delaware banker

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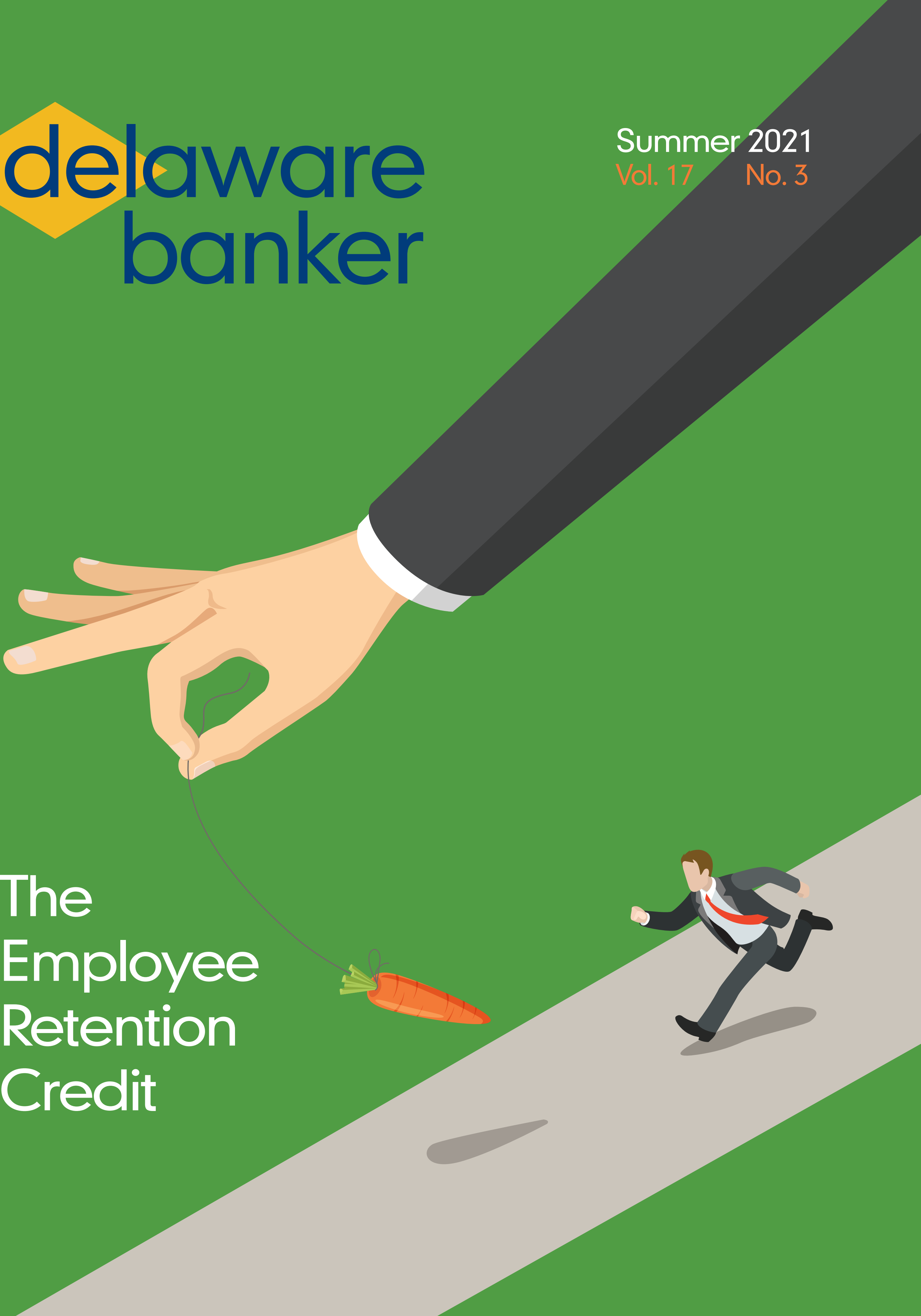

The Employee Retention Credit

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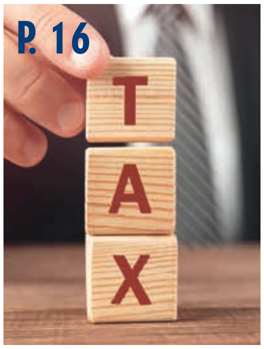

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SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the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

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View from the Chair

by
Thomas M. Forrest
President & CEO
U.S. Trust Company of Delaware

Chair
Delaware Bankers Association

"The Delaware Bankers Association believes all Americans should have an equal opportunity to prosper..."

America is a land of differences. One doesn't have to drive very far beyond the cozy confines of Delaware to see the landscape change dramatically from a coastal plain to hill to mountains, prairies, and deserts. Our citizens represent an even more striking panoply of diversity. Individuals from throughout the globe have traveled here to forge the nation we've become.

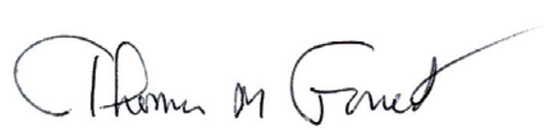
Diversity, equity, and inclusion have distinct meanings, associated with different practices, but are interconnected. Inclusion, in particular, is a process that must be executed, assessed, adjusted, and executed continually. While the process of inclusion may seem daunting because it has no definitive end, think of it as perpetual teambuilding. The process itself is enriching to the organization and to the individuals who will then form innovative and productive teams.

Not surprisingly, having an inclusive and equitable environment will attract individuals to an organization. A diverse workforce is critical to the future strength and vitality of the Financial Services Industry.

Earlier this year, the Board of the Delaware Bankers Association adopted the following statement on Diversity, Equity, and Inclusion:

> **The Delaware Bankers Association believes all Americans should have an equal opportunity to prosper. Economic inclusion is essential to creating opportunities for everyone. We add our collective voice to the national conversation and stand against racial injustice and systemic inequality.**
>
> **Injustice and inequality are at the forefront of the American experience. It is more pressing than ever for all of us to foster intentionally inclusive environments where everyone is valued and provided opportunities.**
>
> **DBA members play a pivotal role in their communities as civic leaders, facilitators of economic growth, and agents of change. We must continue to take steps to:**
>
> - **Enhance economic inclusion**
> - **Open doors of opportunity for all**
> - **Provide greater diversity within our workforces**
> - **Support sustainable growth for our communities**
> - **Ensure the fair treatment of all customers**
>
> **We stand for creating environments and cultures of belonging in which individuals with different identities feel welcome, respected, heard, supported, and valued. Individuals should be able to be their authentic selves in the workplace. A culture of inclusion creates a welcoming environment and opportunities for all perspectives within our organizations.**
>
> **We stand for ensuring fair treatment, access, opportunity, and advancement of people regardless of their individual identities. We strive to identify and eliminate barriers that prevent full participation in our organizations.**
>
> **We stand for having people with different identity factors throughout all teams and all levels of our organizations. Individual identities are made up of all the factors that establish a person's perspectives, values, and experiences.**
>
> **Eradicating injustice and inequality will take all of our efforts. By joining together, we will create prosperity for all.**

The DBA is comprised of members who understand that by sharing a common purpose, and a mutual desire to learn from and with one another, we can make progress in shaping a more equitable and just world. I am proud of our members, our board, and our association, and look forward to serving as your chair in the coming year.



President's Report

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

Alas, yes, the Dog Days of summer are upon us. I'm sure you have heard that idiom used to describe the hot and humid weather we experience in July and August. But I was curious as to its origin and meaning.

According to *The Old Farmer's Almanac*, the term "Dog Days" traditionally refers to a period of sweltering, humid weather occurring during the summer months of July and August in the Northern Hemisphere. This period coincides with when Sirius, the so-called Dog Star, rises and sets with the sun.

The Almanac adds that in ancient Greece and Rome, the Dog Days were believed to be a time of drought, bad luck, and unrest when dogs and men alike would be driven mad by the extreme heat. The ancient Greeks and Romans were not pleased by Sirius's appearance. For them, Sirius signaled a time when evil was brought to their lands with drought, disease, and discomfort.

The Roman poet Virgil, in the classic poem *Aeneid*, described Sirius as a "bringer of drought and plague to frail mortals, rises and saddens the sky with sinister light." Wow, talk about a harbinger of doom!

But here's the kicker: The Almanac goes on to quote a 2009 Finnish study that tested the traditional claim that the rate of infections is higher during the Dog

Days. The authors wrote, “This study was conducted in order to challenge the myth that the rate of infections is higher during the dog days. To our surprise, the myth was found to be true.”

To keep abreast of new developments during the pandemic, the American Bankers Association’s SVP and resident virus expert Paul Benda delivers a weekly podcast where he discusses the latest on COVID-19, the vaccination effort, disease trends, and key updates. Throughout the pandemic, Paul has provided invaluable real-time information to help our members prioritize the health and safety of employees, customers, and loved ones.

Flash forward to July and August 2021. We know the highly contagious Delta variant is now responsible for almost all new COVID-19 cases in the United States, and cases are rising rapidly. In this week’s podcast, Paul noted the recent uptick in the number of new cases began on July 3rd, coincidentally the same day as the first Dog Day of summer: July 3rd. What are the odds of that?

According to Julie Beck, a senior editor at *The Atlantic*, “A coincidence is a surprising concurrence of events, perceived as meaningfully related, with no apparent causal connection. From a purely statistical point of view, these events are random, not meaningfully related, and happen all the time.” Well, Julie, meaningfully related or not, the coincidence of the dates is just eerie.

And as to the peak of the recent surge in cases? Dr. Scott Gottlieb, former FDA chief, said in a recent CNBC interview, “The current spike in COVID infections due to the highly contagious delta variant may be over sooner than many experts believe… peaking probably around late August.” Which again coincidentally tracks with the end of the Dog Days of summer.

The Dog Days of summer officially end when Sirius rises just ahead of the sun, signaling the end of the hottest part of the year and that cooler weather is only weeks away. What a wonderful coincidence it would be if it also signals a precipitous decline in COVID-19 cases.

All Around the Hall

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

"We work to initiate and promote legislation of importance to our members and Delaware."

Another year in Dover - virtually. The First Session of the 151st General Assembly and its committees met as experienced Zoomers rather than live in front of the public they represent.

While it's not an ideal way for an elected body to operate, they were able to conduct business with public input and debate and pass the necessary legislation to keep Delaware moving forward.

I offer some brief reflections on the Session as a Zoomist/lobbyist.

Legislators and Staff

Building and maintaining a relationship with Legislators through a computer or phone screen is not nearly as rewarding as "bumping into" them in Leg Hall three days a week, providing opportunity for casual conversations about a myriad of topics, including legislation.

Missed is the chance to stop by an office for a quick chat about an important issue to one or more parties or just to say hello. Not to be overlooked, the inability to personally interact with the staff imposes another barrier to getting things done in Leg Hall. Taking advantage of the knowledge and willingness of the staff to help certainly smooths the process of advocating one's position on an issue. They are an invaluable source of information and assistance.

Committee Meetings

Attendance and participation were all virtual, of course, but only if you pre-registered for the particular meeting. Because they were virtually present, the public could participate more easily, and they did. However, due to the large number of participants, speakers were often only permitted a limited time to speak – usually 1-2 minutes. And it was strictly enforced, muting the speaker in mid word at times. Other than the dialogue between the bill sponsor and the committee members, there was no opportunity for the members to ask questions of the public speaker. The result, longer meetings and more public input but not always hashed out to clarify issues.

Legislation of Interest

During the session, the DBA usually plays defense in advocating its interests with respect to legislation initiated by someone other than the DBA. We try to stop legislation that we think is harmful to the State and to our banks or work with the sponsor and stakeholders to improve and/or clarify legislative goals. On offense, we work to initiate and promote legislation of importance to our members and Delaware. A perfect example is our collaboration with the Delaware State Bar Association on the Annual Trust Bill (HB 164) that keeps our trust and estates laws at the forefront of the law in the country that was signed into law on June 30th.

The EARNS Act – Expanding Access for Retirement and Necessary Saving Program (HB 205) – is an effort of the Treasure's office to require the establishment of state-sponsored retirement savings accounts by small employers who do not otherwise provide a retirement savings plan for its employees. We worked with other parties to refine the program or, in the alternative, to have it withdrawn because of new federal efforts to address the issue and because of the demonstrated lack of success of similar programs in other states. It is in committee waiting to be addressed when the legislature returns.

Unfair Trade Practices (HB 91) – the sponsor, along with the Attorney General's office, sought to redefine an unfair trade practice in a very vague manner.

Working with other interested parties and an understanding Legislator, the bill was amended to reflect a much better, well-interpreted definition and passed both chambers, and signed by the Governor July 23rd.

Annual Aircraft Fee (HB 232) – is a good example of a bill that appears harmless but could upset our members' substantial corporate trust business.

A small annual fee on aircraft that are registered in but not based in Delaware (i.e., large fleets of airliners and other planes) would put Delaware corporate trustees at a competitive disadvantage. Listening to our objections and those of the legal community, the sponsor agreed to hold the bill pending an analysis of the potential adverse financial impact of the bill.

Data Broker Bill (HB 262) – the sponsor circulated a draft bill among various stakeholders, including the Attorney General's office, asking for comment. The DBA was one of many that submitted comments which, due to the volume of comments, apparently delayed the filing of the bill until June 30th. Much work remains to be done on this bill before the start of the second session of the 151st General Assembly.

Although five months away, with the strength of the COVID variants and a meaningful number of people still fully unvaccinated, I wonder if we don't face another virtual session of the General Assembly. In spite of this encumbrance to the legislative process, the interests of our members specifically and Delaware generally will continue to be our focus in the coming year.

Tom

What's New at the DBA

New Associate Member

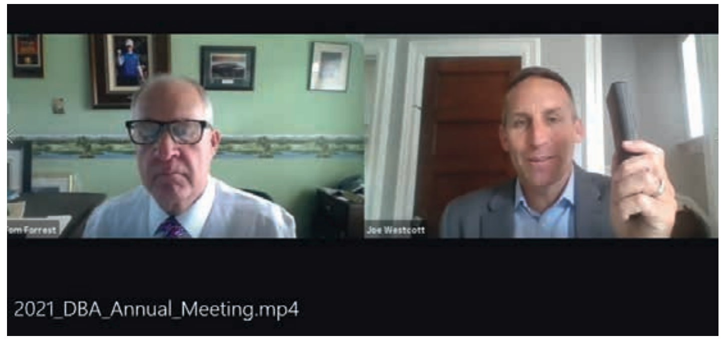
Gawthrop Greenwood – Attorneys at Law

P. Kristen Bennett, Partner
Phone: 302-777-5353
FAX: 302-777-5299
Email: kbennett@gawthrop.com
Website: www.gawthrop.com

Gawthrop Greenwood is a regional law firm with offices in Greater Wilmington and West Chester. For more than a century, the firm has stood by its core principle of providing high-quality legal services with personal attention in a wide range of matters including Delaware estate and tax planning, family law, mediation, business and real estate matters.

DBA 126th Annual Meeting

Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware, was elected the Chair of the Delaware Bankers Association on May 13th at the DBA's 126th Annual Meeting in Wilmington. The DBA also elected and installed: Dominic C. Canuso, EVP & CFO, WSFS Bank, to the position of Chair-Elect. The annual meeting was held virtually due to social distancing requirements.



DBA Chair Joe Westcott, Market President, Delaware, Capital One (r.) passes the virtual gavel to incoming Chair Tom Forrest, President & CEO, U.S. Trust Company of Delaware (l.) the 126th DBA Annual Meeting.

Other Members of the DBA Board of Directors are Past Chair: Joe Westcott, Market President, Delaware, Capital One; Directors at Large: Matthew Parks, Director, Discover Bank; Tarrie Miller, President & COO, County Bank; Directors: Diana Clift, Head of Legal, Barclays; Caroline H. Dickerson, Chief Executive Officer, Commonwealth Trust Company; James Hutchinson, Senior Vice President, Market Executive, PNC Bank, N.A.; George Kern, Regional Director, Bessemer Trust Company of Delaware; Lisa

P. Kirkwood, Senior Vice President, Regional Vice President, TD Bank; Nicholas P. Lambrow, President, Delaware Region, M&T Bank; Isabel Pryor, Chief Administrative Officer & SVP; Key National Trust Company of Delaware; Bonnie Rumbold, Chief Human Resources Officer, Sallie Mae; Joel Schiller, SVP Chief Risk Officer Artisans' Bank; Shelley Waite, Head of CCB Collections, JPMorgan Chase & Co.

Erin Arvedlund, author of *Too Good To Be True, The Rise and Fall of Bernie Madoff*, delivered the keynote address, followed by a Q&A session moderated by Jim Roszkowski, President, Discover Bank.

David G. Bakerian Scholarship Awarded

The DBA announced the winners of the 2021 David G. Bakerian Award. The winners were Brendan Lewis, a student at Caesar Rodney High School, and Aidan Lowe, a student at Newark Charter High School. Both students participated in the Keys to Financial Success course. Each winner received a $2,500 scholarship. Keys to Financial Success is a full-semester elective taught in 31 high schools throughout Delaware to over 4,000 students. The course was developed in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE), Delaware Bankers Association, Federal Reserve Bank of Philadelphia, and Consumer Credit Counseling Service of Maryland and Delaware. Keys to Financial Success introduces students to the fundamentals of sound money management skills and basic financial planning concepts including Goals and Decision Making, Career Research, Money Management, Consumer Skills, and Risk Protection.

Women Connect Speaker Series

The six live sessions of 2021 Women Connect Speaker Series concluded on July 22nd with *Exploring Emotional Intelligence*. All sessions are now available for on-demand viewing. Empower and connect with these great speakers and sessions...

Build Your Personal Brand - Laura Meyer
Business Ready Essentials - Danielle Turcola
Building Rapport and Engagement - Cathleen Hitchens
Taking the Work out of Networking - All-Star Panel
Leveraging Your LinkedIn - Michael Coniglio
Exploring Emotional Intelligence - Linda Comerford

You can watch all six dynamic Women Connect sessions for just $199 for DBA Members, or attend individually for $39 per session for DBA members. Visit www.debankers.com for details.

Cover Story

The Employee Retention Credit

A Little Known, but Powerful Tax Credit

by
Michael D. Kelly, CPA
Belfint, Lyons & Shuman

Have you heard about a little-known tax credit that could generate savings for your business and most nonprofit clients of $5,000 per employee in 2020 or $28,000 per employee in 2021? Powerful, right? Well, we are getting a little ahead of ourselves so let us start from the beginning.

A Little History

The Employee Retention Credit, also known as ERC, was one of many items that came from the Coronavirus Aid, Relief and Economic Security (CARES) Act passed in March 2020. The CARES Act also brought taxpayers the Paycheck Protection Program (PPP) which has been thoroughly covered in the news. It seems like everyone knows about the PPP but for some reason the Employee Retention Credit has not received the same fanfare. One big reason for the lack of coverage is that the CARES Act did not initially allow the Employee Retention Credit to be claimed by employers who also applied for a PPP loan. Because of this, many employers were not allowed to utilize the Employee Retention Credit in the beginning of the pandemic.

The Employee Retention Credit in 2020

In December of 2020, the Taxpayer Certainty and Disaster Tax Relief Act of 2020, a section of the Consolidated Appropriations Act of 2021, was passed which contained a provision that voided this rule and opened the door for many small businesses to claim the credit.

An employer can claim the Employee Retention Credit as a payroll tax credit if the employer pays wages or qualifying health expenses to employees. The credit would reduce the amount of payroll tax withholdings and employer matching amounts that normally would have to be remitted to the government and reported on Form 941 and is calculated on 50% of wages or health expenses paid to employees from March 12, 2020 through December 2020. The maximum annual credit is $5,000 per employee with a maximum annual wage base of $10,000 per employee.

There are a few catches to claiming the Employee Retention Credit. First, employers that averaged more than 100 employees in 2019 would only be eligible for a credit if they paid employees who did not provide services to the employer. Essentially, the government initially wanted to focus on larger employers who closed their doors during the pandemic but still somehow managed to compensate their employees. If an employer had less than 100 employees, the service rule described above did not apply.

Second, eligibility of the Employee Retention Credit could also be derailed depending on the timing and use of the PPP funds. To qualify for full forgiveness of the PPP loan, employers must use a portion of the PPP funding to pay employee payroll costs. The employer reports these payroll costs on a PPP forgiveness application and in most circumstances, these same payroll costs cannot be used for the Employee Retention Credit. However, there are many ways to maximize both the forgiveness of PPP loans and the Employee Retention Credit which go beyond the scope of this article.

Finally, employers could only qualify for the credit in each quarter in 2020 if they demonstrated a 50% drop in gross receipts when comparing to the same quarter in 2019, which is also known as a significant decline in gross receipts. If employers did not demonstrate a significant decline in gross receipts, the employers could still qualify for the Employee Retention Credit if their business operations were fully or partially suspended by the government due to compliance with Covid-19. The suspension of business operations would have to have had more than a nominal impact on business operations. The IRS defines a nominal impact on business operations as something that results in more than a 10% reduction

(Continued on p . 14)

Employee Retention Credit

(continued from p. 13)

in an employer's ability to provide goods or services in the normal course of the employer's business.

Example Scenario in Notice 2020-21: The partial suspension rule may be difficult to analyze, and the IRS has included examples in Notice 2020-21 to help give additional insight into their thought process. One of the most practical examples offered in the notice focuses on a traditional restaurant that previously offered indoor dining to its patrons before Covid-19. In the example, Covid-19 arrives, and a government reacts to it by issuing an order that no longer allows indoor dining. However, the government order continues to allow restaurants to accept take-out orders and provide outdoor dining to its customers. In the example, the IRS concludes that more than a nominal part of business operations has been shut down and the business is eligible for the credit.

Example Scenario of What I've Seen: I helped clients apply the above example to their situation when they suffered a partial suspension of activities due to governmental orders. Most states, Delaware being one of them, identified and grouped businesses into essential and non-essential categories. It is not uncommon for a business to have essential and non-essential components and the government would shut down the activities of the non-essential components while allowing the essential ones to continue operating.

For example, eye doctors perform essential and non-essential services. They may perform emergency eye surgeries but also may offer non-essential services like elective surgeries or basic eye exams. When Covid came, Delaware issued an order restricting non-essential businesses from operating. In this example, a "non-essential" portion of their business operations was suspended. Since the non-essential services comprised more than a nominal portion of business activities, my client claimed an Employee Retention Credit on the wages paid during the period of shutdown. One of my clients only had a 48% drop in gross receipts and barely missed qualifying for the credit under the significant drop in gross receipt test. The partial suspension rule allowed them to still claim a credit.

It is important to note one key difference between a substantial drop in gross receipts versus a full or partial suspension of business activities. If a business has a significant decline in gross receipts in a given quarter, wages or health expenses paid during the entire quarter could be eligible for the credit (subject to the $5,000 cap) while only wages or health expenses paid during an actual full or partial shutdown period would qualify for the credit.

How the Employee Retention Credit Progressed in 2021

The Employee Retention Credit rules were liberalized in 2021 but still contain the same potential complications related to the interaction with the PPP program. So, if an employer received a PPP#2, they may need additional professional analysis to ensure maximization of PPP forgiveness and the Employee Retention Credit.

In 2021, the 100-employee test increased to 500-employees, opening the door for larger employers to apply for the credit. The $5,000 annual cap per employee is increased to $7,000 per employee per quarter and is based on 70% of wages paid to an employee instead of the 2020 rule which only allowed 50%. This essentially allows an eligible employer to apply for a $28,000 credit per employee for the entire year, a potential windfall for many employers which gets magnified if the employer has a large amount of employees.

An employer must demonstrate a 20% drop in gross receipts in any quarter in 2021 when compared to the same quarter in 2019. This is substantially much easier to accomplish compared to the 50% reduction which is the 2020 standard. The full or partial suspension test is still available in 2021 but is less likely to be utilized since the country began to open more in 2021.

How to Claim the Employee Retention Credit & Additional Considerations

The Employee Retention Credit is claimed on payroll tax returns. For payroll tax returns filed in 2020, it is likely an employer will have to amend the payroll tax return to claim the credit since the returns have already been filed. In 2021, an employer could request an advance of the credit and reconcile any differences at the end of the quarter when the payroll tax return is filed. Unfortunately, for the amended returns, the IRS has been extremely slow to process them which is not ideal for businesses that desperately need these funds.

One downfall of the credit is that it reduces the tax deduction for the wages and qualifying health expenses on the income tax return essentially making the credit fully taxable at the federal level. The deduction is lost in the year when the wages are paid. The state income tax rules would have to be examined to determine the tax impact at the state level. In other words, your client's income tax liability might be increased, causing them to pay higher taxes on their 2020 or 2021 income tax return depending on the year the wages related to the credit were paid.

In Summary

The Employee Retention Credit is an extremely powerful credit that could provide immense savings for your clients. The next time you speak to your clients, check with them to see if they are aware of the Employee Retention Credit. Even if they say they know about the Employee Retention Credit and think they do not qualify, I recommend the client take the time to gather a second opinion as the rules of eligibility have been constantly evolving. It could potentially be a wonderful opportunity for them, and they surely will not forget the fact that you proactively asked about their Employee Retention Credit situation.

Michael Kelly has over ten years of experience focusing on taxes while working with various types of industries including medical practices, optometrists, law firms, franchises, family-owned businesses, and construction companies. Michael specializes in individual and business taxation, trust and estate taxation, state and local taxation, and nonprofit advisory. He frequently assists clients with their accounting questions and has a strong understanding of QuickBooks and other bookkeeping software. Continuously thinking of creative solutions to minimize taxes for his clients and increase client efficiency are two of the many areas where Michael excels. He also enjoys the challenge of researching uncertain or unusual federal and state income tax issues, including being heavily involved with his clients on the PPP loan and forgiveness application process.

How Does Your Plan "Stack Up"?

Utilizing QSBS and Non-Grantor Trusts

by
Michael M. Gordon
Daniel F. Hayward
Kimberly Gill McKinnon,
and Patrick J. Rohrbach
Gordon, Fournaris & Mammarella, P.A.

The use of "qualified small business stock" ("QSBS") and non-grantor trusts has become a popular income tax planning technique for high net worth clients (especially entrepreneurs) over the past several years. Section 1202 of the Internal Revenue Code ("Section 1202") generally provides that gains resulting from the sale of QSBS can be realized by non-corporate taxpayers tax-free. A taxpayer is eligible for full or partial exclusion of the gains from a sale or exchange of QSBS if (i) such taxpayer has held the QSBS for more than five years, (ii) a "qualified small business" issued the QSBS after August 10, 1993, and (iii) such taxpayer acquired the QSBS at original issuance and purchased the QSBS or received the QSBS for services rendered.[1]

Basics of QSBS

When the five-year holding period begins depends on how the QSBS was acquired by the taxpayer. If the taxpayer acquired the QSBS through the exercise of an option, the holding period begins on the date of the exercise of such option. If the taxpayer acquired the QSBS through the vesting of restricted shares, the holding period begins on the date of the vesting of such restricted shares.

The issuing company must also constitute a "qualified small business." The company must be a domestic C corporation with $50,000,000 or less in aggregate gross assets at all times prior to the issuance of the

QSBS and immediately after the issuance of the QSBS.[2] In addition, during the taxpayer's holding period, at least 80% of the company's assets by value must be used in the active conduct of one or more qualified businesses, although stock and debt of subsidiary entities are generally disregarded for the 80% test.[3] While there is not much guidance as to what does qualify as a qualified business, PLR 201436001 suggests a "service test"—if the business provides a service (e.g., a law firm, a health provider, an insurance company or a hotel), then it is likely not a qualified business.

The maximum amount of gain that can be excluded in a taxable year from the sale of QSBS, per taxpayer, is the greater of (i) $10,000,000 less the sum of any gains that the taxpayer has already taken in prior taxable years attributable to the company that issued the QSBS, and (ii) ten times the taxpayer's adjusted cost basis of QSBS disposed of during the taxable year. In the vast majority of cases, the maximum amount of QSBS gain exclusion is $10,000,000 per taxpayer.

There are significant tax planning opportunities with the QSBS gain exclusion because the exclusion is available "per taxpayer." This incentivizes a planning technique known as "stacking," which involves gifting QSBS to other taxpayers to allow such other taxpayers, in addition to the transferor, to utilize the QSBS gain exclusion. For purposes of determining whether a taxpayer is eligible for the QSBS gain exclusion, a taxpayer who receives QSBS by gift is treated as obtaining the QSBS in the same manner as the transferor and the transferor's holding period is tacked on to the transferee's holding period.[4]

"Stacking" with Trusts

One popular way to utilize the stacking tax planning opportunity from the QSBS gain exclusion is through trust planning. With respect to grantor trusts, the grantor and the trust are treated as the same taxpayer for income tax purposes. Therefore, upon the transfer of QSBS to a grantor trust from the grantor, the grantor trust should be deemed to have acquired QSBS in the same manner as the grantor and should have the same holding period as the grantor with respect to such QSBS.

In order to utilize the "stacking" technique through trust planning, however, the trust will need to be structured as a non-grantor trust because such a trust is taxed as a separate taxpayer from the grantor of such trust for income tax purposes.

Delaware is a particularly attractive state to situs non-grantor trusts intended to be utilized to stack QSBS gain exclusions for a couple of reasons. First, Delaware does not tax that portion of income and capital gains of the trust accumulated and set aside for future distribution to beneficiaries who are not residents of Delaware. A popular technique with clients from jurisdictions with high state income tax, such as California, is to create a non-grantor trust in Delaware and then fund such trust with QSBS. Upon the sale of the QSBS, the gain from such sale will not only be tax-free at the federal level, but will also avoid California state income tax and will thus be tax-free at the state level, provided none of the beneficiaries of such trust are Delaware residents and provided the trust is structured to avoid any income tax nexus with California (e.g., ensuring that the trust does not have any California residents serving in fiduciary positions, among other requirements). Second, the Delaware Qualified Dispositions in Trust Act, 12 Del. C. § 3570, et seq. ("Delaware's Asset Protection Trust Statute") permits a grantor to establish a trust, including a non-grantor trust, and name the grantor as a beneficiary of such trust while still retaining general creditor protection. This gives the grantor the opportunity to take advantage of stacking one or more additional QSBS gain exclusions while also retaining the ability to benefit from such funds.

Utilizing DING Trusts

A client who wants to stack multiple QSBS gain exclusions, and also wants to potentially benefit from such funds, could create one or more Delaware incomplete gift asset protection trusts (a "DING" or "DINGs"). As alluded to above, DINGs are particularly attractive to a grantor that resides in a jurisdiction with high state income taxes. To ensure that the trust is taxed as a non-grantor trust, and thus a separate taxpayer, practitioners must take care to not trigger the grantor trust rules. Practitioners generally avoid triggering the grantor trust rules by creating a distribution committee that directs distributions from the trust and then populating such committee with two or more adverse parties with respect to the grantor and the grantor's spouse, if he or she is also a beneficiary of the DING. Adverse parties are typically members of the current beneficial class, other than the grantor and the grantor's spouse, who are eligible to receive distributions of income and principal from the DING.

To structure the trust as an incomplete gift, the grantor should retain (1) a lifetime limited power of appointment limited by an ascertainable standard, (2) a testamentary limited power of appointment, and (3) a veto power whereby a distribution directed by any one member of the distribution committee must be approved by the grantor.

Despite the fact that a gift of QSBS to a DING is incomplete, it is still likely deemed to be "acquired by gift" for purposes of determining whether the stock qualifies as QSBS because (1) the QSBS is acquired by the DING via donative transfer and (2) the grantor still made a gift of QSBS to the DING, it is simply an incomplete gift until distributions are made from the DING or the grantor dies, at which point the gift to the DING becomes complete.

When creating multiple DINGs to stack QSBS gain exclusions, practitioners will need to be careful to adequately differentiate each DING from each other DING minimize the risk that the DINGs could be "collapsed" into a single trust or a smaller number of trusts for income tax purposes. We typically accomplish this by differentiating one or more of the following: the beneficial provisions, the class of beneficiaries, the members of the distribution committee, the grantor's testamentary power of appointment, and the interests of the remainder beneficiaries.

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Utilizing Completed Gift Non-Grantor Trusts

A DING is not the only type of trust that can be used to stack QSBS gain exclusions. The other type of trust is a completed gift non-grantor trust. Unlike a DING, the assets used to fund a complete gift trust will no longer be in the grantor's estate upon funding and will not receive a step-up in basis upon the grantor's death.

A type of completed gift non-grantor trust is the spousal lifetime access non-grantor trust (a "SLANT" or "SLANTs"). The primary difference between a SLANT and other types of completed gift non grantor trusts is that the grantor's spouse is a beneficiary of the SLANT. Similarly to drafting the DING, practitioners will need to be careful to not trigger the grantor trust rules. To avoid triggering the grantor trust rules, the beneficial provisions of the SLANT should require the consent of an adverse party to the grantor's spouse to make distributions to the grantor's spouse from the SLANT.

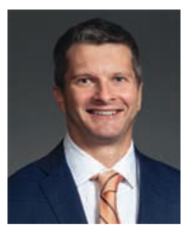
While, unlike DINGs, it is not common for the grantor to be a beneficiary of a completed gift non-grantor trust, Delaware's Asset Protection Trust Statute allows for the grantor to be a beneficiary of a completed gift non-grantor trust. Generally, if the grantor may want to benefit from the funds transferred to a completed gift non-grantor trust, one approach is to structure the trust as a "springing" completed gift asset protection trust. This structure gives a powerholder the ability to add individuals, including the grantor, to the class of beneficiaries. When structuring a trust in this way, practitioners must ensure the trust qualifies as self-settled asset protection trust in accordance with Delaware's Asset Protection Trust Statute. If the grantor never needs access to the trust funds, the grantor would not need to be added to the beneficial class, and the trust would remain a third-party trust.

Hypothetical

To further illustrate the concept of stacking QSBS gain exclusions via non-grantor trust planning, we provide an example of utilizing DINGs to stack QSBS gain exclusions. A client and her spouse hold QSBS valued at approximately $70,000,000 to $80,000,000 with a very low basis. The couple lives in California, which is a community property state. The client expects to sell the stock in the next year or two. The client has two children.

The client and her spouse would enter into a transmutation agreement under California state law to sever their community property interests in the QSBS so that the client owns half the QSBS and the client's spouse owns the other half of the QSBS. After waiting a period of time to ensure that the transmutation agreement is respected, the client would create three trusts and the client's spouse would create three trusts. To avoid the trusts from collapsing into a single trust or a smaller number of trusts, the DINGs must be sufficiently different, as discussed above, such as by having different beneficiaries and distribution committee members, among other differences. The end result is possibly excluding $70,000,000 to $80,000,000 worth of gain (with each trust excluding $10,000,000 worth of gain and possibly each spouse, if filing separately, excluding $10,000,000 worth of gain) instead of $10,000,000 to $20,000,000 worth of gain. The client and her spouse should also work with their local estate planning counsel to ensure that the testamentary powers of appointment contained in the DINGs are properly exercised in such a way as to fit in with their overall estate planning goals.

In 1993, Congress enacted Section 1202 to incentivize investment in small business by permitting the partial exclusion of certain gains from the sale of QSBS. Over time, the law evolved culminating in 2010 when The Small Business and Jobs Act of 2010 eliminated the federal tax on qualifying sales. The popularity of QSBS gain exclusions has risen sharply over the past few years, particularly for founders and early employees of tech companies. Delaware is particularly well suited situs for taxpayers to maximize the advantages of the QSBS gain exclusion.



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Notes:
1- IRC § 1202(a)(1) and (c)(1).
2- IRC § 1202(c)(2)(A) and (d)(10).
3- IRC § 1202(e).
4- IRC § 1202(h).

Jumpstarting Wilmington's Success, Neighborhood by Neighborhood

by
Dionna Sargent, VP, Community Development
Chris Neary, VP, Policy, Research & Advocacy
Cinnaire

There's certainly a lot to be excited about in Wilmington. With a recent announcement of a $100 million Riverfront expansion and significant developments on Market Street, Wilmington is poised to build on the national and international attention these areas gained during the presidential campaign and transition. However, there has been a growing call for ensuring that the heart of Wilmington – its neighborhoods – are not left behind.

Cinnaire launched Jumpstart Wilmington in 2020 to encourage Wilmington residents to build wealth and become developers in their own neighborhoods through a free four-week real estate development training program. Building development skills for Wilmington's developers of color will help lead neighborhood revitalization and change. The program is modeled after the highly successful Jumpstart Germantown program in Philadelphia. Since it launched late last year, 47 community members, largely people of color, have completed the training through one of the first three cohorts. Recently, the aspiring developers gathered to celebrate program completion and begin collaborating on potential projects. Mayor Purzycki was in attendance congratulating the graduates and encouraging them to take on the challenge of revitalizing Wilmington neighborhoods.

"The Jumpstart training program is intensive. It's not just a workshop talking about high-level concepts," said Quincy Watkins, a Wilmington business owner and member of Jumpstart's first cohort. "It is a soup to nuts resource where you learn about contracts, licensing, how to manage a property, financing, environmental concerns…everything was covered."

Skill-building will not be enough, however, to reverse the legacy of systemic racism and discrimination, including disinvestment and blight. As a City, Wilmington faces many of the challenges burdening communities of color across the country. We are living with the legacy of decades of harmful government policies that have destabilized Wilmington's neighborhoods, including discriminatory housing policies that devalued homes owned by Black residents and spurred disinvestment. It will take more than development skills to address the glut of vacant and blighted homes that plague some of Wilmington's neighborhoods to this day.

The legacy of housing discrimination has been well-documented. In 2019, author Richard Rothstein spoke at Cinnaire's Building Equitable Communities Symposium at the Queen Theater. In Rothstein's book, The Color of Law, Rothstein lays out in stark detail how intentional government policies like redlining segregated previously diverse communities and drove the racial wealth gap by freezing Black families out of homeownership opportunities. The resulting decrease in Black home values created a vicious cycle of disinvestment.

We are living with the compounding legacy of these policies to this day. The gap between white and Black homeownership is at a higher level now than it was in

1968, when Congress enacted the Fair Housing Act.[1] "Black Americans have a 60% income ratio to whites, but just a 10% wealth ratio," Rothstein said in his remarks at The Queen. "The enormous disparity between a 60% income ratio and a 10% wealth ratio is entirely attributable to unconstitutional federal housing policy and a civil rights violation that every one of us has an obligation to remedy."

As a Community Development Financial Institution (CDFI) serving Wilmington, Cinnaire is committed to reversing these trends – and needs strong partnerships to do so. In addition to sponsoring the Jumpstart program, we are working to develop vacant homes for affordable homeownership opportunities. Unfortunately, while there are other mission-driven organizations in the City working toward the same goal, it is not sustainable without government-led investments to spur private sector development.

Recently, we released a paper outlining the challenges of bringing investment to communities in Wilmington that have experienced disinvestment and the policy solutions we believe will help reverse the legacy of government policies.

There is some momentum for reversing this dynamic. The movement sparked by the murders of George Floyd, Breonna Taylor, and Ahmaud Abery more than a year ago and the disproportionate impact of the COVID-19 pandemic on communities of color have heightened awareness of the legacy of government policies in driving segregation and disinvestment to this day. While this reality is nothing new to communities in Wilmington, we have seen bolder policy responses proposed than ever before, including by President Biden, who called for $213 billion in federal funding for affordable housing productions.
Our elected officials in Delaware understand this need, too. Our Congressional delegation has called for housing investments to be included in federal infrastructure legislation. Under Governor Carney, the State of Delaware has invested in Wilmington's neighborhoods through its Strong Neighborhoods Housing Fund. Here in Wilmington, Mayor Purzycki has called for $30 million in investments in Wilmington's neighborhoods using federal COVID relief funding.

Successfully confronting the legacy of discrimination and ongoing systemic racism will require intentional practice and policy solutions – and strong partnerships. In Wilmington, there is a growing recognition that now is the time to get to work, one block at a time.

1- https://www.jchs.harvard.edu/son-2020-homeownership-gap

Learning to Lead:

Which degree matches your career goals: the MBA or the MSM?

by
David Bernard
Wilmington University

Management skills aren't just for climbing the corporate ladder. Those who work in health care, information technology, law enforcement, or nonprofit organizations can also benefit from the lessons of business. If you're looking to lead in your field, Wilmington University's Master of Business Administration and Master of Science in Management allow you to customize your graduate studies to your own professional path. Each offers a career-focused, experience-driven degree that fits your schedule as well as your budget.

"Students come to WilmU's College of Business because they're looking to advance their careers," says Dr. Kenneth Morlino, MBA program chair. "The master's degree they choose to pursue depends on where they're aiming to be."

Both degree programs are available 100% online, for education at your convenience. Both 12-course programs can be completed in one or two academic years. WilmU's open admission policy means Graduate Management Admission Test scores are not required for application or enrollment. Plus, since classes start every eight weeks, you won't have to wait long to get started on either program.

Both programs' cutting-edge coursework, endorsed by the International Accreditation Council for Business Education, enables students to immediately put the lessons they're learning to work on the job. WilmU's small class sizes allow individual access to and attention from instructors, working professionals who bring a world of business experience into the classroom. The coursework for both degree programs offers concentrations that enable professionals to acquire the knowledge necessary for leadership in their respective industries.

What makes the MBA and the MSM unique educational experiences, however, is their differing approaches to the leadership experience. The quantitative MBA focuses on the financial and analytical aspects of business with emphasis on strategy, managerial accounting, marketing, and organizational behavior.

The MSM's qualitative approach prepares skilled leaders and change agents through an emphasis on strategic thinking and artful communication. Candidates learn to successfully manage diverse teams while nurturing creativity and harnessing new technologies.

While entry into the MBA program requires the prior completion of accounting, economics, finance, and mathematics courses, the MSM has no prerequisite requirements.

"The difference between the two master's degrees is meant to convey the range of opportunity in our leadership learning," says Sheryl Scanlon, who chairs the MSM program. "We follow through on that opportunity with a choice of concentrations, which allow students to customize their degrees to their specific areas of interest."

Each concentration is comprised of five courses, providing a deep dive into the student's chosen area of study. In addition to a range of business and financial concentrations (see full list in sidebar), WilmU offers a number of concentrations to train leaders outside of the standard corporate setting.

The Health Care Administration concentration explores the changing environment of patient care, including the impact of public policy, the business of insurance, demographics and demand, and legal and ethical issues.

Law enforcement officers pursuing an MBA or MS in Management with the Homeland Security concentration will learn how to prepare and protect business environments with risk assessment and crisis management techniques.

Business depends upon technology. The Management Information Systems concentration provides technology's handlers with the business abilities needed to oversee its implementation and use.

Nonprofit organizations play an increasing role in filling community needs. The Nonprofit Management concentration aims to train their leaders and future leaders to apply business strategies to their administrative governance, their fundraising efforts, and their core missions.

The military, as well as civilian business, is regularly challenged in its quest to identify, acquire, and develop or identify those candidates with leadership capability. WilmU's MSM with a concentration in Military Leadership is designed to meet the growing, complex needs of the Delaware National Guard leader.

The Sport Management concentration equips students with the skills and abilities necessary in one of the largest industries in the world. Students will demonstrate knowledge in areas such as sport law, governance, service, strategy, forecasting and risk.

WilmU MBA and MSM Concentrations add specialization to your degree to increase your knowledge and marketability.

MBA	MSM
Accounting	Business Communications
Business Analytics	Healthcare Administration
Business Communications	Homeland Security
Business Technology Management	Human Resource Management
Finance	Management Informations Systems
Health Care Administration	Marketing
Homeland Security	Military Leadership
Human Resource Management	Nonprofit Management
Managment Information Systems	Organizational Leadership
Marketing Management	Public Administration
Nonprofit Management	Sport Management
Organizational Leadership	
Sustainability	

"As an MBA graduate of Wilmington University, I am very proud of the programs we offer," says Kathy Kennedy-Ratajack, dean of the College of Business. "I have had the opportunity to use the skills that I learned in the program to help me grow both professionally and personally. Now and in the future, our focus is on ensuring that we're meeting the career needs of our students, and the businesses that employ them."

Accessible. Affordable. Adaptable. WilmU's MBA and MSM degrees work for working adults in many fields. For more information or to apply, visit the College of Business online at wilmu.edu/Business.

David Bernard is a Media Services Assistant at Wilmington University

Education

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Learn the Basics of Business Administration - WilmU's new Mini MBA course offers an overview of corporate concepts

If your non-business career is orbiting closer to your company's business operations, Wilmington University's new Mini MBA course can provide the fundamentals you'll need to keep current with your changing role. A one-semester graduate-level course, Topics in Business: Mini MBA (MBA 5001) offers an accelerated overview of the concepts examined in WilmU's Master of Business Administration degree program.

"We put this course together with a specific group of students in mind," says Dr. Kenneth Morlino, the MBA program chair of WilmU's College of Business. "It's for professionals who want to understand the business ideas being discussed around them, without committing to a full- or part-time, 12-course MBA program."

The careers of engineers, scientists, health care and human services workers, artists, and others without undergraduate business degrees are increasingly intersecting with the work of their corporate colleagues, notes Morlino.

"Those who want to explore MBA content but aren't sure they're ready to invest the time, energy and tuition into earning the degree, and those who want to enhance their skills in preparation for career advancement, will find a lot to value in this condensed business course," he says.

The course consists of eight 90-minute live online classes, one every other week during the spring or fall semester. The course's small class sizes are designed to promote student interaction, and assigned readings and writing assignments will supplement class discussion. Topics to be covered in the course include business structures, organization leadership, ethics, human resources, marketing, finance, data analysis, accounting, information technology, strategy and tactics, and global business.

Students must have previously earned a bachelor's degree to enroll in MBA 5001, Topics in Business: Mini MBA. Once completed, the three-credit course may be applied as an open elective to eligible WilmU graduate degree programs, with program chair approval.

For more information, please visit go.wilmu.edu/MiniMBACourse or contact recruiting@wilmu.edu.

Due Diligence – Cybersecurity

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

"Plan sponsors must now be prepared in a Department of Labor audit to respond to a slew of cyber-related questions."

Does your retirement plan service provider offer strong cybersecurity practices? Do they offer a customer protection guarantee? When was the last time you conducted a comprehensive benchmarking analysis of provider services, fees, and investments, including an RFI on cybersecurity?

The Department of Labor (DOL) issued new cybersecurity guidance for plan sponsors, plan fiduciaries, record keepers, and plan participants. The guidance, in the form of "Tips" and "Best Practices" for Cybersecurity, seeks to clarify expectations of fiduciaries and help protect trillions of dollars in plan assets.

Plan sponsors should be prepared to establish, on audit, if they have done their due diligence regarding cybersecurity. It is possible the courts will utilize these tips as minimum responsibilities in determining whether plan fiduciaries acted prudently and to determine the responsibilities of the respective parties.

The guidance consists of three separate documents in three forms.

Tips for Hiring a Service Provider with Strong Cybersecurity

Sponsors are tasked with understanding and knowing the service provider's security measures and reconciling with industry standards; the service provider's track record for breaches; confirm an independent audit is established regarding effective security measures being in place and followed; and confirming service contract explicitly states the service provider is fully responsible for cyber breaches.

Cybersecurity Program Best Practices

Provides twelve points that service providers should follow, including (but not limited to) the cybersecurity program is well documented; an annual audit by an independent third party that establishes effective security measures are in place and followed; and employee training regarding security measures.

Online Security Tips

Participant-directed tips such as the importance of strong passwords, monitoring accounts regularly and not falling for phishing attacks. These tips acknowledge that participants retain some responsibility in maintaining account security.

Plan sponsors must now be prepared in a DOL audit to respond to a slew of cyber-related questions. Investigations are already underway where the Department has requested significant documentation regarding cyber security including items such as written policy and procedures, risk assessments and cyber security awareness training.

An in-depth benchmarking analysis can determine if your service providers are in alignment with the new guidance. A prudent advisor and fiduciary should conduct these reviews on a regular basis in accordance with a well-established and documented fiduciary governance process. A comprehensive analysis and review should also include a quantitative and qualitative review of fund performance, fees and expenses, services provided by your vendors, participant engagement resources and holistic financial wellness and education programs.

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Regulatory Expectations in Vendor Management

Gene Collett, CRCM
Managing Principal
CAPCO I RISC Services

"These [agency] bulletins and letters clearly establish an expectation of complete bank ownership of – and accountability for – process outcomes, including vendors' actions."

Worried about service providers in some of your operations? Satisfied with their service, but have a few frustrations? Relationships with operational service providers can be complex, with implications for business growth, consumer compliance, technology, reputation, and operational cost and execution. These complex interrelationships – and the resulting risks – are clearly on the current workbench of the Federal Reserve, FDIC and OCC regulators who recently proposed expanded vendor management guidance for banks as discussed below.

The goal of this article is to:

- explore the evolution of regulatory guidance on vendor management;
- provide examples of consumer compliance-related process breakdowns; and
- offer recommendations for enhancing bank oversight of, and satisfaction with, key vendors

Early Vendor Management Guidance

Since 1999, several regulatory authorities have published third-party and vendor management guidance. Early guidance was basic, with later issuances gradually shaping the current best practice of complete bank ownership, with due diligence and oversight that incorporates people from multiple teams.

FDIC FIL 49-99 (6/3/1999): This Financial Institution Letter (FIL), titled "Required Notification for Compliance with the Bank Service Company Act," did not even focus on specific regulatory requirements. The letter reminded banks of the obligation to report third-party relationships in areas such as 'check sorting' and 'data processing.' As banks moved increasingly toward technology, their largest contracts tended to be with hardware, software, and technology providers. Regulators came to realize that these relationships created risks – regulatory and beyond – that required specialized oversight.

FDIC FIL 44-2008 (6/6/2008): Titled "Guidance for Managing Third-Party Risk," this letter provided an initial risk management framework of risk assessment, due diligence, contract structure/review, and oversight. Beyond Equal Credit Opportunity, there was strong regulatory focus on customer record privacy, business contingency, information security and data breaches. The combination of regulatory guidance and the nature of large vendors usually drove vendor management into Information Technology (IT) Departments. This helped in terms of safeguarding transmitted files and customer data handled by third parties. However, third parties often lacked a full understanding of their role in banks' achievement of business goals and regulatory compliance. Effective third-party vendor management requires ownership and accountability from stakeholders beyond IT.

CFPB Bulletin 2012-03 (4/13/2012): The CFPB recognized the trend of shifting vendor management to IT teams and published this bulletin to create definitions, describe expectations and assert CFPB authority to examine the operations of supervised service providers on-site. One expectation was banks' due diligence to verify that each third-party understands – and is capable of – complying with federal consumer financial protection law. At the time, IT-focused vendor management involved limited participation by other internal stakeholders. This made it difficult for IT to comprehensively meet the new expectations. Files were always transmitted on-time and accurately, but vendor actions in helping achieve banks' compliance mandates were occasionally deferred. Often, there was bank overreliance on vague contract language that the vendor would "comply with all applicable laws, rules and regulatory guidance," without clear guidelines addressing responsibility for, and how to define, 'applicable.'

Considering a More Holistic Approach

The one-function ownership approach had pitfalls, e.g., a servicer not providing a mandatory default notice for months, vendors sending out late adverse action notices, and double-billing consumers for insurance research. However, the compliance shortfalls were not purely vendor-created. Banks had to examine what metrics were in place and being monitored (e.g., key performance indicators)? Were periodic transaction tests of these functions/requirements being performed? While service levels were written into the contracts, they were often only for file transmission, encryption, and security. It was rare that anyone – bank or vendor – took an enterprise-wide approach to jointly owned processes.

The regulatory response was vendor oversight guidance that pushed banks to take full ownership and accountability of third-party actions and related processes, as evidenced by comments such as:

- "A bank's use of third parties does not diminish the responsibility of its board of directors and senior management to ensure that the activity is performed . . . in compliance with applicable laws." (OCC Bulletin 2013-29, 10/30/2013; this bulletin replaced and enhanced OCC Bulletin 2001-47, 11/01/2001, the OCC's seminal pronouncement of risk management principles for managing third-party relationships.
- "A financial institution's service provider risk management program should be risk-focused and provide oversight and controls commensurate with the level of risk presented by the outsourcing arrangements in which the financial institution is engaged." (Federal Reserve Board SR 13-19, 12/5/2013)
- "To limit the potential for statutory or regulatory violations and related consumer harm, supervised banks and nonbanks should take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers." (CFPB Bulletin 2016-02, 10/31/2016)
- "All third-party relationships should be governed by written contracts, and management should not overly rely on the service provider's assertions." (OCC Bulletin 2017-43, 10/20/2017)

On July 13, 2021, these evolving principles were integrated into Proposed Interagency Guidance on Third-Party Relationships: Risk Management and request for comment from the Federal Reserve, FDIC and OCC, which would replace each agency's existing guidance on this topic. Not surprisingly, this joint proposed guidance includes expanded guidelines for managing relationships with financial technology-focused third parties.

Current Expectations

These bulletins and letters clearly establish an expectation of complete bank ownership of – and accountability for – process outcomes, including vendors' actions. However, this is only possible with a sound risk management framework that includes the involvement of relevant stakeholders at every step of the vendor life cycle. At a minimum, you'll want to make sure there has been a thorough assessment of your bank's critical vendor relationships – to ensure that vendor oversight teams include people from:

- Data/IT: to devise process metrics;
- Line of Business process owners: to understand and anticipate handoffs/delays;
- Compliance: to raise relevant regulatory requirements; and
- Contracts/Legal: to astutely incorporate adequate measurements into a vendor contract – before it's signed.

Once a contract is signed, these and other key stakeholders must understand that their roles in the vendor management life cycle are not complete – in fact, they are just beginning!

The Potential Impact of Green Book Provisions on Capital Gain Income

Karly Laughlin
& Valerie Middlebrooks
Belfint Lyons & Shuman, P.A.

Are your high-net-worth clients aware that they could face up to an 82% increase in capital gain taxes under the new tax proposals?

On May 28, 2021, the Biden administration released the Fiscal Year 2022 Budget, and the "General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals," which is commonly referred to as the "Green Book". The Green Book summarized the Administration's tax proposals contained in the budget. While the Green Book is not proposed legislation, it is a starting point for Congress and many of these concepts are being considered for inclusion in the latest legislative budget talks.

Two of the more significant provisions included in the Green Book focus on the following two items:

- Taxation of capital gain income for high-income earners at ordinary rates.
- The transfer of certain appreciated assets which pass by gift or death would now be treated as a realization event for income tax purposes.

Both provisions could significantly impact tax planning in the near term.

Taxation of Capital Gain Income

Long term capital gains and qualified dividends have been taxed as high as 23.8% beginning in 2013 when President Obama signed the Affordable Care Act, which added the 3.8% net investment income tax to this type of income. President Biden's proposal focuses on taxing this type of income at ordinary rates for those with adjusted gross income exceeding $1 million. This would result in capital gain income being taxed at 37%, which is currently the highest individual tax rate, or 40.8% if you include the net investment income tax. Also, taxpayers must be mindful that President Biden is also proposing to increase the top tax bracket from 37% to 39.6%, which would further compound the issue. If both proposals are successful, long term capital gains and qualified dividends would jump from a tax rate of 23.8% to 43.4% for high net wealth individuals, which would be an 82% increase.

Even more concerning is the effective date of this provision. The proposal states that the change would be effective for gains after the date of announcement, April 28, 2021, which would make it retroactive. In any event, these proposed changes would have profound ramifications for individual taxpayers, creating incentives to defer realization events for appreciated investments, increasing the economic value of capital losses and capital loss carryforwards, and bringing dividend bearing investments closer to tax parity with interest-bearing debt investments. It also potentially means that planning needs to be done with much longer timelines, years in advance of possible large transactions.

Tax Recognition of Appreciation at Gift or Death:

Under current law, when a taxpayer passes away, he does not recognize any income tax consequences on unrealized gains of capital assets at the date of death. President Biden's proposal would force recognition of unrealized gains for certain taxpayers forcing the decedent's estate to pay the tax. In addition, gains on unrealized appreciation would be recognized by a trust, partnership or other noncorporate entity if that property has not been the subject of a recognition event within the prior 90 years. The testing period for this provision would begin on January 1, 1940, with the first possible recognition event occurring on December 31, 2030.

Certain exclusions would apply:

- Transfers by a decedent to a U.S. spouse or charity.
- Gain on tangible personal property, such as household furnishings and personal effects (excluding collectibles).
- Certain small business stock.

In addition to the above, the proposal allows a $1 million per-person exclusion on the recognition of unrealized gains for transfers at death or by gift. Also, the payment of tax on certain family-owned and operated businesses could be deferred until the interest in the business is sold. Finally, a taxpayer may be allowed a 15-year payment plan for tax on the unrealized gains from the appreciated assets transferred at death, other than liquid assets such as publicly traded securities.

These proposed changes are a fundamental shift to more than a century of tax law. The change will layer an increased capital gains tax on top of any gift, estate, or generation-skipping transfer tax and will effectively eliminate the step-up in basis in estates. However, the Green Book notes that unrealized gains subject to tax at death would be deductible on the estate tax return. Look for a shift in planning away from gift and estate tax, towards income tax planning. Holding appreciated assets until death in order to achieve a stepped-up basis will no longer be a viable strategy. Stay tuned to see how these provisions are ultimately either included, amended, or excluded from the legislative process.

DBA Calendar of Events

FDIC Directors' College - September 24 - On-Line 8:30 a.m. to 12:35 p.m.

The FDIC Directors' 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.

2021 Delaware Trust Conference - October 19 & 20

We're delighted to be back at the Chase Center on the Riverfront after holding last year's edition virtually. But for those who still need to distance, this year's conference will also be available as a live stream. There will also be a selection of on-demand sessions.

Mid-Atlantic CEO Forum - November 7 - 9

Renaissance Baltimore Harborplace Hotel - Don't miss this premiere event for Bank CEOs and Senior Leadership. Get the latest information on the economy, branching strategies, data transformation, and more. Presented by the Delaware, Maryland, Pennsylvania, Virginia, and West Virginia Bankers Associations.

It's Not Over 'Til It's Over: Vaccines, Masks and the Pandemic for Employers in 2021

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"Whether to mandate vaccines, or take other approaches to maximize workplace safety remains a top concern."

On July 12, 2021, Governor Carney declared that the coronavirus State of Emergency, including all its related orders (at least 35 in total) was terminated.

Despite our weariness of the pandemic, the Delta variant is sending infection rates and hospitalization in the wrong direction, the CDC has reissued mask guidance, and many states and municipalities have reinstituted mask and occupancy restrictions. As a result, Delaware employers must decide how to run their business in the safest and most effective way possible. Whether to mandate vaccines, or take other approaches to maximize workplace safety remains a top concern.

Vaccine Mandates Are Legal, but Advisable?

Some Delaware businesses are considering a vaccine requirement as a condition of continued employment. The U.S. Equal Employment Opportunity Commission (EEOC) has made clear that vaccine mandates do not violate federal anti-discrimination laws, as long as employers make reasonable accommodations for medical and religious restrictions on vaccination. While employers mandating the vaccine are still in the minority, the latest news suggests this tide may be turning. Many high-profile companies that have recently announced vaccines will be mandatory for its employees.

Options Short of Vaccine Mandate

Employers may be reluctant to mandate the vaccine for a number of reasons outside of legal concerns, including employee morale and retention in the current labor-driven market. Here are some other approaches and important considerations.

Vaccine Incentives - Many employers tried to use a "carrot" rather than a "stick," by offering various incentives – often in the form of gift cards and other cash incentives. Some states, including Delaware, have implemented their own "incentives" to try and encourage their residents to get vaccinated. The prevailing view is that to the extent any such incentives changed anyone's mind, they have run their course. Most of those who remain opposed to vaccination at this point seem unlikely to be persuaded with a $50 gift certificate.

Masking Requirements for Unvaccinated Employees Only - Although a handful of states have enacted some restrictions on employers' collection of vaccine status or proof thereof, Delaware (so far) has no such limitations. The Delaware General Assembly is currently considering a bill that would expressly prohibit employment discrimination on the basis of vaccination status, but the odds it becomes law appear slim.

Delaware employers are therefore free to request proof of vaccination and grant greater liberties to those who have been vaccinated, such as going mask-less. Some employers have shied away from these distinctions because it feels punitive to those who have chosen not to receive the vaccine and creates a visual marker for vaccine refusal. Many justifiably fear that this kind of visual marker may engender hostile situations in the workplace due to employees' strong opinions one way or the other on vaccination.

The devil is in the details for these sorts of workplace rules. Rules have little value if they are not going to be enforced with consequences. Who in the organization is going to be the mask police? What kind of discipline will be imposed if an employee is caught violating mask policies? Are you prepared to discipline your top employee the same as your worst for a mask violation? The enforcement mechanisms must be carefully thought through before implementation.

Required COVID Testing for Unvaccinated employees only - Employers should be aware that employer-mandated testing is generally considered compensable time for non-exempt employees under the Fair Labor Standards Act. Most employers implementing such requirements, therefore, are providing at-home test kits or otherwise making testing available on work time. To the extent employers may have considered required testing "on your own time" for the purpose of incentivizing vaccination, they may run afoul of other employment laws. And of course, if any part of the workforce is unionized, all of these workplace rules around testing and masking are likely to be challenged if not bargained for.

The Ongoing Burden on Employers

With the patchwork of state and federal laws and the lack of federal mandates in this area, employers at this point are left largely to fend for themselves. Making reasonable and lawful decisions about workplace safety, while balancing efficiency will be a continuing challenge.