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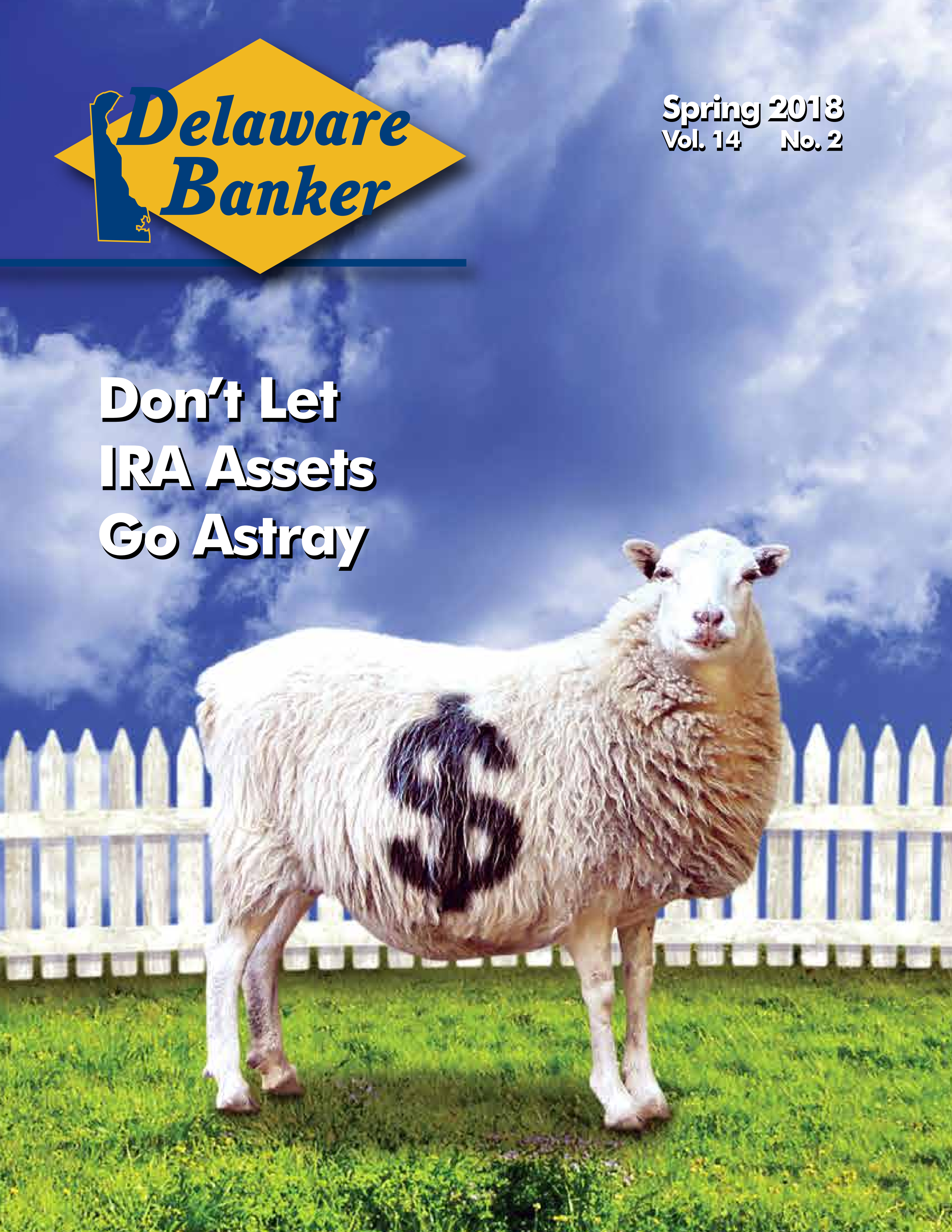

Don't Let IRA Assets Go Astray

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Contents

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

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View from the Chair

by
P. Randolph Taylor
EVP & Director of Private Banking
Fulton Bank

Chair
Delaware Bankers Association

"As wonderful as Teach Children to Save Day is, we want to do more!"

This year Delaware will celebrate our twentieth annual Teach Children to Save Day. Our approach to the event is a little bit different from other states. In most states, banks are encouraged to contact their local schools on their own and supply a lesson independently. In Delaware we're fortunate to have a strong partnership between the DBA and the University of Delaware's Center for Economic Education and Entrepreneurship. The CEEE lines up the classrooms, while the DBA solicits the banker volunteers from all its member banks. As I said, that partnership is unique in the nation.

Also unique is the creation of a series of children's books on saving. Inspired by the DBA's Great Investo series of public service announcements, we've produced eight original books featuring The Great Investo, the world's worst money magician, and his money savvy assistant, Penny. The books are written and illustrated by Greg Koseluk with educational guidance from Dr. Bonnie Meszaros and Judy Austin at the CEEE, and are made possible by a grant from Capital One. The CEEE also creates the lesson plan based on the book.

I'm glad to have had the opportunity to teach classes over many years. We are grateful to all the bankers who have taken the time to volunteer for this important initiative. This year's effort reached a record number of third and fourth graders in public, private, and parochial schools throughout the state.

As wonderful as Teach Children to Save Day is, we want to do more! It's great to teach a lesson on the importance of saving to kids, but admittedly, that's just 45 minutes or an hour once a year. We want to make a deeper impact and foster a regular saving habit, hopefully one that will last a lifetime and support financial independence for individuals after they are no longer children.

Toward this end we're launching The Great Investo Savers Club. Kids between the ages of 8 and 11 can join the Savers Club free of charge. Each member will receive a kit containing: a membership card; a six-month saving diary with advice on setting goals and saving; a collapsible bank; and, a large wall poster to track and chart their saving. In addition, there will be club videos featuring Investo and Penny posted to the new DFEA website and also YouTube.

The intial plan is to create 10,000 kits for distribution statewide. The kickoff will be at Kids' Day at the Delaware State Fair in July. In addition, the Club will be promoted online, in schools, and on the air.

The DBA is asking member institutions to help support this unique effort to get kids in the saving habit. There are sponsorship opportunities that will fit institutions of all sizes, and sponsors will be recognized on the diary, the poster, the bank, and in promotional materials. Please consider having your institution join in this effort. The DBA will be reaching out to members with sponsorship details, or just call the DBA at 302-678-8600 for more information.

We know The Great Investo Savers Club will be another great example of Banks in the First State leading the way and making a positive impact in our community.

Randy

President's Report

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

"Your dedication to your profession, extends well beyond your day job. "

Give yourself a round of applause! Better yet, you deserve a standing ovation!

By the time this column is published, National Volunteer Week will have passed. National Volunteer Week was established in 1974 by then President Richard M. Nixon, and has grown exponentially each year, with thousands of volunteer projects and special events scheduled throughout the week.

Every day at the Delaware Bankers Association and the Delaware Financial Education Alliance, we give thanks for the hundreds of volunteers who support us with their time, treasures and talent. Through your selfless contributions, you are positively effecting change in communities across the State of Delaware. Your dedication to your profession, extends well beyond your day job. The countless hours you invest toward the betterment of your profession have a lasting and far reaching effect. Together, you shape the future of the industry and ensure Delaware remains the preeminent state for financial services.

Getting involved is easy! From teaching a financial saving lesson in a classroom during Teach Children to Save week, to participating on one of the many committees listed below, there are countless ways to get involved.

Teach Children to Save Committee connects hundreds of banker volunteers with thousands of students in public, private, and parochial elementary schools throughout Delaware to teach the importance of personal saving for future financial independence.

Women Connect is the premiere financial services alliance that engages, empowers and connects women across the State of Delaware. By convening to discuss relevant issues affecting the State and sharing of best practices innovative solutions are created that impact the communities in which we live and work.

Strengthening Communities Committee supports Members in their activities to deliver programs that meet the needs of the people throughout the State of Delaware, especially low- and moderate-income individuals, families and communities. This includes, but is not limited to delivering programs that meet the spirit and intent of the Community Reinvestment Act (CRA).

Government Affairs Committee monitors, reviews and analyzes state and federal legislation and regulatory actions affecting Members and makes appropriate position recommendations to the Board.

Cyber Security Committee brings together experts across the Financial Services industry to facilitate collaboration, information sharing, and strategic intelligence analysis to support, enhance, and contribute to security risk decision-making. By connecting our collective intelligence the risk of successful cyber-attacks and other related threats are reduced.

FinTech Working Group is focused on all aspects of the emerging financial technology sector, including the impact of FinTech on the financial services industry, partnering with FinTech entities, understanding the evolving regulatory environment, etc.

Compliance Committee is dedicated to matters of regulatory compliance risk, issues and best practices. The committee brings together a diverse group of compliance professionals whose goal is to enhance the overall risk posture of member banking institutions.

Trust Committee addresses Trust issues that impact DBA Members and serves as an advocacy group and forum to promote, exchange and interpret both personal and corporate trust related issues, and provides educational and informational sharing opportunities.

Thank you for all that you do!

What's New at the DBA

New Associate Members

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A Delaware law firm focusing on trust, estate, and tax matters; business transactions; and litigation. The attorneys at McCollom D'Emilio Smith Uebler represent corporate and individual clients in a range of transactional and litigation matters with a commitment to strategic thinking, responsiveness, and efficiency

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Full service law firm providing merger, regulatory, litigation and financing legal work to banks and trust companies. Management succession planning is an area of interest to clients as is employment litigation, payments systems issues, secured transactions, credit card matters, tax credit work, real estate finance and compliance matters.

DBA Trust Committee Meeting

The DBA's Trust Committee met February 15th, at the offices of Gordon, Fournaris & Mammarella for a presentation on the New Tax Law by Jordon Rosen, Director - Tax & Small Business, Belfint, Lyons & Shuman; Carol G. Kroch National Director of Philanthropic Planning Wilmington Trust; and, Michael M. Gordon, Director, Gordon, Fournaris & Mammarella.

DBA Washington Visit

The Delaware Bankers Association conducted their annual DBA Senior Executive Washington Visit, March 7th through the 9th. The 2018 Washington Visit provided members the opportunity to meet with key regulators at the FDIC, the OCC, the CFPB, and FinCEN. The group also met with Senator Tom Carper, Senator Chris Coons, and Representative Lisa Blunt Rochester. The DBA thanks all their generous sponsors including Platinum Sponsor - The Federal Home Loan Bank of Pittsburgh; Reception Sponsors - Discover Bank; and, Richards Layton & Finger.

DBA Legislative Reception

The Delaware Bankers Association hosted its eighth annual Legislative Reception for members of the Delaware General Assembly March 22nd, at the Biggs Museum of American Art in Dover. "The DBA Legislative Reception helps demonstrate the importance of financial services to Delaware," said DBA President Sarah Long. "This is a great opportunity for our members to meet with our elected state representatives." The reception was made possible by the generous sponsorship of the following members: Artisans' Bank; Bank of America; Barclays;The Bryn Mawr Trust Company of Delaware; Capital One; Commonwealth Trust Company; County Bank; Discover Bank; Fulton Bank; M&T Bank; MidCoast Community Bank; Wilmington Trust; and, WSFS Bank.

Strengthening Communities Meeting

The DBA's Strengthening Communities Committee met, March 13th, at the offices of WSFS. The group received updates on DBA financial literacy efforts, CRA Modernization; LISC - Local Initiatives Support Corporation; CRA Modernization Update; and a time of discussion and information sharing.

Foundations of Delaware Trusts

The DBA presented three new sessions of Foundations of Delaware Trusts. The sessions included: *Recognizing Grantor Trust Issues* with George Kern, Managing Director, Bessemer Trust Company and David Diamond, President, The Northern Trust Company of Delaware on March 28th; *Foundations in International Trusts* with David Manni, VP, JPMorgan Trust Company of Delaware, and Charles Durante, Partner, Connolly Gallagher LLP on April 4th (pictured above); and *Quarterbacking the Trust Relationship* with Daniel Hayward, Director, Gordon, Fournaris & Mammarella, P.A., and Michael Neri, Managing Director, U.S. Trust Company of Delaware on April 11th. A fourth session on Investment Basics has been rescheduled for fall, along with sessions on two additional trust topics. The sessions are also available on an audio/slide flashdrive for in-house training.

Women Connect

(l to r) Tanisia Murrell chats with Melissa Davey, Documentary Filmmaker of *The Beyond Sixty Project*

Over 100 financial service professionals gathered April 19th at the White Clay Country Club for Women Connect, a morning to Engage, Empower, and Network. The morning kicked off with keynote speaker Avery Blank. Also featured was "The Chat" an inspirational conversation between documentary filmmaker Melissa Davey and Tanisia Murrell, Manager Human Resources, Capital One. The group also enjoyed a conversation between panelists Tarrie Miller, SVP, Retail Banking and Marketing, County Bank; Lia Dean, SVP of Strategy, Capital One; Kathryn George, Partner, Brown Brothers Harriman in Private Banking; The Hon. Jan Jurden, President Judge, Delaware Superior Court; and, Diane Sparks, Risk Officer, M&T Bank, who shared lessons they've embraced during their careers. Thank you to all who participated and to Platinum Sponsor: Brown Brothers Harriman - Gold Sponsors: Capital One, and JPMorgan Chase; and Bronze Sponsor Fulton Bank.

Don't Let IRA Assets Go Astray

What to Expect in 2018

by
Peter Desmond Hopkins, CPA, MS
Cover & Rossiter

It is no secret that Delaware's many advantages entice clients to establish relationships with Diamond State bankers and other advisers. Often, new clients are so impressed with the professionalism they observe in Delaware that they move all their financial assets here, and this may include individual retirement accounts (IRAs).

Even the most diligent Delaware banker could fall into a situation where something goes terribly wrong with an IRA. It may be faulty instructions or identification by the disbursing institution or an error by the client. No matter the cause, IRA funds sometimes end up in the wrong place, and a mistake can be costly. A distribution could be taxed at the top federal rate of 37% tax plus a 10% penalty. The client's resident state may also tax (and even penalize) the inadvertent distribution. Once the funds are outside the IRA, they no longer grow tax-deferred (or tax-free for Roth IRAs).

Fortunately, there are exceptions to the 10% penalty, and there are even ways to fix a failed rollover. Recent guidance published by the IRS throws a lifeline to many failed rollovers. Why not update our understanding of the IRA rollover and early distribution penalty rules?

Penalty exceptions

By default, the 10% penalty (technically, an "additional tax") applies to all distributions made before the account owner reaches age 59½. Amounts that are properly rolled over from one IRA to another are not taxable and not subject to the penalty. Distributions after the death of the account owner are not subject to the penalty, even if the account owner had not yet reached 59½.

The penalty is not targeted at the disabled or those who retire before age 59½. A person with a physical or mental impairment, who is consequently unable to engage in substantial gainful activity, may be exempt from the penalty. Regulations describe the specific criteria needed to qualify as disabled.

A series of substantially equal periodic payments withdrawn from an IRA is not subject to the penalty. Typically, this exception is used by those who retire early, but it can be used by folks who are still working. The payments need not be level; they can increase over time, provided they are considered "substantially equal" under one of a calculation methods permitted by the IRS. If the payments deviate from the calculation method chosen either within five years of the first payment or before the account owner reaches age 59½, a recapture tax applies.

Certain distributions over which the account owner had no control are exempt from the 10% penalty. These include IRS levies and qualified domestic relations orders. However, distributions need not be voluntary to cause a penalty. For example, if a bankruptcy trustee invades a debtor's IRA to pay debts of the estate, the withdrawal is subject to the penalty, unless an exception applies.

An individual may elect to treat funds transferred from an IRA to a health savings account (HSA) as a nontaxable distribution and a nondeductible HSA contribution up to that individual's HSA contribution limit for that year. The election may be made only once per lifetime. A valid election exempts the distribution from the 10% penalty.

There are several life event exceptions to the penalty including education expenses, the purchase of a home, medical expenses, health insurance premiums of the unemployed, reservists called to active military duty and natural disasters.

An individual may claim an exemption from the penalty up to the amount of qualified higher education expenses paid in the same year. These expenses may be for the IRA account holder's own education or for his or her spouse, children or grandchildren. The expenses must be paid directly; paying down a student loan does not count. Tuition, fees, books, supplies and equipment may be included. Room and board can be counted as well, but the allowable amount may be limited.

Up to $10,000 of an IRA distribution can be exempt from the penalty, if the funds contribute to the acquisition of a new principal residence for the account holder or his or her spouse or the children, grandchildren or ancestors of either of them. The acquisition must take place by the 120th day after the distribution. This so-called "first-time homebuyer" exception applies, if the new homeowner and spouse, if any, had no ownership interest in a principal residence during the two-year period before the new home acquisition. Each individual has a $10,000 lifetime limit on IRA distributions that may qualify for this exception.

If an IRA distribution fails to meet the first-time homebuyer exception because of a delay or cancellation of the purchase or construction, the amount withdrawn may be rolled over up to the 120th day after the distribution and thereby avoid the 10% penalty. IRA distributions are exempt from the penalty up to the amount of an individual's (and spouse's, if filing a jointly) deductible medical expenses after taking into account the adjusted gross income limitation (7.5% in 2018, 10% thereafter). The account holder does not need to itemize deductions to qualify for the exception.

IRA distributions to those who have been receiving unemployment compensation for at least 12 weeks used to pay health insurance premiums are exempt from the penalty. Self-employed people qualify, if they would have been entitled to unemployment benefits had they not been self-employed. IRA distributions must be made no more than 60 days after employment resumes to qualify.

Reservists called to active duty in the United States military for at least 180 days or for an indefinite period may take penalty-free distributions from their IRAs from the date of the order until the close of the active duty period.

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IRAs

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IRA distributions of up to $100,000 to an individual whose principal place of abode was located in the disaster areas created by Hurricanes Harvey, Irma and Maria are not subject to the 10% penalty, if they are made after the date of the relevant hurricane and before 2019.

Rollovers

A rollover entails the movement of assets from one tax-advantaged account to another with no immediate tax consequences. Assets in most qualified plans can be rolled over to other qualified plans or to IRAs. Balances in nongovernmental Section 457(b) plans cannot be rolled over. Assets in IRAs can be rolled over to other IRAs. Only otherwise taxable amounts from IRAs may be rolled over to qualified plans. After-tax amounts in traditional IRAs (such as nondeductible contributions) may only be rolled over to other traditional IRAs. Roth IRAs may be rolled over to other Roth IRAs. After-tax amounts in qualified plans (such as Roth 401(k) balances) may be rolled over to other qualified plans that agree to separately account for the after-tax amounts. Alternatively, these may be rolled over to the appropriate type of IRA, depending on the type of after-tax money in the plan. Tax-free treatment for a partial rollover is available up to the amount rolled over.

A rollover generally must be completed within 60 days of the distribution. The best way to accomplish this is a trustee-to-trustee transfer. This ensures everything happens at once. However, clients often withdraw funds by check, before they know what they will do with the money. They may hold on to the check or deposit it into a bank account. Suddenly, 60 days have come and gone, and the client has a problem.

There are five categories of exceptions to the 60-day rule. The first is a failed first-time homebuyer distribution, as mentioned above. The rollover period for this type of distribution is 120 days.

If a distribution is made by check from an account that becomes frozen during the 60-day rollover period, the rollover period may be extended. Days the account is frozen are added to the end of the 60-day period, and the rollover period cannot end earlier than 10 days after the freeze ends.

For those who are called to the battlefield in service to our country, the 60-day clock stops running until 180 days after they have either left the combat zone or been discharged from the hospital after suffering combat-related injuries, whichever is later. If hospitalization is inside the United States, it is limited to five years in applying this rule. There is no time limit on hospitalization abroad. Days in missing in action status count as time in a combat zone. The spouse of anyone entitled to claim this exception is entitled to the same extension of the rollover period. However, spouses may not count time spent in a United States hospital.

The IRS is authorized to provide relief to individuals in federally declared disaster areas, and that relief generally includes a blanket extension of the 60-day rule. After a disaster occurs, the IRS issues a notice describing which taxpayers qualify and the procedures to be followed to claim relief.

The fifth and final exception is based on hardship. The law directs the IRS to waive the 60-day rule in cases of casualty, disaster or other events beyond the reasonable control of the individual, if enforcing the rule would be against equity or good conscience. In enacting this hardship waiver provision in 2001, Congress provided examples of situations where it thought a waiver should apply: a distribution made by check that has not yet been cashed, errors committed by financial institutions, death, disability, hospitalization, incarceration, restrictions imposed by foreign countries and postal errors.

Prior to August 2016, an individual seeking a hardship waiver generally had to request a private letter ruling (PLR) from the IRS. The only exception was where a financial institution that received the funds prior to expiration of the rollover period made an error that caused the rollover to fail, even though the client followed proper procedures. In such a case, an automatic waiver was granted, as long as the funds were credited to the IRA within one year. Now, new IRS rules permit clients to self-certify that they qualify for a hardship waiver in any of the following circumstances:

1. An error by the financial institution receiving the contribution or making the distribution.
2. The distribution in the form of a check was misplaced and never cashed.
3. The distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan.
4. The account holder's principal residence was severely damaged.
5. The account holder's family member died.
6. The account holder or a family member was seriously ill.
7. The account holder was incarcerated.
8. Restrictions were imposed by a foreign country.
9. A postal error occurred.
10. The distribution was made on account of an IRS levy, and the levy proceeds have been returned.
11. The disbursing plan or institution delayed providing information that the receiving plan or custodian required to complete the rollover, despite the taxpayer's reasonable efforts.

If an individual provides self-certification, the assets may be rolled over, and the receiving trustee or plan administrator will not be held responsible for accepting an ineligible rollover, unless the self-certification was known to be untruthful.

If the individual fails to self-certify, and the rollover happens anyway, the IRS has authority during a later audit to grant retroactive relief, if appropriate.

For failed rollovers not described in the situations listed above, requesting a PLR remains necessary in order to obtain a waiver. The IRS generally denies waivers to those who used the funds for personal purposes.

Advice for institutions receiving tax-advantaged funds

The best practice is to use trustee-to-trustee transfers for rollovers. The banker can offer to review distribution request forms prior to their submission or suggest the client have his or her tax adviser do so. The banker needs documentation establishing the type of funds that are leaving the other IRA or qualified plan to ensure there is an appropriate account to receive them. Questions or uncertainties about the disbursing IRA or plan must be resolved prior to requesting the distribution. The client's tax adviser can be an invaluable asset to the banker. The tax adviser may have intimate knowledge of the client's holdings and help keep things on course.

If the banker encounters a failed rollover, he or she must first determine whether it can be repaired by self-certification. If so, the banker should obtain self-certification from the client and preserve the document as long as the account remains open. Alternatively, the banker may consult with the client's tax adviser regarding seeking a PLR. The amount of the failed rollover must be weighed against the expected cost and the likelihood of success of the PLR request.

If a client faces an early withdrawal penalty, it is important to check all the exceptions. For example, a client who erroneously took an early distribution from an IRA may have paid higher education expenses for a grandchild in the same year. If not, the client may prefer to do this rather than pay the penalty.

Scholar and philosopher Nassim Nicholas Talib said, "Banking is a very treacherous business, because you don't realize it is risky, until it is too late. It is like calm waters that deliver huge storms." Delaware bankers understand that knowledge, patience and diligence will lead to smooth sailing.

Peter Hopkins is a Manager in the Tax Department of Cover & Rossiter where he focuses on trusts and estates. Peter joined Cover & Rossiter in 2015, and has established a reputation for his excellent analytical skills, broad technical knowledge and commitment to optimizing his clients' tax situation. Prior to moving to Delaware in 2015, Peter practiced public accounting for over 20 years in New York City. During that time, he served on both the Interstate Taxation Committee and the International Taxation Committee of the New York State Society of Certified Public Accountants. Peter authored taxation articles for The CPA Journal and served as an instructor for Foundation for Accounting Education seminars. Peter earned a Bachelor of Business Administration in Public Accountancy from Baruch College in 1988. He completed his Master of Science in Taxation in 1995, at Baruch College as well. Peter has been licensed as a CPA in New York since 1991, and also holds a permit to practice in Delaware. He is a member of the American Institute of Certified Public Accountants. Cover & Rossiter is one of the first and most respected full-service CPA & advisory firms in the area, providing tax, audit, trust and accounting services to businesses, nonprofits, families and individuals.

Delaware Decantings

A Practical Guide to the Pitfalls and Perils

by
Kimberly Gill McKinnon
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Fifteen years ago Delaware enacted its decanting statute with the addition of Section 3528 to Title 12 of the Delaware Code. Decanting became part of a growing list of innovative laws that propelled Delaware into the leading jurisdiction that it is for the creation and administration of trusts.

Decanting may seem simple, but its execution can be complicated. This article will identify some of the most common "pitfalls and perils" encountered when exercising the decanting power.

The Basic Mechanics

Trust decanting earned its name by analogy to the decanting of wine. Decanting a trust involves "pouring" assets from one trust to another trust with more favorable terms. It is a valuable tool that enables the terms of an irrevocable trust to be modified. Among other things, a decanting could be used to add a direction or consent adviser, add a trust protector, grant or limit administrative powers, revise standards of liability, fix tax problems, change the governing law, change trustee succession provisions, extend the trust term, add confidentiality provisions, modify interests of current beneficiaries, or grant a power of appointment. The Delaware statute is available to any trust that is administered in the State of Delaware, even if the trust is actually governed by the laws of another jurisdiction.

Delaware's decanting statute authorizes trustees that have the power to make discretionary distributions to beneficiaries of an irrevocable trust (the "first trust") to instead appoint those assets in further trust (the "second trust") for the benefit of one or more of those beneficiaries. Until recently, the second trust had to be a completely new trust. The Delaware statute became even more flexible in 2017 when it was amended to allow property to be appointed back to the same trust, subject to modified terms.

Generally, a decanting must:

(1) be in favor of a second trust having only beneficiaries who are currently eligible to receive distributions from the first trust (although the second trust may revert to the dispositive terms of the first trust at any time, thereby permitting the first trust's remainder to also be beneficiaries of the second trust); and,
(2) comply with any standard that limits the trustee's authority to make distributions from the first trust.

Once these conditions are satisfied, a few rules and best practices come into play.

Interests of Remainder Beneficiaries Cannot Generally Be Changed

When analyzing a decanting transaction, it is helpful to group beneficiaries into two categories:

(1) beneficiaries who are presently eligible to receive distributions from the trust, and
(2) remainder beneficiaries who are typically not presently eligible to receive distributions from the trust.

Once the second group is identified, it is important to ensure that their beneficial interests are not changed by the decanting except to the extent subsumed by beneficiaries in the first group. Although the wording of the statute may seem confusing, the only option that the statute provides regarding the interests of beneficiaries in the second group is that at a time or upon an event specified in the second trust, the assets of the second trust shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests. It is important that the identities of such remainder beneficiaries remain entirely unchanged by the decanting. Furthermore, there should be no other changes from the first trust to the second that alter the "nature" or "extent" of such remainder beneficiaries' beneficial interests other than changes that defeat or limit remainder interests in favor of beneficial interests granted to beneficiaries in the first group.

Some common trust provisions might, if altered by the terms of a second trust in a decanting transaction, arguably affect the nature or extent of a remainder beneficiary's beneficial interest. Examples of such provisions include:

(1) statements of a settlor's intent regarding distributions if the statements could be construed as binding,
(2) manner of distribution provisions that identify permissible methods for making a distribution (*i.e.*, directly to a beneficiary's service provider or to a person with whom the beneficiary resides),
(3) provisions that require a beneficiary to survive by a certain number of days,
(4) holdback trusts for minors or incapacitated persons, and
(5) early or small trust termination provisions.

In some cases, it may make sense to simply revert back to the terms of the first trust upon the death of the last of the current beneficiaries in order to avoid a possible violation of this rule.

Beneficiaries Cannot Be Added and Remainder Beneficiaries Cannot Generally Be Eliminated

Another rule to follow when structuring a decanting transaction is that no beneficiaries can be added by the decanting and no remainder beneficiaries can be eliminated except to the extent their interest is defeated or limited by the nature of the beneficial interests granted to beneficiaries in the first group. It is fairly easy to follow this rule in cases where only targeted provisions of the first trust are changed. However, in cases where the second trust is an entirely new form from the first trust, following this rule can be challenging.

It is not enough simply to compare the provisions describing the current and remainder beneficiaries of the first trust with the provisions describing the current and remainder beneficiaries of the second trust and make sure there have been no impermissible additions or eliminations. Numerous provisions throughout a trust instrument could potentially impact the identity of trust beneficiaries. Changing those provisions could add beneficiaries or change the identity of remainder beneficiaries in a way that is not always obvious. For example, if the trust is held for the benefit of someone's descendants, the definition of "descendants" or "issue" should not be changed in any way that *could* be construed in a manner that adds or eliminates beneficiaries in violation of the rule.

Another not-always-obvious example of a potential violation of this rule is the addition of the popular grantor trust power to add beneficiaries. The addition of such a provision may be tax-driven, but it probably violates the statute nonetheless. Consider also that if the law governing the trust's construction changes from the first trust to the second, the identity of the beneficiaries might change in a way that violates the decanting statute. For example, a baby born to same-sex spouses might be deemed the child of the non-biological parent under the laws of the jurisdiction governing the construction of the second trust, but not under the laws of the jurisdiction governing the first trust. If the descendants of the non-biological parent are beneficiaries of the trust, simply changing the law governing the trust's construction may have the unintended consequence of adding beneficiaries in violation of the statute. These are just a few examples among many that demonstrate possible difficulties in following this rule.

Additional Restrictions on Interests of Current Beneficiaries

A significant advantage of a Delaware decanting is that interests of current beneficiaries can be changed. Trusts can be divided, income interests and withdrawal rights can be defeated, trusts can be extended, beneficiaries can be eliminated, distributions can be limited… the list goes on.

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Tax issues aside, various limitations arise when altering interests of current beneficiaries. In addition to the "no adding beneficiaries" rule discussed above, the decanting must also comply with any standard that limits the trustee's authority to make distributions from the first trust. Thus, if the trustee can only make distributions to current beneficiaries for purposes of health, education, support, and maintenance, distributions to them from the second trust must generally be limited to those purposes or be subject to a narrower standard.

Another limitation is the rule that the decanting may not cause an "open class" of beneficiaries of the first trust to receive distributions sooner than when or in excess of the amounts permitted by the first trust. An "open class" is essentially a class of beneficiaries to which new members may be added in the future, such as someone's descendants.

Powers of Appointment

Granting a power of appointment is another significant advantage of a Delaware decanting. Here are some issues to consider when granting, eliminating or altering power of appointment.

Since the nature and extent of the beneficial interests of remainder beneficiaries cannot generally be changed by a decanting, their powers of appointment should not be altered or eliminated and they should not be granted new powers.

Beneficiaries who are presently eligible to receive discretionary distributions can be granted a power of appointment, exercisable in favor of anyone (even non-beneficiaries), and their existing powers of appointment may be eliminated or altered. In practice, changing powers of appointment of current beneficiaries is not always without complication. It makes sense that if the trustee could have distributed the entire trust to the beneficiary in its sole discretion, the trustee should be able to grant the beneficiary a power to appoint the entire trust to anyone, as the statute clearly allows.

However, what if distributions are subject to an enforceable distribution standard? The statute provides that the decanting must comply with any standard that limits the trustee's authority to make distributions from the first trust. Does the trustee have the power to grant a current beneficiary who only has an enforceable right to distributions for his education a power to appoint the entire trust to anyone? It may be that the most the trustee can do in this circumstance is to grant the beneficiary the following two types of powers of appointment:

> (1) the power to appoint trust property among current beneficiaries subject to the distribution standard, and
> (2) the power to appoint to anyone that amount that the trustee could have distributed to the beneficiary under the distribution standard.

Unfortunately, the answer to this question is not clear.

Other considerations have arisen with the recent passage of Section 3341 of Title 12 of the Delaware Code, which discusses various consequences of a trust decanting. Because that statute can give continuing effect to powers of appointment granted by the first trust, the decanting documents should expressly extinguish powers of appointment that the trustee intends to eliminate. Furthermore, in cases where the trustee is decanting property to a previously funded trust, the decanting instrument should expressly provide the extent to which powers of appointment will be exercisable over the property of the combined trust.

Tax Reimbursement Provisions

Tax reimbursement provisions are common in trust instruments, but caution should be used when adding one by decanting. It is not unusual to include a tax reimbursement clause that reimburses a grantor for the payment of income tax attributable to a trust classified as a "grantor trust" for tax purposes. However, adding such a provision by decanting arguably results in the addition of the grantor as a beneficiary of the trust.

Estate tax apportionment or reimbursement provisions may also be problematic. If, under the second trust the trustee may be responsible for greater estate tax obligations, in cases where trust property is includible in a beneficiary's estate, than it would have been under the first trust or applicable law, could this be a violation of the decanting statute? A change that could result in the distribution of more trust property to a taxing authority, to the benefit of beneficiaries of the deceased beneficiary's estate, may be an impermissible exercise of the decanting power. This issue is not clear.

The Enumerated List of Exceptions

The Delaware statute expressly prohibits the following three types of decantings:

> (1) a decanting that delays the time when a beneficiary's remainder interest in a "minor's trust" created pursuant to Section 2503(c) of the Internal Revenue Code vests and becomes distributable,
>
> (2) a decanting that reduces an income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal or state estate or gift tax purposes, and
>
> (3) a decanting of property that is subject to a current withdrawal right held by a trust beneficiary who is the only beneficiary eligible for current distributions.

Trust fiduciaries should work with their advisers to ensure that the proposed transaction does not violate any of these rules or any similar restrictions added by changes to the law.

Comply with Formalities.

Decanting involves very few formalities, but the trustee must exercise its decanting power in a writing that is signed before a notary and file it with the records of the trust (although it is best to file with both trusts in the event that a new trust is created). Currently pending legislation would eliminate both the notarization and filing requirements. If the first trust requires that the trustee's power to make discretionary distributions be exercised at the direction of or with the consent of an adviser, then the trustee should also obtain the necessary consent or direction before proceeding with the transaction.

It is also good practice (but not required) to obtain release agreements from the beneficiaries before decanting a trust. As a practical matter, decanting is far more likely to be employed in the most advantageous manner if the distribution fiduciaries are adequately protected from liability for engaging in the transaction.

Conclusion

Although trust decanting can be structurally complicated, it is a very powerful tool. In many cases it will serve as the best, if not the only, option available to meet the objectives of a trust's beneficiaries and fiduciaries.

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Trust-Owned Businesses and the Potential Impact of the New Partnership Audit Rules on Trustees

by
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Everyone is well aware of the recently enacted Tax Cuts and Jobs Act of 2017—a law that provides for sweeping changes to many areas of the United States tax regime and generally goes into effect for taxable years beginning on or after January 1, 2018. At risk of being lost in the shuffle, however, are the new partnership audit rules (the "New Partnership Audit Rules") that originally were approved by Congress under the Bipartisan Budget Act of 2015[1] but are currently in effect for the same taxable years.

While they may not have received the same press as the Tax Cuts and Jobs Act, the New Partnership Audit Rules also effect a fundamental change, in this case to the default rules governing how the IRS will audit partnerships and multi-member limited liability companies taxed as partnerships (each such entity, a "partnership") and their partners and members (each such party, a "partner").[2]

Generally, under the New Partnership Audit Rules, audits will be conducted, and "imputed underpayments" of tax, interest, and penalties will be collected, at the partnership level, rather than at the partner level.[3] These rules were enacted to streamline the IRS's audits of large partnerships, and many commentators believe that the New Partnership Audit Rules will increase the number of partnership audits.

An understanding of, and appropriate planning regarding, the New Partnership Audit Rules are extremely important for a partnership and its partners. This is especially true, as discussed in greater detail below, with regard to trustees of any trust that is a partner in a partnership—improper planning for the New Partnership Audit Rules may leave a trustee vulnerable to claims for breach of trust.

Partnerships Subject to the New Partnership Audit Rules

Before discussing some of the key aspects of the New Partnership Audit Rules, it is important to understand which partnerships the rules will affect. The simple (but incomplete) answer is all of them. The New Partnership Audit Rules are intended to set up the default partnership audit regime and automatically are applicable to all partnerships and their partners that are subject to U.S. income taxation.[4]

The good news—for those partners who do not wish their partnerships to be subject to these rules—is that certain partnerships may opt out of the New Partnership Audit Rules.[5] The potential bad news for the same partners is that a partnership having one or more "ineligible partners" cannot opt out.

Specifically, a partnership can affirmatively elect out of the New Partnership Audit Rules if the partnership is required to issue 100 or fewer Schedule K-1s and such Schedule K-1s are required to be issued only to "eligible partners."[6] To be an eligible partner, a partner must be: (i) an individual, (ii) a C corporation, (iii) an S Corporation, (iv) the estate of a deceased partner, or (v) a foreign entity that would be a C corporation under U.S. tax regulations.[7] If it is an option for a partnership, the election to be excluded from the New Partnership Audit Rules must be made on each and every timely filed partnership tax return (Form 1065) for each tax year.[8]

Unfortunately, a partnership may not elect out of the New Partnership Audit Rules if more than 100 Schedule K-1s (including Schedule K-1s required to be issued to the shareholders of a partner S corporation) are required to be issued to eligible partners or if any partner of such partnership is an ineligible partner. An ineligible partner is any partner that is one of the following: (i) another partnership, (ii) a trust, including a revocable trust or grantor trust, (iii) a foreign entity that wouldn't be taxed as a C corporation under U.S. tax regulations, (iv) an entity

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disregarded for tax purposes, (v) a nominee or similar person holding an interest on behalf of another person, or (vi) an estate of an individual other than a deceased partner.[9] Accordingly, if a trust is a member of any multi-member limited liability company taxed as a partnership or a partner in any partnership, such entity will be subject to the New Partnership Audit Rules.

It is worth noting that, while the Schedule K-1s issued to the shareholders of an S corporation that is a direct partner of a partnership will count towards the 100 Schedule K-1 limit for opting out of the New Partnership Audit Rules, an S corporation that has a trust (or other ineligible partner) as a shareholder will not by that fact alone cause the partnership of which the S corporation is a partner to be ineligible to opt out of the New Partnership Audit Rules.[10]

Certain Key Aspects of the New Partnership Audit Rules

Generally speaking, and subject to certain exceptions, prior to the New Partnership Audit Rules regime, an audit of a partnership was carried out at the partner level, and the partners themselves were liable for the amounts due for the tax year under audit.

Under the New Partnership Audit Rules, however, the default rule is that the IRS will conduct a partnership audit at the partnership level and will collect any imputed underpayment of tax, interest, and penalties arising from one or more partnership adjustments determined by the IRS, directly from the partnership during the year in which such partnership adjustments became final, rather than from the individual partners from the year under audit.[11] This has the effect of placing the burden of the underpayment on the partners in the year that the audit becomes final, rather than the partners in the year under audit, even if the partners in the year the audit becomes final were not partners during the year under audit and otherwise would have no liability for such taxes.

While any audit under the New Partnership Audit Rules would still be conducted at the partnership level, the New Partnership Audit Rules payment default may be altered by the partnership's making a valid "push-out" election.[12] Pursuant to a valid push-out election, the partners during the tax year under audit must account for and pay their share of the partnership adjustments related to the imputed underpayment—effectively pushing the tax out from the partnership and the partners in the year an audit becomes final to the partners of the partnership during the tax year under audit.[13]

For a push-out election to be valid, the partnership must make it within 45 days after receipt of a notice of final audit adjustment from the IRS and must then provide to the relevant partners and file with the IRS statements showing the share of the partnership adjustments for each partner during the tax year under audit.[14,15] However, if the IRS determines that a push-out election is invalid, either because of defects in the contents of the election or the statements to be provided subsequent to the election, the partnership again will be subject to the default rules of the New Partnership Audit Rules and be liable for the imputed underpayment in the year it becomes final.

In addition to the option of effecting a push-out election, a partnership also may avoid liability for the tax during the year an audit becomes final if all partners during the year under audit agree to file amended returns reflecting the underpayment from the audit and pay such amount with the amended filing.[16]

Another notable aspect of the New Partnership Audit Rules is that, subject to certain exceptions that must be pursued by the partnership, any tax that is to be paid by the partnership, in the absence of liability by the partners from the audited tax year, shall be assessed at the highest applicable income tax rate for the year under audit.[17]

The Partnership Representative

Since the New Partnership Audit Rules are meant to centralize the audit process for the benefit of the IRS, another important concept introduced by the rules is the "partnership representative."[18] The partnership representative replaces the pre-New Partnership Audit Rules concept of the "tax matters member" or "tax matters partner." The partnership representative—which does not need to be a partner of the partnership—is the one and only person (or entity) that may participate in an audit, may act on behalf of the partnership, and is entitled to receive notice from the IRS under the New Partnership Audit Rules.[19]

Also, the acts of the partnership representative on behalf of the partnership under the New Partnership Audit Rules are binding on the partnership and all partners.[20] Specifically, the partnership representative may control the decisions to elect out of the New Partnership Audit Rules (to the extent this is an option) or to make a push-out election, agree to a settlement of an audit with the IRS, or seek adjustments to or court intervention regarding any audit determinations by the IRS.

If no partnership representative is appointed by the partnership, the IRS may select one for the partnership.[21]

Practical Advice for Trustees

To the extent that a trust is a direct partner in a partnership, there is no ability for that partnership to opt out of the New Partnership Audit Rules. In other words, the default rule is that any partnership in which a trust is a partner will be liable for imputed underpayments in the case of an audit of the partnership—thus making the current partners effectively liable for such tax.

If the trust became an assignee of any partnership interests in such a partnership after the tax year under audit, the failure to make a valid push-out election may result in the trust bearing a tax burden that could have been the liability of the partnership's former partners (and may also lead to a tax at a higher rate than otherwise would be assessed if a push-out election were made). If this is the case, the trustee of such a trust may see itself subject to a breach of trust suit from the trust's beneficiaries for these negative tax implications.

In light of these and other aspects of the New Partnership Audit Rules, a trustee of a trust that is a partner of a partnership (and frankly all partners in a partnership) should amend the relevant partnership, operating, or limited liability company agreement to, among other things: (i) specifically appoint a trustworthy and sophisticated partnership representative (potentially, the trustee itself) and provide for the orderly replacement of each partnership representative; (ii) require that specific actions be taken by the partnership representative, including, without limitation, making a push-out election, pursuing available remedies in the event of an unsatisfactory audit, or taking other specific steps in the context of an audit; (iii) require a voting procedure of the partners prior to any discretionary action being taken by the partnership representative; and (iv) require that the partnership representative provide notices and updates to the partners as received or on a regular basis.[22]

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Vince Thomas practices in the firm's tax and business planning sections. His business practice primarily involves counseling companies in complex business transactions, including, mergers, acquisitions, corporate restructurings, and financing transactions. He also has substantial experience counseling distressed companies with tax issues, Delaware corporate governance advice, and transactional matters. Vince also has a substantial trust practice. He primarily represents institutional trustees with all aspects of the administration of Delaware statutory and common law trusts, including, transfer of trust situs, trust reviews, tax planning, decanting, merger, and petitions in the Delaware Court of Chancery. Vince has extensive experience with DING Trusts, Delaware asset protection trusts, Delaware dynasty trusts, Delaware statutory trusts, liquidating trusts, settlement trusts and other sophisticated tax planning structures. He routinely combines his tax, trust and transactional experience to advise distressed companies with liquidation structures.

Justin Duda concentrates his practice in the area of business transactions, including mergers and acquisitions, corporate restructurings, and financing matters. Justin acts as outside counsel to a number of regional clients, whom he regularly advises in contractual and corporate governance matters. He also has extensive experience advising clients regarding in- and out-of-court restructurings. Justin currently represents a number of institutional trustees and high net worth individuals looking to take advantage of Delaware's comprehensive trust laws and highly regarded court system, including with regards to transfers of trust situs, decantings, and trust modifications.

Notes:

1- The Bipartisan Budget Act of 2015 (BBA), Pub. L. No. 114-74 § 1101(g)(1).

2- The New Partnership Audit Rules replace the prior partnership audit regime, which included audits: (i) under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"); (ii) under the Electing Large Partnership rules pursuant to the Taxpayer Relief Act of 1997; and (iii) of small partnerships outside of the rules set forth by TEFRA.

3- *See* 26 U.S.C. §§ 6221(a), 6225(a).

4- *See* 26 U.S.C. § 6221(a).

5- In the event that a partnership properly opts out of the New Partnership Audit Rules, an IRS audit will be conducted, and any underpayment of tax, interest, and penalties will be paid, at the partner level.

6- For purposes of determining whether a partnership is at or under this 100 Schedule K-1 threshold for opt out purposes, Schedule K-1s required to be issued by an S corporation that is a direct partner of the partnership to its shareholders shall be counted. See 26 U.S.C. § 6221(b)(1)(B); Reg. § 301.6221(b)-1(b)(2)(ii).

7- *See* 26 U.S.C. § 6221(b)(1)(C); Reg. § 301.6221(b)-1(b)(3)(i).

8- *See* 26 U.S.C. § 6221(b)(1)(A); Reg. § 301.6221(b)-1(c).

9- *See* Reg. § 301.6221(b)-1(b)(3)(ii).

10- *See* Reg. § 301.6221(b)-1(b)(3)(i).

11- *See* 26 U.S.C. § 6221(a); Prop. Reg. § 301.6241-1(a)(1).

12- *See* 26 U.S.C. § 6226; Prop. Reg. § 301.6626-1.

13- *See* id.

14- *See* id.

15- On March 23, 2018, the President signed into law the Consolidated Appropriations Act, 2018, which, among other things, provided for certain technical amendments to the New Partnership Audit Rules. These technical amendments include rules—already reflected in Proposed Regulations published by the IRS—allowing for the tax payments owed by a partnership, but for a valid push-out election, to be further pushed out upon a valid push-out election to the partners and shareholders of pass-through entities that are partners of the relevant partnership. See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, at § 204.

16- *See* 26 U.S.C. § 6225(c); Prop. Reg. § 301.6225-2(d)(2). The newly passed Consolidated Appropriations Act, 2018 also provides for so-called "pull-in" procedures, whereby the partners from the tax year under audit, rather than filing amended returns, may pay the tax that would be due under such amended returns, make changes to the relevant tax attributes for subsequent years, and provide the relevant information to the IRS in order to review the changes to such tax attributes. *See* Pub. L. No. 115-141, at § 203.

17- *See* 26 U.S.C. § 6225(c); Prop. Reg. § 301.6225-1(c)(1).

18- *See* 26 U.S.C. § 6623(a).

19- *See Id*; Prop. Reg. § 301.6223-2(c).

20- *See* Prop. Reg.§ 301.6223-2(a).

21- *See* 26 U.S.C. § 6223(a).

22- It should be noted that Proposed Regulation § 301.6223-2(c)(1) promulgated with regard to the New Partnership Audit Rules provides, in part, that "[n]o state law, partnership agreement, or other document or agreement may limit the authority of the partnership representative or the designated individual [in the case where the partnership representative is an entity] as described in section 6223 and this section." However, this Proposed Regulation has yet to be finalized, and it is unclear to what extent a court will fail to uphold a partnership or operating agreement that subjects a partnership representative to the will of the partners. Therefore, it is important that all such agreements be updated to protect the current partners of each partnership, especially where such partnership cannot seek to opt out of the New Partnership Audit Rules.

Compliance Focus

by
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"A business continuity strategy should incorporate a financial institution's short-term and long-term goals and objectives."

Business Continuity Planning: How to Ensure Your Institution Is Prepared

In January, the Hawaii Emergency Management Agency sent out an emergency notification that a ballistic missile threat was inbound to Hawaii. Minutes later, the notification was confirmed to be a false alarm.

This event is a wake-up call for institutions, and reinforces the need to shore up business continuity plans (BCPs). Communication with internal and external members of an institution regarding disaster, and the policies and procedures of how businesses deal with disaster, is unfortunately becoming more and more important every day. Having an underdeveloped plan, distributing disaster messages in error or not properly training staff on disaster protocol can significantly impact an institution's ability to recover and potentially cause irreparable reputational harm.

A business continuity strategy should incorporate a financial institution's short-term and long-term goals and objectives. When developing or amending a business continuity strategy, financial institutions have many things to consider, from personnel to communication, all the way to setting aside proper funds for potential disasters.

Short-term goals are more tangible. These include an institution's ability to mitigate problems, designate critical personnel and infrastructure, and recognize the resources required for recovery.

Long-term goals focus on more nebulous aspects of the BCP, like budgetary consideration, an enterprise-wide strategic plan, and supervision of third-party resources.

Regardless, an institution should update its BCP at least annually or after significant changes to business operations, and whenever gaps or shortcomings are revealed through training or testing.

From the FFIEC IT Examination Handbook, Appendix G: Business Continuity Plan Components, here are some key some key questions that must be addressed when developing BCPs:

Personnel

An institution needs clear and defined tasks when it comes to personnel.

1. In preparing for these events, is the institution hosting, at a minimum, annual emergency trainings to make sure identified personnel know their overall role in the recovery process?
2. If someone can't be reached, is there a succession plan?
3. If there is substantial damage, what type of accommodations will displaced staff members require?
4. If there is an emergency lodging program in place, has management accounted for the business needs of the employees, like a secure internet connection, if required?

Communication

"Communication" in relation to a BCP covers communication with: i) emergency personnel; ii) regulators; iii) vendors and suppliers; iv) customers; and v) media.

1. When communicating with employees about a pending disaster and specific evacuation instructions, is prompt notification guaranteed?
2. Does the institution still utilize a manual telephone calling tree or has it switched to an emergency notification system?
3. Has the financial institution incorporated external communication into its BCP?

Technology

As the potential for technology allows financial institutions to innovate and reach customers in different ways, an institution's technology reliance has grown into a dependence.

1. When a disruptive event takes place, is there a strong understanding of what is considered "critical business unit data"?
2. Do employees understand their ability to work on personal computers after a disrupting event if they do not have a work-issued laptop or do not have access to something similar to a VPN?

Data Recovery Facilities

The FFIEC handbook also emphasizes the importance of financial institutions having "formal arrangements for alternate processing capability in the event that their data processing site becomes inoperable or inaccessible."

1. Has the institution considered expectations based on its size and complexity, and its impact on the overall financial system?

   An institution that is considered critical to the overall functioning of the financial system may need to have same-day business resumption, however there may be circumstances allowing other financial institutions to respond less quickly.

There are a number of different back-up recovery facility models. Some of the models include: i) hot sites, ii) cold sites, iii) warm sites, iv) duplicate facilities/split operations, and v) tertiary location.

Moving Forward

In general, it is important financial institutions make updates and evaluate their BCP plans at least annually. Unfortunately, this is one area where institutions waiting for a triggering event could expose significant gaps in a BCP that could have a significant impact on an institution.

This article was excerpted from Capco's Regulatory Intelligence Briefing (RIB) – Issue 2, 2018: Corporate Governance. For the complete RIB or to register to receive regular updates from Capco's Center of Regulatory Intelligence, email: capco.cri@capco.com

For Your Benefit

by
Louis D. Memmolo, GBA, CHRS
Employee Benefits Advisor
Weiner Benefits Group

“ERISA applies to virtually all private-sector employers that maintain welfare benefit plans for their employees, regardless of the size of the employer.”

All Wrapped Up?

Most people reading this article are familiar with ERISA plan documents in the context of retirement plans or large employer group benefit plans. But were you aware that ERISA applies to virtually all private-sector employers that maintain welfare benefit plans for their employees, regardless of the size of the employer? This includes corporations, partnerships, limited liability companies, sole proprietorships and nonprofit organizations.

Small employers are subject to ERISA’s requirements, unless they meet the exemption for governmental employers or churches.

As I’m sure you are aware, The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for employee benefit plans maintained by private-sector employers. Under ERISA, employer-sponsored welfare benefit plans, such as group health plans, must be described in a written plan document. In addition, employers must explain the plans’ terms to participants by providing them with a summary plan description (SPD).

The insurance certificate or benefit booklet provided by an insurance carrier or other third party for a welfare benefit plan typically does not satisfy ERISA’s content requirements for plan documents and SPDs.

However, employers may use **wrap documents** in conjunction with the insurance certificate or benefit booklet in order to satisfy ERISA’s requirements. This document is called a “wrap document” because it essentially wraps around the insurance certificate or benefit booklet to fill in the missing ERISA-required provisions. When a wrap document is used, the ERISA plan document or SPD is made up of two documents— the insurance certificate or benefit booklet and the wrap document. They can also be used to combine more than one welfare benefit under a single plan, which is sometimes referred to as a **“mega wrap plan”** or an **“umbrella plan.”** Your benefits advisor should discuss this with you and these documents should be carefully assembled and reviewed by your attorney or a good employee benefits advisor with familiarity and experience in these matters.

Noncompliance

While there aren’t really any specific penalties under ERISA for failing to have a plan document or SPD, not having them can have serious consequences for an employer, including the following:

Inability to respond to participant requests: The plan document/SPD must be furnished in response to a participant’s written request. The plan administrator may be charged up to **$110 per day** if it does not provide the plan document within 30 days after an individual’s request. These penalties may apply even where a plan document/SPD does not exist.

Benefit lawsuits: Not having a plan document may put an employer at a disadvantage in the event a participant brings a lawsuit for benefits under the plan. Without a plan document, it will be difficult for a plan administrator to prove that the plan’s terms support benefit decisions, plan participants can use past practice or other evidence outside of the actual plan’s terms to support their claims, and courts will likely apply a standard of review that is less favorable to the employer (and more favorable to participants) when reviewing benefit claims under an unwritten plan.

DOL audits: The Department of Labor (DOL) has broad authority to investigate or audit an employee benefit plan’s compliance with ERISA. When the DOL selects an employer’s health plan for audit, it will almost always ask to see a copy of the plan document and SPD, in addition to other plan-related documents. If an employer cannot respond to the DOL’s document requests, it may trigger additional document requests, interviews, on-site visits or even DOL enforcement actions. Also, the DOL may impose a penalty of up to **$152 per day** (up to $1,527 per request) for failing to provide information requested by the DOL.

While we are not attorneys, Weiner Benefits Group is available to review a checklist of DOL Audit items where exposure may be evident and therefor provide direction and avoidance of unnecessary penalties in regard to your health and welfare employee benefit programs. Portions of this article are excerpted from our zywave compliance library available to our clients along with a host of other valuable resources.

DBA Calendar of Events

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

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May 17th - 123rd Annual DBA Meeting and Dinner - Join the DBA at the historic Hotel du Pont with dinner in the Gold Ballroom. Keynote speaker will be Lt. Col. Robert J. Darling USMC (Ret.), author of *24 Hours Inside the President's Bunker on September 11th*. As a public speaker on crisis leadership and decision making, Bob has addressed numerous academic, government, and military organizations to include Harvard University's John F. Kennedy School of Government and as a guest lecturer on the subject of Crisis Leadership and Counterterrorism at the FBI National Academy in Quantico, Virginia.

July 24th - Bankers Teach Kids to Save Day at the Fair, State Fair Grounds, Harrington

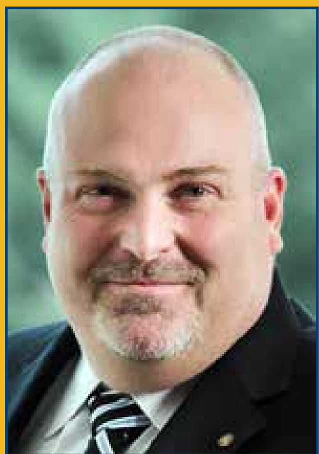
September 28th - FDIC Directors' College

University of Delaware Virden Center, Lewes, Delaware. The FDIC Directors' College is an interactive program that provides ongoing education on current topics to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the everchanging regulatory environment.

October 23rd & 24th - 2018 Delaware Trust Conference:
The Tricks and Treats of Delaware Trusts

Chase Center on the Riverfront, Wilmington. Wealth Management Professionals, Get the latest strategies at the 13th annual edition of this premiere trust event highlighting the advantages of Delaware's trusts. Sponsorships and Exhibitor space available!

Accounting for Success



by
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"Tax reform is not the only change to worry about in 2018."

What Do You Mean There Are Other Changes to Worry About Besides Tax Reform?

Tax reform is not the only change to worry about in 2018. It's also time to determine if the Revenue from Contracts with Customers (ASU 2014-09) and Leases (ASU 2016-02) standard updates apply to your financial accounting effective for periods beginning after December 15, 2018 for nonpublic entities.

Both accounting standard updates are applicable to entities that maintain their financial reporting basis under generally accepted accounting principles (GAAP). If your basis of accounting is a special purpose framework, the new standards do not apply.

Revenue from Contracts with Customers (ASU 2014-09)

Current GAAP includes over 200 specialized or industry-specific pieces of revenue recognition guidance.

The standard will eliminate this transaction and industry-specific revenue recognition guidance and replace it with a principle-based approach for determining revenue recognition. The standard affects all entities that have contracts with customers, except for certain exclusions.

The core principle under the standard is that an entity should recognize revenue depicting the transfer of goods or services to customers in an amount that reflects the consideration in which the entity expects to be entitled in the exchange for those goods or services.

Revenue is recognized when a company satisfies a performance obligation by transferring a promised good or service to a customer. The application of this standard is expected to have varying levels of impact across organizations and industries. However, all entities preparing GAAP financials will at the very least be exposed to increased levels of disclosure. If your industry is one of the sixteen industries for which the AICPA has created a task force to develop a new Accounting Guide on Revenue Recognition, your revenue recognition may be affected.

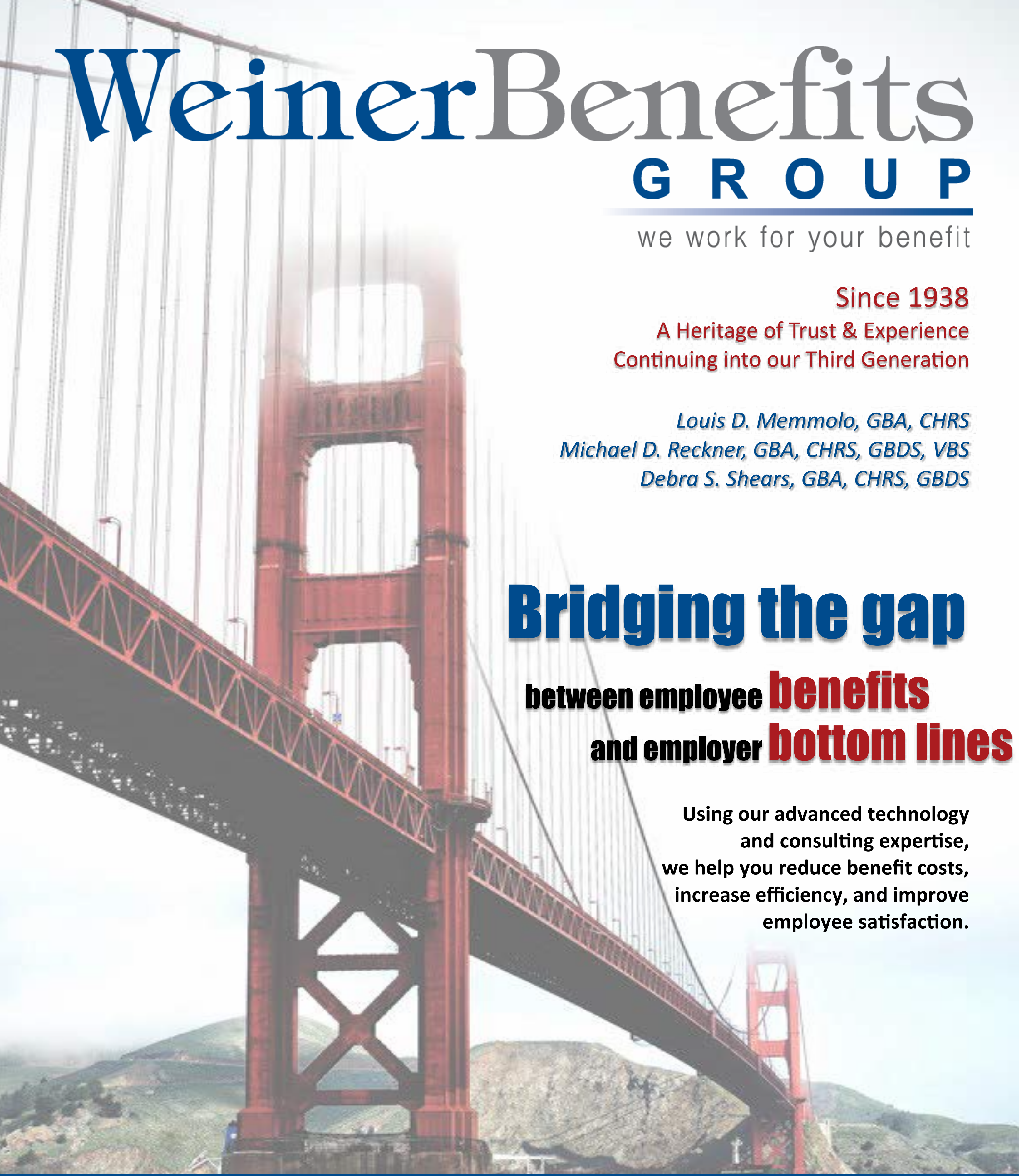
Leases (ASU 2016-02)

Under current GAAP, capital leases are reported on the balance sheet, but operating leases are expensed as incurred with no effect on the balance sheet. Under the new standard, lessees will be required to recognize lease assets and lease liabilities for all leases, with certain exceptions, on their balance sheets. Leases will be classified as either financing or operating and the income statement treatment is different between the two. Lessors will account for the leases using an approach that is substantially equivalent to current GAAP.

What to Do

The following are some suggestions to consider:

- Determine if and how these standards affect your entity.
- Assess if your software, systems, contracts and personnel are designed to handle the changes.
- Evaluate your contracts with customers. Determine if your contracts require updating.
- Evaluate the lease impact on your lending intuitions' financial covenants. Have a discussion with your lender to amend or waive your covenants if significantly affected.
- Unless certain financial statement users require GAAP, consider reporting under a special purpose framework like the Financial Reporting Framework for Small and Medium-Sized Entities. Have a dialog with your financial institution or bonding agent to see if an alternate reporting basis is an acceptable alternative.
- Contact your CPA to discuss in more detail.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