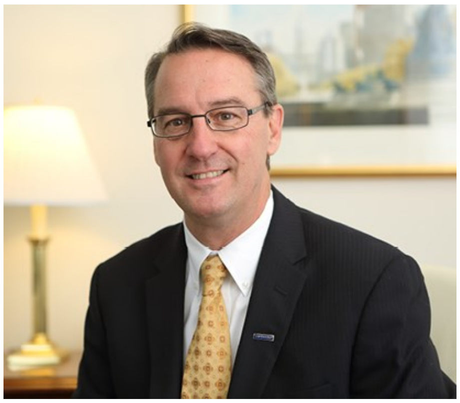
Montgomery County Estate Planning Council

MCEPC Founded 1962

Charter Member of the NAEPC

NEWSLETTER

Summer 2023, Issue 65



Greetings from our President

Keith Eby

Welcome Back Friends! I hope everyone is having a wonderful summer. On behalf of the Board of Directors, I am thrilled to announce some of our upcoming programming. This year, we will be doing a mix of in-person meetings and virtual meetings, and gathering at both new and traditional venues.

We begin on September 20th at Boardroom Spirits, where we will enjoy a brief mixology class and Michael Karwic will discuss the challenges of managing sudden wealth. Members are invited to bring a colleague for free.

In October we will meeting at the Philadelphia Country Club where a panel of business leaders will discuss how to create and maintain great client relationships. This will be a great event to network and learn from seasoned veterans. We encourage you to bring a colleague to this event.

Later in October we will have a limited capacity, member only, event at the newly renovated headquarters of Wissahickon trails. We will receive a tour of the new headquarters and learn what Wissahickon trails (aka Wissahickon Valley Watershed Association) is up to. We will then enjoy a wine tasting and a bite to eat before settling down for a conversation about the evolution of journalism with 2 veteran Wall Street Journal reporters.

And this is just the start of our season.

I hope that this incentivizes you to renew your membership – or join us as a new member – so that you can take advantage of all that MCEPC has to offer. Please note that we are reintroducing an "all inclusive" option this year that includes your annual membership fee plus registration for six regular monthly meetings at a discounted price.

Consider sharing this membership invitation with your friends and colleagues. The Montgomery County Estate Planning Council offers quality programming (with continuing education credits available), meaningful networking opportunities and fellowship. Our membership comprises many professionals within the estate planning field, including attorneys, accountants, investment professionals, valuation specialists, trust officers, insurance professionals, nonprofit professionals, home health care and senior care providers, and other related estate planning professionals.

We look forward to an exciting year ahead and hope to see you soon!

Keith Eby, Vice President & Portfolio Manager
The Haverford Trust Company

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In This Issue:

WELCOME NEW MEMBERS AND
THANK YOU TO OUR REFERRING MEMBERS!!
April Charleston, Esq.—Membership Chair

We extend a warm welcome to our newest members as well as a big THANK YOU to our members who referred them! Please continue to spread the word about the great benefits of MCEPC membership – education, networking, camaraderie!

Candace L. Ciesielski, The Haverford Trust Company

Matt Dewees, Valley Forge Financial Group, Inc.

Sophia Duffy, JD, CPA, The American College of Financial Services

Matthew I. Fingerman, ChFC®, CFP®, BNY Mellon Wealth Management

Alexander Gusikoff, Esq., Friedman Schuman, P.C.

Jim Heaney, J.P. Morgan Private Bank

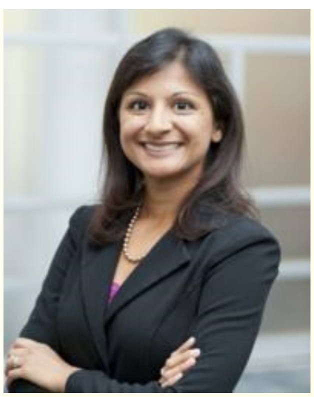
David C. Heck, III, BNY Mellon Wealth Management

Merideth E. Ketterer, Attorney, Heckscher, Teillon, Terrill & Sager, P.C.

Gregory J. Shank, CPA, CVA, Maillie LLP

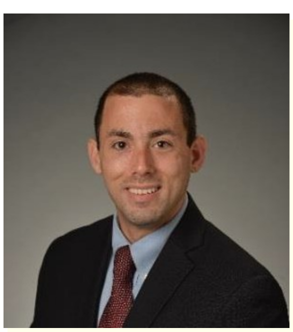
Thomas Tuskey, CFP®, Northstar Financial Companies

New Member Spotlight



We welcome Sophia Duffy, JD, CPA, with The American College of Financial Services.

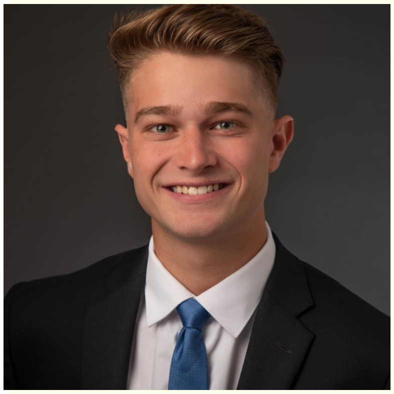
Sophia Duffy, JD, CPA practices estate planning at Duffy & Winter Law in Colmar, Pennsylvania, and is an Associate Professor at The American College of Financial Services. She teaches undergraduate and graduate courses in estate planning, small business succession planning, and taxation. Duffy has published research on a variety of issues related to estate planning and financial planning, including discrimination risks in AI-based insurance underwriting, vulnerability of aging investors due to cognitive decline, improving credit access for African-American business owners, and award-winning research on social security planning for high-income women. She received her Bachelors of Science in Accounting at Rutgers University and her juris doctorate from Temple University's James E. Beasley School of Law in 2012. Although she is a New Jersey native, she is now a proud Pennsylvanian. She resides in Montgomery County with her husband and three children.



We welcome Matthew I. Fingerman, ChFC®, CFP®, with BNY Mellon Wealth Management.

Matt Fingerman is a senior wealth manager for BNY Mellon Wealth Management. In this role, he works directly with clients to address their investment and wealth management needs. Matt joined the firm in 2012 as a senior portfolio analyst. Matt currently serves on the BNY Mellon Mid-Atlantic Charitable Trust Committee and the BNY Mellon Family Law Advisory Practice Group.

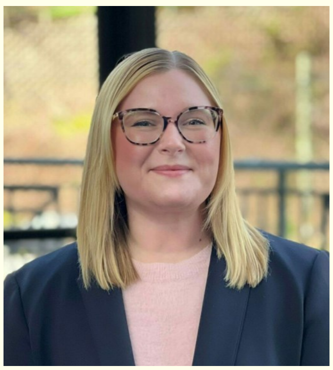
In his free time, Matt and his wife enjoy traveling and fostering dogs for a local animal rescue.



We welcome Matt Dewees. Matt joined Valley Forge Financial Group in 2022 as a Wealth Transfer Consultant. In his role, Matt advises high net worth individuals and business owners with estate planning and life insurance. Matt is a participant in M Financials' Magnet Program, an immersive training and mentorship program for emerging financial professionals. In addition, Matt has a strong passion for charity; he currently serves on the board of VFFG's Charitable Committee and as an ambassador for First Generation Investors (FGI), a non-profit organization who helps teach underserved communities about financial literacy.

Before joining VFFG, Matt attended the University of Maryland where he earned a B.S. in Business Management and a minor in Philosophy. Currently, Matt holds a PA Life and Health Insurance License, FINRA Series 7 and 63 Licenses, and is pursuing his CLU designation.

Originally from South Jersey, Matt now resides in Phoenixville, PA. When he's not working, you can find him trying out a new restaurant on Bridge Street, watching Philly sports, or spending time with his family and girlfriend, Sarah.



We welcome Merideth Ketterer, J.D. Merideth is an associate attorney with Heckscher, Teillon, Terrill & Sager, P.C., and focuses her practice on trust and estate planning and administration.

Merideth grew up in Hanover, Pennsylvania and graduated from Temple University with a bachelor's degree in Strategic Communication and a minor in Business Studies.

In 2019, Merideth graduated from Temple University Beasley School of Law. After law school, Merideth completed a judicial clerkship with the Honorable John J. Matheussen, Superior Court of New Jersey, Gloucester County. She also served as President of the Temple University Young Alumni Association for the 2018-2020 term.

Prior to joining Heckscher, Teillon, Terrill & Sager, Merideth was an associate at a boutique trusts and estates law firm in Princeton, New Jersey. Merideth formerly served on the board of the Mercer County Estate Planning Council and is excited to get more involved with the community in Montgomery County.

We welcome Jim Heaney,an Executive Director and Banker in the Philadelphia office of J.P. Morgan Private Bank. He and his team help develop tailored strategies for successful individuals and families with a strong focus on investments, estate planning, banking and lending. He combines his 15+ years of experience in financial services and the global resources of J.P. Morgan to help clients develop a comprehensive wealth management plan that meets their evolving goals and objectives. Jim also dedicates time to helping develop junior colleagues to further deepen the talent we have at our organization.

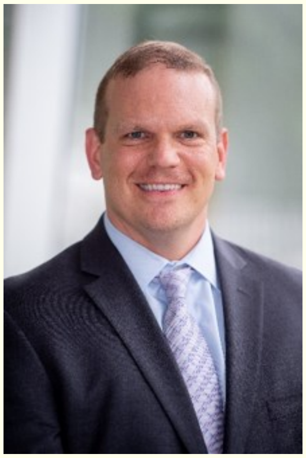
A native of Bucks County, he was excited to return to the area in 2013 to deepen his network and build on strong, local roots. Jim holds a B.S. in Finance from The Pennsylvania State University and an M.B.A. from the Fuqua School of Business at Duke University. He resides in Flourtown, Pennsylvania, with his wife, Colleen, and two daughters.

We welcome Thomas Tuskey, CFP®.

Thomas is registered with Northstar as an Investment Advisor Representative (IAR) and currently serves as an Advisor in the Pennsylvania office. He is a member of both our Investment Committee and our Compliance Committee and has grown further into an Advisory role upon becoming a CFP® Professional in 2022.

After graduating from The Rutgers Business School in New Brunswick, NJ, Thomas began his professional career with Northstar in 2018 as a Client Service Specialist. He prides himself on relentless attention to personalized client service. Thomas is passionate about helping people, and loves cultivating new relationships so please feel free to say hello!

Currently residing in Pennsylvania, when he is not working you can usually find Thomas back in New Jersey spending time with his family and friends, cooking something delicious, or studying the financial markets.



We welcome David C. Heck, III, with BNY Mellon Wealth Management.

David is a client strategist for BNY Mellon Wealth Management in the Mid-Atlantic Region. In this role, he advises affluent families and institutions with their portfolios, respective trusts, foundations, endowments and retirement plans. In conjunction with BNY Mellon's Portfolio Management Team and Wealth Strategists, he works closely with his client's personal tax and legal advisors on all matters ranging from tax and estate planning, concentrated stock positions, advance allocation decisions and the sale of privately held businesses.

David joins BNY Mellon Wealth Management with 25 years of experience in political and non-profit fundraising. Prior to BNY Mellon, he served as the director of philanthropy for WHYY, Philadelphia's local, member-supported NPR and PBS station. Prior to joining WHYY, he was the director of philanthropy at Virtua Health Foundation. David also held various leadership roles at American Cancer Society and worked as the director of development for multiple congressional and judicial campaigns.

David earned a Bachelor of Arts from Ohio Dominican University. He is an active member of his community and currently serves on the board for Intercultural Journeys, which leverages performing arts to catalyze social change, challenge bias and create spaces for dialogue. David and his wife Jenna Goldstein live in the Philadelphia suburbs with their daughter Eleanor, son Asher, and dog, Archimedes (Arch).

Unlocking Hidden Value: How Life Settlements Can Optimize Estate Planning Strategies

By Brendan Flatow

Life insurance is a critical component of estate planning that provides tax-free death benefits to beneficiaries upon the policyholder's passing. However, as clients' circumstances and needs evolve, their life insurance policies may no longer be the most effective solution for their estate planning objectives.

For instance, let's consider the example of a 79-year-old man who purchased a $4.5 million universal life policy for estate planning purposes. The change in the estate tax exemption and proper planning rendered the trust-owned policy unnecessary. The man was prepared to lapse the policy, which had no surrender value, but his advisor advised him to treat the policy like any other asset in his portfolio and seek fair market value before acting. This led to the discovery of $1,660,000 of additional value, which was used to balance his estate plan.

According to the Life Insurance Settlement Association (LISA), 92% of life insurance policies in the US never result in a claim, and a vast majority of those policies are surrendered or lapsed, rather than sold. In an average year, that equates to more than 500,000 policies insuring seniors, totaling over $120 billion in death benefit. However, in 2021, policy owners received, on average, 7.8 times more for selling their policies than if they were surrendered.

Another study identified that 90% of seniors who surrendered a policy would have preferred to have been informed that a life settlement was an option. These statistics indicate that many seniors are not aware of all the options available to them when their life insurance policies no longer meet their needs or goals.

Estate planners, attorneys, trust officers, and legacy planners can help clients explore alternatives to lapsing or surrendering their life insurance policies, such as life settlements. A life settlement enables a client to sell their life insurance policy for a lump sum that exceeds the policy's cash surrender value. This can provide liquidity to address changing financial needs or goals, such as paying for long-term care expenses or funding existing retirement strategies.

Additionally, a life settlement can be an excellent option when a client's beneficiaries no longer require the life insurance coverage, or the client wants to use the proceeds for a different purpose. For example, a client may want to donate the proceeds to a charitable organization, make gifts to their grandchildren, or invest in a different asset class.

For example, a 74 year old insured recently sold his $1 million dollar universal policy after exploring the idea of surrendering the policy. He wanted access to the cash value with the goal of taking advantage of an investment opportunity created by the current interest rate environment. The sale provided him $175,000 more to invest than if he had simply surrendered the policy.

It is crucial for estate planners to educate their clients about their options and help them make informed decisions about their life insurance policies as part of their overall estate planning strategy. By understanding all the uses of life insurance in estate planning and how life settlements can be a good option when clients' needs change, estate planners can provide the best advice and guidance to their clients.

Brendan Flatow is co-founder of Evergreen Settlements, LLC, a leading life settlement firm based in the Delaware Valley that provides professional representation to a broad range of clients: consumers; financial advisors, insurance professionals, as well as trust, legal and accounting professionals throughout the United States. The Evergreen team holds over 130 years of combined experience in the life settlement space and has facilitated more than $15B in longevity transactions. Inquires: contact@evergreensettlements.com

FBAR [Fire Brimstone And Regret]

Joel S. Luber, Esq.

The United States Supreme Court has some weighty cases to consider this term. One of the cases involved the interpretation of how foreign bank account penalties are calculated for failure to file the Report of Foreign Bank and Financial Accounts (known as “FBAR”). The Supreme Court on November 2, 2022 heard oral arguments in this case, Bittner v. United States, and published their decision on February 28, 2023. The Court ruled in the taxpayer’s favor.

For Mr. Bittner, the difference was between a penalty of $50,000 or $2.72M. No small consequence. For purposes of this article, I am not going to go into any significant detail about the arguments that were made by both sides (Taxpayer and Treasury Department) advancing their interpretation of the applicable statute, 31 U.S.C. §5321(a)(5)(B)(i). Rather, the purpose here, after a brief description of the statute, is to (i) alert you to the magnitude of the penalties; (ii) warn you where these penalties may lurk and who may be exposed, particularly in the context of trusts; and (iii) help you determine what to do if you find yourself on the receiving end of an assessment for these penalties.

Background. In 1970, in response to concerns regarding the unavailability of foreign account records of persons thought to be engaged in illegal activities, Congress enacted the Bank Records and Foreign Transactions Act, commonly known as the Bank Secrecy Act (“BSA”), codified in 31 U.S.C. §5311 et. seq. Although the original focus of the BSA was on reporting by financial institutions, it also required residents or citizens of the United States, and persons in, and doing business in, the United States, to keep records of and report their relationships or transactions with foreign financial agencies. This reporting requirement was implemented through regulations issued by the Financial Crimes Enforcement Network of the Department of the Treasury (“FinCEN”) that provided for the reporting of foreign bank, securities, or other financial accounts through the filing of an FBAR. Each United States person with an interest in, or signatory authority over, a foreign account is required to file an FBAR with FinCEN if the aggregate value of all such foreign accounts is over $10,000.

Beware of Questions on Common IRS Forms. On IRS Form 1040, Schedule B, on which Interest and Ordinary Dividends are reported, there is a Part III, titled Foreign Accounts and Trusts. Questions 7a, 7b, and 8 have to be answered Yes or No. Do not overlook these questions, and certainly do not answer “No” in 7a when the answer is “Yes.” Your foreign account will be discovered. A “Yes” answer to 7a alerts you to file a FBAR. On IRS Form 1041, Page 3, Other Information, Questions 3 and 4 ask the same question, with admonition to file a FBAR if you answer Yes. On IRS Form 1065, Schedule B, Questions 8 and 9 ask the same questions. And, on Form 706, in Part 4, there is a Question 15 that asks whether the decedent had “an interest in or a signature or other authority” over a financial account in a foreign country. If you’re the responsible person completing a 706 for a decedent, you best ask that question to all persons who may have knowledge of the decedent’s connection with anything foreign. In addition to the FBAR penalty that can be assessed against the Estate, the IRS can impose tax preparer penalties for inaccurate or incomplete tax return preparation. See §6694 of the Internal Revenue Code of 1986, as amended (“IRC”).

Draconian Penalties. Failing to file an FBAR can carry a civil penalty of $10,000 for each non-willful violation. Non-willful means you didn’t intend any harm, you were just ignorant. And that $10,000 is each year, and the statute of limitations on FBAR violations is six years.

So is that $60,000 per account? What if you have 10 accounts? The Supreme Court’s decision in Bittner ruled that the number of accounts is immaterial for a non-willful violation and the $10,000 penalty is applied on a per-person per-year basis. It can get worse. FinCEN adjusts FBAR penalties for inflation each year. For 2022 the non-willful penalty is $14,489, not $10,000.

If your violation is found to be willful, the penalty is the greater of $100,000 or 50% of the amount in the account for each violation—and each year you didn’t file is a separate violation. Criminal penalties for FBAR violations are even more frightening, including a fine of up to $250,000 and five years of imprisonment.

FBAR [Fire Brimstone And Regret] - cont.

Application of FBAR Penalties to Fiduciary Parties.[1]

Any U.S. person who has either a "financial interest in" or "signature or other authority over" a foreign financial account is required to file an FBAR. 31 C.F.R. §1010.350(a). The persons subject to a reporting obligation include account owners and fiduciary parties in relationships established under common estate planning documents such as financial powers of attorney, trust agreements and wills, as well as entities held by trusts or estates. See also 31 C.F.R. §§ 1010.350(b)(3), 1010.350(e)(2).

Regulations treat a U.S. person as having a reportable financial interest in a foreign account held in a trust if he or she is the grantor of the trust and is, under the grantor trust income tax rules (IRC §§671-679), taxed as the deemed owner of any of the trust assets. 31 C.F.R. §1010.350(e)(2)(iii). The regulations also treat a U.S. person as having a reportable financial interest in a foreign account held by a trust in which the U.S. person has a present beneficial interest in more than 50 percent of the trust assets or from which he or she receives more than 50 percent of the trust income. 31 C.F.R. §1010.350(e)(2)(iv).

Regulations also state that a person has signature or other authority over a foreign account if that person, either alone or in conjunction with another person, controls the disposition of the assets of the account by direct communication with the person maintaining the account. 31 C.F.R. §1010.350(f)(1). The result of all the foregoing is this: Multiple persons may have reporting obligations for the same account, and the non-willful failure to satisfy these obligations can result in multiple penalties being imposed with respect to those accounts.

A common estate planning relationship in which these rules present a substantial risk of multiple non - willful FBAR penalties is the relationship created between an individual and the person to whom he or she grants a power of attorney. A financial power of attorney names an agent with authority to act on behalf of the principal with respect to property and financial transactions. The agent typically has the authority to open, close, continue and control accounts, whether foreign or domestic. Granting this authority to the agent does not relieve the principal of the authority to control the same accounts. In most cases, the principal is not required to notify the agent of all of the principal's accounts or whether the principal maintains foreign accounts, and typically does not.

The agent's signatory authority over foreign accounts may make the agent holding the power of attorney a "person" subject to FBAR reporting requirements. Thus, the relationship between the principal and the agent may double the persons responsible for filing FBAR reports and whose non-willful errors can be subjected to an FBAR penalty.

Example 1: Assume that Principal established two foreign financial accounts in Country A to facilitate the payment of expenses associated with real properties owned by Principal in Country A. In Years 1-6 each account balance is $6,000. Principal names Agent under a power of attorney with power to act with respect to all of Principal's real property and accounts. Principal does not inform Agent that Principal has foreign accounts in Country A, and Agent does not inquire as to the existence of foreign accounts. Agent non-willfully and without reasonable cause fails to file an FBAR in years 1-6. There can be a $10,000 penalty imposed upon Agent in each year, creating a $60,000 total penalty for the 6-year period, which is equal to five times the balance of the accounts.2

There also can be a similar penalty imposed upon the Principal, creating in the aggregate a penalty ten times the total account balances. (If the Supreme Court in Bittner had decided differently, the penalty would have been computed per account rather than per return and there would have been an aggregate penalty of $240,000, twenty times the total account balances.3)

The potential for multiplier effects of various $10,000 penalties is increased even further in the context of trusts. Trusts are immensely varied in type, structure, and duration. Trusts may be either revocable or irrevocable, either grantor trusts or nongrantor trusts for income tax purposes, and either domestic or foreign trusts for income tax purposes.

FBAR [Fire Brimstone And Regret] - cont.

A trust also may have an investment advisor or trust protector with specific powers with respect to the trust. These powers may include the power to open, close, continue, and control financial accounts. The beneficiaries of a trust have the economic benefit of the trust assets, but usually have no power to administer those assets.

A beneficiary may have an interest in trust income, principal or both, and that interest may be mandatory or discretionary. The interest may be either present or future, vested or non-vested. Trusts often continue for multiple generations, with beneficiaries and their interests possibly changing during the trust term.

Example 2: Assume that Grantor, a U.S. person, creates a revocable trust to hold Grantor's assets. Grantor names three U.S. citizens as trustees, requiring that all decisions be made by majority vote. The trustees have authority to make distributions during Grantor's lifetime only to Grantor and Grantor's spouse. Grantor transfers to the trust two foreign financial accounts in Country A, which Grantor established to facilitate the payment of expenses associated with real properties owned by the trust in Country A. In Years 1-6 each account balance is $10,000. Each of the trustees is obligated to file an FBAR reporting the foreign financial accounts. 31 C.F.R. §1010.350(f)(1). The trustees' non-willful failure to file a timely and correct FBAR could subject the trust or trustees to up to $180,000 of FBAR penalties – nine times the size of the account balances.4

FBAR Collection Procedures. FBAR penalty procedures under Title 31 are similar to federal tax penalty procedures under Title 26. Under both Title 31 and Title 26, the IRS must make a timely assessment of the penalty prior to initiating a collection action. However, the two procedures diverge somewhat with respect to collection remedies available to the government. The IRS has six years to make a timely FBAR assessment. This six-year period begins on the date the FBAR should have been filed and runs regardless of whether an FBAR has been filed at all.

Because FBAR penalties are located in Title 31, provisions therein govern collection. Under Title 31, the government may collect FBAR penalty assessments through various means including: (i) administrative (or tax refund) offset (collectively, "administrative offset"); (ii) wage garnishment; and/or (iii) litigation.5

The government's right of administrative offset permits the government to administratively reduce amounts that are already owed by the government to the taxpayer to satisfy all or part of an unpaid FBAR penalty assessment.6 For example, the government may use its right of administrative offset to reduce a federal income tax refund7 or reduce benefits already owed to the taxpayer under government programs such as Social Security.8

Title 31 also permits the government to garnish up to 15% of the taxpayer's "disposable pay"—i.e., the taxpayer's compensation (salary, bonus, commission, etc.) from an employer minus health insurance premium deductions and amounts otherwise required by law to be withheld (e.g., federal employment taxes).9 Perhaps the strongest of its collection methods, the government also has the authority to initiate a civil lawsuit against the taxpayer to reduce the FBAR penalty assessment to judgment.10 After a judgment is entered against the taxpayer, the government may: (i) file a judgment lien against the taxpayer's property11; (ii) foreclose on the taxpayer's property12; or (iii) obtain a post-judgment Writ of Garnishment.13

Title 26 permits the IRS 10 years from the date of an assessment (tax, penalty, or otherwise) to collect the assessment through administrative means. But there is no statute of limitations if the government seeks to collect an FBAR penalty assessment through administrative offset. In other words, the government may continue collection via administrative offset until the FBAR penalty assessment is paid in full. If the government chooses to file a civil lawsuit against a taxpayer to reduce the FBAR penalty assessments to judgment, the government must initiate the lawsuit within two years from the assessment date, unless the government obtains a criminal judgment, which extends the statute of limitations to file a civil action another two years from the criminal judgment date. If the government is successful in obtaining a judgment against the taxpayer, the government can file a judgment lien for 20 years after the judgment date and may extend the judgment lien for an additional 20 years if it so chooses.14

FBAR [Fire Brimstone And Regret] - cont.

If the government files suit against the taxpayer within the required two-year period, DOJ has the authority to settle the lawsuit on terms agreeable to the DOJ. However, taxpayers are not required to take a wait-and-see approach to determine whether a suit will be filed against them—rather, taxpayers are permitted to pay all or part of the FBAR penalty and file a refund suit against the government.15 This option may make sense if the taxpayer wants a jury trial, as government-initiated lawsuits do not permit jury trials.16 However, any advantages to filing suit first should be weighed against the very real risk that the government will file a counterclaim to reduce all of the FBAR penalty assessments to judgment, resulting in the additional collection measures available to it (discussed above).

<u>Conclusion</u>. FBAR penalties are no joke. If you have a client who has any connection at all with anything foreign, and in today's worldwide globalized economy it's almost rare one does not, there is absolutely no reason to believe that a conscious decision not to report a foreign account will not end up in a disaster. And, for those persons who may have exposure simply by virtue of a financial relationship with another person who owns a foreign account, whether as trustee, trust protector, investment manager, distribution advisor, or beneficiary, not to ask the question is, in this author's humble opinion, tantamount to negligence. Query, whether negligence will be considered the equivalent as the absence of willful neglect. It's not as if a taxpayer owning a foreign account that produces income is not otherwise required to report the income from the account. There is a plethora of tax penalties for failure to report the income. But if the reason not to report the foreign income is because you don't want to report the existence of the account, then when the hammer does fall, you have already crossed the line from non-willful to willful. Good night, Irene.

1 This portion largely derived from Brief of The American College of Trust and Estate Counsel [ACTEC] as Amicus Curiae in Support of Neither Party filed in the Bittner case.

2 $10,000 statutory penalty x 6 years = $60,000.

3 ($10,000 x 2 accounts x 6 years) x 2 persons (Principal and Agent) = $240,000.

4 [$10,000 x 6 years] x 3 trustees = $180,000

5 31 U.S.C. § 3711(g)(9).

6 Id.; see also 31 U.S.C. § 3716.

7 31 U.S.C. § 3720A.

8 31 U.S.C. § 3716(c)(3)(A).

9 31 C.F.R. § 285.11(c).

10 31 U.S.C. § 5321(b).

11 28 U.S.C. § 3201.

12 28 U.S.C. § 3201(f), § 3202(e).

13 28 U.S.C. § 3205.

14 28 U.S.C. § 3201(c).

15 Norman v. U.S., No. 15-872T, 2016 WL 1408582 (Fed. Cl. Apr. 11, 2016) (jurisdiction under the Tucker Act); see also Landa v. U.S., 153 Fed. Cl. 585, 592 (Fed. Cl. 2021); Jarnagin v. U.S., 134 Fed. Cl. 368 (Fed. Cl. 2017); Jones v. U.S., No. SACV 19-00173 JVS, 2020 WL 4390390 (C.D. Cal. May 11, 2020).

16 See 28 U.S.C. § 2402.

Joel S. Luber, Esquire, is chair of the Estates & Trusts Group at Reger Rizzo Darnall LLP. Joel concentrates his practice in sophisticated estate planning for high-net-worth individuals, asset protection planning, estate administration, Orphans' Court practice, and general corporate and income tax planning.

Marijuana Usage and the Current State of Life Insurance Underwriting

Michael Mallick and Ryley Harper

History & Current Legal Landscape

With the passage of the Marijuana Tax Act in 1937, a tax was placed on the sale of cannabis that quickly criminalized it and classified it as a Schedule 1 Controlled Substance. Almost 60 years later, the state of California passed Proposition 215 in 1996 by a 56% vote to permit the use of marijuana for medical treatment recommended by a physician. Today, nearly 80% of US States have passed legislation approving either the recreational or medical use of marijuana or both, with 20 states passing approvals in just the last five years.

<u>US States + District of Columbia</u>

Recreational & Medical Use Approved: 22 (43%)
Medical Use Approved: 18 (35%)
No Uses Approved: 11 (22%)

According to a 2021 national survey performed by the Substance Abuse and Mental Health Services Administration ("SAMHSA"), almost 20% of adults reported using marijuana the prior 12 months. As the legal landscape and potential social stigma around marijuana use continues to evolve, the underwriting for life insurance is quickly evolving. However, the changes vary by insurance carrier and depend on the type and frequency of use. In this article, we hope to answer several questions surrounding the impact of marijuana use on securing life insurance coverage.

Can I get life insurance if I use cannabis in any form?

Obtaining life insurance coverage with disclosing or evidence of marijuana use is possible. However, as with many things…it depends. The major factors that determine underwriting class are:

- Admission of Use
- Lab Results for THC
- Reason for Use
- Frequency of Use
- Delivery Method
- Age
- Additional High-Risk History

An insurance carrier will assess an underwriting class based upon the medical history and disclosures provided by an applicant. Each risk class is designed to assess a fee or charge for a given level of risk or probability of shortened life expectancy. An applicant's risk class, product, age and gender are used to determine the cost of insurance for a given level of death benefit. The cost for each risk class can vary substantially across each level. The table below illustrates the percentage increase in premium when compared to the best available underwriting risk classification amongst non-smoker and smoker rates:

45-year-old male, $1M of 20 Year Level Term		
Risk Classification	Non-Smoker	Smoker
Best Class	0%	427%
Preferred	18%	473%
Standard (Average)	91%	720%
Substandard	191%	882%

Admission of Use

Insurance underwriters do not look favorably if usage is not disclosed on the written application and instead uncovered through other sources such as lab results, medical records, or prescription drug history. If a policy is issued and a death claim is submitted during the two year Contestability Period, a life insurance carrier may investigate the claim and potentially deny it if false or misstatements were made on the application. On the other hand, a positive Tetrahydrocannabinol ("THC") lab result with a documented reason and disclosures for marijuana use may still qualify for Non-Smoker Best rates.

Reason for Use

Medical usage of marijuana is viewed more favorably than recreational use. An applicant with a valid prescription card, details of their underlying medical condition and treatment plan can qualify for Best to Preferred rates. However, an underwriter also will review and rate the underlying medical condition separately, which could result in a reduced rating. Recreational use is acceptable for applicants where marijuana has become legalized however the rating class would be determined based on the frequency of use.

Marijuana—cont

Frequency of Use

The frequency of use of marijuana is one of the biggest determining factors of rating and/or an offer of coverage. Mild usage, defined as up to 2x per month, could qualify for Preferred or Best rates. Medium usage, defined as up to 10x per month, could qualify for Standard rates. In most cases, heavy usage, defined as 25x per month or daily would be Table Rated or Declined coverage with exceptions made for certain medically prescribed cases. Even if frequency is high, non-smoker rates are available within each classification depending on delivery method.

Delivery Method

Smoking THC more than 1x per month will result in Smoker rates in addition to the underwriting class designated. Some carriers differentiate between smoking and vaping by qualifying vaping as a Non-Smoker classification. Ingesting marijuana in an edible form will avoid Smoker ratings and the underwriting class will predominately be determined by the frequency and reason of use. Additionally, Cannabidiol ("CBD") oil use has become a very popular delivery method and is different from THC.

Some of the differences between THC and CBD are as follows:

THC

- Controlled substance and psychoactive
- Effects: stimulates appetite, euphoria, drowsiness
- Marijuana plant is used (THC content between 15-20%)

CBD

- Not a controlled substance or psychoactive
- Effects: calming, relaxing, supporting well-being, healing
- Hemp plant is used (THC content is less than 0.2%)

Insurance carriers qualify CBD oil users as Non-Smokers regardless of delivery method or frequency.

Age

Insurance underwriters may view marijuana usage for older applicants more favorably than younger applicants. In many cases, those under age 30 with documented or admitted marijuana use, could achieve no better than Standard rates. Applicants over this age may qualify for Preferred to Best rates subject to type and frequency of use.

Other High-Risk History

Regardless of the specific details of marijuana use, the following criteria also would be considered and would typically result in a decline in coverage:

- Business owners, executives and employees in the marijuana industry
- Additional current or historical alcohol or drug abuse
- Criminal history
- Motor vehicle driving record with violations
- Mental health conditions
- Aviation activity

Recommendations

The underwriting manuals at each of the insurance carriers have evolved substantially over the past few years as they relate to marijuana usage. It would have been impossible to achieve Non-Smoker rates with any history of marijuana usage about five years ago but insurance carriers have now greatly liberalized their position. However, there is still substantial variability among the top life insurance carriers. For example, one major insurance carrier will allow usage up to several times per week for best available rates while another carrier would be less lenient and restrict usage to once per month to obtain the best class. When applying for life insurance coverage with marijuana history, it is crucial to clearly document the reasons behind consumption and consult with your independent life insurance professional to obtain the most cost-effective coverage.

Given the different opinions on marijuana between insurance carriers and state regulators, it is ideal to work with an experienced insurance professional who has access to a variety of insurance carriers to conduct due diligence and provide the best insurance solution throughout the market.

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Private Foundations Granting to For-Profit Organizations? It's Possible.

In certain situations, private foundations can support for-profits as well as nonprofits.

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Although it's well known that a private foundation ("PF") can freely make grants to Internal Revenue Code ("IRC") Section 501(c)(3) public charities, many are surprised to learn that a PF may make a grant to a for-profit organization ("FPO")[1] by satisfying certain requirements.[2] Due to the potential for the enrichment of private interests, however, a PF must contend with an added layer of complexity when granting to an FPO: the need to conduct a private benefit analysis, as the presence of substantial private benefit can subject the PF to a 20% penalty on the grant. This article will provide an analytical framework to help a practitioner gauge whether the private benefit concern posed by a PF's grant to an FPO poses a threat and, if so, guidance as to how it might be overcome.

As a starting point, it's critical that the PF identify a sufficiently large group of individuals—a broad charitable class3—that it intends to benefit through a grant to an FPO. After all, the FPO itself is not the intended beneficiary; it is merely the instrument used by the PF to achieve its charitable objectives. For instance, if the PF were to make a grant to an FPO caterer to provide free meals to children attending a particular school in a disadvantaged neighborhood, the children, not the caterer, would be the intended beneficiaries of the PF's largesse.

Additionally, the PF must consider the degree to which the grant serves the private interests of the FPO and others who will benefit from the grant, even though they are not part of the charitable class that the PF intends to benefit (in other words, the unintended beneficiaries). This requirement stems from the private benefit doctrine embodied in IRC Section 501(c)(3), which provides that PFs and other charitable organizations must be operated exclusively for charitable and other exempt purposes. Specifically, Treasury Regulations ("Reg.") § 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as operated exclusively for exempt purposes unless more than an insubstantial part of its activities is in furtherance of a non-exempt purpose. Further, Reg. § 1.501(c)(3)-1(d)(1)(ii) adds that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. Thus, an organization's exemption may be lost if it serves a private interest to a more than insubstantial degree, although there is no bright-line test to make such determination.[4]

The ability to make such a determination is also key to a PF avoiding a penalty when making a grant to an FPO. The Regulations specifically address activities that could cause a PF to lose its charitable status if such activities were a substantial part of the PF's total activities. If a PF makes an expenditure for such an activity, Reg. § 53.4945-6(a) provides that the PF will be subject to a 20% taxable expenditure penalty. Since the presence of a private benefit can cause a PF to lose its charitable status if it were a substantial part of its overall activities, it follows that a grant conferring a substantial private benefit also may be subject to a taxable expenditure penalty. The key is knowing when a private benefit is merely insubstantial and, therefore, permissible.

As noted by Mancino and Hill, the IRS "has taken the position that insubstantial is properly understood as an "incidental" amount and that the position that whether an activity is incidental will be tested on both qualitative and quantitative grounds."[5] To be deemed qualitatively incidental, the primary benefit must flow to the public at large and any benefits to private interests must be a necessary concomitant to achieving the organization's charitable objectives.[6] The qualitative test is illustrated by Rev. Rul. 70-186,7 in which an organization was formed to improve the condition of the water in a lake that was available to the community as a recreational facility. While the improvement would benefit the public at large, it also would benefit the owners of lakefront property by increasing property values. The IRS concluded that the private benefit was incidental in a qualitative sense because the benefits would flow to the general public, and such benefits could not be attained without necessarily benefitting the private property owners.

Private Foundations—cont

When making a grant to an FPO, a PF must apply the qualitative test to both the intended and unintended beneficiaries of the activity conducted by the FPO, as well as to the FPO itself. For instance, consider the school meal program discussed above. There, the PF should consider whether the benefit will reach the needy children (the intended beneficiaries) and whether the benefit provided to the other children who will receive the meals even though they are not in need of them (the unintended beneficiaries) is an unavoidable by-product of the program. Suppose that the school insists on providing the meals to all children because it would be administratively burdensome to keep track of those who would not qualify for the program, as nearly all would be eligible. In that case, the benefits to the small group of unintended beneficiaries would be a necessary by-product of the program.

Similarly, conferring a benefit upon the FPO likely would be unavoidable if the PF exercised reasonable judgment in determining that its charitable goals would be best achieved through an FPO. In any event, a PF should not be compelled to choose a less effective option for achieving its charitable purposes just because that other option might confer a lesser degree of private benefit. For example, while a loan or equity investment provides a lesser degree of private benefit than a grant because the PF stands to recover its investment, a grant may still be the best option because the FPO may not earn sufficient revenue to service debt or pay dividends, and a PF investment may deter commercial investors. Further, an FPO might be the best choice because of superior experience, track record, qualifications, lower cost, higher quality, etc., even if a charity also could carry out the program, albeit not as well. However, in the unlikely event that an alternative option would be equally effective while conferring less private benefit than a grant to an FPO, one may infer that the PF should choose that alternative in order for the private benefit to be qualitatively incidental. After all, to the extent that private benefit can be reduced, but isn't, the portion of the private benefit that could have been avoided, but wasn't, can't be considered a necessary by-product of the activity.[8]

Additionally, as noted above, an activity must be quantitatively incidental, requiring the application of "a comparative standard in which the private benefit is measured against the specific public benefit provided."[9] In weighing the private against the public benefit, the IRS has acknowledged that the degree to which private benefit will be tolerated will vary in proportion to the degree of public benefit conferred.[10] This principle is illustrated in Rev. Rul. 76-152,11 where an organization was established to promote community understanding of modern art trends. The organization selected modern art works of local artists for exhibition and sale at its gallery. Upon sale of an artwork, the artist received the sales proceeds after paying a ten percent commission to the organization. Noting that the artists were not members of the charitable class intended to benefit from the activity, the ruling concluded that the private benefit to the artists could not be overlooked as being merely insubstantial in relation to—and despite—the public benefit conferred by the exhibitions.

In applying the quantitative test to an FPO grant, the PF must weigh any private benefit conferred upon the grant's unintended beneficiaries against the public benefit. Of course, the larger the charitable class, the greater the number of intended beneficiaries who are likely to be reached, and the greater the benefit to the intended beneficiaries, the more likely the public benefit will outweigh the private benefit. Another way to tip the scale in favor of public benefit would be to minimize the private benefit as much as possible. In fact, an implied imperative to minimize private benefit can be found in IRC § 501(c)(3), which expresses the ideal of an organization's operating exclusively for charitable purposes. Although the Regulations clarify that an incidental amount of private benefit may be tolerated, a PF nevertheless should conform as closely as possible to the IRC's ideal.

Referring back to the example with the school meal program in a disadvantaged neighborhood, local demographics should ensure that the number of intended beneficiaries would greatly outnumber the unintended beneficiaries. Therefore, one may readily conclude that the private benefit in this scenario is quantitatively incidental because the public benefit outweighs the private benefit. By contrast, had the program been conducted in an affluent neighborhood, the private benefit could have been minimized by limiting program eligibility to those in need.

Private Foundations—cont

Additionally, the quantitative test must be applied to the FPO itself. Here, too, the PF should strive to minimize the benefit to the FPO to increase the likelihood that any private benefit will be outweighed by the public benefit. However, a PF should employ a different approach for minimizing the FPO's private benefit, given its unique role as the PF's instrument for carrying out its charitable objectives. Namely, the PF should avoid granting more than a reasonable amount in exchange for the value furnished by the FPO in terms of goods, services, and other tangible benefits.[12] If the PF does not negotiate fair value in exchange for the grant, as required by the ongoing fiduciary duty of care, the ensuing private benefit to the FPO may outweigh the grant's public benefit. For instance, referring back to our example, suppose that the going rate charged by other caterers for the same meals is substantially less than the grant paid to the FPO. In that case, the PF's substantial overpayment for the value received could cause the private benefit to the FPO to outweigh the public benefit.

In GCM 37789, the Office of the Chief Counsel reasoned that private benefit would be merely incidental if a nonprofit hospital were to lease land to physicians at market value and provide financing to them at the prevailing rate for the construction of a medical building on such land. The GCM noted that, as originally proposed, the hospital would have leased the land at virtually no cost to the physicians, resulting in a more than incidental quantitative private benefit because it may well have outweighed the benefit to the public at large. In this vein, the GCM noted that while the financing arrangement at market rates was not problematic, it would have been "troublesome" if the hospital were to lend its funds at less than market rates.

Finally, Reg. § 53.4945-6(b)(2) supports the conclusion that paying fair value to an FPO for goods, services, or other tangible benefits should not give rise to a substantial private benefit. Generally, this regulation provides that an expense payment in excess of fair value may be subject to a taxable expenditure penalty unless it is paid in the good faith belief that such expense was reasonable and is consistent with ordinary business care and prudence. As with the private benefit analysis, the determination as to whether an expenditure is reasonable will depend on the particular facts and circumstances of each case.

In determining whether a grant to an FPO would result in impermissible private benefit, a PF would be well advised to thoroughly document its reasoning. The answers to the following questions can assist a PF in documenting its reasoning in ruling out an impermissible private benefit that could expose the PF to a penalty:

• What is the charitable purpose served?

• Describe the "broad charitable class" that will benefit from the PF's grant.

• In the judgment of the PF's board, is the FPO the best vehicle for achieving the PF's charitable purposes? If so, why?

• If the FPO is the best vehicle for achieving the PF's charitable purposes, is a grant the best means of providing funding to the FPO in the judgment of the PF's Board, as opposed to a loan or equity investment? If so, why?

• With respect to the qualitatively incidental test, is the private benefit, if any, a necessary by-product of an activity that benefits the public at large?

• With respect to the quantitatively incidental test:

• Does the public benefit outweigh the private benefit? If so, why?

• Is the program designed to target the grant's intended beneficiaries to the greatest extent possible while minimizing benefits to unintended beneficiaries? If so, how?

• Is the PF receiving at least fair value in terms of goods, services and other tangible benefits (to be provided by the FPO to the intended beneficiaries) in exchange for the amount of the grant? What is the basis for this conclusion?

• If the goods and services received for the grant constitute less than fair value, has the PF obtained other concessions from the FPO? If so, what concessions were gained?

Although using an FPO as an instrument to advance a PF's charitable purposes adds a layer of complexity, more and more PFs are expressing interest in this unique approach. Indeed, working through an FPO can

Private Foundations—cont

certainly be a highly effective option for accomplishing a PF's charitable purposes, so long as the PF exercises business judgement and thoughtfully analyzes the private benefit concerns.

1 Note, however, that the self-dealing rules under IRC Section 4941 would prohibit the PF from making a grant to an FPO that is a "disqualified person," as defined in IRC Section 4946.

2 Generally, Reg. § 53.4945-5 outlines a set of mandatory procedures, collectively termed "expenditure responsibility," for making grants to organizations not classified as public charities. Expenditure responsibility requires a specified charitable purpose, pre-grant due diligence, a written agreement incorporating certain terms, oversight of the grantee's expenditure of grant funds, and reporting to the IRS.

3 A broad charitable class is one that is "large enough or sufficiently open-ended that the community as a whole, rather than a pre-selected group of people, benefits when a charity provides assistance." IRS Pub. 3833 at 9 (Dec. 2014).

4 Taxation of Exempt Organizations, Hill & Mancino, § 4.02[2]; see also GCM 37789.

5 Mancino and Hill at § 4.02[2].

6 See GCM 37789.

7 1970-1 C.B. 128.

8 See GCM 3778, which reasoned that a hospital's renting land to physicians for the construction of a medical building essentially free of charge was not a necessary concomitant to the hospital's charitable purposes because its purposes could have been just as readily achieved by charging rent at market rates.

9 Hill & Mancino, Section 4.02[2].

10 GCM 38459 (07/31/80).

11 1976-1 C.B. 151.

12 See GCM 37789, infra, noting that an exempt organization intending to lease land for less than fair rental value might have avoided private benefit concerns by obtaining "tangible benefits" that may have had the effect of increasing the lease payments to market value. For instance, suppose that a PF were to decide that a grant to a pharmaceutical FPO is the best way to develop an "orphan" drug, one that is generally considered unprofitable because it would treat only a rare medical condition. To ensure that the PF receives at least fair value in return for the grant, it may require the pharmaceutical FPO to make various concessions, like agreeing to market the drug in underdeveloped countries, sell the drug at affordable prices, and publish a research paper after the drug has been patented.

13 Aside from private benefit concerns, a PF's Board members have a fiduciary duty of care to avoid wasting corporate assets by overpaying to such an extent that no business person would reasonably conclude that the PF had received fair value in exchange for the payment.

14 The GCM also noted that leasing the land essentially free of charge would not have been qualitatively incidental, either, because it was not necessary to charge below rental value to achieve the desired public benefit, as such benefit could have been just as readily achieved by leasing at market rates.

15 Reg. § 53.4945-6(b)(2).

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The Corporate Transparency Act: Ready or Not, The Reporting Will Begin[1]

Kim V. Heyman

Few jurisdictions in the United States ("U.S.") require legal entities to disclose information about their beneficial owners. Historically, this lack of transparency created opportunities for bad actors to hide their identities while perpetrating fraud, drug trafficking, financing of terrorism, tax evasion and other criminal activities. The U.S. has long been viewed as lagging behind other developed countries in its safeguards to prevent the flow of illicit money. Governments all over the world and international organizations have been pushing for greater transparency of beneficial ownership information to combat terrorism and money laundering. As part of their efforts, they have advocated for the creation of central registries to make that information available for law enforcement, tax authorities, and other similar entities. It is from this background that the Corporate Transparency Act (the "**CTA**") was enacted, to increase national security, to protect legitimate businesses, to enhance law enforcement efforts and to support the growing international consensus to enhance beneficial ownership transparency.

What is the Corporate Transparency Act?

The CTA was enacted into law on January 1, 2021, under The National Defense Authorization Act for Fiscal Year 2021.[2] The CTA requires certain entities to report information about their beneficial owners and the individuals who created them (collectively referred to as "beneficial ownership information" or "**BOI**") to the U.S Treasury Department's Financial Crimes Enforcement Network ("**FinCEN**"). All BOI submitted to FinCEN will be confidential. The CTA directs the Secretary of the Treasury to maintain BOI in a secure, nonpublic database. To implement this requirement, FinCEN developed the Beneficial Ownership Secure System ("**BOSS**"), from which information will not be available to the general public and may only be disclosed under limited circumstances.[3]

FinCEN issued proposed regulations establishing a BOI reporting requirement on December 8, 2001, which were adopted largely as proposed on September 29, 2022 (the "**Final Regulations**"). Pursuant to the Final Regulations, the CTA will be effective on January 1, 2024. The biggest changes from the proposed regulations to the Final Regulations were made to reduce the burdens on entities required to provide a BOI report.

All wealth planning and tax professionals will need to understand the CTA's compliance obligations, which are primarily focused on corporations, limited liability companies and partnerships that do not conduct operating businesses and that are not otherwise subject to regulation by a federal agency.

This article highlights the rules under the Final Regulations. It will explain the definitions of key terms, the exemptions from the CTA and the requirements imposed on "**Reporting Companies**."

What is a "Reporting Company"?

This definition is central to determining who falls within the CTA regime. It helps to keep in mind the purpose of the CTA – to discover what may be elicit use of shell companies. Therefore, organizations that are otherwise regulated are excluded from the definition. A "Reporting Company" is either a domestic reporting company or a foreign reporting company.

- The term "**Domestic Reporting Company**" means any entity that is:
  - A corporation;
  - A limited liability company; or
  - Created by filing a document with a secretary of state or any similar office under the law of a state or Indian tribe.
- The term "**Foreign Reporting Company**" means any entity that is:
  - A corporation, limited liability company or other entity
  - Formed under the laws of a foreign country; and
  - Registered to do business in any state or tribal jurisdiction by filing a document with a secretary of state or any similar office under the law of a state or Indian tribe.

Notwithstanding the foregoing broad definition, the

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following are exempted:

- Trusts (other than certain business trusts), general partnerships and sole proprietorships, which usually are not created by filing a document with a secretary of state or similar office;
- Companies that have significant business operations in the U.S. To qualify as a so-called "Large Operating Company," an entity must have all of the following requirements:
  - An operating presence at a physical location in the U.S.;
  - At least 20 full-time employees; and
  - At least $5 million of gross receipts or sales as shown on its prior year's federal income tax return.
- Entities wholly owned or controlled by a Large Operating Company (or, for the most part, with any other type of CTA-exempt entities) are also exempt under the "Subsidiary Exemption;"[4]
- Tax-exempt charitable organizations under section 501(c) of the Internal Revenue Code of 1986, as amended (the "Code") (and will remain exempt for 180 days after the loss of its tax-exempt status);
- A charitable or charitable split interest trust described in section 4947(a)(1) or (2) of the Code;
- A political organization exempt under section 527 (e)(1) of the Code;
- Public accounting firms registered under section 102 of the Sarbanes-Oxley Act;
- Publicly traded entities;
- Domestic governmental authorities;
- Banks, credit unions, depositary institutions and the like;
- Securities exchanges;
- Insurance companies;
- Broker dealers and Registered Investment Companies ("RICs");
- Public utilities;
- Financial market utilities; and
- Certain pooled investment vehicles.

What does a Reporting Company have to report?

A Reporting Company is required to provide information on its "**Beneficial Owners**." A "Beneficial Owner" is defined as any individual who, directly or indirectly, (A) exercises "**Substantial Control**" over a Reporting Company (regardless of any actual ownership of the entity) or (B) owns or controls more than 25% of the "**Ownership Interests**" in the Reporting Company.

- Who has "**Substantial Control**?" Whether an individual has Substantial Control over a Reporting Company is based upon the facts and circumstances. In addition, multiple people may have Substantial Control over a Reporting Company, and all of them will be considered Beneficial Owners for these purposes.
  - The Senior Officers of a Reporting Company are all deemed to have Substantial Control. A "Senior Officer" is defined as any individual holding the position (or exercising the authority of) a President, CEO, CFO, COO, general counsel or any other officer regardless of title performing a similar function.
  - Any individual with the authority to remove any Senior Officer or a majority of the Board (or similar body) of a Reporting Company has Substantial Control.
  - Any individual who otherwise directs, determines or has substantial Influence over "Important Decisions," such as:
    - o Sale, lease, or other transfer of any principal assets;
    - o Reorganization, dissolution or merger;
    - o Major expenditures, investments, issuing equity or taking on significant debt, or approval of operating budget;
    - o Altering lines of businesses or geographic focus;
    - o Compensation of Senior Officers;
    - o Decisions regarding major contracts;
    - o Changes to governing documents; and
    - o Other similar decisions impacting the Reporting Company.
  - The exercise of Substantial Control over a Reporting Company may be exercised directly or indirectly, as a trustee of a trust or similar arrangement, including through:

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o Board representation;

o Ownership or control of a majority of the voting power or voting rights of the Reporting Company;

o Arrangements, financing or business relationships with others acting as nominees; or

o Control over one or more intermediaries that exercise Substantial Control.

♦ An individual who owns or controls more than 25% of the "Ownership Interests" in a Reporting Company is also a Beneficial Owner.

• "Ownership Interest" is broadly defined to include:

o Any equity, stock, or similar instrument;

o Any capital or profits interest;

• Any instrument convertible into one of those listed above;

• Any put, call or other option of buying or selling one of those listed above, unless such option is created and held by a third party without the knowledge of the Reporting Company; or

o Any other instrument, contract or understanding used to establish ownership.

• Ownership or control of an Ownership Interest in a Reporting Company can be held directly or indirectly through a contract, understanding, relationship or otherwise, including:

o Joint ownership;

o Through ownership or control of intermediary entities;

o Through another individual acting as the agent, custodian or nominee of such individual;

o With regard to a trust or similar arrangement, multiple individuals may be deemed to own or control the same Ownership Interest:

• The trustee or other individual with authority to dispose of trust assets;

• A beneficiary who is the sole permissible recipient of income and principal or who has the right to demand a distribution or withdraw substantially all of the assets; or

• A grantor who has the right to revoke the trust or withdraw the trust assets.

♦ How to determine if an individual controls or owns 25% of a Reporting Company:

• Ownership and control are determined as of the present time, and any options or similar interests held by an individual are treated as exercised;

• If a Reporting Company issues capital or profit interests, including entities taxed as partnerships for federal income tax purposes, an individual who owns at least 25% of the capital or profit interests in the entity will be a Beneficial Owner;

• If a Reporting Company is a corporation, is taxed as a corporation for federal income tax purposes or otherwise issues stock, an individual who either holds 25% of the total voting power of all classes of ownership interests entitled to vote or at least 25% of the outstanding value of all classes of ownership will be a Beneficial Owner;

• If the facts and circumstances do not allow the foregoing calculations to be performed with reasonable certainty, then an individual who owns or controls 25% or more of any class or type of ownership interest in the Reporting Company will be deemed to be a Beneficial Owner.

♦ The following are excluded from the definition of a Beneficial Owner:

• Minors, in which case the parent or legal guardian of the minor may be treated as the Beneficial Owner;

• An individual acting as the nominee or agent on behalf of another individual;

• Individuals whose ownership interests are only through a future right of inheritance;

• An individual acting solely as an employee of a Reporting Company, who is not a senior officer; and

• An individual who is a creditor of a Reporting Company.

Who is a "**Company Applicant**" (whose information must also be reported as part of BOI)?

♦ An individual who

• Directly files a document creating a Domestic Reporting Company;

• Directly files the first document registering a Foreign Reporting Company; or

• Is primarily responsible for directing such filing.

♦ There may be only up to two Company Applicants for purposes of reporting. This limits the long list of people who may be involved in directing and imple-

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menting the formation of an entity.

- This requirement is only applicable for Reporting Companies formed or registered after January 1, 2024.
- The proposed regulations did not include these two limitations, making these requirements particularly onerous, as they would have required tracking down and reporting all people involved in creating entities going all the way back to the beginning of time.

What is required to be included in a report?

- A Reporting Company must provide a BOI Report with the following information to FinCEN:

  • Information about itself:

    o Its full name and any other name (such as a d.b.a.) used by it;

    o If a Domestic Reporting Company, the address of its principal place of business (otherwise the primary location in the U.S. where it conducts business). A PO Box or third-party information (such as an agent for service of process) will NOT satisfy this requirement;

    o The state or tribal jurisdiction in which it was formed (or for a Foreign Reporting Company, the place of its first U.S. registration); and

    o Its EIN or TIN.

  • For each Beneficial Owner, and for entities formed on or after January 1, 2024, up to two Company Applicants, the Report must include:

    o Name;

    o Residential address for each individual;

    o Date of birth; and

    o For each individual, a unique identifying number and issuing jurisdiction from an acceptable identification document, and it must provide a copy of that document, such as a driver's license or passport.

    o If a Company Applicant is an entity that forms or registers legal entities in the ordinary course of business, the entity's current street address.

    o Alternatively, and this will be an important option, individuals and entities may apply to FinCEN for a unique identifying number.

What is a FinCEN Identifier?

- The CTA requires FinCEN to provide a unique identifier, also called a FinCEN ID, upon request to:

  • An individual who provides FinCEN with the same information required to be included in a BOI Report for a Beneficial Owner or Company Applicant; and

  • Any Reporting Company that has provided its BOI to FinCEN.

- Each individual may obtain only one FinCEN ID, and once obtained, the FinCEN ID may be used by any Reporting Company on the BOI Report rather than the information detailed above.
- After a FinCEN ID is obtained, it is the individual's and NOT the Reporting Company's responsibility to keep the information up to date (including updating the image of the identifying document) and to correct any inaccuracies (within the same timetable set out below for Reporting Companies).

When is the BOI Report due?

- For existing Reporting Companies, by January 1, 2025.
- For Domestic Reporting Companies formed on or after January 1, 2024, within 30 calendar days of the earlier of the date on which [i] it receives notice that its creation is effective and [ii] on which the secretary of state or other agency publishes public notice that it has been created.
- For Foreign Reporting Companies formed on or after January 1, 2024, within 30 calendar days of the earlier of the date on which [i] it receives notice that it has been registered to do business and [ii] on which the secretary of state or other agency publishes public notice that it has been registered.

Are any additional reports required?

- No, unless (or until) information changes. An updated report must be filed within 30 calendar days after any change to any information previously submitted to FinCEN, such as:

  • Change in Beneficial Owners; or

  • Information related to a Beneficial Owner, such as change in address or name.

What if a report needs to be corrected?

Corporate Transparency Act—cont

- If a Reporting Company learns or "has reason to know" that a BOI Report contains incorrect information, it has 30 calendar days to file a corrected report.

What are the penalties for failing to file a report?

- An individual, Reporting Company or any other entity that directly or indirectly willfully provides, or attempts to provide, false or fraudulent information, or willfully fails to report complete or updated BOI, faces a civil penalty of $500/day the violation continues and is not remedied, and a criminal fine of up to $10,000 and/or a two-year prison sentence.

  • There is a 90-day safe-harbor if an individual voluntarily submits a report containing correct information.

Now that we know this, what should we as advisers do?

- If you have not already done so, notify clients that the CTA will be effective on January 1, 2024.
- Discuss the option of obtaining a FinCEN identifier as soon as possible with clients.
- Address the CTA in operating agreements, including requiring all members to provide initial and updated BOI.

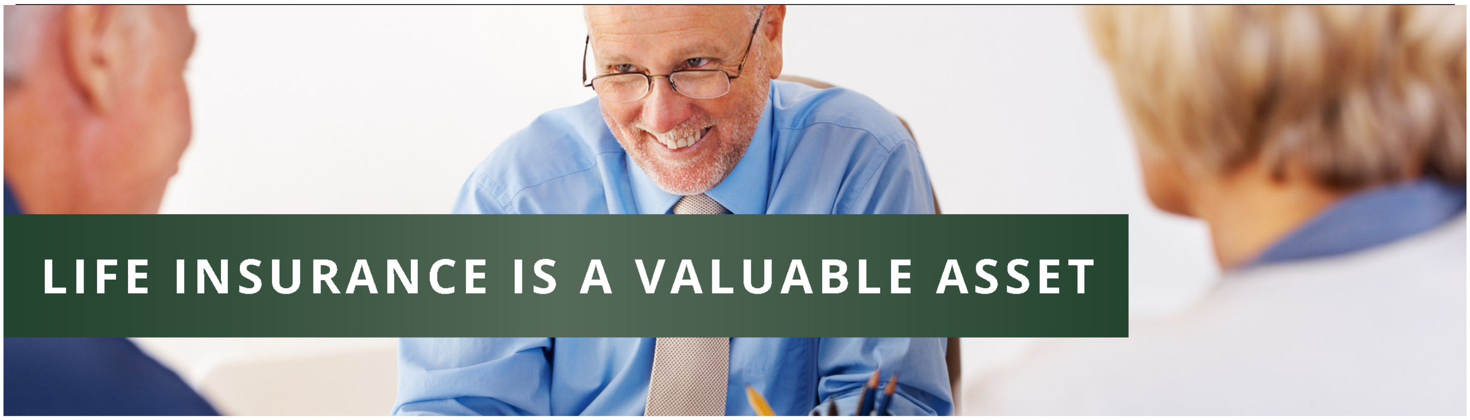
1 The information contained in this article is provided is for educational purposes only. This material is not intended to constitute legal, tax, investment or financial advice. Effort has been made to ensure that the material presented herein is accurate at the time of publication, however, we have no obligation to update, modify or amend this information or to otherwise notify a reader if any information becomes outdated, inaccurate, or incomplete. This material is not intended to be a full and exhaustive explanation of the law in any area. The information discussed herein may not be applicable to, or appropriate for, every investor and should be used only after consultation with professionals who have reviewed a client's specific situation.

2 The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (Jan. 1, 2021) (the "NDAA"). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act by adding to Subchapter II of Chapter 53 of Title 31, United States Code, a new section 5336, titled "Beneficial Ownership Information Reporting Requirements."

3 BOI will only be available upon request of [i] a federal agency engaged in national security, intelligence or law enforcement, for those purposes; [ii] a state, local or tribal law enforcement agency, but only if authorized by a court in connection with a criminal or civil investigation; [iii] a financial institution for customer due diligence purposes, but only if authorized by the "Reporting Company;" [iv] a federal agency on behalf of a foreign country (if the request is pursuant to a treaty or similar agreement); or [v] a prosecutor, judge or law enforcement agency in a "trusted" foreign jurisdiction, under certain conditions.

4 The Subsidiary Exemption does not apply if the exempt entity was a money service business, a pooled investment vehicle or an entity assisting a tax-exempt entity.

Kim V. Heyman is a strategic and passionate adviser with over 25 years of experience, providing legacy planning services to ultra-high-net-worth individual and family clients at Veritable, LP. Before moving to provide more holistic planning advice, Kim was a partner in a boutique estate planning law firm in Wayne, Pennsylvania. She sits on the board of the PEPC and she serves as Vice-Chair of the Emotional and Psychological Issues in Estate Planning Committee of the American Bar Association Real Property, Trust and Estate Law Section. Kim has written articles and spoken locally and nationally on estate planning, charitable planning and trust and estate administration topics. Kim received her J.D., cum laude, and her LL.M. in Taxation, both from New York University School of Law, and her B.A. from the University of Pennsylvania.



LIFE INSURANCE IS A VALUABLE ASSET

Life insurance is a powerful and necessary planning tool that provides financial stability and peace of mind. But, over time, personal and financial priorities change.

As a result, the decision is made annually to lapse or surrender $120B of death benefit on senior insureds. Selling these unwanted, unneeded or unaffordable policies can be a powerful source of liquidity to help capitalize existing investment strategies, fund healthcare, supplement retirement, pay down debt, or it can be a way to simply uncover "found money."

Policy owners received, on average, 5X more for selling their policies than if they were surrendered.

CASE STUDY

FACE AMOUNT: $4,500,000
UNIVERSAL LIFE

INSURED: MALE AGE 79
BELOW AVERAGE HEALTH

SURRENDER VALUE: $0

- ✓ $785,000 increase from first bid to last
- ✓ Bid history included 23 offers
- ✓ $1.66M more than the CSV

LIFE SETTLEMENT: $1,660,000

The seller was prepared to lapse the unneeded policy without a surrender value. Through a life settlement, his advisor wisely helped uncover significant hidden value that was used to balance his client's estate plan.

Selling a life insurance policy is not like selling other assets.
You can't log in to make a trade or ask a neighbor what their policy sold for.

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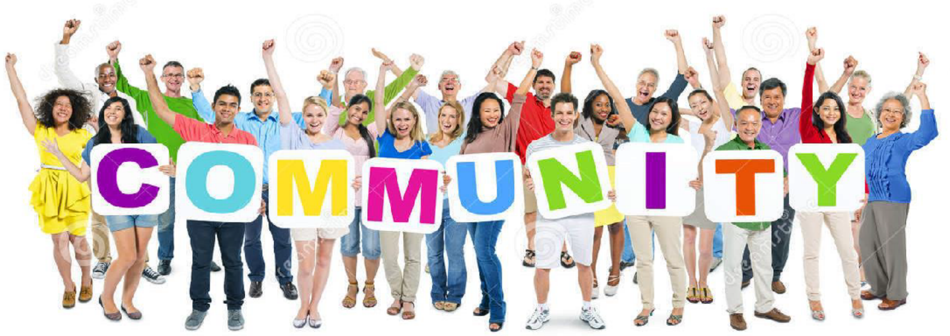

The Montgomery County Foundation
4 Sentry Parkway East, Suite 302 Blue Bell, PA 19422
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UPCOMING EVENTS

September 20, 2023—"*Unprepared for Fortune: Tackling the Top 10 Challenges of Sudden Wealth*", Speaker Michael B. Karwic, CFP®, CeFT®, CRPC®, AEP® at Boardroom Spirits in Lansdale

October 11, 2023—"*Creating and Maintaining great relationships*" Speakers Joe McLaughlin, CEO of Haverford Trust, James Dunigan, Retired CIO and managing executive of PNC Asset Management, Nicole Perkins, Partner and director at Gresham Partners, Former Executive Vice President of the PNC Financial Services Group and the Managing Executive of Hawthorn, PNC Family Wealth. At Philadelphia Country Club

October 26, 2023—Members only event; conversation about the "*Evolution of Journalism*" at Wissahickon Trails with Joanne Lublin and Michael Pollock

November 15, 2023—virtual meeting via Zoom—NAEPC speaker

January 17, 2024—Haverford Trust "*Economic/Market Update*" at William Penn Inn

National Association of Estate Planners & Councils

MCEPC is a member of the National Association of Estate Planning Councils (the "NAEPC") and as a member of MCEPC you are as well. NAEPC serves estate planning councils with goals of excellence in estate planning, education and collaboration.

Among your benefits as a member is access to the NAEPC Journal of Estate & Tax Planning that provides regular updates on important information regarding the ever changing world of estate and tax planning. NAEPC also offers Council of Excellence Awards, professional designations including the Accredited Estate Planner ("AEP") designation, the extensive Robert G. Alexander Webinar Series, LinkedIn social groups, and an outstanding annual conference with national speakers.

Charter Member

Montgomery County Estate Planning Council

PO Box 853
Spring House, PA 19477

Email: admin@mcepc-pa.org

www.mcepc-pa.org

Administrator's Corner….

If you have moved or will be making any changes to your membership information (address, email, phone, fax, professional designations, etc.) please notify the office as soon as possible.

More information about the website… We have received a few requests from our members for their "access code" to the MCEPC website. To view and access information on the Council website : http://www.mcepc-pa.org, you **DO NOT** need a login name or password. We currently do not have privileged information on our site and browsing it does not require a login name or password. Only administrative access is password restricted.

Feel free to browse and access the website for information, form downloads, meeting dates and information, and database. You can also pay for meetings and membership.

E-Mail: admin@mcepc-pa.org
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