Delaware Banker

Spring 2019
Vol. 15 No. 2

Employee Civility in the #MeToo Era

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Contents

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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

"The banking industry in the First State is diverse and strong: Delaware Strong!"

Recently I had the opportunity to walk through one of our local malls. Strolling along, in the space of a few hundred yards I found shoes, books, clothing, toys, and food; all in a variety of styles and prices. At that moment I was struck with the notion that the Delaware Bankers Association and our financial services industry here in Delaware are similar to a mall. We offer an amazing diversity of products all under one umbrella organization, and all in one place, the State of Delaware.

What is truly remarkable in considering the diversity of our association is our size. When comparing the DBA to other state banking associations, and in particular, their memberships, the first thing one is struck by is the sheer disparity of numbers. When comparing Delaware to other states it is important to keep in mind that Delaware is the second smallest state in terms of geographic area. One would also expect larger states to have more banks just because they have more towns and a larger potential customer base (Delaware is 45th out of 50 in terms of population size).

Because of its size, Delaware has always had to be a little bit quicker, a little bit smarter, and a little more agile not only to keep pace with but stand out among the other states in the Union. Looking back to its roots, the state has long had the advantage of its strong corporate laws and its unique Court of Chancery, but it took more to make it into the prosperous banking haven we now enjoy.

The event that propelled Delaware banking into what it is today was the enactment of the Delaware Financial Center Development Act (FCDA) in 1981. This forward-thinking piece of legislation helped attract national credit card banks to the State and created tens of thousands of jobs. I'd guess that at least half of the Delaware bankers reading this wouldn't be in their current positions without the Financial Center Development Act.

While the FCDA was a landmark piece of legislation that impacted banking in Delaware and with ripples felt across the country, the First State didn't spend the rest of the 1980s resting on its laurels. Next came changes to bolster the Delaware trust industry. In 1985 the State's original directed trust statute was enacted, followed one year later by the abolishment of the rule against perpetuities that previously had limited the duration of a trust. After this came the enactment of Delaware's asset protection trusts. Since then, the wealth managers, attorneys, and all those who comprise our trust industry have worked to continually update and improve this vital sector of the financial services realm.

As dynamic and exciting as our national banks and trust companies have been for Delaware's banking footprint, the DBA wouldn't be here at all if it weren't for our stalwart community banks. Returning to the mall analogy, the wide variety of specialty stores and niche boutiques wouldn't be possible with the "anchor" department stores. Our community banks have been here for over 200 years serving Delawareans with personal accounts, mortgage and business loans, and generally serving as the backbone of our industry.

All this points to one great conclusion: the banking industry in the First State is diverse and strong: Delaware Strong! And that is the message we'll be promoting all year at our Annual Meeting, in our 2019 Community Brochure, and in this October's Delaware Trust Conference at the Chase Center on the Riverfront. Thank you all for being part of our exciting industry!

All the best,

Cindy

President's Report

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

"While the industry is actively moving toward gender equality and diversity in the workplace, there is still much room for growth. "

Spring is here! Most of us welcome the new season for many different reasons. For some it's a chance to shed heavy wardrobes and enjoy the warm sun on our winter-chilled bodies. Some relish getting outside and working in the garden as it springs to renewed life. Many make plans for their summer vacations…. a trip to the beach, attending a family reunion, or simply a well-deserved staycation. As for me, spring makes me think of Teach Children to Save Day.

It's so fun teaching children to save, especially with the DFEA's own Great Investo series of books. The world's worst money magician makes concepts like getting financially fit by setting goals, budgeting, and saving, fun and understandable for children. This year I was struck by the observation that Investo, as amusing as his misadventures may be, wouldn't be effective without money-wise Penny at his side. For every trick of his that goes wrong, Penny is standing by with sage advice and the correct answer to save the day.

A familiar quote goes: "behind every great man is a great woman." This has been amplified and parodied in several ways. Voltaire observed that "behind every successful man stands his surprised mother-in-law." Mark Twain noted that "behind every successful man, there is a woman, and behind every unsuccessful man, there are two." An entry that seems more appropriate for today is "every successful man stands alongside an equally successful woman."

According to Gallup, "Men and women have different viewpoints, ideas, and market insights, which enables better problem solving." Gallup studies have shown that when business units are gender-diverse, a company's financial performance improves dramatically.

In addition, a Women in Research study suggests that "women need to be approached early in their career to assist in mapping their path with goals, training plans, and leadership associations. While the industry is actively moving toward gender equality and diversity in the workplace, there is still much room for growth. Companies need to continue to focus on the needs of current and future parents (both mothers AND fathers)."

Enter DBA Women Connect. As the premiere financial services alliance, Women Connect serves as a catalyst to engage, empower and connect women and men in the Financial Services Industry throughout the State. By convening to discuss relevant issues and share best practices we can create an environment where people thrive. In 2018, over 250 women and men attended Women Connect events in New Castle, Kent and Sussex counties. After a successful inaugural year, Women Connect has established a reputation for providing high-energy, high-quality programs.

Some past Women Connect speakers include; Congresswoman Lisa Blunt Rochester; Impact Strategist Avery Blank; The Honorable Jan Jurden, President Judge of the Superior Court of Delaware; Kathryn George, Partner, Brown Brothers Harriman in Private Banking; Melissa Davey, Documentary Filmmaker; Joe Westcott, Delaware Market President, Capital One; Grace Stockley, Marketing Manager, Depository Trust Company of Delaware; Senate Majority Leader Nicole Poore, Representative Ruth Briggs King; Serial Entrepreneur Jen Groover and sculptor of Fearless Girl, Kristen Visbal.

As we go to print, we are looking forward to the first Women Connect event of 2019 on May 7th. The conference will focus on personal, professional and community well-being with keynotes from Mark A. Turner, Executive Chairman, WSFS, and Kathy Jennings, Delaware Attorney General. Panel discussions on leadership and financially empowering girls and young women through education will round out the program, along with afternoon sprint sessions on financial fitness, physical well-being and philanthropy.

I look forward to seeing you at a Women Connect Event this year. I promise the impact will be profound.

Sarah

What's New at the DBA

New Associate Member

Heritage Auctions
Michelle Castro, Director, Trusts & Estates
214-409-1824
email: michellec@ha.com

Elyse Luray, Director, Trust and Estates, New York
212-486-3504
email: Elysel@ha.com
website: www.ha.com

The largest auction house founded in the United States and the world's third largest, Heritage Auctions upholds an unmatched community of collectors interested in precious objects from 40 unique categories. Along with over 700 auctions a year, Heritage offers an array of services to collectors and professional advisors alike, including complimentary estate valuations, USPAP and IRS compliant appraisals, charitable giving and estate planning services. Our Trust & Estates team creatively works with clients to maximize the value of their art, luxury goods and collectibles making Heritage the trusted choice for fiduciaries and international clientele of over one million bidders.

2019 Washington Visit

The Delaware Bankers Association conducted their annual DBA Senior Executive Washington Visit, March 6th through the 8th. The 2019 Washington Visit provided members the opportunity to meet with key regulators at the FDIC, the OCC, the Federal Reserve and the CFPB. The group also met with Senator Tom Carper, Senator Chris Coons (pictured above), and Representative Lisa Blunt Rochester. The DBA thanks all their generous sponsors including Platinum Sponsor - The Federal Home Loan Bank of Pittsburgh; Reception Sponsors - Discover Bank; and, Richards Layton & Finger.

Legislative Reception

(l to r) Governor John Carney, DBA President Sarah Long, Bank Commissioner Robert Glen, and DBA Chair and President Commonwealth Trust Cynthia D.M. Brown at the 2019 Legislative Reception

The Delaware Bankers Association hosted its ninth annual Legislative Reception for members of the Delaware General Assembly March 28th, at the Lobby Bar, Dover Downs. "The DBA Legislative Reception provides a unique opportunity to demonstrate the importance of the financial services to Delaware's elected legislators," said DBA President Sarah Long. The reception was made possible by the generous sponsorship of the following members: Artisans' Bank; Bank of America; The Bryn Mawr Trust Company of Delaware; Capital One; Commonwealth Trust Company; County Bank; Discover Bank; Glenmede; M&T Bank; MidCoast Community Bank; U.S. Trust Company, and, Wilmington Trust.

Teach Children to Save Day

The DBA's Greg Koseluk and Margaret Cregan demonstrate the magic of saving at Major George S. Welch Elementary School on the Dover Air Force Base

The Delaware Bankers Association celebrated its 21st annual Teach Children to Save Day in magical style. This year's event began with Governor John Carney proclaiming the week of April 8th "Teach Children to Save Week" in the First State. The Governor signed the proclamation in a ceremony on Wednesday, April 3rd, at Linden Hill Elementary School in Wilmington.

Governor John Carney, proclaims Teach Children to Save Week as (l to r) State Representative Michael Smith; State Treasurer Colleen Davis; Red Clay School District Superintendent Dorrell Green; and DBA VP Greg Koseluk look on.

A record 323 classrooms in over 80 public, private, and parochial schools, throughout Delaware were taught a lesson on saving. Several bank presidents and special guests also volunteered as teachers for the event, these included: Robert Eaddy, President, Bryn Mawr Trust Company of Delaware; Chip Rossi, Delaware Market President, Bank of America; Randy Taylor, Executive Vice President & Director of Private Banking, Fulton Bank; Joe Westcott, Market President, Delaware, Capital One; Colleen Davis, Delaware State Treasurer; Robert Glen, Delaware Bank Commissioner; and, Sarah Long, President, Delaware Financial Education Alliance.

Chip Rossi, Delaware Market President, Bank of America teaches at Highlands Elementary School in Wilmington

This year's Teach Children to Save Day lesson is taken from the new book *The Great Investo and Muscles O'Money*. The book teaches the importance of setting goals, budgeting, and saving to build personal financial fitness and create a financially secure future. The book was created specifically for the 2019 Teach Children to Save Day event and was made possible by a grant from Capital One.

Cover Story

Investing in Employees and Morale

Sexual Harassment, Training, and Workplace Civility in the #MeToo Era

by
Lauren E.M. Russell
Young Conaway Stargatt & Taylor, LLP

Effective January 1, 2019, the Delaware Discrimination in Employment Act (DDEA) was amended to require that certain Delaware employers provide mandatory sexual harassment training to their employees. We outline some of the new law's most important requirements below. But employers are well counseled to provide comprehensive employment training to their employees, even if they are not subject to the new law.

Why Now?

Delaware, along with a handful of other states, now requires that large employers conduct anti-harassment training. But such training has been strongly recommended for decades. Why are states taking affirmative action to require training now? It is undoubtedly a reaction to #MeToo movement, and the eruption of numerous, high-profile claims of quid pro quo harassment lodged by individuals against some of the most powerful men (and women!) in the country. This reality is reflected in the fact that California and New York—two states at the center of the maelstrom—were the first to pass mandatory training laws.

But #MeToo is just a symptom of a broader problem: lack of respectful workplace behavior and a failure to observe traditional boundaries between the personal and professional. Some of the causes are clear. Social media has contributed to the blurring of the boundaries that were once commonplace. Similarly, social discourse has become more coarse, and people are becoming increasingly isolated from others with different social and political views. In short, the workplace is changing. Many of these changes are for the better: our offices are becoming more diverse by the year, and businesses benefit directly from the varied experiences and thoughts contributed by these employees. But increasing diversity also means that we all have to think more critically about what we say, and how our behavior may be perceived by others.

Fostering an inclusive and welcoming environment for all employees increases morale, and directly benefits the employer.

Who Is Required to Train?

Delaware law requires any public or private sector employer with 50 or more employees in the State of Delaware to provide harassment prevention training. In determining whether a business has 50 or more employees, employers should count all full-time and part-time employees, interns and apprentices, but need not count applicants or independent contractors towards the numerosity requirement. The law does not specify what time period to use when determining coverage, but one approach would be to follow the formula applied under various federal employment laws. This means you would be covered if you employed 50 or more employees during 20 or more working weeks in either the current or the preceding calendar year.

Who Is Required to Be Trained?

The training must be completed by all employees who work in the State of Delaware, which includes all full-time and part-time employees, seasonal employees, temporary employees, and interns and apprentices. Further, if an individual works a portion of his or her time in Delaware, even if based in another state, the individual should be trained. Note that new hires do not need to be trained until they have been employed for at least 6 months.

What about Employment or "Temp" Agencies?

Employment agencies are the only employers required to count and provide training to employees placed by them with a third party employer under the new law.

What Do I Do about Employees in Other States?

Only employees who work in Delaware are required to be trained under Delaware law. However, if an individual works a portion of their time in Delaware, even if they're based in another state, they must be trained.

Employers are also well counseled to remember that high-quality training can be a powerful defense if the business is ever sued. An employee who completes training and then fails to report alleged harassment may be barred from recovery under certain circumstances. In short, even outside of Delaware, training provides protection from the employer, and contributes to employees' sense of happiness and wellbeing in the workplace.

When Does Training Need To Be Completed?

The new law provides a timetable for when training must be completed. For existing employees, the training must be completed on or before January 1, 2020. Employers who conducted training in calendar-year 2018 receive an extension, and do not have to complete training until January 1, 2021. Following the completion of initial training, and new hires must receive training within one year of commencement of employment. Once the employees have received the initial

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training, they must be retrained on harassment prevention every two years thereafter.

What Must Be Included In the Training?

Under Delaware law, training must be interactive and designed to educate employees regarding the prevention of sexual harassment. Additional requirements differ slightly, depending upon the employee's supervisory status. For non-supervisory staff, the training must cover the following elements:

1. The illegality of sexual harassment;
2. The definition of sexual harassment using examples;
3. The legal remedies and complaint process available to the employee;
4. Directions on how to contact the Delaware Department of Labor; and
5. The legal prohibition against retaliation.

For supervisors (which includes any employee authorized to change the employment status of another employee or who directs an employee's daily work activities), the interactive training must include the above elements <u>and</u> the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment.

Is There A Minimum Number of Training Hours Employees Must Complete?

No, the law does not specify any minimum time as long as the employees receive training that meets or exceeds the minimum standards. As a best practice, we recommend the training session for non-supervisory employees be at least 1.5 hours, and at least 2 hours for supervisors.

What Does "Interactive Training" Mean?

Delaware law requires that all sexual harassment training be interactive. While the law is silent on what would satisfy the "interactive" requirement, a common sense approach would provide that the employee must have the ability to participate in the training. This is also consistent with regulations issued in California. Several examples of employee participation might include:

1. Web-based training, if the employees have an option to submit a question online and receive an answer during or immediately after the training session;
2. Live, in-person training, if the presenter asks the employees questions or gives them time throughout the presentation to ask questions.

Importantly, an individual watching a training video or reading a document, with no feedback mechanism or interaction, would NOT be considered interactive. Officials within the Delaware Department of Labor have echoed this sentiment. This old style of training, which we refer to as "checking the box," is precisely the reason why state legislators stepped in to mandate what is and is not acceptable in terms of training. The old method was not working.

Can an Employer Use a Third-Party Vendor to Provide Training?

Yes, an employer may use a vendor to provide training. While the new law does not specifically require that the vendor possess a license or certification, at a minimum the vendor should be well versed in the requirements of Delaware's sexual harassment law and be able to adequately respond to questions from participants. As an employer, you should thoroughly review any third-party training to ensure it meets or exceeds the minimum standards required under the law.

What Happens If Some Employees Fail to Take the Training, Despite an Employer's Best Efforts to Make It Available?

Employers are required to ensure that all employees receive the required training within the timeframes provided. There are no exceptions under the law for long-term absences, such as a period of leave under the Family & Medical Leave Act. Employers may take appropriate remedies (including disciplinary action, if necessary) to ensure compliance. But be careful not to engage in retaliation for individuals who have a statutorily protected basis for being absent, such as under the FMLA. In these cases, an interactive web-based program may be ideal, as training can be provided on-demand, when an employee returns to the workplace.

Are Employers Required To Pay Employees For The Time Spent In Training?

The new law is silent on this issue, but federal law generally requires that employer-provided training time is counted as regular work hours.

What Type Of Records Must Employers Maintain To Verify Training Compliance?

Again, the law is silent on this issue. We recommend employers keep a signed acknowledgement (including any vendor certification) and a copy of all training records. These records may be helpful in addressing any future complaints or lawsuits.

I'm Concerned; What Next?

There is no reason to be concerned about the new statute. There is still ample time to come into compliance, especially if your organization conducted anti-harassment training in 2018. First, consider your options and determine what works best for your workplace. Live, in-person training is best suited to comparatively small groups of employees (20 to 40) to allow full participation. For large employers, this could mean an extended period of training, and the attendant expenses associated with multiple training sessions.

If you have a large workforce, an online program may be better suited to your needs. Just ensure that the program is high quality, and truly participatory. Employees should be engaged with the material, not sitting blankly in front of a screen. And the ability to ask questions is absolutely essential to compliance with Delaware law.

You may also elect a combination of both approaches. Key employees, or those who have engaged in unprofessional conduct in the past, may be ideal candidates for smaller, in-person training, while others may benefit from the flexibility of online training. Whatever approach your business elects, ensure that the program receives support from senior leadership. No matter how good your training program, if senior leadership is not behind it, employees will sense that the endeavor is an empty gesture, and you will lose the goodwill and employee morale that can come from this type of investment.

Final Thoughts

Workplace training on abstract concepts like discrimination, respectful workplace behavior, and civility can feel like a burden. In the worst scenarios, you may be educating your employees on how to build a better case. But the reality is that training is an investment in your work force. A good anti-harassment program should make your staff feel empowered and valued. And your managers should feel more confident in their interactions with their subordinates, because they know where the boundaries are, and won't go running scared the next time someone throws around the term "hostile work environment." Do not be deterred by a fear of increased complaints. A small uptick is normal, and actually reflects that you've done a good job. People are coming forward to have their questions answered and hopefully you're also building their confidence that they can trust your human resources department with their concerns.

Lauren Moak Russell is an associate at Young Conaway Stargatt & Taylor, LLP. She specializes in the representation of employers on a range of issues relating to compliance with local, state, and federal labor and employment laws and constitutional provisions. She provides compassionate and responsive counsel, targeted at achieving client goals while minimizing cost and risk. Lauren emphasizes client counseling—on issues ranging from wage and hour compliance, to workplace training and investigations, to effective employee terminations—with the goal of avoiding litigation before it begins. Her counseling practice includes handbook revisions, effective policy implementation, and on-site training on legal compliance. Lauren has developed and conducts specialized in-house training for emerging legal issues including the pregnancy, reproductive rights, and family care provisions of the Delaware Discrimination in Employment Act. One of her current programs outlines the complexities of the #MeToo movement and offers executives essential information on harassment avoidance and modifying corporate culture. Lauren also conducts high-level investigations of discrimination and harassment on behalf of employers.

Lending

Practical Considerations for Commercial Lenders Regarding Environmental Liability

by
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In the context of making a loan secured by commercial real estate, a lender is right to be concerned about environmental contamination at that property, and how it may impact potential liability for cleanup and the value of the property as collateral. According to a survey by Environmental Data Resources ("EDR"), one out of every ten banks involved in commercial real estate loans has experienced losses due to environmental issues over a one year period, with average losses of $1.2 million per loan.[2] This survey found that the smallest banks experienced the highest occurrence of environmental losses, with lenders with assets less than $1 billion experiencing almost 75 percent of loan losses due to environmental contamination. EDR concluded that one potential reason the smallest banks suffered the largest loan losses due to environmental contamination was because those banks performed less comprehensive environmental due diligence, and because smaller borrowers tended to walk away from contaminated sites because cleanup costs often exceeded their equity in the property.

This article reviews the specific factors on which liability for contaminated real property is based, as well as available defenses and exemptions, so lenders can spot transactional risks throughout the life of a loan, and make informed lending decisions.

The Wide Net of Environmental Liability

The primary environmental laws that concern most lenders in the context of property contamination are CERCLA[3], commonly known as "Superfund," and its Delaware equivalent, HSCA[4] . Liability under both laws is practically identical. CERCLA is typically directed at larger, more complex sites and is administered by the federal EPA. HSCA was enacted to enable the state environmental agency, the Department of Natural Resources and Environmental Control ("DNREC") to address contaminated sites not being addressed under the federal Superfund Program.

Under CERCLA and HSCA, liability is triggered if hazardous substances are present at a facility, there is a release or possibility of a release of those hazardous substances, response costs have been or will be incurred, and the entity at issue is a responsible party. Once a party is determined to be a "potentially responsible party" ("PRP"), it may be liable for cleanup costs, damages to natural resources, and the costs of certain health assessments, among others. CERCLA has four classes of liable parties, which include (1) current owners and operators of a facility, (2) past owners and operators of a facility at the time hazardous wastes were disposed, (3) generators and parties that arranged for the disposal or transport of the hazardous substances, and (4) transporters of hazardous waste that selected the site where the hazardous substances were brought. HSCA applies to the same categories of responsible parties, and adds an additional very broad catch-all category: any person who is responsible in any other manner for a release or imminent threat of release.

The key to liability is the "release" or suspected release of a "hazardous substance" that must be present at a property.[5] The operative terms are defined very broadly, encompassing a large number of compounds, substances, and mixtures as "hazardous substances," and defining a variety of passive and active activities as a "release." Of note, however, is that CERCLA's definition of hazardous substances specifically carves out petroleum, including crude oil or any fraction thereof not already listed as hazardous.[6]

Liability under CERCLA and HSCA is strict, joint and several. Liability is not based on a PRP's fault in causing a release, and it is joint and several, meaning one PRP can be responsible for all of a site's contamination even if it did not cause the release of hazardous substances. Liability is also retroactive, meaning that a PRP can be liable for activities that occurred before CERCLA or HSCA were enacted.

CERCLA and HSCA's unforgiving liability scheme gives rise to several concerns in the commercial lending arena: (i) whether the purchaser/borrower will be able to proceed with site development activities (and at what cost); (ii) whether the purchaser/borrower will be saddled with unexpected or prohibitive environmental remediation expenses; (iii) whether the site (loan collateral) will be impaired; and (iv) whether the lender will be confronted with potential liability for remediation costs. These issues, among others, are the foundation for much of what takes place in the environmental due diligence process.

Environmental Site Assessments – Protections and Value

How does a lender investigate a property for the presence of contamination? Lenders will typically require that the borrower conduct a Phase I Environmental Site Assessment, or "ESA," in accordance with EPA's All Appropriate Inquiry rule. If the borrower/prospective purchaser conducts due diligence and meets the "all appropriate inquiry" requirements in CERCLA or HSCA, liability may be limited or avoided under several statutory provisions. For the purchaser of property, and the lender, the ESA is a valuable tool in the due diligence tool box.

The first, and perhaps best known, of the statutory liability protections[7] is the "innocent landowner" defense. This protection applies to those persons who at the time of property acquisition did not know and had no reason to know that any hazardous substance that was part of a release was disposed of, on, in, or at the facility. To qualify for this protection, the borrower must perform the "all appropriate inquiry" prior to purchase. The availability of this defense hinges on establishing that the purchaser/borrower had no knowledge, and had no reason to know, of the presence of hazardous substances on the site—a difficult burden to meet at many sites that are the subject of transactions. This protection, if applicable, is a complete defense to CERCLA and HSCA.

In response to concerns about the limitations of the "innocent landowner" defense, CERCLA was amended to create a new form of liability protection – the bona fide prospective purchaser protection. This provision affords protection to an owner that did have knowledge of contamination, and limits EPA's recourse for response costs to a lien on the property for the increase in value attributable to EPA's response action. For this protection to apply, all disposal of hazardous substances at the facility must have occurred prior to the borrower acquiring the property, "all appropriate inquiry" must be performed prior to acquisition, and the purchaser/borrower must take appropriate care with respect to hazardous substances found at the property.

Brownfield Development Program

In light of the uncertainty that can exist as to the applicability of these defenses and exemptions, Delaware and many other states have developed "Brownfields" programs to ease the path to re-utilization of contaminated sites. The Delaware Brownfield Development Program was created to spark investment in the large stockpile of former industrial sites across Delaware which had been siting unused, in part due to concern for potential CERLCA/HSCA liability. The Brownfield Development Program provides protection to purchasers of contaminated property even when contamination is present and known to the purchaser prior to closing, provided that the purchaser investigates the contamination and agrees to remediate the site to a level appropriate for its intended use.

Pursuant to the Brownfield Development Program, a brownfield developer will execute a Brownfield Development Agreement with DNREC, and the agreement will set forth a scope and schedule of activities to assess and respond to the release of hazardous substances. HSCA provides that a brownfield developer that enters into a Brownfield Development Agreement is not liable for any release of hazardous substances existing when the agreement is executed, and is not liable for a remedy or any costs incurred by the State or any other person to remedy a release of hazardous substances. The developer must obtain approval for its plan to address the presence of hazardous substances, and must perform any land-disturbing activity at the facility in accordance with that plan. As an additional potential benefit under the program, a developer may be able to obtain DNREC grants for qualifying projects.

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The appeal of the Brownfield Development Program is that a developer need not conduct the typical full cleanup required under HSCA, but instead must take appropriate care to stop ongoing releases of hazardous substances, and must also use risk-based corrective action principles to remediate to a level appropriate for the site's planned future use. Careful negotiation of the Brownfield Development Agreement is essential, as that agreement defines the scope and extent of the developer's liability (and indeed its ability to develop the site). In the ideal circumstance, the developer will work together with an experienced environmental consultant, legal counsel, and DNREC staff to formulate a site-specific agreement that allows site development to proceed and affords the developer (and its lender) with appropriate liability protection.

Lender Liability – Secured Creditor Exemption

Lenders should also keep in mind their potential liability as an owner or operator of a site where a release of hazardous substances has taken place, namely when a lender exercises control or management over a borrower's operations. Both CERCLA and HSCA contain "secured creditor" exemptions from liability, as each statute has been amended to provide more certainty to lenders faced with contaminated sites in their loan portfolios. HSCA and CERCLA exempt from liability a person who holds or acquires title to or possession of a property to protect their security interest in that property but does not participate in management of that property.

Key to the lender liability exemption is that the lender must not participate in management of the property. HSCA and CERCLA provide the same examples of "participation in management," which include if a lender exercises decision-making control over the facility's environmental compliance, or exercises control at a level comparable to that of a facility manager, among others. Participation in management generally does not include simply holding a security interest (such as a mortgage lien), monitoring or enforcing the security interest (such as foreclosing or accepting a deed-in-lieu), inspecting the facility, or requiring a response action or other lawful means of addressing a release or threatened release in connection with the facility during the extension of credit.

Thus a lender who forecloses on a site is not liable under HSCA absent the lender actually managing the property, but the lender must sell the property after foreclosure, and it must market the property at the earliest practicable and commercially reasonable time, and on commercially reasonable terms. Lenders who work with distressed real estate know that often a property can go into waste and be subject to poor management before the institution of the foreclosure or deed-in-lieu is accepted. This is a tricky place for a lender to be. On one hand it is important to not manage a property to maintain the liability exemption under HSCA; on the other, swift action is frequently needed before the lender can exercise a foreclosure or deed-in-lieu. In such circumstances it is especially important to consult with legal counsel. Frequently loan documents will give the lender the right to seek a receiver in the event of a default. Appointment of a receiver is a technique frequently used by lenders to address concerns about the property management while not actually becoming responsible for the management of the property, thus maintaining liability protection from environmental damages.

When a lender is considering a workout, foreclosure or other actions against a borrower who is in default of its loan obligations, regardless of whether known contamination is present, it is in the lender's best interest to consult with legal counsel. Even if no known contamination exists, a lender may still face liability if contamination is discovered in the future and a release was determined to have taken place while the lender was participating in management of the property.

Environmental Representations, Warranties and Indemnities

What is a lender to do when a borrower is seeking a loan to purchase a property that has known or suspected contamination, in light of the uncertain applicability of the aforementioned prospective purchaser protections? In addition to conducting environmental due diligence, the lender should consider obtaining environmental representations, warranties, and or indemnities from the sponsor or other entity or capable individual. In order for the indemnity to be meaningful, it is important that the indemnitor remain solvent and able to satisfy its obligations under any such indemnities. Further, in the context of a site acquisition, the buyer/borrower may attempt to obtain from the seller of the property indemnities for any known contamination, to the extent a seller will give them. This in turn may facilitate the borrower's ability to provide an environmental indemnity to the bank that is financing the borrower's acquisition of the property. In addition, it is becoming more common to see policies of environmental insurance issued at closing. If an environmental insurance policy is being issued it might be possible for the lender to be named as an additional insured party.

In order to protect themselves from the potential for CERCLA and HSCA liability, lenders should work with a team of environmental and real estate legal counsel and consultants to assess the specific risks and liabilities presented by a particular loan, and to develop a robust internal environmental due diligence program. Regardless of the stage of a transaction, whether in initial discussions with a borrower, loan negotiation, closing, servicing, workout, or foreclosure, a team of environmental and real estate professionals can effectively guide lenders through the various pitfalls that may arise.

Robert W. Whetzel advises a wide range of clients on issues arising under federal and state environmental laws. He has extensive experience with federal and state environmental agencies, and has served on the Delaware Coastal Zone Act Regulatory Advisory Committee, the Delaware Hazardous Substances Cleanup Act Advisory Committee, and other regulatory committees. Mr. Whetzel has also been active on legislative matters in Delaware, and has drafted, commented, and testified on many of the state's key environmental laws. Mr. Whetzel's practice includes permitting, transactional matters, compliance advice, enforcement, and private-party environmental litigation, involving the full spectrum of environmental issues.

Sara T. Toner is the chair of the Real Estate Group of Richards, Layton & Finger, in Wilmington, Delaware. She focuses her practice on complex transactions involving the finance, acquisition, sale, lease, and development of commercial real estate properties. Ms. Toner has a particular emphasis on closing sophisticated commercial real estate loans, including CMBS financing, portfolio financing, and mezzanine and preferred equity transactions. She represents major real estate developers, financial institutions, significant holders of commercial real estate, and institutional clients in all types of commercial real estate transactions.

Philip Micha practices in Richards, Layton & Finger's Real Estate and Environmental groups. He focuses his practice on environmental liability, specifically in connection with real estate transactions, environmental enforcement, and related litigation. During law school, Mr. Micha worked for the Illinois Attorney General's Office of Environmental Enforcement Bureau and the US EPA Region 5 Office of Regional Counsel. In addition to his legal background, Mr. Micha has a bachelor's degree in biology and zoology and a master's degree in environmental management.

Notes:

1- Currently admitted in Illinois only.

2 - See Environmental Issues in Business Transactions, Chapter 11 Overview of Lender Liability Under Environmental Laws (2011).

3 -"CERCLA" refers to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 to 9675.

4 - "HSCA" refers to the Hazardous Substance Cleanup Act, 7 Delaware Code Chapter 91.

5 - "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment[.]" The definition encompasses both passive and active activities by a PRP. "Hazardous substance" includes (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act (also known as the Clean Water Act), (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of CERLCA, (C) any substance designated as hazardous waste under the Solid Waste Disposal Act, (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture that the EPA Administrator has taken action with pursuant to section 7 of the Toxic Substances Control Act.

6 - In the context of underground storage tanks, the Solid Waste Disposal Act, Subchapter IX, Regulation of Underground Storage Tanks defines "regulated substance" to include petroleum, 42 U.S.C. § 6991(7)(B), and the Delaware Underground Storage Tank Act ("DUSTA") also defines "regulated substance" to include petroleum. 7 Del. C. § 7402(18)(b). DUSTA employs a liability scheme similar to CERCLA and HSCA in that under DUSTA a "responsible party" is any person who owns or operates a facility, or caused or contributed to a release from an underground storage tank system.

7 - Another exemption is the contiguous property owner exemption, which excludes from "owner" or "operator" a person who owns property that is contiguous to a facility that is the only source of contamination found on that person's property. Persons who prior to purchase know or have reason to know that the property could be contaminated cannot qualify for the contiguous property owner protection. Again, the AAI must be conducted for the exemption to apply.

"Kaesting" Doubt on the State Fiduciary Income Tax System

by
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The U.S. Supreme Court will soon render a decision that could have a significant impact on the manner in which some states tax income accumulated in nongrantor trusts. The case pending before the U.S. Supreme Court, *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust* (No. 18-457), involves a North Carolina statute that assesses a tax upon the undistributed income of a nonresident trust based upon the residence of trust beneficiaries within the state. The North Carolina Supreme Court found the statute to be unconstitutional as applied to a particular trust and, in a somewhat surprising development, the U.S. Supreme Court granted certiorari and will hear the North Carolina Department of Revenue's case. State legislatures and wealth management professionals anxiously await the U.S. Supreme Court's decision due to its potential impact on state coffers and the trust industry nationwide, particularly in jurisdictions like Delaware that generate substantial business from trusts settled by, and for the benefit of, out-of-state residents.

The Kaestner Case

The trust at issue in *Kaestner* derived from a trust that was originally settled by a New York resident in 1992 for the benefit of his three children. One of the settlor's children, Kimberly Kaestner, moved to North Carolina in 1997. In 2006, the original trust was divided into three separate trusts for administrative convenience, with one such trust for each of the settlor's three children and their respective descendants. The trusts, including the trust for the benefit of Kimberly Kaestner and her descendants (the "Trust"), remained governed by New York law.

During the years at issue, the trustee of the Trust was a resident of Connecticut and the Trust's assets were maintained by a custodian in Massachusetts. The Trust's books and records were maintained in New York and the Trust's accountings were prepared in New York. Consequently, the Trust's only connection to North Carolina was the residence of the Trust's beneficiaries.

Under the terms of the Trust's governing instrument, Trust beneficiaries did not have an absolute right to Trust principal or income, but rather the trustee had discretion to make distributions. No distributions were made to beneficiaries in North Carolina during the years at issue, although a loan was made to Kimberly Kaestner to enable her to pursue an investment opportunity during the relevant period, but the loan was subsequently repaid.

From 2005 to 2008, North Carolina assessed taxes upon the Trust's accumulated income in excess of $1.3 million pursuant to a North Carolina statute that applies an income tax that is "computed on the amount of the taxable income of the estate or trust that is for the benefit of a resident of [North Carolina]." N.C. GEN. STAT. § 105-160.2 (2017). The Trust paid the assessed taxes and subsequently requested a refund from the state. After the refund request was denied, the Trust filed a complaint challenging the constitutionality of the North Carolina statute. The Trust successfully argued at both the trial level and intermediate court of appeals that the North Carolina statute is unconstitutional as applied to the Trust.

In affirming the courts below, the North Carolina Supreme Court found that the North Carolina statute violated the Due Process Clause, as applied to the Trust. *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 814 S.E.2d 43, 51 (N.C. 2018). The Fourteenth Amendment of the United States Constitution provides, in part, that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend XIV. In the taxation context, the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id*. at 48 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)). The minimum connection requirement (commonly known as the "minimum contacts" requirement) is satisfied when the entity sought to be taxed "purposely avails itself of the benefits of an economic market" in the taxing state "even if it has no physical presence in the State." *Id.*

Although trusts are not entities in the traditional sense, the North Carolina Supreme Court recognized that nongrantor trusts are treated under the Internal Revenue Code and North Carolina law as separate entities for tax purposes. Critical to its ruling, the North Carolina Supreme Court found that a taxed entity's minimum contacts with the taxing state cannot be established by a third party's (i.e. the beneficiary's) minimum contacts with the state. The Trust, as a separate taxable entity, would have needed to purposely avail itself of the benefits and protections offered by the State, and mere contact with a North Carolina beneficiary does not suffice. Ultimately, the North Carolina Supreme Court determined that the due process requirement could not be satisfied in this instance because "it was the beneficiaries, not the Trust, that availed themselves of the benefits and protections of North Carolina's laws." *Id*. at 49.

Delaware Connection - Overview of Fiduciary Income Tax Approaches around the Country

States use a variety of methods to tax trust income. Some states, like North Carolina, aggressively target trusts based on *de minimus* connections to the state. Nearly half of all states tax a trust's accumulated income and capital gains merely because the settlor resided in the state at a particular time, for instance at the time the trust was funded, when the trust became irrevocable, or at any time during the current tax year. Some states, including New York, Massachusetts, Missouri and Ohio, tax trusts created by residents if certain other contacts with the state exist, such as if a trustee or beneficiary are present in the state or if some trust administration occurs in the state.

Other states, like Delaware, South Dakota, and New Hampshire, have favorable tax environments to encourage settlors and fiduciaries to administer trusts in their respective jurisdictions. Delaware, similar to other leading trust jurisdictions, does not

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generally impose taxes upon trusts except in cases where one or more trust beneficiaries live within the state. Even then, Delaware only taxes the portion of the trust income attributable to the Delaware resident beneficiaries. Consequently, Delaware is a popular jurisdiction for out-of-state settlors because it may be possible to eliminate state income taxes on undistributed trust income, allowing trust assets to grow at a greater rate.

Delaware's Approach to Fiduciary Income Taxation

The manner in which Delaware taxes a trust is based on whether a trust is a "resident trust" or "nonresident trust." A non-grantor trust is treated as a "resident trust" for Delaware income tax purposes if:

a. The trust is created by the will of a decedent who at death was domiciled in Delaware; or

b. The trust is created by, or consists of property of, a person domiciled in Delaware; or

c. During more than half of any taxable year, the trust has only one trustee who is either a Delaware resident individual, or a corporation, partnership or other organization having an office for the conduct of trust business in Delaware; or

d. During more than half of any taxable year, the trust has more than one trustee and one of the trustees is a corporation, partnership or other organization having an office for the conduct of trust business in Delaware; or

e. During more than half of any taxable year, the trust has more than one trustee all of whom are individuals and one-half or more of whom are Delaware residents. 30 Del. C. § 1601(8).

Indeed, many trusts qualify as "resident trusts", within the meaning of Section 1601(8) of Title 30 of the Delaware Code, because the trust has a Delaware trustee without any other connection to the state.

A Delaware nonresident trust is any trust that is not a resident trust. 30 Del. C. § 1601(5). Delaware nonresident trusts are only subject to Delaware state income tax to the extent that they have items of income, gain, loss and deduction derived from, or connected with, sources located within the State of Delaware. 30 Del. C. § 1639. Consequently, nonresident trusts, even those with Delaware beneficiaries, are frequently not subject to Delaware income taxation. Indeed, a nonresident trust that does not have Delaware source income is not even required to file a Delaware income tax return. 30 Del. C. § 1605(b)(1).

Delaware resident trusts are potentially subject to the Delaware income tax imposed upon individuals, but are allowed income tax deductions for (i) federal distributable net income that is actually distributed and (ii) federal taxable income (including capital gains), as modified for Delaware purposes, that is set aside for future distribution to nonresident beneficiaries. 30 Del. C. § 1635 and 1636. The practical effect of these two deductions is that a Delaware resident trust never pays Delaware income tax if (1) the trust has no living beneficiaries who are residents of Delaware; and (2) the trust's beneficiaries are not identified as a result of their relationship to a Delaware resident. In cases where one or more beneficiaries reside in Delaware, the portion of the trust's accumulated income and accumulated capital gains allocable to the Delaware resident beneficiaries is subject to Delaware income taxation. A resident trust that has no Delaware resident beneficiaries is not required to file a Delaware income tax return. 30 Del. C. § 1605(b)(1).

Takeaways

The most obvious risk that *Kaestner* poses to Delaware is that the U.S. Supreme Court will expand the view of what constitutes a "minimum contact" in the trust context, thereby making it more difficult or perhaps impossible for some Delaware resident trusts to avoid taxation by other states. If, for example, North Carolina is permitted to tax income accumulated in a Delaware resident trust based upon a beneficiary's residence in North Carolina, the perceived advantage of establishing a resident Delaware trust may at first glance diminish. Moreover, other states may enact similar statutes, which could increase the cost and burden of administering a trust with beneficiaries in numerous jurisdictions. It should be noted, however, that even if the North Carolina statute is upheld as applied in *Kaestner*, planning opportunities designed to avoid or mitigate the impact of such a statute likely will abound.

More than a dozen amicus briefs have been filed by industry groups, academics and states. The highly-anticipated argument before the U.S. Supreme Court is scheduled for April 16, 2019.

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Selecting Your Personal Trustee

A Decision Fraught With Pitfalls and Potential Missteps

by
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and
Theresa L. Hughes, MBA, CTFA, AEP®

The selection of a trustee for one's personal trust is arguably as important as the provisions of the trust itself; it should not be an afterthought, considered to be inconsequential. We will discuss many of the factors one should consider in the selection process.

We have worked together for a number of years for traditional "corporate" trustees, most recently with a directed trust company with a modern business model. We have worked in the personal trust industry for a combined 75 years, plus or minus, and have seen a great many changes in the profession we have chosen for our careers.

But while the way in which trusts are being used today, (for example, the great change in the taxation of estates, and the evolution toward the "tri-furcation" of trustees' responsibilities, the Dynasty Trust with no rule against perpetuities, the use of decanting to effectively change the provisions of a trust, and the evolution of the role of the Trust Protector) one of the things that has not changed is the necessity of identifying the right trustee for one's personal trust.

We will start by considering the various functions that a trustee of a personal trust may be required to perform, then we will look at the choices of trustees available today, with our assessment of the strengths and weaknesses of each type of trustee.

First, though, it would be helpful for the uninitiated to define the term "personal trust."

At its simplest, a trust is a set of instructions (normally written) telling the trustee what to do with the trust assets (sometimes called the trust corpus, or body) for the benefit of the beneficiaries (usually defined as current beneficiaries and remainder beneficiaries – those remaining after the grantor or initial beneficiaries are deceased).

Functions A Personal Trustee May Perform

The basic functions required of most trustees are:
o Provide for safekeeping of trust assets, such as bank accounts and brokerage accounts,

as well as virtual holdings such as hedge funds, derivatives, and LLC interests,

o Accounting to current and remainder beneficiaries regarding trust assets, investments, and transaction activity on a timely and periodic basis,

o Overseeing the management of the trust's investments, except where the investment function is "directed" to a directed investment advisor,

o Ensuring that trust tax reporting is completed in a timely manner, either in-house or outsourced to a competent firm, as well as ensuring the tax information is provided to the grantor and/or beneficiaries,

o Making required distributions as defined in the trust's terms, and

o Making discretionary decisions in accordance with the terms of the trust regarding the distribution of income and/or principal of the trust, except where the distribution function is "directed" to a directed distribution advisor.

An effective trustee will have many years of experience administering trusts. They will work with both those establishing trusts (grantors) and those who benefit from the trusts (beneficiaries). A professional trustee typically will have 7 to 10 years of experience to be qualified to competently administer a trust.

The expertise that a professional trustee absorbs over those years crosses many fields, including:

o The entirety of trust law, including statutes, regulations, private letter rulings, and case law.

o Financial planning, including budgeting and managing the trust's cash flow.

o Trust accounting, which typically includes the separate accounting for the beneficiaries who receive current income and those who have an interest in the principal upon the death of current income beneficiaries.

o Real estate transactions and management, both of residential and commercial properties, which a trust might hold.

o An understanding of business, especially closely held or family businesses, which could vary from farms, vineyards, and agricultural holdings, to a pharmaceutical company or a hotel. A trust may hold such assets, and the trustee must be qualified to make sound decisions in the on-going administration and eventual disposition of such assets.

o State and federal income and estate taxes, specifically as they relate to the highly complex taxation of trusts.

o Investments, including traditional stocks and bonds, oil and gas interests, hedge funds, commodities, mutual funds, exchange traded funds, and other miscellaneous assets.

o An understanding of psychology, including dealing with various family dynamics and conflicts. Many trustees have been trained in facilitating family meetings and counseling multiple generations within a family, ensuring the continuity of the family's wealth, and the legacy left by the founder of the wealth.

o A broad knowledge of charitable planning and wealth preservation, including helping wealthy families teach younger generations how to preserve wealth and use it for worthwhile purposes. A good trustee will help families to develop human, social, and intellectual capital as well as preserving wealth.

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Types Of Personal Trustees
There are a number of options available in the selection of a trustee to carry out the duties and responsibilities of a personal trust. Those options fall into the category of Corporate Trustees and Individual Trustees.

Corporate Trustees
One common feature that is considered an advantage of working with corporate trustees is that a corporation doesn't die. It lives forever, and while individual employees may come and go in the role of trust officer, the entity will exist indefinitely. This can remove some uncertainty as to the consistent administration of a trust compared to naming an individual trustee.

Other advantages of corporate trustees include having trust accounting systems for reporting and tracking income and principal account activity, policies and procedures that are acceptable to state and federal bank regulators, and periodic internal audits and examinations to ensure they are carrying out and documenting their fiduciary activities and responsibilities properly.

Types Of Corporate Trustees
o Large, National Money-Center Banks
o Regional Banks
o Community Banks
o Independent Trust Companies

There are several different kinds of corporate trustees. The most traditional are the large, national money-center banks, such as JP Morgan, Citibank, Wells Fargo, and Bank of America. Also included in this category are the large, multi-family office institutions, such as Bessemer Trust.

When working with corporate trustees, some trust beneficiaries have found that the policies and procedures in place can cause delays in completing discretionary and investment decisions. The reason for this is that most decisions are made through committees that meet on a periodic basis that may not fulfill the timeline needs of the beneficiaries. They may also be slow to respond to inquiries from beneficiaries and other interested parties. There can sometimes be a high level of employee turnover, which can be disruptive and create delays to the administration of the Trust and the relationships formed between with corporate trustee and interested parties.

Because large banks are often more bottom-line driven and have higher overhead, their fees are often higher than regional or community banks and much more costly than individual trustees' fees. They typically have higher minimum fees, essentially eliminating much of the trust market. Some have minimum trust asset market value requirements as high as $25 million. Most will not accept a trust unless it is at least $2 million in total market value.

A large institution will often be willing to take on more complex trust administration than small banks, independent trust companies, and individual trustees. Offsetting this is their frequent unwillingness to take one-off trusts that are not associated with a large family relationship such as Irrevocable Life Insurance Trusts (ILITs) and Supplemental Needs Trusts (SNTs) for special needs beneficiaries.

Smaller, regional banks, such as SunTrust and BB&T, work much like the large, money-center banks, so we will not differentiate them, except that their fees might be slightly lower.

However, community banks can differ significantly from the larger banks, being local, and frequently have lower fees than the larger banks.

Independent trust companies are another option in the Corporate Trustee category. They differ widely, and many have unique business models that may be attractive. For example, some independent trust companies specialize in special needs trusts, some in self-directed IRAs, and others in highly complex trust administration. They may also have very limited investment options, including outsourcing their investment capabilities to a third-party manager, using an ETF-only investment option, or in some cases, will serve only as a directed trustee with no investment management capability. Fee methodology (that is, flat fee or asset-based fee) and minimums can vary widely, so it is best to shop carefully.

Individual Trustees
o Family Member
o Family Advisor
o Professional Individual Trustee

A family member is frequently named as trustee simply because there seems to be no other logical choice. The advantage to having a family member serve as trustee is their knowledge of the family dynamics and values.

Family members have the benefit of knowing the dynamics within a family, but they are generally not a good option, as they often have limited time to carry out trustee responsibilities and do not have the necessary experience, resources, or systems to fulfill the duties of a trustee. They can be challenged with a multitude of conflicts that may preclude the ability to make sound, unbiased discretionary decisions. Family members may not understand trust reporting requirements. Examples of family members not performing adequately in their capacity as trustee could be failure to report to the beneficiaries the trust's assets, investment strategy, or the terms of the trust that detail the income or principal to which the beneficiary may be entitled. Such situations drive families apart and frequently result in litigation. Fiduciary litigation attorneys tell us that the majority of fiduciary lawsuits are against family member trustees and not corporate trustees.

Family advisors are individuals who are also available to families who do not wish to name a family member as trustee.

o Financial advisors may serve as individual trustees but they may not have the requisite experience. Many financial advisory firms' compliance departments do not allow them to accept trustee appointments.

o Attorneys and CPAs sometimes accept individual trustee appointments and can handle simple trust administration, but typically are not well suited to the more complex aspects of trust administration, such as working with grantors and beneficiaries or managing closely held businesses owned by trusts. They seldom have an experienced trust officer on their staff to provide the client service expected by grantors and beneficiaries.

The professional individual trustee is a somewhat newer and less obvious choice. A number of trust professionals from the banking world have established themselves as professional, independent, individual trustees, filling a big gap between large and small institutional trustees and family members.

A professional individual trustee's primary responsibility is trust administration. They are typically individuals who have years of experience working in the trust industry and understand fiduciary duties, and they have the independence and ability to be unbiased. An experienced individual trustee provides the benefits of an experienced corporate trustee without burdensome bureaucracy and high fees.

It is important to choose a professional individual trustee that has the willingness and ability to handle complex trust administration when necessary. If the individual trustee you choose has the capabilities to administer the trust, they are likely to be responsive, stable, and the least expensive trustee solution.

Conclusion

There is a broad range of possibilities to consider in the selection of a trustee. This decision determines the experience the grantor and beneficiaries will have for the duration of the trust.

Over the years, we've heard grantors select a trustee based upon where they have their checking account or choose a family member because no other options were discussed. Choosing a trustee that can best carry out the intent of the grantor should be of primary consideration.

We've shown that potential trustees have a wide range of capabilities, regulation, sensitivity, experience, systems, and business models. It is incumbent upon those advising clients, and the trust creators themselves, to evaluate all of the options and to select a trustee based upon the best long-term interest of the trust and the beneficiaries.

Richard Trumpler has spent over 40 years in the personal trust business, having managed trust companies from Maine to Florida, from very large to very small, and with a wide range of business models from traditional, directed trustee, and brokerage affiliated trust companies. He founded Trumpler Wealth Consulting LLC and advises individuals, trust companies, and investment advisory firms.

Theresa L. Hughes has worked in the trust industry for over 35 years in multiple capacities in various trust departments. She has spent a third of her career as Chief Fiduciary Officer for several trust companies. Theresa is highly knowledgeable about trust administration in general and Delaware trusts in particular. She is currently accepting appointments as a professional individual Delaware directed trustee.

Sustainability Is Not Just for the Polar Bears

How Financial Institutions Win with Sustainability

by
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You might believe you can ignore global sustainability because it's some far-left, crunchie, hippie movement to save the polar bears that is completely removed from you. Or you might think that you can ignore it because you believe you are already doing your part by recycling, drinking your water from a reusable bottle and, when you remember, bringing reusable shopping bags to the grocery store. The truth is that sustainability is so much more than that.

So, what is global sustainability?

Sustainability is commonly referred to as a policy that takes into consideration an entity's impact on the environment, society (people and their communities) and governance - ESG. More specifically, environmental criteria address how companies perform as stewards of the natural environment in the communities where they operate and in those of their suppliers. We all impact the environment on a daily basis – even banks, and we all are subject to the global climate change risks. Banks, for example, while they generally don't have the same waste issues as a manufacturing company, need to be concerned with their energy usage both physically and digitally. Banks need resiliency plans to protect against hurricanes, flooding, storms, or other natural disasters.

Social criteria examine how companies manage their relationships with their employees as well as those in their supply chain. This includes, for example, ensuring that they are not purchasing supplies including computers or other electronics made with child labor in China. It means ensuring that the organization has diversity throughout its operations – both on the ground level as well as the c-suite and boardroom. This includes gender diversity, racial diversity, and thought diversity, among others. It includes a company's impact on the community in which it operates. Does the company benefit the local community by providing livable-wage paying jobs, good health and wellness programs for its employees? Does the bank contribute to local economic development? Improving the local education system?

Governance criteria boil down to integrity. It is how a company deals with its leadership, executive pay, audits, internal controls, and shareholder rights. Is the board of directors committed to not harming the environment? To diversity? Does it tie the compensation of its leadership to improving the company's impact on the environment, or diversity, or any other sustainability factors? Does the organization have a social purpose that is integrated into the fabric of its mission, vision, and business strategies? Governance issues are critically important for banks to earn the trust of the public and their clients.

Big business has already figured out the importance and value of sustainability. Of the world's 250 largest businesses, 92% report on sustainability measures. Eighty-six percent of the S&P 500 companies report on sustainability. This is up from 20% five years prior in 2011. Large banks in particular are generally very committed to sustainability, including Bank of America, Citi, JPMorgan Chase, Legg Mason, Morgan Stanley, State Street, U.S. Bank, and Wells Fargo. JPMorgan for example, spends hundreds of millions of dollars a year on its sustainability efforts. Bank of America and Citigroup each has sustainable financing commitments of over $100 billion per year!

Why do these large businesses care?

It's more than wanting to make the world a better place. It actually makes business-sense to do so. Three stakeholder groups are driving the push for more sustainability: investors, employees, and consumers.

Investors look to sustainability performance as a sign of strong management and governance, and long-term thinking. There are dozens of stock exchanges worldwide dedicated to sustainable companies. Globally, there are now over $22 trillion of assets being professionally managed under responsible investment strategies, an increase of 25 percent since 2014. Sustainable investing is an investment approach that considers environmental, social and governance factors in portfolio selection and management. A growing mountain of evidence shows the direct, positive correlation between a company's focus on sustainability and its performance.

As for employees, millennials want to work for a company that has sustainability policies in a job that is fulfilling. Eight in 10 millennials think the private sector has a very important role to play in achieving global sustainability. And, by 2025, 75% of the workforce will be millennials. This is six years away. Banks that want to attract and retain top talent would be wise to commit to sustainability or they risk losing out on the best and brightest employees.

Consumers are also driving the push for more sustainability in the purchases they make. A 2017 study showed that 87% of consumers will purchase a product if the company advocated for an issue they cared about, and 75% would refuse to purchase a product if the company represented an issue the consumer opposed. In fact, over 50% of the study participants had boycotted a company within the preceding year for bad business practices.

Smaller and mid-sized companies that are engaged in B2B supply chain sales with larger companies are starting to be required by those larger companies to adopt sustainable practices in order to continue doing business. Banks in particular are well-positioned to help these small and medium sized companies finance sustainability initiatives, enabling their clients to prosper through increased contracts with their uber-large, super-sustainable customers. It will only be a matter of time before these larger companies start asking their service providers (bankers, lawyers, accountants, marketing companies, etc.) to commit to sustainability in order to continue to serve the company.

Not only will a commitment to sustainability attract investment, top talent and sales, but it will also naturally cut costs, as organizations seek ways to be more efficient, both in processes as well as utilities including water and energy. Some may protest and say that it costs more to be environmentally friendly. The issue is not whether there are upfront costs to becoming more efficient. There might be. The challenge is to identify which upfront investments in process and product efficiency will pay off in the long run. The challenge is to invest in innovation that has the potential to solve world problems while providing a new product or service to the marketplace, the sales of which will more than recoup the cost of investment.

Why is global sustainability relevant for banks?

Banks are uniquely positioned in the marketplace not only to improve their own operational impact on the world, but also to support and propel their customers' impact on the world. This magnifies the importance for banks to get on board with global sustainability. The International Finance Corporation, through numerous studies, shows the direct link between a bank's ESG practices and its stronger growth and higher, more stable profits.

Top 10 Sustainable Risks and Opportunities for Banks

***Environment**

1. Energy conservation (especially relating to data storage, travel).
2. Sustainable buildings and real estate, including strong resilience plans for climate-change related disasters like floods, hurricanes, droughts, or fires.
3. Offering sustainable products for clients, including green bonds, green finance, and sustainable lending.

*** Social (People and Community)**

4. Diversity from the board through leadership
5. Strong culture of engagement with and giving back to the local community both financially and through volunteerism
6. Strong health and wellness programs for employees

*** Governance**

7. Company has a social purpose, mission, and core values focused on long-term sustainability
8. Board-level commitment to sustainability
9. Integrated reporting of its sustainability and financial performance data
10. Executive compensation tied to sustainability targets

Banks can have a tremendous reach incentivizing sustainability through their lending and investing. The sustainability financing market was $247 billion last year and growing significantly. Banks can provide green financing – including green bonds, and lending money for projects that are going to be good to the environment. But they can go much further. They can adopt a lending policy that organizations committed to sustainability will receive a lower interest rate. The difference between green financing and sustainability-related loans are that the green financing supports projects that are specifically good for the environment, whereas sustainability-related financing supports the use of funds for any purpose (not just environmental), but to organizations that are committed to sustainability. In those projects, the interest rate varies based on how well the borrower hits sustainability targets.

Why would a sustainable company warrant reduced costs for borrowing? In part, they are a reduced risk. Companies that are committed to sustainability are outperforming their non-sustainable peers, as growing evidence shows. This makes them less of a credit risk. Early adopters of these "positive-incentive loans" include ING Bank, BNP Paribas, and Barclays. One of, if not the first sustainability loan was issued in 2017 by ING for $1.2 billion to a Dutch electronics company. Barclays, for another example, entered into a $1.4 billion sustainability-linked revolving loan with CMS Energy. If CMS reaches certain environmental sustainability targets, then they can reduce their interest rate on new credit. In 2018, global sustainability-linked loans was over $36 billion.

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These sustainability-linked loans offer banks an expanded market opportunity. Rather than simply divesting its portfolio of certain products – coal, oil and gas, tobacco – engaging with the client to incentivize the client to become more sustainable yields a win-win-win for the bank, the client, and society. The bank wins because it has increased market opportunities (divestiture represents the reduction of market opportunities). The client wins because they have the ability to secure funding at a reduced rate if they meet certain sustainability targets. And society wins because our planet is better off when companies act sustainably.

Sustainability products further reduce risks for banks because they are identifying and weeding out properties that have costly environmental liabilities. Banks don't want to acquire properties due to failed loan repayments that come with a tremendous clean-up cost. A bank doesn't want to offer a 15-year loan to a company that is in an industry that will likely be out of business in 10 years because it is unsustainable. Sustainability plays a large part in future predictions of a company's well-being.

Increasingly, bank clients want to work with banks that are sustainable in their own operations and that understand and can support the client's commitment to sustainability. Equally as important, banks can serve a role in educating their clients and potential clients as to what sustainability is and why it can benefit the client. Once the client sees the value in sustainability and realizes they will receive more favorable loans from the bank by becoming sustainable, the client would be hard-pressed not to adopt sustainability strategies. Thus, training of banking associates in sustainability is critical.

All of these considerations bring us back to the mindset shift that needs to occur in order for sustainability to thrive. We need to expand our thinking, broaden our horizons, and truly understand the power of sustainability to enhance our collective lives – both business and personal.

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Compliance Focus

by
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"Both state and local governments are increasingly active in enacting legislation and regulations impacting financial institutions and their customers."

Considering Local Government Regulations in RCM Programs

While financial institutions continue to improve tracking and management of financial services-specific laws and regulations at the federal level, many are challenged by identifying and analyzing changes to laws and regulations at the state, county and local levels. This is especially difficult when institutions manage a large variety of operational risks such as deploying innovation strategies, or covered activities for non-financial topics such as human resources, healthcare, tax and corporate governance.

One area in which financial institutions have seen increased complexity is cybersecurity and privacy. When an institution is considering a new technology, it must consider how privacy and cybersecurity risk management is built into the entire lifecycle of the product or service, whether it plans to deliver the product or service to consumers directly or through a third party. Both state and local governments are increasingly active in enacting legislation and regulations in this area.

For example, in San Francisco on November 6, 2018, voters approved a "Privacy First Policy." This amendment to the city's charter is intended to cover the city's government, but the definition in the ordinance could capture private businesses. The ordinance imposes requirements not only on all City boards, commissions, departments, other entities, and officials, but also on "any or all contractors, lessees, grantees, third parties receiving permits, licenses, or other entitlements, or others, within the jurisdiction of said boards, commissions, departments, other entities, and officials." This broad applicability means financial institutions need to examine whether they are captured under one or multiple authorities, such as when the firm serves as contractor to the defined set of entities. The measure requires that companies disclose data collection practices and ensure consumers' personal information is secure in order to obtain government contracts. The requirements cover any entity that has contracts, leases and/or permits with the city and the information these entities collect on both residents and visitors.

This is just one example demonstrating the need for financial institutions to track regulatory change at multiple levels. In the area of data protection, this means each level from international to local municipalities. From the EU's sweeping General Data Protection Regulation (GDPR), to states such as Louisiana, Colorado and California updating data breach notification laws and enacting new data governance regulations, to new ordinances at the city and county levels, staying abreast of applicable requirements has never been more challenging.

An effective Regulatory Change Management program includes:

- A regulatory applicability matrix that maps the organization's structure and links the universe of regulations applicable at all government levels to each business, product or service, delivery channel or other internal program subject to regulatory oversight.
- Tracking changes at all levels and at all stages, such as a proposed or final rule, updates to examination procedures or topic-specific guidance.
- Analyzing the details of a new regulatory event to determine the impact to the institution. This initial impact analysis could range from an "all hands-on deck" red flag to simply acknowledging that no action is required. Each decision point should be documented.
- A strategy to implement changes as a response to the regulatory change event. This includes a communication strategy that ensures the right people receive the right information at the right time. This is especially important when changes occur at multiple levels, as both solution owners for local branches and staff/executives at higher levels must remain informed regarding new policies.

By including local-level developments in their RCM program, financial institutions can ensure that they stay informed and ready for all applicable changes, minimizing risk and remaining prepared in the ever-changing and increasingly nuanced regulatory landscape.

This article was excerpted from Capco's Regulatory Intelligence Briefing (RIB), Issue 2, 14 March 2019. For the complete RIB or to register your colleagues to receive regular updates from Capco's Center of Regulatory Intelligence, email capco.cri@capco.com.
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Accounting for Success

by
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"For years 2018 through 2025, taxpayers can no longer claim deductions for unreimbursed business use vehicle expenses."

2018 Tax Cuts and Jobs Act – Auto Provisions

The Tax Cuts and Jobs Act (TCJA) made several changes to the automobile provisions, which results in various increased benefits for business owners. One of the beneficial changes from the new law is the rise in the allowable depreciation of automobiles. Like the prior law, passenger automobiles are subject to annual dollar caps on allowable depreciation. However, the new provisions significantly increased the caps on depreciation limits for passenger vehicles acquired and placed in service after December 31, 2017 and before January 1, 2027. The act also extended the $8,000 increase in the first-year depreciation in which bonus depreciation is elected for qualified property acquired and placed in service after September 27, 2017 and prior to January 1, 2027.

If the taxpayer doesn't take bonus depreciation, the allowable annual deductions are as follows:

- $10,000 for the first year (pre-TJCA $3,160)
- $16,000 for the second year (pre-TJCA $5,100)
- $9,600 for the third year (pre-TJCA $5,100)
- $5,760 for each succeeding taxable year (pre-TJCA $1,875)

If the taxpayer claims 100% bonus depreciation, the allowable annual deductions are as follows:

- $18,000 for the first year (pre-TJCA $11,160)
- $16,000 for the second year (pre-TJCA $5,100)
- $9,600 for the third year (pre-TJCA $5,100)
- $5,760 for each succeeding taxable year (pre-TJCA $1,875)

These allowances will be adjustable for inflation for vehicles placed in service after December 31, 2018.

If the passenger vehicle is not used 100% for business, the allowable deduction is reduced proportionally based on the percentage of personal use versus business use.

For passenger automobiles built on truck chassis (qualifying trucks and vans) the IRS provides a different indexing component which generally results in slightly higher limits. Presumably the use of the differing index factor will continue with the new rules when determining the automobile price inflation adjustments for these types of vehicles placed in service after calendar year 2018.

The TCJA also increased the allowable first-year bonus depreciation to 100% (instead of 50%, as under prior law) for heavy SUVs, pickups, and vans that are used greater than 50% for business. This is available for assets placed in service between September 27, 2017 and December 31, 2022. Heavy sport utility vehicles and other heavy vehicles continue to be subject to a $25,000 Section 179 limit on a per-vehicle basis adjustable for inflation, which will begin after calendar year 2018.

One downfall to the change in auto rules from the TCJA is the elimination of employee deductions for unreimbursed vehicle expenses. Under the prior law, taxpayers could claim an itemized deduction for total unreimbursed business use vehicle expenses subject to a 2% of adjusted gross income threshold for miscellaneous itemized deductions. Beginning January 1, 2018 through December 31, 2025, the new law eliminates the miscellaneous itemized expenses that were subjected to the 2% of adjusted gross income threshold under prior law. Thus, for years 2018 through 2025, taxpayers can no longer claim deductions for unreimbursed business use vehicle expenses.

Overall, these enhanced auto allowances provide more acceleration options for deducting expenses.

DBA Calendar of Events

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

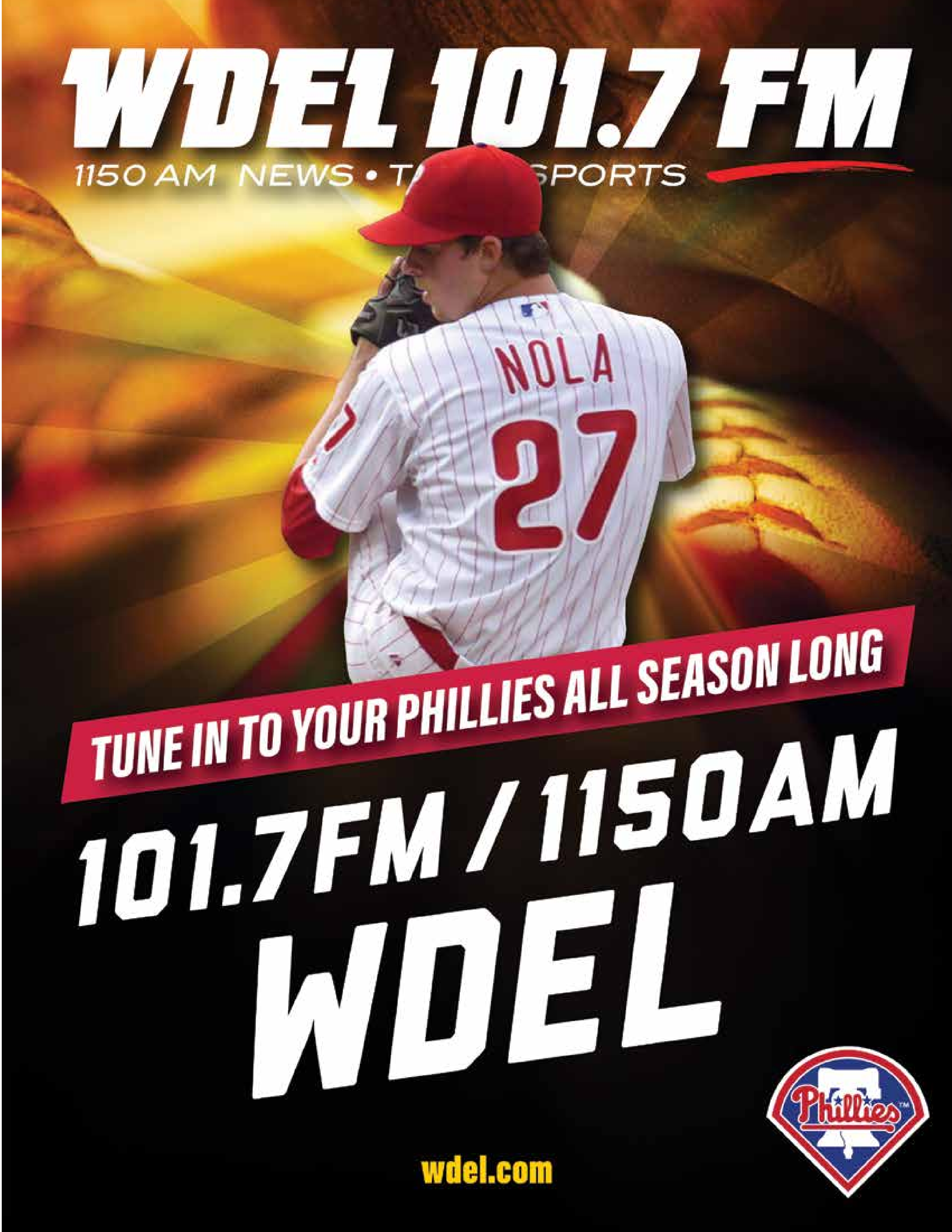
Follow us on Twitter @DBAbankers

May 7th - DBA Women Connect - 8:30 a.m. - 4:00 p.m. - Deerfield Country Club, Newark. The next Women Connect event will focus on personal, community, family, and professional well-being.

May 16th - 124th Annual DBA Meeting and Dinner - Join the DBA at the historic Hotel du Pont with dinner in the Gold Ballroom. Keynote speaker will be Jelena McWilliams, Chair of the Federal Deposit Insurance Corporation.

September 27th - FDIC Director's College -
8:15 a.m. - 1:30 p.m. - University of Delaware Virden Retreat Center, 700 Pilottown Road, Lewes, DE 19958 - 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 22nd & 23rd - 2019 Delaware Trust Conference - ***Delaware Trusts: Built to Last***
Chase Center on the Riverfront, Wilmington. The 2019 Delaware Trust Conference provides attendees with the information and strategies to take advantage of the unique Delaware trusts atmosphere. Sponsorships and Exhibitor space available!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For Your Benefit

by
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"While we know the HSA is part of the health benefit plan, it's also an important piece to help boost retirement readiness. "

Health to Wealth – A Blurry Line Coming into Focus

Many of us know about health savings accounts (HSA's) as a health benefit, but did you know they can also play an important role in retirement saving?

Because health and medical costs are the no. 1 expense in retirement, it's important to factor the high cost of health care into retirement savings. Fortunately, HSA's can help solve for both current and future health care needs by providing an investment option employees can use long-term. And for plan sponsors, HSA's make efficient use of your entire benefits package by covering both health and retirement.

It's important to understand the retirement health care savings gap – and the impact it can have on your workforce – as well as the role HSAs can play in retirement planning.

A cohesive plan design – including HSAs – can help you connect the pieces between health care, HSAs and retirement wellness to ultimately help employees save enough to retire on time.

According to a Government Accountability Study those closest to retirement (Ages 55-64), retirement savings on average amounts to $104,000. That's dismal, especially when you consider the cost of health care alone for a healthy 65-year-old couple could be upwards of $404,000.

Unfortunately, many employees aren't prepared to cover this gap. Health care costs are the single biggest retirement expenditure. And, for most people, their current health care coverage isn't going to last into retirement.

A 2014 National Health Interview Survey found just 14% of employers cover health care costs for retirees -- down from 24% in 2005.

Employees are rightfully worried about how they'll pay for their health care in retirement.

HSA's are a triple tax exempted vehicle that can help. Health savings accounts are a tax advantaged trust or custodial account created for the benefit of an individual covered under a qualified high deductible health plan. Money is contributed pretax, accumulates tax free and can be used to pay for medical expenses tax free. The accounts are portable and unused balances can be carried forward to future years allowing for unlimited accumulation opportunities.

HSAs not only blur the line between health and wealth… but also between employer-sponsored benefits and individual responsibility.

While we know the HSA is part of the health benefit plan, it's also an important piece to help boost retirement readiness. It's important to create a retirement readiness culture for your employees.

Plan design features that include thoughtful investment options and integration with your retirement plan can start to move the needle on retirement readiness.

But to drive better retirement outcomes the key is plan design plus employee engagement because it will take meaningful engagement and information to get employees to save at adequate levels – including saving enough to cover the significant health care costs they'll face.

Consult a qualified adviser with experience in integrating health and welfare plans with employee savings and retirement programs to design a program with robust educational options that fit the culture of your workforce.