Delaware Banker

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Build It and They Will Come

Why Delaware Trusts Lead the League

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

Delaware Banker
Editing & Design
Greg Koseluk

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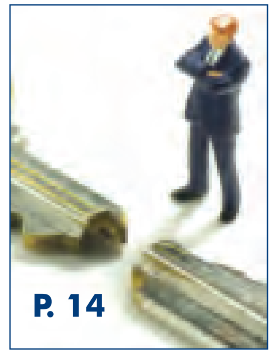
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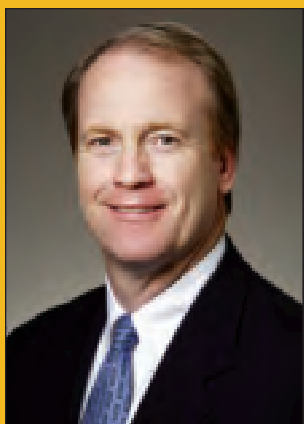


by
Mark A. Graham
EVP, Wealth Advisory Services
Wilmington Trust

Chairman
Delaware Bankers Association

"Our membership continues to grow, a further indication of the value of the association."

When he was 95-years-old Pablo Casals was interviewed by a young reporter who asked: "Mr. Casals, you are the greatest cellist that ever lived. At your age why do you still practice six hours a day?" Casals answered, "Because I think I'm making progress."

The Delaware Bankers Association will soon be celebrating it's 122nd anniversary serving the state's financial services industry, and I'm pleased to say that we too are making progress. What follows is a snapshot of what your association has accomplished in the past year.

The DBA's government relations efforts continue to protect and strengthen the First State's premiere financial services industry. In the last session bills were passed in the area of trusts to help maintain Delaware's preeminence in that area. We also had many constructive meetings with our Congressional delegation, both with the DBA Board, and also during our annual Washington Visit in March. The association's annual Legislative Reception for members of the General Assembly and Senate, also in March, was well-attended and helped to underscore the importance of our industry in the state.

Our membership continues to grow, a further indication of the value of the association. In this current membership term we welcomed four new financial institution members, along with 14 new associate members.

This past fall the DBA unveiled a new website to replace the previous one that was nearly ten year old. Similarly, a few months ago we revamped the platform for the weekly DBA Digest. Both the new website and the Digest feature responsive designs to make them viewable across all platforms and devices.

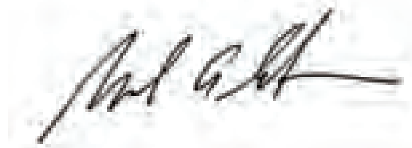
In the field of education, the Delaware Financial Education Alliance (DFEA) has had many notable achievements. In October the Delaware Trust Conference attracted a record number of attendees to its eleventh annual edition. This was our second year in the Chase Center and the response of attendees and exhibitors has been enthusiastic. Planning is under way for the 2017 Conference which promises to be even better!

Also in the area of trust education, our joint venture with the University of Delaware to create the minor program in Trust Management moves closer to fruition. In late April a panel discussion was held for prospective students, and the first classes are scheduled to begin in earnest in September.

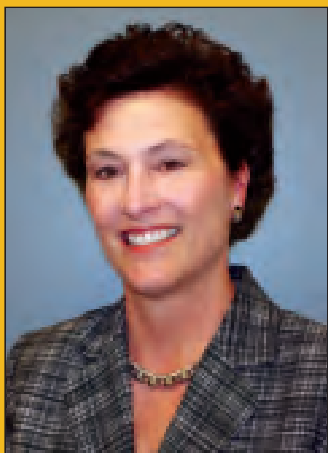
April also saw Delaware's 19th annual celebration of Teach Children to Save Day. Once again hundreds of banker volunteers visited schools throughout the state to teach elementary students how to save for a financially secure future. Another original book was created for the event - *The Great Investo and the Million Pennies*. The book, the seventh title in the series, teaches the importance of saving consistently, even in small amounts.

Looking forward the DFEA is also working on creating its own website to provide more opportunites for interaction with the community.

So, all in all, it was quite a year. And while we're pleased with our progress as your Association, like Pablo Casals, we're hard at work improving on our success.



President's Report



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

"During Shirley's tenure, there have been eight presidential administrations, 39 DBA chairmen, and four DBA presidents."

In Tribute to a Bankers Hall of Famer

It's all together fitting that I'm writing this in the spring issue of Delaware Banker. Among the many signs of spring, one is the start of the baseball season. There's a long-standing tradition in baseball that began with the retirement of Lou Gehrig of retiring a great player's uniform number. Around the same time the Baseball Hall of Fame opened to immortalize the great players in the game. Sometimes I wish we had a Delaware Bankers Hall of Fame, or wore uniforms with numbers on the back. It would help to underscore the honor due to one of the greats of the DBA: Shirley Glanden, our Chief Administrative Officer.

Shirley will be retiring at the end of May after over 40 years of service to the Association. That's a remarkable record of service. Just as a hall of famer is recognized for long and consistent performance, Shirley has given the Delaware banking industry four decades of high caliber service. Shirley came to the DBA after a brief stint in the Office of the State Bank Commissioner. She started here as a secretary, then became an executive assistant, and finally our Chief Administrative Officer. When Shirley began in October 1976 Gerald Ford was president, H. Bernard Lynch was chairman of the DBA, and Jim Jackson was the DBA president. Since then, during Shirley's tenure, there have been eight presidential administrations, 39 DBA chairmen, and four DBA presidents.

When she came to the DBA the standard office equipment was the typewriter and the telephone. Fax machines were just starting to come into use in some offices. In those days Delaware's banking industry could hardly be classified by the term "industry." This was prior to the 1981 Financial Center Development Act. Roughly 4,500 people worked in banking versus the nearly 38,000 who do so today. Since then banking has enjoyed tremendous growth in the First State and through those memorable and often challenging years the DBA has been fortunate to have Shirley as an integral part of the team.

Though it seems as if Shirley is always at her post answering a call for help from a member, she does enjoy a many non-banking pursuits. She did take a little bit of time off in 1980 to present her late husband, Del, with twin sons, Matt and Mark. And she recently became a grandmother with the arrival of her granddaughter, Hannah. Outside of her family, Shirley loves her Philadelphia Phillies, and horse racing including a visit to the Kentucky Derby. Shirley enjoys cruises and the beach, too. Hopefully, she will have the opportunity to enjoy all those pursuits and hobbies in the coming months.

My predecessor, David Bakerian, who served 30 years with Shirley, once modestly remarked that the bankers "tolerated him" but they really loved Shirley. In the two years I've had the pleasure to work with her, I can attest that everyone, from Association chairmen, to board members, to bank presidents and their assistants, the Delaware Congressional delegation, Governors, ABA personnel and everyone who has ever worked with or called on Shirley loves her. Lastly, the members of the DBA staff count it a privilege and a pleasure to call Shirley their colleague and friend.

Shirley, best wishes for a long, happy and well-deserved retirement!

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Legal issues in the workplace aren't just about human resources. They're about human beings.

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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
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What's New at the DBA

New Financial Institution Member

New York Private Trust
200 Bellevue Parkway, Suite 500
Wilmington, DE 19809
Tim Carroll
President & CEO
Phone: 302-792-4735
Email: tcarroll@nyptrust.com
Website: www.NYPTrust.com

New York Private Trust is a Delaware-chartered non-deposit trust company. New York Private Trust offers a broad range of fiduciary services domestically and internationally, including trust administration services, estate administration services and specializes in delivering private label trust services. The firm is led by the Milstein family.

New Associate Member

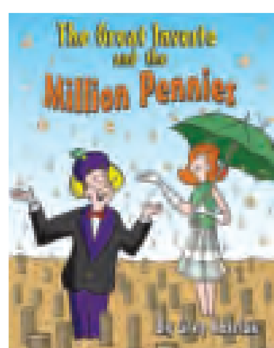
Cinnaire Corporation
100 W. 10th Street
Wilmington, DE 19801
Hughlett Kirby
Vice President Business Development
Phone: 302-298-3868
Email: hkirby@cinnaire.com
Website: www.cinnaire.com

As a nonprofit Community Development Finance Institution ("CDFI"), Cinnaire raises debt and equity funds to finance affordable multi-family housing. Participating and investing in Cinnaire funds, and working with Cinnaire on its CDFI economic development initiatives, helps its bank partners meet their debt, equity and service tests in fulfillment of their Community Reinvestment Act responsibilities. The Delaware team leads Cinnaire's work across its Mid-Atlantic footprint of DE, MD, Southeastern PA and Southern NJ. Formed from the merger of the Delaware Community Investment Corporation with Great Lakes Capital Fund in 2013, Cinnaire has been successfully pursuing its mission in Delaware since 1993. During that period, in Delaware alone, Cinnaire financed 72 affordable housing developments with 4,553 units of affordable housing by raising $279,000,000 in equity and through seven housing loan funds, totaling $123,000,000.

DBA Legislative Reception

The Delaware Bankers Association hosted its seventh annual Legislative Reception for members of the Delaware General Assembly March 30th, at Dover Downs. DBA Chairman, Mark A. Graham Executive Vice President, Wealth Advisory Services Wilmington Trust, joined other prominent bankers from across the State in welcoming the lawmakers. The reception was made possible by the generous sponsorship of the following members: Artisans' Bank; Bank of America; Bessemer Trust Company of Delaware; The Bryn Mawr Trust Company of Delaware; Capital One Financial Corporation; Charles Schwab Trust Company of Delaware; Commonwealth Trust Company; Community Bank Delaware; County Bank; Discover Bank; Fulton Bank, N.A.; M&T Bank; MidCoast Community Bank; U.S. Trust Company; Wilmington Trust; WSFS Bank.

(l. to r.) Mark A. Graham, DBA Chairman, EVP, Wealth Advisory Services Wilmington Trust; Sarah A. Long, DBA President; Representative Bryon H. Short, Chairman House Economic Development/Banking/Insurance/Commerce Committee; and, Robert A. Glen, Delaware State Bank Commissioner, at the DBA Legislative Reception.



New Great Investo Childrens' Book Published

The newest adventure of The Great Investo and Penny has been published in conjunction with the 2017 Teach Children to Save Day effort. *The Great Investo and the Million Pennies* teaches the importance of saving consistently to build a financially secure future. The book is the seventh in the series, written and illustrated by Greg Koseluk, and made possilbe by a grant from Capital One. The book is available at Amazon.com.

DBA Senior Executive Washington Visit

Senator Tom Carper meets with attendees of the 2017 Washington Visit

The Delaware Bankers Association conducted their annual Senior Executive Washington Visit, March 1st through the 3rd. The 2017 Washington Visit provided members the opportunity to meet with key regulators at the FDIC, the OCC, and the CFPB. The group also met with Senator Tom Carper, Senator Chris Coons, and Representative Lisa Blunt Rochester. The DBA thanks all their generous sponsors including Platinum Sponsor - The Federal Home Loan Bank of Pittsburgh; Reception Sponsors - Brooks Courier Service, Inc.; Discover Bank; and, Richards Layton & Finger.

Cover Story

Build It and They Will Come

Why Delaware Trusts Lead the League

by
Todd A. Flubacher
Partner
Morris Nichols Arsht & Tunnell LLP

Having begun my legal career in 1999, I had the good fortune of occupying a dug-out seat to witness the Delaware trust industry's amazing expansion over the past two decades. While this period wasn't necessarily Delaware's "first pitch" in the trust field, it arguably marked the "early innings" of exponential growth which has attracted an all-star roster of trust companies affiliated with the worlds most prominent financial institutions that is unparalleled anywhere else in the country (except perhaps New York).

While I may just sound like a "hometown" fan, I think it is fair to say that Delaware has been recognized as the preeminent jurisdiction for trusts. It leads the league with its innovative laws while continuing to evolve to meet client needs. However, the last several years have produced a wave of jurisdictions (and even Uniform Laws) that are also evolving to replicate what Delaware has done. But I posit that the reason why clients and their advisers choose Delaware has as much to do with Delaware's trust infrastructure as it does with the laws on the books. Beyond the innovative solutions found in the black letter law, the well-developed infrastructure of Delaware's trust industry provides consistency, reliability, flexibility and depth that is not found anywhere else.

Delaware's trust industry is the "seasoned veteran" among trust jurisdictions. It's a mature industry, thus enabling it to focus on putting the finishing touches on its infrastructure, completing its line-up and solidifying its place atop the standings. Two examples of these infrastructure enhancements have been notable "home runs" for the industry. The first example is the Delaware Trust Conference. In collaboration with the industry, the Delaware Bankers Association hosts the annual Delaware Trust Conference at the Chase Riverfront Center, attracting well-known national speakers and boasting more than 450 attendees (a number that increases every year). There is literally no other Delaware-based conference of its kind that educates and promotes a local industry and attracts out-of-town visitors to our State, including attendees, sponsors and exhibitors, and no other trust jurisdiction has anything like it. I am personally aware of several new Delaware trust companies that have opened their doors as a direct result of their founders attending this conference. Second, this fall, students at the University of Delaware will begin studies in a new, first-of-its-kind, accredited Trust Management Minor program in the Lerner College of Business. This program was made possible by the efforts and resources of a partnership between the University of Delaware, the Delaware Bankers Association, financial institutions, law firms, accounting firms and the State of Delaware. It will provide mentoring and internships within the Delaware trust industry and will ensure an ongoing supply of well-trained personnel (a talented "farm team" if you will) to support the growing industry and ensure that the people providing Delaware trust administration services will be skilled and experienced.

As we mark the 20th anniversary of the enactment of Delaware's asset protection trust statute, and we recently passed the 30th anniversary of the repeal of Delaware's common law rule against perpetuities and the enactment of Delaware's first directed trust statute, it is a good time to reflect on just how far Delaware's trust industry has come and how we got here. And as the baseball season is now beginning, it also seems like an appropriate time to bring a merciful end to the baseball metaphors in this article.

Importance of the Industry

The trust industry has become a vitally important part of Delaware's economy, sustaining hundreds of professionals in the trust management field, including trust officers, fiduciary risk specialists, in-house counsel, tax advisers, accountants, attorneys and other skill positions. In 2011, an economic impact study conducted by Professor Max Schanzenbach, of Northwestern University School of Law, concluded that, conservatively, the non-Delaware trust business that flows into Delaware contributes between $600 million and $1.1 billion annually to Delaware's economy, accounting for nearly 2% of the state's economic output. That report concluded that Delaware has taken a much larger share of national trust business, amounting to at least 10 to 20 times the trust assets and fiduciary fees that would be predicted for a state of Delaware's size, and this excess trust business alone generates between $19 million and $33 million in state income tax revenue. It is notable that all those figures preceded the incredible run-up of trust assets flowing into Delaware at the end of 2012 and the exponential growth that has occurred since then.

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How Was It Built

Of course, Delaware has been the preeminent jurisdiction in the world for businesses to incorporate since the early 1900's. More than one-half of the Fortune 500 companies are incorporated in Delaware and toward the latter half of last century, Delaware also became a favored jurisdiction for alternative entities. Many of the same reasons why businesses have turned to Delaware as their jurisdiction of choice are the same factors that make Delaware so appealing to settlors of trusts.

The Delaware Court of Chancery, the court recognized worldwide for its reputation in corporate and commercial matters, is the same court with primary jurisdiction over Delaware trusts. Matters are presented to sophisticated judges on the Chancery Court who are appointed (not elected) by the Governor of Delaware, at the recommendation of a nominating committee, for 12 year terms. The Chancellor and Vice Chancellors hold the reputation of the Court in the highest regard and are accustomed to routinely deciding cases of national importance. Delaware trust cases are never tried before a jury and cases are appealed directly to the Delaware Supreme Court, also a preeminent court recognized around the world for its thoughtful and sophisticated decisions. Because of Delaware's sizable and experienced bar, litigants in Delaware are generally represented by lawyers who are knowledgeable about trust law issues. Delaware also has a large and long-standing body of trust-related case law. Many of the decisions cited in the major treatises are Delaware cases. Delaware's well-developed jurisprudence addresses many issues with clarity, and assures trustees and trust beneficiaries that they can predict, with a fair degree of certainty, how the Delaware courts likely will rule upon trust law matters.

Delaware's origins as a trust jurisdiction began in the early part of the 20th century when Delaware trust instruments were already being drafted to include directed trustees, and Delaware facilitated perpetual trusts by permitting the exercise of powers of appointment to begin a new perpetuities period, thus extending the duration of a trust beyond the common law rule against perpetuities. Of course, the latter gave rise to the Sections 2041(a)(3) and 2514(d) of the Internal Revenue Code, colloquially known as the "Delaware tax trap" because they were enacted to prevent estate and gift tax avoidance through the use of perpetual Delaware trusts. In 1985, Delaware enacted its original directed trust statute which provided that a trustee acting in accordance with an investment direction shall have no liability for any loss resulting from an action taken or omitted by reason of complying with the direction. Then, a year later in 1986, Delaware abolished the common law rule against perpetuities, thus truly enabling perpetual trusts which have come to be known as "dynasty trusts." But it was not until the late 90's when the influx of out-of-state trust business truly began to explode. In 1996, the State began chartering limited purpose trust companies under new laws that greatly reduced the capital and employee requirements previously applicable to banks and trust companies. This immediately resulted in an influx of Delaware trust company affiliates of major financial institutions seeking to offer their clients the Delaware advantage. Shortly after the Delaware trust company affiliates of New York-based financial institutions opened, a massive number of trusts that were paying New York income tax solely because they had a New York trustee, were migrated to Delaware to cease paying New York taxes. In 1997, Delaware enacted the country's second asset protection trust statute (immediately following Alaska). By the end of the late 90's, the stage was set for an expansion of the trust industry over the next two decades that few might have predicted.

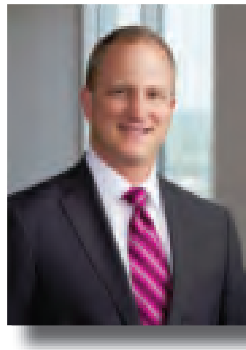
Answering the needs of trust settlors and beneficiaries, Delaware's trust statutes have gradually developed into a very detailed and clear framework for the body of law that governs trusts. The answers to most questions can be found in Title 12 of the Delaware Code, and if there is an area of uncertainty or concern, it is often addressed with legislative updates. The Estates and Trusts Section of the Delaware State Bar Association maintains a standing legislative drafting committee that proffers new legislation annually. The new laws often respond to issues that require clarification, or the needs of settlors and beneficiaries. Delaware's legislature is quick to react to new developments and respond to concerns, and has attempted to create flexible trust laws that are best able to effectuate the wishes of trust settlors and meet the needs of trust beneficiaries. Many of the statutes enacted over the past 2 decades have been followed by other jurisdictions throughout the country and the notable developments are too numerous to recount. For example, Delaware's directed trust statute is inarguably the most successfully implemented directed trust regime in the country and has been copied by many jurisdictions. It is functionally the model for the Uniform Directed Trust Act that is being finalized by the Uniform Laws Commission. Delaware enacted the country's very first total return unitrust statute in 2000, and I could go on and on with other examples, like Delaware's statutes addressing decanting, merger, non-judicial settlement agreements, pet trusts and purpose trusts, designated representatives, pre-mortem validation, silent trusts, etc.

Now today, Delaware boasts over 60 trust companies, most of which are affiliates of the largest, most recognizable financial institutions in the world. This critical mass of corporate fiduciaries provides plenty of alternatives for clients and ensures that the trust infrastructure remains robust. The many prominent financial institutions that have invested in Delaware, and are committed to the continued success of the industry, provide solid stewardship, ensure stability and secure Delaware's future success as a trust jurisdiction.

Why Choose Delaware?

When we are setting up large, complex, long-term wealth transfer vehicles for clients (which often-times is the most important thing they will do for themselves and their family, and perhaps the only lasting legacy they leave), I think it is necessary to take a quality-based approach and not the cheapest, most expedient option. There are many scorecards in the form of charts, comparisons and rankings that compare Delaware's laws to other jurisdictions, but I believe the following factors are vitally important to consider when choosing among trust jurisdictions:

- Responsiveness and efficiency of the jurisdiction's legislature and the quality of updates
- Stability of the trust industry and the State's long-term commitment to the industry
- Quality of the court system
- Quality of the judges, how are they appointed/elected, and length of term
- Depth, breadth and quality of case law
- History and experience of the trust industry and its professional support infrastructure
- Different drafting styles
- Quality and depth of legal counsel
- Variety of options among trust companies and number and diversity of high quality options now and in the future
- Availability and stability of experienced, high-quality, well-trained trust officers and other trust professionals
- Different trust administration practices
- Taxation of trusts
- Last but certainly not least, never underestimate the importance of the trust industry's infrastructure.



Todd A. Flubacher works with national, international and local clients on the creation, migration, modification and administration of Delaware trusts. He represents Delaware trustees, beneficiaries, law firms and individuals throughout the country on all matters involving Delaware trusts and estates.His practice emphasizes the unique advantages of Delaware trust law, including directed trusts, dynasty trusts, tax planning, asset protection trusts, and all aspects of trust validity, construction and administration. Todd has substantial experience with migrating trusts to Delaware and modifying trusts by decanting, merger, non-judicial settlement agreements, Delaware Court of Chancery trust petitions, administrative amendments, and addressing issues pertaining to choice of Delaware governing law. He drafts, reviews and comments on Delaware trust documents and renders Delaware trust law opinions. For more than a decade, Todd has filed trust petitions with the Delaware Court of Chancery for instructions, reformations/modifications, transfer of trust situs, construction, choice of law and other trust-related matters.

Splitsville?

Can Community and Condominium Association Liens Impair Your Delaware Mortgage Loans?

by
Eugene A. DiPrinzio, Esq. and
Brent C. Shaffer, Esq.
Young Conaway Stargatt & Taylor, LLP

Delaware lenders confront declarations of restrictive covenants recorded prior to the lenders' mortgages on a daily basis. These covenants typically "run with the land" (title to real estate) and often vest community, homeowner, and condominium associations with the contractual power to impose mandatory assessments on the real estate collateral, coupled with the right to place liens on the property for unpaid assessments. These associations and lien rights are present in virtually all residential and commercial condominiums, and are also positively ubiquitous in non-condominium residential developments created after the mid-1970s. They are even frequently encountered with commercial real estate in office and industrial parks, as well as large retail centers. Assessments are the critical life blood for many associations to insure amenities and common areas, operate and perform maintenance and repairs, make replacements or incur capital expenditures in all aspects of their development projects.

At Delaware common law, these contractual liens for assessments, attributable to periods after recordation of the mortgage, did not generally have priority over the mortgage lien, since they were construed as liens arising after recordation of the mortgage. This general rule of thumb has changed in Delaware, however, primarily due to the 2009 adoption of the Delaware Uniform Common Interest Ownership Act ("DUCIOA"),[1] based on the Uniform Common Interest Ownership Act ("UCIOA") promulgated by the National Conference of Commissioners on Uniform State Laws.

DUCIOA establishes a "split lien" priority status. If DUCIOA applies to the mortgaged real estate (as discussed below, this will generally be the case with residential developments and community associations created after September 2009), then the association ("HOA") has a lien prior to all encumbrances that arise after the recordation of the HOA's declaration except for tax liens and the liens of first and second mortgages; however, the first and second mortgage priority does not apply to HOA assessments for the six month period arising prior to the mortgage foreclosure filing.[2] To obtain this "super priority" status over mortgages (for the six months of assessments), the HOA need only have recorded in the county in which the real estate is located, a document that contains the name of the association, the address, a contact telephone number, a contact e-mail address and a web-site address; and shall have recorded at any time, but not less than thirty days prior to the sheriff's sale in the foreclosure of the bank's mortgage, a statement of lien which shall include a description of such unit, the name of the record owner, the amount due and the date due, the amount paid for recording the statement of lien and the amount required to be paid for filing a termination thereof upon payment, and the signature and notarized statement of an officer of the association that the amount described in the statement of lien is correct and due and owing.[3]

Moreover, the bank may have a bigger problem than just having foreclosure sale proceeds applied to six months of HOA assessments first, before application to the mortgage debt. There is currently much controversy in states that have adopted a version of the UCIOA over whether this six month priority just means that such amount is paid first to the HOA at a first mortgage foreclosure action, or whether this provision (by its mere presence) establishes a "true priority lien" instead, enabling the HOA to extinguish the mortgage lien entirely upon HOA lien foreclosure (unless the mortgage holder steps up and pays off the HOA lien).

Three published court decisions (from Nevada, the District of Columbia, and Wisconsin) hold that split-priority statutes establish such "true priority" over the HOA liens. In other words, this concept means that even though the HOA liens prime the mortgage only as to a limited amount and the mortgage lien is superior to the remaining balance of assessments owed, if the HOA forecloses on its lien, that foreclosure sale extinguishes the entire prior mortgage as a subordinated lien.[4] These cases created considerable turmoil in the lending industry and a "chilling effect" on residential condominium financing. The most prominent trade associations came together to issue a policy statement condemning these decisions.[5] The reaction of the Federal Housing Finance Authority ("FHFA"), Fannie Mae, and Freddie Mac to these decisions was forceful. With respect to mortgages held by Fannie Mae or Freddie Mac, they have taken the position that pursuant to the Housing and Economic Recovery Act of 2008, HOAs cannot foreclose on their superior assessment liens without the prior consent of FHFA, as long as FHFA is acting as conservator.[6] FHFA then issued a policy statement that it will not grant such consent.[7] At one point, more than 1,000 cases in Nevada were being litigated to determine whether first mortgages were given proper notice in HOA lien foreclosure actions.[8] FHFA, Fannie Mae and Freddie Mac even attempted to file a class action lawsuit with respect to these thousands of Nevada foreclosure actions;[9] ultimately the court did not certify the class action but did rule that a homeowners' association foreclosure of its super priority lien cannot extinguish a Fannie Mae or Freddie Mac mortgage. Note that this ruling only applies to Fannie Mae and Freddie Mac loans given the limited scope of the decision.[10]

How does a bank determine if it has a "DUCIOA problem" with its Delaware mortgage loan? The first step is to determine if these lien provisions in DUCIOA apply to the real estate. Residential condominiums established prior to September 30, 2009 and commercial condominiums, regardless of when formed, are subject to the Delaware Unit Property Act ("UPA")[11] instead of DUCIOA, unless the unusual step is taken in the declaration of voluntarily "choosing" to be governed by DUCIOA.[12] Also, even if formed on or after September 30, 2009, residential condominiums and non-condominium HOAs with small numbers of units (less than 20) or, in the case of non-condominiums, that have small annual assessments, are exempt from the DUCIOA lien provisions.[13] Residential condominium and non-condominium projects that do not pre-date DUCIOA and do not qualify for the foregoing exemptions are subject to DUCIOA's treatment of HOA liens.

The UPA does not itself create a statutory lien right; it instead simply permits HOA liens to be pursued in actions filed against the real estate, resulting in a judgment lien if successful.[14] HOA liens reduced to judgment will be inferior to prior-recorded mortgages under Delaware's general first-in-time, first-in-right recording rule.[15] There is no "super priority" provided in the UPA.

Even if DUCIOA rears its ugly head, there is still hope for the bank. DUCIOA's lien provisions are prefaced with "except as otherwise provided in the declaration."[16] A well-drafted (from the bank's perspective) declaration of covenants will so "otherwise provide," by using specimen language such as in the following example[17]:

(continued on p. 16)

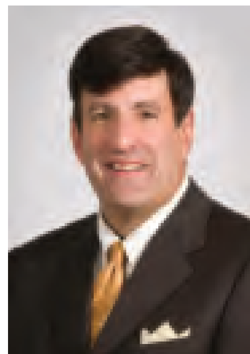
(continued from p. 15)

> **Subordination of the Lien to Mortgages.** The lien of the assessments provided for herein shall be subordinate to the lien of any Mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to a mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof. No amendment to this Section shall affect the rights of the holder of any Mortgage on any Lot (or the indebtedness secured thereby) recorded prior to recordation of such amendment unless the holder thereof (or the indebtedness secured thereby) shall join in the execution of such amendment.

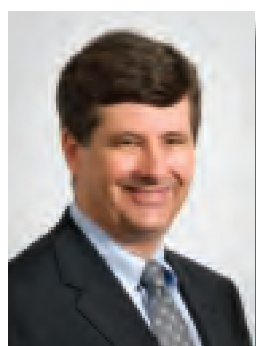
Another example of overriding declaration language that is palatable to mortgage lenders might read as follows:

> If a mortgagee of a first mortgage of record or other purchaser of a Unit obtains title to the Unit as a result of foreclosure of a first mortgage, or through the other remedies provided for in the first mortgage, such purchaser, its successors and assigns, shall not be liable for, and such Unit shall not be subject to, a lien for the payment of Common Expenses assessed prior to the acquisition of title to such Unit by such purchaser pursuant to the foreclosure sale, or through the other remedies provided for in the first mortgage; provided, however that the purchase of any such Unit as a result of any such foreclosure of a first mortgage, or through the other remedies provided for in the first mortgage, shall be without prejudice to the Association's right to recover from the selling or prior Unit Owner any past due or delinquent assessments. Any lien for Common Expense assessments or other charges that the Association has on any Unit shall be subordinate to the lien of the mortgage on the Unit, if the mortgage was recorded before the delinquent assessment was due. Any lien for Common Expense assessments shall not be affected by the sale or transfer of a Unit, unless a foreclosure of a mortgage is involved, in which case the foreclosure will extinguish the lien for any assessments that were payable before the foreclosure sale, but will not relieve any subsequent Unit Owner from paying further assessments.

What is the take-away here? Regardless of whether DUCIOA applies, Delaware bankers should always review (or better yet, have a bank closing attorney review) the lien and mortgage lender protection provisions provided in the copy of the recorded declaration of covenants that will be included with the title work for the mortgaged real estate. If these provisions don't contain the language the lender wants, then the bank will need to further investigate whether DUCIOA applies and, if so, determine whether it can live with the prior lien risk or require an escrow from the borrower for HOA assessments.



Eugene A. DiPrinzio's practice emphasizes the handling of complex commercial real estate transactions and the representation of financial institutions and other lenders involving commercial mortgage loans, asset-based lending, loan modifications, workouts and restructurings. In addition, he has represented numerous property developers and borrowers in connection with their overall real estate transactions on a primary basis. Gene also has been engaged in many substantial leasing transactions on behalf of landlords and tenants and has successfully represented building owners in prosecuting their property tax assessment appeals. As counsel to title insurers, he has assisted with the closing of numerous portfolio and multi-state transactions.



Brent C. Shaffer has a broad range of experience within the commercial transactional real estate area, having represented institutional and local lenders, buyers, sellers, developers, landlords and tenants as a continuously active member of the Delaware and Maryland Bars. His practice has a particular concentration in representing lenders and borrowers in real estate construction and permanent loans, nonprofits and lenders in affordable housing transactions, and landlords and tenants in commercial leases.

Notes:

1- 25 Del. C. § 81-101 et seq.

2- Id. § 81-316(b) ("except as otherwise provided in the declaration, a lien under this section is prior to [a first or second mortgage lien]… for an amount not to exceed the aggregate customary common expense assessment against such unit for 6 months as determined by the periodic budget adopted by the association pursuant to § 81-315(a)").

3- Id.

4- SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014); Chase Plaza Condo Ass'n v. JP Morgan Chase Bank, N.A., 98 A. 3d 166 (D.C. Ct. App. 2014); Summerhill Vill. Homeowners Ass'n v. Roughley, 289 P.3d 645 (Wn. App. 2012).

5- Am. Bankers Ass'n, Am. Financial Svcs. Ass'n, Ass'n of Mortgage Investors, Housing Policy Council of the Financial Svcs. Roundtable, Mortgage Bankers Ass'n, Securities Industry and Financial Markets Ass'n Structural Finance Industry Group, Statement of Principles: HOA Super Priority Liens (July 23, 2015), www.aba.com/Advocacy/LetterstoCongress/Documents/StatementofPrincipalsHOASuperLiens.pdf.

6- 12 U.S.C. § 4617(j)(3) ("[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency").

7- Federal Housing Finance Authority, FHFA Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), http://www.fhfa.gov/Medical/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx.

8- Am. Bankers Ass'n, supra, app. at 2.

9- Heather Howell Wright, FHFA, Fannie and Freddie File Defensive Class Action in Nevada, JDSUPRA Business Advisor (Oct. 14, 2015), www.jdsupra.com/legalnews/Fhfa-fannie-and-freddie-file-defensive-47111/.

10- See Skylights LLC v. Byron, 2015 U.S. Dist. LEXIS 82048 (Dist. Ct. Nev., June 24, 2015), Case No. 2:15-cv-43-GMN-VCF; Fed. Hous. Finance Agency v. SFR Investments Pool 1, LLC (Dist. Ct. Nev. May 2, 2016), Case No. 2:15-cv-01338-GMN-CWH.

11- 25 Del. C. §§ 81-119, 81-122(a).

12- Id. §§ 81-119, 81-122(c).

13- Id. §§ 81-117, 81-118.

14- See id. §§ 2233, 2234, 2236. These UPA statutes read as follows:

§ 2233 Assessment of charges. All sums assessed by resolutions duly adopted by the council against any unit for the share of common expenses, chargeable to that unit shall constitute the personal liability of the owner of the unit so assessed and shall, until fully paid, together with interest thereon at a rate not to exceed 18% per annum from the thirtieth day following the adoption of such resolutions, constitute a charge against such unit which shall be enforceable as provided in the next section.

§ 2234 Method of enforcing charges. Any charge assessed against a unit may be enforced by an action at law by the council acting on behalf of the unit owners, provided that each action, when filed, shall refer to this chapter and to the unit against which the assessment is made and the owner thereof. Any judgment against a unit and its owner shall be enforceable in the same manner as is otherwise provided by law.

§2236 Unpaid assessments at time of execution sale against a unit. In the event that title to a unit is transferred by sheriff's sale pursuant to execution upon any lien against the unit, the council may give notice in writing to the sheriff of any unpaid assessments for common expenses which are a charge against the unit, but have not been reduced to lien pursuant to § 2234 of this title, and the sheriff shall pay the assessments of which the sheriff has such notice out of any proceeds of the sale which remain in the sheriff's hands for distribution after payment of all other claims (emphasis added), which the sheriff is required by law to pay, but prior to any distribution of the balance to the former unit owner against whom the execution issued.

15- Id. §§ 2106, 2118.

16- 25 Del. C. § 81-316(b).

17- Capitalized terms in both of these examples are intended to be defined in the applicable declaration where they may appear.

Cybersecurity

Plug & Pray

The Inherent Risks of the Internet of Things (IoT)

by
Sean Colicchio, CISSP, CEH,
Sr. Business Risk Analyst
Essextec

Consider the implications of a device that is fully functional only when online and requires connectivity to receive routine security updates. Now, imagine that security researchers discovered flaws which allow the device to be controlled by an attacker. The company that developed this product did not fully consider the security ramifications of connecting that device to the Internet and, as a result, needed to recall over one million devices. While the technology industry pushes for the next smart TV and businesses and consumers push for more connectivity between everyday devices, security is only recently being considered in most devices that make up the Internet of Things (IoT).

Definition

To define IoT, we can think of "Things" as any device, big or small, regardless of purpose, that contains the core components of a computer such as a processor and memory, runs an application, and connects through a network interface to other devices. Simply speaking, IoT refers to a whole class of everyday objects (Things) that are now being offered with built-in network connectivity. Most of the "Things" referenced in context of IoT are presented to the public as though they are not personal computers, but rather traditional items that are limited to only the scope of their primary task such as a "Smart" TV, energy meter, thermostat, or baby monitor.[1] Although these systems may not seem dangerous, some of these connected devices are more powerful than the average laptop.

Background

The concept of smart devices is nothing new, with the oldest device dating back to 1982. A modified Coca Cola machine at Carnegie Mellon University was the first Internet-connected appliance able to report how many drinks were left in it and whether newly loaded drinks were cold.[2] Just over thirty years ago we find the first example of what would become a network of devices accessed by everyone, from children to government officials, and the risks that are introduced by those items has only very recently started to improve.

Threats

Automobiles - In July 2015 Fiat Chrysler Automobiles (FCA) issued a recall of 1.4 million vehicles that may have been affected by vulnerable software in Chrysler's dashboard computers.[3] This event brought attention at the federal level to the lack of security controls surrounding IoT and how individuals who exploit such vulnerabilities could potentially cause harm and/or bodily injury from the safety of their own home. There is now more discussion on this subject and awareness is the first step toward mitigating the risks of IoT.

Baby Monitors - There have been several reported attacks of baby monitor/camera manipulation. These reports rate the attacks from crude and obnoxious to threatening. These devices can be compromised based on either unpatched systems that exist on the monitor's network, unpatched cameras, or even default credentials that are not changed when the device is installed.[4] A recent report showed that attackers can and do control baby monitoring cameras, enabling the victim to be observed via audio and video as though the attacker was in the same room.[4b]

Medical Devices - In 2011 security researchers demonstrated that it is possible to manipulate an insulin pump to cause physical harm or death to a patient. The Department of Homeland Security's Industrial Control Systems Cyber Emergency Response Team (ICS-CERT) issued an advisory in June 2013 in which 300 medical devices made by 40 different firms were found to have unchangeable passwords that, once guessed, could allow someone to alter critical settings.[5] Also in 2013, Barnaby Jack, Director of Embedded Device Security at a security firm, developed software that allowed him to remotely send an electric jolt to anyone wearing a pacemaker within a 50 foot radius.[6] This illustrates that existing threats not only affect information or account compromise, but also human life and well-being.

Lack of Patching Methods, Lack of Updates

Today, there is no easy way for consumers to update all of their personal IoT devices and manage their respective patch levels. As the average number of devices grows per person, the idea of manually installing updates on all devices seems less practical. Because automatic updates from manufacturers can be disruptive (if they issue updates at all), proper compensating controls and a layered approach to security are the only true solutions to this problem. Additionally, updates should be digitally signed to verify the

(continued on p. 20)

(continued from p. 19)

integrity of the source, as these avenues of patching and updating are typically a great attack vector for a malicious actor.

Tiny Computers = Cheap Computers
The IoT "Things" are typically just small computers that are scaled in architecture to fit a certain price point or marketing strategy. Software update platform maintenance, secure coding planning, as well as development takes time and money. When development of a platform is primarily concerned with cost, shortcuts with security are all but commonplace.

In 2016 a Chinese manufacturer recalls millions of cameras sold in the U.S. in response to attacks against the DNS provider which rendered a number of web-based services, such as Twitter, offline for much of the day.[8]

Closed Source
When Fiat Chrysler Automobiles developed the Uconnect system, it appeared that the organization did not fully consider the security implications of connecting the system to the Internet without proper controls and, as previously mentioned, Chrysler had to recall 1.4 million devices. The future of security for IoT lies with opening boundaries by leveraging open standards. Converse to enterprise IT security best practices, embedded, closed source applications are under far less scrutiny during the peer review process, which leaves them more vulnerable than when the community as a whole reviews the potentially flawed device.

Network Access = Physical Access
Obtaining access to the front door, garage door, security cameras, and alarm system is difficult to do without authorization. However, when these devices are connected to the same network, an attacker need only compromise the network to obtain access to the actual physical home itself. Today, home networks of telecommuters are rarely, if ever, "in scope" for penetration testing exercises, nor are they subject to centralized vulnerability scanners. Therefore, access to and the security of home networks is another "Thing" which should be considered and addressed.

Risks

More Connected Devices = More Entry Points
According to a recent ISACA survey, 49% of IT professionals stated that they did not believe the IT department in their company knew of all of the devices on the company's network.[7] Network visibility and monitoring play a key part in identifying threats to the security infrastructure and ultimately the risk posture of the organization. Chrysler not only issued a recall on certain automobiles, but also mailed USB drive patch packages to the owners to self -update and ensure systems were patched. Chrysler then contacted Sprint, their network provider, for their network-to-automobile communications, in order to implement "network-level security measures." Most likely these were network security tools to detect and block potentially malicious traffic on Sprint's network from reaching devices. This action not only helped to mitigate the current vulnerability in the software, but also closed a gaping security hole that individuals can no longer access.

How To Mitigate/Minimize IoT Risk

Industry Responsibility
IoT risk can be mitigated for consumers and organizations from the start with the help of the IoT industry. Much responsibility is shared between device manufacturers and distributors when it comes to security, confidentiality, and privacy while the devices are in the design phase. Building a security mechanism into products reduces the overall cost of implementing a security control and can be accomplished by leveraging basic best practices such as ensuring devices can be updated and enabling systems to be patched for new vulnerabilities. This includes testing the security of these devices and allowing researchers to review the devices objectively. Additionally, the ability to set a unique and complex password should be built into the device, as simple passwords are a major attack vector and most IoT devices do not have brute force password guessing defensive controls.

Company Responsibility
In addition to the IoT industry's obligation of securing the IoT landscape, IT departments for organizations also have a responsibility to deploy necessary safeguards. These safeguards start with a comprehensive IoT security policy. This policy must outline acceptable use and maintenance procedures for all connected devices. This policy must be supported by upper management such as the Chief Information Security Officer or Compliance Officer. This support must include the implementation of lower-level IoT security policies and education for internal resources. Another way to minimize risk, is to create internal procurement standards. Internal procurement standards that leverage a vendor management program would ensure that all IoT devices are reviewed with the same process and standards and deployed only after consulting the most up-to-date expert guidance.

Updates should be digitally signed to verify the integrity of the source, as these avenues of patching and updating are typically a great attack vector for a malicious actor.

Shared Responsibility
IT departments should regularly apply available updates to IoT systems and devices. Although end-users should also patch the previously-discussed consumer goods that are connected to the Internet, IT departments should go a few steps further and conduct internal and external security assessments. These assessments include scanning organization offices and other company owned or operated facilities for IoT devices. Continually monitoring these items for anomalies with enterprise level network security tools completes this program, as network anomaly detection helps an organization know when their digital perimeter has been breached.

Conclusion

The controls outlined here will provide reasonable assurance that company owned, non-traditional devices are protected in the same manner in which critical servers and systems are. The Internet is constantly changing and new risks are uncovered hourly. For organizations to get in front of these risks, a formal IoT security policy and set of internal procedures for procurement, patching, monitoring, and incident response are necessary. End users also share the responsibility of protecting their local environments by applying available patches to personal IoT devices and additional controls where necessary. Increasing connectivity and network visibility between devices may seem exciting, especially for those who remain unaware of the growing risks. However, organizations and individuals should be aware of the proven threats that exist today in the IT industry and in the insecure world that is the Internet of Things (IoT).

Sean Colicchio is a trained professional in risk analysis with over ten years of experience in information and network security. Sean has proven track record utilizing a methodical manner to gather, document and present specific customer needs or requirements. Sean has a strong familiarity with NIST, ISO 27001/27002, FFIEC, NCUA standards, HIPAA/HITECH rules, as well as PCI and other industry and regulatory compliance requirements. Sean also possesses a solid understanding of OWASP, OSSTMM, and other security and auditing frameworks. By joining Essextec, Sean has been able to couple his experience with that of other risk management professionals and provide secure risk management guidance to organizations, regardless of size or sector. Sean has recently become an adjunct professor teaching a university course on the psychology of a cyber attacker. Sean holds several professional certifications regarding security including CISSP, CEH, and Security+, as well as a Bachelor of Science degree in Computer and Network Security.

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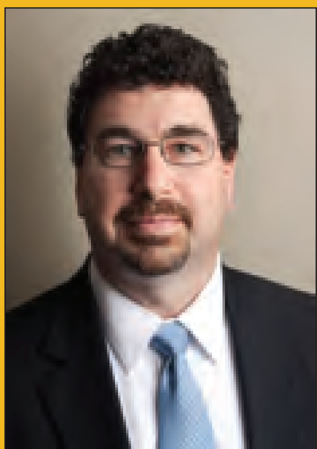
Notes:

1-https://www.rapid7.com/docs/Hacking-IoT-A-Case-Study-on-Baby-Monitor-Exposures-and-Vulnerabilities.pdf
2- https://www.cs.cmu.edu/~coke/history_long.txt
3-http://www.wired.com/2015/07/jeep-hack-chrysler-recalls-1-4m-vehicles-bug-fix/
4-http://london.ctvnews.ca/baby-monitor-camera-hacked-while-child-rocked-to-sleep-1.2483149
4b-http://newyork.cbslocal.com/2015/04/21/seen-at-11-cyber-spies-could-target-your-child-through-a-baby-monitor/
5-https://www.newscientist.com/article/mg22429942-600-murder-by-hackable-implants-no-longer-a-perfect-crime/
6-http://www.vice.com/en_ca/read/i-worked-out-how-to-remotely-weaponise-a-pacemaker
7-http://www.isaca.org/SiteCollectionDocuments/2013-Risk-Reward-Survey/2013-Global-Survey-Report.pdf
8-https://threatpost.com/chinese-manufacturer-recalls-iot-gear-following-dyn-ddos/121496/

For Your Benefit

ACA Replacement Bill Fails



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

"Some definitive changes have been made in some ACA taxes and fees for 2017."

Congress has voted to repeal the ACA over 50 times since the bill's onset in 2012. The last attempt, February 2, 2016, actually made it to President Obama's desk and was promptly vetoed, setting the stage to be one of the top campaign issues in one of the most divisive elections in history.

With majorities in both houses and now a newly elected Republican President, all obstacles would finally be removed making repeal and replacement of Obamacare a reality. However, on March 24, 2017, after several delays and multiple amendments, the American Healthcare Act was withdrawn due to a lack of votes to ensure passage.

The AHCA in its first phase as a budget reconciliation bill would have:

- Repealed the Employer and Individual Mandates
- Replaced health insurance subsidies with tax credits
- Enhanced HSAs by increasing the maximum contribution limits up to the maximum out-of-pocket limits to $6550 and $13,100, allowed both spouses to make catch-up contributions into the same account, addressed expenses incurred prior to the establishment of the account , reinstated the use of funds for OTC items and reduced the tax on non-qualified expenses
- Delayed the Cadillac Tax until 2025
- Repealed the FSA limits
- Repealed the Additional Medicare tax for high income individuals
- Reinstated the Part D subsidy deduction for businesses

While the AHCA represented a good start it ultimately was not agreeable to the majority of Congress leaving the ACA intact and its future unclear. However, some definitive changes have been made in some ACA taxes and fees for 2017.

Future of Certain ACA Taxes and Fees

The federal budget bill enacted for 2016 made significant changes to several ACA tax provisions:

- Delayed implementation of the ACA's Cadillac tax until 2020
- Imposed a one-year moratorium on the health insurance provider's fee
- Imposed a two-year moratorium on the medical devise excise tax fee

ACA Section 1332 Waivers

On March 13, 2017, the Department of Health and Human Services (HHS) sent a letter to state governors to highlight Section 1332 of the Affordable Care Act (ACA). Beginning in 2017, Section 1332 allows states to apply for a State Innovation Waiver from certain ACA requirements and to pursue innovative strategies for providing their residents with access to high quality, affordable health insurance while retaining the basic protections of the ACA.

Final regulations on the ACA's Section 1332 State Innovation Waivers were published on Feb. 27, 2012. HHS is now promoting the availability of these waivers as a result of President Donald Trump's Executive Order directing federal agencies to provide relief from the burdens of the ACA.

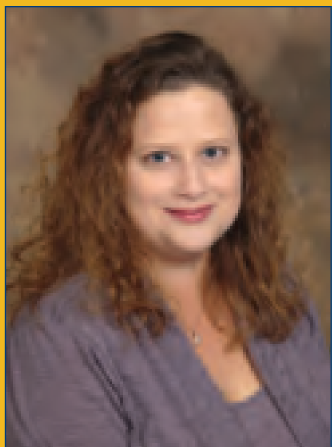
ACA Provisions That May Be Waived

Through an approved State Innovation Waiver, the Departments are authorized to waive the following ACA provisions under their respective jurisdictions:

- Establishment of qualified health plans (QHPs);
- Consumer choices and insurance competition through the Exchanges;
- Premium tax credits and cost-sharing reductions for plans offered within the Exchanges;
- The employer shared responsibility rules; and,
- The individual mandate

Incremental changes in the health care laws will likely continue throughout 2017. Congress hints another attempt to replace and repeal the ACA is planned. Time will tell and possibly a pending 2018 election may be the final motivator for real action.

Compliance Focus



by
Becky Breland, Esq.
Senior Compliance Manager,
Center of Regulatory Intelligence
FIS Risk, Information Security
& Compliance (RISC) Solutions

"Regulation 504 requires a review of an institution's data matching system and an evaluation of the OFAC sanctions list."

New York State Department of Financial Services Aims to Improve AML Compliance Standards

The New York State Department of Financial Services (NYDFS) established clear standards for anti-money laundering (AML) compliance, with new AML regulation effective January 1, 2017. Financial institutions covered under Regulation 504 should determine whether their transaction monitoring and filtering programs both comply with Regulation 504 and meet their Bank Secrecy Act (BSA)/AML and Office of Foreign Assets Control (OFAC) requirements.

Regulation 504 applies to Bank Regulated Institutions, defined as "banks, trust companies, private bankers, savings banks and savings and loan associations chartered pursuant to the New York Banking Law (Banking Law) and all branches and agencies of foreign banking corporations licensed pursuant to the Banking Law to conduct banking operations in New York." The rule also applies to Nonbank Regulated Institutions," defined as "all check cashers and money transmitters licensed pursuant to the Banking Law." An objective of Regulation 504 is to address perceived weaknesses in institutions' BSA/AML programs attributable to a "lack of robust governance, oversight, and accountability at senior levels." Regulation 504 has three main sections:

(1) Transaction monitoring
(2) Filtering
(3) Board or senior level compliance findings

In an attempt to bridge any apparent gaps in the federal regulation, Regulation 504's requirements for transaction monitoring and filtering are more detailed than the requirements of the Financial Crimes Enforcement Network (FinCEN). The Federal Financial Institution Examination Council (FFIEC) BSA/AML examination procedures and Regulation 504 require institutions to conduct a risk assessment and update programs. New York, however, requires more, specifically requesting a monitoring program to create detection scenarios based on threshold values and amounts testing at all transaction stages. These elements include, but are not limited to:

- Data mapping
- Model validation
- Data inputs

Requirements for a filtering program consist of ways to identify OFAC sanctions. Regulation 504 requires a review of an institution's data matching system and an evaluation of the OFAC sanctions list. The rule requires an analysis that includes a tool for matching names and account information with the OFAC sanctions list. Regulation 504 requires institutions to keep consistent documentation throughout this process, ensuring the filtering program remains on track and records the correct data. While most institutions are complying with OFAC requirements using industry best practices, the NYDFS rule codifies specific provisions regarding maintaining a filtering program needed for compliance.

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Accounting for Success

by
Jonathan D. Moll, CPA
Belfint Lyons & Shuman, P.A.

"A public charity may engage in lobbying, but must limit it to an insubstantial part of the organization's activities."

Avoiding Activities that Jeopardize a Charity's Tax-Exempt Status

The passionate and energetic board members that lead organizations within the Delaware nonprofit community are integral to the success of those organizations. The community leaders that volunteer their time with our charities strategically direct the delivery of much needed services within our state. However, the prerequisites of a strong board member extend beyond a passion for the mission. It is critical for nonprofit board members to recognize that tax-exempt status is not a benefit that is earned only when the organization receives its determination letter from the IRS. Rather, it is a status that is earned continually through the demonstration of tax compliance. The IRS acknowledges the role of board members and have stated that good governance and tax compliance go hand in hand. As a result, board members must be familiar with the activities that could jeopardize an organization's tax-exempt status.

Automatic Revocation for Failure to File Annual Information Return – Most public charities are required to file an annual information return (Form 990 series) with the IRS. Organizations that do not file for three consecutive years automatically lose their tax-exempt status. Despite needing only an awareness of the filing requirement and the resources for form preparation, this remains the most common cause for nonprofit organizations to lose their tax-exempt status. According to the IRS's Select Check Tool, more than 48,000 nonprofit organizations lost their tax-exempt status during 2016 by automatic revocation for failure to file. During the past 5 years (ending 2016), more than 1,000 nonprofit organizations in Delaware lost their exempt status through automatic revocation.

Private Benefit and Inurement – Tax-exempt organizations must serve a public interest. Public charities must not be organized for the benefit of private interests and no part of their net earnings may inure to the benefit of an individual. Examples of private benefit and inurement include unreasonable compensation and excess benefit transactions. Any amount of inurement may be grounds for loss of tax-exempt status. Excess benefit transactions are required to be reported on Form 990 and result in excise taxes to individuals involved in the transactions. An excess benefit transaction exists when a nonprofit organization provides an economic benefit to an individual in a position to significantly influence the entity that exceeds the value of any goods or services provided in consideration.

Political Campaign Intervention and Legislative Activities – Public charities are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) a candidate for public office. Contributions to political campaign funds or public statements of position by the organization violate the prohibition against political campaign activity and may result in revocation of tax-exempt status.

A public charity may engage in lobbying, but must limit it to an insubstantial part of the organization's activities. An organization is regarded as attempting to influence legislation if it contacts, or urges the public to contact, a legislative body to propose, support, or oppose legislation. The IRS considers a variety of factors, including lobbying information reported on Form 990, when determining whether lobbying activity is more than insubstantial.

The IRS publishes a variety of resources available to nonprofit board members. The IRS's *Compliance Guide for 501(c)(3) Public Charities* includes additional information on the topics listed above to help board members assure their charity is in compliance and maintaining its tax-exempt status.

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May 10th & 11th - Let's Deal the Cards Workshop

University & Whist Club, 805 N. Broom Street, Wilmington, DE 19806. New for 2017, FIS RISC brings you a 2-day workshop on all things cards. That's right, we will speak to the regulatory requirements for debit cards, credit cards, and prepaid cards. Our Let's Deal the Cards: Hot Topics in Regulation E Debit Cards, Credit Cards, and UDAAP workshop will guide you through the maze of requirements under Regulations E and Z. We will look at the NEW prepaid accounts rule that the CFPB issued in October 2016 that has an effective date of October 1, 2017. Lastly, we will engage in discussions concerning how best to avoid the hot button issues that the CFPB and other regulators are looking at concerning credit cards. Recommended for compliance officers, debit and credit card operations staff, loan operations staff, deposit operations staff, credit card servicing staff, marketing staff, and audit department staff!

May 18th - 122nd Annual DBA Meeting & Dinner

Join Delaware's top bankers at this annual event at the historic Hotel du Pont with dinner in the elegant Gold Ballroom. Keynote speaker will be James Olson, Professor, George Bush School of Government and Public Service, former Chief of Counterintelligence at CIA headquarters in Langley, Virginia, and author of *Fair Play: The Moral Dilemmas of Spying*. Mr. Olson spent thirty years chasing Soviet KGB secrets, and jumping out of moving cars as a spy for the CIA.

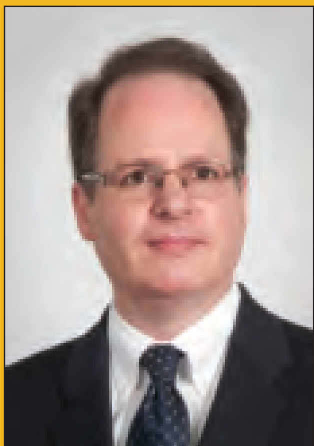
October 24th & 25th - 2017 Delaware Trust Conference

Chase Center on the Riverfront, Wilmington. Save the date for the 12th annual edition of this premiere trust event highlighting the advantages of the Delaware trust product. Sponsors: join Platinum Sponsor, Reliance Trust Company of Delaware! Exhibitor space also available.

November 14th, 15th & 16th - 2017 Regulatory Compliance School

University & Whist Club, Wilmington. The Delaware Bankers Association and FIS RISC present the 2017 Regulatory Compliance School offering a comprehensive review of federal laws and regulations affecting the financial services industry. 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!

Lending Law Update



by
John J. Paschetto, Esq.
Young Conaway Stargatt & Taylor, LLP

Keeping Entities in Good Standing with the Secretary of State

Forming a corporation or a similar business entity is a privilege. Each state has imposed various requirements that must be met when creating a corporation, limited liability company (LLC), or limited partnership (LP).

Similarly, states impose requirements for maintaining an entity after its formation. A Delaware corporation must pay an annual franchise tax and file an annual franchise tax report with the Secretary of State by March 1 each year. The annual franchise tax is calculated according to formulas provided in the General Corporation Law of the State of Delaware (the DGCL). The annual franchise tax report must contain such information as the address of the corporation's principal place of business, the names of its directors, and the number of shares it is authorized to issue.

"A Delaware corporation must pay an annual franchise tax and file an annual franchise tax report with the Secretary of State by March 1 each year."

A Delaware LLC or LP must pay a flat annual tax of $300 by June 1 each year. Delaware LLCs and LPs are not required to file reports comparable to the annual franchise tax reports that corporations must provide.

If the preceding requirements are ignored, the entity will lose its "good standing" under Delaware law. If they are ignored long enough, the entity may cease to exist.

Loss of good standing has a number of negative consequences. Interest will accrue on the unpaid tax. A penalty may be assessed. The entity may be barred from bringing suit in a Delaware court. And perhaps most importantly, the Secretary of State will not issue a Certificate of Good Standing for the entity until any amounts owed have been paid. Because a Certificate of Good Standing from the State is typically required by lenders or others before they will enter into a substantial deal with an entity, the inability to obtain the Certificate can result in an embarrassing delay to a closing while management scrambles to bring the entity current.

When a corporation has failed to pay its annual franchise tax for one year or more, its certificate of incorporation becomes "void," and (in the words of the DGCL) "all powers conferred by law upon the corporation are declared inoperative." Thus, at this point, the ability of the corporation to do business at all comes into doubt.

In the case of an LLC or LP that is delinquent in its annual tax, Delaware law does not employ a "void" category. Instead, once the entity has failed to pay the tax for three years, it is canceled.

Fortunately, Delaware law offers a procedure for "reviving" a corporation that has become void, or an LLC or LP that has been canceled, for failing to pay its annual tax. Revival requires the filing of a certificate with the Secretary of State and the payment of any taxes, interest, and penalties that are owed. When an entity has been properly revived, Delaware law treats it as if it had never been void or canceled. Any doubts that the void status or cancellation raised about the validity of the entity's dealings are laid to rest upon its revival.

Delaware Bankers Association
8 West Loockerman Street
Dover, DE 19903-0781