Delaware Banker

Summer 2016
Vol. 12 No. 3

A first in education for the First State.

Wilmington Trust and M&T Bank are pleased to congratulate the Delaware Financial Education Alliance and the Lerner College of Business and Economics at the University of Delaware for the establishment of the first Trust & Wealth Management Minor program in the nation.

This accredited program comprised of 13 courses will provide students with comprehensive skills grounded in taxation and estate planning.

We are proud to be one of the founding partners of this program, which will keep the state of Delaware at the forefront of the trust industry.

wilmingtontrust.com

Wilmington Trust is a registered service mark. Wilmington Trust Corporation is a wholly owned subsidiary of M&T Bank Corporation (M&T).

©2016 Wilmington Trust Corporation and its affiliates. All rights reserved.

Delaware Bankers Association
The Delaware Bankers Association
P.O. Box 781
Dover, DE 19903-0781
Phone: (302) 678-8600 Fax: (302) 678-5511
www.debankers.com

BOARD OF DIRECTORS

CHAIRMAN
Mark A. Graham
EVP, Wealth Advisory Services
Wilmington Trust

CHAIRMAN-ELECT
P. Randolph Taylor
President
Fulton Bank, Delaware Division

PAST CHAIRMAN
Rodger Levenson
EVP and Chief Corp. Dev. Officer
WSFS Bank

DIRECTOR-AT-LARGE
James J. Roszkowski
President
Discover Bank

DIRECTORS

Elizabeth D. Albano
Chief Financial Officer
Artisans' Bank

Thomas M. Forrest
President & CEO
U.S. Trust Company of Delaware

Cynthia D.M. Brown
President
Commonwealth Trust Company

David M. Hargadon
SVP, Regional Vice President
TD Bank

John J. Coane
President
Comenity Bank

Donna G. Mitchell
President & CEO
Deutsche Bank Trust Co. DE

Bruce Colbourn
Market Executive
PNC Bank Delaware

William S. Wallace
COO, Consumer & Community Banking
Chase Card Services

President, CEO & Treasurer
Sarah A. Long

Delaware Banker
Editing & Design
Greg Koseluk

Editorial Disclaimer:
The opinions expressed in articles by authors other than the Association staff and officers are the responsibility of the authors only and not necessarily those of the Delaware Bankers Association. Questions and comments should be addressed to the Editors. No part of this publication may be reproduced without the written permission of the Editors. Copyright 2016 by the Delaware Bankers Association. All Rights Reserved.

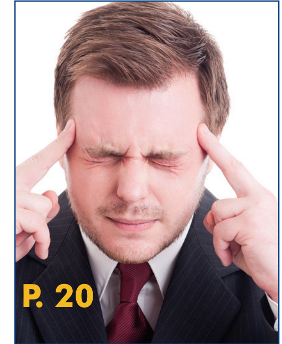
Delaware Banker seeks to provide banking updates and other news of interest to the members of the Delaware Bankers Association. With the exception of official announcements, the Delaware Bankers Association disclaims responsibility for opinion and statements contained in Delaware Banker, and does not endorse any product or service. Delaware Banker is designed to provide accurate information on the subject matter covered. It is presented with the understanding the publisher is not engaged in rendering legal, accounting, or other professional services or advice.

Summer 2016
Vol. 12, No. 3

The Quarterly Publication of the Delaware Bankers Association

P. 12

P. 16


P. 20

Contents

View from the Chair 4
President's Report 6
All Around the Hall 8
What's New at the DBA 10
Trust Modification: A Shiny New Tool for the Toolbox 12
Greater Protection for Delaware Employees 16
Consistent Basis Reporting Between Estates and Beneficiaries 20
For Your Benefit 23
Accounting for Success 24
Compliance Focus 26
DBA Calendar of Events 28
Lending Law Update 30

SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the publication date in accordance with the Association's needs. Direct submissions to Greg Koseluk at greg.koseluk@debankers.com

SUBSCRIPTIONS
Delaware Banker is available free of charge to all officers, executives, management, and key personnel of DBA members. Paid subscriptions to Delaware Banker are available to all others at a rate of $20 per year. To be placed on the subscriber list, please email Greg Koseluk at greg.koseluk@debankers.com.

ADVERTISING
Advertising inquiries should be directed to Greg Koseluk at (302) 382-6467 or greg.koseluk@debankers.com. Rates will be furnished upon request.

View from the Chair

by
Mark A. Graham
EVP, Wealth Advisory Services
Wilmington Trust

Chairman
Delaware Bankers Association

"There hasn't been an accredited trust and wealth management minor… Until now!"

Alfred Lord Tennyson noted: "in the spring a young man's fancy lightly turns to thoughts of love." Unfortunately, the Poet Laureate didn't bother to expand on his observation to let us know what was running through that fellow's mind in the summer, but let's go out on a limb and say it was baseball.

Delaware is home to a baseball team, The Blue Rocks. They're a professional team, but not a major league team. In fact they're quite a few levels removed from that high status. This is not to disparage the Rocks. Many future big league players honed their skills down at Frawley Stadium in hopes of attaining eventual stardom. It's a proven way to cultivate talent.

Lest you think you've picked up a sports magazine, let's apply the above analogy to a business even more beloved to us than the dear Blue Rocks: the Delaware Trust Industry. I'm sure we'd all agree that Delaware trust companies and the Delaware product represent the Big Leagues. Our professionals are truly the Hank Aarons and Steve Carltons of their field. As good as our people are, most of them either come from other companies, or are trained on the job, not necessarily the most cost-effective way of fostering top talent. The Delaware trust industry hasn't had a minor league. You can get degrees in finance, in economics, and in many related fields that prepare you for a job in the banking industry. But there hasn't been an accredited trust and wealth management minor that can provide the trust professionals of tomorrow… Until now!

The Delaware Financial Education Alliance and the Lerner College of Business and Economics at the University of Delaware have inaugurated the Trust & Wealth Management Minor. The Trust & Wealth Minor will be an accredited program comprised of up to 13 courses in the curriculum providing students with comprehensive skills grounded in taxation and estate planning. The program will provide a pipeline of experienced candidates for employment by trust companies and law firms in Delaware. The program will be the first accredited trust and wealth management minor in the nation and will provide employment opportunities in well-paying jobs.

An undertaking of this magnitude doesn't happen without great effort and support. First, we want to thank all of the generous Founders who have helped make this program a reality. The Corporate Founders: Wilmington Trust; Bank of America; Christiana Trust Company; Commonwealth Trust Company; U.S. Trust Company of Delaware; Gordon, Fournaris & Mammarella, P.A.; Morris, Nichols, Arsht & Tunnell LLP; Richards, Layton & Finger, P.A.; Young Conaway Stargatt & Taylor, LLP; Reliance Trust Company of Delaware; Brandywine Trust Company, LLC; Bryn Mawr Trust Company of Delaware; Cooch & Taylor, P.A.; TD Bank, through the TD Charitable Foundation; Wells Fargo & Company; Gawthrop Greenwood, PC; and, the Delaware Economic Development Office. Our grateful thanks, too, to the Individual Founders: David Diamond; Daniel Hayward; Elizabeth W. King; Anne Schumeyer; and, Lynn and Dave Watson.

Finally, I want to congratulate the many individuals in the trust and legal professions who have worked to make this important program a reality. I especially want to thank Cindy Brown, President of Commonwealth Trust Company, and chair of the DBA's Trust Committee, and Sarah Long, DBA and DFEA President for all their efforts in soliciting and organizing the program's supporters. Thank you all!

Pictured: Rachel A. Dwares, David S. Conway, Arthur "Chip" Connolly

Creativity and Savvy

The path from handshake to closing can be a waltz or a marathon. Negotiations can be collaborative or tense. Undertakings must be secured. The ownership structure must be designed beyond the honeymoon, with long-term tax efficiency. Delaware's commercial laws can provide opportunities, or impose severe liabilities.

When you buy, sell or launch a business, your attorneys must be strategic, skeptical and well-grounded. Connolly Gallagher's attorneys represent public companies, private investors, special committees, investment bankers and equity funds in negotiating and fashioning asset sales and mergers, from due diligence to post-closing covenants.

When a transaction is at stake, business leaders call Connolly Gallagher. They draw on leaders in the profession, who command the respect of their peers and bring the culture of a law firm recognized among the region's best by U.S. News & World Report and Best Lawyers, colleagues in an environment ranked as one of the state's best workplaces.

Connolly Gallagher. Trusted by business leaders.

WILMINGTON OFFICE
1000 West Street; Suite 1400
T 302-757-7300
F 302-757-7299

NEWARK OFFICE
267 East Main Street
T 302-757-7300
F 302-757-7299

Our Attorneys

Christos T. Adamopoulos
Mary I. Akhimien
Karen C. Bifferato
Matthew F. Boyer
John A. Clark III
Kelly M. Conlan
Arthur G. Connolly III
David S. Conway
Lauren P. DeLuca
Charles J. Durante
Rachel A. Dwares
Henry E. Gallagher, Jr.
Kyle Evans Gay
Michael R. Grandy
N. Christopher Griffiths
Trisha W. Hall
Timothy M. Holly
Ryan P. Newell
Daniel R. Stanek
Scott E. Swenson
Christina M. Thompson
Max B. Walton
Gregory J. Weinig
Jeffrey C. Wisler
Josiah R. Wolcott

CONNOLLY GALLAGHER LLP

President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"Now more than ever the First State relies on the financial services industry to provide employment, revenue, and investment in the community."

Reflecting on this year's Annual Dinner theme, "Only in Delaware!" seemed particularly relevant. Indeed, no other State collectively affords the advantages of a business friendly environment where companies choose to be, an Economic Development Office that works hard to make our State the right place for all businesses, a responsive State Legislature that collectively works to keep Delaware banking and trust laws the most favorable in the country, and a very accessible Congressional delegation that is always willing to meet.

Together, these create an environment that allows for the robust growth of banking in the First State which now employs over 37,000 individuals, which by industry share is the largest in Delaware. As Delaware's banks have grown, so have our efforts to give back to the communities in which we live and work. Our annual brochure entitled Delaware's Banks 2016, highlights the many contributions the banking industry makes to support Delaware organizations through grants and volunteer hours.

Now more than ever the First State relies on the financial services industry to provide employment, revenue, and investment in the community. A shining example of which is Teach Children to Save – which this year included 266 third and fourth grade classes being taught a financial lesson by 289 bank volunteers, which encompassed 76 schools and 6,500 students from all over the State. We also awarded scholarships to two Delaware high-school students who excelled in the Keys to Financial Success economic education elective. To date we have awarded over $55,000 in scholarships to Delaware high school students.

We all know that there is much more that we can do to support financial education in our state. Through our lobbying efforts, the DBA was able to appoint two bankers to the State of Delaware Financial Literacy Taskforce. Many students in Delaware schools are failing to receive education on topics that impact their ability to be productive financial citizens. This taskforce will make policy and program recommendations that will help increase the financial literacy of all of our students.

We also educate and develop financial leaders. One area of particular focus is providing a pipeline of talent for the Trust Industry in Delaware. The gap between the availability of, and the demand for, talent in the Trust industry is particularly acute in Delaware with more than 43 Delaware based trust companies. Over the next 10 years, the industry will encounter a retirement wave of trust officers, as many of the boomers who have been working in the field since the 80's leave their careers.

Given the importance of the Trust industry in Delaware, the Delaware Financial Education Alliance on behalf of the various trust related institutions in the State of Delaware, entered into an agreement that that will formalize our collective partnership with the University of Delaware, Alfred Lerner College of Business and Economics, to develop and implement an accredited Trust and Wealth Management Minor in the State of Delaware. This will be the only accredited Trust and Wealth Minor program in the country. Once only a vision, now quickly becoming a reality.

As a member of Delaware's banking industry you have a lot of which to be proud. As the preeminent state for financial services, we shape the future of the industry. The achievements of our Association demonstrate the power and influence we can exercise for the promotion of the welfare of our industry and our State. United in purpose, we can secure for our industry the best that can be.

There is nothing out of the realm of possibilities for what we can accomplish.

Only in Delaware!

Sarah

PROTECTING YOU FROM FINANCIAL, COMPLIANCE AND REPUTATIONAL RISKS

Risks come in an ever-changing array of shapes and sizes, so it's critical to have a comprehensive plan to identify, prevent and mitigate the adverse influences facing your business. FIS offers a holistic suite of risk, information security and compliance (RISC) solutions: consulting, managed services and cutting-edge technology solutions that are scalable to match your institution's risk profile. With FIS, you can manage compliance and mitigate risk to protect your assets, customers and reputation.

For more information, please visit fisglobal.com/RISC

CONSULTING

From anti-money laundering compliance to mortgage quality control to regulatory remediation, rely on the depth and breadth of our risk experience.

TECHNOLOGY

Get the tools you need to mitigate risk, manage compliance, train your staff on laws and regulations, and protect your company and your customers.

MANAGED SERVICES

Free up or augment your risk and compliance team by outsourcing your risk and compliance needs to FIS™ RISC solutions.

FIS and the FIS logo are trademarks or registered trademarks of FIS or its subsidiaries in the U.S. and/or other countries. ©2016 FIS

All Around the Hall

by
Thomas P. Collins
Executive Vice President
Government Affairs
Delaware Bankers Association

"All in all, it was a good session for Delaware's banking and trust industry..."

Following an explosive burst of legislating, the second session of the 148th General Assembly finally finished its work at 5:15 am on July 1, 2016. Blood was spilled that night when a Senator accidently cut his head on the corner of his desk in the Senate Chamber while leaning over to pick up a fallen object. A short recess and a quick trip to the local hospital and he was back before missing a vote. All in all, it was a good session for Delaware's banking and trust industry, no harm was done and several bills supporting or protecting our industry were passed by both chambers.

Delaware's preeminence in the trust field continues with the passage of three bills. The authorization of trust owned private placement life insurance (HB 237) with very favorable premium tax rates presents an opportunity to competitively offer this sophisticated financial product in Delaware. The annual update of our body of trust law (SB 243) drafted by the State Bar Association was passed. Finally, modifications of trusts with the consent of all parties involved was authorized in SB 248. With the endorsement of the State Bar Association and the DBA, these bills moved through the General Assembly with little friction.

In other banking related areas, the insurance industry and Uber negotiated a bill (SB 262) addressing the safety, reliability and cost-effectiveness of rides provided by transportation network company drivers in Delaware. The DBA was able to amend the bill to protect the interests of the financial institutions that finance the vehicles used by Uber and other such providers. SB 262 makes clear that the lienholder is to receive proceeds of insurance payments for damaged vehicles as well as certain required disclosures regarding lienholders' interests. While caught up in Senate politics unrelated to the substance of the bill, SB 262 was finally passed early on July 1 after suffering defeat 10 days earlier.

A House joint resolution (HJR 4) authorizing a Financial Literacy Taskforce was passed and signed by the Governor. The DBA was granted two appointees to participate on the taskforce which is charged with studying and making findings concerning financial literacy education in Delaware and making policy and program recommendations that will help increase the financial literacy of Delaware's K-12 students.

The DBA fully supported the Bank Commissioner's Housekeeping Bill (HB 286) that modernized the operation of the office and cleaned up the obsolete sections of the Delaware Code.

Last on the DBA agenda, HB 226, a bill that authorizes prized-linked savings accounts designed to encourage savings by low-income individuals and first-time savers did not get enacted. While making it through committees in both chambers, there was little enthusiasm for the product.

While the above reflects our efforts to promote legislation, much time was spent playing defense to avoid unwanted legislative efforts. HB 254 and HS1 for HB 254 attempted to expand the rights of Homeowners Associations (HOA) to collect unpaid assessments to the detriment of the mortgage holder by potentially taking priority over the mortgage holder in foreclosure eliminating the mortgage altogether. At the DBA's request, the bill was tabled in committee and subsequently we worked unsuccessfully with the sponsor and other stakeholders to strike

a compromise. We will see this bill again in the first session of the 149th General Assembly.

Finally, a resolution was proposed calling for Congress to reinstitute the modern equivalent of the Glass-Steagall Act. The intent of the resolution is to break up big banks and separate investment and commercial banking. Fortunately for DBA and all, the House majority leadership recognized the importance of banking in Delaware and the wrong message such a resolution would send to the country and promised that the resolution would stay in committee, where it remained.

The DBA is fortunate that legislators regularly contact us about potential legislation, seeking our input, suggestions, and support. When additional regulation of student loans was considered, we successfully diverted the issue by demonstrating the extent to which the industry is already regulated at the federal level. However, we are not always so lucky. HB 446, introduced in the final hours of the session, addresses alternative financial services, otherwise known as pay day lending. Despite the intent of the sponsor to not capture banks in the bill, HB 446 will need amendment as a result of technical defect in drafting. After receiving assurances that HB 446 would not be worked, the pay day lending bill was a surprise on the agenda on the final night of the session, however, no further action was taken on the bill. We do not anticipate opposition to the amendment.

Finally, DBA monitors bills that have an indirect impact on the DBA member interests. This year we tracked many bills including: the Delaware Competes Act (HB 235) which changes the structure of the corporate income tax; the Crowdfunding bill (HB 327) which enables Delaware entrepreneurs to more easily raise capital to support start up initiatives; the annual changes to the Delaware corporate, partnership and alternative entity laws; and modification to DNREC's storm water run-off and erosion control rules and regulations that were otherwise stifling development in the state.

In summary, the 2016 Delaware legislative session resulted in no significant harm to the Delaware banking and trust industry and, in fact, includes some initiatives that are favorable.

Tom

CERTIFIED PUBLIC ACCOUNTANTS & ADVISORS

COVER & ROSSITER

Cover & Rossiter is proud to announce Marie Holliday as our new Managing Director

Providing Complete Tax, Audit and Accounting Services

www.CoverRossiter.com | (302) 656-6632

/CoverRossiter

@CoverRossiter

What's New at the DBA

New Financial Institution Member

Stifel Trust Company Delaware, N.A.
David Chambers, President
Stifel Trust Company Delaware, N. A.
100 South West St., Suite 100
Wilmington, DE 19801
Telephone: 302-351-8901
Email: David.Chambers@stifeltrust.com
Stifel Trust Company Delaware, N.A. ("STCD") is a national banking association limited to the exercise of fiduciary powers, which is regulated by the U.S. Office of the Comptroller of the Currency and headquartered in Delaware. STCD is owned by Stifel Financial Corp. which is a global, publicly traded financial services holding company headquartered in St. Louis, Missouri. STCD's principal lines of business are trust and investment management.

New Associate Members

Fox Rothschild LLP
Sharon Oras Morgan, Esq.
Office Managing Partner
919 N. Market Street, Suite 300
Wilmington, DE 19801
Phone: 302-622-4246
Email: smorgan@foxrothschild.com
Website: www.foxrothschild.com
Fox Rothschild LLP is a national law firm with nearly 750 attorneys practicing in 22 offices coast to coast. The Wilmington office is dedicated to providing clients – regionally and nationally – with professional services in a wide range of legal matters, including sophisticated corporate and regulatory matters for banks and other financial institutions. Since its opening in 2001, the Wilmington office has continued to grow and expand its legal services in corporate and commercial litigation, financial restructuring and bankruptcy, environmental law, family law, intellectual property, taxation and wealth planning, real estate and other legal areas.

Gawthrop Greenwood, PC
Joanna Reiver, Esq.
3701 Kennett Pike, Suite 100
Wilmington, DE 19807
Phone: 302-777-5353
Fax: 302-777-5299
Email: jreiver@Gawthrop.com
Website: www.gawthrop.com
Gawthrop Greenwood, PC, with offices in West Chester, PA and Wilmington, DE, serves clients throughout the greater mid-Atlantic region and nation. For more than a century, the firm has stood behind its core principle of providing high-quality legal services with personal attention. Gawthrop Greenwood's diverse portfolio of clients comprises entrepreneurs, businesses, and governmental entities that entrust the firm with their representation in a wide range of matters including business and real estate matters, commercial litigation, estate and tax planning, land use and development, and domestic relations. A complete listing of the firm's practice areas and attorneys, as well as legal resources, can be found at www.gawthrop.com.

Gunnip & Company CPAs
Donald J. Bromley, CPA, CVA, Partner
2751 Centerville Road, Suite 300
Wilmington, DE 19808
Phone (302) 225-5000 x 5164
Fax (302) 225-5100
Email: info@gunnip.com
Website: www.gunnip.com
Gunnip CPAs is a trusted advisor for large multinational corporations, entrepreneurs, small businesses and individuals in Delaware, Pennsylvania, New Jersey and Maryland. Our team of professionals is known for highly personalized, comprehensive accounting, tax, audit and business consulting services.

Newton One, LLC
William F. Denney, Regional Managing Partner
131 Continental Drive, Suite 206
Newark, DE 19713
Telephone: 302-731-1326
Fax: 302-455-9089
Email: wdenney@newtonone.com
Website: www.newtonone.com
Newton One is a Delaware-based financial services company with offices in New York City and St. Louis. They specialize in the design and implementation of insurance products for sophisticated planning needs for affluent investors and entrepreneurs.

DBA Annual Meeting

Mark A. Graham, EVP, Wealth Advisory Services, Wilmington Trust, was elected the Chairman of the Delaware Bankers Association on May 12th at the DBA's 121st Annual Meeting in Wilmington. The DBA also elected and installed P. Randolph Taylor, President, Fulton Bank, N.A., Delaware Division, to the position of Chairman-Elect. Other Members of the DBA Board of Directors are: Elizabeth D. Albano, Chief Financial Officer, Artisans' Bank; Cynthia D.M. Brown, President, Commonwealth Trust Company; John J. Coane, President, Comenity Bank; Bruce Colbourn, Market Executive, PNC Bank Delaware; Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware; David M. Hargadon, SVP, Regional VP, TD Bank; Rodger Levenson, EVP & Chief Corporate Development Officer, WSFS Bank (Past Chairman); Donna G. Mitchell, President & CEO, Deutsche Bank Trust Company Delaware; James Roszkowski, President, Discover Bank; and, William S. Wallace, COO, Chase Consumer & Community Banking.

Keys to Financial Success Scholarships

(l. to r.) Mark A. Graham, EVP, Wealth Advisory Services, Wilmington Trust and DBA Chairman, Keys to Financial Success Scholarship winners Justice Haxton and Taylor Reeves, and Patrick Harker, President, Federal Reserve Bank of Philadelphia

The DBA announced the winners of the 2016 Keys to Financial Success Scholarship Award. The winners were Taylor Reeves, a senior at Middletown High School, and Justice Haxton, a senior at Caesar Rodney High School. Both students participated in the Keys to Financial Success course. Each winner receives a $2,500 scholarship. Keys to Financial Success is a full-semester elective taught in 28 high schools throughout Delaware to over 4,500 students. Keys to Financial Success introduces students to the fundamentals of sound money management skills and basic financial planning concepts including Goals and Decision Making, Career Research, Money Management, Consumer Skills, and Risk Protection.

2016 Teach Children to Save Day Poster Contest Winner

P.J. Blessington, a 4th grader at St. Mary Magdalen School in Wilmington was awarded first place in the 2016 Teach Children to Save Day poster contest. P.J. received $100, an autographed copy of *The Great Investo and the Money Tree*, and an award certificate. His winning entry, shown above was selected by the Teach Children to Save Day committee from over 300 entries submitted statewide. Second and third place winners were also awarded and each received $50, books and certificates. Seven students received honorable mention certificates along with copies of the book. P.J.'s poster "Saving Is Like Building a Bridge" featured a colorful design of a suspension bridge made of dollar bills spanning a river of coins.

Library Delaware Trust Law Companion 2016

§ 610. Disclaimer of power of appointment or other power not held in fiduciary capacity.

If a holder that is not a fiduciary disclaims a power of appointment, whether such power is a general power of appointment or a power that is not a general power of appointment, or other power over a trust, granted to the nonfiduciary holder under the terms of an instrument, the following rules apply:

(1) If the holder has not previously exercised the power of appointment or the power over a trust, the disclaimer of a power of appointment or a power over a trust by a holder takes effect as of the time the instrument granting the power to the holder became or becomes irrevocable.

(2) If the holder has previously exercised a general power of appointment and the disclaimer is of the right to exercise such general power of appointment, whether or not the holder presently has the power to exercise such general power of appointment, the disclaimer of such power of appointment takes effect immediately after the last time the holder exercised such general power of appointment.

(3) If the holder has previously exercised a power of appointment and the disclaimer is of a power of appointment that is not a general power of appointment, whether or not the holder presently has the power to exercise such power of appointment, the disclaimer of such power of appointment takes effect immediately after the last time the holder exercised such power of appointment.

34 of 867 533 pages left in this chapter

ePub FORMAT

mnat.com iBooks iTunes

MORRIS NICHOLS ARSHT & TUNNELL

mnat.com

The Morris Nichols' Trusts, Estates & Tax Group is proud to announce that our **Delaware Trust Law Companion** is now available as an ePub.

As more of our clients utilize mobile devices and laptops to access their "on-the-go" legal resources, we are confident that the Delaware Trust Law Companion ePub will become a useful resource on your iBooks shelf and on your computer. Scan the QR codes with your iPhone or iPad to download our free ePub.

Download via mnat.com: mnat.com/epublications/
Download via iTunes: itun.es/us/h8X1cb.l

Below is a list of features and benefits:

- Navigate content with table(s) of content and useful links
- Search terms with built-in functionality
- Save Bookmarks
- Highlight text for future reference
- Annotate with notes
- Share selected content
- Resize fonts for an "easy to read" experience
- Change background colors

A Shiny New Tool For The Toolbox

Utilizing Delaware's New Statute Allowing for Broad Trust Modifications While the Trustor is Living

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

As those of us working in the estate and wealth planning field are well aware, the ability to modify an irrevocable trust is critical for many reasons. Whether the goal is to deal with unanticipated circumstances, correct errors, improve the efficiency of a trust's administration, or take advantage of Delaware's sophisticated trust laws, having several "tools" available for trust modification (and, in particular, tools that do not require judicial intervention) can allow for some of even the most challenging trust issues to be resolved, while also helping to maintain Delaware's place as a favored jurisdiction for new and existing trusts.

This summer, Delaware added another powerful tool to its existing trust modification toolbox via the enactment of new Section 3342 of the Delaware Code, entitled "Modification of Trust by Consent While Trustor is Living" (and hereinafter referred to as the "Nonjudicial Modification Statute"). The inspiration for the Nonjudicial Modification Statute can be found in Section 411 of the Uniform Trust Code (the "UTC"), which generally provides mechanisms for the modification or termination of irrevocable trusts with or without the involvement of the trustor. Delaware's enactment of the Nonjudicial Modification Statute continues the trend of the past several years of adopting select provisions of the UTC and tailoring such provisions to fit within Delaware's overall statutory system.

Analyzing the Statutory Provisions

The core of the Nonjudicial Modification Statute is found in paragraph (a), which reads as follows:

> "(a) Notwithstanding any provision of law or a trust's governing instrument limiting or prohibiting amendment of the trust, an irrevocable trust may be modified to include any provision that could have been included in the governing instrument of a trust created upon the date of the modification *by written consent or written non-objection of the trustor, all then serving fiduciaries and all beneficiaries even if the modification violates a material purpose of the trust."*[1]

As indicated by this provision (and by the title of the statute), the consent or non-objection of the trustor of the trust is required, along with the consent or non-objection of all "fiduciaries" and "beneficiaries." Therefore, the Nonjudicial Modification Statute can only be used to modify a trust when the trustor is living and, presumably, has the capacity to provide written consent or non-objection to the modification on the trustor's own behalf. What if the trustor is incapacitated? While Section 411(a) of the UTC specifically includes the ability of a guardian, conservator or attorney-in-fact to act on behalf of the trustor, the Nonjudicial Modification Statute currently does not. This is an issue likely to be resolved as the statute is further refined over time.

The fiduciaries who need to take part in the modification will include all of the Trustees, any advisers or protectors pursuant to 12 Del. C. § 3313, and any designated representatives pursuant to 12 Del. C. § 3339. As a practical point, it is important to remember that any party with the powers of an adviser or designated representative as set forth in their respective statutory sections is automatically deemed to be a fiduciary unless the trust's governing instrument specifically provides that such party shall not serve in a fiduciary capacity. However, although not required, out of an abundance of caution and for the sake of completeness, we suggest that any powerholder, whether or not a fiduciary, should be a party to an agreement modifying a trust pursuant to the Nonjudicial Modification Statute.

The term "beneficiaries" is not defined in paragraph (a) of the statute, which naturally begs the question: do beneficiaries with very remote or contingent interests need to be a party to an agreement modifying a trust under the new statute? The statute only states that "all beneficiaries" shall consent or not object, which strongly suggests that even the most remote beneficiaries must take part in the modification. On its face, this requirement would seem to be exceedingly difficult to meet. Thankfully, paragraph (c) of the statute (discussed further below) contemplates the use of Delaware's virtual representation statute, 12 Del. C. § 3547, in order to bind the beneficial interests of those more remote than the presumptive remainder beneficiaries of the trust. Therefore, as a general rule of thumb, the Nonjudicial Modification Statute will require the participation of all beneficiaries with a current interest in the trust and the presumptive remainder beneficiaries (i.e., generally those whose interests would vest if the current interests terminated). Absent a material conflict of interest, any minor, unborn or unascertainable beneficiaries, and any contingent remainder beneficiaries, may be virtually represented by the trust's adult current beneficiaries and presumptive remainder beneficiaries.

It is important to be aware of situations where there may be a material conflict between classes of beneficiaries, especially given the potentially sweeping modifications that are possible under the Nonjudicial Modification Statute. For example, if the proposed trust modification is going to directly alter the beneficial interest of a contingent remainder beneficiary, then it may not be proper for a presumptive remainder beneficiary to represent such contingent remainder beneficiary. If the Nonjudicial Modification Statute is being used to modify a trust's dispositive provisions, practitioners and trust professionals should very closely analyze whether virtual representation is proper.

The last portion of paragraph (a) of the statute is likely the most important, as it allows a trust to be modified even if the modification "violates a material purpose of the trust" (which is in direct contrast to Delaware's nonjudicial settlement agreement statute, which provides that such an agreement is only valid to the extent it does not violate a material purpose of the trust).[2] When viewed in conjunction with the language in paragraph (a) which provides that the modification may include the addition of "any provisions that could have been included in the governing instrument of a trust created upon the date of modification," it is clear that the statute can be used to make substantial changes to the administrative structure of the trust. This would include, for example, the addition of provisions making a trust a directed trust as to investment and/or distribution decisions in accordance with 12 Del. C. § 3313, which can be especially useful for trusts that are migrating to Delaware from jurisdictions that do not allow for directed trusts.

Beyond administrative changes to a trust, by its terms the Nonjudicial Modification Statute would allow for changes to a trust's dispositive provisions, including but not limited to the addition or removal of trust beneficiaries, changing the standard for the distribution of income or principal, extending the duration of the trust, and altering the interests of remainder and contingent remainder beneficiaries. In fact, a trust could, theoretically, be entirely amended and restated pursuant to the statute, with the trust being effectively rewritten to reflect how the trustor would have structured the trust if allowed a "do-over," which is a desire that many trust professionals have likely heard more than once from their clients and customers. When dealing with modifications to dispositive provisions, however, it is always critical to keep in mind potential tax consequences. For example, if the trust is exempt from the generation-skipping transfer tax, in most cases you will want to avoid changes that could be deemed to shift beneficial interests to lower generations or that delay the vesting of a beneficial interest. Just because the parties can modify a trust in a certain manner under the Nonjudicial Modification Statute doesn't necessarily mean that they should.

The expansive nature of the statute is also reflected in the ability to modify a trust even if the trust's governing instrument includes a provision "limiting or prohibiting amendment of the trust." Most recent trusts are likely to have a provision specifically prohibiting the trustor from amending or modifying the trust in order to avoid estate tax inclusion and possibly subjecting the trust assets to claims of the trustor's creditors. Older trusts may

(continued on p. 14)

(continued from p. 13)

include a provision that disallows any modifications to the trust unless approved by a court of competent jurisdiction. Regardless of such trust provisions, the Nonjudicial Modification Statute may still be employed to modify a trust, again underscoring the significant power of the statute.

Paragraph (b) of the statute provides as follows:

> "(b) No fiduciary shall have a duty to consent to any proposed modification nor, absent willful misconduct, any liability to any person having an interest in the trust for failure to consent to any proposed modification."[3]

This provision ensures that a fiduciary will not have to contend with the risk of potential liability for refusing to take part in a trust modification under the statute. Trust beneficiaries or fiduciaries who are aware of the expansive modifications allowed under the Nonjudicial Modification Statute may seek to pressure the Delaware trustee to agree to modify the trust in a manner that provides a relative benefit to such beneficiaries or other fiduciaries. This provision allows the Delaware trustee to make an independent decision without the fear of potential liability for not acceding to the demands of the trust's other interested parties.

Paragraph (c) provides a mechanism for a judicial review of a modification under the Nonjudicial Modification Statute:

> "(c) Any interested person, including the trustor, may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a modification adopted under this section, including but not limited to determining whether the representation as provided in § 3547 of this title was adequate; provided, however, that any such person may waive the right to contest the modification."[4]

This closely tracks a similar provision in Delaware's nonjudicial settlement agreement statute.[5] This provision adds an extra feature that allows an interested person to waive the right to contest the modification. Also, as previously noted, the reference in paragraph (c) to Section 3547 of Title 12 indicates that virtual representation may be used where appropriate to bind minor, unborn, unascertainable, or contingent remainder beneficiaries.

Finally, paragraph (d) covers the availability of the statute:

> "(d) This section shall be available to any trust that is administered under the law of this State." [6]

Therefore, as long Delaware law governs the administration of a trust, such trust can be modified pursuant to the statute. When coupled with Delaware's statutes which, in most cases, apply Delaware law to the administration of a trust that has a Delaware corporate trustee,[7] the Nonjudicial Modification Statute provides a useful mechanism to modify trusts that are migrating from another jurisdiction to Delaware in order to take advantage of some aspect of Delaware trust law.

Comparison to Other Methods of Modifying Trusts

How does the Nonjudicial Modification Statute compare to the other established nonjudicial methods for modifying trusts under Delaware law, namely decanting[8], merger[9] and nonjudicial settlement agreements?[10] All of these methods have their advantages and disadvantages, and trust professionals will always need to keep in mind the unique facts of each matter before choosing which method to employ. However, there are some general pros and cons to consider that are likely relevant for most matters.

For example, compared to merger or decanting, one advantage of the Nonjudicial Modification Statute is that the process does not involve distributing or merging the existing trust into a "new" trust. Issues such as whether the "new" trust should obtain a separate EIN or if the termination of the existing trust will result in any income tax consequences are therefore avoided - the existing trust is simply modified and will continue on. As a practical matter, this approach is likely to be more efficient and cost-effective than a merger or a decanting. In addition, regardless of the method employed, a trustee will likely seek to be released and indemnified from any liability associated with its exercise of discretion to take part in the modification process. In a decanting or merger, this is typically accomplished by a separate Consent, Release and Indemnity Agreement signed by the trustee and the beneficiaries. Under the Nonjudicial Modification Statute, the release and indemnification language could be incorporated into the same agreement that sets forth the trust modifications.

On the other hand, if the trustor is deceased or otherwise refuses to be involved, the Nonjudicial Modification Statute is obviously not an option, while merger and decanting do not in any way require that the trustor be living or involved in the process. Likewise, a nonjudicial settlement agreement could be used even if the trustor is deceased, although any modification would be subject to that statute's "material purpose" requirement. Additionally, in certain situations it may be desirable to *not* obtain the affirmative consent or non-objection of one or more beneficiaries, or to simply provide notice of a trust modification to such parties. For example, if a beneficiary agrees to the modification of a dispositive provision that reduces or eliminates such beneficiary's interest in the trust, the beneficiary could be deemed to have made a gift. In such situations, decanting or merger would provide more flexibility because neither method requires the consent or non-objection of the trust beneficiaries.

Conclusion

Delaware's new Nonjudicial Modification Statute provides the interested parties to a trust the broad power to modify the administrative and dispositive provisions of the trust, even to the extent of fully restating the trust. Provided there is a living trustor who will consent or not object to the modifications, the Nonjudicial Modification Statute may be the best tool available to trust professionals in order to complete the job.

Daniel F. Hayward is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. Daniel graduated with a Bachelor of Science degree in Chemical Engineering from the University of Delaware. He received his law degree from Villanova University School of Law in 2006 and is a member of the Delaware Bar Association. Daniel also received his LL.M. in Taxation from Villanova University School of Law in 2015. He is also a member of the Estates and Trusts Section of the Delaware Bar Association.

Michael M. Gordon is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. He is a graduate of Fairfield University and the Catholic University of America, Columbus School of Law. He received his Masters of Law in Taxation from Villanova University School of Law in 2008 and is a member of the Delaware and Maryland Bar Associations.

Peter S. Gordon is a Director of the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. He is a graduate of Georgetown University and Fordham University Law School. He received his Master of Laws in Taxation from Georgetown University Law School in 1981 and is a member of the Pennsylvania and Delaware Bar Associations.

Norris P. Wright is a Director of the Wilmington law firm of Gordon, Fournaris & Mammarella. With the exception of the time he acted as President and Trust Counsel for U.S. Trust Company of Delaware, Mr. Wright has spent his entire career practicing law in Delaware. He earned his J.D. degree from the University of North Carolina and his LL.M. in Taxation from Temple University. He received his B.A. degree from the University of Delaware.

Notes:
1- *12 Del. C. § 3342(a) (emphasis added).*
2- *See 12 Del. C. § 3338(c).*
3- *12 Del. C. § 3342(b).*
4- *12 Del. C. § 3342(c).*
5- *See 12 Del. C. § 3338€.*
6- *12 Del. C. § 3342(d).*
7- *See 12 Del. C. §§ 3332(b), 3340.*
8- *12 Del. C. § 3528.*
9- *12 Del. C. § 3325(29).*
10- *12 Del. C. § 3338.*

Support projects in your community through the Community Lending Program's low-cost financing

To learn more about this and other community development funding available to FHLBank Pittsburgh members, visit www.fhlb-pgh.com.

800.288.3400 • www.fhlb-pgh.com

Greater Protections for Delaware Employees = Additional Training and Awareness for Management

by
Jennifer Jauffret and
Lori Brewington
Richards, Layton & Finger, PA

Delaware's 148th General Assembly recently enacted legislation that expands the landscape of protections afforded to employees and applicants for employment under Delaware law. Prior to the new legislation, Delaware law, similar to federal law, provided protections for applicants and employees based on the protected classes of race, color, age, religion, sex, and disability. As one of the more progressive states, Delaware law also provided protection for employees and applicants based upon their genetic information, gender identity, sexual orientation, volunteer fire fighter status, and their status as victims of stalking, domestic violence, or sexual assault. The new legislation provides even further protection and includes additional classes of protection, including protection related to an employee's or applicant's reproductive health decisions and family caregiving responsibilities. In addition to enacting this expanded coverage, the General Assembly passed laws on wage disclosure and clarified that workers' compensation is an exclusive remedy for on-the-job injuries with limited specific exceptions, among other employment-related legislation. The following summary of the new employment laws in Delaware will help management in any Delaware business be prepared to comply. Compliance typically begins first with training all management employees.

Employee Protection from Discrimination for Reproductive Health Decisions

Many individuals in the United States are receiving fertility treatments and medications to start a family and are starting families at a relatively older age. Further, many Americans have strong views on fertility aids, birth control, and abortion. The Delaware legislature recognized these dynamics and their impact on the workplace and, accordingly, enacted a law to protect individuals in the workplace regarding their personal reproductive health decisions. The lead sponsor of the bill, Debra Heffernan, stated:

> We've heard the stories over and over — employees feel pressured by their bosses to disclose the deeply personal decisions they have made or intend to make related to raising a family. We believe that an employee's plans for his or her family should have no bearing on business decisions made by their employer.

House Bill No. 316, also known as "Not My Boss' Business" which takes effect on December 30, 2016, prohibits employment discrimination based upon an employee's "reproductive health decisions." Under this new law, employers cannot refuse to hire or discriminate against an applicant or discriminate against or discharge an employee because of any of

the employee's or applicant's "reproductive health decisions." A "reproductive health decision" is defined under the statute as a decision related to the use or intended use of a particular drug, device, or medical service related to fertility control, or the planned or intended initiation or termination of a pregnancy. Notably, this new law does not address personal opinions regarding reproductive health held by applicants or employees; rather, the focus is on protecting individuals from discrimination based upon their personal reproduction decisions. This state law does not create any accommodation obligations for employers, but individuals may qualify for accommodations and/or leave under federal law. Also of note, the legislature made clear that this new law does not create any new obligations or change any existing obligations related to insurance coverage of reproductive health care.

As a side note, House Bill 316 is an amendment to the Delaware Discrimination in Employment Act ("DDEA") (state law equivalent to Title VII), which sets forth all of the protected classes against discrimination and retaliation in employment for Delaware employers with four or more employees. The DDEA provides for an exemption for religious organizations for discrimination relating to gender identity and sexual orientation. However, the new amendment does not provide a similar exemption for religious organizations for reproductive health decisions. Thus, all Delaware employers with four or more employees must comply with this new law.

Employee Protection from Discrimination for Family Caregiving Responsibilities

Another expansion of protection for employees and applicants is House Bill No. 317, which takes effect December 30, 2016. It protects employees and applicants for employment from discrimination based upon their responsibilities as family caregivers. "So often, the role of primary caregiver for an aging parent or a child with special needs is filled by a daughter or mother who also has a full-time job," said Rep. Kim Williams, D-Newport, sponsor of House Bill No. 317. "No one should have to choose between earning a living and making sure that a loved one is cared for properly. Employers should judge people on how well they perform their jobs, not the responsibilities they may have at home."

The new law provides that employers cannot discriminate against employees because of their caregiving responsibilities. More specifically, pursuant to House Bill No. 317, an employer cannot refuse to hire, discharge, or otherwise discriminate against an employee because of the employee's family responsibilities. Additionally, an employer cannot segregate or deprive anyone of employment opportunities or otherwise adversely affect an individual's status as an employee because of the person's family responsibilities. Under the new law, "family responsibilities" means the obligation of an employee to care for any family member who would qualify as covered under the Family Medical Leave Act ("FMLA"). Generally, covered family members are the employee's spouse, son, daughter, or parent. Each of these terms is further defined in the FMLA regulations. This new law applies regardless of whether the employee is FMLA eligible.

It is important to note that this law does not create an accommodation obligation for employers related to caregiving responsibilities. Employees, therefore, must still fulfill the essential functions of the job and follow all other employment requirements, such as attendance standards. Employers may still discipline for attendance and other work-related violations that are outside of FMLA, the Americans with Disabilities Act, and other leave protections, provided they do so in a fair, consistent, and non-discriminatory fashion. Nevertheless, this law prohibits the employer from making job-related decisions, for example, based on the fact that an employee has multiple young children, a disabled child, or a sick parent.

Employers Cannot Prohibit Employees from Commiserating About Wages

Although employers often in the past have had practices or policies prohibiting employees from disclosing or discussing their wages, in Delaware, such practices are no longer permitted. In Delaware, employees are now free to discuss their compensation, even bonuses, with other employees or third parties. The intent of this new law is to allow employees to discuss compensation with other employees to ensure they are being paid fairly. Now, for example, women employees, by asking a male colleague the amount of his compensation or hearing another employee mention his bonus amount, more easily can ascertain the wages and bonuses of their male counterparts to determine whether they are receiving equal pay for equal work. "Wage secrecy is one of the big barriers that keeps women from earning as much as their male colleagues for the same work. Though it can be considered taboo to talk about fellow workers' pay, some companies actually prohibit it outright," said House Bill No. 314 sponsor Rep. Helene Keeley, D-Wilmington South. "We want all employees, not just women, to be able to talk openly about wage fairness in the workplace."

Specifically, House Bill No. 314 makes it unlawful for an employer to prevent an employee from discussing his or her wages or the wages of another employee. Under this new law, employers cannot require that an employee refrain from inquiring about, discussing, or disclosing his or her wages or the wages of another employee. In addition, the new law makes clear that it is unlawful to require an employee to sign a waiver or other document that would deny the employee the right to disclose his or her wages, and prohibits an employer from discharging, formally disciplining, or otherwise discriminating against an employee for discussing his or her wages or the wages of another employee. Notably, the new law does not require employers to disclose wages of employees nor employees to disclose his or her wages. Thus, an employee lawfully may choose not to tell others his or her compensation, even if asked. Moreover, this law does not prevent an employer from requiring employees in certain positions, such as a manager, to treat other employees' compensation and personnel data in a confidential manner; however, this manager would be free to disclose his or her own salary or ask another manager about that other manager's compensation. This new law took effect when signed by Governor Markell on June 30, 2016.

(continued on p. 18)

(continued from p. 17)

Delaware Division of Unemployment Has the Means and Method for Collecting Unpaid Overpayments and Tax Assessments

House Bill No. 160 clarifies that the Delaware Division of Unemployment Insurance is authorized to collect unpaid claimant overpayments of unemployment benefits and unpaid employer unemployment tax assessments by intercepting state and federal tax refunds due to the claimant or employer. This is already authorized by the Delaware Code for state tax refunds, and is both authorized and required as a condition of receiving federal unemployment compensation funds. This new law took effect when signed by Governor Markell on June 28, 2016.

Delaware Workers' Compensation Statute Remains the Exclusive Remedy for Work Injuries with Minor Exceptions

Although not yet signed by the Governor, should this bill become law, House Bill No. 308 would clarify that even though an employee is bound by Delaware's workers' compensation law with regard to compensation for personal injury or death arising in the course of employment, regardless of the question of negligence, the injured employee can still obtain or retain uninsured and underinsured motorist benefits and personal injury protections.

House Bill No. 308 clarifies the issue raised in Simpson v. State, 2016 WL 425010 (Del. Super. Jan. 28, 2016), in which the plaintiff employee sought underinsured motorist benefits from her employer, the State of Delaware, and her personal insurance carrier for injuries sustained in the course of employment. Simpson was injured in an accident with an underinsured motorist while driving a car owned by the state. Simpson received workers' compensation benefits for her injuries, but she wished to collect benefits from her own personal insurance against underinsured motorists and from the state, which self-insured its employees against underinsured motorists. Simpson's insurance carrier informed her that she was prevented from accessing such benefits until she had exhausted the state's coverage as the primary policy on the vehicle involved in the accident. The state claimed Simpson was not eligible for these benefits because she had already collected workers' compensation benefits as her exclusive remedy.

The Delaware Code already allows employees to collect both workers' compensation and their own insurance policy benefits. However, in this case, the workers' compensation insurer and the underinsured motorist insurer were the same entity, the State of Delaware. The court believed that if an individual could get both types of benefits, he or she would be compensated twice for the same injury. The court then suggested that the legislature introduce clarifying language if it wanted to support the position that the phrase "exclusion of all rights and remedies" did not apply to other insurance provided by the employer. Otherwise, the state in the Simpson case was not required to pay the plaintiff anything beyond the workers' compensation benefits she had already received. As a result of this decision, the General Assembly acted to ensure that employees, including state employees, had the protection of workers' compensation benefits as well as motorist and personal insurance benefits, if applicable.

This new law will take effect if and when signed by the Governor.

Statute of Limitations for Discrimination Claims Increases from 120 Days to 300 Days

The Delaware Department of Labor's Office of Anti-Discrimination (the "DDOL") has the exclusive jurisdiction to investigate employees' state law claims of discrimination or retaliation made against their employer. Current Delaware law provides that for charges based solely on Delaware state law, employees must file their charge of discrimination with the DDOL within 120 days of the alleged unlawful employment action committed by their employer, setting forth a concise statement of facts, in writing, verified and signed by the employee or applicant for employment. Under Senate Bill No. 214, employees and applicants would have 300 days to file such charges against employers. The legislature's intent was to make Delaware's statute of limitations consistent with the statute of limitations under federal discrimination law. Senate Bill No. 214 has not yet been signed by the Governor, but if signed by the Governor will take effect when signed.

As a practical matter, Senate Bill No. 214 is not likely to materially increase the number of claims against employers filed by employees and applicants with the DDOL. Employees and applicants already have the ability to file a charge of discrimination with the DDOL within 300 days, as long as they are simultaneously filing their charge with the EEOC under federal anti-discrimination law, which is accomplished by simply checking a box on the charge form. In reality, most employees automatically file charges with both the EEOC and the DDOL, and as a result, most employees already have 300 days to bring their claim against their employer. The employees who will benefit from this change in the law are those who work for employers with fewer than 15 employees, as they are not protected by federal anti-discrimination laws and only have 120 days to file a charge of discrimination.

What Do Employers Need to Do?

Employers should ensure that they are, or will be, in compliance with these new laws and potential new laws as of their effective dates. One critical step is to educate and train management about these new laws. Management must be aware of these issues, particularly related to the increase in protected classes under anti-discrimination protections, and know to seek human resources and legal guidance before implementing any employment decisions that could put the

company at risk. These new laws also may require revisions to existing employment policies, such as Equal Employment Opportunity anti-discrimination, and confidentiality policies.

Lori Brewington, an associate at Richards, Layton & Finger, represents a wide variety of corporate and business clients in employment issues and commercial disputes. She provides employment advice on issues such as noncompete agreements, discrimination and retaliation complaints and discipline/termination situations, and trains both managers and employees regarding compliance with employment laws.

Jennifer Jauffret, head of the Labor and Employment Group at Richards, Layton & Finger, represents a wide variety of management clients in labor and employment issues and disputes in Delaware and neighboring states. She advises, for example, on major corporate transactions, restrictive covenants, and general employee issues. She also defends charges of discrimination and employment lawsuits at both the agency and court level.

The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.

You May Call Your Best Witness

William A. Santora, CPA
Lori L. Stoughton, CPA
Stacey A. Powell, CPA, CFE, CICA
Robert S. Smith, CPA

Delaware's Premier Litigation Support Team

Santora CPA Group
Right, By Your Side

Call Bill Santora at 302-737-6200

Consistent Basis Reporting Between Estates and Beneficiaries

by
Jordon Rosen, CPA, MST, AEP®
Director – Tax & Small Business
Belfint Lyons & Shuman, P.A.

What may have started out as a well-intended set of rules to stop the perceived inconsistent reporting of basis of inherited assets by beneficiaries and the value of that property reported for federal income tax purposes, has turned into a mess. Somehow, after sitting on the cutting room floor for several years, tax policy writers included new basis consistency reporting rules as part of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("2015 Act"). P.L. 114-41 added Sections 1014(f) which requires consistent basis reporting between estates and persons acquiring property from a decedent and Section 6035 which requires the executor of an estate that is required to file a return under Section 6018, to file a statement with the IRS and provide each legal or beneficial owner of such property with a statement identifying the value of the property.

This last minute provision buried in an otherwise non-tax related bill caught both practitioners and the IRS off guard since the bill was passed on July 31, 2015 and applied to estate tax returns filed on or after August 1, 2015, requiring some executors to file these new statements as soon as 30 days thereafter. In order to allow Treasury time to provide guidance and implement these new rules and for practitioners and executors to adapt to the new rules, Notices 2015-57, 2016-19 and 2016-27 effectively delayed the reporting requirement by executors until June 30, 2016. A draft of new Form 8971 (issued 12/18/15) along with instructions (issued 1/16/16) were subsequently issued, along with proposed regulations (T.D. 9757 published in the Federal Register on 3/4/16). However many questions and inconsistencies still remain that executors and practitioners will have to deal with until Treasury has had time to address them. The 2015 Act also added Sections 6662(k) which adds underreporting resulting from inconsistent basis reporting to the list of those actions subject to the 20 percent accuracy related penalty and Section 6724(d)(1)(D) which provides for

a penalty for failure to file with the Secretary the required statement under Section 6035.

Basis Consistency – Section 1014(f)

The law and Proposed Regulations provide that the taxpayer's initial basis in property acquired from a decedent cannot exceed the property's "final value" for estate tax purposes, or, if the "final value" has not been determined, the value reported on the statement required by Section 6035. This rule only applies to property which increases the estate's liability (after credits) by reason of inclusion in the gross estate. In the case where the Federal estate tax is imposed, the proposed regulations also provide an exclusion for property that qualifies for the marital or charitable deduction as well as tangible personal property for which an appraisal is not required.

"Final value" is determined if (a) the value has been reported on Form 706 filed with the IRS and is not contested by the IRS before the period of limitations for assessment has expired, (b) the value is specified by the IRS and not contested by the executor of the estate, or (c) the value is determined by a court or pursuant to a settlement agreement with the IRS. An unanswered issue remains in the case where a beneficiary has better information than the executor regarding the determination of value of property even though a different value was used by the executor on the estate tax return filed with the IRS.

The proposed regulations clarify that Section 1014(f) does not prohibit otherwise permitted adjustments to the basis due to post-death events such as capital improvements, depreciation, amortization, adjustments to the basis of a partnership or S corporation interest or a sale or exchange. However, notwithstanding these adjustments, a deficiency and underpayment penalty could apply if the final value of specific property has been determined before the period for assessment has expired for the Federal income tax return of the recipient, but after the recipient has sold the property and reported a different basis (a harsh, but real possibility).

"Zero-basis rule"

Creating much controversy, Proposed Section 1.1014-10(3)(i)(B) provides that if after the filing of a Federal estate tax return the executor discovers previously omitted property that would have generated an estate tax liability had it been included on Form 706, and the statute of limitations for assessment has expired, the final value (basis) of the after-discovered or omitted property is zero (conversely, if the statute of limitations has not yet expired and the executor reports the property, then the final value of the property is determined under the general rules described in Section 1014(f)). Many commentators, including this author believe that the IRS has overstepped its statutory authority with this provision since (a) there is otherwise no related provision in the 2015 Act and (b) it contradicts longstanding Section 1014 which provides for how basis of property acquired from a decedent is to be determined. It otherwise would seem to be a harsh punishment on the beneficiary for what might be an inadvertent omission by the executor. Even allowing for a supplemental filing by the executor after the statute has passed in order to report the omitted property and allow the beneficiary to use the final value prescribed by Section 1014 would be a welcome relief. If this rule is upheld, executors will want to be sure to protect themselves and seek hold-harmless provisions prior to accepting the position.

New Reporting Requirements – Form 8971

New Section 6035 created by the 2015 Act now requires the executor of an estate to file a statement of value (new Form 8971) with the IRS and to each beneficiary (a copy of Schedule A) regarding the value of the property the beneficiary acquires from the decedent. Form 8971 is due to the IRS with a copy of Schedule A to each beneficiary no later than 30 days after the Federal estate tax return is filed or should have been filed and applies to all estate tax returns filed on or after August 1, 2015. This would include returns that were on extension as of the date of enactment and are subsequently filed on or after August 1, 2015. As noted above, a transition provision allows for Form 8971 otherwise due between August 1, 2015 and May 31, 2016, to be filed by June 30, 2016 (currently, there is no provision to request an extension of time for filing From 8971 and Schedule A). If the beneficiary is other than an individual, such as a trust, estate or business entity, the Schedule A should be provided to the trustee, executor or the business entity itself and not the beneficiaries or owners. If there is an adjustment to the information required to be included on the form, a supplemental statement (Form 8971) must be filed no later than 30 days after the adjustment is made. The Proposed Regulations clarify and confirm that the reporting requirement under Section 6035 does not apply if a Federal estate tax return is otherwise not required to be filed, including where returns are filed solely to make the portability election or a GST tax election or exemption allocation.

Practitioners and executors will face several obstacles when preparing Form 8971. First, and maybe most importantly is that most executors will not know which assets will be going to which beneficiaries within 30 days after the 706 is filed and multiple beneficiaries may be receiving a pro-rated portion of a single asset (which begs the question why the law simply doesn't require the filing of Form 8971 30 days after assets are distributed rather than 30 days after the estate return is filed). In such instances, any and all possible assets that could be used to satisfy a beneficiary's interest must be listed on each Schedule A. This would result in each beneficiary receiving a Schedule A listing the same and possibly all of the assets of the estate, disclosure of which, may not have been consistent or the intent of the decedent.

Complicating these rules is the inconsistency between Sections 1014(f) and 6035. The former exempts property subject to the marital deduction from the basis consistency rules (and related penalty provisions), but the same exemption does not apply to the reporting rules for Form 8971, such as the case where the portability election is not used or is not applicable and the surviving spouse is receiving assets. In these cases, Form 8971

(continued on p. 22)

(continued from p. 21)

will need to be filed and a Schedule A provided to the surviving spouse.

Example: Husband dies in 2016 after using all of his applicable exclusion amount ($5,450,000), leaving his entire estate to his surviving spouse, subject to the marital deduction. The assets left to the surviving spouse will not be subject to the basis consistency rules since Section 1014(f) excludes assets subject to the marital deduction. However, a similar exemption does not apply under Section 6035 and since the portability election cannot be made by the executor (there is nothing left to port), the executor must file Form 8971 with the IRS and provide a copy of Schedule A to the surviving spouse.

Practice point: Practitioners preparing client tax returns, more than ever, will have to inquire if any assets sold by the taxpayer were inherited and obtain a copy of Schedule A to verify basis.

The Proposed Regulations provide four categories of assets that are not required to be reported on the Form 8971 including-

- Cash and equivalents. However, it is unclear what assets fall under the category of "equivalents".
- Income in respect of a decedent. Technically, unless clarified, this exemption would not apply to balances in a Roth IRA or Roth account with an employer or the after-tax contributions in a traditional IRA or employer retirement account.
- Tangible personal property – exempt from reporting if an appraisal is not required under Section 20.2031-6(b) and 1.6035-1(b)(1)(iii). This exemption does not extend to collectables.
- Property that is sold or otherwise disposed of by the estate during the course of administration in which capital gain or loss is recognized. What is not addressed here is the situation where ordinary gain or loss is recognized (e.g. Section 1231).

Supplemental information returns

The Proposed Regulations generally require a supplemental information return (Form 8971 and related Schedule A) to be filed within 30 days upon a change of information required to be reported that would otherwise render the original filing incomplete. This could be the result of erroneous or incomplete information originally available to the executor, including the discovery of additional property, final property values (e.g. as the result of an audit or litigation) or the discovery of a new or change of identity of a beneficiary who will receive the assets. The regulations make clear that a supplemental filing is not required to correct an inconsequential error or omission or to specify the actual distribution of assets previously reported as being available to satisfy the interest of multiple beneficiaries.

Subsequent transfers

Section 6035(a) clearly states that the responsibility for furnishing the statement of information to the IRS and beneficiaries falls on the executor. A controversial provision in the Proposed Regulations, however, requires additional information reporting by the beneficiary (recipient) upon a subsequent transfer to a related transferee (generally a family member or related entity) in a transaction in which the transferee's basis is determined in whole or in part with reference to the transferor's basis, such as in the case of a gift.

Example: John inherits 100 shares of ABC stock with a final estate value of $1,000, which is properly reported on the decedent's estate tax return and on Form 8971 and Schedule A prepared by the executor. John holds the stock for 50 years and then gifts the shares to his son and reports the gift on a timely filed gift tax return. In this case John will also need to file a supplemental Form 8971 with the IRS and provide his son with a copy of Schedule A.

Again, the question as to whether the IRS is overstepping its statutory authority is an issue, not to mention why this information is needed if a gift tax return is being filed reporting the information. Until this issue is resolved, estate beneficiaries will need to retain the initial Schedule A indefinitely or until all inherited assets have been disposed of.

Conclusion

As Treasury and the IRS wade through the flood of comments and recommendations being sent by various professional organizations in an effort to provide more clarity and guidance, practitioners and executors will need to be wary of the gaps and inconsistencies of the new law and regulations and keep on top of developments to properly advise clients as to their filing obligations and avoid unexpected surprises.

Jordon Rosen, CPA, MST, AEP® is the Director of estate and trust services at the Wilmington, DE accounting firm of Belfint, Lyons & Shuman and is the past president of the National Association of Estate Planners & Councils. He can be reached at 302.573.3911 or jrosen@belfint.com.

For Your Benefit

by
Louis D. Memmolo, GBA, CHRS
Employee Benefits Advisor
Weiner Benefits Group

"It's very difficult to stay on top of all the changes and requirements that just keep coming at us in rapid fire fashion. "

The dog days of summer have arrived! As the political season continues to consume the news and the NFL preseason is just around the corner, employee benefits compliance relentlessly nips at our heels. Are you the rising star of compliance standards, staying cool and confident in your obedient adherence, or are you hiding your head under your paws in the dog house of denial? In this issue we will bring to your attention a few items of importance.

PCORI Fees Due Aug 1, 2016

The Affordable Care Act (ACA) requires health insurance issuers and sponsors of self-insured plans to pay Patient-Centered Outcomes Research Institute fees (PCORI fees). These fees are paid and reported annually using IRS Form 720 (Quarterly Federal Excise Tax Return). This year they are due August 1, 2016. Employers should determine which benefit plans will be subject to the fees; assess plan funding to determine if they are responsible or the issuer of the coverage; and select an approach for calculating the fees. Many issuers leave this confusing and complicated process for employers to figure out on their own. It's important to get dependable and competent assistance as the fines could exceed the fees themselves.

Cadillac Tax Update

Beginning in 2020, the ACA will levy a 40 percent excise tax on health plans that cost more than $10,200 for an individual or $27,500 for family coverage. The Kaiser Family Foundation indicates over 40 percent of employers could be subject to this tax by 2028. Even though this controversial tax has been delayed several times and its implementation shares bipartisan disdain, employers are beginning to plan and make adjustments now. Some changes employers are considering include: increasing wellness initiatives to improve their employees' health; reducing the value of plan designs; and changing Health Savings Account contributions to post-tax. Yes, pre-tax HSA contributions and your employer's contributions impact the value of your health plan.

DOL New Fiduciary Rule Impacts HSAs

Speaking of HSAs…. In April 2016, the Department of Labor released a final rule that expands who is considered a fiduciary when providing investment advice to retirement plans and their participants which also applies to IRAs and HSAs. Employers should review their arrangements with HSA service providers to determine if their communications rise to the level of investment recommendations covered by the new rule. Advisors should also review the expanded definitions and make any necessary modifications to their practices.

DOL Increases Penalties for Health Plan Violations

On July 1, 2016, the DOL issued an interim final rule that increases the civil penalties that may be imposed under various federal laws, including the Employee Retirement Income Security Act (ERISA). Failing to file an annual form 5500; annual notices under CHIP, GINA, CHIPRA; failing to furnish summary plan documents (SPDs) and WRAP documents relating to employee benefit plans and SBCs; all come with increased fines in the event of failed compliance.

It's very difficult to stay on top of all the changes and requirements that just keep coming at us in rapid fire fashion. A complete compliance review by a competent advisor along with a steady flow of timely relevant information is a must and a critical first step out of the dog house!

Accounting for Success

by
Stephen D. Ritchie, CPA
Director – Tax & Small Business
Belfint Lyons & Shuman, P.A.

"...Recognize the need for 'facetime' with others to listen and candidly share experiences."

"Face Time"

Recently I had the opportunity to meet with two local bankers to enjoy a cup of coffee and discuss our respective businesses for the sole purpose of relationship building. One meeting was with a senior member of a local bank I have known for many years, the other was a younger banker whom I'd never met.

Both conversations were candid and extended well beyond the obligatory small talk about who we know and how we can develop opportunities to work together. Rather, our discussions were more focused on the challenges facing our respective businesses and those of our clients. The landscape of Delaware small business is changing; some of this change is good, some of it not so good, and the similarities encountered by our respective businesses were surprising and thought-provoking. In order to navigate these changes, advisors need to purposefully enhance their support networks through substantive and open communication.

I have unknowingly overlooked the value of setting time aside to meet with other advisors in the financial services business. Both the bankers and I realized that along with lack of time, technology is a contributing factor to forgetting about facetime. Technology has achieved amazing advancements, making the world a smaller place and allowing us to operate from just about anywhere. It allows communication to be instantaneous, ever public and brief. While this may increase efficiency, it could also constrain the synergy that takes place in a face-to-face conversation not driven by an agenda or expectation. Email and texting reduces our ability to really listen and understand what the other person is trying to say. The ability to interpret body language and tone to guide a conversation may become a lost art in our electronic world. At both meetings, we discussed these struggles along with the perceived fear of the next generation of associates to interact face to face with clients, business partners, and other advisors. They don't want to be disruptive to their contacts or experience the anxiety that results when thinking about a meeting with no agenda.

In reality, my experience has been just the opposite. As an advisor to small businesses, I have had the privilege of "looking behind the curtain" and understanding how business owners either struggle or excel at managing their businesses in a rapidly changing environment. Unlike us, they often work in a vacuum without an opportunity to be aware of potential challenges and threats, or how to benchmark their performance in relation to their peers. By providing "facetime" for the sole purpose of listening to their concerns, rather than delivering our content, we can be a valuable resource.

I want to thank the two individuals who recently contacted me to schedule facetime over a cup of coffee; both meetings were invigorating, educational and enjoyable. I came away from both interactions with fresh ideas and perspectives about their businesses as well as my own and I hope they each had a similar experience. The lesson for me is to recognize the need for "facetime" with others to listen and candidly share experiences.

New

5:30am - 9:00am

The Larry Mendte Show

Delaware's NEW, LIVE, LOCAL, Morning Show

NEWSRADIO
1450 WILM

NEWSRADIO
1410 WDOV

Compliance Focus

by
Benay Nachin, CAMS, CRCM
Assistant Director, AML/Sanctions Team
FIS™ RISC Solutions

"The expectation is that covered financial institutions will start developing policies, procedures and processes for this regulatory action immediately."

Benefical Ownership Rule

The Financial Crimes Enforcement Network (FinCEN) published the long-awaited addition to the Customer Due Diligence (CDD) requirements, commonly referred to as the Beneficial Ownership Rule, in the Federal Register on May 11, 2016. This addition is intended to address weaknesses in the current federal CDD rules and strengthen the CDD requirements for:

- Depository institutions
- Brokers or dealers in securities
- Mutual funds
- Futures commission merchants
- Introducing brokers
- Brokers in commodities

While FinCEN has allowed two years to fully comply, the expectation is that covered financial institutions will start developing policies, procedures and processes for this regulatory action immediately.

The beneficial ownership requirements have been designed to:

- Assist law enforcement in financial investigation
- Help prevent evasion of targeted financial sanctions
- Improve the ability of financial institutions to assess risk
- Facilitate tax compliance
- Align U.S. compliance with international standards

Requirements and Coverage

Viewed simply, the new rule adds a fourth element to the CDD requirements, which is to identify and verify the identity of the beneficial owners of a legal entity customer (i.e., the natural person(s) who own or control the legal entity) when a new account is opened.

An individual is considered a beneficial owner if he or she:

- Owns 25 percent or more of the equity interests in the legal entity customer, and/or
- Exercises significant managerial control over the customer.

Excluded entity types include:

- Banking organizations
- Entities with common stock listed on the New York, American or NASDAQ stock exchanges
- SEC-registered investment companies and advisers
- CFTC-registered entities
- State-regulated insurance companies
- Foreign financial institutions established in jurisdictions that have beneficial ownership reporting regimes
- Legal entities with private banking accounts subject to FinCEN rules

Pooled investment vehicles operated by an excluded entity and certain nonprofit corporations are subject to reporting only for those beneficial owners that satisfy the control prong.

Key Requirements

Once a non-exempt beneficial owner is identified, what must a covered financial institution do with regard to beneficial owners in order to comply with the rule?

- Obtain the following information for every beneficial owner
    - Name
    - Address
    - Date of birth
    - Social Security number
- Verify the above information according to the financial institution's customer identification program (CIP)
- Understand the nature and purpose of the customer relationships
- Create a customer risk profile using information gathered at account opening and include in enhanced due diligence reviews of the entity
- Conduct ongoing monitoring
- Update beneficial ownership information whenever monitoring reveals that a change in ownership has taken place

- Retain identification records for five years after the account is closed and verification records for five years after the record is made

Optional Certification Form

An institution may accept copies of verification documents rather than requiring originals from beneficial owners. Additionally, a customer's certification regarding each individual's status as a beneficial owner may be accepted. An optional certification form may be used to document the beneficial owners and their identification and verification information as long as the financial institution does not have reason to believe the information is false or incorrect. The form includes a signature line for the person who is certifying the information on the beneficial owners.

NOTE: FinCEN does NOT intend for the certification to act as a safe harbor for the financial institution.

Additional Considerations

As with any regulatory change, institutions should fully evaluate the risk level and impact associated with this regulatory change. Given the long timeframe before mandatory compliance, it is likely that examiners will expect to see full implementation by May 11, 2018. It is critical to remember to:

- Revise impacted policies, procedures, job aids and BSA compliance program, paying particular attention to items related to CDD
- Update training and timely assign to relevant personnel
- Add beneficial ownership to BSA risk assessment
- Implement ongoing testing and monitoring to ensure compliance
- Ensure that all affected third parties and vendors have a clear plan in place for achieving compliance by the deadline

Effective Date: July 11, 2016
and
Compliance Deadline: May 11, 2018

©2016 FIS and/or its subsidiaries. All Rights Reserved. This article is provided for educational and marketing purposes only. This article should not be construed as providing any legal or compliance advice, nor as establishing any attorney-client relationship.

GF&M GORDON, FOURNARIS & MAMMARELLA, P.A.

www.gfmlaw.com
Follow us on Twitter: @GFandMLaw

Attorneys concentrating in Delaware Trust Law, Fiduciary Litigation, Taxation, Estate Planning, Estate Administration, Business Law and Counseling, Entity Formation, Succession Planning, Mergers and Acquisitions, Captive Insurance, Commercial Litigation, Real Estate, Zoning, Land Development and Alternative Dispute Resolution

Peter S. Gordon
Thomas Mammarella
Emmanuel G. Fournaris
Michael M. Gordon

Bryan E. Keenan
William M. Kelleher
Neil R. Lapinski
Jeffrey K. Simpson
Norris P. Wright
Daniel F. Hayward

Special Counsel
Grover C. Brown
E. Norman Veasey

Charles P. O'Brien
Shannon L. Dawson
Andrew J. Rennick
Phillip A. Giordano
Robert V.A. Harra III
Joseph Bosik IV
Daniel L. Fitzgerald

1925 Lovering Avenue Wilmington, DE 19806
(302) 652-2900 Phone (302) 652-1142 Fax

DBA Calendar of Events

For more information on these and other programs visit **www.debankers.com** or phone the DBA at 302-678-8600, or email: debankers@debankers.com

Follow us on Twitter @DBAbankers

September 28th - 2016 FDIC Directors' College

Atlantic Sands Hotel and Conference Center, Rehoboth, DE

Stay current with the information vital to your institution! The renowned FDIC Directors' College is an interactive, one-day program designed for bank directors, senior officers, and corporate secretaries. The sessions provide valuable ongoing education on current topics and various elements of bank supervision.

October 25th & 26th - 2016 Delaware Trust Conference - Songs in the Key of Wealth

Chase Center on the Riverfront, Wilmington, DE.

You won't want to miss the eleventh annual edition of this premiere trust event that highlights the advantages of the Delaware Trust product. Join dozens of expert panelists from the trust, legal, and accounting fields to learn the latest Delaware exclusive information. Sponsorships and exhibitor spaces are available.

November 15th, 16th & 17th - 2016 Regulatory Compliance School

University & Whist Club, Wilmington, DE.

The Delaware Bankers Association and FIS™ Risk, Information Security and Compliance (RISC) Solutions present the 2016 Regulatory Compliance School offering a comprehensive review of federal laws and regulations affecting the financial services industry. NEW this year, we've added an ethics component! Keep current on the important changes in the Regs you deal with every day on the job, and earn CPE, CRCM, DE and PA CLE continuing education credit!

We are listening

Personalized Service.
Reliable Results.

BLS

BELFINT • LYONS • SHUMAN
Certified Public Accountants

Advisory Services • Audit & Assurance • Tax Services
Holding Company Services • Information Technology

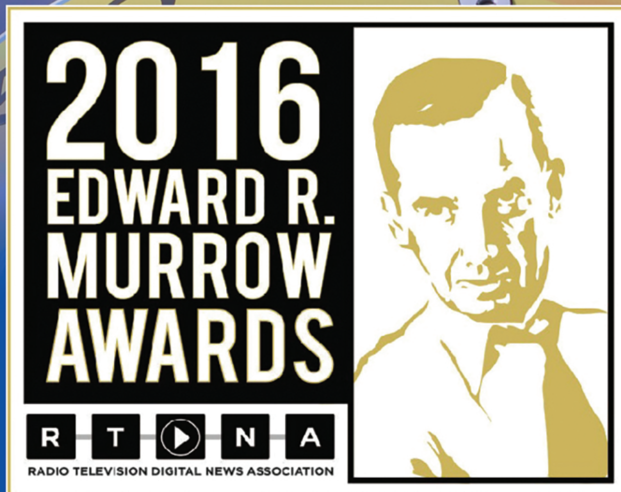
www.belfint.com

DE 302.225.0600 | PA 610.537.5200

info@belfint.com

Delaware's largest
broadcast news operation.
Recognized as best in the nation.

NEW! WDEL 101.7 FM
1150 AM NEWS • TALK • SPORTS



2016 WINNER
for Overall Excellence and Best Newscast

Lending Law Update

by
Eugene A. DiPrinzio, Esq.
Young Conaway Stargatt & Taylor, LLP

"For all you beach goers that engage in bank lending transactions, here is my "hot summer" list of due diligence warnings..."

On a recent vacation, I scorched my feet on beautiful beach sand. The incident reminded me to tread carefully even when circumstances appear to hold no apparent danger. For all you beach goers that engage in bank lending transactions, here is my "hot summer" list of due diligence warnings:

1. Be careful of 50/50 partnerships, LLCs, corporations or other entities

While business entities with equally divided ownership interests are routinely encountered, such entities can involuntarily create deadlock situations. Under Delaware law, even a profitable business may be subject to receivership or dissolution when the parties cannot agree on a course of action. Therefore, it is important to determine whether the controlling documents contain provisions or a default mechanism that will prevent deadlock situations without resorting to litigation.

2. Be wary of the credit application

Lenders often receive credit applications that are signed by not only the principal obligors or borrowers, but also by spouses or guarantors. Under the Federal Equal Credit Opportunity Act, only the true applicant for credit should execute the necessary documents. Unwittingly, a lender may be exposed to greater liabilities if there is discrimination or some other form of disparate behavior during the credit application process.

3. Pay attention to litigation and Uniform Commercial Code searches

These search reports are often glossed over. They provide evidence of old liens, misfiled liens, blanket liens or other encumbrances that create difficulties down the transactional road. Make sure you understand all current or pending litigation, as well as, maintain a clean title to your collateral. This will avoid priority fights between creditors.

4. If your collateral includes environmentally contaminated property or brownfields, determine if there is any future ongoing monitoring or remedial action that will continue during or well past the term of the loan

In many cases, if a lender were to receive the contaminated or brownfields property (through foreclosure or other means), applicable remedial action costs or future monitoring may be involuntarily assumed.

5. Be wary of reassessments, tax abatements and enterprise zones

Make sure you and your borrowers understand the events that can trigger a reassessment of real estate taxes, cause a tax abatement to expire, or an enterprise zone to cease to exist. All of these events may result in additional or increased real estate taxes which could prime the mortgage lien and create a problem for both the borrower and the lender.

6. Check the good standing status of borrowers and entity guarantors on your portfolio

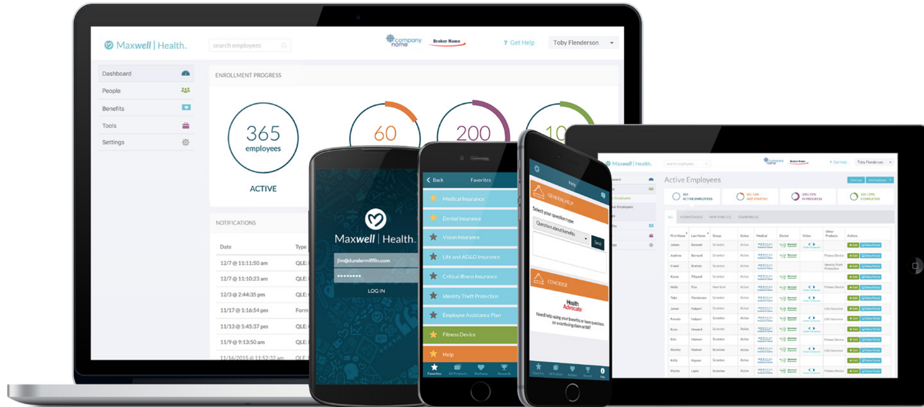
Any time you modify or amend a loan or extend credit, make sure that the borrowing or guaranty entity is in good standing. Otherwise, there could be enforceability issues.

7. Congratulations! You just received an entity guaranty from a trust entity

Have you made certain that the trust is duly authorized to execute the guaranty? Trust agreements may seem to allow for broad guarantees, but the applicable statutes, as well as, the underlying trust instruments, must be reviewed to make sure they fit the transaction.

The moral of this story: Even when circumstances appear free from danger, make sure you carefully examine the transactional due diligence to uncover the issues that could burn you.

An Exciting New Benefits Solution!



Changing Workforce Demographic
How are you changing your messaging?

With Millennials now making up 50% of the workforce employers are faced with how to change their strategy to tailor their benefit package to attract and retain top talent. How are your employees interacting with their benefits?

Weiner Benefits Group + Maxwell Health

Partnered up to bring you and your employees best-in-class benefits administration technology!

- Paperless Forms and Form Signing
- An Awesome Mobile App!
- Email/Communication to Employees Through the System
- Integrations with Carriers and Payroll
- Custom Benefits Marketplace
- Wellness Rewards and Lifestyle Bundles
- Mobile Concierge and Tele-Medicine
- Compliance and Reporting

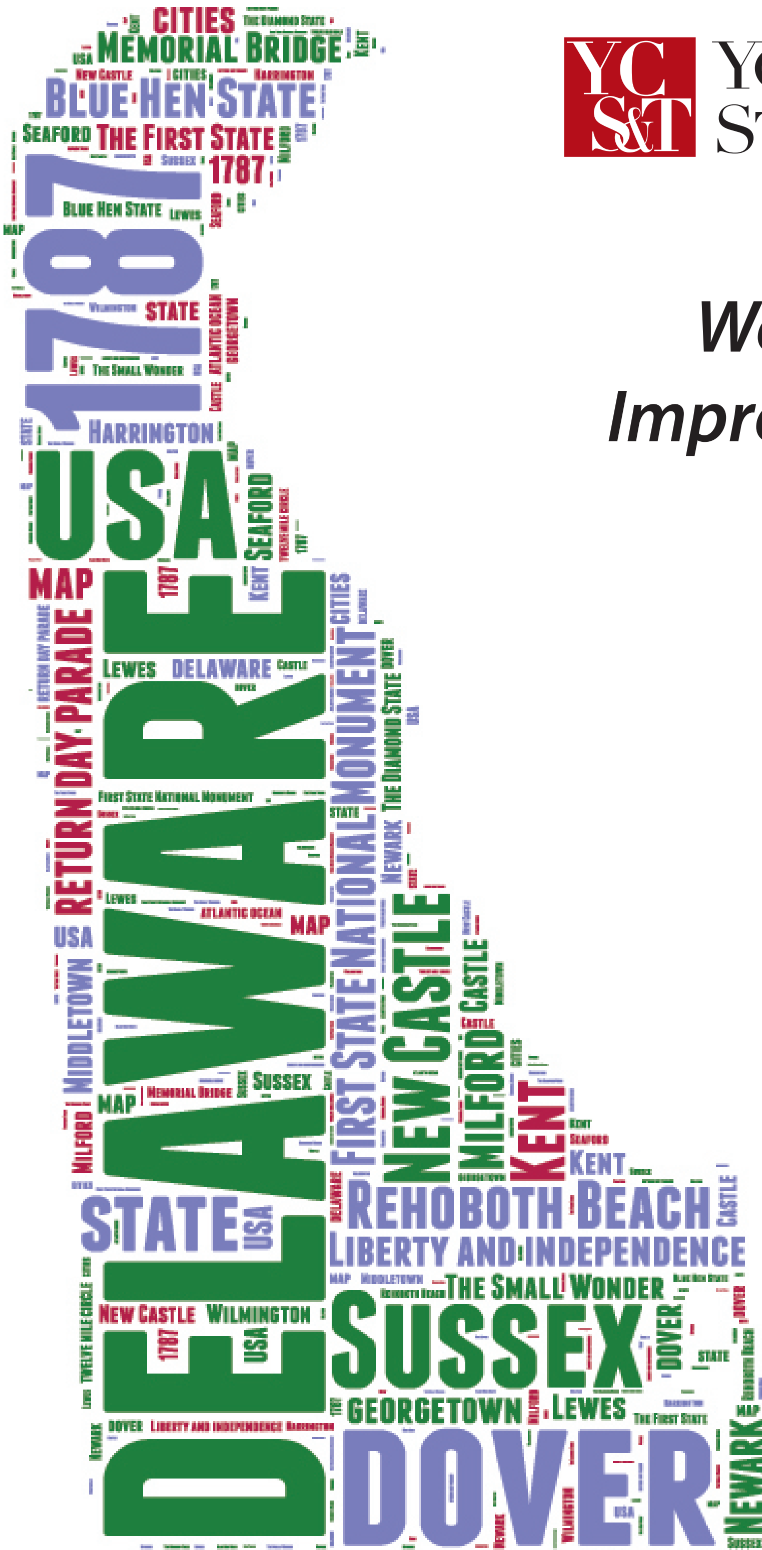
WeinerBenefits
GROUP

Call us or visit our website to learn more about our exciting new technology and state of the art services, or to schedule a personal demonstration.

(302) 658-0218

www.weinerbenefitsgroup.com

2961 Centerville Road, Suite 300, Wilmington, DE 19808



YOUNG CONAWAY
STARGATT & TAYLOR, LLP

Attorneys at Law

Working Together To Improve Our Communities

Eugene A. DiPrinzio
Daniel P. Johnson
Brent C. Shaffer
Vincent C. Thomas
John E. Tracey
Lisa B. Goodman
Stephanie L. Hansen
John C. Kuffel
Cheryl A. Santaniello

Commercial Real Estate, Banking and Land Use

Young Conaway provides a full range of services for commercial real estate acquisition, brownfield development, land use projects, financing and leasing in Delaware, as well as the surrounding region including Pennsylvania, Maryland and New Jersey.

YoungConaway.com

Rodney Square • 1000 North King Street • Wilmington, DE 19801 • 302.571.6600