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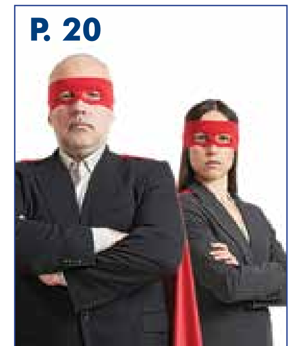

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View from the Chair

by
P. Randolph Taylor
EVP & Director of Private Banking
Fulton Bank

Chair
Delaware Bankers Association

"We're partners with the community facilitating economic stability and growth. "

I know its passé to talk about the holidays past the first week of January. By now we're all holidayed-out and eager to get 2018 up to speed. But I can't help thinking about it with regards to the big news of mid-December: the tax reform package. Many analysts, legislators, and indeed the President, couldn't resist drawing the parallel to the legislation and holiday gift giving. We all can recall presents we've received, some were exciting, some were more practical, but most held an aura of mystery while they were still secreted behind their colorful wrapping paper. I'm sure you've already unwrapped the tax reform bill and have seen the key components, so I won't review those here. But like all those holiday gifts, the real test comes when they are actually put to use.

Many analysts opined that financial institutions would be among those benefiting the most from the bill's corporate tax reforms. Some pundits cynically commented that it was a gift that corporations, banks included, would enjoy, but keep to themselves. Immediately following the bill's passage, before any of the legislation actually took effect, numerous companies reacted putting this assertion to rest. Some companies, including many of our DBA member institutions, announced that they would share the reduced tax burden with their frontline employees in the form of an extra week's pay, or by increasing their company's minimum wage. Local banks have also committed millions of additional dollars to fund community-focused charities funding affordable housing, first-time homeownership, credit counseling, financial literacy, and other initiatives. All these responses help to put resources directly into the hands of the people and the organizations that fuel economic and community growth. I'm proud to say that America's banks have been in the forefront proving once more that our industry is community minded and that we're all in this together.

Let me go back into holiday mode for a moment. Staple viewing of the season is the classic film *It's a Wonderful Life*. For those of you unfamiliar with the film, it's the story of George Bailey, played by Jimmy Stewart, who runs a small town building and loan (analogical to today's community banks). During the Great Depression there's a run on the institution and anxious depositors flock into the building and loan looking for their money. Bailey explains that their money isn't just sitting back in a safe.

"The money's not here," Bailey tells the crowd, "Your money's in Joe's house... And in the Kennedy House, and Mrs. Macklin's house, and, and a hundred others. Why, you're lending them the money to build."

That's a good explanation of what our industry does and one of which we can all be proud. It's valid for our basic reason for being in business, and its also applicable in the area of tax reform, or legislative reform (as Sarah will discuss on page 6), or any initiative that aids financial institutions in their basic mission of serving the community. We're partners with the community facilitating economic stability and growth.

So, yes, the Tax Cut and Job Act of 2017 is a welcome package, some might even call it a "gift." But like any gift its value comes down to how it is used. I'm confident that as they've already demonstrated, the nation's banks will use this not as a gift, but as a tool for greater investment in the community.

Randy

Photo: (L to R) T. Hall, C. Durante, S. Swenson, G. Weinig

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President's Report

by
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President, CEO & Treasurer
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"The 'Economic Growth, Regulatory Relief and Consumer Protection Act' promises to bolster economic growth through commonsense provisions..."

Amid all the political noise and partisan bickering coming out of Washington these days, something very unusual just happened in the U.S. Senate that Delawareans should know about. A bipartisan group of 22 senators -10 Republicans, 11 Democrats and one Independent - agreed to sponsor legislation that would make the first substantial reforms to the nation's financial system since 2010. The "Economic Growth, Regulatory Relief and Consumer Protection Act" (S. 2155) promises to bolster economic growth through commonsense provisions, including the rightsizing of rules that apply to community banks.

The proposed legislation didn't dominate the news cycle or fill the front pages, but if it can clear Congress, it promises to spur economic growth and job creation in Delaware and across the country.

Delawareans should be rooting for this bill and thanking U.S. Senators Tom Carper and Chris Coons who announced their support for this bipartisan legislation authored by Senate Banking Committee Chairman Mike Crapo (R-Idaho) and Senator Mark Warner (D-Va.). This shows what Congress can do when lawmakers of different parties, in good faith, work together to solve real problems. In this case, enhancing consumer protections and reducing regulatory burdens on community banks and credit unions, without compromising safety and soundness.

"After the financial crisis, Congress passed much-needed reforms to strengthen the banking system and help protect consumers by reining in predatory and reckless behavior. Seven years later, we know that many of those reforms are working well, while others require adjustments to ensure community banks and credit unions continue to be a valuable source of affordable loans for families and small businesses," said Senators Carper and Coons.

This bill will give more creditworthy borrowers in Delaware the chance to get the mortgage they need to buy a home. It will allow more deserving small business owners to get the loan they need to expand and hire more workers. And community bankers will be able to spend more time serving their customers' needs, instead of racking up hours a day complying with federal regulations intended for much larger institutions.

Senator Carper and Senator Coons should be applauded for their diligent efforts to ensure the proposed bill included a provision that allows all active-duty service members to receive quality, free credit monitoring, an important service they deserve but don't currently receive. "When it comes to banking legislation, our first priority is to ensure strong consumer protections," said Senators Carper and Coons.

Unfortunately, some in Congress are making false claims about this bill, arguing that it "rolls back" regulations. It does not. Rather, it makes sensible changes that represent seven years of lessons about what's working—and what's not—in financial regulation. Top financial regulators have also called for changes and voiced support for the proposal.

The good news is so many Democrats and Republicans support this bill that it stands an excellent chance of passing the Senate. It's already cleared the Banking Committee on a strong, bipartisan vote, which bodes well for success in the full Senate. If that happens, it will need to be reconciled with similar proposals in the House, but the prospects for this legislation are good.

Delawareans should join with people across the country to support this bill and applaud our Senators who chose to break from the partisan pack and get something done.

We have so many challenges ahead. If bipartisanship can tackle much-needed changes in our financial system, then there's no reason Congress can't tackle other tough issues in the same way. Thank you Senator Carper and Senator Coons for showing the Delaware Way can work in Washington!

Sarah

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What's New at the DBA

DBA Women Honored by *Delaware Today*

DBA President Sarah Long was recognized as one of 2017's Top Women in Business by Delaware Today and the Delaware Business Times at a luncheon at the Chase Center on the Riverfront, December 13th. 36 women were honored as individuals who are changing Delaware's workforce for the better. DBA members Victoria Monahan, Branch Manager II, Discover Bank, and Anabel Pichler, SVP, Compensation and Benefits, M&T Bank Corporation, were also among the honorees. Congratulations to all!

Secure in the Cloud! IT Professionals Convene for Cybersecurity Forum

Over 35 IT professionals gathered December 6th for "Staying Secure in the Cloud" the DBA's Cybersecurity Forum at the University & Whist Club in Wilmington. The event featured Alexandra Shulman-Peleg, Ph.D., Senior Vice President, Cloud Security Program and Engineering, Global Lead, Citi serving as moderator for panelists: Scott D. Ramsey, Managing Principal, Cybersecurity & Resiliency, CAPCO - Cal Waits, CSIS Cyber Investigations Director, Citi - Paul Hester, Vice President and Cloud Security Lead, Global Cybersecurity, JPMorgan Chase - Alex Southern, Executive Director and Cloud Product Manager, Global Cybersecurity, JPMorgan Chase - William R. Denny, Partner, Potter Anderson & Corroon LLP. The forum was sponsored by CAPCO.

2018 Teach Children to Save Day Featuring *The Great Investo and the Winning Ticket*

Registration for banker volunteers for the 2018 Teach Children to Save Day event opens February 26th. Throughout the week of April 23rd to April 27th banker volunteers will teach students in public, private, and parochial schools throughout Delaware. Over 90 percent of Delaware's banks participate in the Teach Children to Save Day event, the highest participation rate in the nation. Teaching is fun and easy. Complete materials and on-line training is provided.

This year's Teach Children to Save Day lesson is taken from the new book *The Great Investo and the Winning Ticket*. The story is the seventh adventure of the inept money magician and his savvy assistant Penny. Investo tries to gain wealth by entering contests and lotteries, despite Penny's advice that "every dollar you save is like a ticket that wins!" The book was written and illustrated by Greg Koseluk of the Delaware Bankers Association, and made possible by a grant from Capital One. *The Great Investo and the Winning Ticket* will be available from Amazon and other retailers in mid-February.

DBA Board of Directors Meets with Delaware Congressional Delegation

Monday, December 11th, the Delaware Bankers Association Board of Directors and past chairs met with Senator Carper, Senator Coons and Congresswoman Lisa Blunt Rochester along with several of their respective staff members through the hospitality of Artisans' Bank. The meeting was a free flowing conversation on issues of importance to the financial services industry and Delaware. The Board greatly appreciated this candid occasion to exchange ideas, concerns and opportunities with its entire Washington delegation.

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The CFPB Under New Leadership

What to Expect in 2018

by
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Richard P. Eckman, Partner
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Pepper Hamilton, LLP

Speculation about the future of the Consumer Financial Protection Bureau ("CFPB") has been ever-present since Donald Trump's victory in the 2016 Presidential election was first announced. Many industry experts initially predicted that Congress would quickly agree to replace the CFPB's single-Director structure with a multi-member commission, which did not happen and now seems unlikely. On the other hand, few, if anyone, foresaw that the formerly obscure Congressional Review Act would emerge as a device for voiding rules and regulations issued under former Director Richard Cordray's leadership. The November 25, 2017 resignation of Director Cordray has given rise to a fresh batch of conjecture.

Attempts to predict the future are inherently suspect, as they necessarily draw from knowledge of past events, which may not be indicative of what follows.[1] The CFPB's new leadership is quickly making major changes in policies and practices, especially in the areas of enforcement and rule-making, but the agency's new approach has yet to emerge. Mindful of the above caveat regarding the inherent unreliability of predictions, below we offer our thoughts on the changes in focus and direction—or lack thereof—that we expect to unfold at the CFPB during 2018.

New "Cop on the Beat"[2]

A change in the top position at the CFPB has a greater impact than a similar change at the FDIC or the OCC. This is because a sitting CFPB Director can only be removed by the President for cause, which gives that incumbent an unparalleled degree of independence in his or her decision-making. Former Director Cordray often referred to himself as a "cop on the beat," but many would contend that he was additionally lawmaker, judge, and jury. The constitutionality of the CFPB's unique agency structure has the subject of lawsuits, most notably *PHH Corp. v. Consumer Fin. Prot. Bureau.*[3]

In his initial press conference, on November 27, 2017, acting CFPB Director Mick Mulvaney outlined his basic plan for leading the agency as follows:

> The rumors that I'm going to set the place on fire, or blow it up, or lock the doors are completely false. I'm a member of the executive branch of government and we intend to execute the laws of the United States, including the provisions of Dodd-Frank that govern the CFPB. That said, the way we go about it, the way we interpret it, the way we enforce it, will be dramatically different. . . [4]

During the week of January 14th the CFPB took four significant actions . First, on January 16th , the CFPB announced that its intent to undertake a new rulemaking for the purpose of reconsidering its controversial new rule entitled “Payday, Vehicle Title, and Certain High-Cost Installment Loans” (the “Payday Loan” rule). Second, on January 18th, acting Director Mulvaney announced that the CFPB would be requesting no funding from the Federal Reserve Board for the first quarter of 2018. The reason given for this decision was that the CFPB already has adequate funds because former Director Cordray had held sizeable funds in reserve, which the new leadership considers unnecessary. This action was seen by many as an indication that the CFPB plans to scale back on its activities. Third, the same day the CFPB announced its decision to drop a pending lawsuit in Kansas against a group of payday lenders associated with American Indian tribes. Finally, also on January 18th, the CFPB announced plans to solicit public input regarding the agency’s enforcement, supervision, rulemaking, market monitoring, and education activities, including its use of civil investigative demands (“CIDs”) through Requests for Information to be published in the Federal Register. According to the CFPB’s press release, the goal these requests will be to “ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers.”

Although some may see the above actions as the first steps toward dismantling of the CFPB, the statutory mandate that drives and determines the CFPB’s activities serves as a break
on such efforts. That mandate includes the following:

1) ensure that consumers have timely and understandable information to make responsible decisions about financial transactions;

2) protect consumers from unfair, deceptive, and abusive acts or practices, and from discrimination;

3) reduce outdated, unnecessary, or overly burdensome regulations;

4) promote fair competition by enforcing the federal consumer financial laws consistently; and

5) advance markets for consumer financial products and services that operate transparently and efficiently to facilitate access and innovation.[5]

More specifically, the Dodd-Frank Act (“Dodd-Frank”) gives the CFPB supervision and enforcement authority over a vast array of consumer financial products and services, including deposit taking, mortgages, credit cards and other extensions of credit, loan servicing, check guaranteeing, collection of consumer report data, debt collection, real estate settlement, money transmitting, and financial data processing. In addition, Dodd-Frank transferred to the CFPB from other federal agencies rule-making authority for fourteen of the most important federal consumer protection laws and attendant regulations.[6] In light of these broad responsibilities, absent new federal legislation fundamentally restructuring the CFPB,[7] acting Director Mulvaney’s statements about not seeking to dismantle the agency merely acknowledged reality; i.e., the CFPB will continue to be staffed appropriately and provided with sufficient financial resources to meet its statutory obligations.

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CFPB

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Although acting Director Mulvaney cannot completely remake the CFPB, he can institute significant changes in emphasis and execution. Those changes have already begun. As one of his initial acts, acting Director Mulvaney revised the agency's mission statement to provide as follows:

> The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives.

In comparison, below is the prior mission statement:

> The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives.

The revised mission statement acknowledges an important facet of the agency's statutory mandate that was missing from the prior version. Namely, the agency's duty to promote more efficient regulation by identifying and reducing outdated, unnecessary, or overly burdensome regulations. Based on the rule-makings initiated by former Director Cordray, this addition plainly reflects a change in focus and not just a difference in semantics. For example, the Short-Term Lending Rule, which was issued on October 5, 2017, and will now be reconsidered, has been harshly criticized by the short-term loan industry as effectively precluding high-cost loans with a term of less than 45 days by requiring a burdensome costly ability to repay analysis for each and every loan. Moreover, the constraints this rule places on a lender's ability to utilize ACH repayments for loans with greater than a 36% interest rate further renders such loans economically unfeasible. In short, the rule appears intended to curtail versus regulate certain types of high-cost credit.

We expect the CFPB's new leadership to delay the Short-Term Lending Rule's effective date. In addition, acting Director Mulvaney or his successor may seek to shift the rule's emphasis to the adequacy and clarity of disclosures. More importantly, consistent with the revised mission statement, we expect future rule-makings in general to target the manner in which consumer financial products and services are offered, as opposed to attempting to determine what is available to consumers in the marketplace.

We also expect the CFPB's new leadership to reevaluate aspects of newly-revised Regulation C, which implements Home Mortgage Disclosure Act ("HMDA") and went into effect on January 1, 2018. As written, the revised regulation requires covered entities to collect and report a volume and detail of information that vastly exceeds what was previously required. In particular, the new or revised "data points" that must be collected include, without limitation, applicant or borrower age, credit score, unique loan identifier, property value, application channel, points and fees, borrower-paid origination charges, discount points, lender credits, loan term, prepayment penalty, non-amortizing loan features, interest rate, and loan originator identifier.

Lastly, The CFPB's sole attempt to define UDAAPs in a formal regulation to date consists of a proposed rule governing debt collections (i.e., revised Regulation F), which has been pending since its November 6, 2013 publication as an advance of proposed rule-making ("ANPR"). In the ANPR, the CFPB suggested holding first-party creditors to essentially the same legal standards under UDAAP as what applies to third-party collectors under the Fair Debt Collections Practices Act ("FDCPA"). However, in its 2016 decision in *Henson v. Santander Consumer USA Inc.*,[8] the U.S. Supreme Court held that Congress did not intend for the FDCPA to apply to first-party collectors whose primary business does not involve debt collection.[9] Given this decision, it is unlikely that the CFPB would seek to impose requirements on first-party collectors through an interpretation of UDAAP that go beyond what Congress intended under a law which specifically addresses debt collection. Therefore, we consider it unlikely that the CFPB would finalize a debt collection rule without making significant changes from what was proposed in 2013.[10]

Revised Enforcement Policy

Nothing has drawn more criticism to the CFPB than the exercise of its UDAAP enforcement authority, including its practice of deeming acts or practices "abusive" in the absence of concrete standards. Beginning with what quickly became a succession of consent orders issued against credit card issuers in connection with sales of credit card add on products,[11] the CFPB has been accused of creating new "rules" through unchallenged settlements, which it then seeks to impose against other supervised entities. This strategy has had a profound impact on the financial services industry. For example, the CFPB's massive 2015 lawsuit against more than a dozen debt collectors, payment processors and related entities that allegedly failed to stop fraudulent collection tactics,[12] along with collections-related lawsuits and enforcement actions, had the effect of substantially curtailing debt sales.

The Cordray-led CFPB was also criticized for its liberal use of CIDs, which are burdensome to comply with and extremely difficult to challenge successfully.[13] We expect the new leadership at the CFPB to wield this powerful tool more judiciously. In addition, although CIDs which have already been issued are unlikely to be withdrawn, we are confident that the ultimate outcome of those investigations will result in far fewer lawsuits and enforcement actions than what the CFPB's historical track record indicates.

Fair Lending

In Bulletin 2012-04 (Fair Lending), which was issued on April 18, 2012, the Cordray-led CFPB "reaffirm[ed] that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the [Equal Credit Opportunity Act] ECOA and Regulation B."[14] Yet, the question of whether disparate impact claims are available under the ECOA remains highly controversial. For example, the U.S. Court of Appeals for the District of Columbia questioned whether ECOA supports a disparate impact claim in *Garcia v. Johanns*.[15] In addition, more recently, the U.S. Supreme Court's

decision in *Texas Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc.*,[16] further called into question whether disparate impact claims are cognizable under the ECOA. Given this case precedent, and the controversy and legal uncertainty associated with disparate impact theory, we expect the new leadership of the CFPB to refrain from bringing such actions.

The Cordray-led CFPB's efforts to hold auto lenders accountable for unlawful discrimination practiced by auto dealers quickly became another lightning rod for industry criticism.[17] In 2013, the CFPB issued guidance that sought to restrict the amount of compensation lenders were allowed to pay auto dealers and limit the discretion dealers could exercise in setting loan terms and rates.[18] On December 5, 2017, the Government Accountability Office ("GAO") issued a legal opinion finding that this guidance constituted a "rule" for purposes of the Congressional Review Act.[19] The upshot of the GAO's opinion is that the CFPB had to submit the guidance to Congress for review before it could take effect, and its failure to do so rendered the guidance null and void. We expect the CFPB's new leadership to refrain from embarking upon similar attempts to stretch the agency's jurisdiction beyond what Dodd-Frank expressly provides.

Consumer Research

The consumer research the CFPB relied upon in issuing its July 2017 Arbitration Rule was widely characterized by the financial services industry as both incomplete and patently biased.[20] Although the CFPB's new leadership will undoubtedly continue to conduct research regarding consumers' experiences in using financial products and services, we anticipate seeing a more balanced approach to collecting and analyzing data; albeit, consumer advocacy groups are sure to view such research with skepticism.

Efforts to Advance Markets

On September 14, 2017, the Cordray-led CFPB issued a no-action letter to Upstart Network, Inc., a company that uses alternative data in making credit and pricing decisions. In issuing this letter, which was the first of its kind and drew rare praise from the financial services industry, the CFPB explained that its decision was motivated by a desire "to explore the use of alternative data to help make credit more accessible and affordable for consumers who are credit invisible or lack sufficient credit history."[21] At the same time, however, the CFPB cautioned that it "has quite limited resources to devote to consideration and issuance of [No-Action Letters] at this time."[22] We expect the CFPB's new leadership to find the necessary resources to issue additional no-action letters in 2018.

Conclusion

In her March 2011 testimony to the House Financial Services Committee, then Special Advisor to the Secretary of the Treasury Elizabeth Warren promised that the CFPB would "choose a better way" of seeking to accomplish its goals.[23]

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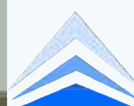

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The path selected by former Director Cordray centered on highly-aggressive enforcement actions and infrequent—albeit drastic—rule-makings. As noted above, this "tough cop" strategy met with fierce industry criticism and spawned multiple legal challenges. The new leadership at the CFPB has an opportunity to chart a very different new course. Without question, the agency's new approach will be friendlier to providers of consumer financial products and services. Consistent with acting Director Mulvaney's verbal assurances, we trust that they will also be focused on achieving the CFPB's statutory responsibilities to both: (i) ensure consumers have timely and understandable information to make responsible decisions about financial transactions; and (ii) protect consumers from unfair, deceptive, and abusive acts or practices, and from discrimination. Regardless of what changes are made, however, we are confident that the CFPB will continue to be staffed appropriately and provided with sufficient financial resources.

Mark T. Dabertin is special counsel in the Financial Services Practice Group of Pepper Hamilton LLP, resident in the Berwyn office. Mr. Dabertin has over 25 years of broad-based experience in financial services law and consumer and regulatory compliance. Mr. Dabertin's career includes extensive experience in consumer lending, safety and soundness, and anti-money laundering. His work in consumer and regulatory compliance at large financial institutions has been marked by innovations that resulted in fundamental structural changes to existing firm-wide compliance activities, including with respect to regulatory change management, risk assessments, and vendor management. Bank examinations that Mr. Dabertin either managed or co-managed while working in consumer and regulatory compliance positions included exams focused on fair lending, data privacy, and add on products.

Richard P. Eckman is a partner in the Wilmington office of Pepper Hamilton LLP. He is a finance and transactional lawyer and from 2003 to 2015 was chairman of the firm's Financial Services Practice Group. Mr. Eckman's transactional practice focuses on representing financial institutions, corporations and other entities in complex financing transactions, including mergers and acquisitions, asset securitizations and other lending and venture transactions. As a result of his background in banking, Mr. Eckman has in-depth experience and knowledge of financial services companies, particularly in the consumer credit and mortgage banking areas. He also represents financial institutions and non-regulated entities, including marketplace lenders in many areas, including consumer finance, small business lending, merchant cash advance and co-branding relationships.

Scott D. Samlin is a partner in the Financial Services Practice Group and leader of the Consumer Financial Services and Bank Regulatory Practice of Pepper Hamilton LLP, resident in New York. Mr. Samlin's practice focuses on representing financial institutions, corporations and other entities in mortgage banking and consumer financial services issues. He regularly counsels clients on compliance with state and federal laws affecting mortgage lending and servicing activities, including the Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA) and Fair Debt Collection Practices Act (FDCPA). Mr. Samlin is experienced in myriad consumer lending, servicing and mortgage compliance challenges.

Richard J. Zack is a partner in the White Collar Litigation and Investigations of Pepper Hamilton LLP, resident in the Philadelphia office. Mr. Zack represents businesses, financial institutions, educational institutions, nonprofits and individuals facing investigation by federal and state law enforcement authorities, and government regulatory agencies. Mr. Zack also represents businesses and individuals who have been victims of crimes. He has extensive experience in representing financial service firms before federal and state prosecutors and regulators and firms facing investigations related to consumer finance and transactions involving foreign entities. He regularly provides advice regarding dealing with money transmission licensure and related issues and government sanctions against foreign countries and compliance with regulations of the Office of Foreign Asset Control, also known as OFAC, and the Financial Crimes Enforcement Network, or FinCEN.

Notes:

1- "The future is like a corridor into which we can see only by the light coming from behind." Edward Weyer, Jr.

2- See, e.g., Prepared remarks of CFPB Director Richard Cordray at University of Michigan Law School. https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-university-of-michigan-law-school/

3- 839 F.3d 1, 2016 U.S. App. LEXIS 18332 (D.C. Cir 2016). This case resulted in a panel decision finding the current structure of the CFPB unconstitutional because it fails to ensure appropriate checks against arbitrary decision-making. This decision was subsequently vacated in an *en banc* decision by the full D.C. Circuit Court of Appeals *(PHH Corp. v. Consumer Fin. Prot. Bureau*, 2017 U.S. App. LEXIS 2733 (D.C. Cir. 2017).

4-https://www.nbcnews.com/video/cfpb-acting-director-mick-mulvaney-clarifies-his-intentions-with-the-agency-1104574019799

5- 12 U.S.C. § 5511(b).

6- 12 U.S.C. § 5586.

7- If enacted, the Financial Choice Act of 2017 (H.R. 115) would have fundamentally changed the structure of the CFPB and reduce its mission by eliminating its rule-making authority and focusing solely on law enforcement.; i.e., the agency would have been renamed the "Consumer Law Enforcement Agency." No similar legislation is anticipated in the foreseeable future.

8- 137 S. Ct. 1718 (2017).
9- *Id*. at 1726. The court took care to note in its decision that the FDCPA does cover first-party collectors whose primary business is debt collection. *Id*. at 1721.
10- It should be noted that CFPB Bulletin 2013-07 (Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debt) continues to apply the prohibitions stated in the FDCPA to first-party collectors.
11- The first such order was issued against Capital One in 2012 and resulted in the issuance of a then unprecedented total liability of $165 million. https://www.consumerfinance.gov/about-us/newsroom/cfpb-capital-one-probe/ That order was quickly followed by a settlement with Discover Card, which resulted in total liability of $214 million. The foregoing later seemed paltry in comparison to the amounts assessed against Bank of America in 2014 ($747 million—$727 million in restitution and $20 million civil penalty) and Citibank in 2015 ($735 million—$700 million in restitution and $30 million civil penalty). https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/; https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/
12-http://files.consumerfinance.gov/f/201504_cfpb_complaint-universal-debt.pdf
13- For example, in *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049, 2017 U.S. App. LEXIS 1028 (9th Cir. 2017), the Ninth Circuit upheld a decision by the from the United States District Court for the Central District of California enforcing a CID issued against various Indian tribal lending entities. Those entities had unsuccessfully argued that the CFPB lacks jurisdiction over them based on sovereign immunity, and filed a petition for certiorari with the U.S. Supreme Court on November 8, 2017, but the petition was denied. By its terms, the Consumer Financial Protection Act, which is part of Dodd-Frank, does give the CFPB express jurisdiction over Indian tribes.
14- *Id.*
15- 444 F.3d 624 (D.C. Cir. 2006).
16- 135 S. Ct. 2507 (2015).
17- Section 1027 of Dodd-Frank granted certain automobile dealers immunity from almost any CFPB action, specifying that "the Bureau may not exercise any rule-making, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles." 12 U.S.C. § 5519. Hence, the CFPB's actions have been characterized by many as an attempt to regulate indirectly an industry over which it does not have jurisdiction.
18-http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf
19- https://www.gao.gov/assets/690/688763.pdf
20- *See, e.g., Banning Arbitration, A Boon For Class Action Lawyers, Not Consumers*, Alfred J. Lechner, Jr., Forbes.com, July 14, 2016 ("The research underpinning anti-arbitration rules crumbles under scrutiny. Critics, such as Professor Jason Scott Johnston of University of Virginia School of Law, have detailed how CFPB manipulated and omitted certain data to reach a desired outcome."). https://www.forbes.com/sites/realspin/2016/07/14/banning-arbitration-a-boon-for-class-action-lawyers-not-consumers/#c5cd23b102f2 The Arbitration Rule was voided by the U.S. Senate in October 2017 under the Congressional Review Act.
21-https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/
22- *Id.*
23-https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-house-financial-services-committee-2/

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Relieving the Pressure of Tight Interest Rate Spreads

As Treasury yields pinch profits, banks are looking to tools like letters of credit to enhance business

by
John Foff
FHLBank Pittsburgh

As 2017 came to a close, rising short-term rates and stagnant long-term rates combined to make the Treasury yield curve flatter – more so than it has been in the past decade. With expectations of further federal funds rate increases in 2018, this flattening trend is likely to continue. Banks whose deposits are tied to short-term rates and whose lending terms are typically in the mid- to long-term part of the interest rate curve are feeling the effects of this the most. Narrow interest rate spreads continue to detract from the amount of profit potential that a steeper curve might offer. As the increase in short-term rates continues, banks are feeling pressure to raise their deposit rates as competition heats up for core deposits. Higher deposit rates will further narrow the gap between what banks pay for liquidity and what they earn on loans and investments. As net interest margins come under pressure, what can banks do to increase profitability?

Turning Letters of Credit into Profit

In this type of rate environment, banks need to lean on other tools in their asset-liability management toolbox to help generate business and increase profitability. One instrument that can help with this is a letter of credit, which supports a bank's obligations and guarantees payment in certain transactions. When a bank uses a letter of credit for a particular business arrangement, it enters into a reimbursement agreement with the

financial institution, such as FHLBank Pittsburgh, that issues the letter of credit. The letter of credit is issued in favor of a third party, the beneficiary, with whom the bank has a relationship. Should the bank ever be in a position that it cannot fulfill its financial commitment to the beneficiary, the institution that issued the letter of credit would then pay the amount due to the beneficiary upon the beneficiary's demand.

Additional assurance for financial transactions is always a benefit, but letters of credit can provide other business advantages, such as helping banks win deals and improve liquidity.

A standby letter of credit can be an important asset-liability management tool for banks. FHLBank offers standby letters of credit to its members, who can use the letters of credit in place of high-quality securities to secure funds from entities that meet the Federal Deposit Insurance Corporation (FDIC) definition of a "public unit." This means that if a local municipality, school district or other public entity deposits funds at a bank, the bank can use the standby letter of credit instead of securities as collateral for account balances exceeding FDIC insurance levels. This frees up the bank's securities to be reinvested in other, higher-yielding opportunities that will generate additional income. Since fees for a letter of credit are often lower than the cost of acquiring liquidity through other means, it is an economical way for banks to optimize their current asset allocation.

(continued on p. 18)

"We have successfully used FHLBank Pittsburgh's letters of credit to support our clients' needs throughout our community footprint. They give us another tool to provide the credit support required by developers, builders and municipalities. Letters of credit are a convenient and effective option for our organization's business model, today and into the future."

– An FHLBank member

Example of How a Letter of Credit (LC) May Improve Income

BEFORE LC	Collateralize public unit deposits with a $1 million, 5-year Treasury Note yielding 1.46% **Annual Income: $1 million x 1.46% = $14,600**
AFTER LC	Collateralize public unit deposits with a $1 million LC at 0.12% and use the unencumbered securities for other purposes, such as originating $1 million in mortgage loans at 4.00% **Annual Income: $1 million x (4.00% - 0.12%) = $38,800** **Use an FHLBank Pittsburgh LC and your stock dividends reduce the "all-in" cost, further increasing income:** Purchase 0.75% ($7,500) in activity stock and receive a potential 5% annualized dividend* **Annual Income: $38,800 + ($7,500 x 5%) = $39,175**

DISCLAIMER: The potential dividend impact discussed above and shown in the fee section is for illustrative purposes only. FHLBank Pittsburgh makes no commitment regarding payment of any dividends or the level of dividends. Dividend impact is the letter of credit rate indication less the product of the current member activity stock purchase percentage and the previous quarter activity stock dividend percentage. The valuation is illustrative only; actual valuation will vary depending on the letter of credit rate (which varies depending on a number of factors), member loan stock purchase and dividend percentages in effect on any given day at a specified time.

**Based on 3Q 2017 actual dividend*

Letters of Credit

(continued from p. 17)

A confirming standby letter of credit can help banks by using the credit strength of the issuer to increase the creditworthiness of a particular transaction. This can help a bank secure lending deals that it might not otherwise have the credit to support, such as a large loan to a local property developer who needs guaranteed financing through project completion. The credit enhancement that a confirming letter of credit provides can be a competitive advantage when seeking new business, helping banks win new business relationships and ultimately earn additional income from that business.

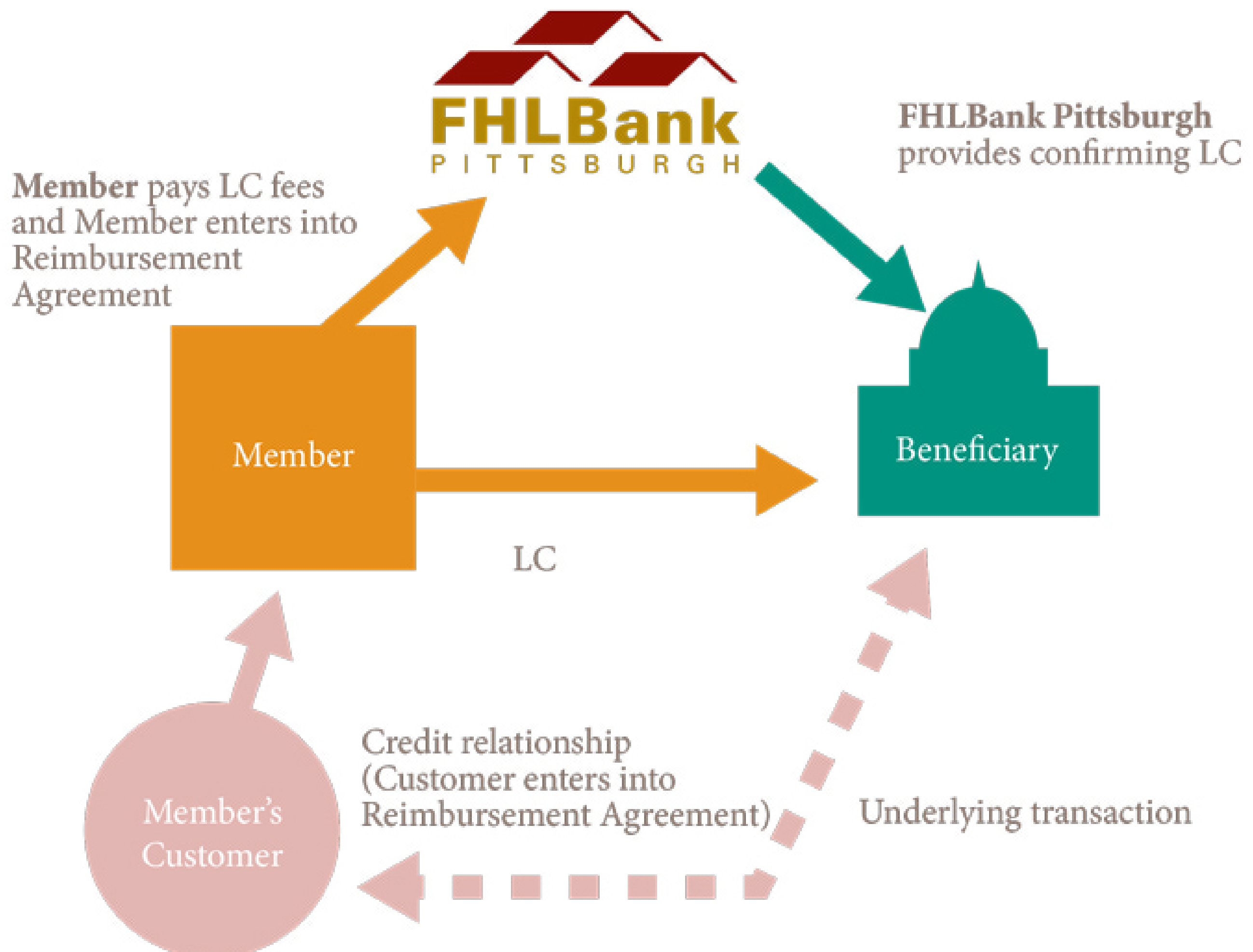
Why Your Letter of Credit Provider Matters

A letter of credit is only as good as the issuer making the financial guarantee. Banks should look for a reputable institution that is reliable and meets their business needs. Beneficiaries usually require that a letter of credit issuer have strong financial ratings. FHLBank Pittsburgh's letters of credit are a smart option for several reasons.

First, FHLBanks are uniquely positioned to offer both types of standby letters of credit to their member institutions. The FHLBanks' letters of credit are accepted in 48 states, including Delaware, to collateralize public unit deposits.

FHLBank Pittsburgh is also a financially strong and reliable institution and has been serving banks in Delaware for more than 85 years. With credit ratings of AAA by Moody's and AA+ by Standard & Poor's, FHLBank Pittsburgh's letters of credit bring a level of credit enhancement that few other providers can match.

Finally, FHLBank members can maximize the value of their cooperative membership in conjunction with their letters of credit. Members can use assets that are already pledged to FHLBank – including real estate loans that are less liquid than most securities – to collateralize letters of credit. As part of the FHLBank cooperative, members also have the advantage of offsetting letter of credit costs with dividends, effectively reducing the "all-in" cost.



How to Get Started

Letters of credit are a good way to increase business and generate additional income. FHLBank members can contact me at 215-962-2130 to learn more. Not yet an FHLBank member? Give me a call to learn more about this and other benefits of membership. I look forward to talking with you further about how letters of credit can support your business.

John Foff is a Relationship Manager for FHLBank Pittsburgh responsible for covering more than 70 member financial institutions in Delaware and Pennsylvania.

Recognized by Delaware Law

Section 6.3.2 of The State of Delaware Cash Management Policy Board's Statement of Objectives and Guidelines for the Investment of State of Delaware Funds specifies that state funds can be invested in the following types of securities:

"Any obligation of, or obligation that is insured as to principal and interest by, the U.S. or any agency or corporation thereof (excluding bills, bonds and notes issued by the U.S. Treasury), and any obligation and security of U.S.-sponsored enterprises, including, the Export-Import Bank of the United States, Farmers Home Administration, Federal Farm Credit Banks, Federal Home Loan Banks, Federal Home Loan Mortgage Corporation, Federal Land Banks, and the Government National Mortgage Association."

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The Unsung Heroes of the Personal Trust World

by
Theresa L. Hughes
Executive Vice President of Personal Trust Services
Santora CPA Group

Administrative Trustees in Delaware

Occasionally the news media will feature a feel-good story about someone who performs a small act of heroism or kindness…an everyday hero. Examples include a person who anonymously pays off a department store layaway purchase during the holidays or who pays for someone's groceries when they realize the person in front of them doesn't have enough money. In the personal trust business, there is an everyday hero - the Trust Administrator. The Trust Administrator is often maligned for being "just an Administrative Trustee." However, the service they provide often goes above and beyond their job duties. Trust Administrators often serve as quasi-family counsellors, psychologists, surrogate parents, and disciplinarians, all while maintaining professional relationships with their clients.

What is an Administrative Trustee? In Delaware, as in several other states, the traditional duties of a trustee can be "trifurcated." In other words, the duty of managing investments, discretionary distributions, and trust administration can be separated and managed by different fiduciaries. A Delaware Directed Trust can have an Investment Direction Advisor, a directed Discretionary Distribution Advisor, and a Trust Administrator, as allowed. Each state, for example, South Dakota, Alaska, and Nevada, have statutes governing the ability to direct such functions, but Delaware's statutes are by far the best and have been validated by case law.

People often believe that when the fiduciary duties of managing the investments and discretionary distributions are directed by parties that are not the trustee, there is nothing left for the Administrative Trustee. Fortunately, most trust documents clearly define the duties of the Administrative Trustee, and the actual activities of the Administrative Trustee often go far beyond the defined duties.

Planning with Delaware Trusts

Why do estate planners throughout the U.S. choose to use states such as Delaware when assisting clients with challenging planning needs? It might seem like an obvious question, but more and more planners are looking to place trusts in states with similar statutes as Delaware for asset protection, long-term generational planning, state and local tax planning, the modification of existing trusts domiciled in other states through the "decanting" process, and/or the ability to keep a trust "quiet," among other reasons. The latter is a particularly popular feature of Delaware trusts, allowing the provisions and even the existence of a trust to be kept confidential from certain beneficiaries, such as minors, for a prescribed period of time.

The Delaware Asset Protection Trust (DAPT) is used for clients who wish to transfer assets to protect business interests or personal assets. Clients who are engaged in careers such as medicine, law, or construction, or who have substantial assets that may be at risk if they should be sued, are candidates for asset protection planning. A DAPT does not stand alone, however. The plan can include provisions that keep the assets in trust for the long term and provide for the care of beneficiaries long after the grantor has passed.

Delaware legal and planning practitioners, and those of us in the personal trust space, believe Delaware continues to offer the best of all domestic locations for situs. This is due to the expertise of the Delaware Court of Chancery and its ability to schedule, hear, and adjudicate a trust matter quickly providing an efficient way for matters to be heard and resolved. States other than Delaware typically utilize court systems that do not provide a specific court for trust matters. While some other states can offer the same benefits discussed above if there is an issue with a trust, the court systems in those states will likely take more time and effort, which results in greater costs to resolve conflicts with the trust.

Transition from the Plan to Administration

As part of the planning process, the estate planning attorney will discuss the selection of a qualified Delaware trustee with the client. The choices are many, and the client may have a qualified Delaware trustee in mind based on a current or previous relationship. If the client does not have a previous relationship with a Delaware trustee who will provide administration of the trust in Delaware, the attorney may suggest options to the client. Options for an Administrative Trustee can be banks, trust companies, or individuals providing Administrative Trustee services located and performed in Delaware. After the client has chosen and met their preferred trustee, the Administrative Trustee begins the trust opening process.

Opening a New Trust – The Process

Perhaps the most important part of the new relationship between the Administrative Trustee and the client is the very beginning. Setting up and opening the new trust account is an exacting and time-consuming process. Proper opening procedures are key to setting the tone for a lasting client relationship, as well as complying with federal and state laws and internal policies. Processes and procedures in account openings are also essential to ensure the trustee is in compliance with internal and external auditors and regulators.

The Administrative Trustee is introduced to the client by the internal or external referral source. It is important for the client to know who will be managing the administration of their trust as early in the relationship as possible to ensure that the client is comfortable sharing personal information with their trustee. The introduction and initial conversation can also serve to detect any incompatibility between the Trust Administrator and the client and provide an opportunity to make a change in administrator, if necessary.

As the parties are getting comfortable with each other, the opening process is started. One of the first steps to accepting a trust is a review of the trust document and assets that will be put into the trust. The trust document review is intended to ensure the trustee can faithfully administer the trust as it is written. Prior to the trust being fully executed, the trustee must be comfortable with the many provisions of the trust. The trustee will also review the intended funding to ensure the assets are acceptable to them. After the trustee communicates that the trust document and the assets are acceptable, they will request information regarding the grantor, beneficiaries, and advisors. Financial institutions are required to perform Know-Your-Customer (KYC) background checks on every person in the relationship. Examples of KYC investigations include obtaining government-issued photo identification and verification of Social Security numbers with a Form W-9, or W-8BEN in the case of a foreign citizen. Many trustees use a subscription background check service to verify identity and ensure potential clients are not on watch lists, do not have a criminal background, or participate in public behavior that might create reputational risk for the trustee.

The new trust is then approved either through a committee or a group of managers who review the information for completeness, as well as assess the trust for risk and any other required factors. After the trust is approved, administration commences.

Administrative Trustee Duties

A well-drafted trust instrument will clearly define the duties of an Administrative Trustee. While it may seem the job of the Administrative Trustee is simple, the detail in execution can be complex and will require expertise, organization, and attention to detail.

Typical Administrative Trustee duties are enumerated below along with some detail as to the proper execution of the duty. This is not meant to be a complete study of how all Trust Administrators manage trust accounts, but to give an example of what is involved in the regular administration of trusts:

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(continued from p. 21)

1. Maintain an account to receive trust income, accept contributions, pay expenses and distributions from the trust, allocate activity to income or principal as the trust specifies, or at the trustee's discretion.
   - Depending on the trustee, the trust account may be established on a trust accounting system where the trustee accounts for and maintains custody of the assets. The trustee may not retain custody of the assets. In this case, accounts can be opened at a bank or brokerage firm by completing forms and submitting them to the chosen custodian.
   - The trustee ensures the account is funded with sufficient cash to be used to pay expenses of the trust. Expenses include trustee fees, legal costs, or expenses of the property held in the trust. Distributions to beneficiaries are also paid from the cash portion of the trust.
   - If sufficient income from trust assets is not generated to maintain appropriate funding for expenses, funds must be raised by the trustee.
   - Direction from the Investment Direction Advisor must be obtained prior to liquidating assets to maintain an appropriate cash balance.

2. Receive direction from the Discretionary Distribution Advisor and document discretionary distribution decisions.
   - The Administrative Trustee must maintain the records of all distributions under the duty to maintain records outlined below.

3. Maintain trust records, such as statements, tax returns, accountings, and documentation resulting from trust activity, and respond to inquiries from notice recipients, advisors, and unrelated third parties.
   - Trust assets can be maintained directly with the trustee, such as in the case of a marketable investment portfolio, or held in many different forms, such as LLCs, brokerage accounts, life insurance policies, and any variety of assets that a trust might hold. It has become common for trusts to hold intangible or hard-to-value assets, such as business interests. Every asset must be accounted for and the information maintained by the Administrative Trustee.
   - Hard-to-value assets, such as LLCs, must be valued periodically, and it is the Administrative Trustee's responsibility to ensure that such valuation is completed.
   - Current and future beneficiaries, as well as a Designated Representative in the case of a silent trust, require at least an annual accounting of investments and activity. All advisors such as Investment Direction Advisors, Discretionary Distribution Advisors, and Trust Protectors should also receive accountings on a regular basis.
   - All documentation regarding any trust activity must be maintained by the Administrative Trustee.

4. Prepare or ensure the preparation and filing of trust tax returns.
   - The Administrative Trustee often arranges for the preparation of trust taxes through a service they may provide. However, the trustee may allow the client to use their own tax preparer.
   - The Administrative Trustee is responsible for signing the trust tax return. Prior to signing the return, the Administrative Trustee must be certain the return is correct and must file the return on time. If the return cannot be filed by the tax deadline, the Administrative Trustee must ensure an extension is filed and estimated tax payments are made prior to the filing deadline.
   - If the trust tax return is put on extension, the Administrative Trustee is responsible for the return being filed prior to the extension deadline.
   - The trustee may also be required to provide distribution information for the beneficiaries' personal tax returns in the form of a tax letter.

5. To retain accountants, attorneys, agents, and other advisors in connection with the performance of the trustee's administrative duties.
   - The Administrative Trustee must select the appropriate professional advisors as required to properly administer the trust.

6. To maintain an audit trail of discretionary distributions showing the rationale for each decision, whether the Discretionary Distribution Advisor gives direction to the Administrative Trustee or the Administrative Trustee is the discretionary decision maker.

Other important duties that may not be outlined within the trust document include:

1. Provide professional implementation of the trust portion of a client's estate plan.

2. Provide an independent decision maker as required by the trust.

3. Provide access to highly favorable state laws, such as Delaware, Nevada, South Dakota, and Alaska, by being present in those domiciles.

4. Provide independent and unbiased administration of the trust. The trustee cannot be influenced by personal relationships with a beneficiary or class of beneficiaries, as the trustee's duty is to the trust, not to any particular beneficiary or beneficiaries.

Perhaps the most important function of the Administrative Trustee is being a part of the client relationship team. At larger trust service providers, there may be a team of professionals that work together to provide administration, investments, and planning services to the trust client. Independent trust service providers may only provide administration services. In order to fully service the client, the independent trust service provider will work with the Investment Direction Advisor, the financial advisor who directly manages the investments, and the client's accountants and attorneys. This team approach ensures that the client's needs are being served. The coordination of the client's professional advisors pertaining to the trust often lies with the Administrative Trustee.

The Trust Administrator builds collaborative relationships with all parties. The responsibility of maintaining records means that the administrator must be aware of all of the trust's business. Communication with all parties must be maintained on a regular basis. The most rewarding aspect of the administrator's job is building lasting relationships with clients and service partners. A Trust Administrator is often the first call a client will make when they assistance or have questions about their trust. Since trusts are a private and personal matter, clients often use their Trust Administrator as a resource to work through difficult family issues on which they may need financial assistance. The Trust Administrator maintains strict confidentiality while providing an unbiased sounding board for the client. If a discretionary distribution is needed (where the discretionary power resides with the trustee), the Trust Administrator will provide the necessary expertise to assist the client in meeting their goals while adhering to the terms of the trust. There are times when the trustee is not able to grant a request. This can cause conflict; however, most Trust Administrators work with the client to assist them in resolving issues that brought them to the trust for assistance even if the resolution does not involve a distribution from the trust.

It takes a special skillset and personality to be a Trust Administrator. Attention to detail, professionalism, relationship management, empathy, organization, and a high standard of client service are just a few of the qualities that go into being a great Trust Administrator. Estate planning attorneys and clients are fortunate to have an excellent group of professional Trust Administrators in Delaware from which to choose.

The content of this article is intended only as an example of the duties of an Administrative Trustee.

Theresa L. Hughes is the Executive Vice President of Personal Trust Services at Santora CPA Group, where she manages the personal trust offering of the firm and accepts appointments as independent individual Delaware trustees. Theresa has over 30 years of experience in all aspects of personal trust administration, operations, and trust accounting systems, as well as managing teams of Trust Administrators for over 17 years. She is a member of the Estate Planning Council of Delaware and volunteers extensively in the Delaware community. She received a Bachelor of Science degree in Banking and Finance, as well as an MBA from Wilmington University. Theresa can be reached at 302-224-5168 or by email at thughes@santoracpagroup.com.

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Compliance Focus

Uncertainty in Marijuana Banking

by
Leah Robinson
Consultant
Center of Regulatory Intelligence
CAPCO

"As 2018 unfolds, we are sure to see the effects of various states' attempts to support the marijuana industry as source of tax revenue including efforts to provide alternative banking systems for MRBs."

On January 1, 2018, recreational marijuana became legal in in the states of Alaska, California, Colorado, the District of Columbia, Maine, Nevada, Oregon and Washington. It will become legal in Massachusetts in July. However, under federal law, marijuana remains illegal, and to make matters more complicated, on January 4, 2018, Attorney General Jeff Sessions rescinded the Obama-era Cole Memo, a document on which many in the industry relied for guidance when dealing with marijuana-related businesses (MRBs).

As background, in February 2017, President Trump issued Presidential Executive Order on a Task Force on Crime Reduction and Public Safety. Attorney General Sessions assembled the Task Force, comprised of a group of prosecutors and federal law enforcement officials. The Associated Press reported that after researching the issue, the Task Force concluded that the subject of legalization of marijuana use requires more study and that Obama-era rules keeping the federal government out of state marijuana laws should continue.

Sessions did not release the Task Force's results, but he did send letters to the governors of states that have legalized marijuana. Some governors responded immediately; Washington Governor Jay Inslee and Attorney General Bob Ferguson wrote a letter defending their state's laws and challenging Sessions' claims on the dangers of marijuana, stating that such arguments were "outdated, incorrect, or based on incomplete information." Alaska Governor Bill Walker and Attorney General Jahna Lindemuth defended the will of Alaska voters in a letter sent back to Sessions.

Sessions' continued promise to crack down on the marijuana industry and utilize federal power to seize assets has made it nearly impossible for MRBs to access banking services. As an attempted solution to this, some municipalities have proposed localized, municipally run financial services institutions to serve their MRBs. For example, California Treasurer John Chiang wants the state to consider creating a government-owned bank that could serve MRBs, and Los Angeles has proposed a city-sponsored public bank to serve MRBs that will not be insured by FDIC. In Colorado, a prospective, state-wide credit union sought licensure in 2017 to support local MRBs, but ran into a roadblock from the Federal Reserve, which denied its application for a mater account. Other states have explored creative solutions. In 2016, Washington state got almost all legal marijuana businesses to open bank accounts and pay their taxes with checks or electronic transfers. Hawaii announced a "cashless" system for buying medical marijuana, reliant on online payment technology. However, with the DOJ's recent Cole Memo rescission, there's a lot of uncertainty related to marijuana businesses in the U.S., and what will happen over the coming months and years is anyone's guess. Clearly, certain states have made significant investments in this area, but they will now have to anticipate the DOJ's targeting of illegal marijuana activities in accordance with pre-existing principles of prosecutorial discretion.

As 2018 unfolds, we are sure to see the effects of various states' attempts to support the marijuana industry as source of tax revenue including efforts to provide alternative banking systems for MRBs. However, if the DOJ does start prosecuting state-regulated marijuana businesses, the issue will likely play out through the judicial system. Given the conflict between federal and state law, it's not hard to envision a case making its way to United States Supreme Court.

Some Tips for Working with MRBs

• Be sure to research and comply with available guidance. Review the DOJ's rescinded Cole Memo and FinCEN guidance, specifically the suggestions for MRB CDD. Ensure you can support your decision to work with MRBs by providing supporting documentation for the decision overall and for each MRB.

• Treat all MRBs as "high-risk." File all required documentation, including SARs and CTRs for any cash transactions over $10,000 and FinCEN form 8300, as appropriate. Be mindful of the three different types of marijuana-related SARs, including Marijuana Limited SARs, Marijuana Priority SARs, and Marijuana Termination SARs.

• Prepare to invest in advanced AML software; extra security at branches; and new staff trained to run background checks on potential MRB clients and conduct ongoing monitoring, including finance reviews and in-person site inspections.

• Be prepared to provide documentation for how your institution defines and classifies "MRBs." Have a written plan in place that addresses if and how you treat MRBs differently depending on their level of involvement with the drug itself and how you ensure sufficient CDD and monitoring at each level.

For Your Benefit

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

"Employers that provide paid family and medical leave may qualify for a temporary tax credit."

Tax Cuts and Jobs Act of 2018 and the January 2018 CSR Impact on Employee Benefits and ACA Taxes

While everyone is rightfully talking about the new tax bill and the CSR there are a few key items that impact your employee benefits programs. Here are few highlights:

Tax Bill

- **Employers can no longer take a tax deduction for qualified transportation fringe benefits.** Beginning in 2018, the Act *eliminates the employer deduction* for expenses associated with a qualified transportation fringe benefit program as well as the deduction for any expenses incurred in connection with providing transportation to an employee in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the employee's safety.

- **Qualified moving expense reimbursements cannot be excluded from employees' gross income.** Before 2018, employers could pay or reimburse an employee's eligible moving expenses related to starting employment at a new principal place of work on a tax-free basis. The Act **suspends this income exclusion** and the employee's deduction for qualified moving expense reimbursements from 2018 through 2025 tax years. However, it still applies in the case of a member of the U.S. armed forces on active duty who moves pursuant to a military order or change of station.

- **Employers that provide paid family and medical leave may qualify for a temporary tax credit.** The Act creates a new temporary tax credit for employers that provide paid family and medical leave to their employees. The tax credit, which applies to wages paid in 2018 and 2019, is equal to a percentage of wages paid to employees who are on family and medical leave. To qualify for the tax credit, an employer must have a written policy in place that provides at least two weeks of paid family and medical leave for full-time employees (proportionally adjusted for part-time employees) and a rate of payment that is at least 50 percent of an employee's normal pay rate.

CSR

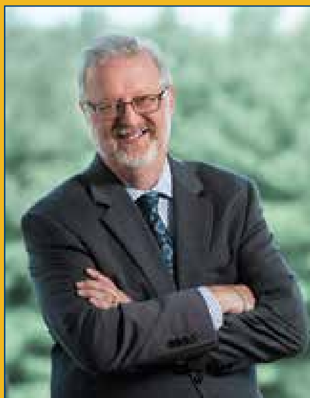
- **The Cadillac tax was delayed for an additional two years, until 2022.** The ACA imposes a 40 percent excise tax on high-cost group health coverage, also known as the "Cadillac tax." Although originally intended to take effect in 2013, the Cadillac tax was immediately delayed until 2018 following the ACA's enactment. A budget bill enacted for 2016 further delayed implementation until 2020. The continuing resolution delays implementation of the Cadillac tax for an additional two years, until 2022.

- **An additional one-year moratorium on the health insurance providers fee applies for 2019** although the fee continues to apply for 2018. The ACA imposed an annual, nondeductible fee on the health insurance sector, allocated across the industry according to market share. The continuing resolution extended this moratorium for an additional two years, through the 2019 calendar year.

- **Moratorium on the Medical Devices Tax.** The ACA also imposes a 2.3 percent excise tax on the sales price of certain medical devices. The continuing resolution extends a previous moratorium for an additional two years, through the 2019 calendar year.

Please consult your tax advisor or your employee benefits advisor for more details as more changes may be coming along with further rulings on these provisions.

Accounting for Success



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

"An immediate negative impact will be felt by terminating trusts with an excess expense deduction."

Tax Cuts and Jobs Act Impact on Estate and Trust Planning

First things first. The official title of the legislation is "An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018." However, I couldn't come up with a good acronym for it, so let's just go with "TCJA."

With regard to the estate tax, TCJA follows the Senate's version of the bill. For decedents dying after 2017 and before 2026, the Act doubles the base exemption for estates and lifetime gifts from $5 million to $10 million, with inflation calculated after 2011 bringing the 2018 exemption to about $11,180,000 (as of the date of this writing), which is actually less than double the current $5.6 million figure due to a change in the cost of living calculation. TCJA is silent as to the generation skipping transfer (GST) tax exemption amount, but it is assumed to increase to the same level as well since it is based on the basic exclusion rules. The Act retains the basis step-up provisions for inherited assets.

Unlike the House Ways and Means Committee version which would have repealed the estate tax altogether after 2023 and lowered the maximum rate to 35%, the final Act does not repeal the estate tax, and after 2025, without further legislation, would revert to the pre-TCJA $5 million basic exemption amount. Furthermore, the Act retains the 40% maximum tax rate (House version would have reduced the rate to 35%). Thus, the temporary nature of the exemption increase raises several questions, including (1) would there be a clawback if the exemption sunsets and (2) what is the risk of reducing life insurance used to pay estate taxes if there is the possibility of the exemption being reduced in a few years?

An immediate negative impact will be felt by terminating trusts with an excess expense deduction. This deduction generally flows through to the beneficiaries and is deductible as an itemized deduction subject to the 2% of AGI floor. Since the Act specifically suspends itemized deductions subject to the 2% floor for individuals, the deduction for excess expenses is presumably lost. Careful planning will need to be done during the years leading up to the termination of the trust or estate.

Further complicating planning is the fact that the Act was silent on whether some issues which impact individuals would also apply to estates and trusts. Further IRS clarification or technical corrections legislation may be appropriate to address the following:

- Is it assumed that the state and local income and real estate tax deduction limitation is applicable to estates and trusts and if so, how would it be allocated?
- Is it assumed that the Section 691(c), deductions with respect to a decedent, is still deductible?
- Will trusts continue to be able to deduct tax return preparation fees and attorney fees?
- Is the new Section 199A flow-through business deduction available to electing small business trusts?
- Are estates and trusts still entitled to an exemption ($600, $300 or $100) while personal exemptions are no longer allowed?

Stay tuned.

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March 7th - 9th - DBA 2018 Washington Visit - This highly acclaimed event for top bank executives features meetings with key regulators, industry representatives at the American Bankers Association, and Delaware's entire Congressional delegation. This year participants will be staying at the Willard InterContinental Hotel. Sponsorships are available.

March 13th - DBA Strengthening Communites Meeting - WSFS Bank, Wilmington. 9:00 a.m. networking; 9:30 to 11:00 a.m. CRA professionals join us for a wide-ranging discussion of topics. Speakers will include Andy Frishkoff, Executive Director of LISC (Local Initiatives Support Corporation) Philadelphia, and Jane Vincent, LISC Consultant.

March 28th - April 18th - 2018 Foundations of Delaware Trusts - 9:00 a.m - 11:00 a.m. - Back on consecutives Wednesdays, four sessions featuring elements of trust management and administration. Visit www.debankers.com for course details and enrollment information.

April 19th - DBA Women Connect - 8:00 a.m. - Noon. White Clay Creek County Club at Delaware Park. Join us for a morning of networking, panel discussions, inspirational speakers, and connecting! Sponsorships available. Visit www.debankers for full agenda and information.

April 23rd - 27th - 2018 Teach Children to Save Day - Don't miss the 20th annual edition of Delaware's Teach Children to Save Day! Teaching is fun and easy. A full teaching kit and on-line video instruction is provided. Banker volunteer sign up begins February 26th!

May 17th - 123rd Annual DBA Meeting and Dinner - Join the DBA at the historic Hotel du Pont with dinner in the Gold Ballroom. Keynote speaker will be Lt. Col. Robert J. Darling USMC (Ret.), author of *24 Hours Inside the President's Bunker on September 11th*. As a public speaker on crisis leadership and decision making, Bob has addressed numerous academic, government, and military organizations to include Harvard University's John F. Kennedy School of Government and as a guest lecturer on the subject of Crisis Leadership and Counterterrorism at the FBI National Academy in Quantico, Virginia.

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*

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Lending Law Update

by
Brent C. Shaffer, Esq.
Young Conaway Stargatt & Taylor, LLP

"This column highlights a few new endorsements that banks should consider, when appropriate, for commercial loans."

New Delaware Loan Title Insurance Endorsements Available

Banks making mortgage loans typically require certain endorsements to enhance the coverage of the title insurance policy that insures the lien of the mortgage. In Delaware, title insurance is tightly regulated and the Delaware Title Insurance Rating Bureau (DTIRB) dictates the exact language of title insurance endorsements that can be issued. On September 1, 2017 DTIRB made 19 new endorsements available. This column highlights a few that banks should consider, when appropriate, for commercial loans.

The new DTIRB-66 "Anti-Taint" endorsement is perhaps the most useful of the new offerings. If the mortgage secures both a term loan and revolving credit loan, this insures the advances and re-advances under the revolving loan will not affect the priority of the mortgage.

Nationwide lenders are already requiring issuance of the DTIRB-70 "Contiguity-Single Parcel" endorsement. The other contiguity endorsement that has been available for many years insures there are no gaps between multiple parcels encumbered by the mortgage; this new endorsement insures that there are no gaps between the mortgaged parcel and adjacent properties surrounding it.

It remains to be seen how often the DTIRB-67 "Assignment of Rents or Leases" endorsement will be used. This insures against loss or damage due to defects in the execution of an assignment of rents document, and against loss due to another recorded assignment of rents that is not listed as an exception in the title policy. The utility of the endorsement is limited, as it only insures against those specific problems; it does not generally insure the enforceability or priority of the assignment of rents.

Another new endorsement is the DTIRB-69 "Commercial Lender Group" endorsement. If a loan is made by a group of lending institutions, this endorsement provides coverage against invalidity, unenforceability or lack of priority of the mortgage lien caused by transfers of portions of the indebtedness by the loan participants.

Some large commercial projects are financed by multiple lenders with separate mortgages. The lenders may agree, in an intercreditor agreement, to equal priority of their mortgages, regardless of the recording order. The DTIRB-77 "Pari Passu Mortgage" endorsement insures against the invalidity or unenforceability of the lien of the mortgage resulting from the agreement between the lenders to have equal priority; and insures the lien priority of the insured mortgage is equal to the other mortgage.

There is a new utility access endorsement (DTIRB-83) insuring against loss of the right to access certain specified utilities (such as water or sewer) because of gaps between the mortgaged property and the utility easement areas or a termination by the grantor of the easement.

The most curious of the new endorsements is the DTIRB-78 "Policy Authentication" endorsement, which confirms that the insurance company will not deny coverage solely on the basis that the policy or any endorsement was issued electronically --or even if it lacks signatures. Many will prefer to require signatures rather than pay $100 for this endorsement.

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