Delaware Banker

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Tax Cuts

How Generous Are They to Your Business?

Delaware Bankers Association
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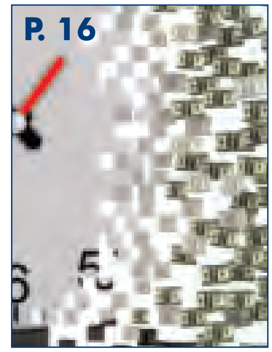

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SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the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

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View from the Chair

by
Cynthia D.M. Brown
President
Commonwealth Trust Company

Chair
Delaware Bankers Association

"I'm happy to report that as bankers from the First State, we also lead the way with educational opportunities uniquely designed for Delaware's financial services industry."

A young boy once approached his father to ask, "Dad, why does the wind blow?" To which the father responded, "I don't know, son." "Dad, where do the clouds come from?" "I'm not sure, son." "Dad, what makes a rainbow?" "No idea, son." "Dad, do you mind me asking you all these questions.?" "Not at all, son. How else are you going to learn?"

Fortunately, while the Delaware Bankers Association doesn't have all the answers, we do have a wide-range of educational programs that have most of the answers you'll need, especially in the realm of banker education. First, like all of our sister associations across the country, we are pleased to offer our members the full range of courses offered by the American Bankers Association. These courses include both self-paced online training for the busy professional who appreciates flexibility, and online facilitated courses for those looking for a little more structure in their learning experience. In addition, ABA offers certificate programs tailored to specific technical expertise in the industry. And finally, there are the ABA Briefings that allow you and your team to stay current on the latest trends and hottest topics. All the ABA courses can be accessed on the DBA's website under the "education" tab.

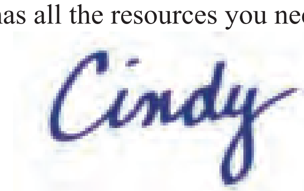
Those are the courses and opportunities that bankers all across the country can enjoy. But I'm happy to report that as bankers from the First State, we also lead the way with educational opportunities uniquely designed for Delaware's financial services industry.

For the bank directors, senior officers, corporate secretaries, and board advisors the DBA is pleased to offer the FDIC Directors' College. This annual interactive program provides ongoing education on topics of bank supervision conducted by the regulators themselves. This year's session will be on September 28th in Lewes, and will feature sessions on emerging credit risk, BSA/AML, case studies, and more.

At the other end of the spectrum we're pleased to bring back three new sessions in our Foundations of Delaware Trust series. Previously we've offered eleven sessions taught by the top professionals in the Delaware trust industry. These are available on flash drive for in-house training. In the coming months we will be offering three new sessions including: Investment Basics; Silent Trusts; and How to Find the Key Information in a Trust Agreement. The Foundations courses are perfect for entry level employees, as well as more seasoned staff looking to enrich their levels of knowledge and technical expertise.

Last, but certainly not least is the Delaware Trust Conference. This year's edition is the 13th Annual and features the theme: The Tricks and Treats of Delaware Trusts. Each year the planners strive to put together a conference that is both informative and exciting, and this edition looks to be exceptional. Over sixty of the top experts in Delaware trusts from across the state, the country and the world will be at the Chase Center on the Riverfront, October 23rd and 24th. The conference also offers 15 CLE credits for attorneys, CTFAs and accountants, including two ethics credits.

Please visit the DBA website - www.debankers.com for the full agenda and registration information on all these programs. When it comes to educating Delaware's financial services industry, the DBA has all the resources you need.



President's Report

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

"Delaware banks support hundreds of organizations throughout the State through grants and volunteer hours."

The video daily double on a recent episode of Jeopardy!, featured the flag of the State of Delaware along with the clue, "The date December 7, 1787, is rather important in identifying the flag of this state." It didn't surprise me that the contestant from Steeleville, Illinois thought it was the state flag of Georgia! I'm sure you've experienced the quizzical look on someone's face when you say you are from Delaware, followed by the question, "What state is that in?"

Well, we certainly know where Delaware is, and we know why we are here! Delaware is blessed with several unique advantages. Responsive representatives, both in Congress and in the State; a business-friendly environment; pro-growth banking and trust laws; and, of course Delaware's own Chancery Court. Add to this industry talent and you have all the makings of a vital, vibrant financial services industry. That's why we are here!

But you already know that. The financial services sector has been a key driver of Delaware's economy since 1981, when forward thinking leaders enacted the Financial Center Development Act — landmark legislation that paved the way for new investment. This legislation created a business-friendly climate for banking.

As a result, banks of all sizes came to the First State. That's why banks came to Delaware, but the story doesn't end there. In 1982, there were 4,500 bank employees in the State. Today, that number has risen to over 39,000. In 1982, Delaware banks paid a little over $2 million in franchise taxes. Bank franchise taxes paid to the State now eclipse $82 million.

Delaware is a great place to live, to work, and to invest. Delaware banks support hundreds of organizations throughout the State through grants and volunteer hours. In 2017 Delaware banks donated over $17 million in grants and contributions to local charities and community organizations. In addition, bank employees volunteered over 198,000 hours of service to over 500 non-profit organizations throughout the State. That's why we are here!

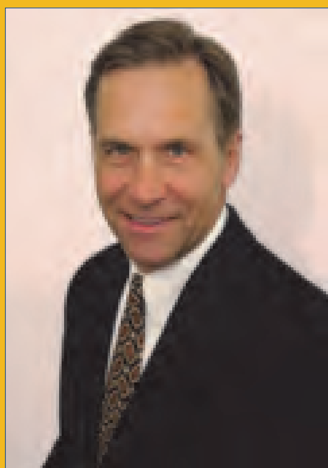
This year, Delaware celebrated the 20th anniversary of Teach Children to Save. Governor Carney proclaimed "Teach Children to Save Week," and the General Assembly recognized two decades of teaching children the importance of saving with a joint resolution commemorating the event. Since the program's inception literally hundreds of thousands of children in public, private, and parochial schools throughout the State have been taught a saving lesson through Teach Children to Save. That's why we are here!

We all know that there is much more we can do to support financial education. To help establish the saving habit all year long, we introduced The Great Investo Savers Club at the Delaware State Fair on Kids Day. Kids Day is one of the busiest days of the Fair, packed full of activities and entertainment. Hundreds of Savers Club Kits were distributed to kids between the ages of 8 and 11, free of charge! Each kit contains a membership card, stickers to make a bank, a savings diary, and a savings wall poster. In addition, the club will be promoted online, in schools, libraries, and on the air. That's why we are here!

We also educate and develop financial leaders. One area of particular focus is providing a pipeline of talent for the Trust Industry. The University of Delaware Minor in Trust Management is filling this critical need. Significant progress has been made this year. All students enrolled in the Minor have been matched with Mentors and all students have been placed in summer internships! Not only is Delaware the only State to offer a Trust Minor, it is the only State to have accomplished this through a collaborative partnership which brought together industry leaders, the State of Delaware and UD! That's why we are here!

As a member of Delaware's banking industry, you have a lot of which to be proud. Whether advocating for the industry, engaging in our communities, or supporting workforce readiness, you make a difference every day. That's why we are here!

All Around the Hall



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

"Many of the bills, including those of most interest to the Delaware banking industry, were worked in the final weeks of the session."

The 2018 legislative session is over and it was another productive session for the Delaware banking industry.

It is reported that of the 507 bills and resolutions introduced, 378 passed both chambers. Many of the bills, including those of most interest to the Delaware banking industry, were worked in the final weeks of the session. Please note that those bills not acted upon expired at the end of the session and will require reintroduction to be considered again. The following is a brief discussion of the bills of significant interest to the Delaware banking community.

Business Development Bank Charter (SB 211)
The DBA board and government affairs committee spent much time trying to understand SB 211 and the need for a proposed limited purpose bank charter. Intended by the sponsor to facilitate short term, high cost loans to small businesses that were not otherwise bankable, the proponents of the bill failed to convince the DBA and others that a separate charter was necessary when the existing bank charter law grants the required authority. Given the DBA's opposition, the bill's advocates and main sponsor decided not to pursue the matter this session.

Glass-Steagall Resolutions (HCR 8 and SCR 46)
A resolution to return to the days of Glass-Steagall (the separation of commercial and investment banking) returned yet again this spring. In the Senate, the DBA was successful in getting the resolution pulled from a consent agenda moments before it was to be voted on thanks to a call from a Senator inquiring about the DBA's position. One gets little or no notice of a consent agenda. The House scheduled the resolution for a committee hearing, but facing opposition, the sponsor tabled it at the last minute. The sponsor indicated that he intended to voice his position to Congress in a different manner.

Trust Legislation (SB 194 and 195)
Once again, the General Assembly recognized the quality and importance of the trust industry in Delaware. The two bills representing the annual update of Delaware trust laws moved easily and confidently through committee hearings and floor votes. Among the many provisions of the bills are provisions that further Delaware's initiative to implement policies enhancing the State's position as a leader in the adoption of distributive electronic network and database technologies (including what is commonly referred to as "blockchain" or "distributed ledger technology"). They specifically provide that the registration of beneficial interests and voting by trustees can be accomplished electronically, including the use of distributive electronic networks and databases.

Pledging or Hypothecating Assets of banks and trust companies (HB 412)
The DBA supported the passage of HB 412 which addressed an anomaly in the Delaware banking code relating to the limitations on pledging or hypothecating assets of banks and trust companies. The bill modernizes the law to apply current practices. Thanks to Barclays for spearheading this effort.

Elder Financial Exploitation (HB 332)
Elder financial abuse was the subject of this bill sponsored by the Attorney General's office. The purpose of the bill is to enhance the reporting requirements by broker-dealers and investment advisors of suspected exploitation involving securities, and grants power to broker-dealers and investment advisors to delay disbursements from an account where financial exploitation is suspected. Note however, there is no such authority to withhold a suspicious transaction, only the disbursement from an account. Reports must now be filed with the Investor Protection Director in the AG's office and the Department of Health and Social Services.

PACE Loans (SB 113)
After a year of effort and the consideration of 7 amendments, SB 113 was passed providing for the creation of the Delaware Voluntary Property Assessment Clean Energy (PACE) program. PACE provides financing for the installation of energy efficient technologies and systems in qualifying commercial properties. Because the loan is secured by, and payable from a voluntary assessment imposed on the property similar to a tax, the sponsors intended that it would have priority over prior existing liens. The DBA however, was able to work with the sponsors to protect the interests of mortgagees from being subordinated or eliminated by the lien securing the PACE loan.

Sexual Harassment (HS 1 for HB 360)
Sexual harassment was much in the news and a bill to prevent it made it through the legislature

in the final hours of the session. HS 1 for HB 360 reflected the final effort of the primary sponsor and the business community, including the DBA, to define sexual harassment, assign responsibility to employers that do not sufficiently train and supervise employees to prevent harassment and to require employers with more than 50 employees to train all employees every two years.

Minimum Wage (SB 170 and HB 483)
This much contested bill provides that the minimum wage be increased annually beginning in 2019 from $8.75 to $10.25 per hour. Unhappy with their failure to get amendments to the bill, the Republicans held the annual Bond bill (HB 475) hostage pending requested amendments to the minimum wage bill, extending the session by several hours. HB 483 provided the compromise by allowing for training and youth minimum wages that are $0.50 less than the actual minimum wage. The Bond bill was passed at 8:35 a.m. on July 1st, marking the end of the 149th General Assembly.

We monitored numerous other bills during the session, including the following:

- **Payday lending bill (HB 54)** – an effort to control payday lending, including the objectionable implementation of an interest rate cap, did not resurface this second session and therefore died on July 1st.
- **Marijuana Control Act (HB 310)** – a comprehensive effort to legalize recreational marijuana use was defeated in the House. Had it passed, the banking industry would have been faced with the conflict between state law and federal banking laws that prohibit banks from doing business with entities involved with illegal drugs.
- **Sustainability and Transparency Standards Act (HB 310)** establishes a voluntary disclosure regime certified by the State to encourage dialogue around sustainability and responsibility among participating Delaware business entities. State certification is focused on information acknowledged by the entity regarding its adoption of procedures to operate sustainably and responsibly and its commitment to disclose, at least annually, such procedures.

Legislature Membership Changes
During the 2018 Legislative session, eight members of the House (5D's and 3R's) and four members of the Senate (3D's and 1R) announced that they are not standing for re-election. This turnover may result in a shift to Republican control of the Senate and meaningful change for the 2019 Legislative session. The DBA urges you to keep an eye on the upcoming elections.

Tom

What's New at the DBA

New Financial Institution Members

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website: www.SallieMae.com
Sallie Mae (Nasdaq: SLM) is the nation's saving, planning, and paying for college company. Whether college is a long way off or just around the corner, Sallie Mae offers products that promote responsible personal finance, including private education loans, free scholarship search tools, free college financial planning tools, and online retail banking. Learn more at SallieMae.com. Commonly known as Sallie Mae, SLM Corporation and its subsidiaries are not sponsored by or agencies of the United States of America.

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Vice President, Personal Trust Manager
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Fax: 484.676.3168
email: skrow@seic.com
SEI Private Trust Company (SPTC) is a federally chartered limited-purpose savings association and wholly owned subsidiary of SEI Investments Company (SEI). SPTC provides personal trust services in all 50 states serving as agent for trustee, investment directed trustee and discretionary trustee. We have trust offices located in Wilmington, DE and Oaks, PA. Our full-service administrative capabilities include fiduciary tax preparation for revocable, irrevocable, credit shelter/marital, testamentary, charitable remainder and charitable lead trusts. Our trust officers are credentialed professionals each with over 20 years' experience in trust administration.

New Associate Member

Wilmington University
Ann Williams, Partnership Coordinator
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Fax: 302.328.9350
email: upc@wilmu.edu
website: www.wilmu.edu/partnerships/organizations
Wilmington University is committed to excellence in teaching, relevancy of the curriculum, and individual attention to students. The university provides a range of exemplary career-oriented undergraduate and graduate degree programs for a growing and diverse student population. It delivers these programs at locations and times convenient to students and at an affordable price. A highly qualified full-time faculty works closely with part-time faculty drawn from the workplace to ensure that the university's programs prepare students to begin or continue their career, improve their competitiveness in the job market, and engage in lifelong learning.

DBA Annual Meeting

Keynote Speaker Lt. Col. Robert Darling, USMC (Ret.), DBA President Sarah Long, and Governor John Carney at the 123rd DBA Annual Meeting

Cynthia D.M. Brown, President, Commonwealth Trust Company, was elected the Chair of the Delaware Bankers Association (DBA) on May 17th at the DBA's 123nd Annual Meeting in Wilmington. The DBA also elected and installed Elizabeth D. Albano, Chief Financial Officer, Artisans' Bank, to the position of Chair-Elect.

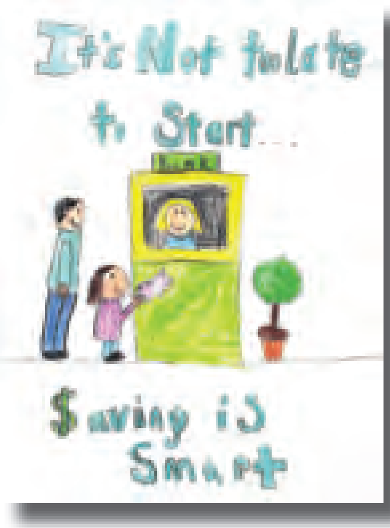
Keys to Financial Success Scholarships

The DBA announced the winners of the 2018 Keys to Financial Success Scholarship Award: Justin Morgan, of Caesar Rodney High School, and Maryam Woods, of Odyssey Charter High School. Each winner received a $2,500 scholarship. Keys to Financial Success is a full-semester elective taught in 31 high schools throughout Delaware to over 4,000 students.

(l. to r.) Jeffrey W. Bullock, Delaware Secretary of State, and incoming DBA Chair Cynthia D.M. Brown, President, Commonwealth Trust Company, present the 2018 Keys to Financial Success Scholarships to Maryam Woods and Justin Morgan.

2018 Teach Children to Save Day

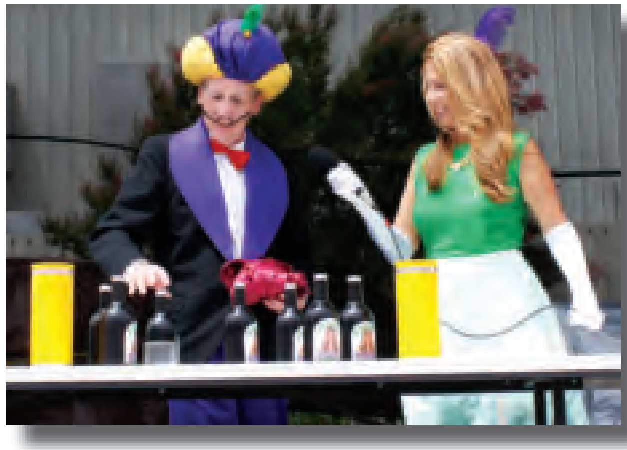
195 banker volunteers taught over 9,000 third and fourth grade students this week as Delaware celebrated its 20th annual Teach Children to Save Day. Over 90 percent of Delaware's banks participate in the Teach Children to Save Day event, the highest participation rate in the nation. Several bank presidents and special guests also volunteered as teachers for the event, these included: Robert Glen, Delaware Bank Commissioner; Joe Westcott, Market President, Delaware, Capital One; Chip Rossi, Delaware Market President, Bank of America; Randy Taylor, Executive Vice President & Director of Private Banking,



Fulton Bank; and, Sarah Long, President, Delaware Financial Education Alliance. Each year students are invited to participate in a poster contest to illustrate the importance of saving. This year's first place winner was Julie Pent, a 4th grade student at Stokes Elementary School in Camden. Julie's poster, "It's Not Too Late to Start...$aving is Smart" is seen at left. Julie received $100 for her winning entry. Two second place winners received $50 each. Nine entrants received honorable mention and were given copies of this year's book: "The Great Investo and the Winning Ticket."

Great Investo Savers Club Launched

The Delaware Financial Education Alliance has launched their latest statewide initiative to teach the importance of saving and instilling a saving habit in kids. The Great Investo Savers Club is free to kids between the ages of 8 and 11. Each member will receive a saving kit including a membership card, a savings diary, a wall poster to track savings goals, and stickers to make their own banks. In addition the club holds regular "meetings" via videos on the club's webpage and YouTube. The Savers Club was introduced at the Delaware State



The Great Investo and Penny demonstrate the magic of compound interest at the Delaware State Fair in Harrington

Fair on July 24th where The Great Investo and Penny performed two shows filled with Money Magic, fun, and audience participation. Over 300 savings club kits were distrubted to fair goers. Each kit included a membership card, a savings diary, a wall poster to track savings goals, and stickers to make their own bank. The Club is made possible thanks to the Generous Sponsorship of... Barclays, Comenity, Fulton Bank, Capital One, M&T Bank, Shore United Bank, SmartyPig, WSFS Bank, Artisans' Bank, and Taylor Bank.

Cover Story

How Generous is the Tax Cut and Jobs Act to Your Business?

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

The centerpiece of the Tax Cuts and Jobs Act (the "Act") is the reduction from the tiered corporate tax rate system with a top rate of 35% to a flat 21% beginning in 2018. Thus, a corporation with taxable income of $335,000 would see a 38% reduction in its tax bill, from $113,900 to $70,350. The story, however, does not end here. The Act contains numerous income recognition and deduction changes that will impact a company's bottom line as well as make the owners and advisors re-think the overall business structure in some cases. This article will provide an overview of those changes and their possible impact.

As noted above, the Act reduced the overall tax rate for C corporations. In response, owners of flow-through businesses such as partnerships, S corporations, and proprietorships cried foul since their business income was reported on their individual tax return and could be taxed as highly as 37% (the new top individual rate from 2018-2025). Congress therefore provided new Section 199A – the **qualified business income (QBI) deduction** which in short, provides for a 20% deduction of qualified business income, thus reducing the overall effective rate for those in the top bracket to 29.6% on their business income. One key here is that the QBI deduction sunsets after 2025, while the corporate rate reduction is permanent. Business owners and advisors will need to evaluate the impact of the QBI deduction to determine its impact as well as determine the best form of entity to be doing business and whether a change in entity is warranted.

Along with the reduction in the top corporate tax rate is a reduction in the corporate **dividends-received deduction** from 70% to 50% and from 80% to 65% if there is at least 20% ownership in the other company. This reduces the rate on corporate dividends received to 10.5% and 7.35%, respectively.

Corporate Alternative Minimum Tax (AMT)

The Act repeals the corporate alternative minimum tax for tax years beginning after 2017. For 2018-2020, the AMT credit is refundable and can offset the regular tax liability equal to 50% of the excess (100% of the excess in 2021 and 2022) of the minimum tax credit for the year over the credit against the regular tax liability.

Depreciation

The Act made several changes to how businesses depreciate fixed assets. First, the **Section 179 expensing** allowance was expanded from $500,000 to $1 million for property placed in service in tax years beginning after 2017, with the $2 million phaseout increased to $2.5 million. The definition of qualified Section 179 property was also expanded to include certain depreciable tangible property used predominantly to furnish lodging and certain nonresidential real property improvements made after the date the property was first placed into service (e.g., roofs, HVAC property, fire protection and alarm systems, and security systems).

In addition, the Act increased the percentage of **bonus depreciation** that can be claimed for qualified property acquired and placed in service after September 27, 2017 through 2022 (note the start date is actually prior to the 12/22/17 enactment date) from 50% to 100% of the adjusted basis of the property. Starting in 2023 the bonus percentage is reduced by 20% each year until it sunsets at the end of 2026.

The Act also shortens the recovery period for certain real property and qualified restaurant improvement to 15 years, using the straight line, mid-year convention.

Finally, the Act significantly increased the luxury automobile depreciation limits. For vehicles placed in service after 2017 in tax years ending after 2017, the first-year depreciation limit

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increases from $3,160 to $10,000. If bonus depreciation is claimed (limited to $8,000), the first-year deprecation increases from $11,160 to $18,000. Similar increases were made to subsequent years' limits (for example, the second-year limit increases from $5,100 to $16,000!).

Net Operating Losses (NOLs)

A provision that will likely cause some frustration is the change in reporting business NOLs. In the past, an NOL could be carried back 2 years and then carried forward up to 20 years. For NOLs arising after 2017, the 2-year carryback provision is repealed except for farming trade or businesses. Thus, businesses will no longer be able recoup prior years' taxes using NOLs. The 20-year carryforward limit is repealed; thus an NOL can be carried forward indefinitely. In addition, the amount of an NOL that can be used to offset income in a succeeding year is limited to 80% of that year's taxable income.

Limit on Deduction for Business Interest

With certain exceptions, the Act places a 30% of "adjusted taxable income" limit on the deduction of net interest expense for tax years beginning after 2017. For 2018 through 2022, adjusted taxable income is computed as taxable income without regard to deductions for depreciation, amortization, and depletion. Any disallowed interest deduction is carried forward as business interest paid in the succeeding year and can be carried forward indefinitely.

Businesses that meet a $25 million gross receipts test (other than tax shelters) are exempt from the new interest limitation rules. Real property trade or businesses can elect out if they use the alternate depreciation system to depreciate applicable property. Floor plan financing is also exempt from the limitation rules.

There are special rules with respect to the limitation applicable to partnerships. The limitation is first determined at the entity level and then taken into account and allocated as part of non-separately stated taxable income or loss. Any excess interest expense is allocated to partners and reduces that partner's basis in the partnership. Special rules, beyond the scope of this article, address excess capacity amounts also allocated to partners as well as the adjustment to partnership basis in the case of unused excess interest expense upon disposition.

Tax Accounting Changes

The Act made four major changes in the way that businesses can report their income and deductions.

• **Expanding the use of the cash method of accounting** for all taxpayers (except tax shelters) for tax years beginning after 2017 if the prior 3 years' average gross receipts are not more than $25 million. This would apply regardless of whether inventory is an income-producing factor. The use of this provision would result in a change of accounting method under Section 481. Note that the exceptions for qualified personal service corporations and taxpayers other than C corporations is retained.

• Pre-Act rules allowed only certain businesses with average gross receipts under $1 million ($10 million in certain cases) to use the cash method for **accounting for inventories**. For tax years beginning after 2017, the Act allows businesses meeting the above $25 million average gross receipts test to account for inventories (1) as non-incidental materials and supplies or (2) using a method that conforms to the taxpayer's financial statement treatment of inventories. The use of this provision is a change in accounting method under Section 481.

• For tax years beginning after 2017, the Act exempts producers and resellers of both real and personal property that meet the above $25 million average gross receipts test from the **UNICAP** rules under Section 263A. The exemption does not apply if use of 263A is not otherwise based on gross receipts. Again, this provision is a change in accounting method under Section 481.

• For **long-term contracts** entered into after 2017 and for years beginning after 2017 and except for tax shelters, the exemption from the requirement to use the percentage-of-completion method for reporting long-term contracts is expanded to include those contracts that are expected to be completed within two years from the commencement of the contact, and the taxpayer performing the work is expected to meet the $25 million gross receipts test for the year the contract is entered into.

Employer Deduction for Fringe Benefits

Through 2017, business-related meals and entertainment were 50% deductible (100% prior to the 1986 tax act). For expenses incurred or paid after 2017, the deduction for entertainment is disallowed. This would include items such as golf fees, theater tickets, and sporting events. The 50% deduction for business meals is retained; however, it is anticipated that IRS regulations will clarify that meals incidental to general business entertainment are "tainted" and thus not deductible. Also, after 2025, the deduction for employer-provided meals for the convenience of the employer is disallowed. This would include meals provide for employees working overtime. The deduction for employee transportation fringe benefits is now disallowed (e.g., parking and mass transit), but the benefit to the employee is still tax-free. Finally, no deduction is allowed for transportation expense paid for employee commuting, except for safety reasons.

Other provisions include:

• Repeal of the Domestic Production Activity Deduction for tax years beginning after 2017.
• Repeal of the partnership technical termination rules for partnership tax years beginning after 2017.
• Requirement that research and experimental expenses be capitalized and amortized over 5 years (15 years if conducted outside of the United States), beginning with the mid-point of the year in which the expense was paid or incurred.
• Limits like-kind exchange treatment under Section 1031 for transfers after 2017 to only real property that is not held primarily for sale (thus, it will no longer apply to tangible personal property). There is a transition rule for pre-Act

tangible personal property if the taxpayer has either disposed of the relinquished property or acquired the replacement property on or before 12/31/17.

• Clarification that tangible personal property given to an employee in recognition of either length of service or safety achievement does not include cash, cash equivalents, gift cards, gift coupons, gift certificates, vacations, meals, lodging, tickets for theater or sporting events, stock, or similar other nontangible property.

• The deduction for lobbying expenses with respect to legislation before local government bodies is eliminated after 12/22/17.

• The tax-free rollover provision of publicly traded securities gains into specialized SBICs under Section 1044 is repealed for sales after 2017.

The above summary of changes only scratches the surface of those made by the Act. Business owners and their advisors need to evaluate the impact of the provisions on their particular business, both from a tax and accounting standpoint. Since the Act was put together so quickly at the end of 2017, many items were not addressed and others are very ambiguous and need clarification. Treasury is expected to address many of these open issues in upcoming regulations.

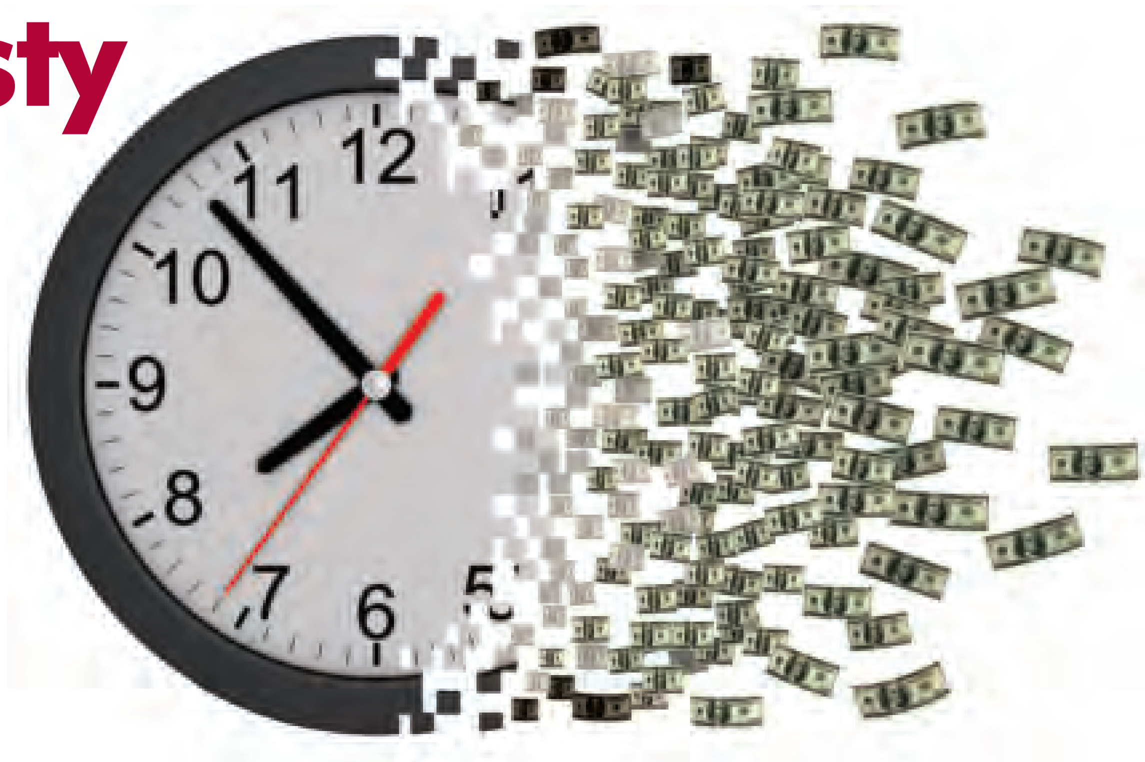
Finally, the question will be whether states and local jurisdictions will conform to the federal changes or decouple, such as in the case of bonus depreciation and the 20% QBI deduction. This is certainly something that businesses and their advisors need to be monitoring.

For questions or further information, please contact Jordon Rosen at jrosen@belfint.com or 302.573.3911.

Jordon Rosen is a Director and shareholder at BLS and heads the firm's estate and trust practice. Jordon also provides tax consulting and compliance services to the firm's higher net worth clients and business owners. He is the Immediate Past President of the National Association of Estate Planners and Councils (NAEPC) and has served as president of the Delaware Estate Planning Council and the Chester County, PA Estate Planning Council. Jordon also serves as Chair of the Tax Committee of the Delaware State Chamber of Commerce, is a member of the AICPA Trust, Estate and Gift Technical Resource Panel and is a member of the editorial board of Thomson Reuters Focus publication. Jordon is a licensed CPA in Delaware and Pennsylvania and is a member of the Pennsylvania Institute of CPAs, Delaware Society of CPAs and the AICPA Tax Section. He also holds the designation of Accredited Estate Planner and has been recognized multiple years as a 5-Star Wealth Manager by Philadelphia Magazine and Delaware Today.

Dynasty Trusts

Nothing Lasts Forever



by
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Daniel F. Hayward, Esq.
Joseph Bosik IV, Esq.

Gordon, Fournaris & Mammarella, P.A.

On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act of 2017 (the "2017 Act"). The 2017 Act increased the federal estate, gift, and generation-skipping transfer ("GST") tax exemptions to $11,180,000 per person in 2018, which exemptions are indexed for inflation. Unfortunately, the 2017 Act also contains a sunset provision that provides that the federal estate, gift, and GST tax exemptions revert back to the 2017 amounts effective January 1, 2026. However, in the interim, clients have been presented with an opportunity to transfer significant amounts of wealth out of their estates without the imposition of transfer taxes. Dynasty Trusts have become a popular tool for clients interested in using the increase in exemption to transfer assets out of their estates. This article will discuss the income taxation of Dynasty Trusts and flexible provisions to include in Dynasty Trusts.

What Is a Dynasty Trust?

A Dynasty Trust is simply a trust that perpetuates from one generation to the next without the requirement of terminating on a set date. The use of Dynasty Trusts is predicated upon the fact that many jurisdictions have either abolished the common law rule against perpetuities applicable to trusts by allowing the creation of true perpetual trusts, or have otherwise extended the common law rule against perpetuities applicable to trusts so that trusts may stay in existence for a very long period of time, e.g., one thousand (1,000) years.

Delaware abolished its common law rule against perpetuities applicable to trusts in 1986 and enacted legislation allowing perpetual trusts in 1995.[1] With respect to real property held inside of a trust, Delaware law imposes a one hundred and ten (110) year rule against perpetuities period.[2] However, Delaware law expressly excludes real property held as an intangible through an entity such as a "corporation, limited liability company, partnership, statutory trust, business trust or other entity," i.e., the real property is held by the entity, which is, in turn, held by the trust.[3]

While a true Dynasty Trust perpetuates from one generation to the next without any direction from a beneficiary as to the ultimate disposition of the Dynasty Trust assets, for flexibility purposes it is often desirable to include testamentary limited powers of appointment to allow each generational beneficiary to redirect the disposition of the Dynasty Trust assets upon his or her death. Often the governing instrument will also include a contingent general testamentary power of appointment (or authorize the trustee or other individual to grant such a power) for tax planning purposes.

Income Taxation of Dynasty Trusts

A trust may be taxed as a grantor trust for federal income tax purposes under Sections 671 – 678 of the Internal Revenue Code ("IRC"). Alternatively, a trust may be taxed as a non-grantor trust for federal income tax purposes. If a Dynasty Trust is taxed as a grantor trust, all income tax consequences with respect to the trust are attributed to the grantor and are reported on the grantor's personal income tax return. If a Dynasty Trust is taxed as a non-grantor trust, the Dynasty Trust is a separate taxpayer and is responsible for the payment of its own income tax liability.

One of the main advantages to structuring a Dynasty Trust as a grantor trust is that the grantor's payment of the income tax liability associated with the Dynasty Trust income being includible in the grantor's gross income will reduce the grantor's estate free of federal transfer tax consequences. Pursuant to Rev. Rul. 2004-64, the grantor of a grantor trust is not treated as making an additional taxable gift to the trust by virtue of paying the trust's income tax liability. This creates an incredibly powerful tool for grantors with large taxable estates, as the Dynasty Trust is able to grow income tax free while at the same time reducing the size of the grantor's estate.

A grantor may choose to structure a Dynasty Trust as a non-grantor trust because he or she simply does not wish to be responsible for the income tax liability of the Dynasty Trust. However, the biggest advantage to structuring a Dynasty Trust as a non-grantor trust is the potential avoidance of state income taxes.

Although Delaware has a state income tax with respect to trusts, Delaware does not tax that portion of trust income and capital gains accumulated and set aside for future distribution to non-resident beneficiaries.[4] If all of the beneficiaries of a Delaware non-grantor trust are not Delaware residents, the trust pays no Delaware state income tax, which creates the possibility of eliminating state income tax on the income and capital gain earned in the Dynasty Trust. Many residents from high income tax jurisdictions such as California, New York, New Jersey, Massachusetts, and Kentucky create Delaware non-grantor trusts to avoid state income tax that would otherwise apply. This may be particularly important given that the 2017 Act limited the deduction for state and local income, sales, and property taxes to $10,000 per return.

Drafting of Grantor Trusts and Non-Grantor Trusts

In certain situations, a Dynasty Trust will automatically be structured as a grantor trust for income tax purposes under IRC § 677(a)(1) due to the fact that income can be distributed to the grantor or the grantor's spouse without the consent of an adverse party. This is most common in a Spousal Lifetime Access Trust ("SLAT").

However, more often than not, grantor trust status is triggered by the retention by the grantor of certain administrative powers. The most common grantor trust power that is utilized in Dynasty Trusts is the ability of the grantor to reacquire trust assets by substituting assets of equivalent value.[5] Under Delaware law, the fiduciary responsible for investment decisions has a fiduciary duty to determine that the substituted property is of equivalent value to the property reacquired, unless the terms of the governing instrument expressly provide otherwise.[6] Where a reacquisition power is the means by which grantor trust status is triggered, it is generally recommended that provisions be included in the governing instrument that allow the grantor (or another individual) to terminate the reacquisition power.

(continued on p. 18)

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It is often advisable to include a tax reimbursement clause in Dynasty Trusts structured as grantor trusts. Rev. Rul. 2004-64 also addressed the estate tax consequences if, pursuant to the governing instrument or applicable local law, the grantor of the trust may or must be reimbursed by the trust for the income tax. Assuming there is no understanding, expressed or implied, between the grantor and the trustee regarding the trustee's exercise of its discretion to reimburse the grantor for the income tax liability of the trust, the trustee's discretion to satisfy the grantor's obligation will not alone cause inclusion of the trust assets in the grantor's gross estate for federal estate tax purposes.

However, Rev. Rul. 2004-64 specifically states that the trustee's discretion to reimburse the grantor for the income tax liability combined with other factors including, but not limited to, (i) an understanding or pre-existing arrangement between the grantor and the trustee regarding the trustee's exercise of its discretion; (ii) a power retained by the grantor to remove the trustee and name a successor trustee; or (iii) applicable local law subjecting the trust assets to claims of the grantor's creditors may cause inclusion of the trust assets in the grantor's gross estate for federal estate tax purposes. In addition, a reimbursement provisions that requires the trustee to reimburse the grantor for the trust's tax liability will result in gross estate inclusion for the grantor.

For flexibility purposes, it is a good idea to include a provision that permits an independent Trustee or other independent fiduciary responsible for distribution decisions to reimburse the grantor for the income tax liability in any given year. It is important to be cognizant as to whether including such a tax reimbursement provision in the governing instrument could subject the assets of the Dynasty Trust to creditor claims of the grantor which, as discussed above, could result in gross estate tax inclusion for the grantor. Delaware law has a specific provision that states that the grantor's retention of the discretionary ability to be reimbursed for the income tax liability of a trust is not considered a retained beneficial interest in the trust that would subject the trust to claims of the grantor's creditors.[7]

As previously mentioned, a Dynasty Trust will typically be structured as a grantor trust for income tax purposes if the grantor or the grantor's spouse retains a discretionary beneficial interest in the Dynasty Trust. This is due to the fact that IRC § 677(a)(1) provides that if income can be distributed to the grantor or the grantor's spouse without the consent of an adverse party the trust will be taxed as a grantor trust. However, where the governing instrument provides that distributions can only be made to the grantor or the grantor's spouse with the consent of an adverse party, as defined in IRC § 672(a), e.g., a beneficiary of the trust, grantor trust status may be avoided.

It has become very popular for clients in high income tax states to structure a Dynasty Trust as a Spousal Lifetime Access Non-Grantor Trust ("SLANT"). The grantor spouse will create the SLANT for the benefit of the beneficiary spouse and descendants. The governing instrument will provide that distributions to the beneficiary spouse can only be made with the consent of one of the adult descendants, who would be considered an adverse party to the beneficiary spouse within the meaning of IRC § 672(a). This gives the client the benefit of a SLAT, while at the same time creating the possibility of state income tax avoidance on the income and capital gains accumulated in the trust.

Even if the grantor or the grantor's spouse do not retain a beneficial interest in the Dynasty Trust the governing instrument must be drafted to prevent the Dynasty Trust from being taxed as a grantor trust under the provisions of IRC §§ 671 – 678. Absent careful drafting, a governing instrument could inadvertently confer a power upon the grantor or another person that causes the Dynasty Trust to be taxed as a grantor trust.

Flexible Provisions to Include in Dynasty Trusts

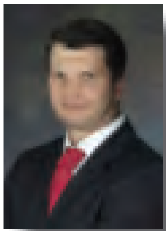
Because Dynasty Trusts are intended to remain in existence for several generations, it is important to incorporate provisions in the governing instrument that allow the Dynasty Trust to be modified or amended non-judicially. For example, in a SLAT or a SLANT, the beneficiary spouse could be granted a testamentary limited power of appointment, which would allow the beneficiary spouse to appoint assets in further trust for the benefit of the grantor spouse if the beneficiary spouse predeceases the grantor spouse. Under Delaware law, the possibility of the grantor receiving assets contingent upon surviving the grantor's spouse is not considered the retention of a beneficial interest in the Dynasty Trust that would result in the grantor's creditors being able to reach the assets of the Dynasty Trust or otherwise result in the assets of the Dynasty Trust being includible in the grantor's estate for federal estate tax purposes.[8]

Additionally, because Dynasty Trusts are structured as perpetual trusts, it is typically best to keep the distribution provisions as flexible as possible. To that end, many grantors include a statement of intent in the governing instrument, which states the reasons why the grantor created the trust, how the grantor expects beneficiaries to conduct themselves, and how distributions should be made to the beneficiaries. Within the statement of intent, a grantor could expressly acknowledge that he or she may provide the Trustee with a letter of wishes, which may be modified, amended, and/or revoked from time to time, that will provide the Trustee with additional guidance regarding distributions to the beneficiaries. It is important that the statement of intent and the letter of wishes be precatory and non-binding.

Another significant flexibility provision is a built-in decanting power. Although many states have enacted decanting statutes, i.e., the exercise of a Trustee's principal invasion power over the existing trust in favor of a second trust for the benefit of one or more of the beneficiaries of the existing trust, it is possible that the Dynasty Trust could be moved to another jurisdiction that does not authorize decantings. Without the built-in power, the ability to decant the Dynasty Trust could be lost upon a change of jurisdiction. It is also possible to draft the built-in decanting power so that it is broader than what is permitted under the applicable state statute.

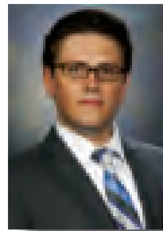
In addition, it is prudent to confer upon an independent fiduciary the power to amend a Dynasty Trust for administrative and tax purposes. This will allow the Dynasty Trust to remain flexible as circumstances change in the future, particularly as they relate to changes in the tax law.

Finally, it may become desirable in the future to move the situs of the Dynasty Trust to another jurisdiction and change the law governing the administration of the Dynasty Trust. While state law may contain specific provisions allowing for such a change, it is advisable to include language in the governing instrument that specifically allows a power holder, such as an independent Trustee or Trust Protector, to move the situs of the Dynasty Trust from one jurisdiction to another and to change the law governing the administration of the Dynasty Trust.



Michael M. Gordon is a Director at Gordon, Fournaris & Mammarella, P.A. Michael's practice focuses on the unique aspects of Delaware trust law, including directed trusts, dynasty trusts, asset protection trusts and all aspects of the validity, construction and administration of Delaware trusts. Michael routinely works with clients across the country to transfer the situs of trusts to Delaware and to modify trusts to take advantage of Delaware's favorable trust law. Michael drafts, reviews and comments on Delaware trust agreements for local and out of state clients and provides legal opinions on the validity of trusts under Delaware law.

Daniel F. Hayward is a Director at Gordon, Fournaris & Mammarella, P.A. Daniel's practice focuses on the unique aspects of Delaware trust law including directed trusts, dynasty trusts, asset protection trusts and all aspects of the validity, construction and administration of Delaware trusts. Daniel routinely petitions the Delaware Court of Chancery to represent interested parties in the reformation of trusts and to transfer the situs of certain trusts to the State of Delaware. He also drafts, reviews and comments on Delaware trust agreements for local and out of state clients and provides legal opinions on the validity of trusts under Delaware law, including Delaware dynasty trusts and Delaware self-settled asset protection trusts.



Joseph Bosik IV is an Associate at Gordon, Fournaris and Mammarella, P.A. Joe received his Bachelor of Arts in Business & Economics from Ursinus College and earned his Juris Doctor, cum laude, from Chapman University, Fowler School of Law, with an emphasis in tax law. He also served as an articles editor for the Chapman Law Review. Joe earned his LL.M. in Taxation at Villanova University School of Law. Prior to joining GF&M, Joe externed for the Tax Division of the United States Attorney's Office, where he was exposed to a variety of complex tax issues. Joe is a member of the Estates and Trusts, Taxation, and Elder Sections of the Delaware State Bar Association, as well as the Delaware Estate Planning Council and the Wilmington Tax Group.

Notes:
1- 25 Del. C. § 503.
2- 25 Del. C. § 503(b).
3- 25 Del. C. § 503(e).
4- 30 Del. C. § 1636(a).
5- IRC § 675(4).
6- 12 Del. C. § 3316.
7- 12 Del. C. § 3536(c)(2).
8- 12 Del. C. § 3536(c)(1).

Take Me to Your Leaders!

Meet the DBA Board of Directors!

Chair
Cynthia D.M. Brown
Commonwealth Trust Company

Cynthia D.M. Brown is the President of Commonwealth Trust Company and is a member of its Board of Directors. Cindy holds a Juris Docorate Degree from Widener University School of Law, now known as the Delaware Law School. Cindy has more than twenty years experience in the areas of trust administration, estate planning and tax. She is an associate member of Estates and Trusts Section of the Delaware State Bar Association and a long-time member of its Trust Act Committee, which annually drafts revisions to the Delaware Code. In addition to the DBA Board, Cindy serves on the Board of Directors of Delaware CarePlan, Inc.; and, is Chair of the UD Trust Management Minor Advisory Committee.

Chair-Elect
Elizabeth Albano -
Artisans' Bank

Beth Albano is Executive Vice President and Chief Financial Officer of Artisans' Bank in Wilmington, DE. She has been employed by Artisans' Bank for over 25 years, serving in a variety of positions with increasing levels of responsibility. Beth holds a bachelor's degree in Business and Finance from Mount Saint Mary's University in Emmitsburg, MD. She joined the Delaware Bankers Association Board of Directors in May 2015 and enjoys serving local community organizations such as the Ronald McDonald House, the Food Bank of DE, and Ursuline Academy.

Director-at-Large
Donna G. Mitchell -
Deutsche Bank Trust Co. DE

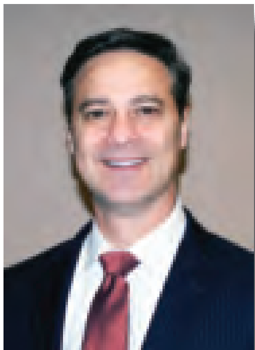
Donna Mitchell is President and CEO of Deutsche Bank Trust Company Delaware. She has over 25 years banking experience in Delaware. She joined Deutsche Bank/Bankers Trust (Delaware) in November 1991 as Assistant Vice President and Credit Officer. Donna serves on the Delaware State Housing Authority's Council on Housing and is Chair of the Asset Quality Review Committee for the Delaware Community Investment Corporation. Ms. Mitchell is a member of the Board of Directors of the East Side Charter School and also serves on East Side's Finance Committee. A graduate from Gettysburg College, she earned her CTFA in 2009. Donna and her family reside in Wilmington, Delaware

Director-at-Large
James J. Roszkowski -
Discover Bank

Jim Roszkowski is President of Discover Bank, a subsidiary of Discover Financial Services. He is a member of the Bank Board and its executive committee, providing senior management leadership and oversight on the Bank's operations, regulatory compliance and corporate development activities. He either chairs or serves on a number of key Bank operational, financial, asset/liability management, government relations/regulatory and corporate risk committees. Jim was previously Senior Executive Vice President and a member of the Management Committee of MBNA America. Also, he held senior-level corporate positions at VISA USA Inc. and

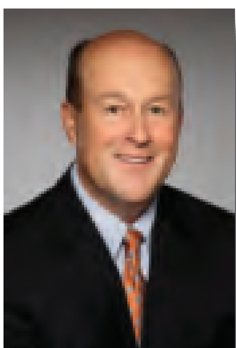
Chase Manhattan Bank, and was a Senior Advisor on Economic Development for Delaware's Governor Ruth Ann Minner.

Directors



Dominic C. Canuso - WSFS Bank

Dominic joined WSFS Bank in June 2016 as Executive Vice President and Chief Financial Officer. From 2006 to 2016, he was Finance Director at Barclays' US Credit Card Business, most recently serving as Line of Business CFO. Prior to Barclays, he was at Advanta Bank and Arthur Andersen Consulting. Dominic is an active member of the community and is currently on the Board of DANA (Delaware Alliance for Nonprofit Advancement), a leader of the nonprofit sector in Delaware with the mission to strengthen, enhance, and advance nonprofits and the sector in Delaware through advocacy, training, capacity building and research. Dominic also serves on the Advisory Board of the Innovation, Creativity & Entrepreneurship (ICE) Institute at Villanova University.



Bruce Colbourn - PNC Bank, N.A.

Bruce Colbourn is Market Executive for Delaware. Bruce leads corporate and commercial banking for PNC in Delaware. A PNC employee since 1978, he worked in the trust department and later the national department where he advanced to vice president and department head with responsibility for the bank's cash management and other commercial banking services. Colbourn later became part of the corporate banking group where he was responsible for lending and business development among corporate clients throughout Delaware, including clients in the public finance and health care sectors. He currently serves on the board of the YMCA of Delaware; Wilmington Renaissance Corporation; The Grand Opera House; and the Delaware Business Roundtable. He is former chairman of the board of Goodwill Industries of Delaware and Delaware County (Pa.)

Larry Drexler - Barclaycard US

Larry Drexler is General Counsel and the Chief Privacy Officer of Barclaycard US. Larry has been with the bank since its inception in 2000 and has touched every part of the business throughout his tenure with the company. Prior to joining Barclays, Larry was Senior Vice President at First USA Bank. From 1985 to 1998 he practiced law in Wilmington, DE representing commercial clients. He is an avid community advocate and is chairman of the Board of Connections CSP, an organization dedicated to treating those afflicted with mental illness and provider of health services including provider of health services to the Delaware Prisons. Larry is also a Board member of the Delaware Volunteer Legal Services, the Delaware Financial Literacy Institute and a member of the Board of Editors of the Delaware Lawyer.

Thomas M. Forrest - U.S. Trust Company of Delaware

Thomas M. Forrest, is President & CEO of U.S. Trust Company of Delaware. Tom is past President and founder of the Personal Trust Division for Charles Schwab Bank in Wilmington, Delaware. He opened and staffed the Schwab personal trust office in 2007. Before joining Charles Schwab, Tom was co-founder, President and CEO of U.S. Trust Company of Delaware. Tom joined U.S. Trust Company in 1999 and opened the U.S. Trust office in Delaware in 2000, where he managed the office through 2007. Tom returned to U.S. Trust Company of Delaware in 2012.

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Board of Directors

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Leslie G. Gillin - Chase Bank USA, N.A.

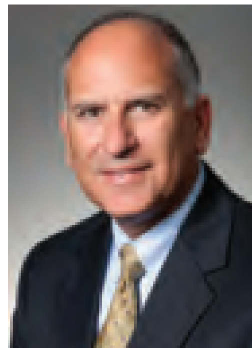
Leslie Gillin manages partnerships with some of the world's most prominent brands as President of Chase Co-Brand Credit Cards. Gillin has more than 25 years of experience in the global credit card business and has held senior marketing, product and business development roles at Citi, Bank of America and MBNA in the U.S., Canada and the U.K. Most recently, she was the Chief Marketing Officer of Citi's Global Consumer Bank, leading efforts to accelerate digital acquisitions, reshape social and content strategy, and enhance brand and product positioning. Gillin holds a bachelor's degree in International Relations and Spanish from the University of Delaware. She was recognized as a 2010 Top 50 Women in Business by Delaware Today Magazine and most recently as the 2016 Distinguished Award Recipient of Manheim Township High School. She has held many board member and director roles, including the Please Touch Museum of Philadelphia, Holy Child School at Rosemont and the Mastercard U.K. Forum. She is also a founding active member of Diamonds Unleashed, a women empowerment initiative.

Eric G. Hoerner - MidCoast Community Bank

Eric Hoerner is CEO of MidCoast Community Bank in Wilmington, DE. He joined the board of directors of MidCoast in January 2014 and became CEO a year later. He has been working in the financial service industry for 37 years and currently serves on the boards of Nantahala Bank & Trust Co. in North Carolina, Greenleaf Capital Partners, and Lancaster Theological Seminary. Eric holds a Master Professional Director Certification, conferred by American College of Corporate Directors, a director education and credentialing organization. He is a graduate of Bucknell University and holds a CPA certificate (inactive).

Lisa P. Kirkwood - TD Bank

Lisa Kirkwood is the Senior Vice President, RVP for the State of Delaware for TD Bank. Lisa oversees all business development activity for TD's Commercial and Small Business operations in Delaware. Lisa joined TD Bank in 1988 and has more than 29 years' experience in banking with a focus on commercial community banking. Most recently, Lisa served as a Senior Relationship Manager in Massachusetts where she managed TD's regional commercial loan portfolio for Southeastern Massachusetts. Lisa resides in Wilmington, Delaware and serves on the boards of the Delaware State Chamber of Commerce, University of Delaware's Center for Economic Education and Entrepreneurship, Delaware Business Roundtable, and Milford Housing Authority, and is a member of the Maritime Exchange for the Delaware River & Bay.



Nicholas P. Lambrow - M&T Bank

Nick Lambrow was named Regional President for M&T Bank Delaware in 2011. Prior to that appointment, Nick served for eight years as the Regional President for the Chesapeake and Central Maryland Division, which included the Eastern Shore, and parts of Central, Southern, and Western Maryland. In his current role, Nick has direct responsibility for the commercial efforts and market outreach within the region, as well as coordinating the activities of the bank's Business Banking and Retail departments. Nick was recently appointed by Governor Carney to serve on the Delaware Public/Private Partnership Board of Directors.

Joe Westcott - Capital One

Joe Westcott joined Capital One in March 2007 and has held a number of roles in the Bank, before and after the Capital One acquisition of ING Direct. Joe is the Delaware Market President, representing Capital One in the local community and accountable for local philanthropic giving, volunteerism and associate engagement. Joe is also accountable for multiple customer contact center teams driving operations execution and unparalleled customer experiences. He has held prior roles in commercial real estate lending and home loans operations. Immediately prior to joining the Bank, Joe was a Vice President in Commercial Real Estate at RBS Citizens Bank where he was responsible for commercial real estate loan originations. Joe has an M.B.A. and a B.A. from the University of Delaware.

Accounting for Success

by
Valerie Middlebrooks, CPA
Belfint Lyons & Shuman, P.A.

"In recent years, several states started enacting what has come to be known as an 'economic nexus' standard."

South Dakota v. Wayfair

Prior to a recent U.S. Supreme Court ruling, the standard to determine "substantial nexus" for sales tax purposes was based on "physical presence" as provided in Quill v. North Dakota. Essentially, to be required to collect and remit sales tax you needed to have either employees or property in the state, or some other physical connection to the state. On June 21st, the U.S. Supreme Court ruled 5 to 4 that the physical presence standard is "unsound and incorrect" and overturned the Quill case.

While the ruling is clear that "physical presence" no longer rules this determination, many questions remain on actual implementation at the state level. Does this change everything, does this change nothing, or is it something in between?

In recent years, several states started enacting what has come to be known as an "economic nexus" standard. Basically, if you exceed a certain amount of activity from customers located in that state you have created nexus with that state and are responsible for collection and payment of sales tax. Certain states including South Dakota, which this case is based on, also enacted a "bright line" test allowing certain activity below that threshold to not trigger a tax obligation. South Dakota uses threshold of $100,000 of gross revenue from sales of good or services delivered into the state or 200 or more separate transactions.

While we will continue to consider the impact of this decision, here are some general observations:

- Businesses with significant digital or economic presence (internet sales) in a state that currently asserts economic nexus could possibly now have nexus in those states and should review and consider the tax compliance obligations.

- Businesses with little digital presence outside their home state may have no current direct impact.

- Businesses selling into South Dakota should review their filing obligations in the state.

- Businesses should be prepared for states to aggressively enforce current economic nexus provisions and states that do not currently have them will most likely quickly add similar provisions.

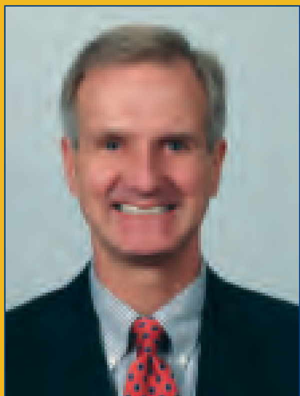
- Foreign businesses based outside the United States may also be affected by this ruling, triggering an obligation for sales tax at the state level regardless of treaty protection for income tax obligations.

Please note this case does not change any existing state laws that limit exposure to sales/use tax. For example, states with no enacted sales tax still have no sales tax. States that provide for exemptions related to sales of certain goods/services or sales to customers that possess an exemption remain exempt.

Future legal challenges or Congressional action could change the course of this ruling or limit its scope. We will continue to monitor forthcoming legislation and provide recommendations for our clients. Stay tuned and see what happens next.

A tax generalist with a strong knowledge base in providing compliance and advisory services to her clients, Valerie Miiddlebrooks works closely with the many experts within the firm to address her clients' varied circumstances. Valerie's experience includes working with large privately-held companies, nonprofits, small businesses, high net worth families, and international businesses (and individuals), and has extensive knowledge leading an engagement team acting as a back office tax department for a global manufacturer. Her widespread background provides a wealth of insight and expertise for the many issues her clients may face.

Compliance Focus



by
Robert W. Cardwell, Jr., Esq.
Managing Principal
Consumer Finance & Fair Banking
CAPCO Finance, Risk & Compliance
Solutions

"Real reform of the CRA is long overdue. "

CRA Reform Efforts Gather Real Momentum

It's been 41 years since the enactment of the Community Reinvestment Act and over 20 years since the last significant amendments, which stressed performance over process. The primary purpose of the CRA is to encourage banks to serve their communities more inclusively, meeting the credit needs of all types of consumers, including those in low- and moderate-income (LMI) areas, consistent with safe and sound operations. Despite the thousands of pages of CRA regulations and interagency FAQs – or as some might say because of them – banks struggle with uncertainty about assessment areas, what community development activities will receive CRA credit, abnormal competition for CRA credits in assessment areas, inconsistent application by examiners of the performance context, what institutions comprise a bank's peer group, and long delays between exams and receipt of performance evaluations.

So much about banking and the delivery of financial products and services has changed since Congress passed the CRA in 1977. Online banking and innovative fintech products have changed the way deposits are gathered, loans are made and money is transferred for both banked and unbanked Americans. This makes the evaluation of a bank's geographic assessment area for evaluation of CRA performance obsolete.

Real reform of the CRA is long overdue. Thankfully, over the past year and a half, a number of developments portend meaningful CRA modernization, namely:

- **February 2017** – Executive Order 13772 requiring the Department of the Treasury (Treasury) to review the CRA
- **June 2017** – Treasury report to the President entitled "A Financial System That Creates Economic Opportunities: Banks and Credit Unions"
- **December 2017** – ABA White Paper entitled "CRA Modernization – Meeting Community Needs and Increasing Transparency"
- **February 2018** – Government Accountability Office (GAO) report entitled "Community Reinvestment Act: Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework"
- **April 2018** – Treasury Report on Recommendations for Modernization of the CRA
- **June 2018** – OCC Bulletin 2018-17: Supervisory Policy and Processes for CRA Performance Evaluations
- **XXXX 2018** – Expected joint agency Advance Notice of Proposed Rulemaking (ANPR) on CRA reform

The highly anticipated ANPR is likely to address the primary findings and recommendations of the April 2018 Treasury report, providing far greater consistency, simplicity and transparency when it comes to how banks are evaluated for CRA performance. Treasury's recommendations include:

- **Assessment Areas** – Updating the definitions of geographic assessment areas to reflect the changing nature of banking arising from changing technology, customer behavior, and other factors;
- **Examination Clarity and Flexibility** – Increasing clarity and flexibility of CRA examinations to increase transparency and effectiveness of CRA rating determinations;
- **Examination Process** – Improving the examination process to increase timeliness of evaluations and increasing accountability for banks' planning of their CRA activity; and
- **Performance** – Incorporating performance incentives to better serve the CRA's intended purpose of encouraging banks to meet the credit and deposit needs of their communities. Treasury's recommendations will incentivize bankers to do more for LMI communities, especially in cases where the bank has underperformed in prior assessment periods.

Until CRA reform is a reality, and it looks closer than at any time since the noteworthy revisions in 1995, here are a few suggestions to ease the burden of CRA compliance and remain competitive in the marketplace:

Performance Context – Don't shortchange the time and effort to formulate input to provide to regulators for your bank's performance context. Carefully evaluate demographic and economic data, community-specific insights, investment and service opportunities, product offerings and business strategy, and unique challenges and constraints. While a somewhat complex exercise, taking the time to provide relevant, substantiated information based upon your unique knowledge of your assessment area gives your bank a voice in formulating the standard against which your CRA activity will be considered.

Innovative Products and Services – Do not reflexively shy away from pursuing innovative and perhaps more complex products or service offerings that are responsive to community needs and the rapidly evolving digital environment. It's more likely than not that many of today's new financial products and services will be eligible for CRA credit in the near future.

Avoid CRA Rating Downgrades – While the OCC issued an update to its Policies and Procedures Manual in October 2017 to clarify the impact illegal credit practices can have on CRA ratings (logical nexus and remedial action), a comprehensive compliance management system continues to provide the best bulwark against CRA downgrades resulting from discriminatory, unfair or deceptive practices related to products that may or may not be part of CRA performance evaluations (e.g., mortgage loans vs. credit cards or indirect auto lending).

Comment Letters – Once the ANPR on CRA reform is issued, make sure your point of view is communicated. Whether you submit an individual comment letter or weigh in on a jointly sponsored industry or association letter, it's vitally important that all CRA-reporting institutions as well as community stakeholders and other interested parties take advantage of the formal rule making process so that the CRA can be modernized to better serve banks and their communities in the 21st century.

For Your Benefit

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

"Employees who struggle financially are often more likely to be less productive at work, have an unhealthier lifestyle, higher medical costs and significantly delayed retirements."

Financial and Physical Wellness – A Unified Approach

Many employers have implemented or at least explored the idea of an employee wellness program. These programs have run the gamut from simple communications like newsletters and posters to extensive health fairs that include biometric exams, professional vendor presentations and creative incentive programs. As employers have toiled over the physical wellness program idea, many fail to realize that financial and physical wellness go hand in hand. In fact, employees who struggle financially are often more likely to be less productive at work, have an unhealthier lifestyle, higher medical costs and significantly delayed retirements. Equipping your employees with comprehensive financial wellness tools and incorporating these components into your overall health and wellness program can be an important move for your company and your employees.

As an employer, you can help your employees cope with their financial problems and improve their financial situations. Consider offering financial wellness benefits, including educational materials, financial calculators, resources for those needing advice or assistance, and classes to teach financial management skills. Many employees have surprisingly little knowledge about finances, so simply offering education can be a huge benefit. If you have a wellness program, incorporate the financial component with the overall program.

While it's better to have one vendor with a unified customized approach, you may have two different vendors providing financial and physical wellness services. You should make sure they communicate so they offer your employees a consistent message. You may already have financial services available through your retirement plan vendor, or as part of your Employee Assistance Program; if this is the case, work to increase awareness so you can boost utilization and ensure employees are taking advantage of the benefit. Instead of focusing on simply physical wellness, emphasize wholistic lifestyle management to help employees strive for wellness in all aspects of their life.

Because finances are on the forefront of so many people's minds, employees will appreciate any financial benefits offered by their employer, and it will likely raise employee morale and satisfaction. In addition, a good financial wellness initiative can go far to reduce health care costs. For example, a smoker may be unwilling to quit until they learn the financial burden of smoking and realize all the money they could save by quitting. Further, putting this money into an emergency fund goes a long way in reducing the worries of a break in finances.

Financial education should also be integrated with discussions about health care to encourage more savvy health care consumers. Ideally, incorporate financial wellness into your open enrollment meetings for your health care and wellness. Once employees learn ways to reduce debt, save money for emergencies, implement adequate life insurance and invest for their retirement needs, they will be more likely to be prudent in their health care expenditures. This education will save both employees and the company significant money overall.

Having financial peace of mind, or even a feeling of controlling one's finances, will significantly reduce an employee's stress level, which will improve his or her overall health, along with improving focus, attitude and performance at work. Financial wellness can support your overall wellness initiatives by promoting healthier behaviors and attitudes in all aspects of life—yielding happier, healthier employees.

The content of this article comes from our extensive Benefits Insights newsletter series and Zywave resource center available to our clients as part of our commitment to education and overall employee wellbeing.

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

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September 28th - FDIC Directors' College

University of Delaware Virden Center, Lewes, Delaware. The FDIC Directors' College is an interactive program that provides ongoing education on current topics to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the everchanging regulatory environment.

October 23rd & 24th - 2018 Delaware Trust Conference:
The Tricks and Treats of Delaware Trusts

Chase Center on the Riverfront, Wilmington. Wealth Management Professionals, get the latest strategies at the 13th annual edition of this premiere trust event highlighting the advantages of Delaware's trusts. Sponsorships and Exhibitor space available!

November 13th, 14th & 15th - Compliance '18

Wilmington University - New Castle, Delaware. Compliance Professionals mark your calendars now for Compliance '18, the DBA's all new conference featuring the latest trends and topics you need in the ever-changing regulatory compliance environment. Sessions and topics include: Fair lending, Deposit Compliance, UDAAP, BSA/AML, Financial Elder Abuse, and more.


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Lending Law Update

by
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"Most participation agreements create a win-win situation for all the lenders, as well as, the banks' customer who gets the benefit of having greater relationship opportunities among a larger group of lenders."

Participations - We are all on the same team - aren't we?

Participation loans serve a vital role in commercial lending. They attempt to allocate risk and allow partial interests in various loans to be shared. In the typical context, a lead bank structures the loan as a sole lender. Simultaneously or subsequent to the making of the loan, the lead lender sells a portion of it to other banks under the terms of a participation agreement. A participant lender may receive a certificate evidencing its share of the loan. The rights and obligations of all parties are created under and controlled by the participation agreement.

In a perfect world, each lender in a participation performs the full amount of due diligence required to underwrite the loan on its own and has looked at all of the underwriting risks. Most participation agreements create a win-win situation for all the lenders, as well as, the banks' customer who gets the benefit of having greater relationship opportunities among a larger group of lenders.

However, when things go awry in the participation loan context, the terms and conditions found in the participation agreement provide the alternatives and remedies available for resolving various issues. In two recent cases, things did not go so well for the participant lenders because their rights and expectations were not clearly stated in the agreement.

In *LNV Corp. v. Branch Banking and Trust Co.*, 2018 WL 358070 (11th Cir. 01/11/18), the U.S. Court of Appeals for the 11th Circuit determined that a participant lender had failed to prove its expectation interest or the benefit of its bargain in connection with the write-down of two different credit facilities that were purchased by a lead bank. The case emanates from a Florida real estate venture that collapsed in 2005 along with the real estate market. The joint venture developer sank and the borrowers were pushed into default. The lead bank accepted a settlement that created a disproportionate return to the lead bank on one of the two credit facilities, leaving the participant to suffer a very large loss under the loan that it had purchased. The lesson to be learned from this particular case is that a participant needs to make sure, with reasonable certainty, that its return on investment is specifically stated in the participation agreement and that the ability of the lead bank, to either structure a work-out or settlement, is done with the affirmation of all participants. When the participation agreement provides extraordinary authority and control to the lead bank, a participant cannot complain nor prove that it was to get a benefitted bargain.

Another case dealing with failed expectations and/or returns on investment was litigated in *Community & Southern Bank v. First Bank of Dalton et al.*, 811 S.E.2d 490, 2018 WL 1080457 (Ga. Ct. App. 02/28/18). In that case, the Court of Appeals of the State of Georgia held that a state trial court had ruled incorrectly when considering how proceeds from the sale of certain real property following foreclosure should be distributed among the participant banks that held interests in the underlying loans. The issue centered on the rights of the lead bank to deduct its expenses before distributing proceeds to the other participants. The participants argued that all proceeds were required to be distributed to the participant banks, pro rata, based upon their ownership interest, without deduction for lead bank expenses. The Court articulated that when separate loans are secured by a single mortgage and the proceeds from the sale of the collateral are insufficient to satisfy the entire debt, in the absence of any other special agreement, the proceeds are entitled to be shared pro rata among the participant banks.

The foregoing two cases, and, of course, other precedential litigation, illustrate that lenders should be clear on the rights and expectations they have when entering into participation loans. Due diligence is required, especially by participant lenders, to make certain that the terms and conditions found in the participation agreement will protect them from loss and provide reasonable alternatives with their input vote should a default occur.

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