writing, the US has agreements with 19 countries includingthe Cayman Islands, Costa Rica, Denmark, France, Germany, Guernsey, Ireland, the Isle of Man, Italy, Jersey, Malta, Mexico, the Netherlands, Norway, Spain and the UK (as Model I Agreements); Bermuda, Japan and Switzerland have enacted Model II Agreements.

- Also in various stages of progress toward agreement at the time of this writing are agreements with the Bahamas, Belgium, the Czech Republic Hungary, , Israel, Lichtenstein, Luxembourg, New Zealand, Sweden and the Virgin Islands.

- Notably absent from the above lists are Canada and China. Reports state that while these agreements are in process, the US government blames the October 2013 government shut-down for the slow implementation.

- In late December, the IRS was reporting that over 6,700 financial institutions around the globe have logged into the Service's online registration portal.

Offshore Voluntary Compliance

Implementation of FATCA was just the first step in the attempt to mitigate offshore tax evasion. While that step places responsibility on the financial institutions, the IRS in its second prong also placed more pressure on the US account holders themselves. In 2011, a new disclosure form became required for individuals to disclose their foreign financial holdings. This reporting form, the Form 8938, did not replace the preexisting requirement to disclose foreign bank accounts on the TD F 90-22.1 "FBAR" form. Known to some as the "Super FBAR", the 8938 form extended reporting to not only bank accounts already reported on the FBAR, but also includes other financial assets such as holdings of partnership interests, foreign pensions, foreign insurance policies (with cash values) and foreign trusts. Reportable values are dependent upon filing status and values of the accounts, both at a high throughout the year as well as on year end (see table below).

FILING STATUS	VALUE AT Dec 31	HIGH VALUE
SINGLE	$50,000	$75,000
MARRIED JOINT (MFJ)	$100,000	$150,000
MARRIED SEPARATE (MFS)	$50,000	$75,000
SINGLE – LIVING ABROAD	$200,000	$300,000
MFJ – LIVING ABROAD	$400,000	$600,000

(continued on p. 12)

(continued from p. 11)

Exchange rates are standardized using the Treasury's website at the December 31 value (even if the account was no longer open at that date). While there was intent to extend this reporting to entities as well as individuals, that requirement has continued to be delayed. In the meantime, however, the failure to disclose foreign financial assets penalty remains quite steep; there is a $10,000 failure-to-file penalty for the Form 8938 if it is not filed by the due date. If, within 90 days after being notified of the failure to file, the form remains unfiled, an additional $10,000 penalty is assessed for every 30 days it remains unfiled (for a maximum of $50,000 in additional penalties).

Further penalties can also apply for failure to file other disclosure forms, including: ownership in a foreign corporation, transactions with that corporation, transfers to that corporation, any ownership of a foreign partnership or an interest in a foreign trust or estate.

The FBAR and OVDP

All of the above-mentioned reporting duplicated some of the FBAR reporting. While the 8938 and the others noted above are filed with an income tax return, the FBAR (TD F 90-22.1) is filed separately by June 30 of each year. This form reports only bank accounts held overseas, however because it is the oldest and therefore to date the most abused, multiple compliance programs have been enacted historically to allow taxpayers to come clean before they're caught.

The Offshore Voluntary Disclosure Program (OVDP) was rolled out in January 2012, on the heels of its immensely successful 2009 and 2011 predecessors. This program is open-ended (has no deadline) and offers taxpayers who have undisclosed offshore income to come clean on their filings without threat of criminal prosecution. The newer program, however, assesses a higher monetary penalty rate than its predecessors (a penalty in and of itself, for not coming forward sooner).

Why Bother Coming Forward?

If a taxpayer is identified as a potential offender before coming forward independently, he/she will be examined by the IRS and could be subject to penalties for failure to file the FBAR (Foreign Bank Account Report) of up to $100,000 or 50% of the value of the account (if a willful failure to file) and $10,000 per violation for non-willful failure where a reasonable cause is not established. Furthermore, if criminal charges are brought, those penalties could include a fine of up to $250,000 and five years in prison for tax evasion, the same fine with three years in prison for filing a false return, and a penalty of $500,000 and ten years in prison for failing to file an FBAR. As you can see, the IRS is not fooling around.
Coming forward in the OVDP saves the risk of criminal prosecution, but carries with it a penalty of 27.5% of the highest aggregated balance in foreign accounts over the past eight years, PLUS the 20% accuracy-related penalty, the failure-to-file penalty and the failure-to-pay penalty. The last three of the penalties mentioned are assessed on the understated tax due for each of those 8 years.

Is OVDP the Only Option?

Some offenders have elected to make "quiet disclosures" in which they are remitting the tax and its associated penalties due on amended returns, but are not formally entering the program (and therefore also are not paying the 27.5% penalty on balances). This is risky because the taxpayer is no longer protected from criminal prosecution without a formal application.

Taxpayers who have been reporting their offshore income but have simply missed making the additional disclosure filings are not the target of the IRS's interest. They can simply file the delinquent disclosures as

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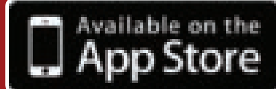

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long as they've not been contacted by the IRS for exam. Penalties may not apply provided there is reasonable cause for the lack of filing.

Taxpayers who believe they may have unreported foreign accounts are highly recommended to seek the advice of a tax professional before entering any of the above programs. Frequently, attorneys are engaged with their CPAs as part of the defense team, so they should be prepared for the cost, risk and reward of compliance.

In Conclusion

As of data available through December 2012, over 39,000 taxpayers have entered into various offshore compliance programs, resulting in increased US tax revenues (a shortened tax gap) of $5.5 billion. Obviously, the risk of non-reporting was very real to those taxpayers. To that end, the IRS continues to take offshore accounts extremely seriously and is leading the way to global transparent tax reporting. It has become more costly and far more difficult to find a safe haven for offshore investing.

Stephanie L. Chapman is a Manager in the Tax & Small Business division of Belfint, Lyons & Shuman, P.A. Stephanie has been specializing in providing tax planning and compliance services for family-owned businesses, specifically in the mid-Atlantic region. She enjoys assisting new business owners as an advisor to their formation decisions and growing pains to ultimately reach the business' highest expectations.
Stephanie also provides United States tax compliance services for foreign entities and U.S. expatriates, through the firm's International Services team. For her foreign entity clients, Stephanie works with the business owners and their formation agents to establish their tax residency, develop banking and legal relationships and remain compliant with their various tax exposures. Expatriates benefit from Stephanie's experience in minimizing tax liabilities through the benefits of treaties and incentives.

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Peierls of Wisdom

Analysis of the Delaware Supreme Court Opinions and their Effect on the Migration of Trusts to Delaware

by
Peter S. Gordon
Michael M. Gordon
Daniel F. Hayward
Norris P. Wright
Kristen W. Poff
Gordon, Fournaris & Mammarella, P.A.

The Delaware Supreme Court recently issued three separate and related *en banc* opinions for the *Peierls* matters[1], authored by Chief Justice Steele, resulting from the appeal of three opinions of the Delaware Court of Chancery. The Delaware Supreme Court opinions in Peierls provide significant insight into various legal issues, including how to determine the administrative law, situs and jurisdiction of trusts and the subsequent modification of those trusts to take advantage of Delaware trust law. This article will discuss the specific holdings of the *Peierls* opinions, and the extent to which such holdings reduce the barriers to effectively transferring trusts to Delaware in order to take advantage of Delaware trust law.

Prior Consent Petition Practice in the Delaware Court of Chancery

Before the Delaware Chancery Court's rulings in *Peierls*, it was common practice for interested parties to file a Petition with the Court seeking confirmation of the appointment of a Delaware corporate trustee, acceptance of jurisdiction over the trust, and the modification/reformation of the trust at issue. The Delaware trustee's acceptance of its appointment as successor trustee was typically contingent upon the entry of an order from the Court confirming the appointment. The most commonly sought modification was the addition of an Investment Direction Adviser to direct the Delaware trustee on investment decisions in accordance with Delaware's directed trust statute, 12 Del. C. § 3313. Confirmation of the Delaware trustee's appointment would occur at the same time the trust was modified for conversion into a directed trust. With this process, there would never be a moment in time where the Delaware trustee was administering the trust in accordance with another jurisdiction's laws and the Delaware trustee would never be responsible for the investment of the trust assets.

The *Peierls* Consent Petitions

Gordon Fournaris & Mammarella, P.A. worked with members of the Peierls family for several months in order to construct a plan by which several trusts created for their benefit could be moved to Delaware with the same corporate trustee and subsequently be streamlined in order for more efficient administration of the trusts.

The various *Peierls* trusts had broadly similar dispositive and administrative provisions, but not all were sitused in the same jurisdiction and they did not all have the same corporate trustee serving. Most of the trusts had two individual trustees and a corporate trustee. Many of the trusts contained assets that would not typically be part of an institutional trustee's portfolio.

In 2012, several Petitions were filed with the Delaware Court of Chancery relating to five inter vivos trusts, seven testamentary trusts, and one charitable lead unitrust. Each Petition requested that the Delaware Court of Chancery:

- Approve the resignation of individual trustees.
- Confirm the appointment of the Delaware corporate trustee.
- Accept jurisdiction over the trusts so that Delaware would be the situs of the trusts and Delaware law would govern the administration of the trusts.
- Reform/modify certain administrative provisions of the trusts, including the addition of the positions of Investment Direction Adviser and Trust Protector, as well as the modernization of other administrative provisions.

The individuals proposed as the initial Investment Direction Adviser and the initial Trust Protector had already been serving as individual trustees of many of the trusts for a significant period of time.

Upon review of the Petitions, the Delaware Court of Chancery denied the Petitions on several grounds. The Petitions relating to the five inter vivos trusts were denied primarily because the Court held that it could not consider the proposed modification because Delaware law did not govern the trusts and, further, *would not* govern the trusts even if the Delaware corporate trustee accepted its appointment as successor corporate trustee. The Petitions for the seven testamentary were denied because the Delaware Court of Chancery held that the courts of other states had retained jurisdiction over the trusts, and to consider such Petitions would be a violation of interstate comity principles. The Petition for the charitable lead unitrust was denied primarily because the Court held that the change in situs and administrative law could be accomplished without Court action, and that "reformation" of the trust, as opposed to "modification," was not a proper remedy.

Additionally, the Court held that it could not rule upon certain items of requested relief, such as the resignation and appointment of trustees, because such actions could be accomplished pursuant to the terms of the trusts, and Court rulings upon such matters would constitute impermissible advisory opinions.

The three opinions of the Delaware Court of Chancery were appealed in November, 2012, and oral argument was heard before the Delaware Supreme Court, *en banc*, on July 10, 2013. Three opinions were issued by the Delaware Supreme Court on October 4, 2013.

Delaware Supreme Court Opinions – Key Holdings

Three key issues were analyzed in the Delaware Supreme Court Opinions: (i) when Delaware law governs administration of a trust, (ii) when a Court can and should exercise jurisdiction over a trust, and (iii) when relief requested in a Petition would constitute an impermissible advisory opinion.

1. Delaware Law Governing Administration

The most critical holding relates to the effect of changing the place of administration of a trust on the law that governs the administration of the trust. The Supreme Court concluded, contrary to the Chancery Court's analysis, that even if a trust contains a choice of law provision, and even if that choice of law provision references "administration" under the principles set forth in the *Restatement (Second) of Conflict of Laws (the "Restatement")*, the law governing the administration of a trust will change when the place of administration of the trust changes via a proper appointment

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Trusts

(continued from p. 15)

of a successor trustee, unless the settlor has specifically stated his or her intent that a state's law shall *always* govern the administration of that trust.

> "When a settlor does not intend his choice of governing law to be permanent and the trust instrument includes a power to appoint a successor trustee, the law governing the administration of the trust may be changed."[2]

The Supreme Court carefully reviewed relevant Delaware case law and concluded that the holdings of those cases did not support the Chancery Court's conclusions concerning the effect of the change of the place of administration of a trust and the law governing the administration of a trust. The Court analyzed the provisions of each of the inter vivos trusts at issue and determined that the settlor did not intend that the initial law governing the administration of the trusts must always remain the law of the original jurisdiction, and concluded that for each trust the "law of administration would change with a change in the place of administration."[3]

In analyzing what trust matters properly constitute "administration" such that they would be governed by the administrative law that applies to a trust, the Delaware Supreme Court ruled that all of the items of relief requested in the Petitions, which included the change of existing trustees, the acceptance of jurisdiction over the trusts, the change of trust situs and administrative law, and the modifications of the trusts, including the creation of the positions of Investment Direction Adviser and Trust Protector, were "administrative matters" as contemplated by the *Restatement*. The Court suggested that the analysis of the effect of a change in the place of administration of a trust on the law governing the administration of a trust may be different when "the trustee has become subject to the continuing jurisdiction of a particular court to which the trustee is thereafter accountable."[4]

This holding opens the door for the use of nonjudicial methods to modify trusts under Delaware law, such as decanting, merger and nonjudicial settlement agreements, once the trust has been moved to Delaware through the appointment of a Delaware trustee so that Delaware law governs the administration of the trust.

2. Jurisdiction

The Delaware Supreme Court, again relying heavily on the *Restatement*, also analyzed when a Court acquires and can properly exercise jurisdiction over a trust. The analysis is helpful in that it is important for the interested parties to a trust to have some level of certainty concerning which jurisdiction's courts will be the forum if there is a future issue relating to the trust requiring judicial involvement.

As an initial matter, in the opinion for the *Peierls* inter vivos trusts, the Court noted that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction "[o]nly when a beneficiary or trustee brings a suit over the trust," and that this situation is distinguishable from the situation where the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.[5]

The Supreme Court analyzed when a court *can* exercise jurisdiction over a matter involving a trust and, if it does have jurisdiction, whether it *should* exercise such jurisdiction to consider a matter. The Supreme Court determined that the Chancery Court did have jurisdiction to adjudicate issues of administration of the testamentary trusts because all parties, including the trustee, had consented to the jurisdiction of the Chancery Court, which satisfied the Due Process Clause.

In determining whether a Court *should* exercise jurisdiction to evaluate a trust matter brought before it, the Supreme Court concluded that it was a matter of which court has "primary supervision" over the trusts. Determining whether a court is currently exercising primary supervision of a trust is critical because:

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• The Delaware Supreme Court adopted the principle that a court having primary supervision over a trust "will exercise jurisdiction as to all questions which may arise in the administration of a trust."

• If the court in which the trustee has qualified does not exercise ongoing control over the administration of a trust, then the court of the *place of administration* of the trust "may exercise primary supervision."[6]

How do we determine whether a court is exercising primary supervision over a trust? Thankfully, the Delaware Supreme Court provided some general guidelines on this issue and then applied those guidelines to the *Peierls* testamentary trusts.

• If a trust has previously been the subject of a court order in any jurisdiction, the order may specifically note whether such court is retaining jurisdiction over the trust.

• If a court is exercising "active control" over a trust, then it clearly has primary supervision over that trust. The Court noted that for a testamentary trust, "active control" by a Court is most commonly evidenced by the requirement that the trustee render periodic accountings in the court in which the trustee had qualified.

Importantly, when considering a Texas court order that resulted from a "pitch and catch" procedure between New York and Texas for two of the testamentary trusts at issue, the Supreme Court concluded that although the Texas order accepted jurisdiction over the trust, there was no evidence that the Texas court exercised active control over the trusts, therefore it did not have exclusive jurisdiction or primary supervision over the trusts. Therefore, the fact that a court at some point exercised jurisdiction over a trust does not mean a subsequent court order is needed for the court to relinquish jurisdiction; the key issue is whether the court specifically retained jurisdiction or is exercising ongoing control over the trust.

One of the key takeaways of the Supreme Court's analysis of jurisdictional issues is that when considering the migration to Delaware of a testamentary trust (for which historical court involvement is more typical than for inter vivos trusts due to the potential accounting requirements of the jurisdiction in which the decedent's will was probated), the history of any court orders or accountings must be carefully considered to determine whether any action needs to be taken in the home state to facilitate the move to Delaware.

3. Advisory Opinions

The Supreme Court upheld the Chancery Court's holding that because no case or controversy existed with respect to the resignation or appointment of trustees, to rule upon such matters would constitute impermissible advisory opinions. Therefore, in the future, the Delaware trustee taking part

(continued on p. 18)

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(continued from p. 17)

in a consent Petition cannot condition the acceptance of its appointment as trustee upon a confirmatory Order from the Court.

As a result of the Delaware Supreme Court's clarity on administrative law and jurisdictional issues, under most circumstances the interested parties to trusts can feel confident that Delaware law will govern the administration of a trust once a Delaware trustee is appointed, and Delaware's sophisticated body of administrative trust law may thereafter be utilized to achieve the parties' goals.

Peter Gordon, Michael Gordon, Daniel Hayward and Norris Wright are Directors and Kristen Poff is an Associate at the Wilmington, Delaware law firm of Gordon, Fournaris & Mammarella, P.A. Their practice focuses on Delaware trust law, including directed trusts, dynasty trusts, asset protection trusts and all aspects of the validity, construction and administration of Delaware trusts.

Notes:

[1] *See In the Matter of Peierls Family Inter Vivos Trusts*, 2013 WL 5539329 (Del. Oct. 4, 2013); *In the Matter of Peierls Family Testamentary Trusts*, 2013 WL 5526239 (Del. Oct. 4, 2013); *In the Matter of Ethel F. Peierls Charitable Lead Unitrust*, 2013 WL 5526243 (Del. Oct. 4, 2013).

[2] *In the Matter of Peierls Family Inter Vivos Trusts*, 2013 WL 5539329, at *17 (Del. Oct. 4, 2013).

[3] *Id.* at *33.

[4] *Id.* at *14.

[5] *Id.*

[6] *In the Matter of Peierls Family Testamentary Trusts*, 2013 WL 5526239, at *11 (Del. Oct. 4, 2013)

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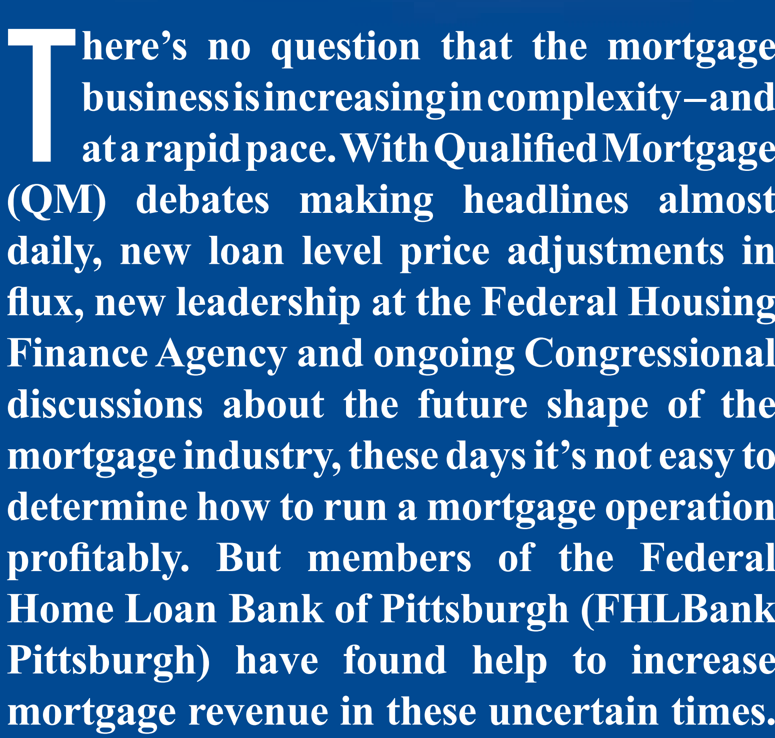
A Silver Lining in Mortgages Today

by Jeff Acquafondata
Business Development Manager
FHLBank Pittsburgh



There's no question that the mortgage business is increasing in complexity–and at a rapid pace. With Qualified Mortgage (QM) debates making headlines almost daily, new loan level price adjustments in flux, new leadership at the Federal Housing Finance Agency and ongoing Congressional discussions about the future shape of the mortgage industry, these days it's not easy to determine how to run a mortgage operation profitably. But members of the Federal Home Loan Bank of Pittsburgh (FHLBank Pittsburgh) have found help to increase mortgage revenue in these uncertain times.

(continued on p.20)

Mortgages

(continued from p. 19)

The Mortgage Partnership Finance® Program (MPF®) is hardly new. In fact, started in 1997 by the Federal Home Loan Bank of Chicago, the MPF Program today includes more than 1,000 participating financial institutions that have delivered over $200 billion in mortgage loans. Even with this longevity and record of success, the MPF Program is enjoying a resurgence as FHLBank members across the country are finding that the program's pricing and ease of use make it an increasingly valuable business tool, a silver lining in today's complex mortgage cloud.

As a Delaware banker and member of FHLBank Pittsburgh, consider the benefits you can gain by becoming a Participating Financial Institution in the MPF Program.

Increased Mortgage Revenue

Depending on the product you choose, the MPF Program can help you increase mortgage revenue in three important ways:

- No guarantee fees
- Absence of loan level price adjustments (LLPAs)
- Fee income earned for sharing the credit risk

Let's review these benefits:

Guarantee fees – Unlike MPF pricing, the pricing of Fannie Mae and Freddie Mac includes a guarantee fee, which generally renders MPF pricing more favorable. No guarantee fee means a significant cost savings for Delaware bankers and other Participating Financial Institutions.

Loan level price adjustments – Fannie Mae and Freddie Mac publish loan level price adjustments that lenders will pass through to borrowers or build into the interest rate on mortgage loans. Although loan characteristics will determine how much credit risk our members will manage, the Original MPF® product does not have risk-based price adjustments.

Fee income – Rather than paying fees to transfer risk to Fannie or Freddie, you can earn fee income by sharing risk with us. If you opt to use the Original MPF product, you will earn a credit enhancement fee paid by FHLBank Pittsburgh for managing the credit risk. Our part of the partnership is managing the funding and interest rate risk.

Other Benefits for Delaware Bankers

- The MPF Program combines your credit expertise with our funding/hedging expertise to provide a more profitable alternative for funding mortgages. By each doing what we do best, we put the "partnership" in the Mortgage Partnership Finance Program.

- You can sell your mortgage originations to an organization in which you are already part owner. As a cooperative institution, FHLBank Pittsburgh is in business to serve our membership – and that means you.

- You can sell conventional, FHA, VA and RHS 502 loans. This makes the key benefit of the MPF Program – increased profitability – available for an increased number of origination types.

- You choose the MPF Program structure that best meets your needs:
  - o Original MPF – You share in the credit risk and receive a credit enhancement fee.
  - o MPF Xtra® – You can offer your customers competitive interest rates for long-term, fixed-rate mortgage loans without assuming the credit risk.
  - o MPF Government – You can sell us fixed-rate mortgage loans insured or guaranteed by government agencies.

- You can retain your relationship with your customer. This keeps the door open for cross-selling and future lending opportunities.
- You will get the service and training you deserve. We offer same-day funding, valuable training and friendly service. Additionally, because the MPF Program is offered by several FHLBanks, you gain access to educational webinars and opportunities to share with other Participating Financial Institutions.

- All MPF Program options offer electronic access through the eMPF® website for easy online submission and instant status reports. The eMPF website is a secure transactional site where you can conduct secondary market transactions in a high-speed, safe environment over the Internet.

A Brief History of the MPF Program

The MPF Program originated at the Federal Home Loan Bank of Chicago in 1997. The following narrative, from the www.fhlbmpf.com website, tells its story.

Prior to the introduction of the MPF Program, community lenders had two choices when originating conventional, fixed-rate mortgage loans:

- Hold the mortgage loans in their loan portfolios
- Sell the loans directly or through a conduit to a secondary market investor

The mortgage preferred by a majority of homebuyers is a 15- or 30-year fixed-rate mortgage; however, these can be complicated assets to hold given their long terms and inherent complex options, such as a borrower's ability to prepay the loan without penalty. Holding these loans in portfolio until they are paid off through a refinance or at maturity requires the lender to bear all the risks associated with them, which includes credit, interest rate, liquidity, prepayment and servicing.

Many community lenders have traditionally had difficulty properly funding and hedging the interest rate and prepayment risks of long-term fixed-rate mortgage loans. For these institutions, it is simply not practical or, in many cases, prudent to retain these risks. To mitigate the risks over the years, mortgage lenders began to sell their fixed-rate loans to secondary market investors, including government-sponsored enterprises.

Selling mortgages in the secondary market typically involved the lender paying "guarantee fees" charged by secondary market investors to protect against credit losses on those mortgages. Recently, these fees have risen to 35-45 basis points per year of the principal balance of the loans sold. Smaller community lenders are typically charged higher fees because they are not able to generate sufficient volumes to qualify for the discounts that may be given to larger originators, even though they originate loans that are of a high credit quality.

Noting the lack of competition in the secondary market for these high-quality loans, the FHLBanks recognized an opportunity to be a competitive outlet for funding mortgages, and so designed the MPF Program. The MPF Program's premise rests on the simple, yet powerful, idea that by combining the credit expertise of a local lender with the funding and hedging advantages of an FHLBank, a stronger, more economical and efficient method of financing residential mortgages would result.

Helping You Minimize the Complexity

Becoming a Participating Financial Institution in the MPF Program is simple. Complete the application and you're on your way. To get started, call your FHLBank Pittsburgh Relationship Manager – John Foff at 215-830-1441 or Larry Swingle at 412-841-2075 – or call me directly at 412-216-1637. I can't wait to talk to you about how you can increase your mortgage revenue by selling into the MPF Program. The mortgage market may be difficult, but we have a silver lining for you.

Jeff Acquafondata is a business development manager at FHLBank Pittsburgh with more than 15 years of experience in the mortgage industry.

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A Matter of Trust

by
Richard J. Immesberger
President
UBS Trust Company, N.A.

"Understanding the evolving landscape of regulatory oversight is critical. "

Strategic Planning Considerations for Trust Companies

Many companies go through an annual strategic planning process. This can serve as an invaluable tool in defining near and long-term vision. While there are common elements across industries, certain unique steps can help trust companies inform processes to improve profitability, regulatory relations and employee engagement.

First, reflect on past experiences. Identify strengths and areas for development. Specific consideration should be given to emerging regulatory demands, the types of fiduciary services to be supported, and where the company should be chartered and located.

While banking is a highly regulated industry, this is especially true of the trust industry. Understanding the evolving landscape of regulatory oversight is critical. Compliance with federal and state regulations, enhancements to a particular state's trust laws, or revisions to examination handbooks may inform allocation of internal resources, required head count, and changes to business lines or revenue streams.

As a best practice, consider periodic meetings with regulators outside of the normal exam cycle. Frequent communication regarding progress against strategy may enhance comfort by examiners, and internal control functions, that management and the Board are fully engaged in providing the required level of oversight and direction.

Another key strategic consideration is how to recognize the unique value your company's fiduciary services offer, to deemphasize pricing as a key decision point. The strategic plan can help define the products and services the trust company will provide and the manner in which they will be provided. Clients may be willing to pay a premium for access to a premier investment platform, industry leading talent or an efficient process. Consider the number of clients a trust officer will support, fee discounts, and the level of employee training that will be provided. Each consideration carries tradeoffs of resources and margin that should shape the strategic vision.

Next, clearly define the scope of services to be supported, internally and externally. This enables focus on serving a particular segment, rather than just trying to chase any business. The market served does not have to be defined just by size of client or trust, but may also be segmented by the underlying opportunity or capacity. Evaluate the demands on service levels and the margin opportunity each fiduciary service presents.

Where to locate administrative offices is another key consideration unique to trust companies. Each state has its own body of trust laws, protections for trustees and beneficiaries, and tax considerations. The location can have a dramatic impact on regulatory implications and services that may be offered. Delaware is often chosen for its progressive body of law, efficient courts, and access to talent. The location for administration is also often driven by where to charter the trust company. The decision to choose a federal or state charter involves several factors that must be weighed in light of the company's objectives. Consider consulting with regulatory counsel on these issues.

The planning process should also define key metrics that will be used to evaluate the plan. Define in advance what success looks like. Review metrics regularly with the management team, and when appropriate the broader company. This will foster a culture where quickly bringing gaps to light is of equal importance to celebrating the successes.

Broad engagement and accountability are key components to delivering against objectives. Solicit input at all levels, internally and externally. Conduct focus groups with partners, referral sources and clients. The broader the audience, the more likely you will be to uncover additional considerations. Finally, align rewards at all levels with the success of the plan, allowing all employees to share in the benefits of strong execution.

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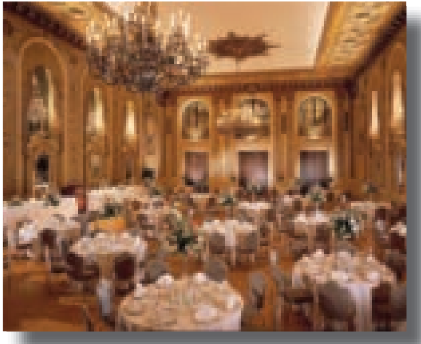
March 2014

March 5th - 7th – 2014 DBA Executive Officer Visit to Washington, DC. This highly acclaimed event for top-level bank executives provides an extraordinary opportunity to meet with the key federal regulators as well as with our industry's representatives at the American Bankers Association in Washington, DC. In addition, we also meet with the entire Delaware Congressional Delegation. This year, DBA participants will be staying at The Hay-Adams Hotel located at Sixteenth & H Streets, NW, Washington, DC 20006.

April 2014

April 8th & 9th - 2014 Teach Children to Save Day.
Join other Delaware volunteer bankers as they visit public, private, and parochial schools, throughout the state as part of Delaware's 16th annual Teach Children to Save Day. Banker volunteer registration starts February 3rd at www.debankers.com. This year's Teach Children to Save Day lesson is taken from the new book ***The Great Investo and the Secret Saver.*** In the book The Great Investo, the inept money magician and his assistant Penny decide to save toward a goal. Penny wisely saves her money in a safe, interest-bearing bank account. Investo decides to use magic and enlists the help of The Secret Saver, a crazy genie, to help reach his financial goals.

May 2014



May 8th – The 119th DBA Annual Meeting and Dinner. Hotel du Pont, Wilmington. Join Delaware's top bankers at this annual event at the historic Hotel du Pont with dinner in the elegant Gold Ballroom. Sponsorship opportunities available.

Delaware Bankers Association/Financial Education Alliance

For more information, or to register, please visit the Web Seminar link at www.debankers.com. Many of the live seminars below are also available as On-Demand sessions. DBA webseminars are provided by ConferenceEdge. When registering for some webinars, members will be directed to a new site. All users will be asked to enter a user name and password to view the event catalog and to register. Webinar attendees may access the webinar for 30 days following the broadcast.

February - April 2014

February 10 - Managing Your Core Vendor Relationships

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February 21 - Personal Financial Statement Analysis, Part 1

February 24 - 2014 Integrated Disclosure

February 25 - Loan Doc 101 - Lien Perfections

February 26 - Start Coaching & Stop Hovering Over the Teller Line

February 27 - Loan Doc 101 - Reviewing Collateral Files

February 28 - Introduction to Personal & Business Tax Returns - Part 2

March 3 - Business Entities for Lenders

March 4 - Developing Your Information Security Program

March 10 - Call Report Revisions & Update - Part 2

March 12 - Complain Management

March 14 - Fair Lending Issues in Indirect Auto Lending

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April 15 - 2014 Integrated Disclosures: New Closing Disclosure

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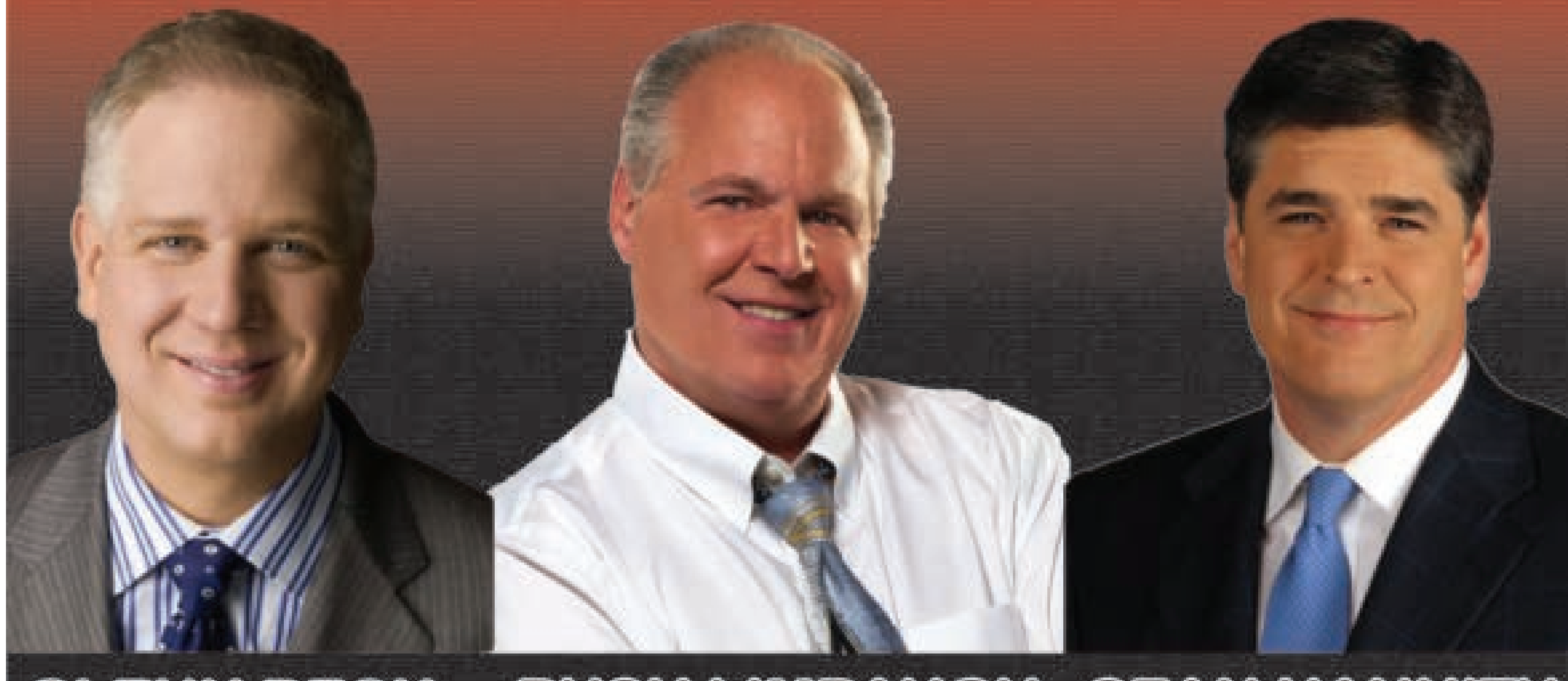

GLENN BECK
9:00am - Noon

RUSH LIMBAUGH
Noon - 3:00pm

SEAN HANNITY
3:00pm - 6:00pm

Real Estate Law Update

by
Cheryl A. Santaniello, Esq.
Young Conaway Stargatt & Taylor, LLP

"ALTA's Best Practices Certification is a risk management tool that is an attractive vetting criteria for lenders when deciding which third party settlement professionals to retain in consumer-related matters."

An Introduction To Alta Best Practices

On February 9, 2012 the United States Department of Justice, Office of Public affairs announced that the federal government and 49 state attorneys general reached a landmark $25 billion agreement with the nation's five largest mortgage servicers to address mortgage loan servicing and foreclosure abuses. One of the many terms of the settlement is the requirement for mortgage servicers to implement changes in how they service mortgage loans and to implement new servicing standards, including the stricter oversight of third party vendors employed by mortgage servicers, to prevent harm to consumers.

The American Land Title Association ("ALTA"), working with others in the mortgage lending and real estate settlement industry, developed a set of guidelines, assessment procedures and certification entitled ALTA Best Practices Framework: Title Insurance and Settlement Company Best Practices Version 2.0, Assessment Procedures and Certification Package (published July 19, 2013, Copyright 2013 American Land Title Association, www.alta.org/best practices) to assist lenders in their efforts to responsibly manage third party vendors and otherwise meet certain requirements placed upon lenders by the Dodd-Frank Act, the Office of the Comptroller of the Currency (OCC) and the Consumer Financial Protection Bureau (CFPB) to prevent harm to consumers. The stated mission of ALTA's Best Practices is to seek to guide ALTA's membership "on best practices to protect consumers, promote quality service, provide for ongoing employee training, and meet legal and market requirements." ALTA's Best Practices are based upon seven identified points of professionalism and conduct which encourage settlement professionals retained by banks, including attorneys and attorney title agents, among other requirements, to:

1. Adopt and maintain appropriate written procedures and controls for Escrow Trust Accounts allowing for electronic verification of reconciliation.

2. Adopt and maintain a written privacy and information security program to protect Non-public Personal Information as required by local, state and federal law.

3. Adopt standard real estate settlement procedures and policies that help ensure compliance with Federal and State Consumer Financial Laws as applicable to the Settlement process.

4. Adopt and maintain written procedures related to title policy production, delivery, reporting and premium remittance.

5. Adopt and maintain procedures for resolving consumer complaints.

ALTA has published Assessment Procedures to be used to assess whether an organization meets the foregoing ALTA Best Practices standards and has published an Assessment Preparation Workbook to help organizations prepare for a Best Practice Assessment. A Certification Package is available and can be used by an organization to warrant to lenders that it has implemented and is compliant with ALTA's Best Practices for the 24 months period commencing with the date of certification.

ALTA's Best Practices Certification is a risk management tool that is an attractive vetting criteria for lenders when deciding which third party settlement professionals to retain in consumer-related matters. It remains to be seen whether Best Practices Certification will be suggested, requested, or ultimately required by lenders of its third party settlement professionals engaged in consumer matters.

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