delaware banker

Fall 2022
Vol. 18 No. 4

Enjoying the View

Why the First State is Still the Leading Jurisdiction for Personal Trusts

For more than a century, we have helped individuals and families thrive with our comprehensive wealth management solutions. Let's work together to provide your clients with the resources to help meet their complex needs.

For more information about how we can help your clients achieve their goals, contact:

Jeff Wolken
Senior Vice President
National Director, Delaware Trust Planning
302.651.8192
jwolken@wilmingtontrust.com

A deeper understanding®

WILMINGTON TRUST

MEMBER OF THE M&T FAMILY

Delaware Bankers Association

P.O. Box 781
Dover, DE 19903-0781
Phone: (302) 678-8600 Fax: (302) 678-5511
www.debankers.com

Delaware Banker
Editing & Design
Greg Koseluk

Editorial Disclaimer:

The opinions expressed in articles by authors other than the Association staff and officers are the responsibility of the authors only and not necessarily those of the Delaware Bankers Association. Questions and comments should be addressed to the Editors. No part of this publication may be reproduced without the written permission of the Editors.

Delaware Banker seeks to provide banking updates and other news of interest to the members of the Delaware Bankers Association. With the exception of official announcements, the Delaware Bankers Association disclaims responsibility for opinion and statements contained in Delaware Banker, and does not endorse any product or service. Delaware Banker is designed to provide accurate information on the subject matter covered. It is presented with the understanding the publisher is not engaged in rendering legal, accounting, or other professional services or advice.

Fall 2022
Vol. 18, No. 4

delaware banker

The Quarterly Publication of the Delaware Bankers Association

Contents

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

SUBSCRIPTIONS
Delaware Banker is available free of charge to all officers, executives, management, and key personnel of DBA members. Paid subscriptions to Delaware Banker are available to all others at a rate of $20 per year. To be placed on the subscriber list, please email Greg Koseluk at greg.koseluk@debankers.com.

ADVERTISING
Advertising inquiries should be directed to Greg Koseluk at (302) 382-6467 or greg.koseluk@debankers.com. Rates will be furnished upon request.

View from the Chair

by
Dominic C. Canuso
EVP & Chief Financial Officer
WSFS Bank

Chair
Delaware Bankers Association

"The entire membership of the Delaware Bankers Association thank Tom Collins for his service to the financial services industry."

Have you noticed that many of the more notable recent innovations in our daily lives aren't changes in "what" we do but "how" we do it. Uber improved the taxi experience. Amazon improved the shopping experience. Tesla improved the driving experience. Taxis, shopping, and driving aren't new, but how they deliver these services now has been a game changer, and has led to these companies being among the most valuable companies in the world.

Like many of these innovations and changes in how we do things, the DBA has evolved how we deliver our mission and purpose. The founding mission of the DBA was "to promote the general welfare and usefulness of financial institutions and to secure uniformity of action, together with the practical benefits derived from personal acquaintance and from discussion of subjects of importance to the banking and commercial interest of the State of Delaware." That's our reason for banding together as an association. Our challenge is to meet that mission in ways that are innovative.

Central to our mission is advocacy for the financial services industry in the Delaware Legislature. Throughout the DBA's history, Delaware's banks have been well-served by a strong succession of advocates in Dover. These individuals have the responsibility of helping to keep Delaware a locale where our industry can thrive and serve the community. For the past nine years, we've had the good fortune to have Tom Collins leading that effort in Dover.

Tom began his career researching and preparing legal memoranda and drafting judicial opinions in corporate law and equity for the Court of Chancery. Before joining Wilmington Trust, he practiced law for a brief time in the areas of personal injury, product liability, real estate, and commercial litigation. At Wilmington Trust, Tom was ultimately responsible for all corporate and banking legal functions, regulatory compliance, insurance risk management and was the Corporate Secretary. He then became a member of the executive management team for a financial technology start-up developing an interest-free credit card repayable through payroll deduction.

Tom continued his career at JPMorgan Chase, advising, negotiating, and documenting co-brand, private label, and affinity credit card co-marketing transactions, card portfolio sales, and servicing agreements. At Chase, he was part of the JPMorgan Market Leadership Team, the JPMorgan Ambassadors Program and participated in Delaware-related government relations.

In 2013, after his distinguished tenure with two of Delaware's top banks, Tom joined the Delaware Bankers Association as Executive Vice President, Government Relations. Over the past nine years, Tom's vigilance and effort championing the banking industry in the Legislature has indeed promoted the general welfare and usefulness of financial institutions in the State of Delaware. And now, Tom has decided to retire from an industry he served so well.

The Board, the staff, and the entire membership of the Delaware Bankers Association thank Tom Collins for his service to the financial services industry. Like Uber, Tesla, and other innovators, Tom Collins has delivered what Delaware's financial services industry needed in ways that were truly game-changing. Tom exemplifies the Association's commitment to finding innovative ways to serve the industry and the community. We extend best wishes for a long, happy, and well-deserved retirement! Thank you, Tom!

.

President's Report

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

"A special thank you to all exhibitors and sponsors for investing in this year's Delaware Trust Conference. "

The seventeenth annual Delaware Trust Conference featured a stellar lineup of the nation's top trust, legal, and wealth management experts who highlighted the unique advantages provided by Delaware trusts. Delaware has long been recognized around the globe as the premier state for wealth management.

This year's conference was held at the spacious Chase Center on the Riverfront and was live-streamed. Additional on-demand sessions were pre-recorded. All sessions were available on-demand through November 30th. Thank you to the over 470 Conference attendees who brought energy and enthusiasm to the room.

The 2022 Delaware Trust Conference Executive Committee led by Chair: David Diamond, President of The Northern Trust Company of Delaware; Co-Chair: Elizabeth Luk, Director, Head of Delaware Trust, BNY Mellon Wealth Management; and Executive Members Cynthia Brown, President, Commonwealth Trust Company; Todd Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP, and George W. Kern, Managing Director, Bessemer Trust Company of Delaware, N.A., combined with over thirty-five Trust Committee members from Delaware's top trust, legal and wealth management firms to select this year's topics and speakers.

Each presentation featured subject matter experts. The Conference kicked off with Samuel Donaldson, Professor of Law at Georgia State University, presenting "What The Cool Kids Are Doing, Current Trends In Estate Planning." Presentations ran the gamut from directed and special purpose trusts, counseling millennial millionaires, international planning, Delaware developments, and many others.

A highlight of the Conference was Terrence Franklin, Partner, Sacks, Glazier, Franklin & Lodise, LLP presentation on "Bending the Arc of History Toward Justice." Terrence shared his personal story of discovering a will contest from the 1840s that challenged the will done by his white fourth great-grandfather that emancipated Terrence's fourth great-grandmother and her children and grandchildren from slavery. Terrence recounted the riveting story of his ancestor Lucy Sutton and the fight in the courts to uphold the last will and testament. He also profiled several other black women, contemporaries of Lucy, who just may have helped Lucy and her family make it to freedom.

Thank you to all the speakers for sharing so freely their subject matter expertise. Another highlight of the Conference was being joined by the University of Delaware Trust Management Minor students and students from Delaware State University's new Financial Planning and Wealth Management Degree program. We know the need for developing leaders for tomorrow has never been more urgent. It was inspiring to meet these talented future members of our industry.

A diverse selection of exhibitors perfectly complemented the panel presentations to provide a variety of wealth management options and solutions. A special thank you to all exhibitors and sponsors for investing in this year's Delaware Trust Conference. With their generous support, all things were possible.

And last but not least, it takes a tremendous team effort to produce the Delaware Trust Conference. Thank you, Greg Koseluk, Corinne Stayton, Renee Rau, and Margaret Cregan, for making it look easy. #BestTeamEver

Sarah

What's New at the DBA

New Associate Members

Banc Card of America
Michael Richards, Relationship Manager
(304)657-0248
email: mrichards@banccard
Banccard.com

From our founding in 1997 in Nashville, Tennessee, we have focused on building trusted, one-to-one relationships. Meeting a customer face-to-face. Shaking a hand. Listening… really listening to their needs. We've earned the respect and trust of more than 600 financial institutions and have the lowest turnover in our industry, making us one of the nation's leading Merchant Service Providers.

S&P Global Market Intelligence
HD Jacobs, Director, Sales Strategy & Financial Partnerships
212 7th Street, NE, Charlottesville, VA 22911
55 Water Street, New York, NY 10041
Telephone: 434-951-7710
Cell: 434-825-1121
E-mail: HD.Jacobs@spglobal.com
Website: www.spglobal.com/marketintelligence/en/client-segments/commercial-banking

At S&P Global Market Intelligence, we know that not all information is important—some of it's vital. We integrate financial and industry data, research and news into tools that help banks track performance, identify investment ideas, understand competitive and industry dynamics, perform valuation and assess credit risk.

Univeristy of Delaware - Lerner College Trust Management Minor
Jennifer Zelvin McCloskey, Director of Trust Management Minor
42 Amstel Avenue
Newark, Delaware 19716
Telephone: 302-528-8317
Cell: 302-528-8317
E-mail: jzmac@udel.edu
Website: udel.edu
Lerner College at the University of Delaware is a first class AACSB accredited Business College that houses the Trust Management Minor. The Trust Management Minor is the only AACSB accredited undergraduate trust program in the United States. Students graduating from the trust management minor go on to work in a variety of facets of the financial services industry, but primarily work as trust professionals within the trust industry.

2022 FDIC Directors' College

40 bankers listened to nine speakers at the 2022 FDIC Directors' College held September 23, at the Hyatt Place in Dewey, Delaware. Sessions and topics included: Economics Update, Asset-Liability Oversight, Third Party Oversight & Risk Management, Compliance and Anti-Money Laundering; and a Conversation with the Regulators. Thanks to presenting sponsor Troutman Pepper.

Tom Collins, EVP, Government Relations, Retires

Thomas P. Collins, DBA Executive Vice President, Government Relations, retired in November, after nine years of dedicated service. Tom joined the DBA in June, 2013 after an extensive banking career. Prior to joining the DBA, Tom served as Senior Vice President at JPMorgan Chase, and was Chief Counsel at Wilmington Trust Company from 1991-2000. As EVP, Government Relations, Tom assumed the State and Federal Government Relations activity for the Association.

"Tom's contributions to the Delaware Bankers Association over the past nine years have been significant," said DBA President, Sarah Long. Delaware is well-known for its strong financial services industry, and Tom played a vital role in strengthening and preserving Delaware's reputation and standing in this area. We thank him for his outstanding service to the Delaware banking industry."

Why the First State is Still the Leading Jurisdiction for Personal Trusts

by
Jeffrey C. Wolken
National Director of Delaware Trust Planning
Wilmington Trust Emerald Family Office & Advisory®

Delaware is one of the premier jurisdictions for personal trusts. The state is at the forefront of trust law innovations and the infrastructure supporting Delaware's trust industry is difficult to match, with distinguished courts, a proactive legislature, a deep pool of professional advisors, and the presence of almost every major financial institution. Delaware's status as a favorable trust jurisdiction has attracted a considerable amount of non-Delaware trust business to the First State, resulting in a positive impact on Delaware's economy through fiduciary fees, job creation, tax revenues, and additional economic activity in support of the trust industry.1

How We Got Here

Over the past half-century, the role of trustees has evolved rapidly along with the trust industry itself. We have seen a transition in the investment standards guiding trustees from a "prudent man" using legal lists to a "prudent investor" employing modern portfolio theory. Jurisdictional considerations for a wealthy family have progressed from inter-state to multinational during this time as well; trustees are now required to understand concepts of foreign taxation and foreign property law regimes and remain compliant with strict federal Know Your Customer laws put in place to combat money laundering and terrorist financing. There has also been an unbundling of the trustee's role where co-fiduciaries take on the responsibility for directing certain aspects of a trust's administration in a directed trust. Finally, today's beneficiaries often request their inheritances in trust to obtain protection from creditors and to minimize transfer taxes. These changes have spurred the evolution of the trust industry and increased the competition among the states for personal trust business.

Increased Complexity of Trust Investments

Historically, trust laws evolved with the development of the common law as each new fiduciary issue was resolved by the courts. A trustee's duties and obligations were often determined based upon standards of prudence and loyalty litigated after the fact. The result of judging fiduciary conduct using 20/20 hindsight was that a trustee's default standards of care were very conservative. Statutes that attempted to modify the common law were strictly construed and, ultimately, may not be enforced by the court if there were appropriate grounds for the court to craft an exception. These circumstances required the trust industry to maintain a very conservative approach.

In the investment realm, the investment process was initially driven by "legal lists" of permissible investments including government bonds and first mortgages. By the 1940s, legal lists were replaced in most states by the prudent man rule which characterized investment in "speculative" stocks, discounted bonds, or buying any securities on margin as presumptively improper. Not until the late 1980s did states, starting with Delaware, begin to repeal their prudent man rules in favor of a prudent investor rule that embraced modern portfolio theory.[2] Until this time, it was generally not seen as proper to invest in a diverse portfolio of securities.

Modern Trust Laws Require a Sophisticated Trustee

Trust-friendly laws allowing for directed trustees and perpetual trusts are not new concepts, but their proliferation in recent years and broad acceptance in many states have expanded the scope of trustees who must administer these complex structures. Starting in the mid-1980s, states began

(Continued on p . 12)

(continued from p. 11)

to compete for trust business using favorable trust laws as a lure to bring trust assets into their states.[3] Many states began to repeal their common law rules against perpetuities to allow for perpetual trusts[4] and to codify laws allowing the role of the trustee to be unbundled so advisors could direct how the trustee exercised its fiduciary powers, the so-called directed trust[5]. Beginning with Alaska and Delaware in 1997[6], certain states began to apply spendthrift protections to self-settled trusts allowing for the creation of domestic asset protection trusts. Until this time, wealthy individuals had to use offshore asset protection trusts if they wanted creditor protection while retaining access to their assets.

During this period of evolution in the trust laws, differences in state income tax laws created opportunities for residents of one state to explore the use of personal trusts administered in another trust-friendly state for the purpose of minimizing their overall state income tax burden. The situs of trust administration became a compelling reason to seek a trustee located in a favorable jurisdiction like Delaware, South Dakota, or Alaska. State income tax arbitrage lead to complex trust structures used to mitigate taxes upon the recognition or receipt of income (a so-called "ING" trust)[7] so the taxpayer remains a resident of his or her high-tax home state while exporting the assets to a trust in a low or no-tax jurisdiction to limit state income taxes.

As trust and tax laws changed and investments became more complex, successful families sought the services of professional fiduciaries located in favorable jurisdictions who were adept at navigating these complex trust laws and able to take advantage of these modern investment options. The demand for fiduciary services made trust departments an attractive source of revenue to financial institutions and some states began to compete to attract trust assets into their states[8]. Some innovations in trust laws that states used to bring assets into their state (such as perpetual trusts, directed trustees, and self-settled spendthrift trusts (a.k.a., asset protection trusts, or APTs)) made the role of a trustee so complex that only a professional fiduciary skilled at navigating these complex trust laws was able to carry out the basic duties of the fiduciary. However, as the sophistication in the role of the trustee evolved to this point, pricing demands created by fierce competition for this fiduciary business put a strain on operating margins.

Dispelling the Myths

Because the personal trust business is a lucrative one, the competition among the states for this business is fierce and sometimes filled with misinformation. Other states claim to have the same favorable laws and similar advantages to lure in prospective clients, often at lower fees.

While promoting their own trust services, other states at times present subjective information as fact. There are even cases where an attorney from a competing state creates charts purporting to rank the trust-friendly states on key features of trust law, such as the duration of a trust (dynasty trusts), domestic asset protection trusts, and the ability to modify a trust through a so-called "decanting" process[9]. By self-selecting the criteria and assigning arbitrary weights to these factors, these rankings elevate competing states to the top of the list and correspondingly move Delaware down in the ranks. Unfortunately, after the charts are published in the popular press and on an annual basis in professional publications (by the charts' own author)[10], these subjective rankings begin to gain some legitimacy.

Consequently, it is important for participants in Delaware's trust industry to be able to answer the question "Why Delaware?" when clients are deciding where to have their personal trusts administered.

The Delaware Advantage

The objective facts tell a different story—that of Delaware as a premier trust jurisdiction. In a 2011 empirical study, Northwestern University law professor Max Schanzenbach determined that a conservative estimate of the impact of the out-of-state trust business on Delaware's economy was between $600 million and $1.1 billion[11]. With the trust industry growing at a rapid pace and Delaware capturing a disproportionate share of this business, these amounts have likely risen substantially since 2011. Moreover, Delaware's state income tax revenue attributable to its excess trust business was estimated in this study to be between $19 million and $33 million per year.

As we know, Delaware is called the First State because it was the first to ratify the U.S. Constitution. However, it was also the first state to develop many of the innovative trust laws that sanctioned directed trusts[12], perpetual trusts[13] and asset protection trusts[14], as well as laws permitting modern and flexible investment standards for trustees[15]. The First State also pioneered the ING trust structure that allows residents of some high-tax states to mitigate state income taxes on income generated by assets held inside a properly structured trust administered in Delaware[16] .

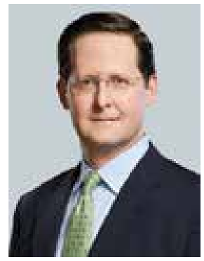
There are no objective rankings of state trust laws generated by an unbiased source because every client's needs are unique, thereby making a ranking of the states' laws misleading for a given client. However, Delaware has all the flexible tools permitting perpetual trusts, directed trustees, modern trust investment rules, flexible income distribution standards, along with rigorous asset protection laws, which make it a top choice for practitioners looking to find the right home for their clients' personal trusts.

Selecting Delaware to take advantage of these favorable laws has the backing of the state's courts, which routinely enforce these laws as written[17]. When advising clients on where to administer trust structures used to carry out a family's wealth management goals over multiple generations, practitioners want confidence that the trust will function as intended. Delaware's long history of court cases, and the state's sophisticated judiciary willing to enforce the laws as written, helps to provide this comfort.

Delaware's physical location also puts it at the deep end of the talent pool. The state's geographic proximity to D.C., Baltimore, Philadelphia, and the financial hub of New York City provides access to leading professionals in the legal, tax, accounting, and investment industries. The size and complexity of the trust business in Delaware draws many talented professionals who provide administrative services for these trusts. The synergy created among these professionals promotes the innovation that helps Delaware remain the First State for trust business.

The First State Remains the Premier Personal Trust Jurisdiction

This evolution of the trust industry has highlighted the fact that modern trusts require the services of robust professional trustees adept at navigating complex legal, tax, investment, and regulatory issues. Trustee services are not a commodity because each trust relationship is unique. Advisors who regularly counsel families on these decisions understand the value a sophisticated trustee found in Delaware brings and can help families find the right fit. Sophisticated wealth planners demand the use of robust trustees in preferred jurisdictions, like Delaware, who have in-house legal, tax, and administrative talent to deliver these complex fiduciary services. The First State has the tools and talent to remain on top.



As part of the Wilmington Trust Emerald Family Office & Advisory team, Jeff is responsible for developing trust planning strategies for wealthy individuals and families throughout the United States and abroad. He works closely with his clients' legal, tax, and investment advisors to construct and implement appropriate trust structures that take advantage of the state of Delaware's unique trust and tax laws. He is a frequent lecturer on topics involving the use of Delaware trusts for asset protection, state income tax minimization, and investment management for unique trust assets. Jeff is a recipient of the Wilmington Trust Chairman's Club award. He is a member of the Estates and Trusts Section of the Delaware State Bar Association and the Real Property, Trust & Estate Section of the American Bar Association.

Wilmington Trust is a registered service mark used in connection with various fiduciary and non-fiduciary services offered by certain subsidiaries of M&T Bank Corporation. Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and directed trusts.

(continued on p. 14)

Delaware Trusts

(continued from p. 13)

This article is not designed or intended to provide financial, tax, legal, accounting, or other professional advice since such advice always requires consideration of individual circumstances. If professional advice is needed, the services of a professional advisor should be sought.

Notes:

1- See, Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale LJ 356, 375 n.62, 393–94 (Nov. 2005).
2- See, 12 Del. C. Section 3302 (1986) and Uniform Prudent Investor Act (1994).
3- Sitkoff & Schanzenbach *supra* note 1.
4- Since 1933, Delaware permitted "perpetual" trusts through the exercise of a series of limited powers of appointment (38 Del. Laws c. 198 (April 6, 1933); 25 Del. C. § 503). South Dakota enacted the first statute that sanctioned perpetual trusts. See, S.D. Codified Laws §§ 43-5-1–43-5-9 (1983).
5- In 1986, Delaware codified the longstanding practice of trust advisers directing trustee actions. *See*, 65 Del. Laws 422, § 5 (1986). *See*, also, Uniform Trust Code, Section 808 (2000) and Uniform Directed Trustee Act (2017).
6- *See*, Alaska Stat. § 34.40.110, 12 Del. C. §§ 3570–3576.
7- The IRS has ruled repeatedly that properly structured self-settled trusts would be treated as incomplete gifts and nongrantor trusts – i.e., "ING trusts". See, e.g., PLRs 201653001–006 (Aug. 16, 2016); 201650005 (Aug. 26, 2016); 201636027–032 (May 23, 2016); 201628010 (Apr. 11, 2016); 201614006–008 (Dec. 4, 2015); 201613007 (Dec. 4, 2015).
8- See, *Sitkoff & Schanzenbach, supra* note 1.
9- *See, e.g.*, www.oshins.com/state-rankings-charts
10- *See*, e.g., *Steve Oshins, Steve Oshins Releases 8th Annual Trust Decanting State Rankings Chart with 31 Decanting Jurisdictions Ranked,* LISI Est. Plan. Newsl. #2878 (April 13, 2021), www.leimbergservices.com.
11- Professor Schanzenbach's report may be viewed at www.leimbergservices.com/docs/report-5-25-11b.pdf (last visited Oct. 20, 2022)
12- *See supra* note 5.
13- *See supra* note 4.
14- *See supra* note 6.
15- *See supra* note 2.
16- *See*, Private Letter Ruling 200148028. See, also, Todd A. Flubacher, Thomas R. Pulsifer, "Eliminate a Trust's State Income Tax," *Trusts & Estates Magazine* (May 2006).
17- *See, e.g., Duemler v. Wilmington Tr. Co.*, 2004 WL 5383927 (Del. Ch. Nov. 24, 2004)(directed trusts), *In re Peierls Family Testamentary Tr.,* 77 A.3d 223 (Del. 2013); *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013); *In re Peierls Family Inter Vivos Tr.,* 77 A.3d 249 (Del. 2013)(court jurisdiction and conflict of laws); *Ravet v. N. Tr. Co. of Del.*, 2015 WL 631588 (Del. Feb. 12, 2015)(lifetime validation of trust); *TrustCo Bank v. Mathews*, 2015 WL 295373 (Del. Ch. Jan. 22, 2015) (DAPT statute of limitations)

Financial Advisors Can Take Client Service to the Next Level with Expertise in Tax-Advantaged Charitable Giving

by
Joanne McGeoch
Vice President for Philanthropy
Delaware Community Foundation

The relationship between a financial advisor and client is founded in trust and confidence in the advisor's expertise and ability to manage wealth wisely and effectively. One opportunity for advisors to differentiate themselves from the competition is to offer greater expertise in tax-advantaged charitable giving.

Few financial advisors have the depth and breadth of knowledge in the philanthropic vehicles available to help clients leverage charitable giving to maximize tax advantages, establish their personal legacy and make a powerful impact on the causes they are passionate about.

Advisors who choose to build their expertise in this area have a distinct advantage and can strengthen their relationship with their clients. This is particularly important as clients grow older and accumulate more resources, when legacy building and estate planning become a more important part of wealth management.

How can advisors build their expertise and ability to serve their clients who want to leverage philanthropic vehicles? Let's explore a few approaches.

Earn Chartered Advisor in Philanthropy Designation

Earning designation as a Chartered Advisor in Philanthropy (CAP(R)) is a great way to increase your knowledge of the myriad ways to leverage charitable giving as a financial planning tool.

Through the CAP program, advisors learn how to:

- Understand client or donor goals for self, family members, and/or society.Advise wealthy families and family offices on important financial matters, including business exit planning, estate planning, and legacy planning.
- Understand the tax strategies, tools, and techniques for philanthropic planning.
- Learn to better collaborate with a client or donor's other advisors across disciplines, to effectively implement estate and charitable plans.

One of more than 10 designations and programs offered by the American College of Financial Services, CAP(R) is a self-paced, online program that results in a prestigious professional certification and – more importantly – the expertise an advisor needs to integrate charitable planning into a client's overall financial and estate plan. This empowers the advisor to help clients achieve a positive impact for themselves, their family members, and their community, which positions the advisor as a trusted partner.

In Delaware, professional advisors, including attorneys, accountants and financial planners, can pursue their CAP(R) designation in partnership with the Delaware Community Foundation (DCF). The DCF recently co-facilitated its second successful local CAP(R) study group, which included Wilmington-based financial planner Mike Staman.

Staman said he joined the DCF's CAP(R) cohort because he wanted to increase his knowledge of charitable giving strategies to benefit his clients.

"I heard about the CAP(R) designation about a year prior to me receiving my certification. It was something that immediately resonated with me personally and something I wanted to pursue," Staman said. "I love being able to serve my clients and my community to the best of my professional abilities and this was another way I could do that."

Now, armed with his new and extensive knowledge of philanthropic services, Staman is effectively guiding his charitably inclined clients as they strive to make a difference in the community – and clients are noticing.

"I have a much higher degree of confidence in interacting with clients on the subject of philanthropy. Wherever the conversation goes, I know I have knowledge of all the important areas," Staman said. "The more you specialize in a given field, especially in the financial field, the more clientele are going to reach out to you for your services. Having the CAP certification really makes one stand out in a crowd."

The local study group launches each fall for participants in Delaware and surrounding areas, with a goal of expanding the local network of CAP(R)s who can work together to build a

(Continued on p . 18)

(continued from p. 17)

stronger culture of philanthropy to benefit our communities.

Outsource Philanthropic Expertise

If the CAP(R) designation isn't for you, consider relying on outsourced experts to help your charitably inclined clients maximize tax-advantaged giving opportunities. The Delaware Community Foundation (DCF), a nonprofit organization with offices in Wilmington and Georgetown, partners with professional advisors to help them help their clients.

The DCF is home to a team of experts with extensive experience helping donors make charitable gifts that are both financially savvy and ultimately have a significant impact on the nonprofit organizations and causes they care about.

One of those team members is Mike DiPaolo, vice president for southern Delaware, who is currently completing the program to obtain the CAP(R) designation.

"We help advisors talk with their clients to understand what they want to achieve through their giving. Then, we all work together to determine how those goals fit into their holistic financial plan and, ultimately, help them realize both their financial and philanthropic goals," DiPaolo said. "This strengthens the relationship between the client and the advisor."

Financial advisors can consult with the DCF for clients who are interested in any type of charitable giving opportunities, including:

- Creating a new donor advised fund (DAF).
- Starting a scholarship fund.
- Converting a private foundation or trust to a DAF.
- Donating illiquid assets such as real estate, public stock, S-corp stock, art or anything else with value.
- Establishing a charitable remainder trust or exploring other planned gift options.

For advisors who want an even more integrated partnership, the DCF offers the Charitable Partners Program. Through the Charitable Partners Program, financial advisors are able to continue to manage assets and earn fees on those assets even after a client has donated them to a fund at the DCF.

Helping Clients Negotiate the Great Transfer of Wealth

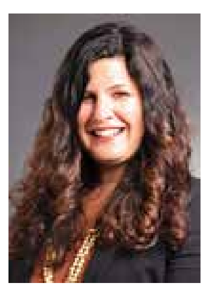
Whatever option is right for your firm, this is the moment to prepare yourself to help clients navigate the great transfer of wealth that is happening in America.

In 2021, bequests contributed $46 billion dollars towards charitable causes. As older Americans are retiring and planning their next chapter of life, many are looking for ways to establish their legacy by leaving a portion of their estate to charitable causes.

Community foundations are a valuable resource for professional advisors who want to help their clients effectively manage this transition and make wise decisions that will benefit themselves, their loved ones and their communities for generations to come.

In Delaware and the surrounding area, the DCF team is available to help advisors determine what strategies will be most effective for them and their clients – whether it's CAP(R), the Charitable Partners Program or something else.

And that's good news for Delaware and for your relationships with your clients.



Joanne McGeoch is vice president for philanthropy at the Delaware Community Foundation. Contact her at jmcgeoch@delcf.org or 302.504.5224, or visit https://delcf.org/advisors-partner-with-us/.

2022 Delaware Trust Conference Special Section

Platinum Sponsor

Diamond Sponsors

Gold Sponsors

BMO Delaware Trust Company
Charles Schwab Trust Company of Delaware
Morris, Nichols, Arsht & Tunnell LLP
The Northern Trust Company of Delaware
Peak Trust Company
Wilmington Trust

Silver Sponsors

BNY Mellon Wealth Management
Brown Advisory
Chilton Trust
Commonwealth Trust Company
Cover & Rossiter
Evercore Trust Company, N.A.
First State Trust Company
Greenleaf Trust Delaware
Morris James LLP
New York Private Trust Company
PNC Delaware Trust Company
Pinion
Santora CPA Group
Truist Delaware Trust Company

Bronze Sponsors

Bank of America, Private Bank • BankTalentHQ • Belfint, Lyons, and Shuman, P.A.
CIBC • Duane Morris LLP • K&L Gates

Exhibitors

American Bankers Association
Bryn Mawr Trust Company of Delaware
Deutsche Bank Trust Company
JTC
ODP Business Solutions
Peak Trust Company
Pinion
National Care Advisors
Reich & Tang + Total Bank Solutions
Santora CPA Group
Weiner Benefits Group
Whisman Giordano & Associates

17th Annual Delaware Trust Conference

Trust Conference Co-Chairs, Elizabeth Luk and Dave Diamond welcome participants to the 2022 Delaware Trust Conference

Over 450 Wealth Professionals converged on the Chase Center on the Riverfront, October 18 and 19 for the 17th Annual Delaware Trust Conference. The event featured both in-person and live-streaming capabilities. All the sessions, including three on-demand sessions, were available through November 30th via the conference site. All the sessions featured the stellar line-up of the nation's top trust, legal, and wealth management experts for which the Delaware Trust Conference is known.

Thank you to all the Sponsors, Exhibitors, Speakers, In-Person Attendees, and Live-Streamers for making the 2022 Delaware Trust Conference a memorable event! Thanks to the conference's executive committee and the committee at-large for the herculean task of putting together another memorable wealth-management event.

Executive Committee: Chair: David A. Diamond, President of The Northern Trust Company of Delaware; Co-Chair: Elizabeth Luk, Director, Head of Delaware Trust, BNY Mellon Wealth Management. Cynthia D.M. Brown, Esq., President, Commonwealth Trust Company; Todd A. Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP; George W. Kern, Esq., Managing Director, Bessemer Trust Company of Delaware, N.A.

Committee At-Large: Gabrielle Bailey, Managing Director, CIBC Private Wealth Management; Ann Balback, Regional Trust Manager, RBC Trust Company (Delaware) Limited; Lisa Berry, VP & Senior Trust Advisor, BMO Delaware Trust Company; Jocelyn Borowsky, Partner, Duane Morris LLP; Bridget Boyd, VP & Trust Advisor, Comerica Bank & Trust, N.A.; Staci Collins, Vice President, Wells Fargo Bank, N. A.; Kim-Marie Cox, Vice President, Stifel Trust Company Of Delaware; Jennifer A. Cuva, Director of Trust Administration, Charles Schwab Trust Company of Delaware; S. Thomas Davidson, Head of Delaware Trust Company, Rockefeller Trust Company (Delaware); Matthew P. D'Emilio, Esq., Director, McCollom D'Emilio Smith Uebler LLC; Robert W. Eaddy, President, The Bryn Mawr Trust Company of Delaware; Linda Elfenbein, Senior Vice President, HSBC Trust Company (Delaware), N.A.; Elizabeth Fallon, Trust Officer, Brandywine Trust Company; Thomas M. Forrest, CPA, President & CEO, U.S. Trust Company of Delaware; Catherine Franceschini, President & CEO, Deutsche Bank Trust Company Delaware; Trisha Hall, Partner, Connolly Gallagher LLP; Todd Hammond, CTFA, MBA, TEP, VP, National Business Development Officer, The Bryn Mawr Trust Co. of Delaware; Daniel F. Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.; Francis Hazeldine, President & CEO, Eleutherian Trust Company; Marie Holliday, Managing Director, Cover & Rossiter; Theresa Hughes, Individual Trustee, Pinion; Kim Kaess, Senior Trust Officer, SEI Private Trust Company; David Keister, Fiduciary Executive, Truist Delaware Trust Company; Danielle M. Kiss, Executive Director & Trust Team Leader, J.P.Morgan; Miranda Ko, President, ADP Trust Company, N.A.; Karly Laughlin, Principal, Belfint, Lyons & Shuman, P.A.; Alexander Lyden-Horn, Managing Director, Director of DE Trust Services and Trust Counsel, Evercore Trust Company, N.A.; Darlene Marchesani, Director, DE Trust Admin. & Trust Counsel, Fiduciary Trust International Of Delaware; Erin Markham, CTFA, AEP®, Vice President, Senior Trust Officer, Goldman Sachs Trust Co. Of Delaware; Dawn McGill, Senior Trust Officer, Greenleaf Trust Delaware; Jamie McGinley, Vice President, Trust Administration, Commonwealth Trust Company; Kathleen O'Brien, Senior Vice President, Arden Trust Company; Mark A. Oller, CTFA, President - Family Wealth Delaware, Wilmington Trust Company; Mark V. Purpura, Esq., Director, Richards, Layton & Finger, P.A. Thomas Scott, Vice President, Brown Brothers Harriman Trust Company; Vincent C. Thomas, Esq., Partner, Young Conaway Stargatt & Taylor, LLP; Elizabeth Vannote, Strategic Advisor, Brown Advisory; Alison Westbrook, Regional Director, First Republic Trust Company Of Delaware LLC; Kalimah Z. White, Senior Consulting Director, Key National Trust Company Of Delaware.

See some of the highlights of this year's Delaware Trust Conference on the following pages.

2022 Delaware Trust Conference

Thomas R. Pulsifer Receives Delaware Trust and Wealth Management Lifetime Achievement Award

Tom Pulsifer receives the Delaware Trust and Wealth Management Lifetime Achievement Award from Conference Co-Chair, Dave Diamond

Thomas R. Pulisfer, former partner at Morris, Nichols, Arsht & Tunnel, was the recipient of the 1st Annual Delaware Trust and Wealth Management Lifetime Achievement Award presented by the Delaware Bankers Association at the 2022 Delaware Trust Conference. Throughout his career, Tom Pulsifer influenced the Delaware trust field, and in turn, has influenced the national trust field. In Delaware, Tom has been active in the formation of Delaware trust laws working on the Trust Act for many years. He was instrumental in devising the strategy of an incomplete non-grantor trust, which led to the DING concept, and ING concept in other states that followed suit. Tom is also responsible for obtaining a series of Private Letter Rulings for the DING structure. Tom has counseled many Delaware trust companies and worked closely with other Delaware attorneys in continually moving the Delaware trust industry forward. Truly Tom has been at the forefront of the creation of Delaware as it is known today in the trust and estate field. On a national level, Tom is well known, having been active in The American College of Trust and Estate Counsel (ACTEC) for many years.

The award recognizes an individual who has made a significant impact on the Delaware Trust & Estate field. Nominations for the award were made by members of the DBA Trust Committee and reviewed by the Delaware Trust Conference planning committee.

Ever wonder what the Chase Center looks like empty? Here's Corinne Stayton, DBA Event Technologist, during Monday's set up.

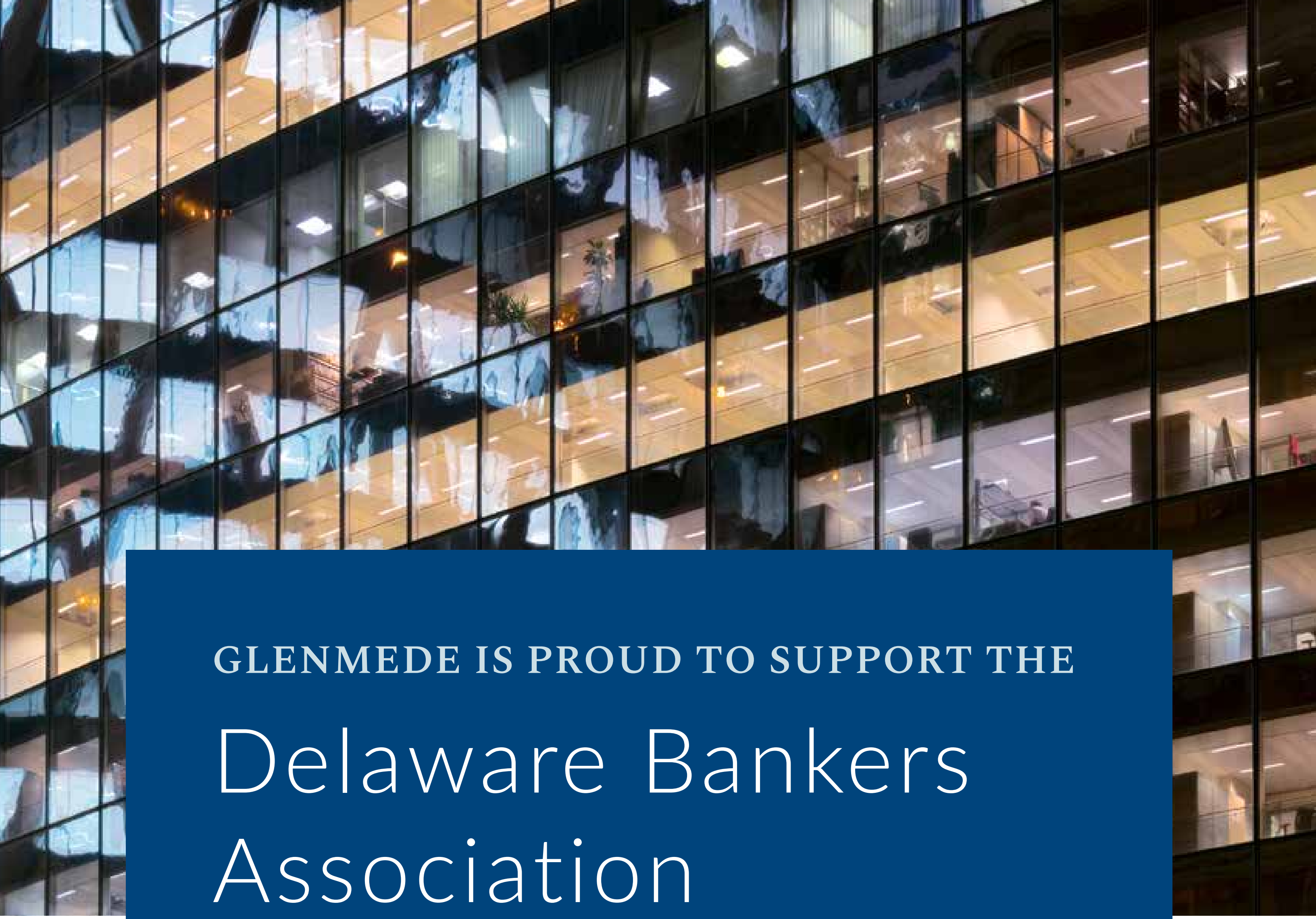
Samuel A. Donaldson, Professor of Law, Georgia State University, kicks off the conference with an explanation on "What the Cool Kids Are Doing" in Estate Planning.

Terrence Franklin, Partner, Sacks, Glazier, Franklin & Lodise LLP, delivers a moving personal account on "Bending the Arc of History Toward Justice."

Reception Snapshots

Advice on Counseling the Millennial Millionaire delivered by (l. to r.) Erin Markham, Vice President, Senior Trust Officer, The Goldman Sachs Trust Company; Matthew D'Emilio, Managing Member, McCollom D'Emilio Smith Uebler LLC; Beth Knight, Director, Richards, Layton & Finger; and Alexander Lyden-Horn, Managing Director, Director of Delaware Trust Services and Trust Counsel, Evercore Trust Company, N.A.

DBA President, Sarah Long, chats with w R. Hugh Magill, Vice Chairman, Retired, The Northern Trust Company, following his presentation "Planning with Purpose in Mind."



Delaware Bankers Association Ambassadors Greet Newcomers

Dr. Nandita Das, Professor of Finance, Delaware State University (center) attended with a group of her students

DBA Ambassadors at the 2022 Delaware Trust Conference greeted new DBA Members, First Time Conference Attendees, Delaware State University students, and University of Delaware students, plus provided them with guidance and advice on getting the most out of their Delaware Trust Conference attendance.

Thank you to all the 2022 Delaware Trust Conference Ambassadors: Isabel Araujo, Charles Schwab Trust Company of DE; Lisa Berry, BMO Delaware Trust Company; Tara Bolinski, Pinion/Santora; Cindy Brown, Commonwealth Trust Company; Dave Diamond, The Northern Trust Company of Delaware; Wil Duggan, Pinion/Santora; Samantha Finfer, Pinion/Santora; Todd Flubacher, Morris Nichols Arsht & Tunnell LLP; Trisha Hall, Connolly Gallagher; Todd Hammond; Bryn Mawr Trust Company of Delaware /WSFS Bank; Theresa Hughes, Pinion; Elizabeth Luk, BNY Mellon Wealth Management; Jennifer McCain, Brown Brothers Harriman Trust Company of Delaware; DaiShawn Nycole, Key National Trust Company of Delaware; Kathy O'Brien, Arden Trust; Kalimah White, Key National Trust Company of Delaware.

Students from the University of Delaware's Trust Management Minor gather during one of the conference breaks.

"Wait, You Are Directing Me to Do What?"
Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware; Robert W. Eaddy, President, The Bryn Mawr Trust Company of Delaware; Isabel R. Araújo, Sr. Manager, Trust Consulting Services, Charles Schwab Trust Company of Delaware; and, Cynthia D.M. Brown, President, Commonwealth Trust Company, discuss the challenges of The Modern Direct Trust.

And We Have a Winner!
Thank you to the many sponsors and exhibitors who provided door prizes. At left, Scott Swenson, Partner, Connollly Gallagher, presents a gift bundle to Grace Stockley, Vice President, Depository Trust Company of Delaware.

Gregory J. Weinig, Partner, Connolly Gallagher LLP, and Jocelyn Margolin Borowsky, Partner, Duane Morris LLP, scale the heights and plumb the depths of changes in Delaware trust statutes.

Use of Delaware trusts in International/Cross Border Planning: Daniel Hayward, Partner, Gordon, Fournaris & Mammarella, P.A., makes a point, while Myriam Soto, Head of International Wealth Planning and Fiduciary Services, BNY Mellon Wealth Management looks on. The panel also featured Scott A. Bowman, Partner, McDermott Will & Emery LLP.

Why is the First State Still #1 for Personal Trusts? Jeffrey C. Wolken, Senior Vice President, Wilmington Trust, explains. Jeff also addresses the topic in this issue's cover story.

Rawn Reinhard, Senior Loss Prevention Counsel, ALAS, Inc., provides advice on Avoiding a Wealth of Trouble, during Wednesday's ethics session.

Dana G. Fitzsimons, Jr., Principal, Senior Fiduciary Counsel, Bessemer Trust, details the past year's "Significant, Curious, or Downright Fascinating Fiduciary Cases."

Kudos to the exemplary technical crew who ran the show and helped make the live-stream a seamless experience!

Conference Co-Chair Dave Diamond addresses the luncheon in the Riverfront Ballroom.

How did Delaware's Special Purpose Trust Statute Revolutionize Content Governance in Social Media? The panel of Olivia Jackson, General Counsel, Meta Oversight Board; Beth King, President, Brown Brothers Harriman Trust Company of Delaware, N.A.; and, Vincent Thomas, Partner, Young Conaway Stargatt & Taylor LLP, explained.

The 2022 Conference's final panel featured Todd Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP; Susan D. Snyder, Trust Counsel and Deputy General Counsel, Northern Trust; and, Elizabeth Luk, Head of Delaware Trust, BNY Mellon, hitting the target on Trusts in Motion!

The Bryn Mawr Trust / WSFS Bank Ice Cream Van backs out of the Chase Center, bringing the 2022 Delaware Trust Conference to a close! See you all in 2023 for the 18th Annual Delaware Trust Conference!

Aging & Exploited

The Role of the Trust & Estate Professional to Combat and Respond to Financial Exploitation of Older Clients.

by
Regina S. Schoenberg
Associate
Connolly Gallagher LLP

Financial exploitation of aging and vulnerable adults is among the most significant challenges facing financial professionals. Attendees at this year's Delaware Trust Conference heard compelling comments on this topic from Dana G. Fitzsimons of Bessemer Trust, who described controversies involving elder abuse, overreaching, and contested guardianships.

I have seen this exploitation firsthand—and it is what drove me to join the private sector as a trusts and estates attorney at Connolly Gallagher.

For over a decade, I served as a prosecutor at the Delaware Department of Justice, specializing in crimes against vulnerable adults and financial exploitation of impaired adults. For eight years, I also led the office's Senior Protection Initiative, going into communities to speak with older adults, law enforcement agencies, and financial institutions about fraud and scams that target seniors.

I worked on a number of cases as a prosecutor that will stay with me throughout my career, but some stand out. One matter involved a victim who I will call Julia. Her late father worked as a painter his entire adult life. Her mother died when she was very young. Always living beneath his means, Julia's father was able to leave his chronically ill, isolated, and shy adult daughter (and only child) a residence in Brandywine Hundred, and enough money that ensured, with proper management, that Julia's needs would be met for the rest of her life. Julia's father died when she was 68 years old. Within six years of his death, every dollar was gone.

Julia's financial advisor made the report to our office that was the impetus for my involvement. The financial advisor spoke to Julia on numerous occasions about her withdrawals and their consequences and ultimately felt compelled to freeze Julia's accounts. Julia, furious, closed her accounts and stopped her communications with almost everyone. The advisor, who knew Julia and her family for decades, was at a total loss for what to do.

The advisor reported that Julia had been taking thousands of dollars from several IRAs and other investments, purportedly for home repairs. Then, Julia started taking large amounts of money to invest in manufactured housing communities in California. All of these actions were highly unusual for the shy, isolated Julia. The advisor had a relationship with her long before Julia's father died and Julia had always been just as frugal as her dad. Something was wrong, but Julia was adamant about her desires for the money.

Upon receipt of the report from Julia's investment advisor, and after several members of our team tried to engage Julia without success, I wrote her a handwritten letter and told her that people in her life are worried about her, that I know it can be hard to discuss such personal things, and to call me if she felt like talking.

About three weeks later, Julia called.

She was absolutely desperate. The IRS was garnishing her Social Security for draining the IRAs without tax withholdings. A special investigator and I spoke to Julia for over two hours. She described that all the trouble started with a young man that was coming around the neighborhood and doing odd jobs for various neighbors. The man offered to help her with repairs around the home and he would spend time with her. He developed a friendship with Julia, and she looked forward to his visits more than anything in the world.

While working on her home, the man said he discovered a family of raccoons living in Julia's attic and that it would take about $10,000 to rid the home of the critters and remediate the damages. Julia ended up spending over $100,000 on the alleged raccoon infestation. He took down a wall in her master bedroom and expanded the space, but left most of the work unfinished. Over the next few weeks, we would learn from Julia that she gave this man in excess of $1 million. About $150,000 was for a bogus "investment opportunity" he had for her in California and the rest went to "home repairs." Julia's home was worth about $350,000 at the time. We had an expert come in and determine that there was approximately $40,000 of work done to Julia's home. Not only had this man taken every penny Julia's father saved for her care and quality of life, but she was now left owing penalties and fees to the IRS. While she once had a home that was paid for and ample investments and cash, she now had less than nothing.

When Julia spoke about the man who had come into her life, it was clear that she was in love. My colleague and I immediately knew that Julia had not only fallen prey to home improvement fraud, but to a romance scam, as well. The man was already on our radar and was recently arrested for defrauding an elderly woman in an adjacent neighborhood for over $20,000 to remediate a bogus rat infestation (he had the nerve to leave a box from a local pet store under her house—we pulled the footage from the store and there he was, buying rats.)

(continued on p. 34)

(continued from p. 33)

As we got to know Julia and worked on her case, she began to realize the extent to which she had been victimized. As we uncovered every lie her perpetrator fed to her and built our case, we could see Julia's shock and disbelief that this had happened at all—it took a deep physical toll on her. The man convinced Julia that he was in love with her, and it was a hard day when we disclosed to her our evidence about his wife and family. All the while, she would play us daily voicemails of the man calling, asking for more money and growing increasingly threatening, insisting that she put him on the deed to her home.

Julia is not alone. Around the same time, we were working with a local man, a retired scientist, who sent over $400,000 overseas in hopes of claiming a foreign lottery prize. But it was not just strangers—I routinely worked with older adults whose children and grandchildren felt entitled to every dime of their loved one's money, whether or not the aging adult's needs were met.

I learned quickly that there is no shortage of bad actors. They are close to home, over the phone, and lurking within the Internet. Perpetrators, whether known or unknown to their victims, are convincing, emotionally abusive, and ready to take everything. They groom their victims and tell them exactly what to say to family members, financial professionals, healthcare professionals, and law enforcement. New reports came to my desk at the Department of Justice almost daily. It is no wonder that the National Council on Aging estimates that older adults are victimized annually out of at least $36.5 billion dollars.

In 2021, I had the opportunity to join Connolly Gallagher's trust and estates team. I jumped, excited to focus my energies on prevention and to explore private remedies for this financial epidemic.

One of the greatest challenges in elder abuse is that adults have a right to make their own decisions—even poor ones. This autonomy is a celebrated hallmark of a free society. But how do trusted family members, caretakers, and financial professionals determine when spending decisions cross the line from free will, to cause for concern, to the need for swift intervention?

We all understand that estate planning allows us to make our wishes known in times of good health, or at least sound mind. Well-drafted documents are also critical evidence of a testator's financial goals and desires. These documents are dated, made in times of capacity, and often contain statements of intent. They detail to whom we want our most precious belongings and resources to pass, in what amounts, and under what conditions. Planning documents are personal and unique records. When a person has documents in place for years that name certain individuals, and then there are sudden drastic changes that include new people and exclude others, we have a paper record that tells a story over time. I had more than one prosecution where these documents were vital evidence.

Planning has the added benefit of reducing isolation. In my experience, the people most vulnerable to financial exploitation are lonely and have very few people in their life with whom to discuss decisions. The scammer over the phone may have a captive audience, because the adult has not spoken to anyone else in days or weeks. If there are trusted financial professionals with whom a potential victim must engage, it is an added layer of protection—not a bullet proof vest, but someone from the outside world to say that something is not right and to offer help.

Every professional in the financial industry should be aware of the tools Delaware law affords. Hopefully, your institution has a policy that provides direction if you suspect that a client is being financially exploited. 31 Del. C. § 3910 empowers financial institutions to implement such policies, place holds on transactions, and make reports to the DOJ, Division of Health and Social Services, and other appropriate institutions. Section 3910 further provides that any person or entity who makes a good faith report, shall have immunity from any liability, civil, administrative, or criminal that might otherwise exist as a result of reporting or holding or not holding the transaction. There is a similar provision covering broker-dealers and investment advisors under 6 Del. C. § 73-307.

I know it was incredibly difficult for Julia's financial advisor to freeze Julia's accounts and lose her as a client for doing so, but without that financial advisor making a report, several plausible and terrible outcomes could have befallen Julia. The adviser lost a client, but saved Julia's life.

Julia's perpetrator ended up serving just about two years in prison for his crimes. She will never get her money back. But, Julia now lives with family in New England and is slowly putting her life back together. While her perpetrator's accountability was meaningful, no punishment could make Julia whole, and two years certainly felt inadequate. As is usually the case with financial crimes, once the money is taken, it is gone, and there is very little anyone can do to put the pieces back together again. Most perpetrators are judgment-proof, and the emotional damage to victims cannot be undone. The best outcome is prevention and estate planning is a critical tool.

If you have not dealt with these issues yet, you will. We all need to be educated on the dynamics and red flags of abuse, so we are able look for it, know it as soon as we see it, and respond with swift and appropriate action. The challenges are immense, but our collective response can save lives.

Regina S. ("Gina") Schoenberg is an Attorney at Connolly Gallagher, focusing her practice on estate planning, administration, and litigation. With years of experience prosecuting matters of elder abuse and financial exploitation, she has seen firsthand the importance of having a comprehensive plan in place, regardless of net worth. Prior to joining Connolly Gallagher, Gina served for ten years as a Deputy Attorney General at the Delaware Department of Justice, where she was most recently the Deputy Director of Consumer Protection in the Fraud and Consumer Protection Division. As Chair of the Senior Protection Initiative, Gina served as the liaison between the Department of Justice, law enforcement, state agencies serving the population of older adults and persons with disabilities, and the public.

Building A Cannabis Road Map

Marianne Byrne, Esq.
Managing Principal
CAPCO RISC Services

"A comprehensive cannabis risk assessment will include key facets, such as strategy, market, cost, community, and opportunity."

According to New Frontier, "The U.S. marijuana market is the world largest, generating over $25 billion in regulated sales in 2021 – a figure expected to reach $40.5 billion by 2025." However, cannabis is illegal at the federal level. Unless and until the SAFE Banking Act becomes law, federal banking regulators can penalize institutions that service cannabis-related businesses (CRB). Still, financial institutions are forging ahead. In September 2022, Cannabis Business Times reported credit unions are banking 26% CRB, followed by regional banks and cannabis-focused banks both with 23% of the market, leaving 31% of the CRB market unserved. The purpose of this article is to set forth what a bank needs to consider when deciding whether to enter the CRB market. Three comprehensive risk assessments should be completed before building a cannabis road map. Below are the recommended phases.

Phase 1: Cannabis Risk Assessment

A comprehensive cannabis risk assessment will include key facets, such as strategy, market, cost, community, and opportunity.

- Strategy: According to the American Bankers Association's October 2022 consumer survey on key banking issues, 66% of respondents support cannabis businesses access to financial institutions products and services. Strategic risk statements and questions should align with the institution's strategic plan. Assessing CRB against the strategic plan will provide critical insight into the viability of cannabis banking.
- Market: Evaluate the market opportunity and forecasted changes. For example, California has the most cultivating licenses in the U.S. with 7,548, followed by Oregon with 1,319 and Colorado with 1,245. States are also granting specialized licenses to CRB for production, testing, transporting, retailing and other activities.
- Cost Benefit: Consider operating costs and the forecasted revenue. Customized risk statements should include the institution's fee strategy for CRB, e.g., application fee, monthly account fee, deposit fee, and fee to offset infrastructure costs.
- Social Equity Programs: Various states have developed programs to encourage people convicted of marijuana crimes to obtain licenses for CRB. What is the institution's policy of doing business with persons having criminal records? Appropriate risk statements and answers to questions about each state's social equity program, the potential community reinvestment benefit, accountholder risk, and specialized monitoring must all be addressed.
- Opportunity: Conservative predictions in 2019 had the U.S. cannabis market growing to $30 billion by 2025, including cannabis use in cosmetics, pharmaceuticals, and food and beverage. The assessment of target customers should include growers, cooperatives, microbusinesses, medical providers, product manufacturers, retailers, transporters, research facilities, independent test labs, couriers, delivery endorsement providers, and delivery operators.

A comprehensive cannabis risk assessment will yield adequate information to assess the bank's infrastructure.

Phase 2: Cannabis Infrastructure Assessment

Assessing the infrastructure will highlight the relative strengths and weaknesses of controls to mitigate risk. Components included are Board oversight, compliance management system, business line capabilities, and related bank resources.

- Board Oversight: The Board must have requisite knowledge of the SAFE Act, CRB categories, institution's risk appetite, regulatory risks, costs, growth, resources, and governance responsibilities.
- Compliance Management System: will identify control strength to mitigate risks associated with CRB services. Risk statements and questions covered within an enterprise-wide compliance risk assessment will include a federal and state regulatory applicability matrix, regulatory change management, policies, procedures, testing, training, reporting, third party oversight, and the three lines of defense.
- Business Line: A dedicated CRB line should be considered. Specific risk statements and questions will consider people, processes, and systems. It will include Hemp, Marijuana and CBD business, applicable regulations, key performance risk indicators, as well as credit, legal, reputation, compliance, liquidity, and operational risks.
- Resources: The focus here is the impact on the existing infrastructure and the readiness throughout the CRB journey. The assessment should include a timeline for the CRB journey.

The infrastructure risk assessment will provide the foundation for assessment of current products and services and opportunities for new offerings.

Phase 3: Cannabis Product and Service Assessment

CRB is cash intensive. The product and service offerings must be customer orientated, transparent and compliant with applicable law. In highest demand are deposit accounts, online banking, cash services, payment services, and loan products.

- Deposit Accounts: As with most businesses, establishment of deposit accounts is typically the first banking relationship sought by CRB. Assessment of deposit products should include marketing, terms and conditions, enhanced due diligence, onboarding, real time monitoring and off-boarding. CRB documentation should be reflective of the business as there are no historical data of the CRB transactions.

• Online Banking: Assessment of the extent of online banking usage and fraud mitigation are two key focus areas.
• Cash Services: CRB are cash intensive businesses. The ability to make large and frequent cash deposits is important to the business. Consideration of current and modified cash services is important. The institution's infrastructure must be able to support the volume of cash, enhanced monitoring, and the reporting of additional CTRs and SARs s.
• Payment Services: Assessment of all payment channels and whether controls are adequate to process secure payments and fight money laundering are crucial.
• Loan Products: What is the bank's lending risk appetite? The risk statements and questions should include current and competitor products with high interest rates, short terms, and no collateral. CRB applicant criteria should include personal and business credit history, business relationships, business duration, criminal record, and whether the owners are US citizens or permanent residents.

Upon completing foregoing risk assessments, if banking cannabis appears viable, next develop a cannabis road map. If decision is not to bank cannabis, banking hemp businesses may be an alternative, as hemp is legal under federal law. Either way, a road map is a prerequisite for market entry.

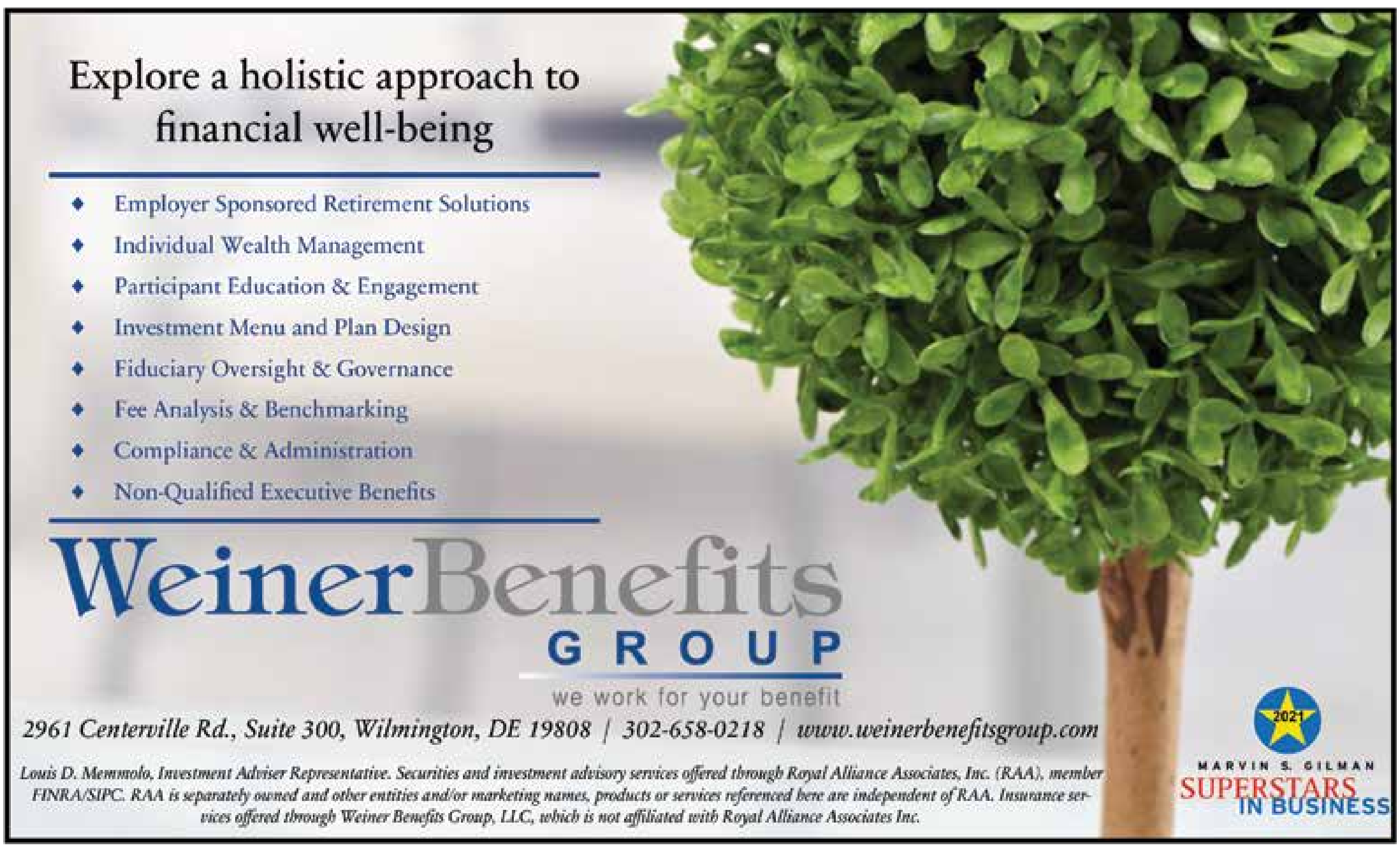
Phase 4: Cannabis Road Map

Road map key elements:
• Policies: Develop a cannabis policy, update related policies, and obtain Board approval.
• Procedures: All business lines must draft new procedures representing procedural mapping.
• Human Resources: Develop employee qualifications and job descriptions.
• Regulatory Change Management: Update the Regulatory Applicability Matrix with state cannabis laws and proposed federal and state laws. Plan for continuous update and method of dissemination.
• Testing: Develop testing and monitoring scripts for the three lines of defense and an annual cannabis program risk assessment.
• Training: Create and deliver customized training on CRB, policies, procedures, and risk management.
• Technology: Schedule technology evaluation, validation, and adjustments pre- and post-launch of CRB services.
• Reporting: Prepare template reports for enterprise risk, BSA/AML, and compliance for reporting to appropriate committees and the Board.

Historically, when California legalized marijuana in 1996 there was no road map. Since then, we have insight to the regulatory guidelines and standards for risk and compliance management. Whether an institution decides to provide cannabis related businesses products and services, the decision must be well thought out and documented. As banking continues to evolve, sound risk management discipline comprises more and more of the playbook for marketplace winners.

Resources

• S&P Global Market Intelligence, September 16, 2022. Cannabis banking bill gains momentum in Senate, increasing odds of passage. (New Frontier)
• Cannabis Business Times, September 2, 2022
• Cannabis Business Times, October 28, 2022 – Where Candidates Stand on Cannabis
• ABA October 19, 2022, Consumer Survey of Key Banking Issues
• Statista Cannabis cultivation licenses, by state U.S. 2021 | Statista



The Calm Before the ERC Compliance Storm

Jonathan D. Moll, CPA
Belfint Lyons & Shuman, P.A.

The employee retention credit (ERC) has been a lifeline for local business entities as they recover economically from the impact of the pandemic. Introduced by the CARES Act in 2020, and updated in 2021 by various legislation, the program allows eligible business entities to claim a refundable credit on qualified wages and certain health insurance costs. For most business and nonprofit entities, the program coverage period spans from March 13, 2020, through September 30, 2021.

Eligibility requirements for the ERC program require employers to:

- Fully or partially suspend operations during any calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings; or
- Experience a significant decline in gross receipts during the calendar quarter (50% 2020 vs. 2019; 20% 2021 vs. 2019).

Credits are received by filing Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return*. This process differs from other major pandemic relief programs, such as the Paycheck Protection Program, Restaurant Revitalization Funds, and Shuttered Venues Operator Grants, where business and nonprofit entities received funding only after an initial application and a thorough vetting of eligibility.

"Due to the complexity of the ERC program, the focus of IRS audits will vary from entity to entity..."

The easier path to receive the funds, combined with aggressive, contingency based service providers, and a sense of FOMO (fear of missing out) from businesses and nonprofits is fueling concern at the IRS. These third parties usually charge fees contingent on the amount of credit refund. As a result, a conflict of interest may exist for these third-party providers that hinders their ability to critically evaluate eligibility at the business or nonprofit level and assess the qualification of wages for purposes of the credit calculation. On October 19, 2022, the IRS warned employers to beware of third parties promoting ERC claims and warned that improperly claiming the credit will result in repayment of the credit along with penalties and interest.

If easy access to funding and aggressive contingent-based service providers are concerning to the IRS, increased resources of money and time make it easy to predict that a blizzard of ERC compliance audits is on the horizon. The Inflation Reduction Act allocated an additional $80 billion to the IRS, with key policy makers indicating compliance is a high priority for the utilization of funds. Additionally, ARPA 2021 extended the statute of limitations for the ERC from the normal three years to five years. This is a clear indication that the IRS is expecting to aggressively enforce the ERC program. While the IRS never reveals the secrets to their audit selection process, any computer savvy Gen Z'er can write an algorithm that evaluates information the IRS already has on hand from tax filings (revenue 2019-2021 and total ERC credits received) to identify organizations whose financial results may imply they were not eligible to receive the credit.

Due to the complexity of the ERC program, the focus of IRS audits will vary from entity to entity and will likely challenge areas such as gross receipts decline for eligibility purposes, the definition of qualified wages for purpose of the credit calculation, aggregation rules, and the interaction between ERC and PPP (PPP wages used as the basis for forgiveness are not qualified wages for ERC purposes). However, due to its interpretive nature, a higher risk of examination likely exists for entities that rely on the suspension of operations eligibility criteria.

On the surface, it appears that any business or nonprofit with fully or partially suspended operations due to orders from a governmental authority would result in eligibility. However, the IRS subsequently provided clarifying content in the form of FAQs that limits subjectivity in the evaluation. Per IRS Notice 2021-20, the mere fact that an employer must make a modification to business operations due to a governmental order does not result in a partial suspension unless it has more than a nominal effect on operations. The IRS further states that a portion of operations will constitute more than a nominal portion if either the gross receipts from that portion of the business operations is not less than 10 percent of the total gross receipts or the hours of service performed by employees in that portion of the business is not less than 10 percent of the total number of hours of service performed by all employees.

The complexity of the program warrants the use of experts, however, make sure the experts you engage limit your organization's risk and provide an audit-proof paper trail. The most critical element for business entities to become ERC audit ready is accepting responsibility for the eligibility determination process and credit calculation. The best defense against a future audit 'storm' is to prepare adequate documentation now.

For Your Benefit

Why Doesn't My Retirement Plan Have ESG?

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

"ESG assets may exceed $40 trillion by the end of this year and by 2025 one third of all managed assets worldwide are expected to be in ESG strategies."

What is ESG anyway? ESG investing considers nonfinancial factors such as environmental and social concerns and corporate governance. Generally, assets in the form of mutual funds or exchange traded funds that invest in ESG strategies have grown significantly in recent years. Important factors driving this trend is increasing concern about climate change and the political pressures that follow.

In recognition of this trend your advisor now possesses the ability to provide your fiduciaries ESG rating analytics generated by MSCI, one of the leading global investment research organizations, as well as other comprehensive qualitative and quantitative analytical tools. These research tools guide the selection and monitoring of your plan's fund menu lineup.

A recent Bloomberg Intelligence report indicates that ESG assets may exceed $40 trillion by the end of this year and by 2025 one third of all managed assets worldwide are expected to be in ESG strategies. There are now approximately 550 open-end mutual funds and ETF's following ESG strategies.

In numerous surveys plan participants have responded that they are increasingly concerned about sustainability and believe that factors beyond traditional financial parameters should be considered in the investment of their retirement savings. This is especially true for younger participants - Millennial's and Generation X (people ages 26 to 55). Notwithstanding the growing interest in ESG investing, 401(k) plans have been slow to adopt the concept. Only a small percentage of assets in 401(k) plans are currently allocated to ESG strategies.

Not surprisingly those industries whose values align with ESG investing have been more willing to embrace the concept. Many public plans, along plans sponsored by endowments and foundations, offer at least one ESG option. However, Vanguard's "How America Saves" study in 2021 revealed that only 13 percent of defined contribution plans in the private sector offer an ESG option. The same study found that only six percent of participants were utilizing an ESG option when one was available.

One reason for the reluctance on the part of plan fiduciaries to adopt ESG options is the fluctuations the industry has seen in sub-regulatory guidance from the Department of Labor over the past two-plus decades. ESG has either been slightly in, or out, of favor depending upon the political party sitting in office at the Executive level over the years. The years of back-and-forth guidance is due to the facts that Democratic administrations tend to look favorably on the concept of ESG investing, while Republicans are more skeptical.

The most recent proposed regulations from the Biden Administration's Department of Labor published early last year give a green light to ESG investing but represent 180 degrees turn from regulations published in 2020 at the end of the Trump administration. All this back-and-forth has created some uncertainty. It is probable that many plan fiduciaries are postponing decisions about ESG investing, at least, until the recent guidance is finalized, which is expected in December of this year. And many fiduciaries may abstain from engaging in ESG talks altogether given the potential for continued political uncertainty impacting how the government views such decision-making into the future.

A second hurdle to the growth of ESG assets in 401(k) plans is the lack of target date funds and other asset allocation tools with an ESG approach. In most 401(k) plans, a target date series is the qualified default investment alternative and often holds the majority of plan assets. This has become more true in recent years with the advent of automatic enrollment. Many participants are now automatically enrolled into plans and defaulted into a target date series without taking any action.

Some plan fiduciaries may be quick to adopt a target date series with an ESG approach once there are more of these funds with a track record to allow a meaningful comparison. In the meantime, 401(k) plans have more exposure to ESG investing than is apparent at first glance. In a recent Russell Investment survey, 82% of managers, not following a stated ESG strategy, responded they take such factors into consideration in making investment decisions. And thus perhaps fiduciaries studying their existing investment menus for ESG impact investing may be the more prudent course of action over adding explicitly ESG-driven and marketed securities.

This article comes directly from our Fiduciary Hot Topics Newsletter through our RPAG partnership. If you would like to be added to our email list please contact our WBG Team.design and implement an effective plan.

Louis D. Memmolo is an Accredited Investment Fiduciary, Certified Plan Fiduciary Advisor, Nonqualified Plan Advisor and Investment Advisor Representative. Securities and advisory services offered through Royal Alliance Associates Inc., Member FINRA & SIPC. Insurance services offered through Weiner Benefits Group, LLC, which is not affiliated with Royal Alliance Associates Inc. Weiner Benefits Group, 2961 Centerville Rd, Ste. 300, Wilmington, DE 19808. For a comprehensive benchmarking fee and service analysis please call 302-658-0218 or email lmemmolo@royalaa.com.

Estate Tax Update

Portability Lost? You Now Have More Time Under Rev. Proc. 2022-32.

Travis G. Maurer
Young Conaway Stargatt & Taylor, LLP

"You now have additional time to elect portability and capture the historically high exclusion amounts applicable over the last few years."

Since the passage of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, section 2010(c) of the Internal Revenue Code (the "Code") has allowed the personal representative of an estate to make an election to transfer the decedent's unused federal basic exclusion amount to the decedent's surviving spouse (which is currently $12,060,000 for decedent's dying in 2022 and set to increase to $12,920,000 for 2023). This unused amount is defined under section 2010(c)(4) of the Code as the "deceased spousal unused exclusion amount" or the DSUE amount.

Under 2010(c)(5) of the Code, the election to make the DSUE amount available to the surviving spouse (commonly known as the portability election) must be made by filing a federal estate tax return within the time prescribed by law (including extensions). Treasury regulations promulgated with respect to Section 2010 make it clear that for an estate which is not required to file an estate tax return because the gross value of the estate falls below the basic exclusion amount, the due date to file the return, and thus to make a portability election, is nine months from the decedent's date of death plus any period covered by an extension.

With many estates no longer required to file a return due to the significant increase in the basic exclusion amount over the last decade (as a result of various pieces of tax legislation and an annual inflation adjustment provided under the Code), the IRS has seen a significant increase in requests for private letter rulings to grant an extension of time to file an estate tax return for the purpose of making a portability election. Recognizing that many of these requests were received within a relatively short period of time after the due date of the return, the IRS issued Rev. Proc. 2017-34 adopting a simplified method to make a portability election even after the statutory timeframe for filing a return had expired. Provided that (i) the decedent died after December 31, 2010, (ii) the decedent was a citizen or resident of the U.S. at his or her death, (iii) the decedent was survived by a spouse, (iv) the executor of the estate was not required to file an estate tax return due to the size of the gross estate, and (v) no return was filed within the timeframe required under the regulations, the executor of the estate could make the portability election by simply filing the estate tax return within two years of the decedent's death and indicating conspicuously at the top of the return that it was being filed pursuant to Rev. Proc. 2017-34. In the event that a return was not filed within the two-year period, it would still be necessary to file a request with the IRS for a letter ruling seeking administrative relief with respect to the filing deadline.

In order to address the number of letter ruling requests still being received on the issue of portability, the IRS recently issued Rev. Proc. 2022-32, effective July 8, 2022. This revenue procedure, which supersedes Rev. Proc. 2017-34, adopts the same simplified method for making a portability election while extending the timeframe for doing so until the fifth anniversary of the decedent's date of death. Otherwise, the same requirements indicated above continue to apply and the return must now clearly state that it is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)." In the event you or your clients missed the two-year window under the prior revenue procedure and did not want to proceed with a request for a letter ruling, you now have additional time to elect portability and capture the historically high exclusion amounts applicable over the last few years.

"The DCF is really great at facilitating contributions from the fund quickly, and it's nice being able to get the funds to charities that need it on fairly short notice."

– **Dr. Charles Robertson**, Charles & Patricia Robertson Charitable Fund

Strategic Partners for Powerful Giving

The Delaware Community Foundation (DCF) helps generous people plan and execute informed giving strategies. As a facilitator, resource, and fund manager, the DCF empowers and grows philanthropy through knowledge and relationships.

Partner with the Delaware Community Foundation today to discover the benefits of informed giving.

DCF Delaware Community Foundation™

Engaging Communities, Empowering Giving™

To learn how you can open a charitable fund or support our community leadership work, **visit delcf.org** or **contact Rebecca Elzey, Senior Philanthropy Officer, 302.504.5234** or **relzey@delcf.org.**

Charles J. Durante
302-888-6280
cdurante@connollygallagher.com

Trisha W. Hall
302-888-6421
thall@connollygallagher.com

Regina S. Schoenberg
302-888-6206
gschoenberg@connollygallagher.com

Scott E. Swenson
302-252-4233
sswenson@connollygallagher.com

Alexis Turner Garris*
302-884-6591
agarris@connollygallagher.com

Gregory J. Weinig
302-888-6411
gweinig@connollygallagher.com

PROBLEM SOLVERS

No two problems are alike. Every situation is unique. That's why families choose you as their trustee. You know the rules. You remain current. You are resourceful. Most importantly, you know people.

So when you need help on a question, you've already given significant thought to the problem. You might just need the reassurance of a sound second opinion. Or you might be facing a matter of major risk management, or even the foreshadowing of litigation.

When professionals call on other professionals for advice, they call Connolly Gallagher – for planning, for strategy, for litigation. They draw on leaders in trusts, estates and taxation, who bring over 100 years of steeled experience. *Chambers High Net Worth 2022*, *U.S. News – Best Lawyers®*, and *Delaware Today–Top Lawyers* consistently rank Connolly Gallagher as one of the region's best law firms. And our firm is home to three Fellows of the American College of Trust and Estate Counsel.

Connolly Gallagher. Trusted by trustees.

Wilmington
1201 North Market Street
20th Floor
Wilmington, DE 19801

Newark
267 East Main Street
Newark, DE 19711

Photo (L to R) Scott E. Swenson, Alexis Turner Garris, Charles J. Durante, Gregory J. Weinig, Regina S. Schoenberg, Trisha W. Hall

**Florida Bar only*

CONNOLLY
GALLAGHER LLP

www.connollygallagher.com