Delaware Banker

Winter 2020
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How to Manage a Bank Examination

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View from the Chair

by
Elizabeth D. Albano
Executive Vice President
Artisans' Bank

Chair
Delaware Bankers Association

"You are the latest in a long line of professionals serving the residents of the First State."

Comedian George Burns once said: "If you live to be one hundred, you've got it made. Very few people die past that age." Well, George Burns did make it to his 100th birthday, but we've got that beat!

2020 is an exceptional year for the Delaware Bankers Association. We are celebrating our 125th Anniversary. Of course, George Burns did his 100 years all by himself. I don't think any of our members were around in 1895, least of all working in the banking industry. But our predecessors have an impressive record of accomplishment.

What has the DBA been doing these past 125 years? Your association has been advocating for the banking industry, helping to draft, monitor, and support legislation. Currently, the financial services industry is one of the most vital private industries in Delaware, employing over 47,000 individuals. A figure that dwarves the number employed just 40 years ago. Much of that growth and vibrancy is due to the enactment of the business- and banking-friendly laws advocated by the DBA.

The DBA has also had a consistent record in the field of education. Your association helps new bankers acquire the skills needed at the entry-level while supporting established career individuals with continuing education in the form of seminars, committees, and conferences.

The association is also active in the community. DBA member institutions provide grants to Delaware non-profit organizations (over $15 million in the past year). DBA members volunteer in the community as well, consistently giving their time to local civic groups and charities.

Those are just a few of the ways that banks contribute to make the First State a stronger place to live and work. And your Delaware Bankers Association provides the support and coordination to help make those efforts even more vibrant.

Anniversaries are celebrated with special gifts. A first anniversary is traditionally commemorated with a gift of something made out of paper. Year two is cotton; three is leather, four is flowers, and so on. The more precious things come in later years. We're all familiar with silver (25 years), gold (50), and diamond (60 years).

But what do you give an association, especially one that has survived and thrived for 125 years? Two gold watches and a silver tray (50+50+25)? Actually, something much more in keeping with our celebration of the DBA's quasquicentennial (125th anniversary)!

The next issue of Delaware Banker will be a special issue commemorating the 125th Anniversary of the Association. There will be plenty of history, special features, and more. That issue will also feature commemorative ads placed by our members, as well as a few celebratory surprises. The special issue will be released at the 125th annual dinner, May 14th at the duPont Country Club. I hope you will take advantage of this opportunity to join with your fellow member institutions to celebrate our collective anniversary.

So, no, none of the bankers here today were there at the founding of the DBA. But the current members of the Delaware Bankers Association are carrying well the standard of the financial services industry. You are the latest in a long line of professionals serving the residents of the First State. Thank you all for your dedication to your institutions and the community. Happy Anniversary to you all!

All the best!

Beth

THE POWER OF CHANGE

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President's Report

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

"We all need mentors to guide us, advocates to support us, and sponsors to elevate us."

What is the true meaning of success? Ralph Waldo Emerson, transcendentalist extraordinaire, philosopher, poet, author, essayist, believed that each must find his or her own "inmost truth" and bring that to "perfect expression in the world." Emerson's quote below articulates how one's actions, when expressed, can make a tangible impact on the world.

"To laugh often and much;
to win the respect of the
intelligent people
and the affection of children;
to earn the appreciation of honest critics
and endure the betrayal of false friends;
to appreciate beauty;
to find the best in others;
to leave the world a bit better
whether by a healthy child,
a garden patch,
or a redeemed social condition;
to know that one life has breathed easier
because you lived here.
This is to have succeeded."

Ralph Waldo Emerson
The Infinitude of the Private Man

I was reminded of this quote earlier this month while attending a requiem in thanksgiving for Paul M. Muller, III, banker extraordinaire, friend, mentor, advocate, and sponsor, who had a keen eye for finding latent talent in people. Paul's "inmost truth" was that he was able, almost effortlessly, to identify that which someone was capable of, but of which they personally had not yet exhibited or achieved. I was indeed fortunate to be "Mullerized", as Paul's wife Pat coined the phrase.

Having a mentor helps you navigate your career more effectively. In a true mentoring relationship, you have the freedom to share concerns and ask the 'dumb questions.' Not only do those being mentored gain much, mentors take great personal pride in seeing their proteges succeed.

An advocate not only knows you and your work first-hand, they speak positively about you to others. Generally held in high regard, their voice gives you instant credibility. They ensure you are recognized for the work you do. They truly believe in your ability and will put their reputation on the line to create an opportunity for you to succeed.

A sponsor can make a hiring decision and move you along your career path. A sponsor fearlessly invests in your career, and in return, you must demonstrate that you are worthy of that investment. A sponsor not only sets high standards, they demand in an extremely thorough way, that you meet those standards. Successful sponsors build a reputation for identifying top talent.

Paul was all of these for me, as well as for countless others, and I am grateful.

I am also grateful for those, like Paul, whose "inmost truth" is to ensure through their actions the success of others. We all need mentors to guide us, advocates to support us, and sponsors to elevate us. May Paul's legacy serve to remind us that through our actions we are all empowered to leave the world a bit better. That is the true measure of success.

Sarah

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Photo (L to R) Daniel R. Stanek, Gregory J. Weinig, Charles J. Durante, Trisha W. Hall, Scott E. Swenson

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What's New at the DBA

Women Connect/ Legislative Meet and Greet

(l to r) Richard B. Carter, Director of Special Projects, Senate Majority Caucus, and Dr. Courtney Stewart, Deputy Secretary, Department of State, deliver a brief history on the passage of the 19th Amendment

(l to r) Melanie Ross Levin, Director, The Office of Women's Advancement and Advocacy moderates a discussion on the Family Friendly Workplace with Valerie Longhurst, House Majority Leader; and Drewry N. Fennell, Chief Communication and Experience Officer, Christiana Care Health Systems

Over 50 legislators and bankers gathered January 23rd, at the Delaware Agricultural Museum in Dover. Attendees enjoyed a networking brunch with Delaware's legislators; a commemoration of the 100th anniversary of the 19th Amendment; and, a panel discussion on a Family Friendly Workplace. The event was made possible by Platinum Sponsor: Capital One; Silver Sponsor: Charles Schwab Trust Company of Delaware; and Bronze Sponsors: The Bryn Mawr Trust Company of Delaware; Delaware Community Foundation; and, Discover Bank.

Strengthening Communities Forum

Cynthia Pritchard, CFRE, President and CEO, Philanthropy Delaware discusses the 2020 Census

(l to r) Susan Frank, Senior Vice President, Business Development, Cinnaire; Joseph Pigg, SVP and Sr. Counsel, American Bankers Association; Joel Schiller, Chief Risk Officer, Artisans' Bank; and Matthew Parks, Director, Discover Bank, discuss CRA modernization

Community Reinvestment officers and professionals, met January 31st for the Strengthening Communities Forum at the University & Whist Club in Wilmington. Cynthia Pritchard, CFRE, President and CEO, Philanthropy Delaware discussed the 2020 Census and offered compelling reasons why banks should become partners in the effort. Susan Frank, Senior Vice President, Business Development, Cinnaire; Joseph Pigg, SVP and Sr. Counsel, American Bankers Association; Joel Schiller, Chief Risk Officer, Artisans' Bank; and, Matthew Parks, Director, Discover Bank, provided a panel discussion on the proposed modifications to modernize the Community Reinvestment Act regulations. State Treasurer, Colleen C. Davis concluded the program with special remarks. The event was sponsored by Cinnaire.

Cybersecurity Forum

Cybersecurity professionals met on February 5th at the University & Whist Club to hear the region's top cybersecurity experts discuss the latest issues surrounding cloud security for financial institutions. Speakers included: Harry Perper, Chief Engineer at

The MITRE Corporation; Lawrence Cruciana, Chief Systems Engineer at Corporate Information Technologies; George Mach, CEO – CISSP, CounterAct Cybersecurity Group; Robert Nicholson, Solutions Integrator, Department of Technology and Information; Richard S. Mroz, Managing Director, Resolute Solutions, LLC; and, Dr. Jim Fraley, Chair, MS-IST Information Assurance, Wilmington University.

DBA
Cybersecurity Forum
February 5, 2020

(l to r) Richard S. Mroz, Managing Director, Resolute Solutions, LLC; Dr. Jim Fraley, Chair, MS-IST Information Assurance, Wilmington University; Lawrence Cruciana, Chief Systems Engineer at Corporate Information Technologies; Robert Nicholson, Solutions Integrator, Department of Technology and Information; and, George Mach, CEO – CISSP, CounterAct Cybersecurity Group

2020 Polar Bear Plunge

Renee Rau, DBA Education Coordinator, and Corinne Stayton, DBA Meeting and Event Planner, took the Lewes Polar Bear Plunge to support Special Olympics Delaware. This year's plunge raised over $1,000,000.

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Cover Story

How to Manage a Bank Examination

by
By Mark T. Dabertin, Esq.
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Describing how to manage a bank examination effectively is tantamount to describing how to run a bank effectively, as the two are inextricably linked. That said, even the best run institution may experience a difficult examination from time to time, including for reasons that might have been avoided through better planning and preparation. The author of this article has over 25 years of experience navigating the ins and outs of bank exams while working at various times as a bank regulator, in-house counsel, or bank compliance officer. Whether the experience-based advice offered herein results in a revelation or merely confirms the appropriateness of existing strategies, the author's goal of increasing the odds of a productive exam will have been achieved.

How can a bank "manage" an exam?

As defined in Webster's Dictionary, to "manage" means "to handle or direct with a degree of skill: such as: (a) to make and keep compliant; (b) to treat with care; or (c) to exercise executive, administrative, and supervisory direction." Although every bank examination is necessarily performed by an external party (i.e., the applicable bank agency), bank management can, and should, seek to manage the exam from the bank's perspective. In this regard, by clearly explaining how compliance is achieved and maintained for purposes of the exam's area(s) of focus, bank management will have managed the exam in a significant way by charting the direction the examiners are likely to pursue in confirming the existence of appropriate controls.

The Bank Supervision Process section of the Office of the Comptroller of Currency ("OCC") Handbook, which is a subsection of the OCC's broader guidance describing the examination process, states that "high quality" bank supervision involves assessing "whether each bank has a sound risk management system consisting of policies, processes, personnel, and control systems to measure, monitor, and control risk." With this in mind, whether the nature of the given exam is compliance or safety and soundness, or the exam is focused on a particular area, such as anti-money laundering or fair lending compliance, bank management should strive to describe for the examiners the system of integrated controls the bank relies upon for purposes of complying with the applicable requirements. To this end, it is crucial for management to appreciate that no single functional area will "own" that system. Rather, an effective system of controls is inherently cross-functional in nature, which means that a critical initial step in preparing for any exam is to identify the key stakeholders within the bank.

During the course of an exam, regulators will evaluate the key controls in place to address and sustain regulatory adherence by assessing the design and operational effectiveness of controls. Common pitfalls associated with describing a bank's relevant controls to examiners often relate to management's inability to demonstrate adequately, in the form of written policies, procedures, and/or ongoing business reporting, that the claimed system for maintaining compliance (i) exists, and (ii) is being followed. To this end, no bank examiner will accept management's naked assertions of appropriate controls. Rather, the exam team will insist on validating all of the system's mechanisms, including by interviewing applicable bank personnel, reviewing all related policies and procedures, and reviewing all relevant reporting and other management information. For example, if bank management asserts that the bank maintains a risk-based Compliance and/or Audit testing plan, the examiners will seek to understand how risks are identified, whether the inventory of control to mitigate risks are complete and effective, whether the risk assessments are kept current and continuously evaluated for both existing and potential future impacts, including by whom. In addition, the examiners will investigate whether, to what extent, and through what means, input on the plan is solicited and received key stakeholders, including with respect to the materiality of each risk. The examiners will also seek to confirm that foreseeable legal, business, or economic changes, including any planned new or modified bank products or services, material geographic expansion, or projected economic downturns or upswings are appropriately reflected in the plan. Finally, the examiners will seek to understand how decisions to depart from the plan are made, including by whom and based on what justifications.

In short, any effective scheme of controls is necessarily composed of multiple parts, and the examiners will want to understand: (i) each individual part; (ii) how the collective control environment operates, is maintained, and is validated for continued effectiveness; and (iii) how the scheme fits within the bank's broader risk and control framework. Hence, the exam team will inevitably request copies of the relevant Audit and/or Compliance reports together with documentation relating to any associated remedial actions. With respect to the latter, management should confirm far in advance of the exam's kick-off date that all such remediation has been implemented and remains effective—assuming the remediation in question is of a long term nature. Moreover, similar confirmation should be performed for relevant prior exam issues.

Even if an effective system of controls exists, the report of examination may not acknowledge that fact if bank management failed to describe the system in a clear and complete manner. To this end, management should refrain from using esoteric terms and acronyms (i.e., "bank speak") in conversation with examiners, which may come across as meaningless, or, worse yet, have a negative meaning or connotation based on the examiners' experiences elsewhere.

In sum, bank management should describe the relevant controls to the examiners in both particular and holistic terms, recognizing that a core goal of any exam is to confirm the existence of a sound risk management system comprised of policies, processes, personnel, and control systems to measure, monitor, and control risk. If the examiners are satisfied early on that risks are being managed in a systemic and effective manner, their inquiries throughout the remainder of the exam should be targeted toward verifying that the applicable control schemes are being followed and kept current. In this sense, bank management will have 'managed' the exam toward what should be a favorable outcome.[1]

Effective internal communication is essential

Consistent with the adage, the right hand needs to know what the left hand is doing, each employee who will be identified to the examiners as key player within a given control structure will need to possess a complete and accurate understanding of their own position, including with respect to both that role's responsibilities and its limitations, and any related positions.

The advance preparation for any exam should additionally include bringing together relevant staff for the purpose of thoroughly vetting what will be told to the examiners. This step should surface and help resolve any material differences in understanding, thereby reducing the possibility that a bank employee might contradict, in the course of being interviewed by an examiner, the overview of their business function that management provided to the examiners at the outset of the exam.[2]

Know the applicable bank agency guidance

Reviewing the current bank agency guidance, including the applicable exam procedures, should be considered an essential part of exam preparation.[3] Demonstrating in-depth knowledge of agency guidance in conversations with the examiners should instill confidence with examiners that bank management knows what is required and thus, is likely to insist on maintaining appropriate controls. In addition, having such knowledge enables management to drive the conversation by proactively drawing attention to the most germane aspects of the bank's risk management systems.

In this regard, smaller banks are unlikely to maintain the type of "three lines of defense" risk management structure that is mandatory for larger banks. Rather than beginning their dialogue with the examiners by drawing attention to what the bank does differently from other institutions, we suggest a more effective approach is to start by acknowledging the applicable requirements and supervisory expectations, and then proceed to explaining how those requirements and expectations are fully met under the bank's structure, thereby rendering any operational variances from what other banks may be doing unimportant.

As a caveat, however, we note that no matter how knowledgeable management may be with respect to the examiners' expectations, any claims of control effectiveness must be able to pass muster under close scrutiny. In this regard, we suggest it is always better for management to acknowledge the need to further strengthen controls than to overstate the quality and effectiveness of the controls that currently exist.

Openness is essential to a successful exam

The old saw, "tell the examiners as little as possible," is never a sound exam strategy. To this end, the civil money penalty matrix

(continued on p. 12)

(continued from p. 11)

contained in the OCC's Policy and Procedure Manual,[4] which is used by that agency in determining the appropriateness and amount of civil penalty assessments treats "concealment" as second most weighty negative factor after "intent" out of a total of ten factors. Moreover two of the three offsetting, positive factors contained in the matrix speak to the bank's level of communication and cooperation; i.e., before and after the subject issue was identified.[5] In addition, in June 2013 the CFPB published Bulletin 2013-06 (Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation), which explains the importance of open communications and the circumstances under which that agency may be willing to treat what it refers to collectively as "responsible conduct" as a favorable factor in resolving a potential or existing enforcement. In this regard, of the four types of positive conduct discussed in the bulletin, the importance of self-reporting is singled-out; i.e., "the Bureau puts special emphasis on this category in its evaluation of a party's overall conduct."

Although being open and forthright with examiners should be treated as a necessity, we caution that any decision to disclose attorney-client privileged information should only be made following careful consultation with legal counsel. Federal law protects such disclosures made to any of the federal banking agencies or the CFPB in the course of bank supervision by providing that the bank does not waive its right to assert the privilege against any other person.[6] However, the law does not compel a bank to disclose privileged information, and there are legitimate reasons why a bank may choose not to do so. First and foremost, the privilege exists in order to promote full, frank, and entirely unfettered communications between a person and their lawyer, which is essential to the provision of sound and accurate legal advice. If bank management has cause to believe that their unrestrained communications with counsel may later be disclosed to a regulator, the inexorable effect will be to dampen such communications. This is not to say that privileged communications should never be disclosed, but only that any such disclosures should be (i) deliberated on in advance with the advice of counsel, and (ii) limited to the extent needed to address the issue at hand.

Responding to exam issues

Part and parcel of the openness discussed above, bank management should strive to maintain close communications with the examiners throughout the duration of the exam. In this regard, management should appoint one or more knowledgeable employees to liaise with the examiners on a daily basis, which could be someone from the area of the business being examined and/or a Compliance officer. Having daily discussions with the examiners is extremely important, as the single most effective way to clear-up a potential exam issue as to which bank management can offer a valid explanation is to address the issue before it is reduced to writing, including in the form of a preliminary issues list, which will likely have been vetted with the examiners' superiors before being shared with bank management. Furthermore, learning about bona fide issues early on will allow management to vet its remediation plans with the examiners, and potentially implement certain remedial actions, before the final exam report is written.

For those exams that result in the issuance of a supervisory letter, it is essential that bank management's written response be: (i) fully responsive to each issue cited, (ii) accurate in all respects, and (iii) realistic in terms of both the nature of the planned remedial action and the stated timeframes for implementation. In addition, the responses should respectful in tone and forward-looking in perspective—if management strongly disagrees with certain findings, that disagreement should be communicated verbally, and as diplomatically as possible. Finally, if management's disagreement concerns the examiners' legal findings, we suggest having legal counsel prepare and submit a separate response addressing those findings. To this end, it may be advisable to ask that the deadline for submitting management's response on other issues be delayed until the legal questions have been resolved.

Certain remedial actions, such as those that involve technology system changes or relating to violations of law where identifying all harmed consumers, and the extent of that harm, may take more months to implement. For those actions, we suggest that remediation plan be stepped by including a series of milestone dates by which certain actions will be implemented, culminating in full remediation.

Few banks choose to challenge exam findings by pursuing a formal administrative appeal. Moreover, although each of the federal banking agencies maintains an Office of Ombudsman for resolving disagreements informally, decisions to engage such assistance are likewise rare. There are many reasons for refraining from challenging an exam, including the risk of derailing an otherwise positive relationship between the bank and its regulator. To this end, no matter how objectionable bank management view certain exam findings, once the decision to forego a formal appeal has been made, with the result that the validity of all findings has been accepted, management's attention should be redirected toward developing effective remediation plans.

Conclusion

No one can offer a formula for ensuring that a bank exam will unfold seamlessly, promptly progress to its conclusion without any hiccups, and conclude with no issues having been cited. There are, however, certain measures bank management can take to increase the likelihood of a favorable exam. First, management should appreciate that the examiners will be seeking evidence of appropriate risk management structures. Thus, relevant controls should be presented to the examiners in both specific and holistic terms. Second, effective internal communications are essential to a well-managed exam; i.e., everyone needs to be operating from the same playbook and reading from the correct page. Third, in order to control the dialogue and direct the examiners to the relevant areas of the bank's operations, management should possess a thorough understanding of the applicable agency guidance. Fourth, having frequent communications with the examiners throughout the exam's duration is vital for a host of reasons, including for purposes of deflecting misplaced findings and enabling management to develop appropriate remedial action plans. Lastly, fifth, close care should be taken to ensure that management's written response to the supervisory letter (if applicable): (i) is well-reasoned, (ii) addresses each and finding by stating specific remedial action(s), (iii) reflects a forward-looking perspective and is respectful in tone; and (iv) is capable of being implemented by the stated completion date(s).

Mark T. Dabertin is special counsel in the Financial Services Practice Group of Pepper Hamilton LLP, resident in the Berwyn office. Mr. Dabertin has over 25 years of broad-based experience in financial services law and regulatory compliance. Mr. Dabertin's career includes extensive experience in banking law, lending, safety and soundness, and anti-money laundering. He began his career in financial services working as a senior attorney at the Office of the Comptroller of the Currency (OCC), Central District Office for five years, and went on to work in various in-house capacities at major financial institutions for nearly two decades. His work in regulatory compliance at those institutions was marked by innovations that resulted in structural changes to existing firm-wide compliance practices, including with respect to regulatory change management, risk assessments, data security, affiliate transactions, and third-party oversight. He also handled a high volume of transactional work and had a lead role in chartering multiple financial institutions, both in the U.S. and abroad. At Pepper Hamilton, Mr. Dabertin frequently handles agreements between non-bank lenders and regulated banks, and has represented both banks and non-bank parties to such relationships.

Notes:

1-In the authors' opinion, a "favorable" exam outcome does not mean that no issues were identified. Even the run of institutions may experience occasional compliance issues, for example, due to human error or an inadvertent system's glitch. However, such institutions have effective systems in place to identify and remediate such issues promptly and completely, including by identifying and addressing the root cause of the problem, and by accurately identifying and assessing customer impacts. Hence a favorable exam necessarily encompasses one in which the examiners recognized the quality and effectiveness of the subject bank's risk and control environment and compliance structures.

2- An unwarranted "that's not how it actually works" response to an examiner's inquiries can needlessly extend or complicate any exam. Moreover, including non-managerial staff in the vetting process can help parse between what is stated in policies and procedures, and what is actually being done—preferably in time to rectify any inaccuracies in the former.

3- On September 11, 2018, the Federal Reserve Board, the Bureau of Consumer Financial Protection, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency issued a Statement Reaffirming the Role of Supervisory Guidance. The statement confirmed that such guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. The statement further explained that supervisory guidance can outline the agencies' supervisory expectations or priorities and articulate the agencies' general views regarding appropriate practices for a given subject area.

4- PPM 500-7 (REV).

5- The third positive factor is remediation.

6- 12 U.S.C. § 1828(x).

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Preparing for the LIBOR Transition

2019
2020
2021

by
Mark Evanco
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LIBOR-indexed average daily trading volume has steadily declined and now stands at $500 million.

Since the mid-1980s, the London Interbank Offered Rate (LIBOR) has played an essential role in the global financial system. This key benchmark interest rate is set daily by a small group of institutions across five different currencies for seven different maturity points. Simply put, LIBOR is the most commonly referenced rate in the world, representing more than $200 trillion in financial contracts.

The Significance of LIBOR

While the vast majority of these contracts are derivatives, such as interest rate swaps, caps and floors, LIBOR is also used to set interest rates for everything from adjustable-rate mortgages and mortgage-backed securities to student loans and credit cards. LIBOR is also used heavily in the FHLBank Pittsburgh business model, with applications related to advances, debt, derivatives and investments. The scope of LIBOR's impact on financial activity is significant, as the LIBOR market is 10 times the size of the U.S. Treasury market.

The Challenges of LIBOR

The financial crisis in 2007 and 2008 highlighted LIBOR's shortcomings as a benchmark index, and particularly its potential to be tampered with by institutions involved in setting LIBOR on a daily basis. While steps were taken to address the threat of rate manipulation, the market's confidence was never fully restored.

Additionally, average daily trading volume in the interbank market, which LIBOR is intended to represent, has steadily declined and now stands at only $500 million. As a result, LIBOR no longer reflects a robust, transaction-based market rate. Instead, it is increasingly based on the subjective judgments of panel banks and their estimated borrowing costs.

Phasing Out LIBOR

Due to LIBOR's inherent instabilities, a global initiative was launched several years ago to help identify more reliable benchmark rates. In the United States, the Alternative Reference Rate Committee (ARRC), a working group of market participants and regulators, was convened and tasked with identifying an index to replace LIBOR and ensuring a successful transition. Market participants anticipate the elimination of LIBOR at the end of 2021, based on remarks made by the Financial Conduct Authority, the U.K.'s top regulator that provides LIBOR oversight.

FHLBanks have issued nearly half of all SOFR debt issued to date.

Comparison of LIBOR and SOFR

LIBOR	SOFR
Unsecured	Secured
Estimate-based	Transaction-based
Various terms	Overnight
Limited underlying bank-to-bank borrowing	Robust underlying repo market
Incorporates credit risk premium	No credit risk premium

Introducing SOFR

Ultimately, the Secured Overnight Financing Rate (SOFR) was selected by ARRC as the recommended alternative to LIBOR. Unlike LIBOR, SOFR is supported by the very deep, liquid overnight Treasury Repurchase Agreement (repo) market, which has an average daily trading volume of nearly $1 trillion. The sheer volume of transactions allows SOFR to be set in a more transparent manner.

The Role of FHLBanks

A smooth transition from LIBOR to SOFR will be crucial to the stability of the financial markets, and one important factor is the development of a robust market for SOFR-linked debt. As the largest issuer of floating-rate debt, the FHLBanks are uniquely positioned to help develop and shape the SOFR-linked debt market.

The FHLBanks have established a System-wide team to support the transition to SOFR. They also participate in the ARRC working groups and collaborate in the issuance of SOFR debt. As of Dec. 31,

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LIBOR

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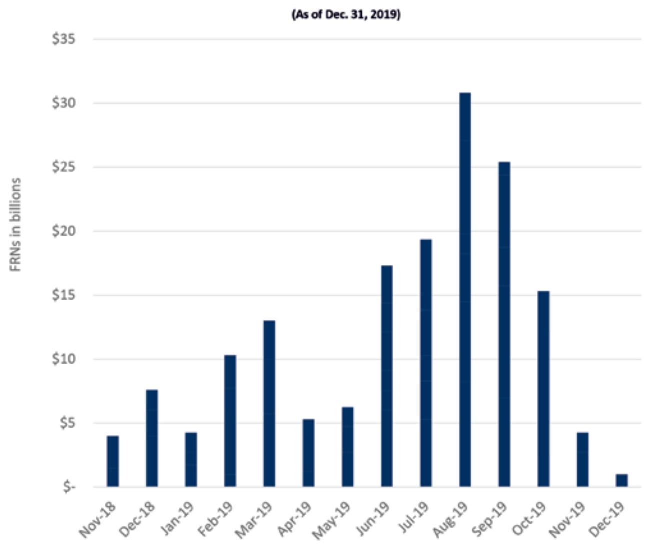
2019, the FHLBank System has issued more than $164 billion in SOFR debt, nearly half of all SOFR debt issued.

FHLBanks have issued a total of $164 billion in SOFR floating rate notes (FRNs)



Note: Fourth-quarter decreases in the issuance of SOFR FRNs can be attributed in large part to the better relative value of LIBOR-linked FRNs.

Source: FHLBanks Office of Finance Investor Presentation, January 2020

Preparing for the Transition

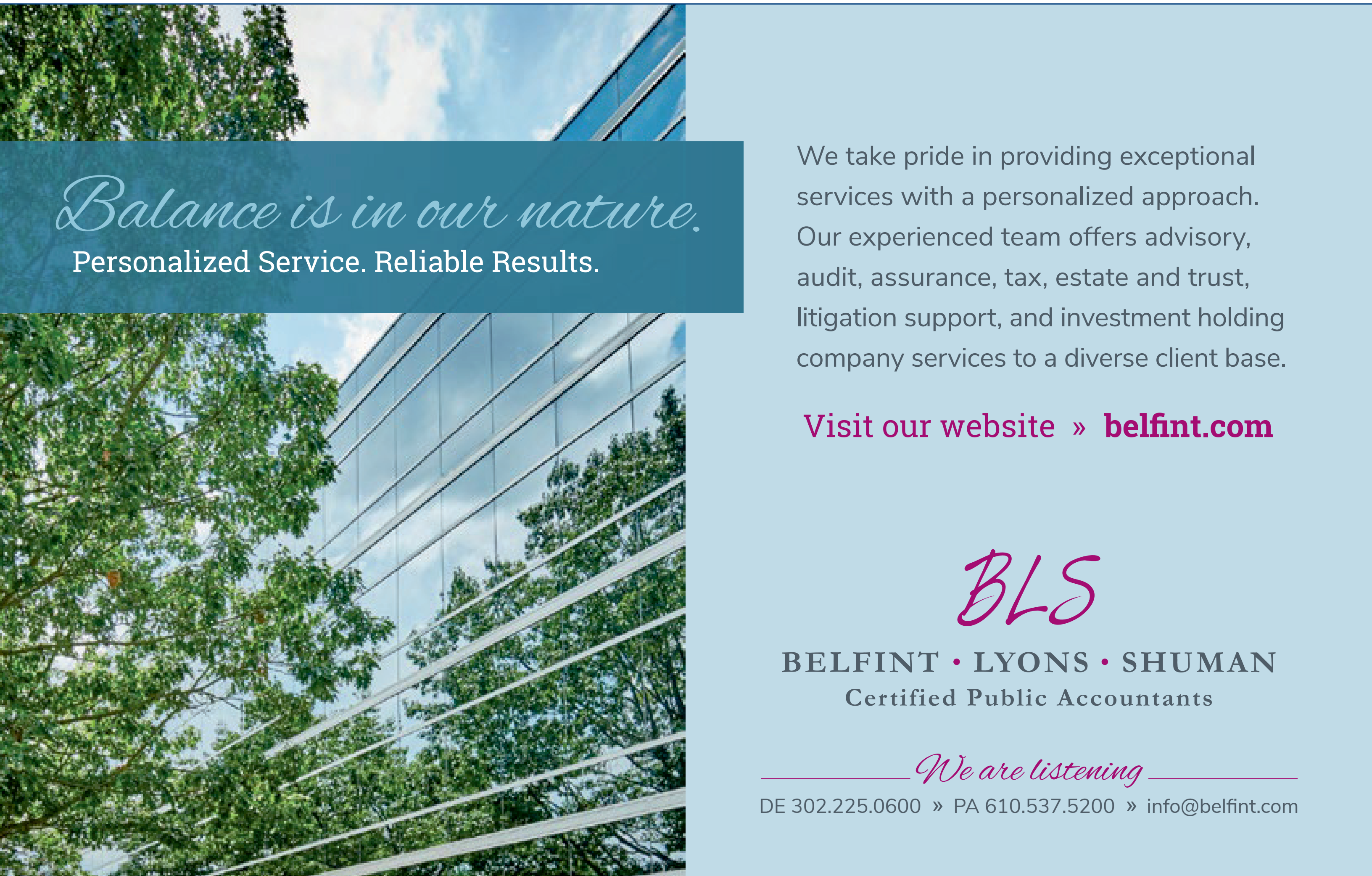
Affected members of FHLBank Pittsburgh are encouraged to begin preparations now for the LIBOR transition. While the end of 2021 might seem far away, there is much work to be done between now and then.

The following activities provide a framework for the LIBOR-to-SOFR transition:

Organize a Team: A structured transition team should be established and include representatives from executive management, treasury, loan operations, accounting, legal, information technology, risk management and others business units as needed.

Inventory All Instruments: Once a transition team is in place, a comprehensive portfolio review should be conducted. The goal is to quantify all financial exposure to LIBOR and identify those instruments maturing before and after the 2021 phase-out date.

Review Fallback Language: A review of legacy LIBOR contracts will help determine if current fallback language is adequate to provide a smooth transition to SOFR – or another reference rate such as Prime. A key consideration is the calculation of interest for adjustable-rate instruments in the absence of LIBOR. Contract language for those agreements should be amended as needed, in compliance with banking, securities and consumer protection laws. Another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consideration is whether changes to contracts will require consent of various parties named in the agreements.

Develop Language for Future Transactions: Once legacy-contract fallback language has been evaluated, new language for future LIBOR transactions must be developed. When amending contract language or developing language for new transactions, a focal point should be mitigating risks related to disputes with borrowers or other parties to the financial contract. Procedures and mechanisms to handle potential disputes should be put in place.

Assess Operational Readiness: A transition plan should include an assessment of operational readiness, including the ability to manage changes to systems, models and other operational processes triggered by the phase out of LIBOR. Specifically, those changes could involve accounting systems, loan systems, pricing models, risk models and other management information systems, as well as vendor relationships.

Establish a Communications Plan: An effective transition plan will address the need for regular communications with internal and external stakeholders to convey changes and other relevant information.

Stay Informed: Accurate communications will rely on an awareness of industry developments and best practices that could affect the timing and nature of the LIBOR-to-SOFR transition. As these developments occur, related processes should be adapted and shared with others as appropriate.

Transition plans will no doubt need to be revisited and adapted along the way. For now, the most important step is to initiate a comprehensive plan. FHLBank Pittsburgh and the FHLBank System are prepared to support member institutions throughout the development and refinement of their respective LIBOR-to-SOFR transition plans.

Additional information and resources regarding the transition from LIBOR to SOFR are available at www.fhlb-pgh.com/LIBOR-Transition.

Mark Evanco is Senior Director, Business Development and Strategy, with FHLBank Pittsburgh. He has more than 30 years of banking experience and has managed multi-billion-dollar LIBOR-indexed portfolios consisting of loans, investment securities and derivatives, such as interest rate swaps, caps and floors.

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The SECURE Act and the Taxpayer Certainty and Disaster Tax Relief Act of 2019

by
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On December 20, 2019, Congress and President Trump gave a holiday gift of retirement plan changes and restored tax extenders wrapped inside the $1.4 trillion budget spending package. Within the package was the Further Consolidated Appropriations Act, 2020 (H.R. 1865), and further inside it were two sections called the SECURE Act (Setting Every Community Up for Retirement Enhancement Act of 2019) and the Taxpayer Certainty and Disaster Tax Relief Act of 2019, which addressed these changes. The SECURE Act was first introduced by the House in April 2019 to enact comprehensive retirement plan reforms, but it was not voted on by the Senate until December. The Taxpayer Certainty and Disaster Tax Relief Act of 2019 focused on renewing expired or soon-to-expire tax extender provisions following years of indecision by lawmakers.

True to its tradition for last-minute tax legislation, Congress approved these changes with only a few days left in the year. As advisors, business owners, individual investors, and taxpayers, our ability to digest and prepare for their effects on year-end planning was somewhat limited, yet the consequences of most changes continue past 2019. While not exhaustive, this article will provide relevant details and highlights within both areas that should provide value to financial advisors and investors alike.

The SECURE Act

The SECURE Act was the culmination of Congress' attempt to pass major retirement plan reform legislation over the past several years. Having passed the House in early 2019, it slowed down in the Senate, but it finally succeeded being included with the 2020 spending bill. The thrust behind the Act's provisions is to encourage greater retirement savings by Americans through two main objectives: 1) increase employer incentives to adopt new plans or enhance existing plans, and 2) provide expanded opportunities for individuals within employer-based and individual retirement saving plans.

Many aspects of the new law are geared toward increasing small business participation, using techniques such as improved plan adoption flexibility, safe harbor incentives, expanded tax credits, and access for employees to participate. The Act also encourages greater investment by individuals through relaxing age-related rules affecting contributions to traditional IRAs, required minimum distributions, and investments in annuities. As with most new tax laws, ambiguities exist throughout the SECURE Act's provisions, so expect clarifications from the IRS and the U.S. Department of Labor (DOL) in the months to come. Highlights of the Act's provisions for expanding and preserving retirement savings and administrative improvements are described below.

The Positives: Expanding and Preserving Retirement Savings and Administrative Improvements

Increased plan start-up tax and automatic enrollment credits starting 1/1/2020. The tax credit for small employers (less than 100 employees earning more than $5,000 per year) for the first three years of the plan is $250 per eligible, non-highly compensated employees. The minimum credit is $500, and the maximum credit is $5,000. An additional $500 tax credit is available for automatic enrollment in 401(k) and SIMPLE IRA plans for up to three years, along with an opt-out alternative.

Deadline to set up a new retirement plan starting 1/1/2020. An employer has until the due date of their company's tax return, including extensions, to establish a new qualified retirement plan for the year. This deadline has traditionally been the last day of the employer's tax filing year. This provides greater flexibility in decision-making for owners whose tax situation is not clarified until after the year is over. Tax-deductible contributions may still be made under a similar deadline for the adoption year.

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Safe Harbor 401(k) rule simplification and savings expansion starting 1/1/2020. Employers will have more flexibility to amend their existing 401(k) plans and add a non-elective safe harbor feature any time up to 30 days before the end of the year, and afterward as long as the sponsor makes a 4% contribution in the first year. Secondly, the Act eliminates the notice requirement for safe harbor plans that make non-elective contributions to employees. Additionally, the automatic employee deferral contribution cap increases from 10% to 15% of employees' pay under an automatic enrollment safe harbor plan. These enhancements provide greater flexibility to plan administrators and employers, potentially resulting in a higher number of safe harbor plans that are favorable to all employee groups.

Participation by part-time employees for plan years starting by 1/1/2021. Employees who have three consecutive years of at least 500 hours of service per year are now allowed to participate (group A). This group was previously excluded from participation, but as of 2021, employers must make them eligible. The existing law for the one-year, 1,000-hour service requirement for plan participation is still in effect (group B). Employees in either group must meet the plan's minimum requirement of age 21. Furthermore, group A participants are not counted for non-discrimination testing purposes. Other qualification rules must be met by employees. Applicability to existing plans is uncertain, so grandfathering may be available once the law is clarified.

Open Multiple-Employer Plans (MEPs) starting 1/1/2021. The Act expands access to Open MEPs starting in 2021 by allowing MEPs to consist of diverse, unrelated employers. Previously, employers in an MEP needed to possess characteristics similar to other employers in the same MEP. A common example is a trade association retirement plan MEP that employers in similar industries could join, thereby benefitting from larger plan participation and centralized cost-effective administration. Under the new law, more employers with limited participation and concerns about costs and fiduciary responsibilities can benefit from joining other employers in an Open MEP.

Lifetime income disclosures starting in 2021. Participants must be provided a calculation showing the monthly payments due assuming the account balance was used to provide lifetime income in an annuity.

Annuity safe harbor and portability starting 1/1/2020. Selection of a lifetime income provider is now possible without exposing employers to liability for annuity repayment losses (the objective fiduciary safe harbor). This will encourage employers to offer more in-plan annuity options. In addition, moving annuities between plans and IRAs is allowable without causing surrender charges and fees.

Required Minimum Distributions (RMDs) starting 1/1/2020. The age at which RMDs must begin from traditional IRAs and employer plans is increased from age 70½ to 72. It is not clear how this affects a person who began RMDs in 2019 but who has not reached age 72 in 2020. Additional guidance is expected from the IRS on this interpretation.

Maximum age for traditional IRA contributions repealed starting 1/1/2020. Individuals may now contribute to traditional IRAs regardless of age, similar to existing rules for Roth IRA and 401(k) plans. The previous law did not allow contributions in the year a taxpayer reached age 70½. Earned income requirements continue to apply.

Birth and adoption withdrawals allowed starting 1/1/2020. Up to $5,000 may be withdrawn from a qualified plan before age 59½ for expenses relating to birth or adoption of a child without incurring the additional 10% tax on early distributions. The $5,000 limit applies to each parent individually, and the distribution must be made within one year after the birth or when the adoption becomes final.

Distribution expansions from 529 plans starting 1/1/2019. Distributions from 529 plans up to $10,000 per year are allowed for payments toward a registered apprenticeship program. Repayment of qualified student loans for the beneficiary or beneficiary's sibling is also allowed up to a $10,000 plan maximum.

Kiddie tax restored to pre-TCJA rules starting 1/1/2018. The taxes for many children subject to kiddie tax in 2018 and 2019 were higher than intended from the use of the trust tax table. The Act repealed this rule and restored the original kiddie tax rules retroactive to 1/1/2018, allowing for amending, if desired.

The Negatives – The Revenue Provisions

The revenue provisions of the SECURE Act are intended to cover the costs of tax decreases caused by the above changes. These provisions fall into three general areas:

- Modification of required distribution rules for designated beneficiaries (the "Stretch" IRA rules),
- Increases in penalties for failure to file retirement plan returns and other documents, and
- Increased information sharing to administer excise taxes.

Of the three items above, I'm going to focus on the modification of RMD rules for beneficiaries of inherited IRAs.

Stretch IRA converts to mandatory 10-year payout span starting 1/1/2020. Most non-spouse beneficiaries of inherited IRAs are now required to take taxable distributions within 10 years of the death of the retirement account owner. Through 2019, the rule was that an RMD began the year following death using the life expectancy of the beneficiary. Beginning with deaths on or after 1/1/2020, the new 10-year rule applies to most beneficiaries except for the following types:

- Surviving spouse
- Minor children of IRA owner until majority age
- Chronically ill and disabled
- Those who are younger and within 10 years of the deceased IRA owner's age

The above excluded categories of beneficiaries are exempt from the 10-year rule and will continue with pre-SECURE Act RMD life expectancy tables.

As a caution, planned distributions to beneficiaries of future inherited IRAs and other retirement plans are at risk of being adversely affected by this change. In many cases, distributions mandated under the new law could be substantially increased in earlier years causing excessive unintended payouts and greater tax consequences to beneficiaries. The coordination of future payouts to affected beneficiaries should be reviewed as soon as possible to mitigate undesirable consequences. The current IRA/retirement plan owner may also consider converting some or all retirement plan funds to a Roth IRA over time to help reduce the future tax impact on beneficiaries caused by the new 10-year rule. To note, for Roth IRAs the stretch feature is also replaced by the 10-year rule, so RMDs will be accelerated similar to non-Roth IRAs and retirement plans, even though Roth IRA distributions are not taxable.

The Taxpayer Certainty and Disaster Tax Relief Act of 2019

In addition to the SECURE Act, Congress was able to slide in a restoration of over 30 tax incentives with a limited shelf life, which expired at the end of 2017 and 2018 or were due to expire on 12/31/2019. Congress revived these incentives on a retroactive basis and, in most cases, until the end of 2020 or later. Some taxpayers will amend 2018 returns to take advantage of the retroactive reinstatements. With less than one year left on the revived incentives, we may see more legislation later this year or afterward to extend them further into the 2020s. There were also new tax provisions targeted to victims of federally declared disasters going back to 2018.

Listed below are some of the more popular extender incentives being brought back to life, plus a summary of the disaster relief provisions.

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Taxes

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Discharge of principal residence debt extended through 12/31/2020. Taxpayers whose principal residence debt was discharged is excludable from taxation on cancelled debt up to $2 million through 12/31/2020. This extender is applied retroactively to 1/1/2017.

Mortgage insurance premiums (MIP) extended through 12/31/2020. The deductibility of MIP as qualified home mortgage interest on a primary residence is deductible as an itemized deduction through 12/31/2020. This extender is applied retroactively to 1/1/2017.

Medical expense deduction adjusted gross income (AGI) floor extended through 12/31/2020. The itemized deduction for qualified medical expenses is now allowable for amounts in excess of 7.5% of AGI for 2019 and 2020. The AGI floor was previously set at 10% starting in 2019. Under new law, it will reset to 10% beginning in 2021.

Energy credit programs. A total of 14 tax incentive programs for alternative energy and conservation expenditures were renewed, including these more popular areas:

- Energy efficient homes credit (Section 45L) and nonbusiness energy property
- Energy efficient commercial buildings deduction (Section 179D)
- Qualified fuel cell motor vehicles
- Alternative fuel refueling property credit

Deduction for qualified tuition and related expenses extended through 12/31/2020. Up to $4,000 of qualified tuition and related expenses may be deducted for taxpayers with AGI less than $65,000 or $2,000 for AGI less than $85,000. This extender is good now through 12/31/20, applied retroactively to 1/1/2019.

Work Opportunity Tax Credit (WOTC) extended through 12/31/2020. The WOTC is an elective general business credit provided to employers hiring individuals meeting criteria of one or more of 10 targeted groups of economically challenged workers.

Disaster tax relief for disasters occurring in 2018 through January 19, 2020. Abatement of the 10% additional tax on early distributions is granted on retirement plan withdrawals up to $100,000 to cover costs from federally declared disasters. Additionally, an employee retention credit is available to employers for up to 40% of qualified wages paid during the time a business is shut down due to a natural disaster for the first 150 days. New rules for personal casualty losses were also enacted. While there were no federally declared disasters affecting our immediate area, many reader's families, friends, or clients may benefit from knowing more about these tax benefits.

In summary, the spending legislation did much to improve expected retirement plan savings incentives for American taxpayers and simplify their access. The extenders that were revived will yield tax benefits for many individuals and business taxpayers, but keep in mind they are due to expire at the end of 2020 causing another wave of possible extender legislation at the end of the year. As we work through these law changes, we can expect clarifications from the IRS and DOL for some of the more complicated areas these changes bring.

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Bob's practice area is diverse, working with many types and sizes of business entities and trusts, as well as business owners, their families, and other individuals. Services range from start-up consulting, entity selection, tax management, and annual tax planning, to tax preparation, representation with taxing authorities, estate planning, and services concerning business acquisitions and sales.

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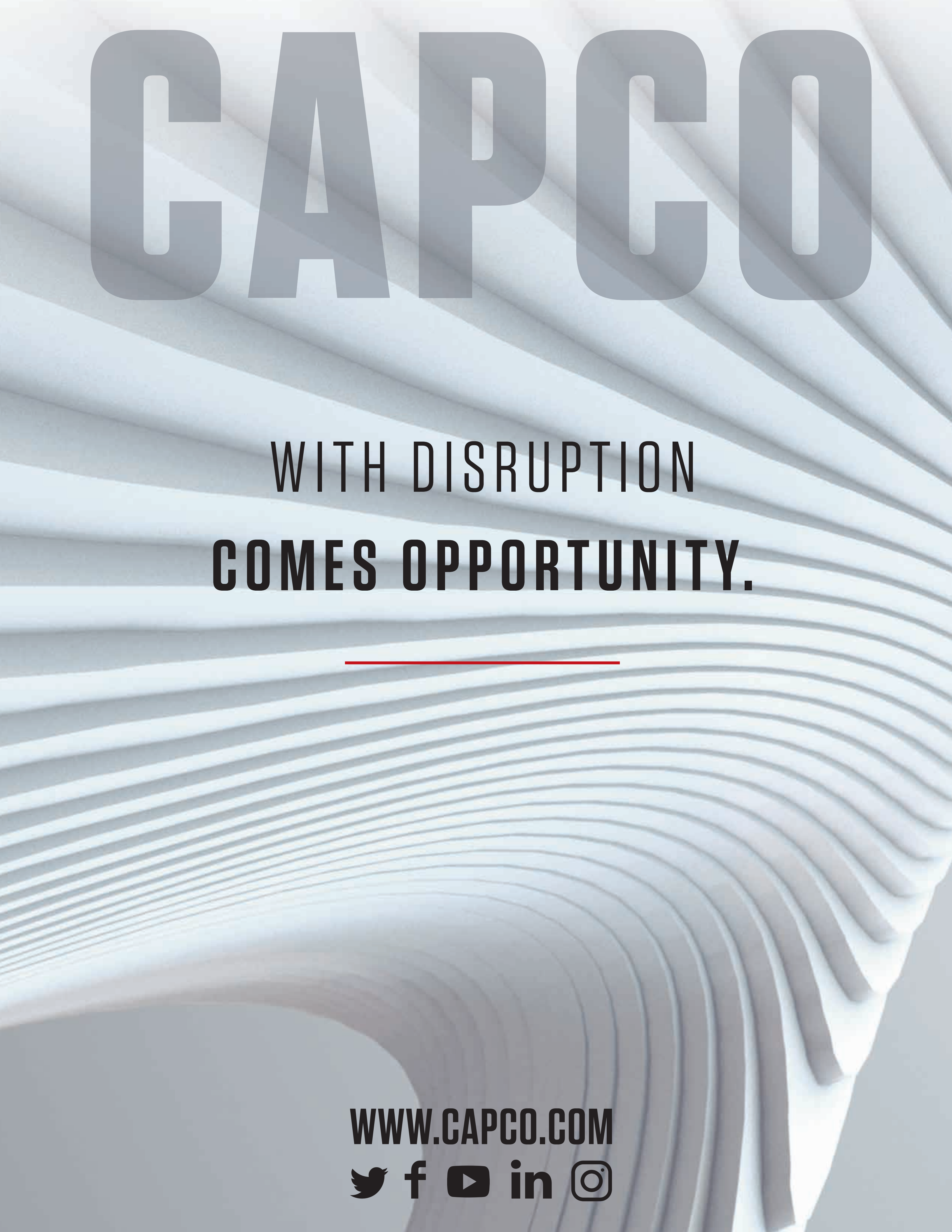
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Compliance Focus

by
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"How will your existing compliance management framework control fintech risk?"

Thoughts on the Federal Reserve Board's Bulletin on Fintech Compliance

The December 2019 issue of the Board of Governors of the Federal Reserve's (Board) Consumer Compliance Supervision Bulletin focuses on supervisory observations on the use of financial technology, commonly known as fintech. In this article, we will summarize the Bulletin and offer insight into strategies designed to foster compliance.

Financial institutions continue to adopt the use of fintech solutions to provide customers with convenience and ease of use of financial products and services. According to statistics quoted by the Board, 82 percent of financial institutions responding expected to increase their collaboration with fintech firms over the next several years. One of the primary motivations for institutions to engage in these partnerships is concern for the loss of market share to competitors, according to that same survey.

The first step in compliant collaboration with fintech is risk management. Fintech products and services may look and feel different, but from a risk management perspective the goals are the same – provide the best customer service while mitigating risk. Utilizing your existing Compliance Management System (CMS) will ensure smooth navigation through fintech waters. Remember that the same laws and regulations apply to fintech products as every other product or service Be aware, however, the fintech providers may not be aware of the large number and complexity of laws and regulations in the financial industry. You need to exercise extra vigilance with all fintech relationships.

How will your existing compliance management framework control fintech risk? By using all the risk management tools at your fingertips. Employ board and management oversight to fully understand the risks before engaging in any collaboration. The ability to proactively identify risk is a hallmark of a strong CMS. When board and management understand the risks, it's time to develop and implement appropriate policies, procedures, and training. Ensure that all personnel involved in the product or service are well trained and have the tools they need to perform their work in compliance with all applicable laws and regulations. Of course, the risk management process must include appropriate risk monitoring. Design a program that tests the effectiveness of your policies, procedures, and training, and monitor that program so weaknesses are identified and addressed quickly. Remember that consumer complaints are an important part of any monitoring program. In addition to resolving complaints, use them to uncover and correct areas of risk. Third party oversight, both before and during any collaboration with fintech partners, is essential. Regulators will expect your vendor oversight program to include fintech and may look for additional controls for fintech firms with limited knowledge of the regulatory climate in the financial industry.

Online and mobile banking are fintech products used by over 40 percent of Americans in 2018, according to a survey quoted by the Board. It's no wonder, as these products allow consumers to access banking services anytime and anywhere. However, these products carry all kinds of compliance risk, including the risk of engaging in unfair and deceptive practices. The Bulletin points out that certain practices have resulted in UDAP findings. These include neglecting to provide accurate account information such as payment amounts and fees, as well as neglecting to present information on past due accounts and late fees. Avoid these risks by ensuring that online and mobile disclosures are consistent and compliant, and that the customer experience is exactly as intended. Remember to monitor complaints for signs of any unfair or deceptive practices.

Targeted internet-based marketing, with its algorithms and analytics that seem to operate in a black box, presents enormous fair lending risk to financial institutions. Open that black box and ensure you understand how the targeted marketing works. The Facebook case, which involved targeted marketing that violated the Equal Credit Opportunity Act and the Fair Housing Act by discriminating on prohibited bases, should serve as a warning bell to institutions engaged in this kind of marketing. Institutions need to manage this risk while when taking advantage of the valuable marketing opportunities presented by social media. It is essential that all aspects of any marketing program be reviewed and understood fully before launching any campaign to attract customers. This includes reviewing all filtering criteria used and the elimination of any filter that discriminates or has the potential to discriminate on a prohibited basis. Policies, procedures, and monitoring to prevent fair lending violations must be established and maintained.

The Bulletin closes with a valuable list of fintech resource materials, which we strongly suggest you take advantage of. Properly managed, fintech collaborations need not be complicated or perilous. Even though the products and services may be innovative and different, safely engaging in them requires only vigilance to time-honored risk management principles. Using the CMS already in place to assess and mitigate the risks of any collaboration is paramount, and that means being sure to include compliance at the table from day one of planning for any new or enhanced product or service.

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Accounting for Success

Using 529 Plans to Ease Back-To-School Jitters

by
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Prior to the Tax Cuts and Jobs Act (TCJA), distributions from 529 plans could only be used for post-secondary qualified higher educational expenses (tuition, books, room, board, etc.). TCJA expanded the use of 529 plan distributions to include tuition (only) for elementary and secondary education at public, private and religious schools, but limits those distributions to $10,000 per year, per beneficiary.

Contributions to a 529 plan are not deductible for federal tax purposes, although some states allow a state tax deduction. There is no income limit on who is eligible to contribute to a 529 plan, however, each state typically has its own maximum account balance ($350,000 in Delaware). It is not required that you use your own state's plan.

> *"There is no income limit on who is eligible to contribute to a 529 plan, however, each state typically has its own maximum account balance."*

Distributions used for qualified education purposes are not taxable for federal purposes. Some states, however, have not adopted the TCJA changes, which could subject distributions used for other than higher education purposes to be taxed by the state.

Taxpayers receive the best benefit from 529 plans when the funds have had adequate time to appreciate, taking advantage of the tax-free growth inside the plan and not waiting for a beneficiary to open an account. Individuals can set up a plan for their own benefit and later change the beneficiary. Growing families can request 529 plan contributions in lieu of baby shower or birthday gifts since anyone can contribute to the account.

Contributions to a 529 plan are considered gifts and could require the donor to file a gift tax return if the contribution exceeds $15,000 per beneficiary, per year. A special election can be made, whereby an individual can contribute up to five times the annual gifting limit for a beneficiary (currently up to $75,000) and elect to have the gifts spread over a five-year period.

Commonly overlooked qualified expenses include off-campus housing, required equipment such as computers and software, as well as internet access used primarily for educational purposes. For special needs individuals, expenses for special-need services also qualify.

If tuition is refunded (dropped class, changing schedules), the reimbursed amount must be contributed back to the 529 plan within 60 days of receipt to avoid taxation and penalties. Nonqualified distributions would subject the earnings portion of the distribution to both income tax and a 10% penalty.

Taxpayers who qualify for the American Opportunity or Lifetime Learning credits will want to consider paying a portion of tuition with non-529 plan funds in order to claim the credit.

A note of caution: plans set up by those other than the student or his/her parents (i.e., grandparents) are not considered assets in the student's financial aid calculation, however, 50% of any distribution from those plans is considered a student resource and could reduce or eliminate the student's aid eligibility. Therefore, grandparents and others should consider contributing to the parent's or student's plan or using funds from plans that they have personally established only in years where future financial aid will not be impacted.

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For Your Benefit

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

> *"Employers must constantly seek ways to innovate and stay on top of trends and developments if they want to compete in the marketplace."*

5 HR Trends and 5 Employee Benefits Developments to Watch in 2020

Human Resource and Employee Benefits departments are given more and more responsibility each year. New regulatory compliance, HR trends, tight budgets that don't match up well with the diverse needs of their employees are all making it more and more difficult for employers and their HR teams.

This means employers must constantly seek ways to innovate and stay on top of trends and developments if they want to compete in the marketplace.

Here are five human resource trends to watch as well as five employee benefit developments to keep on your radar.

Human Resource Trends to Watch for 2020

1. Employee personalization
Employees want to be recognized for the unique value each brings to the organization. This uniqueness is something employers are beginning to embrace.

Companies are starting to offer more personalized benefits and online tools casting a wide net with niche options like tuition reimbursement and pet insurance. The idea is that providing a wide array of options will suit the unique needs of employees from any background and in any stage of their careers. This may include custom individualized online portals to administer and review benefits, schedule doctor appointments and handle other specific needs.

2. A focus on wellness
Holistic benefits are a common way of introducing wellness to an organization. These benefits address all aspects of well-being, including mental health and financial security that help improve well-being beyond standard health coverage.

According to a 2019 MetLife survey, over half of respondents said they'd be more interested in working for and more loyal to a company that offered holistic benefits and felt they would likely be more successful in their work and personal lives.

3. Workplace flexibility
The 9-5 work shift is giving way to more novel constructions in this gig economy.
The overall trend is that employees aren't required to be in the office for eight hours every day. Some organizations allow for flextime and remote work—allowing employees to leave early one day and make up the time another day—or work from home so long as their hours add up to 40.

4. Employee upskilling
Employees want to be appreciated on an individual level. Employers are showing their appreciation through upskilling. Not only does this help employees feel valued, but it also helps fill knowledge gaps within the company.

According to a report by Deloitte, the "inability to learn and grow" is the top reason why employees leave their organizations. Employers are catching on. Cross-training and encouraging growth opportunities internally to retain their employees.

5. AI-driven technology
Artificial intelligence (AI) is a tool that empowers organizations to achieve more than ever before by helping HR to administrate their human capital and manage complex data sets.

AI systems can be used to autonomously screen candidates, move prospective hires through the application process, monitor employees to strategically address performance issues saving HR teams untold hours.

Employee Benefits Developments to Watch in 2020

1.Guidance on Wellness Incentive
Expect new rules from the EEOC on permissible incentives for workplace wellness

plans under the ADA. The EEOC removed the incentives of up to 30% of the cost of health care coverage effective Jan 1, 2019.

2. Paid Leave Laws

Paid leave laws are rapidly spreading throughout the country. Several states and many cities have extended leave to it's employees and the federal paid leave laws may follow continue this momentum.

3. Extension of PCORI Fees

The PCORI fees have been extended for 2020-29 fiscal years after previously being set to expire.

4. Proliferation of State Individual Mandates and Employer Reporting

Many states are actively considering individual mandates with corresponding state health coverage reporting requirements after 5 states have already passed their own mandates.

5. Mental Health Parity

Employers offering Mental Health and Substance Use Disorder coverage should review their benefit plans to ensure compliance with federal MHPAEA requirements.

Consider how your employees and your organization may benefit or be impacted by these trends and developments. A proactive approach may help give you an edge in this tight labor market. Speak with Weiner Benefits Group to discuss how you can prepare for these trends. The information in the article comes from our Zywave resource library.

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

March 4th - 6th - DBA 2020 Washington Visit - This highly acclaimed event for top bank executives features meetings with key regulators, industry representatives at the American Bankers Association, and Delaware's entire Congressional delegation.

April 27th - May 1st - Teach Children to Save Week - Statewide. Don't miss the 22nd annual edition of Delaware's Teach Children to Save Week! Teaching is fun and easy. A full teaching kit and on-line video instructions are provided. Bankers can sign up by visiting debankers.com.

Women Connect!
Engage, Empower, and Network!
May 7, 2020 – The Waterfall, Claymont

May 7th - DBA Women Connect - The Waterfall, Claymont, 8:30 a.m. to 4 p.m. The next Women Connect event features an exciting lineup of speakers and topics including: "How to Negotiate Your Salary," with Cathleen Hitchens; "Building Your Brand," with Laura Meyer; "From Invisible to Influential," with Danielle Turcola; and, more. Be there to Engage, Empower, and Network!

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May 14th - DBA 125th Annual Meeting & Dinner - Join the DBA and celebrate our 125th anniversary at the duPont Country Club, Wilmington. The keynote speaker will be Erin Arvedlund, financial writer for the Philadelphia Inquirer and Barrons and author of *Too Good to be True: The Rise and Fall of Bernie Madoff*. Sponsorships available!

2020 Delaware Trust Conference

October 19th & 20th - 2020 Delaware Trust Conference - Chase Center on the Riverfront, Wilmington. The 2020 Delaware Trust Conference provides attendees with the information and strategies to take advantage of the unique Delaware trusts atmosphere. Sponsorships and Exhibitor space available!

September 25th - FDIC Director's College - Location TBD - Save the date for the next edition of the FDIC Director's College. The Director's College is an interactive program that provides ongoing education on current topics of bank supervision 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 ever-changing regulatory environment.

Lending Law Update

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

Collateral Descriptions in Financing Statements - The (Almost) $7.6 Million Mistake

Under the Uniform Commercial Code (UCC), the owner of personal property (referred to as the "debtor") grants a security interest in personal property by signing a security agreement between the bank and the debtor. Though this agreement causes the security interest to "attach" to the property, under the UCC for most types of personal property collateral the security interest needs to be "perfected" by filing a financing statement in the appropriate public records office, which establishes the priority of the bank's security interest against competing interests of others. Financing statements need only provide the names of the debtor and the secured party, and indicate the collateral covered by the financing statement, using a National Standard UCC-1 form (which is the only form accepted by the Delaware Division of Corporations). This simplicity can lead to lack of care in the preparation of these UCC-1s.

First Midwest Bank filed a financing statement that described the personal property as "all collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between debtor and secured party." Initially, a bankruptcy court determined that this security interest securing a $7.6 million dollar loan was unperfected because the financing statement attempted to incorporate the description of collateral by reference instead of actually describing the collateral. First Midwest Bank v. Jeana K. Reinbold, Chapter 7 Trustee (In re 180 Equipment, LLC) (Bankr. C.D. lll,. Aug. 2018). First Midwest was relieved when the decision was later reversed by the U.S. Court of Appeals, in In re: 180 Equipment LLC, 938 F.3d 866 (7th Cir. 2019), which noted the UCC has options for describing collateral: by specific listing, category, type, quantity, mathematical computation, or in this case by "any other method, if the identity of the collateral is objectively determinable." However, other conflicting court decisions on collateral descriptions throughout the country make it prudent for the bank to use a "safer" collateral description than a lazy cross-reference.

> *"The safest option is to describe the collateral in the financing statement as 'all assets' or 'all personal property.'"*

The safest option is to describe the collateral in the financing statement as "all assets" or "all personal property." Though this accomplishes perfection, this does not necessarily mean that the bank actually has a security interest in all assets or personal property; that is controlled by the grant of collateral in the security agreement. This "all" technique creates a problem if the bank takes a security interest in only some of the debtor's property, and the debtor needs to be able to grant a security interest in other property to a different party. In this case, the collateral description in the financing statements should match that in the security agreement precisely.

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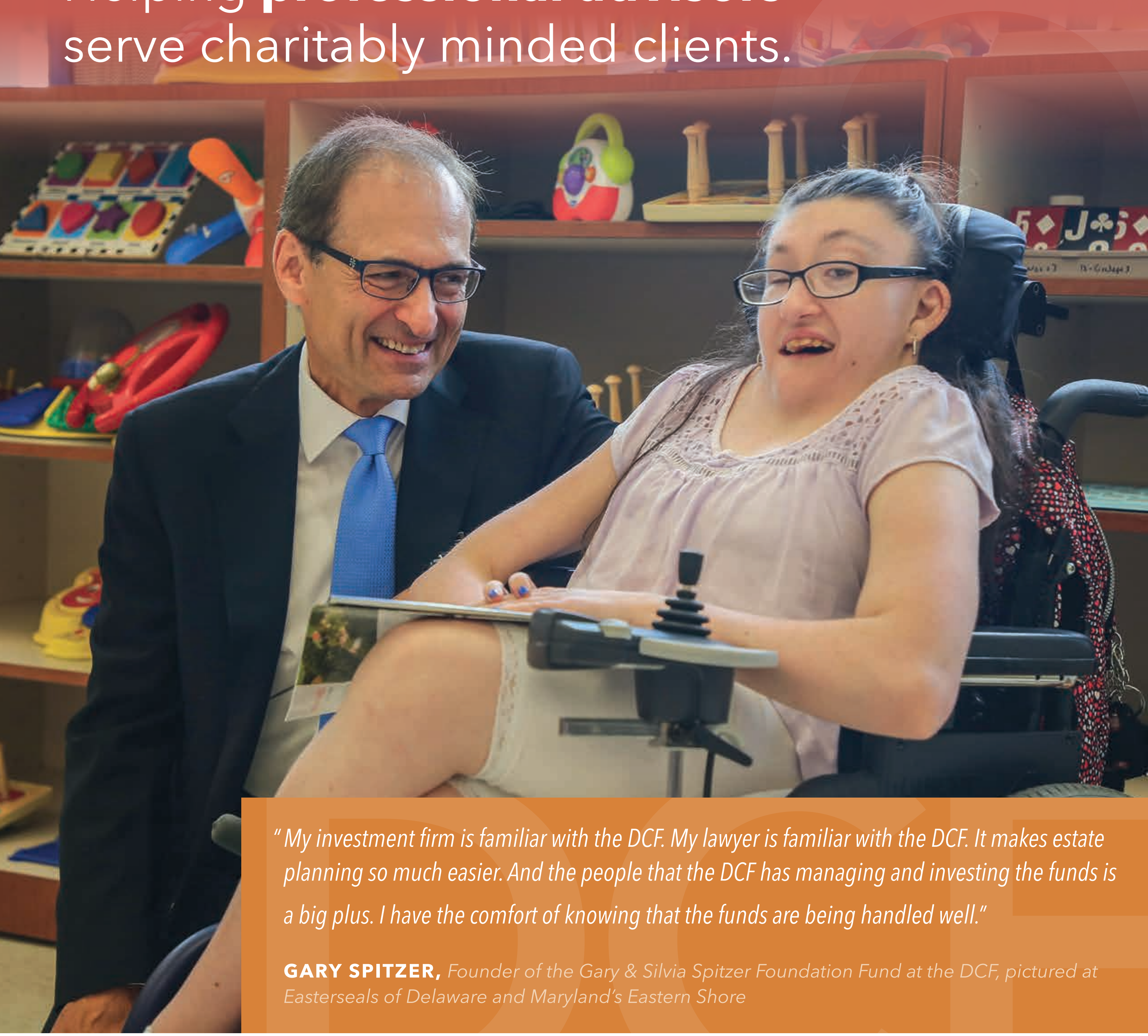

"My investment firm is familiar with the DCF. My lawyer is familiar with the DCF. It makes estate planning so much easier. And the people that the DCF has managing and investing the funds is a big plus. I have the comfort of knowing that the funds are being handled well."

GARY SPITZER, *Founder of the Gary & Silvia Spitzer Foundation Fund at the DCF, pictured at Easterseals of Delaware and Maryland's Eastern Shore*

TO LEARN MORE, PLEASE CONTACT: **Joan Hoge-North · jhoge-north@delcf.org** or **302.504.5224**

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