delaware banker

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The Turbulent Release of the Corporate Transparency Act

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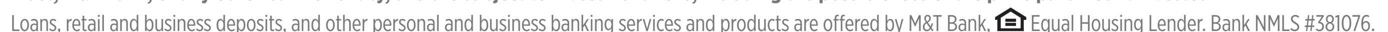
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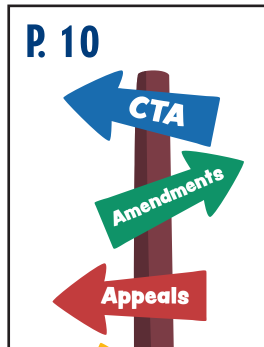

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View from the Chair

by
Tarrie Miller
President & COO
County Bank

Chair
Delaware Bankers Association

"As the eyes and ears of the financial services industry, they vigilantly monitor proposed legislation that could impact banking."

Many years ago, my Mom cut out of a magazine a story that moved her, gave it to me, and it goes like this…

Today is a gift…..

Imagine there is a bank which credits your account each morning with $86,400. It carries over no balance from day to day, allows you to keep no cash balance, and every evening cancels whatever part of the amount you had failed to use during the day. What would you do? Draw out every cent of course!!!

Well, everyone has such a bank. Its name is TIME. Every morning it credits you with 86,400 seconds. Every night it writes off as lost whatever of this you have failed to invest to good purpose. It carries over no balance. It allows no overdraft. Each day it opens a new account for you. Each night it burns the remains of the day. If you fail to use the day's deposits, the loss is yours.

There is no going back. There is no drawing against the "tomorrow". You must live in the present on today's deposits. Invest it to get from it the utmost in health, happiness and success! The clock is running. Make the most of today.

I try to live my life taking advantage of the time I have available to me. And I have spent some of my time this past year serving as your chair. I can happily report that like me, the Delaware Bankers Association tries to use their time working for its members and for the entire Delaware community.

For over 125 years, the Delaware Bankers Association has been a united voice in the halls of government, both in Dover with the General Assembly, and in Washington with our elected representatives. As the eyes and ears of the financial services industry, they vigilantly monitor proposed legislation that could impact banking. They actively participate in legislative and regulatory affairs, drafting, monitoring, and supporting legislation that benefits the banking and trust business in Delaware.

Your Association also conducts a full range of professional development programs for its members. These include original in-house programs like The Delaware Trust Conference, Women Connect, The FDIC Directors College, Regulatory Compliance School, and Foundations of Delaware Trusts. In addition, the DBA offers outside courses from the American Bankers Association, Breaking Into Banking, Wilmington University, and the newest offering: OnCourse educational sessions.

In the community, the DBA is a national leader in the Teach Children to Save Day effort, creating original content to educate elementary school students on the importance of saving for a secure, independent future. Since 2002, they have offered two $2,500 David G. Bakerian Scholarships annually. This year, the DBA has also launched two new online video series, *More Money Than Cents* and *Wizzo the Money Dog*, to illustrate basic financial concepts.

The financial services sector employs over 50,000 individuals in Delaware, making banking a vital industry that contributes to the health and well-being of the First State. The Delaware Bankers Association proudly serves as the collective representative of that industry. I've been proud to serve as your chair this year. Thank you for that opportunity.

Tarrie

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President's Report

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

"It just makes sense to enact HB203 and prepare all Delaware students for future financial success."

Banks of every size and business model add unique value to our financial system and are critically important to Delaware's economy. One important mission the over 47,000 employees of the financial services industry in Delaware share is providing financial education in communities across our State. We know that financial education elevates the opportunities of individuals, families, and communities, and has measurable impacts on future success in life for all.

The Delaware Bankers Association supports HB203, the proposed Equity and Inclusion in Financial Literacy for All High School Students in Delaware Act, currently under consideration by the Delaware House of Representatives. The Act will require all students to complete a semester-long course in personal finance before graduation to equip them with the knowledge to make sound financial decisions.

In 2001, the DBA, in cooperation with the University of Delaware's Center for Economic Education and Entrepreneurship, the Consumer Credit Counseling Services of Maryland and Delaware, and the Federal Reserve Bank of Philadelphia, piloted the Keys to Financial Success course in one Delaware high school. The Keys program teaches personal finance to high school students. Since then, the program has expanded to more than 200 teachers in 85-plus high schools in Delaware, Pennsylvania, and New Jersey. This semester-long elective course includes setting goals, budgeting, saving, investing, handling credit, paying for post-secondary education, affording to live on your own, and more.

The DBA awards two scholarships annually to Delaware high school students participating in the Keys course. Winners are selected on the strength of essays on the importance of personal finance education. Their stories are powerful.

"My mother had me six days after she turned seventeen. You could say she was just a child when she had me. She went from a girl in high school to a mother. She had no job and no savings. What does this have to do with how Keys to Financial Success can change your life? I am going to share how this class could have changed the course of my mother's life, and how I am going to make it change mine. With the correct classes and knowledge, it is possible to break the cycle and live a more financially stable life. This class and the knowledge it has provided me gives me the power to understand my money, the value of every penny, and how taking charge and having lifelong financial goals can sway the outcome of life."

"As the child of two Haitian immigrant parents, I've witnessed firsthand the impacts that result from a lack of financial literacy. Migrating from a financially unstable country to the U.S., a country known by many as the "land of opportunity", was a massive change. They had to adjust to these changes and adapt to the financial standards and expectations of the U.S. immediately after arriving here. The concepts we learned in Keys to Financial Success carry the power to change one's life and succeed in ways their ancestors could not. At the core of success lies education and understanding the fundamentals behind finances such as saving, budgeting, investing, etc.

Individuals need to be properly informed so that they can make wise decisions. With this knowledge, one can leave a legacy for themselves, one that their descendants would be eternally grateful for."

"You wake up with butterflies in your stomach, put on your cap and gown, and drive yourself to school for the last time. Your name gets called, the butterflies intensify, you walk up on the stage praying you don't trip, shake the principal's hand with your sweaty palms, grab your diploma, and finally after 1461 days you are done with high school. You think the nerves will go away, but then you realize your life is in your hands now, and the butterflies worsen. You are an adult and have to make your own decisions. You got into your dream college. How are you going to pay off that loan after college? You ask yourself, do I even like my major, my future career? How will I afford a house, an apartment, or a car and still have money to buy the things I want? How do I pay taxes? You head into life with uncertainty, like thousands of other American students, but not me. Not because I planned out my entire life, but because I took a financial success class where I learned budgeting, building and improving credit, saving, borrowing and repaying debt, and investing."

Couple these stories with a recent report by consulting firm Tyton Partners and Next Gen Personal Finance, that found there is a lifetime benefit of roughly $100,000 per student from completing a one-semester course in personal finance. Take that $100,000 in savings and multiply it across families and communities, it's an incredible economic engine.

It just makes sense to enact HB203 and prepare all Delaware students for future financial success.

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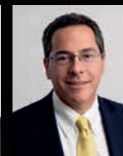
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What's New at the DBA

DBA 2024 Washington Visit

60 members of the Delaware Bankers Association converged on the nation's capital March 6 throuh 8 for the 2024 DBA Washington Visit. The group received extensive briefings from the American Bankers Association, the FDIC, The Federal Reserve, the OCC, FHFA, and, the Treasury. There were also meetings with Senators Carper and Coons and Representative Blunt Rochester. Thank you to all our sponsors! Platinum Sponsor: Federal Home Loan Bank of Pittsburgh. Gold Sponsor: Sallie Mae. Reception & Dinner Sponsor: Wipfli. Reception Sponsors: Richards Layton & Finger; and, S&P Global. Transportation Sponsors: Discover Bank, RKL Advisors, and, WSFS Bank.

2024 Legislative Reception

Dozens of bankers and members of the Delaware Legislature met on March 27 in Dover for the 2024 DBA Legislative Reception. The annual event affords bankers the opportunity to meet one-on-one with the senators and representatives who pass the laws that directly impact the financial services industry.

"The Legislative Reception is an excellent demonstration of the importance of the banking industry to Delaware," said DBA President, Sarah Long, "it's a great opportunity to meet one-on-one with our elected representatives."

The reception was sponsored by Discover Bank.

(l. to r.) David Mench, DBA Director, Government Affairs; Sarah Long, DBA President; Jordan Seemans, Delaware Deputy State Treasurer; and, Matthew Parks, VP, Investments, CRA & Retail Banking, Discover Bank, and DBA Board Chair-Elect.

Women Connect at Wilmington University

Over 100 attendees gathered April 25 at Wilmington University's Brandywine Campus for the first Women Connect Network event of the year. The event began with a Networking Breakfast and Vendor Showcase. Featured sessions included: Philanthropy Ages and Stages; Women in Business; and concluded with special remarks from Dr. LaVerne Harmon, President of Wilmington University. Speakers included: Rebecca Elzey, Senior Compliance & Operations Officer, Delaware Community Foundation; Tara Bolinski, Senior Trust Administrator, Santora CPA Group; Badia Weeks, CEO, Your Wellness Homegirl; Lynne Howard, Philanthropist; Alexis Harris, Founder & Strategist, First State Destinations; Kaisha Blackstone, Producer & Co-Founder, BASSic Black Entertainment, LLC; and, Elizabeth Sanchez, Founder & Holistic Healer, Magnificent Mamas Collective.

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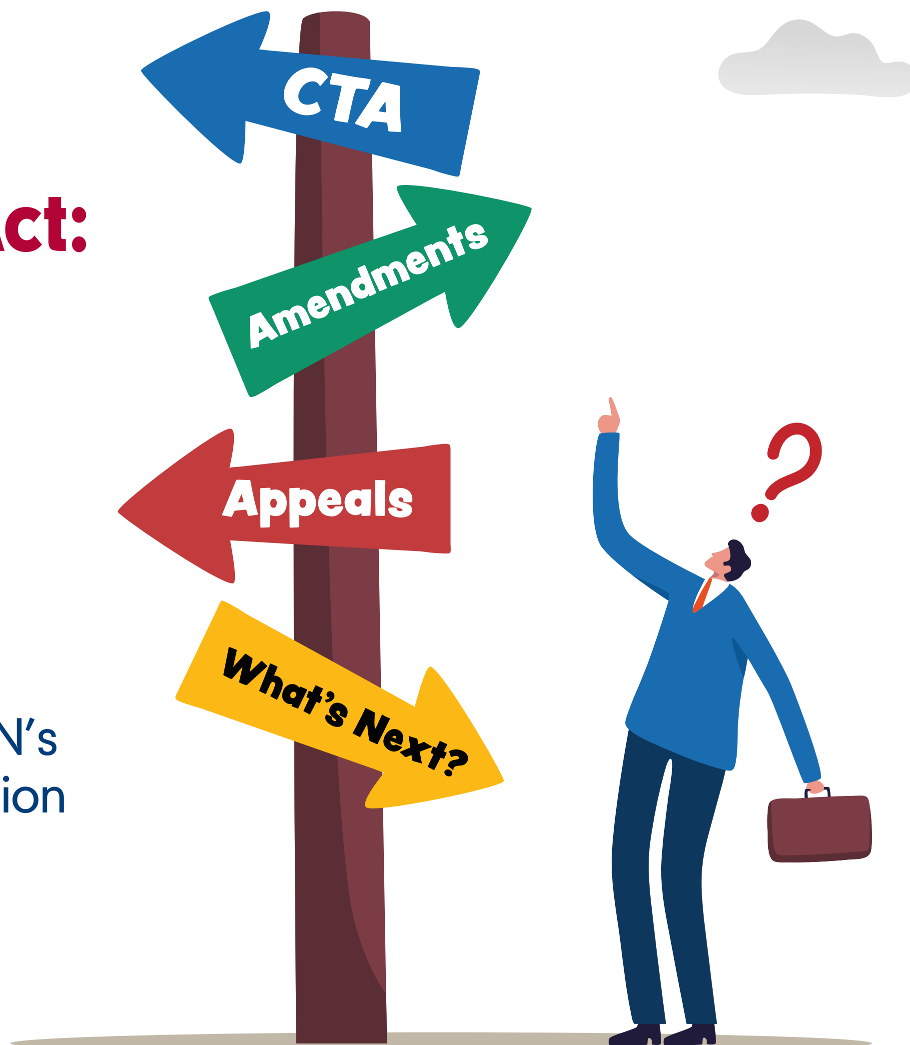
The Corporate Transparency Act: Amendments, Access Rule, and Appeals

Analyzing the Turbulent Release and Implementation of FinCEN's Groundbreaking Regulation



by
Grant Kulonda
and
Sara Wagner
Richards, Layton & Finger

The Corporate Transparency Act ("CTA") has received considerable national attention since its January 1, 2024 effective date. The past six months alone have seen a number of significant developments, including eased filing deadlines for beneficial ownership reports in 2024, the introduction of new standards and safeguards for accessing the Beneficial Ownership Secure System ("BOSS"), and even an initial volley of constitutional challenges to the CTA. As one of the national leaders in new entity filings, Delaware remains uniquely positioned at the epicenter of the CTA's impact. This article provides a refresher course on CTA basics, breaks down some of its recent changes, and highlights three federal cases seeking (and in one instance winning) permanent enjoinment from the CTA's reporting requirements.

What Is the CTA, Again?

Passed in 2021, the 21-page Corporate Transparency Act (31 U.S.C. § 5336) was enacted by Congress as part of the 1,482-page bipartisan National Defense Authorization Act to expand on the Bank Secrecy Act and broaden existing laws that prevent and combat money laundering, terrorist financing, and other illicit activity.[1] The CTA requires any entity formed by a filing with a secretary of state or similar office under the laws of a state or Indian tribe (a "Reporting Company") to file a beneficial ownership information report (a "BOI Report") with the Financial Crimes Enforcement Network ("FinCEN") within a specific timeframe from its formation, barring an exemption.[2] Reporting Companies existing prior to the January 1, 2024 effective date of the CTA have until January 1, 2025 to file a similar beneficial ownership report.[3] There are 23 exemptions to the definition of a Reporting Company.[4] For so long as a Reporting Company falls into one of the exempted categories, it will

not be required to file a BOI Report. Absent an exemption, the CTA's definition of Reporting Company will encompass almost all Delaware-created business entities.

Each BOI Report filed with FinCEN must contain specific information on the Reporting Company itself as well as certain personal identifying information on its beneficial owners ("Beneficial Owners") and company applicants ("Applicants")—a new designation for certain individuals tied to the formation of Reporting Companies.[5] An individual qualifies as a Beneficial Owner by owning or controlling at least 25 percent of the ownership interests in the Reporting Company or by exercising "substantial control" over the Reporting Company.[6] Individuals exercising substantial control include any who (i) serve as a senior officer of a Reporting Company, (ii) exercise authority over the appointment or removal of any senior officer or a majority of the board of directors or managers (or similar body) of a Reporting Company, (iii) direct, determine, or substantially influence important decisions made by the Reporting Company, or (iv) have any other form of substantial control over the Reporting Company.[7]

An Applicant can be (i) the individual who directly files the document that forms the Reporting Company and (ii) the individual who is primarily responsible for directing or controlling such filing, if different than the direct filer.[8] Each BOI Report must have at least one Applicant, with a maximum of two.[9] Reporting Companies existing before the January 1, 2024 effective date are exempt from the Applicant requirement.[10] Attorneys, advisers, independent managers, accountants, corporate service providers, and other professionals all may qualify as Applicants based on the roles they play in the formation of a Reporting Company.[11]

Amendment to Filing Deadlines in 2024

Amid concerns surrounding the public's overall awareness and exposure to the CTA's reporting requirements, FinCEN amended its beneficial ownership reporting rule on November 30, 2023 to extend the filing deadline for entities created or registered on or after January 1, 2024 and before January 1, 2025 from 30 calendar days to 90 calendar days.[12] Under these modified deadlines, all Reporting Companies now must submit BOI Reports within the following timeframes:

- **No later than January 1, 2025:** All domestic Reporting Companies existing prior to January 1, 2024 and all foreign Reporting Companies registered to do business in the U.S. prior to January 1, 2024.

- **Within 90 calendar days from formation:** All domestic Reporting Companies formed on or after January 1, 2024 and before January 1, 2025 or foreign Reporting Companies registered to do business in the U.S. on or after January 1, 2024 and before January 1, 2025.

- **Within 30 calendar days from formation:** All domestic Reporting Companies formed on or after January 1, 2025 or foreign Reporting Companies registered to do business in the U.S. on or after January 1, 2025.

(Continued on p . 12)

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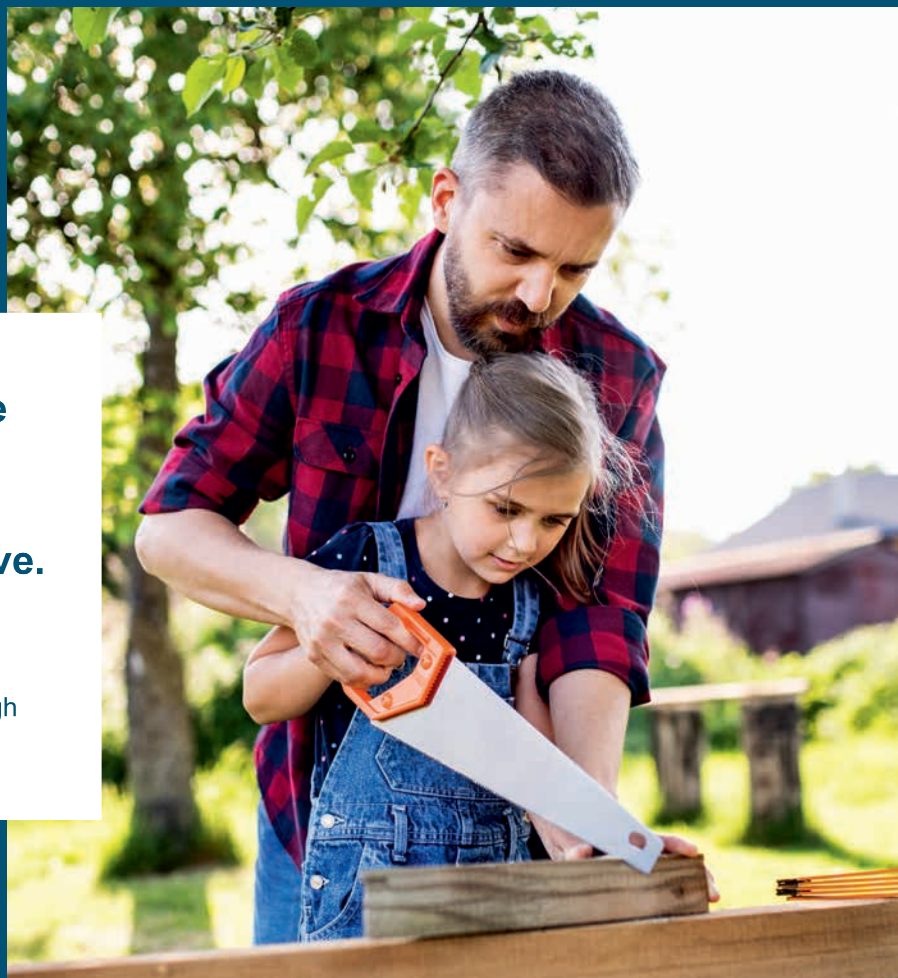

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- **Within 30 calendar days:** Any filing to correct a previously submitted BOI Report in which the Reporting Company has become aware contained false, inaccurate, or outdated information.

The responsibility to timely file and update a BOI Report rests with the Reporting Company itself, rather than with certain individuals or entities. Regardless, the CTA establishes escalating civil and criminal penalties for persons responsible for violating reporting requirements, willfully disclosing confidential information, or causing a false filing.[13] FinCEN has reiterated that its decision to extend the timeframe to file for entities created or registered in 2024 does not warrant a permanent departure from the BOI Reporting regime initially set out by Congress, as Reporting Companies in the future will have greater awareness of the CTA's requirements and, as a result, will ostensibly be better positioned to comply with the 30-day reporting timeframe than they would have been in 2024.[14]

Access Rule and BOSS

In another step towards "creating a highly useful database for authorized BOI recipients," FinCEN issued a final rule on December 22, 2023 promulgating its anticipated CTA access and safeguards provisions (the "Access Rule").[15] This new rule prescribes guidelines on who may access beneficial ownership information, *what* information is available, and *how* retrieved information must be protected.[16] The Access Rule expressly grants access to six categories of parties, including (i) U.S. federal agencies engaged in national security, intelligence, or law enforcement activity; (ii) U.S. state, local, and tribal law enforcement agencies; (iii) foreign law enforcement agencies, judges, prosecutors, central authorities, and competent authorities (foreign requesters); (iv) financial institutions using BOI Reports to facilitate compliance with customer due diligence (CDD) requirements under applicable law; (v) federal functional regulators and other appropriate regulatory agencies acting in a supervisory capacity assessing financial institutions for compliance with CDD requirements under applicable law; and (vi) treasury officers and employees.[17]

The Access Rule also establishes security and confidentiality protocols applicable to each type of authorized recipient of information.[18] Domestic agencies seeking beneficial ownership information will need to enter into contractual agreements with FinCEN, establish standards and procedures to protect the security and confidentiality of such information, and maintain permanent auditable records of requests.[19] Banks and financial institutions will function under geographic restrictions when retrieving beneficial ownership information and must establish administrative, technical, and physical safeguards for its protection, similar to the Gramm-Leach-Bliley Act.[20] The Access Rule doubles down on prior commitments from FinCEN that any unauthorized use or disclosure of beneficial ownership information retrieved from BOSS could incur suspension of access as well as civil and criminal liability.[21]

Mounting Litigation

Since the CTA's effective date, constitutional challenges have begun to surge across the country, with varying degrees of success. Most prominent of these cases has been *National Small Business United d/b/a the National Small Business Association, et al. v. Janet Yellen et al., No. 5:22-cv-01448 (N.D. Ala.)*, in which the U.S. District Court for the Northern District of Alabama held the CTA to be an unconstitutional exercise of Congressional power.[22]

In *NSBA v. Yellen*, two plaintiffs—the National Small Business Association ("NSBA"), an Ohio nonprofit corporation representing "over 65,000 businesses and entrepreneurs located in all 50 states", and Isaac Winkles ("Winkles"), an NSBA member and business owner—challenged whether the CTA's reporting requirements exceed Congress' authority under Article I of the Constitution and violate the First, Fourth, Fifth, Ninth, and Tenth Amendments.[23] Both the NSBA and the U.S. Department of Justice on behalf of the Department of the Treasury (the "Government") agreed to proceed via dispositive motions and cross-moved for summary judgment. In its review, the Alabama court assessed plaintiffs' standing to challenge the federal regulation and the viability of the Government's sources of constitutional authority for the enactment of the CTA.[24]

Ultimately, the court entered a final declaratory judgment on March 1, 2024 holding that, as a matter of law, (i) both plaintiffs have standing to bring their constitutional claims, and (ii) the CTA is unconstitutional because it cannot be justified as a legitimate exercise of Congress' enumerated powers.[25] Injunctive relief was then granted by the Alabama court, enjoining the Government from enforcing the CTA's reporting requirements against the NSBA and Winkles. Relief was expressly limited to those plaintiffs named in the suit (including those businesses and entrepreneurs represented by the NSBA) and did not extend further to all other Reporting Companies across the country. Because the court concluded that the CTA did not constitute a valid exercise of Congress' enumerated powers, it did not go on to address whether the regulation violates the First, Fourth, and Fifth Amendments. In a press release published May 11, 2024, FinCEN stated that it is appealing the decision to the United States Court of Appeals for the Eleventh Circuit, but until then will not enforce the CTA against the plaintiffs in that action.[26]

In the wake of the *NSBA v. Yellen* decision, several new federal complaints have rapidly followed in apparent attempts to replicate the award of injunctive relief. In *William Boyle v. Janet Yellen et al., 2:24-cv-00081 (D. Me.)*, filed March 15, 2024, a Maine resident ("Boyle") with ownership interests in two limited liability companies engaged solely in intrastate commerce challenged the constitutionality of the CTA, contending it exceeds the enumerated powers of the federal government as set forth in Article I, Section 8, violates the Ninth and Tenth Amendments, and infringes on state sovereignty.[27] Boyle's complaint argues that, in practice, the CTA unjustifiably transfers responsibility from exempt institutions that process the targeted illicit transactions (e.g., banks, financial institutions, and escrow agents) on to small business owners.[28]

Small Business Association of Michigan v. Janet Yellen et al., 1:24-cv-00314 (W.D. Mich.), filed on March 27, 2024, presents similar constitutional challenges as *NSBA v. Yellen* from the perspective of a business association. The Small Business Association of

Michigan ("SBAM"), representing 30,000+ members, filed suit against Janet Yellen and the Department of the Treasury for declaratory relief from the CTA's reporting requirements.[29] In its complaint, the SBAM analogizes the CTA's treatment of law-abiding U.S. citizens to that of criminals, without providing any particular reason to suspect them of wrongdoing.[30] By circumventing the Fourth Amendment, SBAM reasons, the CTA allows federal law enforcement to leverage collected data in any future criminal investigation, regardless of whether such an investigation is related to money laundering or terrorist financing.[31]

As these civil actions and appeal proceed through the legal system, FinCEN has expressed no intention of slowing its CTA implementation efforts. Other than the named plaintiffs (and represented parties) in *NSBA v. Yellen* subject to the U.S. District Court's injunction, all other Reporting Companies across the United States are still required to comply with the CTA and its beneficial ownership reporting requirements.

The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.

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Sara T. Wagner is chair of the Real Estate Group of Richards, Layton & Finger, Delaware's largest law firm. She focuses on transactions involving the finance, acquisition, sale, lease, and development of commercial real estate properties. Sara represents major real estate developers, financial institutions, significant holders of commercial real estate, and institutional clients in all types of commercial real estate transactions. She earned a J.D. from Temple University School of Law and a B.S., summa cum laude, from Philadelphia University.

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Notes:
1- *See* H.R.6395 - William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021).
2- 31 U.S.C. § 5336(a)(11).
3- 31 C.F.R. § 1010.380(a)(1)(iii).
4- 31 U.S.C. § 5336(a)(11)(B). Under 31 U.S.C. § 5336(a)(11)(B)(xxiv), additional exemptions may be granted to any entity that the Secretary of the Treasury has determined should be exempt because requiring beneficial ownership information (i) would not serve the public interest and (ii) would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.
5- 31 C.F.R. § 1010.380(b)(1)(ii).
6- 31 U.S.C. § 5336(a)(3)(A)(i); 31 U.S.C. § 5336(a)(3)(A)(ii).
7- 31 C.F.R. § 1010.380(d)(1).
8- 31 C.F.R. § 1010.380(e).
9- *See* FinCEN, Beneficial Ownership Information Reporting Frequently Asked Questions, at E.1 (Issued September 18, 2023), https://www.fincen.gov/boi-faqs#E_1.
10- 31 C.F.R. §1010.380(b)(2)(iv).
11- *See* FinCEN, Beneficial Ownership Information Reporting Frequently Asked Questions, at E.3 (Issued September 18, 2023), https://www.fincen.gov/boi-faqs#E_3.
12- 31 C.F.R. § 1010.380(a)(1); see 88 Fed. Reg. 83499 (Nov. 30, 2023).
13- 31 U.S.C. § 5336(h).
14- *See* 88 Fed. Reg. 83502 (Nov. 30, 2023).
15- *See* 88 Fed. Reg. 88732 (Dec. 22, 2023).
16- *See* FinCEN, Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule, https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-access-and-safeguards-final-rule.
17- 31 C.F.R. § 1010.955(b).
18- *See* 31 C.F.R. § 1010.955(d).
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20- 31 C.F.R. § 1010.955(d)(2).
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22- National Small Business United, d/b/a the National Small Business Association et al., v. Janet Yellen et al., No. 5:22-cv-1448 (N.D. Ala. 2024).
23- *Id.* at 4.
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26- *See* FinCEN, UPDATED: Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.), https://www.fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448#msdynttrid=DP_MtZNpU0WiMeBBV_JEZT8l_pbv4xKlwsKK51ygbFU.
27- William Boyle v. Janet Yellen et al., 2:24-cv-00081 (D. Me. 2024).
28- *Id.*
29- Small Business Association of Michigan et al. v. Janet Yellen et al., 1:24-cv-00314 (W.D. Mich. 2024).
30- *Id.*
31- *Id.*

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Divide and Conquer!

Statutory Divisions of LLCs and Limited Partnerships Under Delaware Law

by
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and
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A powerful new tool was recently added to the toolbox of Delaware entity practitioners. In 2018, the Delaware Limited Liability Company Act (the "Delaware LLC Act") was amended to add Section 18-217, which authorizes a Delaware limited liability company (an "LLC") to divide its assets and liabilities into two or more LLCs pursuant to a plan of division. In 2019, the Delaware Revised Uniform Limited Partnership Act (the "Delaware LP Act") followed suit by adding Section 17-220, which allows a Delaware limited partnership (a "Limited Partnership") to divide into two or more Limited Partnerships. It is important that those who deal with Delaware LLCs and Limited Partnerships, including lenders, are aware of the new division statutes, both to be able to take advantage of the opportunities they create but also to protect against the potential consequences of a division.

Effecting the Division

We begin by describing how a division works. In simple terms, it is essentially the opposite of a merger, in which one or more entities merge into another entity, with the result being that multiple entities are now a single entity. A division, on the other hand, begins with a single entity and results in multiple entities.

A simple example will help illustrate this concept. Let's say that an LLC holds two primary assets, a shopping center and a hotel, and wants to sell the hotel but retain the shopping center. For tax, regulatory or other reasons, the proposed buyer of the hotel wants to purchase the entity that owns the hotel rather than purchase the individual assets that comprise the hotel, but the proposed buyer does not want to buy the shopping center or the LLC in which the shopping center is held. A division could be used to move the hotel into a separate, new LLC, while the shopping center remains in the original LLC, and the buyer could then purchase the interests in the new LLC.

Under the Delaware LLC Act, the "dividing company" is the LLC that is effecting the division and the "division company" is (a) each new LLC that is formed as

a result of the division and (b) if the original LLC survives the division, the original LLC. Under the Delaware LP Act, the "dividing partnership" is the Limited Partnership that is effecting the division and the "division partnership" is (a) each new Limited Partnership that is formed as a result of the division and (b) if the original Limited Partnership survives the division, the original Limited Partnership. For purposes of simplicity, we use the term "dividing company" to refer both to a dividing LLC under the Delaware LLC Act and a dividing Limited Partnership under the Delaware LP Act and "division company" to refer both to a division company under the Delaware LLC Act and a division partnership under the Delaware LP Act. The dividing company can either continue its existence or terminate as a result of the division. A division of an LLC or a Limited Partnership is effected by (i) the adoption of a plan of division by the dividing company and (ii) the filing with the Delaware Secretary of State of a certificate of division and, in the case of the division of an LLC, a certificate of formation for each newly formed LLC and, in the case of the division of a Limited Partnership, a certificate of limited partnership for each newly formed Limited Partnership.
Similar to a merger agreement with respect to a merger, a plan of division is the fundamental agreement with respect to a division that sets forth the terms and conditions of the division, including, importantly, how the assets, property, rights, series, debts, liabilities and duties of the dividing company will be allocated among the division companies. The plan of division also specifies what happens to the interests in the dividing company upon the division. For example, the interests in the dividing company may remain outstanding, may be converted into or exchanged for interests in one or more division companies, may be converted into cash, property or rights or securities or obligations of or interests in any other entity that is not a division company or may be canceled, or any combination of the foregoing. The plan of division can also include any other matters that the dividing company determines to include in it.

A certificate of division is the document that is filed with the Delaware Secretary of State to effect the division. It includes high-level information, such as (i) the name of the dividing company and whether it will survive the division, (ii) the name of each division company and (iii) the name and business address of the division contact, which is a person who is required to maintain a copy of the plan of division for a period of 6 years following the division. The division contact is required to provide a copy of the plan of division, without cost, to any creditor of the dividing company. A division becomes effective immediately upon the filing of a certificate of division with the Delaware Secretary of State unless the certificate of division specifies a future effective time.

Approvals Required for a Division

To determine the approvals required to authorize a division of an LLC or a Limited Partnership, one must first look to the provisions in the limited liability company agreement of the LLC or the limited partnership agreement of the Limited Partnership (the "Company Agreement"). If the Company Agreement specifies the manner of approval required for a division, then

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that provision will govern. If the Company Agreement does not specify the manner of approval required for a division, and does not prohibit a division, but does specify the manner of approval required for a merger or consolidation, the approval required for a division is the same as the approval required for a merger or consolidation. If the Company Agreement does not specify the manner of approval required for a division, merger or consolidation and does not prohibit division, the division must be approved, in the case of the division of an LLC, by members who own more than 50% of the interest in the profits of the LLC or, in the case of the division of a Limited Partnership, by all the general partners of the Limited Partnership and by limited partners who own more than 50% of the interest in the profits of the Limited Partnership.

Effects of a Division

When a division occurs, the division companies resulting from the division are separate and distinct LLCs or Limited Partnerships. All of the property rights, privileges and powers and all debts and liabilities of the dividing company are allocated to and vested in the division companies pursuant to the plan of division, without any further actions. If any debts, liabilities and duties of the dividing company are not allocated in the division, they become joint and several liabilities of all of the division companies so it is important for the plan of division to address the allocation of all debts, liabilities and duties to avoid this result.

Importantly, the rights, privileges, powers and interests in property of the dividing company and debts, liabilities and duties of the dividing company allocated to a division company are not deemed to have been assigned or transferred for purposes of Delaware law. Thus, subject to one exception we will describe below, a typical restriction on the assignment or transfer of assets in a contract with a dividing company likely would not restrict an allocation of those assets to a division company in a division. Similarly, all liens upon any property of the dividing company are preserved unimpaired, and all debts, liabilities and duties of the dividing company remain attached to the division company to which those debts, liabilities and duties have been allocated in the plan of division, and may be enforced against the division company to the same extent as if such debts, liabilities and duties had originally been incurred or contracted by such division company in its capacity as an LLC or Limited Partnership.

In light of the ability in a division to divide up the assets and liabilities of the dividing company among division companies, one obvious concern is whether a division can be used to avoid fraudulent transfer laws. The answer is no. If a division constitutes a fraudulent transfer, each division company resulting from the division is jointly and severally liable for any liabilities on account of the fraudulent transfer notwithstanding the allocation made in the plan of division. For example, if an LLC were to do a division in which it allocated all of its assets to one division company and allocated all of its liabilities to another division company, which allocation would presumably constitute a fraudulent transfer, both division companies would be jointly and severally liable for the liabilities of the dividing LLC and thus creditors of the dividing LLC who were victimized by the fraudulent transfer should have recourse against the same assets of the dividing LLC, now held in division companies, to which they had recourse prior to the division. To avoid the potential uncertainty and complexities that would result from attempting to "undo" a division that has occurred but is later found to constitute a fraudulent transfer, a division remains valid and effective even if it is determined to result in a fraudulent transfer, but, as discussed above, subject to the imposition of joint and several liability among the division companies.

Another significant feature of a division is that it can effect an amendment to the Company Agreement of the LLC or Limited Partnership or adopt a new Company Agreement, without regard to the vote otherwise required to amend the provisions of the Company Agreement unless the amendment provisions of the Company Agreement specifically restrict amendments by division, merger or consolidation. For example, if the Company Agreement of an LLC provides that the unanimous vote of the members is required to amend the provisions of the Company Agreement but does not specifically address amendments in connection with a division, merger or consolidation and the Company Agreement is silent with respect to the vote required to approve a division of the LLC, the LLC may be divided, and the LLC Agreement of the LLC may be amended as part of that division, with a vote of the members who own more than 50% of the interest in the profits of the LLC.

Implications for Lenders

Prior to the adoption of the division amendments to the Delaware LLC Act and the Delaware LP Act, most loan documents did not explicitly restrict, condition or prohibit divisions, as the concept of a statutory division only existed in a few jurisdictions. To protect lenders and others who entered into contracts with LLCs and Limited Partnerships prior to the adoption of the division amendments, a provision was included in the Delaware LLC Act and Delaware LP Act providing that any written contract, indenture or other agreement entered into prior to the effective date of the division amendments (August 1, 2018 with respect to LLCs and August 1, 2019 with respect to Limited Partnerships (as applicable, the "Effective Date")) that by its terms restricts, conditions or prohibits an LLC or Limited Partnership formed on or before such Effective Date from (x) consummating a merger or consolidation with or into another party or (y) transferring assets, such restriction will be deemed to apply to a division as if it were a merger or consolidation or asset transfer. Thus, if a loan agreement entered into before August 1, 2018 restricts an LLC formed prior to August 1, 2018 from merging, consolidating or transferring its assets, such LLC would also be restricted from dividing.

However, in entering into a loan agreement with any LLC or Limited Partnership formed on or after the applicable Effective Date or entering into a loan agreement on or after the applicable Effective Date with an LLC or Limited Partnership, a lender should consider including restrictions or conditions on the ability for the LLC or Limited Partnership to divide. Otherwise, the debtor could effectuate a division that allocates assets to a non-

debtor or allocates the loan to a new LLC. While, as discussed above, a lender is protected against a division that constitutes a fraudulent transfer, allocation of the loan or assets away from the original debtor could reduce the creditworthiness of the debtor, could affect the collateral or other security for the loan or could have other undesirable consequences for a lender. In the event a division occurs with respect to an LLC or Limited Partnership that is a debtor, it is valuable to remember that a creditor can request, without cost, a copy of the plan of division from the division contact during the six-year period following the division.

Conclusion

The amendments to the Delaware LLC Act and the Delaware LP Act offer increased flexibility to entity practitioners to address circumstances that call for restructuring how the assets and liabilities of an LLC or Limited Partnership are held without having to resort to a merger or transfer of assets. They are yet another example of Delaware entity law remaining on the cutting edge.

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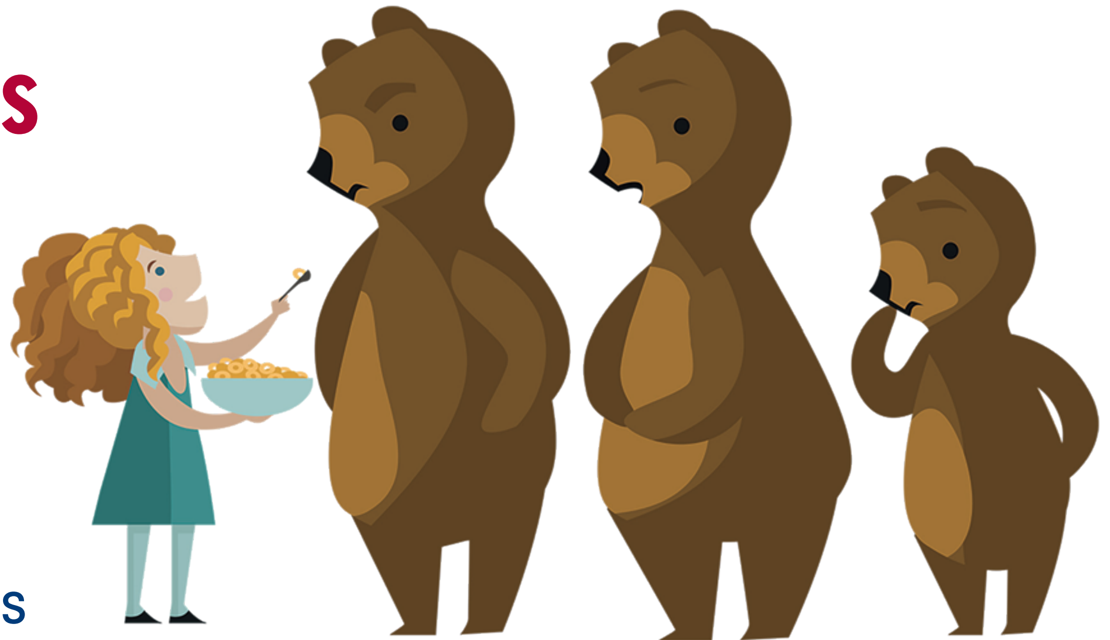

Planning Considerations for Mid-Size Estates

by
Gina Nelson
& Daniel Cihanowyz
Chilton Trust

Many of us began our careers when the estate tax exemption was $1 million (or less) per person and portability did not exist. As such, planning for many clients revolved around ensuring use of the full exemption amount upon the death of the first spouse. In short, the tax tail wagged the planning dog. As the individual exemption has grown significantly to its current $13.61 million and with the introduction of portability, fewer and fewer clients have had the need for estate tax planning. Even if the exemption sunsets at the end of 2025 as per the current legislation and resets between $6 and $7 million per person, the overwhelming majority of Americans will not have estates subject to estate taxation. As a result, advisors are able to place a higher priority on other tax planning concerns and can focus on making certain that a client's assets pass in a manner with which they are comfortable and with flexibility to adapt to changes in future circumstances.

Current State of the Estate Tax Exemption

The 2017 Tax Cuts and Jobs Act ("TCJA") increased individual exemptions from $5.6 million to their current $13.61 million over the course of the last seven years. Under that current legislation, as of January 1, 2026, the exemption changes sunset, returning to their pre-TCJA amount of $5 million indexed for inflation. After indexing, estimates are that the 2026 exemption will be approximately $7 million per individual and $14 million per married couple. For individuals with estates that are not currently taxable but may become so after the sunset, planning requires a multifaceted approach, taking into account income tax implications, beneficiary designations, traditional tax planning and non-tax factors.

Tax Planning Considerations

As the exemption amounts have climbed, fewer clients have a need to prioritize estate tax planning. For those clients whose estates are on the borderline, especially after a decrease in exemptions, traditional estate tax planning may still be unnecessary. Many Americans find the majority of their wealth derives from two main asset classes: real estate and retirement accounts.

Retirement accounts are not conducive to irrevocable tax planning due to their income tax inefficiencies, but for clients with charitable intent they present an important planning opportunity. Where retirement accounts will be the difference between an estate being taxable or not, leaving those accounts to charity allows the estate to take a charitable deduction, thereby offsetting the inclusion of the assets in a client's estate. And since the charity does not pay income taxes on the gift, both estate and income tax savings are maximized.

For clients whose real estate puts them over the exemption amount, a Qualified Personal Residence Trust ("QPRT") may be advisable. This allows the client to transfer their residence or a vacation property into the QPRT, thereby removing the full value of the residence from their estate, including any appreciation over the term of the trust, at a highly discounted value for gift tax purposes. The grantor retains the right to use the home during the term of the trust and may pay rent thereafter to remain in the property, reducing their taxable estate even further. The trade-off is a loss of the step-up in basis that the beneficiaries would receive if the home remained a part of the client's taxable estate.

Of course, a client's estate may be near the taxable amount without the help of retirement accounts or real estate. For these clients, and many others, the use of a Spousal Lifetime Access Trust ("SLAT") may be advisable. These are particularly attractive to many clients in this range who fear large gifts to irrevocable trusts will leave them short on assets needed to live out their lives comfortably in the lifestyle to which they are accustomed. For married couples interested in locking in exemption amounts today, the SLAT allows clients to remove assets from their taxable estate but still allows access if the assets were to become needed later in life. Most often both spouses establish SLATs for the benefit of each other with slightly differing provisions in order to avoid the Reciprocal Trust Doctrine (e.g. giving one spouse a power of appointment but not the other, having a 5x5 power in one trust but full discretion in the other, etc.). However, upon the death of the first spouse, the survivor does lose their indirect access to the first-to-die spouse's SLAT funds, so the determination of proper funding amounts must be adjusted accordingly.

For some clients on the cusp of a taxable estate, income tax planning may be more advantageous than estate tax planning. For example, clients who hold highly appreciated, low-cost basis assets may realize a more significant overall tax savings by keeping those assets in their estates versus gifting them during lifetime. This allows them to take advantage of a step-up in cost basis upon their death rather than removing the asset from their estate and losing the basis step-up. This allows the client to retain the benefit of the asset during life while also giving the ultimate beneficiaries greater flexibility in determining if or when to sell the assets without having to factor significant capital gains into the equation.

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Trusts

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Planning Beyond Taxes

When estate tax minimization does not drive planning, the focus can shift to making sure the client's assets pass exactly how they would like, not necessarily in the most tax efficient manner. This means more attention can be paid to whether outright distributions or funding trusts is better for the beneficiaries, whether one beneficiary has needs that are better met in a different method than the others, whether age attainment distributions/terminations are appropriate, whether there is a beneficiary who does or may require special needs provisions, spendthrifts, etc. While these factors certainly play a part even when tax planning is necessary, they often become the primary drivers when tax planning takes a back seat.

This also allows drafters to build maximum flexibility into the estate plan. Trustees can have broad discretion to make determinations at the time key events occur. By way of example, a client may want their assets to distribute outright to their children upon their death, but at death one child may be involved in a lawsuit, a divorce, or another situation whereby an outright distribution would have negative consequences for the beneficiary. Similarly, trusts that include outright distributions at certain ages may occur where a child is struggling with chemical dependency or other issues impacting their ability to properly manage their finances. By drafting trusts that give trustees guidance as to the grantor's preferences (e.g. outright distributions preferred over continuing trusts, distributions contingent on a beneficiary reaching certain milestones, etc.) it gives the trustee discretion to make determinations at relevant times, estate plans can best accomplish a grantor's goals and serve the needs of the beneficiaries.

That said, drafting flexibility into a trust means the decision as to whom should serve as trustee becomes vitally important. This aspect of planning is often glossed over but can have a substantial impact on a client's overall estate plan. Oftentimes people default to naming a family member or close friend to serve as their fiduciary. One of the advantages of that arrangement (and why it is often done) is that this person will have personal knowledge of the client's family situation, important family dynamics, and will likely be familiar with their financial values and wishes. They may know if there is a beneficiary who is less financially responsible, who has special needs, or any other unique needs of the beneficiaries. This puts them in the best position to make decisions as the clients would have done themselves. However, the amount of work required of a fiduciary can become overwhelming for an individual, particularly if they are asked to serve without compensation.

As an alternative, some people choose to appoint a professional trustee, such as a trust company or lawyer. Estate and trust administration can be time-consuming, and professional trustees have the expertise, knowledge and technology to be able to administer them efficiently and effectively. Particularly in complex estate planning, where complicated trustee/executor decisions have important ramifications, professional fiduciaries are well suited to understanding how to make these determinations. Additionally, professional trustees may be better situated to act impartially, outside of the constraints of familial relationships and dynamics. Trust companies can provide continuity in the fiduciary role, maintaining relationships over multiple generations and seamlessly continuing administration over the life of the estate/trust. They also have controls in place to ensure the trust is properly administered throughout its existence and are appropriately insured if an issue is discovered.

One approach that works particularly well is pairing a family member or friend with a trust company as co-trustees. In these situations, the burden of day-to-day administration, record-keeping, tax preparation, etc. can be handled by the corporate trustee, while distribution and/or investment decisions can be made jointly by the co-trustees. This balances the advantages of an individual trustee who has close personal knowledge of the family, its dynamics and goals, with the strengths of a corporate trustee who can act impartially and help guide (and in some cases, serve as a buffer, for) the individual trustee during difficult decisions. In situations where the family member or friend is uncomfortable saying no, the corporate trustee can take that on, allowing the individual trustee to maintain a comfortable relationship with the beneficiary.

Looking at the Big Picture

When approaching clients' planning needs it is always important to take their entire financial and family story into account and to consider both the tax and non-tax drivers that influence their planning. For families well under the exemption amounts, income tax and non-tax related planning may be more important, while families near those amounts may look to focus on reducing their taxable estate.

We know from past experience that many times attorneys are unable to continue taking on new clients as we approach the tax change deadline, or they will not have the time to draft new trusts for everyone who wants to establish one. For that reason, having clients review and adjust their estate and gift tax plans in 2024 ensures their ability to take advantage of the decreasing exemption (assuming no legislative changes are made). Clients can hold off on funding those trusts, or at least fully funding them, until there is more certainty around the change in exemption amount. This is especially true for married clients with estates near the $14 million expected exemption amount in 2026. Putting estate planning vehicles into place now is recommended to allow clients to take full advantage of this "use it or lose it" exemption amount.

**This article is not tax or legal advice. Readers should consult with their professional advisors.*

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Gina M. Nelson is Senior Vice President and Head of Fiduciary Services at Chilton Trust with over 15 years of experience in various trust and estate roles. Prior to joining Chilton Trust, Ms. Nelson served as Executive Director/ Global Head of Trusts and Estates Risk at J.P. Morgan where she was responsible for Risk Management of all of J.P. Morgan's trust companies, which include the U.S., Delaware, Bahamas, and other international entities. Prior to J.P. Morgan, Ms. Nelson has over 10 years of trust company experience, serving as a resource on complex fiduciary matters, reviewing and approving new business, and developing and enhancing fiduciary processes and procedures. She has spoken on panels at several key industry events, including the Delaware Trust Conference and the Mourant Ozannes International Trust and Private Client Conference. Ms. Nelson began her career practicing law and opened her own practice where her focus was estate planning and trust and estate administration. Ms. Nelson received her B.A. in French and European Studies from Vanderbilt University and her J.D. from the University of Minnesota School of Law. Ms. Nelson also devotes her time to organizations focused on ocean conservation.

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The Magic of Teach Children to Save Day!

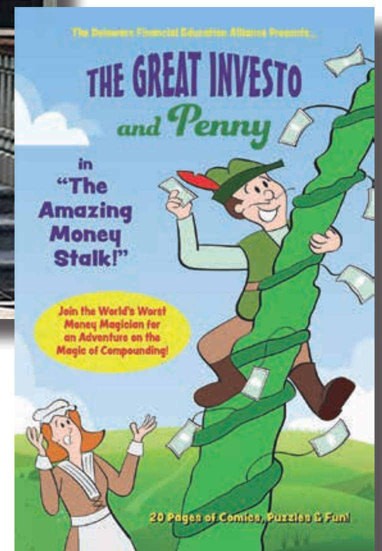
Throughout the week of April 15th to April 19th, over 100 banker volunteers taught over 5,400 students in more than 210 public, private, and parochial classrooms throughout Delaware as part of the 26th annual Teach Children to Save Day. The total is an increase of 650 student over 2023. In addition, the lesson was also shared to an additional 1,000 students in Pennsylvania, New Jersey, and Nevada. Over 90 percent of Delaware's banks participate in the Teach Children to Save Day event, the highest participation rate in the nation. The Delaware Legislature approved a resolution honoring the effort on Wednesday, April 17th. Delaware Governor John Carney also issued a proclamation recognizing the event.

This year's lesson is taken from the new comic book *The Great Investo and Penny in The Amazing Money Stalk.* The book illustrates the concept of compound interest and how it can work against borrowers but for savers. The book was written and illustrated by Greg Koseluk of the Delaware Bankers Association. Each student received their own copy of the comic book. The book was created specifically for the 2024 Teach Children to Save Day event and was made possible with the support of **Barclays, Wells Fargo, Sallie Mae, Smarty Pig, TD Bank, WSFS Bank, Artisans' Bank, Bank of America, Fulton Bank, M&T Bank, Visa, Comenity Bank, County Bank, First Citizens Community Bank,** and **Shore United Bank.**

Teach Children to Save Day is part of a national program developed by the American Bankers Association's Education Foundation to teach children about the importance of saving. The Delaware Bankers Association and the Delaware Financial Education Alliance coordinate the program in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE). The CEEE develops the lessons which meet Delaware's state economic education standards.

The Great Investo and Penny use magic to illustrate the magic of compound interest during a show at Welch Elementary School.

DBA President Sarah Long addresses the Delaware General Assembly on the importance of Teach Children to Save Day.



For the second year, all the students received a copy of the comic book on saving. All members of the General Assembly also recieved a copy.

Judy Austin, of the Center for Economic Education and Entrepreneurship, University of Delaware, provided educational support in the writing of the comic book, as well as training volunteers on the instructional video.

County Bank employees, (l to r) Penny Sharp, Brady Witmier, Melanie White, Yanina Sgroppo Emerick, Kimberly Joseph, and, Kori Stewart, visited Love Creek Elementary and not only read the story... they acted it out!

DBA President Sarah Long accompanied Penny and Investo in their visit to Welch Elementary School on the Dover Air Force Base.

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Qualified Sponsorship vs. Advertising: When Acknowledgement Goes Beyond Donor Recognition

By Jonathan D. Moll, CPA
Director – Nonprofit Practice Group
Belfint Lyons & Shuman, P.A.

"Advertising and sponsorship acknowledgements are often difficult to differentiate as they look similar with only subtle differences."

Delaware's vibrant nonprofit community is well supported by the generosity of local individuals, foundations, businesses, and banks. One of the most popular forms of supporting the various charitable missions is through special event sponsorship. But hidden in the event program guides, golf outing tee signs, auction brochures, and 5K sponsor posters are occasional instances of tax noncompliance. To mitigate this risk of noncompliance, an organization must know the difference between qualified sponsorships payments (QSP) and advertising.

Advertising and sponsorship acknowledgements are often difficult to differentiate as they look similar with only subtle differences. However, the impact of the differences is important. Advertising revenue is generally classified as unrelated business income (UBI) and subject to unrelated business income tax, while QSP payments are not considered UBI.

Nonprofit organizations are typically exempt from income tax. However, nonprofit organizations must pay corporate income tax on UBI. UBI is business income regularly conducted by a nonprofit organization and not substantially related to the performance of its exempt purpose. Even if a nonprofit organization uses profits derived from an UBI activity while carrying out its tax-exempt mission, it does not, alone, make the activity substantially related to its nonprofit purpose.

Qualified sponsorship payments are not UBI and are defined as payments made by a person or business for which they will receive no substantial benefit other than the use or acknowledgement of the business name, logo, or product lines. These payments are considered philanthropic gestures and do not involve substantial promotional benefits.

Advertising payments are considered UBI and would subject a nonprofit to income tax. Advertising is defined as any message or other programming material which is transmitted, published, or displayed and promotes or markets any trade or business. Advertising usually includes explicit calls to action and promotional messaging aimed at driving consumer behavior.

The characteristics of advertising that distinguish it from a QSP is that advertising includes:

- Messages containing qualitative or comparative language, price information, or indication of value;
- Endorsements; and
- Inducements to use the products or services.

Increasing the complexity of compliance is that technology's role in sponsorships is evolving faster than that of guidance provided by the IRS. For example, QR codes are becoming an increasingly popular tool in digital sponsorships and advertising. Does the QR Code itself represent a call to action, or is it treated similar to a phone number or web address? Does the content of the web-site destination determine if the QR code provides a benefit to the payor? Until the IRS issues additional guidance, organizations would need to rely on current guidance to evaluate reporting requirements.

The IRS' landmark case that laid the groundwork for differentiating between QSP and advertising dates back to 1991 when a large corporation sponsored a major college football bowl game with a $1.5 million payment. The receiving organization originally considered this a sponsorship, however, the IRS disagreed and determined that the prominent display of the corporate name and logo on the venue's football field, scoreboard, player uniforms and print materials went well beyond simple donor recognition and provided substantial return benefits akin to advertising.

The most effective approach for nonprofits to limit their risk for under-reporting UBI is through staff education and open communication between their development and accounting departments. Few nonprofit organizations are lucky enough to have accounting and finance support staff that have formal training required to identify and report UBI. Most organizations rely on 3rd party CPA service providers and business professionals on their board for support. Additionally, most local nonprofits task their development and fundraising staff to cultivate donor relationships and solicit sponsorships. This also likely includes an extended team of support staff that is involved in receiving logos and branding information from sponsors and creating the special event materials. While formal training on UBI may be impractical for nonprofit staff, organizations that conduct special events and solicit sponsorships should make sure that their staff responsible for all aspects from soliciting the sponsorship to developing the event sponsor materials should be aware of the differences between advertising and QSP and the impact of those differences on the organization. Additionally, there should be an open line of communication during the process with the organization's accounting or finance team responsible for identifying and reporting UBI to help assure accurate financial reporting.

Careful consideration of these guidelines will help nonprofits stay tax compliant and assure continuation of mission-driven activities without disruption.

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Alternative Funding Concepts

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

"An ICHRA allows employers to reimburse employees a fixed allowance of tax-free money each month to buy health care services that fit their unique needs."

With health care expenses increasing every year, businesses need to get creative in their approach to mitigating health care costs and how they think about delivering affordable benefits to their employees. The impact of these challenges is a top concern for employers across the country.

In response to these challenges, alternative methods of funding and delivering health care benefits to employees have evolved into many sophisticated and affective approaches. Some popular solutions include concepts like fully insured, partial self-insured, level funding, health insurance captives and consortiums. However, the adoption of ICHRA's has increased significantly and is now among the fastest growing option for employers.

A new report by the HRA Council found that U.S. employers' adoption of individual coverage health reimbursement arrangements (ICHRAs) increased by 64% from 2022 to 2023. Many employers noted that ICHRAs offer more autonomy for employees and budget control for themselves than traditional group plans, according to a 2023 report by benefits administration software company PeopleKeep.

What is an ICHRA?

ICHRA ("ik-rah") is shorthand for "Individual Coverage Health Reimbursement Arrangement." An ICHRA allows employers to reimburse employees a fixed allowance of tax-free money each month to buy health care services that fit their unique needs. They can reimburse for health insurance premium and health care related out-of-pocket expenses if they purchase their own health insurance plan. They are an alternate way of providing quality health insurance benefits to employees with the same tax benefits of a traditional group plan. As a result, ICHRA usage is increasing as more plan sponsors consider ways to control costs around health benefits.

How does an ICHRA work?

On a very basic level, an ICHRA works in the following way:

- Employees obtain individual health coverage through a Marketplace or another method rather than purchasing health coverage through their employer.
- Employers contribute a set amount every month so the employees can be reimbursed for premium and/or certain expenses as they are incurred. Contributions and reimbursements are both tax-free. Employers decide on an amount of premium reimbursement and which expenses are eligible for reimbursement under the plan's terms.
- Unused funds at the end of the plan year may go back to the employer or carry over, depending on the employer.

It is as simple as that.

The power of an ICHRA comes from its flexibility. ICHRAs are extremely flexible because they rely on employees' individual health care plans. So, reimbursement contributions are basically all employers need to worry about.

The benefits of ICHRA for employers:

- Cost Control – set your budget and cap your spending.
- Savings – keep unclaimed reimbursements.
- Risk Removal – no more carrier renewals based on high claims and utilization!
- Participation – no minimums

The benefits of ICHRA for employees:

- Choice – employees can pick the health plan to meet their needs.
- Flexibility – secure the right level of coverage.
- Control – define benefits budget.

Setting up an ICHRA successfully that engages the employees and simplifies the processes requires a sophisticated and experienced Employee Benefits Advisor who selects appropriate solutions through the best-in-class vendors. There are multiple components that make up a properly implemented program.

This article is not intended to be exhaustive. There are many factors to consider when determining if an ICHRA is right for you. The summarized information comes directly from our resource libraries, Legislative Update Newsletters, and Zywave partnerships. Please contact us for all sources and/or complete articles. If you would like to be added to our email list or schedule a consultation, please contact the WBG Team.

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

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Trust & Estates Law Update

Beneficiary Designations: Potential Invalidity and Remedial Actions

Kenneth L. Norton
Young Conaway Stargatt & Taylor, LLP

"Banks and other asset custodians accepting beneficiary designations should confirm compliance with Section 924 or the TOD Act on the front end."

Beneficiary designations permit the owner of securities and other deposited assets to direct the non-probate disposition of such assets upon the owner's death. However, under Delaware law, only two types of beneficiary designations will afford the bank or other asset custodian a statutory release of potential liability arising from a transfer in accordance with the beneficiary designation—under Section 924 of Title 5 of the Delaware Code ("Section 924") and Sections 801-812 of Title 12 of the Delaware Code (the "TOD Act").[1] Banks and other asset custodians should therefore consider remedial actions before paying out assets pursuant to a beneficiary designation that does not strictly comply with Section 924 or the TOD Act.

Section 924 applies to deposit accounts established pursuant to an account agreement providing for payment upon request to the account owner during life and transfer after death to a designated beneficiary. In addition, for Section 924 to apply, the depositor must be a natural person, and the designated beneficiary must be a natural person or nonprofit organization (as qualified under 26 U.S.C. § 501(c)(3)). Conversely, while the TOD Act contains no comparable limitations regarding the identity of the owner or designated beneficiary, it is applicable solely to a "security" or "security account," which defined terms on their face encompass only equity, debt, and similar property interests or accounts associated therewith (i.e., accounts containing securities, proceeds thereof, and/or cash for investment therein). Thus, in some instances, the institution paying out assets pursuant to a beneficiary designation may not benefit from the statutory release under Section 924 or the TOD Act.

For example, the designation of a beneficiary that is neither a natural person nor a 501(c)(3) nonprofit organization with respect to a conventional checking account likely is invalid under Section 924 for want of a qualifying designated beneficiary, and the TOD Act would not apply because the account was not associated with a security. Under such circumstances, upon the death of the account owner, the designated beneficiary may still be entitled to the relevant assets on a contractual basis, pursuant to the beneficiary designation and/or the relevant account agreement (i.e., the relevant documents governing the relationship between the account owner and the applicable account custodian). However, the determination as to existence of a contract and enforceability thereof is often as clear as mud. So, absent a clear contractual determination, the relevant assets and the institution holding them in this example could be subject to disputed claims and state law governing the disposition of the deceased account owner's estate, all without the benefit of a statutory release.

Accordingly, banks and other asset custodians accepting beneficiary designations should confirm compliance with Section 924 or the TOD Act on the front end. If a potentially defective beneficiary designation slips through, legal advice should be sought as to any contractual right to the relevant assets and applicable law governing the deceased account owner's estate (including future third-party claims against such estate). Counsel may recommend obtaining a release from all potential recipients, which release should include appropriate refunding language in the event of a future claim with regard to the transferred assets or the deceased account owner's estate. Where such a release cannot be obtained, counsel may recommend seeking an order from a court of competent jurisdiction directing the payment of the relevant assets.

1- Please note that the TOD Act currently is subject to proposed amendments. As of February 28, 2024, the proposed legislation has been circulated for review and comment by the relevant legislative committee but has not been made available to the public. Although such proposed legislation is subject to change, if enacted in its proposed form as of February 28, 2024, it would not materially change the opinions and recommendations stated in this article.

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Lori Janosik Morrison, Laurel, Janosik Family Charitable Foundation Fund

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To learn more, contact **Joanne McGeoch**, **vice president for philanthropy**, at **jmcgeoch@delcf.org** or **302.504.5224**.

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