Delaware Banker

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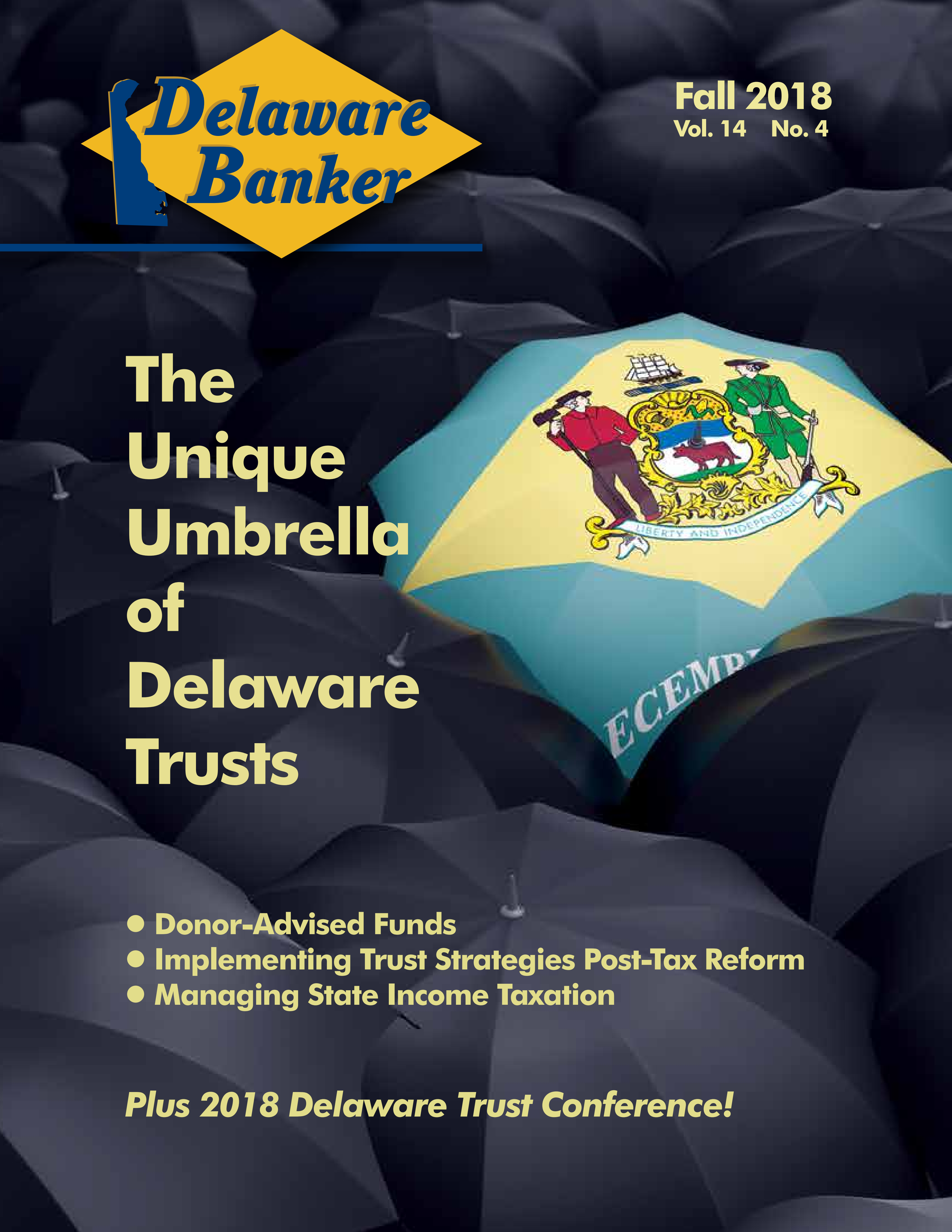

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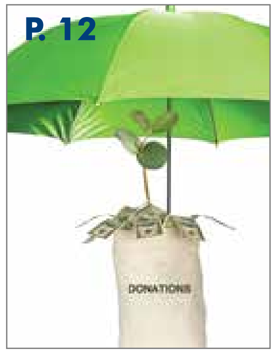

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SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the 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

"This edition of the conference saw a record number of attendees at the Chase Center on the Riverfront. "

Thirteen is supposed to be an unlucky number. The word "triskaidekaphobia" was even coined to describe the fear of the number. Ironically, Stephen King, the master of horror literature, has the phobia. There are many buildings that avoid the thirteenth floor, that is of course if they have more than twelve floors to start with. I mention this to point out that while the planning committee was organizing the 2018 Delaware Trust Conference, we totally ignored that this was the 13th edition of the annual event, in fact, we didn't even think of it. We took it a step further when we unconsciously adopted a Halloween theme to the event: The Tricks and Treats of Delaware Trusts. I'm happy to report that triskaidekaphobia notwithstanding the number thirteen was indeed very lucky for the event and the association.

This edition of the conference saw a record number of attendees at the Chase Center on the Riverfront. We also had the support of a record number of sponsors and exhibitors (listed on page 25).

The Tricks and Treats of Delaware Trusts featured a lively and varied array of topics from how to best take advantage of the recent changes in the tax code, to the best strategies for guiding international clients to benefits of Delaware trusts.

Each year we try to keep the Delaware Trust Conference fresh and engaging for participants. We do this by finding a lively theme; surveying previous attendees for suggestions; doing extensive polling on what topics and speakers the audience finds interesting; and, an awful lot of discussion and planning. It seems like a winning formula for success.

One of the major components of the conference each year is the much-needed two ethics credits. Years ago we would pack those into one two-hour session at the end of the conference. Unfortunately, by the end of a two-day conference, a two-hour ethics session would often find participants straggling from the session in a weary stupor. Since then we've not only split the ethics component into two sessions, but we've worked to make them entertaining. Kudos to Judge Tom Forrest, the plaintiffs, defendants, and their counsels, for ending this year's conference with a lively mock trial, that was engaging and, dare I say it, even made ethics "fun."

I want to personally thank our chair, Thomas Forrest, President and CEO, U.S. Trust Company of Delaware; and co-chair Mark Oller, President, Family Wealth Delaware, Wilmington Trust Company. Tom and Mark did an outstanding job managing the complicated process of setting an agenda and rounding up speakers from around the world. Thanks too to all of the members of our planning committee. You will see their names listed on page 26.

Work on the Delaware Trust Conference has become almost a twelve-month undertaking. The first planning meeting met in January, and the work didn't stop until the final session met on October 24th! Each year we get feedback that the conference keeps getting better and better. That's in no small thanks to our fantastic planners. I'd also like to thank our liaisons. These are the people charged with contacting the panelists, supervising schedules, holding meetings, gathering materials, coordinating presentations, and generally herding the cats. Great job, one and all! And here's to making the 14th Annual Delaware Trust Conference even better!

Cindy

President's Report

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

"For more than 30 years, David Bakerian dedicated his career to leading and growing the banking industry in Delaware."

"As long as we can love each other, and remember the feeling of love we had, we can die without ever really going away. All the love you created is still there. All the memories are still there. You live on—in the hearts of everyone you have touched and nurtured while you were here… Death ends life, not a relationship."

– Mitch Albom, *Tuesdays with Morrie*

For more than 30 years, David Bakerian dedicated his career to leading and growing the banking industry in Delaware. He will be missed and remembered by each of us, not just for the impact he made on our industry, but for his incredible sense of humor, his big heart, and his warm friendship.

David was a devoted husband, father, and grandfather who loved to garden, travel and cook for his family and friends. We give thanks for his loving wife of seven years, Pamela J. Bakerian; his children Catherine Kempista (Jeff), Nicholas (fiancée Kelly Hofmann), and Alexandra (fiancé Daniel Zwiren); and his three grandchildren Adam, Madeline, and Jack Kempista.

As President and CEO of the Delaware Bankers Association, David worked to ensure a significant part of the American banking industry maintained its home in the First State and continued to thrive as one of Delaware's largest employers. David worked with three Governors and testified before and advised 11 separate Delaware General Assemblies.

But above all else, David was an educator. David started his career as faculty in the State University System of New York and then served as the Assistant Academic Dean and Director of Continuing Education at Wesley College. In 1985, David was named Executive Director of the Delaware Chapter of the American Institute of Banking, which later became the DBA Delaware Financial Education Alliance.

Under David's leadership, in spring 2001, the University of Delaware Center for Economic Education & Entrepreneurship (UD CEEE), the Federal Reserve Bank of Philadelphia, the Delaware Bankers Association, and the Consumer Credit Counseling Service of Maryland and Delaware formed a partnership to provide curriculum resources and teacher training to Delaware high school teachers interested in teaching a semester-long personal finance course. The course was designed by selecting from the best instructional materials available for teaching personal finance using basic economic concepts. In the 2001-2002 school year, the first Keys to Financial Success course was offered as a pilot at a Delaware high school. Since then, hundreds of teachers in 85-plus high schools in Delaware, Pennsylvania, and New Jersey have been trained to teach personal finance using the Keys to Financial Success model. In addition, thousands of high school students have been taught how to make sound financial decisions and manage their personal finances.

All students enrolled in the Keys to Financial Success elective are eligible to apply for a scholarship each year. Scholarships are awarded on the basis of an essay on the importance of financial literacy education. We thought a fitting way to honor David's legacy would be to expand the scholarship program and name these scholarships, The David G. Bakerian Memorial Scholarships. We will celebrate David's life by presenting the first David G. Bakerian Memorial scholarships at the Delaware Bankers Association annual dinner in May 2019.

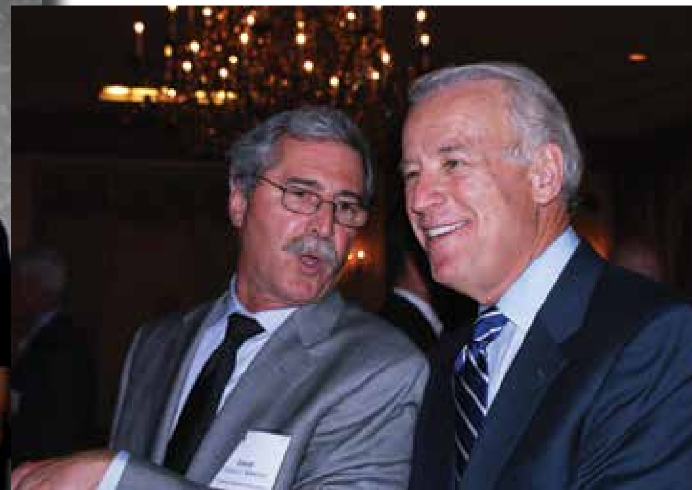
If you would like to support the David G. Bakerian Memorial Scholarship fund, contributions may be sent to:

Delaware Financial Education Alliance
Attn: David G. Bakerian Memorial
Scholarship Fund
PO Box 494
Dover, DE 19903

Sarah

Please see pages 8 and 9 for a photographic remembrance of David

Memories of David

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What's New at the DBA

Women Connect at Dover Downs

Nicole Krajewski from Gold Sponsor Wilmington Trust introduced keynote speaker Congresswoman Lisa Blunt Rochester

Legislative Roundtable (l to r): Sen. Nicole Poore; Rep. Helene Keeley; Rep. Ruth Briggs King; State Treasurer Ken Simpler; and, Martha O'Malley

Over 120 financial professionals gathered August 15th at Dover Downs for the second Women Connect event of the year. The gathering enjoyed a spirited and inspirational address from Congresswoman Lisa Blunt Rochester. Next was an insightful conversation on integrating work/life issues with moderator Joe Westcott, Capital One; Anne Eidschun, Griswold Home Care; Catherine Willey, Bank of America; Grace Stockley, Depository Trust Company of Delaware; and, Katya Nieburg-Wheeler, Barclays. The final session featured a legislative roundtable moderated by Martha O'Malley, Comenity Bank, and featured Senator Nicole Poore; Rep. Helene Keeley; Rep. Ruth Briggs King; and State Treasurer Ken Simpler. Thank you to all sponsors including Gold Sponsor: Wilmington Trust; Silver Sponsors: The Bryn Mawr Trust Company of Delaware; Capital One; Charles Schwab Trust Company of Delaware; and, The Delaware Society of Certified Public Accounts.

FDIC Directors' College

DBA President Sarah Long introduces the first panel at the 2018 FDIC Directors' College

A record number of financial service professionals attended the 2018 FDIC Directors' College, September 28th at the University of Delaware Virden Center, Lewes. Sessions included: Conversations with Regulators; Emerging Credit Risk; BSA/AML; and, a large group case study on CRA and Fair Lending. There was also an optional session on the challenges of cybersecurity.

UD Trust Minor Students Attend Art in Trust Panel at Biggs Museum

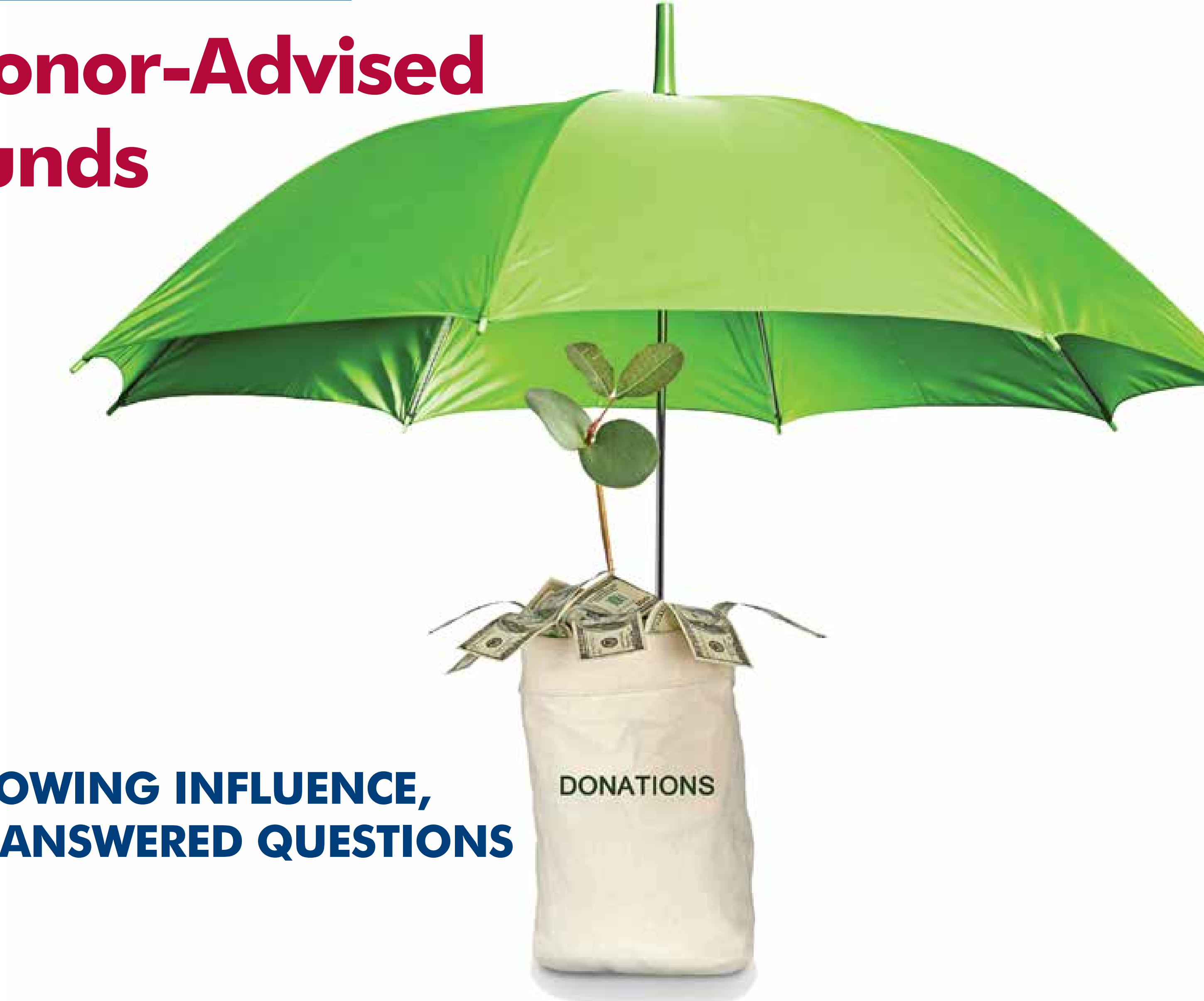
Students enrolled in the UD Trust Management Minor attended a panel presentation at The Biggs Museum of American Art on "Holding Art in Trust". Speakers included; Ryan Grover, Curator, The Biggs Museum of American Art; Jennifer McCloskey, Director of Trust Management Minor, University of Delaware; Kimberly Gill McKinnon, Special Counsel, Morris Nichols; Robert Coppock, Trust Advisor, Bryn Mawr Trust Company of Delaware; Loretta Manning, Director, Cover & Rossiter; and Bob Eaddy, President, Bryn Mawr Trust Company of Delaware.

Great Investo Savers Club Videos Premiere

The first three videos for The Great Investo Savers Club have premeired on the DFEA.org website and on the DBA's YouTube channel. The short videos feature the world's worst money magican and his assistant, Penny, teaching kids how to make their own bank; how to save money; and how compounding works. The Great Investo Savers Club is free to kids between the ages of 8 and 11. Each member receives a saving kit including a membership card, a savings diary, a wall poster to track savings goals, and stickers to make their own banks. 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.

The Great Investo and Penny demonstrate the magic of compounding with the multiplying bottle trick - now available on YouTube and DFEA.org

Donor-Advised Funds



GROWING INFLUENCE, UNANSWERED QUESTIONS

by
Charles J. Durante
Connolly Gallagher LLP

Once an exotic gambit known to few, donor-advised funds have been thrust to the top of the year-end tax-planning checklist.

The idiosyncrasies in the 2017 tax bill, which raised the standard deduction and stifled the deduction for state and local taxes, have combined to nullify the tax benefit of charitable giving for many.

Typically, about 30 percent of taxpayers have itemized their deductions. That number will radically decline this year, with special consequences for charitable gifts.

The other major itemized deductions – state taxes, mortgage interest, heavy medical bills – are largely fixed or inescapable. Charity, though, is voluntary. The charitable deduction has been built into societal expectations. An implicit governmental subsidy underlies the behavior of donors and development officers alike. Most givers, on making a $100 contribution, are programmed to feel as if they've only parted with $50 to $80, depending on their income. The rendering to God reduces what they render to Caesar, except for the value of the tote bag.

When the deduction for state taxes, a foundation of federal-state relations for a century, was capped at $10,000 in the 2017 act, and the standard deduction increased to $24,000 for married taxpayers, the law's effect on charitable giving was as obvious as its hostility to local government.

Those who have traditionally itemized their deductions, and don't want their charitable gifts to be stripped of their tax benefit, are turning to donor-advised funds. These are funds held by an administrator, classified as a public charity, which holds and invests the funds, and ultimately distributes them to other charities, inevitably those proposed by the donor.

These vehicles enable taxpayers with sufficient liquidity to deduct future charitable contributions before the donees receive the money. Someone who gives $500 annually to her favorite charity might give $1,500 to such a fund in a year when other circumstances would make the gift deductible, and in later years, ask the fund administrator to make her customary annual gift to the charity.

The funds represent opportunity for financial institutions. They can only be distributed to public charities, but their fund managers must be compensated, and fund administrators have related parties that can do so quite efficiently. Fidelity Charitable has passed the United Way to become the nation's largest charity. Even before the 2017 legislation, donor-advised funds made $15 billion in grants annually, more than twice the total of 10 years earlier.

Fidelity made an early start toward becoming the industry leader in 1991, when it obtained a ruling from the IRS that treated its prototype fund as a public charity, rather than a private foundation. Congress gave recognition to donor-advised funds in 2006 by adding §§ 4966 and 4967 to the Internal Revenue Code, to impose excise taxes if funds are distributed for non-charitable purposes, or used to benefit donors and their families, but establishing few other requirements.

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Donor-Advised Funds

(continued from p. 13)

After receiving this administrative and legislative sanction, donor-advised funds grew – and not due to tithes from the pews. Because a donor-advised fund is considered a public charity, it can offer deductions unavailable from a private foundation, and is not subject to the transparency, distribution requirements or deductibility limits of a private foundation.

Consider a hedge fund principal who invested $50,000 in his limited partnership interest, now worth $5 million. If he were to give it to his private foundation, only the $50,000 investment could be deducted. If it were donated to a public charity – such as a donor-advised fund – its full fair market value may be deducted. Private foundations, hawked by some promoters 20 years ago as ideal giving-while-keeping-it vehicles, can start to look antiquated.

In some obvious ways, donor-advised funds resemble private foundations. They provide a deduction for the donor, whether or not any charity receives anything. The law imposes no deadline by which assets donated to a donor-advised fund must be distributed, although some financial institutions will impose such deadlines by internal policy.

In important other ways, donor-advised avoid the rules governing private foundations:

- A private foundation must distribute five percent of its assets annually. A donor-advised fund can sit inert for as long as the custodian's policy will permit.
- Donor-advised funds must reveal where their grants go, but they don't have to say which of their clients provided those gifts. Few funds reveal such information voluntarily. Traditional charities have long welcomed anonymous gifts, but in conjunction with modern artifices – such as charitable LLC's of the nature pioneered by Facebook founder Marc Zuckerberg – this invisibility can increase the flow of dark money in ways more nefarious than bountiful.
- A private foundation must file an annual return, disclosing its donors and donees, one that can be examined by nosy neighbors around the world, and pay an annual excise tax. A private foundation is exempt from disclosure and excise tax.

For those who face compliance issues, many questions arise.

- Can a donor-advised fund make a distribution that enables the donor to attend a charity ball? Consider, for example, an awards banquet where the sponsor-level donation is $500, of which $80 represents the non-deductible cost of the meal and libation.

Suppose a donor were to ask the fund manager to donate $420 to the charity, while sending a separate check to the charity for the dinner portion. Would the donor receive more than an "incidental benefit" from the distribution from the donor-advised fund? If so, the consequences would not be incidental. Section 4967 of the tax code imposes an excise tax of 125 percent on a distribution that confers a prohibited benefit.

In guidance issued late last year, the Internal Revenue Service and the Department of Treasury indicated that such bifurcation is not possible for donor-advised funds. In Notice 2017-73, those agencies advised that this arrangement "can be considered a direct benefit to the donor/advisor that is more than incidental." Since the donor couldn't attend the charity ball by just paying $80, the action of the donor-advised fund to spring for the other $420 would be a "more than incidental benefit" in the inelegant terminology of § 4967. After all, the donor-advised funds portion "relieves the donor/advisor from the financial obligation that the donor/advisor would otherwise incur in order to receive the same benefits."

- Can distributions from donor-advised funds be used to satisfy the donor's pledge?

Whether or not a charitable pledge is legally enforceable is a question on which advisers and advocates will change positions, depending on whether it is a pledge by a church-going decedent for which a post-mortem deduction is being sought, or by a living donor who has changed his mind because alma mater fired his favorite coach. The answer varies by state. Guiding authority is often scant or dated.

For these reasons, Treasury and the IRS stated in the same notice that proposed regulations will provide that distributions from a donor-advised fund to a charity will not be considered to cause a prohibited benefit to the donor merely because the donor made a charitable pledge to the same charity, so long as (1) the custodian makes no reference to the pledge when making the distribution; (2) the donor receives no direct or indirect benefit as a result, and (3) the donor does not attempt to claim a charitable contribution deduction – even if the charity erroneously sends donor a written acknowledgment similar to those for standard deductible gifts.

Many more such issues will rise, as the use of donor-advised funds spreads from hedge funds to middle-class taxpayers. Donor-advised funds are poised to proliferate in every way. Regional financial institutions may choose compete with the national behemoths, after weighing the costs of compliance. Donees will have to learn not to issue their standard acknowledgment letters when receiving gifts from donor-advised funds, and instead develop a different template.

Above all, overall policy questions – ranging from disclosure to timing of distributions and perhaps beyond – will certainly be addressed when a future Congress takes up comprehensive tax policy from a different perspective than in the unique circumstances of the past two years.

Chuck Durante is a founding partner of the Wilmington law firm of Connolly Gallagher LLP, where he heads the Tax, Trusts and Estates Department.

He advises fiduciaries on the administration of trusts and estates, and counsels clients in estate planning, management of nonprofit organizations, statutory trusts, investment holding com¬panies and limited liability companies. His litigation includes fiduciary matters and cases of significant public impact. He is called upon as an expert witness on fiduciary law.

A fellow of the American College of Trust and Estate Counsel, he is recognized in The Best Lawyers in America in tax law, in Top Lawyers in Delaware in trusts and estates and as a notable practitioner in private wealth law by Chambers and Partners.

Chuck chairs the Board of Editors of Delaware Lawyer, a quarterly magazine, and is Sec-retary of the Delaware State Bar Association. A leader in many civic and charitable efforts, he received the Haverford College Alumni Award in 1998. A former sportswriter and columnist for The Philadelphia Inquirer, Chuck is a member of the Delaware Track and Field Hall of Fame.

Creative Trust Planning for Real Estate Investors and Developers

Implement tax-advantaged trust strategies post tax reform

by
Donald P. DiCarlo Jr., Chief Fiduciary Officer
and
Marguerite C. Weese, Vice President & National Director of Fiduciary Planning
Wilmington Trust, N.A.

Much has been written about the—— sweeping tax law changes that took effect this year through the 2017 Tax Cuts and Job Act (the Act). High-net-worth taxpayers and business owners alike are faced with not only a myriad of changes, but also many planning opportunities. For real estate owners, investors, and developers, the impacts are significant.

First, let's take a look at the effects of the tax law changes and then we'll explore some specific strategic planning opportunities using trusts.

Impact of Tax Reform on Real Estate Investors and Developers

The Act more than doubles the prior estate, gift, and generation-skipping transfer (GST) tax exemption, from $5,490,000 for individuals, or $10,980,000 for married couples, to $11,180,000 for individuals, or $22,360,000 for married couples. There are still seven individual tax brackets, but the top rate was lowered from 39.6% to 37%. The standard deduction is nearly doubled under the law—from $6,350 to $12,000 for individuals, and from $12,700 to $24,000 for married couples. In addition, the corporate tax rate was lowered from 35% to 21%. Many of the provisions of the new tax law affecting individuals are scheduled to sunset after December 31, 2025, at which time the prior provisions of the tax law would return if no further legislative action is taken.

In addition to others, the following changes are of particular interest to real estate owners, investors, and developers.

Creation of section 199A

The Act created a brand new deduction for non-corporate taxpayers under Internal Revenue Code (IRC) section 199A. The section applies to income earned through partnerships, S corporations, LLCs (taxed as a partnership), and sole proprietorships, and provides a deduction of up to 20% of qualified business income (QBI). The definition of QBI can be rather complex, but for the real estate industry, it includes income from real estate development, leasing, and operations. QBI does not, however, include capital gains income, which is important for real estate developers, since this means the QBI calculation may not include gains from the sale of real estate.

Limitations on SALT, mortgage, and home equity loan interest deductions

A number of notable changes to the state and local tax (SALT) deduction provisions were also made through the Act. The first is limiting a taxpayer's SALT deductions to $10,000 for federal income tax filing. The second is limiting the mortgage interest deduction on new mortgages for primary and secondary homes to $750,000 (previously $1 million). An important note for real estate developers is that business properties do not have a limitation on mortgage interest. The third notable change is that taxpayers may no longer deduct interest on home equity loans, unless the loan was used to acquire or improve a qualified residence. These changes are set to expire on December 31, 2025.

Exchanges of real property still allowed

While the Act limited section 1031 like-kind exchanges, it continues to allow the exchanges of real property. These exchanges allow real estate developers to defer the recognition of taxable gains on the sale of their real property by replacing it with another piece of like-kind real property. By exchanging one piece of property for another, the taxpayer may carry over the basis, effectively carrying over the gain from the old parcel into the newly acquired one. This roll over of tax basis continues indefinitely until the taxpayer disposes of a piece of real estate without replacing it. At that time the taxpayer will recognize gain on the disposition. An important caveat is that real estate held primarily for sale to customers is not eligible, which may affect condo developers. Additionally, any portion of the real estate that includes personal property may no longer get like-kind treatment.

Opportunity Zones

The Act also created a new tax provision, an incentive program under Internal Revenue Code Subchapter
Z – Opportunity Zones. Opportunity Zones are created as a way to incentivize long-term investments in struggling communities. Besides providing attractive financing options for businesses and commercial property in these selective low-income tracts, the investors are then allowed to create Opportunity Funds to seed these new projects. Opportunity Funds must invest at least 90% of their assets in these qualified Opportunity Zone properties or businesses.

Utilizing Creative Trust Strategies

Taking advantage of the increased federal exemption to fund or add to trusts. With the significantly increased federal exemption, high-net-worth taxpayers are afforded a fresh opportunity to shift more of their current wealth (and future growth on any transferred assets) to their heirs free of federal transfer taxes. Large potential growth in the value of a real estate development business through successful operations, increases in real estate values, inflation, and other factors often indicates the need for estate freezing and minimizing strategies. These strategies are designed to limit or reduce the value of the taxable estate, so that future appreciation can be shifted over to beneficiaries free of gift, estate, and GST taxes. When transferring real estate, the availability of minority interest and lack of marketability discounts may allow further opportunities to take advantage of the increased federal exemption and remove more value from the estate.

A dynasty trust established in a trust-friendly state, such as Delaware, is an excellent vehicle for such transfers. This trust is designed to help achieve multigenerational tax savings, creditor protection, and flexibility. Also, by using a technique of selling appreciating assets to the trust in return for a promissory note, the federal exemption can be further leveraged to mitigate future federal transfer taxes.

(continued on p. 18)

Trust Planning

(continued from p. 17)

Using trusts to take full advantage of the section 199A deduction. Like many other deductions, section 199A's benefit may be limited because of an income threshold. In order to take full advantage of the deduction, real estate developers may want to consider utilizing trusts to spread the income to multiple taxpayers. By transferring ownership interests into non-grantor trusts, the real estate developer (as the grantor of the trust) is effectively creating additional taxpayers to be owners of the business, each with their own 199A deduction and income threshold. To implement this strategy, the grantor would want to establish voting and non-voting interests in the business, and would then establish non-grantor trusts for the benefit of a spouse, children, and/or grandchildren to hold the non-voting interests. Each trust would be entitled to its own qualified business interest deduction. If the trust's income approaches the phase-out threshold, the trustee could determine if it makes sense to distribute the excess income to the trust's beneficiary, to be taxed at the beneficiary's individual tax rate, rather than the trust tax rate. For a spousal trust, any distributions would require approval of an adverse party. When considering this strategy, it's important to be sure that the grantor does not unintentionally enact IRC section 643(f), which treats multiple trusts established by the same grantor for substantially the same trust beneficiary as a single trust. Because of these nuances, it's imperative to consult with an advisory team including tax, legal, and wealth management professionals.

Using non-grantor trusts to maximize the SALT deduction. Real estate developers may use a similar strategy to maximize the SALT deduction. Since the Act restricts the taxpayer's deduction on the federal income tax return to $10,000 per taxpayer, the strategy is to create additional taxpayers. Real estate owners would place properties or interest in properties in separate non-grantor trusts. Each trust should be created for a different primary beneficiary, so that the trusts are not considered substantially the same under IRC section 643(f). The key to this strategy is that each trust must generate at least $10,000 in income, in order to take full advantage of the property tax deduction. One idea is to fund each trust with additional income producing assets to ensure there is enough income to utilize the entire deduction.

The restriction on SALT deductions as well as mortgage interest deductions may prove to be an opportunity for real estate investors. These restrictions may make home ownership become less appealing from a tax perspective, causing individuals to be more inclined to rent rather than buy, particularly in high property tax states.

Funding ILITs to provide liquidity. Having sufficient available funds in the estate with which to pay monetary bequests, taxes, administration expenses, debts, and other obligations after death is an important planning consideration. The need for estate liquidity is often generated by the nature of real estate development business assets which may not be readily convertible into funds needed by an executor to meet estate obligations. This may necessitate the need for life insurance for liquidity needs.

The advantage of owning life insurance in an irrevocable trust, compared to personally owning the life insurance, is that the death benefit may not be included in the estate for estate and inheritance tax purposes. Without utilizing a trust, the death benefit may be includable in the estate and an estate tax liability could be potentially compounded.

Integrating deferral provisions and new like-kind exchange rules with trust planning. There are two capital gains tax deferral or mitigation strategies for real estate investors and developers. In addition to the better known section 1031 exchanges, real estate developers have an additional option for deferring and potentially eliminating capital gains by investing in an Opportunity Fund. Investors are allowed to roll unrealized gains into an Opportunity Fund to defer federal taxes on the profit. It's important to note that the law requires only the gain to be invested in the Fund, not the entire proceeds of the sale. Additionally, the character of the gain is irrelevant. The longer the investment stays in, the better tax benefit an investor receives. The taxpayer's initial basis in the Fund is zero, but the basis will be increased by 10% of the deferred gain after five years and 15% after seven years. If the investment remains in the Fund for at least 10 years, the individual will not recognize capital gains on the appreciation. The deferred gain must be recognized at the earlier of the date of sale of the investment or 10 years. For real estate developers looking for this long-term investment, owning the Opportunity Fund within a multigenerational dynasty trust makes sense because of the long-term mindset coupled with the attractive tax benefit.

Decant trusts to provide more flexibility for tax basis management. For real estate developers who already have an irrevocable trust in place, it's important to take a look at the provisions of the trust to be sure it still meets its original objectives and is flexible to meet future needs. If the trust is older and can't adapt to changing environments, decanting it to provide more flexibility for tax basis management may be worth considering. Decanting involves distributing assets from an old irrevocable trust into a new irrevocable trust with slightly modified terms.

Tax basis management is an important component in a trust. While assets transferred at death generally enjoy a basis stepped up to the date of death value, assets within an irrevocable trust do not. As such, the estate tax impact of retaining certain assets within a trust should be balanced against the future income tax effects of the sale of such assets. It's important to build in flexibility at both the grantor's death as well as a beneficiary's death.

Don P. DiCarlo Jr. serves as chief fiduciary officer for Wilmington Trust's Wealth Management division, overseeing the development and delivery of our trustee and planning services. He and his team provide families and business owners with strategic wealth planning advice and assist them in the implementation of their estate and business succession plans. 610.519.1915 ddicarlo@wilmingtontrust.com

Marguerite C. Weese develops customized wealth management strategies and financial plans for prominent individuals, families, and business owners throughout the Mid-Atlantic region. She works closely with other professional and family advisors to structure appropriate financial plans to help clients meet their current objectives and achieve future personal and financial goals. 215.419.6561 mweese@wilmingtontrust.com

The State of the State Address

Managing State Income Taxation of Trusts and Estates

by
Ted Carlson
Gunnip & Company LLP

With the majority of taxpayers currently focusing on a variety of new Federal tax rules that came into effect on January 1, 2018, those of us who deal with trusts and estates on an everyday basis, cannot forget about the very different impact that the rules of income taxation for each applicable state has on the income tax filing requirements for trusts and estates. This is especially important given the variety of rules that each state has in determining whether or not a trust or an estate will be required to file an income tax return in a given state, and how much tax may be owed with the filing of such income tax return, if any.

The rules for determining the income taxation filing requirements for a trust or for an estate are unique and differ greatly from state to state. Those individuals who are acting in the role of a fiduciary of a trust or an estate, and those professionals who provide guidance to such fiduciaries, must be diligent in maintaining a solid base of knowledge in order to identify the various connections that a trust or an estate has to any particular state.

The location of the settlor, the location of the fiduciaries, the location of the beneficiaries and even the type of income earned within the trust or estate, can all have a significant impact on the state, or multiple states, where the trust or estate may be required to file income tax returns, and possibly pay income tax.

Along with the normal year-end income tax planning strategies for income deferral, deduction acceleration and estimated income taxes, fiduciaries should also focus on the residency status of every individual who is connected to the trust or estate in order to determine whether or not any change in state residency by such individual, results in a change to the income tax filing requirements for the trust or estate.

Many states require an income tax return to be filed by the fiduciary based on the residency of such fiduciary. Annual consideration must be given to the possible change in a trust or estate's state income tax filing requirements where a fiduciary has been added, has resigned, has moved to a different state, or has been relieved of their fiduciary responsibilities.

A detailed analysis of every trust and estate, preferably on an annual basis, along with proper, and timely, changes to the residency of the fiduciary of a trust or an estate may result in significant state income tax savings and/or the elimination of filing a particular income tax return for such state(s) altogether.

For example, an irrevocable Delaware resident trust, with four individual fiduciaries, all of whom live in different states, could give rise to five separate and distinct state income tax returns, possibly with the payment of income tax with each one. Depending on which states are involved, and the type of income reported for each one, there will likely be applicable credits available for taxes paid to another state which would help to minimize the overall state income tax incurred by the trust.

The planning opportunity here arises when one or more of these fiduciaries resigns or is replaced with another fiduciary who lives in a state with no income tax (Florida or Texas, for example), or who lives in a state that would not cause the trust to be required to file an income tax return, and thus not be taxed at the state level due to specific trust or estate tax regulations for that state. Given the right circumstances, and effectuating the proper timing of the change in the residency of the fiduciary, a significant decrease in overall state taxes may be achieved, as well as possibly eliminating income tax returns required to be filed in a particular state.

Another example is where a non-resident of Delaware establishes a trust and names a Delaware resident individual as the sole trustee. Under this scenario, the trust would be considered a Delaware resident trust, and an annual Delaware income tax return would need to be filed. With proper planning before the governing instrument is finalized, the simple addition of two more individual trustees, who are non-residents of Delaware, would cause the trust to be classified as a non-resident of Delaware under the state income tax filing requirements, thus eliminating the need for an annual Delaware income tax return.

The payment of estimated taxes is another important aspect of this entire analysis. Where a new state income tax return is required to be filed in a given tax year, it is quite possible that there will be a requirement to pay estimated taxes on a quarterly basis. It is always better to understand this requirement during the year of such change so it can be addressed proactively, rather than discovering the change after year-end during the preparation of the tax returns, and then having to explain unexpected additional tax preparation fees and underestimated tax penalties to the client.

The residency of a trust or estate's beneficiaries can also impact the number of states with which a fiduciary income tax return may be required to be filed. It is especially important to have ongoing communication and documentation of the residency of all beneficiaries at least on an annual basis. This is important not only for the accurate delivery of Schedule K-1's, but also for understanding the impact on any and all required state income tax filings.

For example, a Delaware resident trust that has only one, non-contingent, beneficiary living in Texas would file Federal and Delaware income tax returns. What happens if the beneficiary happens to move to California during the year? This simple change would trigger a California state income tax return filing

(continued on p. 22)

(continued from p. 21)

requirement for the trust, along with the payment of California income tax based on the trust's specific income and deductions.

If the fiduciary of the trust, and correspondingly, the tax return preparer, is unaware of the change to the residency of the beneficiary, a California income tax return would not have been prepared by the filing deadline, which could subject the trust to penalties for late filing of the tax return and the late payment of income tax.

Annual confirmation of residency information with the beneficiaries (or more often, if warranted) also provides an easy contact point with them, which could then afford the opportunity for providing them with additional services, or proactively responding to other concerns they may be dealing with at the time.

For a trust with multiple beneficiaries living in multiple jurisdictions, consideration might be given to whether or not it is feasible to make administrative changes to the trust in order to gain the highest overall state income tax efficiency. This may take the form of severing a single trust into a separate trust for each beneficiary, or group of beneficiaries, or possibly decanting the trust as a means of otherwise splitting up the trust interests.

However, caution should be given, and proper research and planning should be completed, in order to confirm whether or not such physical change, decanting or other trust modification, has any adverse implication from a transfer tax perspective.

The residency of individuals who have other administrative responsibilities over the trust, such as a trust protector, an independent trustee, or a distribution administrator, will need to be analyzed on an annual basis in order to confirm whether or not such administrative connection to the trust, in conjunction with the applicable rules of their state of residency, will result in an income tax filing requirement.

Depending on the current needs of the trust, and the age and maturity of the trust beneficiaries, such administrative responsibilities may no longer be needed. If it is allowed under the specific terms of the governing document, or under applicable state law, consideration should be given whether or not to eliminate such administrative oversight of the trust. This is an especially important analysis where the existence of such administrative individuals causes a required income tax return filing and payment of state tax.

The residency of the settlor of the trust or estate typically has significant impact on the state income tax returns required to be filed. Appropriate planning and counsel with a professional who has in depth knowledge of all applicable state regulations, should be completed. If possible, consideration of a change of the domicile of the settlor should be given before the establishment of trust, or prior to a known time or event when a trust will change from being revocable to becoming irrevocable. This will help ensure the most effective income tax planning before the governing documents are finalized and executed, or before the specific triggering event occurs.

Every state has separate and distinct rules for the determination of whether the residency of the settlor causes an income tax return filing requirement. Proper analysis of the governing documents, and of the settlor's resident state filing requirements, is of utmost importance in determining all applicable state income tax filings.

For example, a trust that is established by a resident of Delaware is considered a Delaware resident trust, and an annual income tax return will be required, although Delaware income tax may not be owed. Similarly, a trust established by a resident of New York is considered a New York resident trust, and an annual income tax return will be required, although New York income tax may not be owed. By contrast, a trust established by a California resident does not necessarily cause an annual income tax return filing requirement. Under California statue, the residency of the trustees, along with the residency of non-contingent beneficiaries are the determining factors of whether or not a California income tax return is required to be filed and applicable income tax paid. Contingent beneficiaries of the trust are ignored under California law for this purpose.

Another aspect of whether or not a trust or estate is required to file specific state income tax returns has nothing at all to do with the individuals who are connected to the entity, but is solely the result of the assets that are held by the entity. Where income is generated by a business, or by the rental of real property, that is located in a single state, or in multiple states, there will likely be an income tax filing requirement for, and possibly the payment of income tax to, the state where the business or real property is located.

It is incredibly important to understand the income tax compliance requirements, and the income tax liability impact, that such state sourced income can have on a trust or estate.

For example, a New York resident trust always has an income tax return filing requirement, but not necessarily an income tax liability requirement if it meets the three prong test under New York statute (No New York Trustee, No New York real property and No New York source income). However, if an investment is subsequently made by the trust through a partnership for example, without an appropriate amount of due diligence as to the types of income typically reported by the partnership currently, or may be reported by the partnership in the future, and the partnership happens to report New York source income to the trust, the trust would then fail the three prong test, and all of the income for the trust, not just the New York sourced income, would be subjected to New York taxation.

There are a number of different scenarios which can have an adverse income tax impact on a trust or an estate, and it is very important to have access to a solid base of understanding of all of the possible scenarios that can occur depending on the residency of all individuals related to a trust or an estate along with the possible impact that certain investments can have on the overall state income tax liability.

Ted Carlson is a tax manager with expertise in guiding trustees and executors through the complicated process of tax compliance related to trusts and estates. With more than 33 years of experience advising high net worth individuals, trustees and executors about their income tax compliance requirements, he specializes in the detailed analysis of trust documents and wills in order to file appropriate Federal and State income tax returns. He also assists with annual and lifetime gifting strategies, as well as providing detailed plans for the tax effective exercise of Stock Options. Ted earned his Bachelor of Business Administration degree in Accounting from the University of North Dakota. He also earned a Master of Science degree in Taxation from Widener University. He is a member of the American Institute of CPA's, the Delaware Society of CPA's and the Estate Planning Counsel of Delaware.

2018 Delaware Trust Conference

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Wealth Management Professionals Treated to Another Great Conference!

13th Annual Delaware Trust Conference Highlighted the Tricks and Treats of Delaware Trusts

A record number of Trust and Wealth Management professionals attended the 2018 Delaware Trust Conference: The Tricks and Treats of Delaware Trusts, October 23rd and 24th at the Chase Center on the Riverfront in Wilmington. The 13th edition of the conference highlighted the unique advantages of the favorable Delaware Trust environment were showcased with over fifty of the nation's top trust, legal and wealth management experts providing the latest information on Delaware trusts. Thank you to all speakers, liaisons, and attendees for another great Delaware Trust Conference. Special thanks to the sponsors and exhibitors (see page 25 for a complete listing) for their support!

The Delaware Bankers Association thanks the members of the trust conference planning committee who helped make the 2018 Delaware Trust Conference a success: Committee Chairs: Thomas M. Forrest, CPA, President & CEO, U.S. Trust Company of Delaware; and, Mark A. Oller, CTFA, President - Family Wealth Delaware, Wilmington Trust Company. Committee members: Lisa K. Berry, Managing Director, PGB Trust & Investments of Delaware*; Bridget Boyd, MBA, CFTA, SVP & Senior Trust Officer, Citi Trust Delaware*; Anne Booth Brockett, Vice President, BMO Delaware Trust Company; Cynthia D.M. Brown, Esq., President, Commonwealth Trust Company*; Timothy Carroll, Esq., COO, New York Private Trust; Jennifer A. Cuva, Sr. Manager, Trust Administration, Charles Schwab Trust Company of Delaware*; Matthew P. D'Emilio, Esq., Director, McCollom D'Emilio Smith Uebler LLC; William Dugdale, Senior Advisor, Brown Advisory; Charles J. Durante, Partner, Connolly Gallagher LLP*; Robert W. Eaddy, President & CEO, The Bryn Mawr Trust Company of Delaware; Todd A. Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP*;Daniel F. Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.*; Francis J. Hazeldine, Managing Director, Trust Administration, Charles Schwab Trust Company of Delaware; Gregg Homan, Vice President, Reliance Trust Company of Delaware; Maria Iversen, CTFA, SVP, Sr. Trust Advisor and Team Lead, The

Northern Trust Company of Delaware; George W. Kern, Esq., Managing Director, Bessemer Trust Company of Delaware, N.A.; Carlo Lombardi, Esq., Vice President, Wilmington Trust Company*; Jamie McGinley, Vice President, Trust Administration, Commonwealth Trust Company*; Darlene M. Marchesani, J.D., LL.M., Chief Trust Officer & Trust Counsel, Evercore Trust Co., N.A.; Mark V. Purpura, Esq., Director, Richards, Layton & Finger, P.A.; Isabel A. Pryor, CEO & Director, Key National Trust Company of Delaware*; Jordon Rosen, CPA, AEP ®, Director – Estates & Trusts, Belfint Lyons & Shuman, P.A.*; Nicole M. St. Amand, CTFA, Assistant Vice President, Wilmington Trust Company*; Vincent C. Thomas, Esq., Partner, Young Conaway Stargatt & Taylor, LLP*; Lizzie Vannote, VP & Trust Officer, J.P. Morgan Trust Company of Delaware; Lynn Welch Watson, CFP, EA, VP, Sr. Trust Officer, Brown Brothers Harriman Trust Company of Delaware*; Kalimah Z. White, Vice President, TD Bank*; Kevin A. Worsh, Senior Wealth Director, BNY Mellon Wealth Management

**Trust Conference Panel Liaison*

Thanks also to Additional Conference Liaisons:
Nicole Krajewski, Assistant Vice President, Wilmington Trust Company; Brian McLean, CTFA, Vice President, Trust Officer II, U.S. Trust Company of Delaware; Jessica D. Mojica, CTFA, Assistant Vice President & Trust Officer, Christiana Trust; Anthony N. Smedley, J.D., LL.M., AVP, Trust Officer - Assistant Fiduciary Counsel, Bessemer Trust Company of Delaware, N.A.

A special thank you to our 2018 Delaware Trust Conference Ambassadors: Anne Booth Brockett, Vice President, BMO Delaware Trust Company; Cindy Brown, President, Commonwealth Trust Company, DBA Chair; Bob Eaddy, President, The Bryn Mawr Trust Company; Todd Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP; Tom Forrest, President, U.S. Trust Company of Delaware; and, Lynn Welch Watson, Vice President, Brown Brothers Harriman Trust Company of Delaware, N. A., who welcomed and provided tips on how to make the most of the Delaware Trust Conference to first time conference attendees and new members.

The DBA Ambassador Program is a member relationship program. The objective of this program is to build a solid relationship with Members, New Members, First Timers (first event attendees) and the DBA. This program helps New Members and First Timers feel welcomed and educated about the Delaware Bankers Association, its events and its member family.

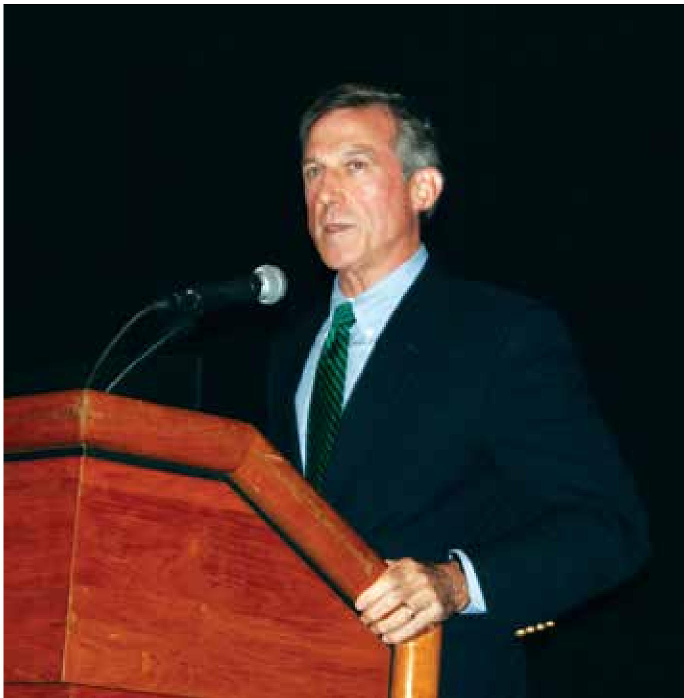
Samuel Donaldson, Professor of Law, Georgia State University, delivers a memorable Federal Tax Update.

Committee Chair (l to r) Mark Oller, President, Family Wealth Delaware, Wilmington Trust, and Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware welcome attendees to the conference.

The "Now & Later" panel describe how to administer a directed trust right from the start. (l to r) Jennifer E. Smith, Member, McCollum D'Emilio Smith Uebler LLC; Michael S. Neri, Managing Director, U.S. Trust Company of Delaware; Cynthia D.M. Brown, President, Commonwealth Trust Company; and, David Diamond, President, The Northern Trust Company of Delaware.

Conference participants enjoy lunch in the Chase Center's Riverfront Ballroom.

Sarah Long, DBA President, addresses the Tuesday luncheon.



John C. Carney, Governor the State of Delaware, greets the conference attendees.

E. Norman Veasey, Former Chief Justice, Delaware Supreme Court, speaks on: "The Lawyer's Modern-Day Ethical Responsibilities in Preserving Client Confidences."

Tricks of the Trade: Preparing and Surviving Internal and External Examinations and Audits - (l to r) Peter M. Retzlaff, Chief Bank Examiner, Office of the State Bank Commissioner, Delaware; Sharon L. Corbett, Compliance Director, Charles Schwab Trust Company of Delaware; Anne Booth Brockett, Vice President, BMO Delaware Trust Company; and, Mark V. Purpura, Director, Richards, Layton & Finger, P.A.

Jack F. Meola, Partner, EisnerAmper, and Leigh Alexandra Basha, Partner, McDermott Will & Emery, provide a primer on International Tax Planning

What Really Happens With Trust Cases In Court? - A mock trial involving ethical issues closed the conference. Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware, presided as judge. The case was argued by Jocelyn Margolin Borowsky, Partner, Duane Morris LLP; Robert W. Eaddy, President & CEO, The Bryn Mawr Trust Company; Michael Friedberg, Director, Legal Counsel, Charles Schwab Trust Company of Delaware; Peter S. Gordon, Director, Gordon, Fournaris & Mammarella, P.A.; William M. Kelleher, Director, Gordon, Fournaris & Mammarella, P.A.; Chad M. Shandler, Director, Richards, Layton & Finger, P.A., and, W. Donald Sparks, Director, Richards, Layton & Finger, P.A.

Good N' Plenty: Wealth Transfer and Income Tax Planning Opportunities Under the 2017 Tax Act. (l to r) N. Todd Angkatavanich, Ernst & Young; Todd A. Flubacher, Esq., Partner, Morris Nichols Arsht & Tunnell LLP; Jeffrey C. Wolken, Administrative Vice President, Wilmington Trust; and, Jere Doyle, Senior Vice President, BNY Mellon Wealth Management

Tuesday Evening Reception...

John "Jeff" Scroggin, Partner, Scroggin & Company, P.C., discusses "What Dead Celebrities Can Teach Us About Estate Planning": the wealth planning mistakes made in celebrity estates, and how these mistakes can improve an average client's plan.

Litigation Update provide by (l to r) Elizabeth King, President, Brown Brothers Harriman Trust Company of Delaware, N.A.; Dana G. Fitzsimons, Jr., Senior Vice President, Bessemer Trust Company of Delaware, N.A.; and, Matthew D'Emilio, Member, McCollom D'Emilio Smith Uebler LLC.

"Breaking Up is NOT Hard to Do," best practices on trustee breakup and resignation with (l to r) George W. Kern, Managing Director, Bessemer Trust Company of Delaware, N.A.; Julie Min Chayet, Managing Director, U.S. Trust, Bank of America Private Wealth Management; and, Charles J. Durante, Partner, Connolly Gallagher LLP.

Best Charitable Planning Ideas for 2018 - (l to r) William R. Levy, Regional Trust Head and Senior Advisor, Brown Brothers Harriman Trust Company of DE, N.A.; Turney B. Berry, Partner, Wyatt Tarrant & Combs; and, Martin Hall, Partner, Ropes & Gray LLP

Accounting for Success

by
Michael E. Mast. CPA, CFE
Belfint Lyons & Shuman, P.A.

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

Losses from Fraud are on the Rise

Although this column focuses on nonprofit organizations, this information affects any type of organization or business. The 2018 Report to the Nations shows there has been an increase in the per-incident losses among nonprofits over the past two years. According to the 2016, report religious, charitable, and social service organizations were experiencing a median fraud loss of $82,000 based on the ACFE's 2016 report, and that number rose to $90,000 per incident in the 2018 survey. This increase raises the red flag that organizations need to implement and carefully review anti-fraud measures to ensure a maximum level of protection.

About the Survey

The 2018 report is based on information collected by the Association of Certified Fraud Examiners through an online survey which was conducted from July – October 2017. Participants were asked to provide information on the cases they investigated which met specific criteria, including that the case must have involved occupational fraud that was investigated since January 2016. There were 2,690 cases examined in the study.

Key Findings

- **Median Loss** – The average loss per incident for religious, charitable, or social service organizations was $90,000 in 2018, an $8,000 increase compared with the 2016 study. The average loss for arts, entertainment, and recreation organizations in 2018 was $88,000, which is an increase of $12,000 compared with 2016. While the loss per incident for both types of organizations trended toward the lower end of all industries surveyed ($525,000 for communications and publishing companies and $240,000 for manufacturing companies), the increase reveals the need for more effective controls to ensure the opportunities for losses are minimized.
- **Common Types of Fraud** –The survey analyzed the reporting cases to identify the most common types of fraud committed by company type. For religious, charitable, or social service organizations, the most frequently reported fraud activities included billing, corruption, payroll, skimming, and expense reimbursement schemes. Among arts, entertainment, and recreation organizations, the most common types of fraud included cash on hand, corruption, skimming, and cash larceny. Other less notable forms of reported fraud include check tampering, financial statement fraud, and register disbursements.
- **Recovering Fraud Losses** – To understand the importance of fraud prevention, the study analyzed the amount recovered after discovering fraud. Unfortunately, victims are rarely able to recover the full amount of the loss. The study shows that 53 percent of participants did not receive any settlement, 32 percent made a partial recovery, and 15 percent recovered all losses. While it's encouraging that a small portion of participants made a full recovery, most were not made whole. For organizations with limited financial resources, such a loss can be devastating.
- **Behavioral Red Flags** – When designing a fraud prevention program, it's important to understand the most common behavioral red flags fraudsters exhibit. According to the report, 41 percent were living beyond their means, 29 percent were experiencing financial difficulties, 20 percent had an unusually close relationship with a customer or vendor, 10 percent had addiction problems, 9 percent complained about inadequate pay, 7 percent had social isolation, 6 percent experienced past legal problems, and 6 percent refused to take a vacation. Less commonly reported red flags included instability in life circumstances, past employment-related problems, and complaints about lack of authority. It's important to note that someone exhibiting these behaviors does not necessarily indicate fraud, but it paints a picture of the type of person who may be disposed to do so.

The threat that fraud poses to nonprofits and any business or organization is serious and real. We advise clients to assess their fraud prevention programs to ensure they are properly protected from possible threats.

Compliance Focus

by
Dennis Smith, CRCM
Consultant
CAPCO
Finance, Risk & Compliance Solutions

"Banks need to be proactive in managing the risks associated with these innovative P2P apps."

P2P Payment Systems & Erroneous Transfers – Educating Customers

The days of writing a check or trying to find an ATM to pay another person in cash are almost gone. Today, consumers use mobile devices to electronically transfer funds, a very convenient method in the eyes of most tech-savvy consumers. Available on nearly all types of smartphones, payment apps such as Venmo, PayPal, Cash App or Zelle are known as "person-to-person (P2P) apps."

It is estimated that by the year 2020, there will be nearly 200 million users transferring hundreds of billions of dollars through P2P apps. Most P2P systems require users to have a recipient's cellphone number or email address to electronically send money. Primarily, users' P2P apps are linked to checking accounts and/or debit cards tied to these accounts. Some financial institutions offer P2P services through their online banking platforms, via third-party providers. Consumers also have the option of choosing their own P2P platform by signing up with one directly and independently from their financial institution.

Banks should be advised when it comes to their customers who use these standalone P2P products: while this method of transfer is convenient for consumers, they could experience a loss if funds aren't sent or received as intended. Funds inadvertently sent to the wrong recipient or for the wrong amount may be cancelled if the recipient has not accepted the payment; however, if funds are inadvertently sent and the receiver has accepted the payment, this could present an issue. The sender may try to contact the recipient to recoup the money, but it's up to the recipient to return the funds, and most payment systems do not assume liability for these types of errors, which leaves the sender scrambling.

Currently, there is no regulatory guidance or oversight for P2P transactions. As we've seen in the past, new products and services trigger regulatory scrutiny. However, in the meantime, since consumers are liable for these transactions based on inputting information and authorizing payments, fund-holding institutions should expect phone calls, emails, lobby visits and complaints.

What Can Banks Do?

Banks are not required to update any disclosures for P2P systems not offered through the institution. However, a bank should be proactive and take the opportunity to educate its customer base of the risks of using these P2P systems, particularly informing them of the liabilities that could occur when using standalone P2P services. Some best practices to consider include:

• Provide the following tips to customers for using P2P services through a statement stuffer, section on the bank's website or via social media:
  - Download P2P apps from trusted sources.
  - Know the person to whom you are sending money; be cautious of sending money to strangers.
  - Before pressing send, review the transaction to ensure that you have the correct information (i.e., email address, phone number, amount) for the recipient.
  - Secure the app by using security features such as face recognition, fingerprint, pins and passcodes, as available.
  - Utilize security settings for the accessing device so that if its lost or stolen, the P2P app isn't readily accessible to transfer money.

• Adequately train staff members to field customer calls, inquiries or complaints regarding customer-initiated, erroneous P2P transactions.

• Establish debit card limits for customers setting up their debit cards for these types of transactions (i.e., up to $500 per transaction, $1,000 per day).

As stated, transfers by P2P apps are becoming more and more popular due to easy accessibility and sheer convenience; however, use of these apps increase the risk of accidental transfers as well as fraudulent activity. Banks may find it prudent to educate their customers about the potential losses that can result from linking depository accounts to P2P apps and how to use these apps responsibly. Ideally, banks should provide comprehensive, easily understandable information through multiple delivery channels, such as statement stuffers, websites and social media.

As more and more consumers use these types of P2P payments systems, it's a safe bet that regulatory scrutiny will intensify. Undoubtedly, guidance and rulemaking will eventually ensue. But until then, banks need to be proactive in managing the risks associated with these innovative P2P apps.

For Your Benefit

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

"This is great news that will potentially provide new options for employees and employers."

Healthcare Funding Accounts - Health Reimbursement Arrangements Expanding Under Proposed Rules

In a recent executive order, President Donald Trump directed the associated departments to consider expanding the availability of Health Reimbursement Arrangements and allowing HRAs to be used in conjunction with individual health insurance coverage. This is great news that will potentially provide new options for employees and employers.

As a reminder, HRAs are tax-favored, employer-funded accounts that reimburse employees for health care expenses. Under current regulations HRAs cannot reimburse employees for the cost of individual health coverage.

This proposed rule is part of the Departments' efforts to implement the executive order's directives that would allow HRAs to be integrated with individual insurance coverage for purposes of compliance with the Affordable Care Act (ACA), eliminating the existing prohibition on this type of arrangement.

This means that HRAs could be used to reimburse employees for the cost of individual health coverage on a tax-preferred basis as long as certain conditions are met and disclosures of specific information are provided. These conditions and disclosure requirements are intended to mitigate the risk of health-based discrimination that could increase adverse selection in the individual market as well as to ensure employees understand the benefit.

Health Savings Accounts, Health Care and Retirement

The confidence in having enough money to cover health care expenses in our retirement years has reduced in recent years. Health issues are second only to running out of money as one of our top fears when we consider retirement. In fact, health care is the greatest retirement expense for most people.

When we think of HSA's, we often don't consider them as part of a retirement planning strategy. Generally, most people only see these accounts as a convenient vehicle to fund immediate or current plan year medical expenses instead of as a tax qualified savings plan to meet future needs during our retirement years.

As we know, you must have a Qualified High Deductible Health Plan in order to have and to contribute to an HSA. If you do, you can contribute up to $3450 for an individual and $6900 for a family on a pretax basis. If you happen to be 55 or older, there is an additional make up contribution of $1000. The contribution maximums go up each year. 2019 will allow $3500 and $7000 respectively as maximum contributions. There is no maximum accumulation. Unused balances roll forward from year to year. Market-wide an estimated $5.7 Billion rolled into 2018! As with any consistent, tax deferred savings plan the dollars can add up. HSA assets are expected to reach $64 Billion Dollars in 2019. As a result, many are seeking better options for more competitive returns in their HSA's to maximum their opportunities.

While you can't use distributions from your HSA to pay for health insurance or Medicare supplement policies, you can use the funds to pay for long term care insurance, COBRA, or health insurance if you are receiving unemployment, Medicare and of course qualified medical expenses. Please consult your tax adviser to be sure all these options work for you.

Health Flexible Spending Accounts

Health Flexible Spending Accounts or FSA's are the traditional "use it or lose" tax qualified health spending accounts. Employees can have a pre-tax salary reduction to fund contributions into the FSA for qualified expenses. If you don't use it by the end of the plan year you can forfeit your balance. The maximum contribution for 2018 is $2,650 for the year. The 2019 maximum has not been announced yet. Your employer must sponsor this benefit which can come with various provisions to offer more flexibility.

Please seek out the qualified advice from your uniquely qualified professional experienced in total financial wellness for a complete analysis of your company's benefits program.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January 23rd, 30th, February 6th - Foundations of Delaware Trusts

University & Whist Club, Wilmington. Three new sessions for the new year! Topics include: ***Key Information in a Trust Agreement*** (January 23rd); ***Silent Trusts*** (January 30th); and, ***Investment Basics*** (February 6th). Convenient two-hour sessions are perfect for entry-level trust employees, as well as a refresher for established professionals.

March 6th, 7th, 8th - Delaware Bankers Association Executive Officer Washington Visit

Top-level bank executives, don't miss this acclaimed event that provides an extraordinary opportunity to meet with key federal regulators, representatives at the American Bankers Association, and the entire Delaware Congressional Delegation. Sponsorships are available!

April 8th - 12th - 2019 Teach Children to Save Week

Statewide. Bankers save the date for this great annual event. Volunteer to teach a lesson to elementary school students on the importance of saving for a financially fit future!

May 16th - 124th Annual DBA Meeting & Dinner

Hotel duPont, Wilmington. Join us for special keynote speaker Jelena McWilliams, Chair of the Federal Deposit Insurance Corporation. Sponsorships are available!

Lending Law Update

by
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"Banks should check if existing covenants in loan or credit agreements prohibiting changes in the form or composition of a loan's LLC borrower and guarantors are already sufficient to cover divisions."

New Delaware Limited Liability Company Divisions – Simple or Complicated for Lenders?

There has been a great amount of chatter among lenders lately regarding one of the recent changes to Delaware's Limited Liability Company Act (the "Act"). Effective August 1, 2018, an existing Delaware limited liability company ("E-LLC") may now "divide" itself into two or more Delaware LLCs by adopting a "plan of division," allocating debts and liabilities among the resulting LLCs. The E-LLC may or may not be one of the LLCs that survives the division; if it does the E-LLC does not dissolve or need to wind up its affairs (if the LLC is taxed as a corporation there are tax advantages from this). The Act provides that the division does not affect the validity of the E-LLC's obligations prior to the division; but those obligations are allocated to a resulting LLC (maybe not resembling the E-LLC that the bank intended to have as its customer). What is a bank to do?

Banks should check if existing covenants in loan or credit agreements prohibiting changes in the form or composition of a loan's LLC borrower and guarantors are already sufficient to cover divisions. If not, language similar to the following should be added: "Borrower [or Guarantor] may not enter into any plan of division, divide, establish a protected series, create a new registered series, or convert to another form of incorporated or unincorporated business or entity." This provision should result in the bank having leverage to declare a default if an E-LLC divides without bank approval or satisfying the bank's conditions for approval, such as assumption of loan obligations by the resulting LLCs and appropriate allocation of assets and liabilities. The lender may also want to take this one step further by requiring the borrower's (or guarantor's) LLC operating agreement to be amended to prohibit divisions (the Act provides for this ability to prohibit divisions in the LLC agreement).

These solutions appear simple and obvious. The complexity arises if the borrower or guarantor divides despite the prohibiting loan covenant, risking default and asking for forgiveness later. The plan of division of the E-LLC itself is not invalidated by any language in the loan documents. Loan repayment may be triggered, but what if the assets and the bank debt were allocated to different LLCs? Does the lender now need to pursue all the divisions? Is the transfer fraudulent if not made with the proper level of consideration? Lastly, what is the impact of the division for federal and state income tax purposes? The amendments to the Act are too recent to allow all the forgoing (and more) implications from being fully vetted or understood. Most of these implications arise at the peril of the borrower only if the default provisions in the loan documents are not solid and unambiguous. Stay tuned; the answers are yet to come.

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