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Nebraska Banker

SEPTEMBER/OCTOBER 2018

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NBA Past Chairman
(402) 363-7431
Cornerstone Bank
York

NBA EDITORIAL STAFF

RICHARD J. BAIER

NBA President & CEO
richard.baier@nebankers.org

SARAH SASSE-KILDOW

Director of Communications &
Marketing
sarah.sassekildow@nebankers.org

NBA Nebraska Bankers Association

233 South 13th Street, Suite 700
Lincoln, NE 68508
Phone: (402) 474-1555 • Fax: (402) 474-2946

LAUNCHING BLUEPRINT NEBRASKA

Richard J. Baier, President & CEO, Nebraska Bankers Association



THE STATE OF NEBRASKA, LAST YEAR, CELEBRATED ITS sesquicentennial (150th anniversary) with a variety of statewide events and activities focused on commemorating our great state's wonderful heritage. These events, while focused on our history, also fostered numerous conversations about Nebraska's future. One of the foremost leaders in the discussion about the future of Nebraska was University of Nebraska's President, Hank Bounds, who was instrumental in a statewide planning effort during his time working in Mississippi. President Bound's persistence coupled with leadership offered by a small group of the state's business leaders led to the recent launch of Blueprint Nebraska. This initiative is a statewide coalition of business and community leaders, policy makers and Nebraska citizens tasked with creating a plan or "Blueprint", for Nebraska's future economic growth, prosperity and quality of life.

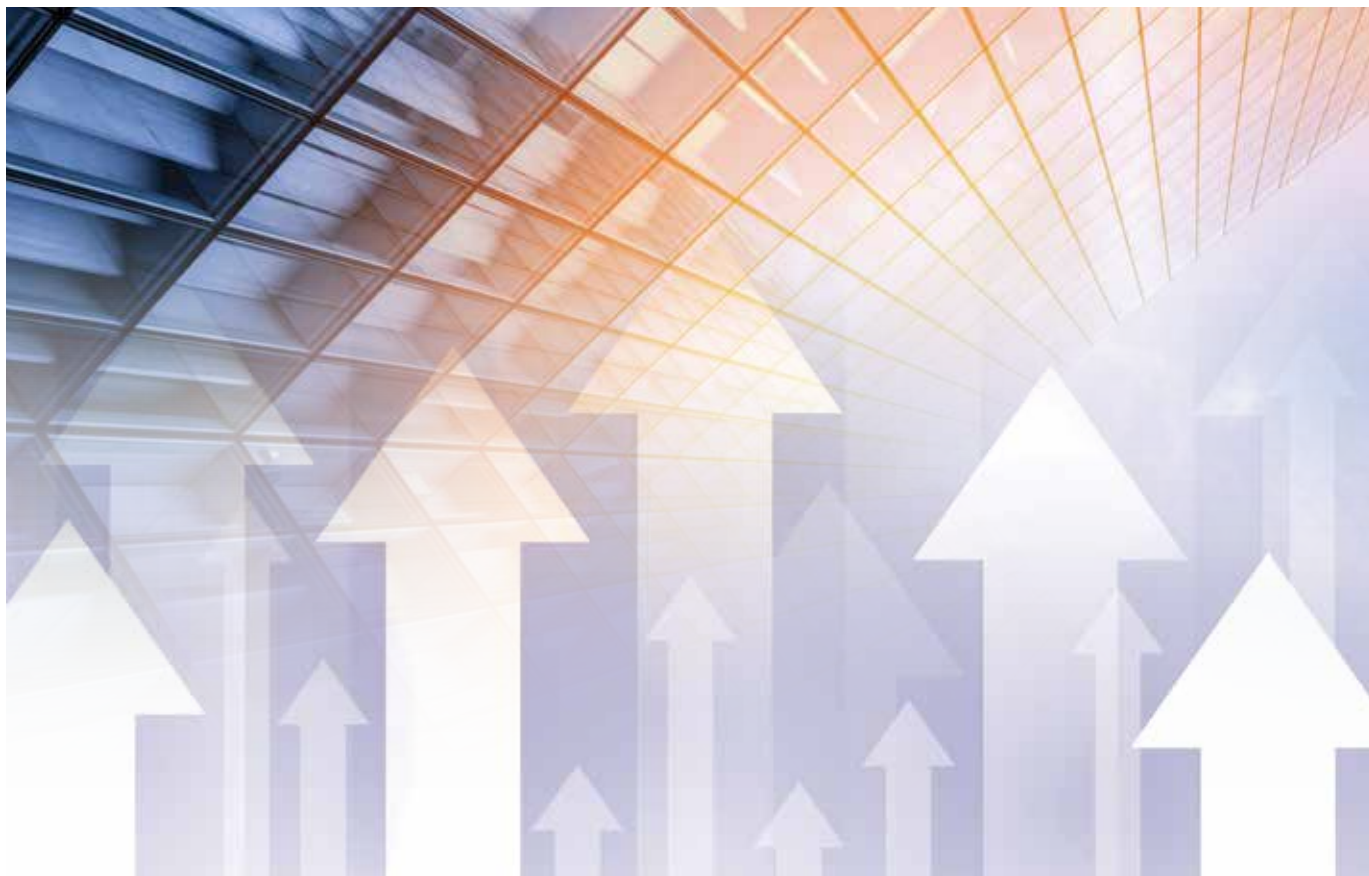
Co-chairs of the Blueprint initiative are Lance Fritz, chairman, president and CEO of Union Pacific Railroad based in Omaha, and Owen Palm, president and CEO of 21st Century Holdings in Scottsbluff. These gentlemen will work closely with a 21-member

statewide Steering Committee which includes strong representation of Nebraska bankers who actively support the NBA. These Steering Committee members include: Leslie Anderson of the Bank of Bennington, Tony Goins formerly with Cabela's Bank, Hod Kosman of Platte Valley Companies of Scottsbluff and Clark Lauritzen of First National Bank of Omaha.

Over the next 12-18 months, Blueprint Nebraska will conduct extensive research related to our state's competitive strengths and weaknesses. This research will incorporate comparative analysis with other states across the country, with a focus on unique growth prospects. There will also be ample opportunities for Nebraskans to offer their personal thoughts and ideas for making Nebraska even better for the next generation.

To help structure and focus the research and planning process, Blueprint Nebraska has established 16 separate industry

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NEW BANKS AS BELLWETHERS

Naomi Camper, ABA Chief Policy Officer, American Bankers Association

WHEN I JOINED ABA AS CHIEF POLICY OFFICER IN JUNE, A task force of bankers with experience launching and running new banks were mid-way through their analysis of why “de novo” activity had stalled in recent years. Their mission—as established by Ken Burgess, ABA’s chair and die hard de novo advocate—was to identify both challenges and solutions, in hopes of re-starting bank startups. As new as I was to ABA, I had no doubt why this was a critically important endeavor.

Just as banks are central to the economic vitality of the communities they serve, new bank charters signify the economic vitality of both the industry as well as our economy as a whole. New banks signal optimism, opportunity and growth potential.

The opposite — no new entrants — means less competition and fewer choices, which ultimately translates to less economic activity and growth, on which all banks depend for success. It may seem counterintuitive, but existing banks are actually better off when we see a healthy pipeline of banks in formation,

just as homeowners benefit when others are eager to buy into their neighborhood.

I first came to appreciate the importance of a dynamic banking industry — populated with banks old and new, large and small — when I worked for former Sen. Tim Johnson (D-S.D.) as staff director of the Senate Banking Subcommittee on Financial Institutions. The South Dakota bankers who visited the office made sure I knew it, and my later experience working for JPMorgan Chase only confirmed it.

That was in the early 2000s, when more than 100 new banks were chartered every year. Post-crisis, that number plummeted to fewer than two per year—and was yet another indicator that our economy and our industry had not yet fully recovered. The pace has started to pick up recently, along with the economy, but it’s still anemic. That’s why Burgess convened the ABA De Novo Task Force, a banker-led effort to identify the essentials for de novo success and major impediments to increased de novo activity. Many banks on the task force were started just

I first came to appreciate the importance of a dynamic banking industry — populated with banks old and new, large and small — when I worked for former Sen. Tim Johnson (D-S.D.) as staff director of the Senate Banking Subcommittee on Financial Institutions.

before the financial crisis. Their resilience and success through the crisis and its aftermath reminds us that new banks can succeed in any environment.

The task force agreed that successful de novo formation starts with selecting an experienced board and bank management team. De novos are poised for success when they combine their experience with a strong business plan and the capital necessary to support that plan. Unfortunately, the current requirements

for new bank formation prove to be more complicated.

We recently presented our findings and proposed solutions to the FDIC, and the timing couldn't be better. Not only is there new leadership at the agency willing to look into what may be impeding de novo activity, but the economy's robust growth presents the opportunity to ensure bank entrepreneurs — and the customers and communities they wish to serve — benefit from the rising tide. If we can help change

the course of de novo activity and facilitate new growth in the industry, we'll be shaping a vibrant future for banking. ▀



Naomi Camper is chief policy officer at the American Bankers Association.



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councils including a specific banking, finance and insurance council. These councils will be comprised of content experts and industry leaders. The banking, finance and insurance council will be led by former NBA Chairman, Jerry Catlett. Jerry will lead the group's research and strategy to further strengthen this sector of our state's economy. The NBA has agreed to assist the Blueprint Nebraska effort by offering support for this council.

Due to the leadership role bankers hold in their respective communities, banker input and participation is imperative to the success of this important longterm effort. First and foremost, I would encourage you to log onto www.Blueprint-Nebraska.org and complete the citizen survey.

Second, please plan to attend one of the townhall legislative forums being held in your respective region and offer your suggestions for growing our state. The Blueprint Nebraska Road Tour kicked off on August 27, in Aurora, Nebraska, and has scheduled more than 30 additional community sessions through the end of October. An updated event schedule is available to view on the Blueprint Nebraska Facebook page and will also be communicated in the NBA weekly Update.

Third, if you have specific strategies to better position the banking, finance or insurance sectors for future growth in our state, please direct ideas and suggestions to Jerry Catlett at jcatlett@BruningBank.com. Jerry has actively sought banker specific input about workforce development, positioning Nebraska as a primary location for bank charters, addressing the burgeoning student loan debt load and the importance of improving financial literacy education, and is open to listening. I encourage each banker to reach out and share your valuable perspectives.

Finally, stay involved in the process through its conclusion in late 2019. Rapid evolution in technology, transportation, agriculture and changes in other historically strong industry sectors have placed Nebraska at a true economic crossroads. Together, as bankers and as Nebraskans, we must work to ensure a better Nebraska for future generations. ■



Contact Richard J. Baier at (402) 474-1555 or richard.baier@nebankers.org.



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Community Reinvestment Act Modernization: A Touch Up or a Total Overhaul?

Jeff Makovicka, Kutak Rock LLP



We have a once-in-a-generation opportunity to build upon that legacy of community development and make the Community Reinvestment Act work better for everyone.

— Joseph M. Otting, Comptroller of the Currency, August 30, 2018

TWENTY-FIVE PAGES PUBLISHED ON August 28th by the Office of the Comptroller of the Currency (OCC) may finally kick-off what bankers and regulators have been anticipating since early last year: Modernizing the Community Reinvestment Act of 1977

(CRA). On August 28, 2018, the OCC issued an advance notice of proposed rule-making (ANPR) seeking comment on the best ways to update the regulatory framework implementing the CRA. But how to modernize the CRA has long triggered

intense debate and disagreement among all stakeholders as banks favor expanding CRA assessment areas and consumer groups worry that a broad expansion would simply make it easier for banks to score high CRA grades. Most agree, however, that the CRA is out-of-date and that the majority of ideas for reform are not controversial, including modernizing it by recognizing the growing importance of internet banking and the declining importance of physical branch locations.

This process started with the OCC's revised policy¹ on fair lending downgrades of CRA ratings issued October 2017. This revision, released by then-acting Comptroller Keith Noreika, eased certain CRA regulatory burdens for OCC-regulated

banks. Since then, Comptroller Joseph Otting further eased the regulatory burden with a June 2018 bulletin² relaxing certain CRA exam procedures and an additional release³ in August 2018 similar to the October 2017 revision.

Prior to releasing the ANPR, the OCC engaged over 1,000 stakeholders on the topic of the existing CRA framework and whether it is meeting the credit needs of communities in the constantly changing landscape of banking. The OCC's stated goal for issuing the ANPR is to obtain additional public input on revisions to CRA regulations to encourage more community and economic development by encouraging banks to lend more to low and moderate-income ("LMI") areas, small businesses, and other communities in need of financial services.

The ANPR

The ANPR follows recommendations by the U.S. Treasury for the Federal banking regulators to reform CRA regulations to reflect the significant technological evolution experienced by the banking industry since the CRA's enactment.⁴ Treasury's memorandum was directed to the primary CRA regulators: the OCC, the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve System (Federal Reserve). In issuing the ANPR, the OCC becomes the first of the three bank regulators to move forward on updating its CRA regulations.⁵

In the ANPR, the OCC described stakeholder concerns that (1) the CRA's statutory purpose of encouraging banks to help meet the credit needs of the communities they serve including LMI areas "is not fully or effectively accomplished through the current regulations," (2) the current CRA regulatory framework "no longer reflects how many banks and consumers engage in business of banking," and (3) the current CRA regulatory requirements lack "clarity, consistency, and certainty." The ANPR requests responses to 31 questions across several topic areas, including (1) the current CRA regulatory approach; (2) a modernized CRA regulatory approach; (3) redefining communities and assessment areas; (4) CRA-qualifying activities; and (5) recordkeeping and reporting. Comments on the ANPR will be due no later than 75

days after the date it is published in the Federal Register.

(1) Current CRA Regulatory Approach

The ANPR seeks input on the extent to which stakeholders view the current CRA regulatory framework as clear and easy to understand and whether the regulations have been applied consistently and whether CRA ratings⁶ are assigned in a fair, objective, and transparent manner. The ANPR also solicits comments on whether the existing regulations are effective in encouraging banks to serve the convenience and needs of their communities in a way that fulfills

the objectives of the CRA. Commenters are encouraged to identify which features and aspects of the current framework should be retained or modified.

(2) Modernizing the CRA Regulatory Approach

The ANPR discusses the potential adoption of a more metric-based method for CRA performance evaluations pursuant to which the federal banking agencies would separately evaluate retail and community development activities using quantitative benchmarks to measure qualifying CRA activities and assign rat-

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While both Federal Reserve Vice Chairman for Supervision Randal Quarles and FDIC Chairman Jelena McWilliams have signaled their support for CRA reform, the fact that the Federal Reserve and FDIC did not join the OCC in issuing the ANPR possibly hints these regulators may not fully agree with the OCC's approach to CRA reform.

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ings. Such a method, according to the OCC, would be more transparent and dynamic than the existing performance evaluation method. Evaluations would be tailored for a variety of factors including a bank's size and business model, the demographic characteristics of the customer base, and unique economic and financial conditions in certain communities served by the bank. The OCC suggests that, under such a metric-based method, CRA-qualified activity could be represented as a dollar value and compared to several objective criteria, such as a bank's total domestic assets, deposits, or capital.

The ANPR solicits comments on how an alternative evaluation method should be designed and applied.

(3) Redefining Communities and Assessment Areas

Under current CRA regulations, a bank's CRA performance evaluation is based primarily on the CRA-qualifying activities that occur in or serve a bank's assessment areas. Because these assessment areas are limited to the areas surrounding a bank's main office, branch offices, and deposit-taking ATMs, the assessment areas of some banks may not include a substantial portion of the areas in which they conduct activities. The ANPR solicits input on how a bank's communities should be interpreted and assessed under a modernized CRA regulatory framework. The ANPR suggests that under an updated framework, banks would continue to receive CRA consideration for qualifying activities within their branch and deposit-taking footprint, but could also receive consideration for providing services to LMI communities in other underserved areas outside of that footprint. For example, banks could include within their assessment areas those areas in which a bank has a concentration of loans or deposits, non-depository affiliate

offices, or loan production offices. Such an updated approach to determining a bank's assessment areas could, according to the OCC, address the criticism that the current framework restricts taking account of banks' lending and investment activities in areas of need that are within the reach of a bank's operations, but outside of delineated CRA assessment areas. Of note, the OCC recognized that expanding CRA credit beyond the current delineated assessment areas could help promote services and activities for remote rural populations. The ANPR also notes that an updated approach would be more accommodating for banks with no physical branches.

(4) Expanding CRA-Qualifying Activities

Some stakeholders expressed concerns about which activities receive CRA consideration. Hence, the ANPR invites comment on regulatory changes that could (a) ensure CRA consideration for a broader range of activities supporting community and economic development in banks' CRA performance evaluations and (b) set clear standards for determining whether an activity qualifies for CRA consideration. In the ANPR, the OCC expresses its particular interest in the role of small business credit in LMI communities and under what circumstances a "small business loan" should receive CRA consideration. The ANPR also includes a number of specific questions regarding potential updates to the scope of CRA-qualifying activities, including, for example: whether certain categories of loans and investments should qualify for CRA consideration presumptively or, within such categories, only those that are defined as community or economic development by federal, state, local or tribal governments; whether banks' expanded use of small and disadvantaged service providers should receive CRA consideration; the circumstances under which various forms of consumer lending (e.g. student, auto, or credit card) should receive CRA consideration; and the extent to which purchased loans and portfolio loans (as opposed to loans originated for subsequent sale) should be weighted differently for CRA purposes.



(5) Recordkeeping and Reporting

The ANPR indicates that a modernized CRA regulatory framework could facilitate better tracking and monitoring by banks of their CRA performance and allowing for greater comparison to peer banks. The OCC recognized in the ANPR that the current regulatory approach “does not facilitate regular tracking, monitoring, and comparisons of levels of CRA performance by banks and other stakeholders.” The ANPR invites comments on the extent to which recordkeeping and reporting standards should be modified and whether the economic impact and cost-benefit analysis of any potential changes would justify implementation.

The answers that bankers, consumer groups and others provide in response to the ANPR could ultimately assist regulators in revamping CRA policy. Stakeholders seemingly agree that the 40 year-old law, meant to encourage banks to lend in LMI communities and prevent discrimination, needs modernization.

While both Federal Reserve Vice Chairman for Supervision Randal Quarles⁷ and FDIC Chairman Jelena McWilliams⁸ have signaled their support for CRA reform, the fact that the Federal Reserve and FDIC did not join the OCC in issuing the ANPR possibly hints these regulators may not fully agree with the OCC’s approach to CRA reform. Some in the industry believe this “go at it alone” ANPR significantly deviates from standard interagency “group think”, “consistency” and “conformity” for all regulated banks regardless of charter type.⁹ However, “[i]t’s not unprecedented for agencies to issue ANPRs independently and move forward with actual rule proposals on an interagency basis later.”¹⁰ The OCC’s current actions regarding the ANPR are consistent with its choice to act alone and solicit public comment on certain aspects of the Volcker Rule in August 2017, with the other relevant agencies following suit nine months later.¹¹ It is possible, therefore, that an interagency Notice of Proposed Rulemaking (“NPR”) will be forthcoming and the

content and scope of any future NPR may deviate to some degree from the ANPR.

2018 will continue to be an impactful year for the CRA. As expected, there is considerable overlap between the themes in Treasury’s recommendations and the ANPR, although the ANPR does not set forth a comprehensive approach to revising the CRA framework. There are a number of potential other reforms to the existing CRA framework, some of which were proposed by Treasury (which banking regulators may consider as the rulemaking process continues).

Whether regulators affect a significant overhaul or just a touch up remains to be seen. What is certain, though, is that some sort of change is coming. Banks should join the party and submit comments to the ANPR no later than 75 days after the date it is published in the Federal Register. Comments unrelated to the specific asks in the ANPR are welcome too, as the OCC invites “other ideas and options for modernizing the CRA regulatory framework not identified in this ANPR.” ▶

¹ OCC Policies and Procedures Manual Issuance 5000-43 (October 12, 2017) (“PPM 5000-43”). PPM 5000-43 clarifies the relationship between evidence of illegal credit practices and an institution’s CRA rating.

² OCC BULLETIN 2018-17, Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations (June 15, 2018).

³ OCC BULLETIN 2018-23, Revisions to Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (August 15, 2018). OCC updated its CRA manual to reflect that banks can see their rating downgraded two levels for “particularly egregious” practices. It remains to be seen how the OCC will define “particularly egregious” practices. This update in effect reverses a 2017 (PPM 5000-43) change to the manual stating that the OCC will no longer lower a bank’s CRA rating by more than one level.

⁴ See Memorandum from the U.S. Department of the Treasury to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (April 3, 2018).

⁵ Treasury has released a statement by Secretary Mnuchin commending the ANPR to modernize the regulations that implement the CRA. Treasury Secretary Mnuchin Statement on OCC Proposed Rulemaking to Modernize CRA Regulations (August 28, 2018).

⁶ There are four statutory rating categories: outstanding, satisfactory, needs to improve, and substantial non-compliance. 12 U.S.C. 2906(b)(2).

⁷ See CRA needs to come off ‘autopilot,’ Fed’s Quarles says, American Banker (April 17, 2018).

⁸ See New FDIC Leader Joins Push to Re-Evaluate Banking Rulebook, Wall Street Journal (August 6, 2018).

⁹ See Is the OCC becoming a ‘lone wolf’ on bank policy, American Banker (August 31, 2018).

¹⁰ See There’s no harm in OCC’s single-agency approach on CRA — for now, American Banker (August 27, 2018).



For more information, contact Jeff Makovicka at Kutak Rock LLP: (402) 346-6000 or jeff.makovicka@kutakrock.com. Mr. Makovicka is a member of Kutak Rock LLP’s banking practice group where he concentrates on bank matters.



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TECH TALK

IS YOUR IT AUDIT FALLING SHORT?

Keith Laughery, CISA, CISSP, CoNetrix

ONE OF THE CHALLENGES COMMUNITY BANKS FACE IN selecting an IT audit partner is the confidence they are comparing apples to apples when reviewing security testing proposals. Not only do the definition of terms vary, some audit firms sell an “IT Audit” that is nothing more than a GLBA regulatory compliance audit. Though confirming your Information Security Program meets your examiners’ expectations is important, an audit without a thorough internal network assessment really is not an IT audit. Your technical controls like patch management, malware protection, user access controls, Internet content filtering, file access controls, etc. are where the rubber meets the road. If these controls are not functioning as intended, it becomes a moot point to have them faithfully listed in your InfoSec Risk Assessment and Policies.

Assuming your IT Audit includes an **internal vulnerability assessment**, there are still vast differences in the nature and results of scans.

Authenticated Scans vs Unauthenticated Scans

Security testers worldwide routinely use vulnerability scanners to perform **unauthenticated** scans to find network threats. These scans find basic weaknesses and detect issues within operating systems, open network ports, services listening on open ports and data leaked by services. Unauthenticated scans

provide insight into what an intruder without credentials could see. While this is a valuable perspective, it does not identify every weakness or vulnerability. Additionally, many ports and services do not like this interrogation process (by design) and will simply refuse to respond to the scanners’ queries. An **authenticated** scan eliminates the need to probe. The vulnerability scanner can just log in, ask the operating system what’s installed, what’s running and where.

Oliver Rochford (<https://www.securityweek.com/z-vulnerability-management-authenticated-scanning>) offers this excellent non-technical illustration. Imagine you have a choice between opening a box and looking inside, or shaking and prodding it from the outside to guess what it may contain. Imagine further, if you fail to successfully guess the contents of the box, something bad may happen...something damning, damaging or dangerous. Which choice would you make?

So, it is with unauthenticated vs. authenticated scans. Also called credentialed, logged-in or trusted scanning, an **authenticated** security scan is performed as a logged-in (authenticated) user. “Authenticated scans determine how secure a network is from an inside vantage point. The method finds many vulnerabilities that cannot be detected through an unauthenticated scan.” (Margaret Rouse – <https://whatis.techtarget.com/definition/authenticated-security-scan>)



Authenticated Vulnerability Scanning Advantages

If the value of authenticated scanning is still unclear, here are some benefits:

1. Authenticated vulnerability scans identify vulnerabilities which are often undetected by unauthenticated scanning.
2. Authentication allows the scanning tool to do its job better.
3. Data harvested by authenticated scans is more accurate.
4. Authenticated scans usually have less impact on a system – since the scanning tool is running with elevated privilege, ports and services respond without hesitation.
5. Regulatory examiners are beginning to recommend authenticated scanning.

Now What?

First, you need to determine if your existing IT audit firm performs authenticated scans. If you have not been providing your IT auditor with a **Windows Active Directory account** with elevated privileges (such as **Domain Admin** group), your scans have been *unauthenticated scans*.

As you select an IT audit firm, in addition to performing authenticated vulnerability scans (confirm they will require the type of account described above), look for a firm:

- ✓ Whose auditors are certified and experienced
- ✓ Who will be a partner with you, patiently explaining previously unreported technical findings
- ✓ Who will provide some guidance/recommendations for mitigating these new deficiencies

An IT Audit without an **authenticated** internal network vulnerability assessment is like fishing with a teeny, tiny hook or a shooting a bow with crooked arrows. While you might catch a minnow or hit the target somewhere, you will surely miss the trophy fish and the bullseye. ▶



Keith Laughery is an Account Manager for CoNetrix. CoNetrix serves the community banking community by providing information security consulting, IT/ GLBA audits and other security testing engagement and through its Tandem Security and Compliance Software, a suite designed to assist community banks with GLBA and other regulatory compliance. CoNetrix has performed almost 3,000 security-testing engagements since 2000 and has almost 1,300 clients from all 50 states. Visit <https://conetrix.com/security> or contact Keith at klaughery@conetrix.com or 800-356-6568.



The Dos and Don'ts of Deposit Advertising

Daniela Clark, Compliance Alliance



ADVERTISING RULES CAN BE CONFUSING. THE advertising rules for banks are set out in several different regulations and overseen by several different regulatory agencies. Generally, the CFPB has been given regulating power over some advertising to consumers, including the advertising requirements under Reg DD. The FDIC governs when the FDIC logo and statement must be used.

Regulation DD defines an advertisement as a commercial message in **any** medium, including social media, that invites, offers, or generally announces the availability or terms of an existing or new account.¹ A deposit account is a time, demand, savings, or NOW account, including deposit accounts opened as a condition of obtaining a credit card, foreign currency accounts, IRAs and SEPs, PODs and “Totten trusts”, and an account that is held by or for a deposit broker, if interest in the account is held by or offered to a consumer.²

An advertisement may not be misleading or misrepresent the deposit agreement.³ It should not state that an account is “free”, “no cost”, or “fees waived” if it has any maintenance or activity fees. Maintenance or activity fees are 1) fees for not meeting a minimum balance or exceeding a number of transactions, 2) reasonably expected transaction and service fees, 3) flat monthly service fee, or 4) fees to deposit, withdraw, transfer funds, or per-check or per-transaction charges. A bank may, however, advertise that there are no deposit or withdrawal fees, if it is clear that a monthly service fee, for example, may be charged. If an account is free for a specific amount of time, it may state that it is free for a specific time.⁴

Annual Percentage Yield must be stated at least once as “Annual Percentage Yield” and then may be referred to as APY. It also “triggers” additional terms (“trigger terms”) that must be included in the advertisement. If there is a variable rate, the advertisement should state that the rate may change after the account is opened. The advertisement⁵ should state the period of time the APY will be offered or is accurate. For example, 12% APY accurate as of 8/10/2018. Any minimum balance

required to obtain the APY should be disclosed. If there are tiers, it should be included for each tier. There should be a statement that fees could reduce the earnings on the account. For time accounts, the term of the account should be disclosed and if there may be early withdrawal penalties and any required interest payouts.⁶ If the advertisement states that the APY and other terms may vary depending on the initial deposit or term, it does not need to disclose every possible combination available. The bank may instead disclose an example such as, "For example, our 12-month certificate of deposit accounts currently pays 2.25% annual percentage yield."⁷

Certain advertising mediums are exempt from some of the trigger terms rules. Radio and television ads, billboards and other outdoor media, and telephone response machines are not required to disclose variable rates, time the APY is offered, minimum opening deposits, effect of fees, early withdrawal penalties for time accounts, or the minimum balance necessary to obtain a bonus and when it will be provided. For advertisements

made for tiered-rate accounts through telephone response machines, the advertisement must state the APYs and the balance required for each tier.⁸ However, if it is feasible and practical to do so, it would be best practice to include all trigger term disclosures.

Indoor signs are not subject to any of the trigger term disclosures. Indoor signs are signs inside the bank. This includes advertisements displayed on computer screens, banners, posters, and chalk or peg boards but does not include brochures or computer printouts that the consumer may take with them.⁹

It can sometimes be challenging to include all of the required disclosures in electronic advertising. Sometimes it is a digital copy of a flyer and the disclosures fit easily. Other times the advertisement may be restricted in its size, such as in a small banner advertisement. In that case, it must contain a hyperlink for additional information directly next to or within a statement regarding a term that requires additional disclosures. This is especially true for Trigger Terms.¹⁰

There are also special rules related to bonuses. Regulation DD defines a bonus as a "premium, gift, award, or other consideration worth more than \$10 (whether in the form of cash, credit, merchandise, or any equivalent) given or offered to a **consumer** during a year in exchange for opening, maintaining, renewing, or increasing an **account** balance. The term does not include **interest**, other consideration worth \$10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses."¹¹ However, discount coupons, such as 50% off at a restaurant, are not considered a bonus. Discounts or fee waivers for other products offered by the bank, such as a safety deposit fee, are also not considered a bonus. Furthermore, if an item has a value of less than \$10, it is also not a bonus under the De Minimis Rule. The rule states that the bank may use the IRS value standards to determine the value of items, but general items that would be considered to be worth less than \$10 are t-shirts, coffee mugs, and other small promotional merchandise.¹² The value

Deposit Advertising — continued on page 22

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The FDIC advertising statement or logo may not be used in advertisements that are for non FDIC insured products. This list includes non-deposit products, such as insurance products, annuities, mutual funds, securities, credit products and hybrid products, such as a sweep account.

Deposit Advertising — continued from page 21

of items aggregate per calendar. This means that even if the item is not given at the time of the account opening, or is given throughout a calendar year and in aggregate those items have more than \$10 in value, it is considered a bonus.¹³

If a bonus is given, certain disclosures must also be given. The advertisement must also include the annual percentage yield, as well as any requirements to obtain the bonus such as time requirements, minimum balance to obtain the bonus or open the account, and when the bonus will be provided.¹⁴

If overdrafts are mentioned, the advertisement must disclose each overdraft fee, the transaction categories for which a fee would apply, the time the consumer has to pay the overdraft, and when the bank will not pay an overdraft.¹⁵ This includes any mention of an overdraft limit or overdraft limit balance, even if it is mentioned in a periodic statement or in an automated telephone system, or ATM screen. It does not, however, include any transfer services, such as transferring funds from a savings account to the deposit account to avoid the overdraft, even if there is a fee for the transfer service.¹⁶

There are also specific rules for the FDIC logo. Any advertising for a FDIC insurance deposit account should include the official FDIC advertising statement or logo.¹⁷ If the lines will be eligible because the logo has been made too small, the lines may be blocked out or dropped, showing just the FDIC symbol. The official statement must be used in advertisements for deposit products and services or promotions for non-specific banking products and services offered by the bank. For example, an advertisement that simply states “Anytown Bank, offering a full range of banking services.” or a vehicle wrapped with the bank’s logo and slogan.

The official advertisement state or logo are not required in many scenarios. The bank is not required to use the FDIC statement or logo on statements or reports of condition that must be

published according to state or federal law. It need not be used on “stationary (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, etc.” Signs or plates in or on the bank offices need not have the statement or logo. It does not have to be included when the bank name is listed in a directory, when an advertisement does not state the bank name or show the bank logo, or when the bank participates in a joint advertisement with a non insured bank. Radio or television advertisements shorter than 30 seconds need not use the logo or statement. It also does not need to be included on promotional materials such as calendars, pens, and keychains, as it would be impractical.

The FDIC advertising statement or logo may not be used in advertisements that are for non FDIC insured products. This list includes non-deposit products, such as insurance products, annuities, mutual funds, securities, credit products and hybrid products, such as a sweep account. If an advertisement is for both FDIC insured and non FDIC insured products, it should be split in such a way that it is clear which products are FDIC insured and which are not. If the bank is advertising a non FDIC insured product, it should state in a clear and conspicuous manner that the product is not insured by the FDIC, that the product is not a deposit or other obligation of, or guaranteed by, the depository institution and that the product is subject to investment risks, including possible loss of the principal amount invested. ▶

1<https://www.consumerfinance.gov/eregulations/1030-2/2011-31727#1030-2-b>
2<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-2-b-Interp>
3<https://www.consumerfinance.gov/eregulations/1030-2/2011-31727#1030-2-h1>
4<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-2-a-Interp-1-i>
5<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-a>
6<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-8-a-Interp-10-v>
7<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-8-b-Interp-3> and
8<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-c>

6<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-c>
7<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-8-b-Interp-3>
8<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-e>
9<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-e>
10<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-8-a-Interp-10-v>
11<https://www.consumerfinance.gov/eregulations/1030-2/2011-31727#1030-2-f>
12<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-2-b-Interp-2-vi>
13<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-2-b-Interp-2-vi>
14<https://www.consumerfinance.gov/eregulations/1030-8/2011-31727#1030-8-d>
15<https://www.consumerfinance.gov/eregulations/1030-11/2011-31727#1030-11-a>
16<https://www.consumerfinance.gov/eregulations/1030-Subpart-Interp/2011-31727#1030-11-b-Interp-1>
17<https://www.fdic.gov/regulations/laws/rules/2000-5200.html>



Daniela Clark serves as Associate General Counsel for Compliance Alliance. She holds a Bachelor's in Business Administration with a concentration in Management from the University of Texas at Arlington, AACSB. She continued her interest in business by interning with the Entrepreneurship Clinic at Texas A&M University School of Law, from which she received her JD. Daniela has eight years of experience working in auto finance compliance for DealerSocket, AutoStar Solutions, SecureClose, and Ignite Consulting Partners. As one of our hotline advisors, Daniela helps C/A members with a wide range of regulatory and compliance questions.



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LARGE FCS ASSOCIATION LAUNCHES CONSUMER LENDING BRAND

ON AUG. 1, FARM CREDIT MID-AMERICA (MIDAM), THE SECOND largest FCS association, announced at a PGA TOUR event that it was rebranding its consumer lending division. With \$22.5 billion of assets, MidAm serves Ohio, Indiana, Kentucky and Tennessee. According to its news release, MidAm, “is improving its consumer lending division by launching the brand Rural 1st. Building on its existing experience, the lending cooperative has streamlined processes, added new technology, and specialized a team of expert loan officers [sic] — all to make buying rural property as simple as possible.” Why MidAm needs a consumer lending division is an obvious question the news release did not address. The release also made no mention of the fact that MidAm is an FCS association — instead referring to itself as a “company” — that like other FCS institutions was created to provide credit to farmers and ranchers who cannot obtain credit elsewhere.

The news release quoted Art Whaley, MidAm’s senior vice president for consumer lending, as stating that “our customer’s dream of rural living is the sole purpose of our business.” That certainly is not why Congress created the FCS. The release summarizes the “unique and specialized lending options, tailored specifically for rural land, home purchases and construction projects” offered by MidAm, including lot loans, recreational land loans, construction loans, home loans and home equity loans. What is interesting about the news release and MidAm’s home loan page is what it does not state about the restrictions on rural home loans imposed by the Farm Credit Act and regulations under that act supposedly enforced by the Farm Credit Administration. Importantly, an FCS rural home loan can only finance a “single-family moderately priced dwelling located in a rural area that will be owned and occupied as the rural homeowner’s principal residence.” To its credit, the MidAm notes an

important statutory limitation on FCS home loans — the home must be located in a rural area or in a town with a population of no more than 2,500.

An open question is how well does MidAm comply with all of these restrictions, which in turn raises this question: How good a job does the FCA do in enforcing these restrictions, especially the requirement that FCS associations can only finance “moderately priced dwellings” that are the homeowner’s “principal residence”? Based on reports I have received from bankers over the years as well as my own research, the FCS has financed rural estates with large houses as well as second homes and has financed homes in towns with a population exceeding 2,500. Especially problematic is MidAm’s willingness to finance a “weekend recreational retreat” and to provide “recreational land loans” that can be used for “hunting and fishing, horseback riding or other outdoor activities.” There is, of course, nothing agricultural about those properties; worse, a family’s second home may have been constructed on the property. None of this financing activity, of course, relates to agriculture and all of it can be provided by commercial banks. MidAm’s Rural 1st lending is the type of questionable FCS activity that the Senate and House Agriculture Committees should cast a critical eye on.

Is the FCS adequately acknowledging credit-quality problems?

As ag lenders know all too well, financial distress among farmers has grown due to the falling crop prices and the consequent decline in farm net income. From a peak of \$123 billion in 2013, net farm income is forecast to be about \$60 billion this year. Retaliatory tariffs imposed by China and other importers of U.S. agricultural exports will drive agricultural prices and farmers’ income even lower. That financial stress will feed back to ag lenders, including the FCS, which will lead to deteriorating credit quality among some borrowers. This question therefore arises — is the FCS, and the FCA, being sufficient aggressive in recognizing emerging loan-quality problems, specifically those loans that should be placed on a nonaccrual status?

On the surface, the FCS looks reasonably well reserved for future loan losses, with its allowance for loan losses at June 30, 2018, equal to 67 percent of total non-performing assets, most of which were nonaccrual loans. However, that percentage was down from 79 percent at Dec. 31, 2017. Drilling deeper into the numbers, though, raises questions about the adequacy of the FCS’s loan-loss allowance and the assessment of its loan quality, especially at some associations. Most telling, loans classified as substandard or doubtful rose during the first half of 2018, reaching 3.3 percent of total loans outstanding, up from 3.1 percent at the end of 2017. More troubling, at June 30, 2018, non-accrual loans equaled just 24 percent of substandard/doubtful loans. While not every loan so classified should have a nonaccrual status, one can reasonably wonder if a sufficient number of FCS loans are on a nonaccrual status. More aggressively putting loans on such a status would, of course, reduce the FCS’s reported profits.

Key numbers the FCS publishes for its 25 largest associations — those with total assets exceeding \$1.5 billion at June 30,

2018 — reveal quite a disparity between, one, nonperforming assets as a percent of gross loans and other property owned, and two, the loan loss allowance as a percent of gross loans — see table on page F-58 in the June 30, 2018, Quarterly Information Statement of the Farm Credit System. Even though agricultural conditions and crops grown vary greatly across the country, questions should be raised as to whether this disparity should be so great. For example, the nonperforming assets percentage of these associations at June 30, 2018, ranged from 0.19 percent of gross loans to 1.95 percent. The loan-loss allowance as a percent of nonperforming assets varied greatly, too, ranging from 216 percent down to 26 percent. Farm Credit Mid-America, discussed above, at 28 percent, was among the least well-reserved associations. ▶



To contact Bert Ely, email bert@ely-co.com, phone (703) 836-4101, or send mail to P.O. Box 320700, Alexandria, Va. 22320.

If your bank belongs to the American Bankers Association (ABA), you can enjoy a free email subscription to Farm Credit Watch or you can read it monthly online at www.aba.com. To receive

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HSAS – AN INVESTMENT TOOL BEYOND HEALTHCARE

Carrie Horn, Ascensus



TO NO ONE'S SURPRISE, HEALTH SAVINGS ACCOUNTS (HSAs) continued to experience major growth throughout 2017. According to Devenir, there were over 22 million HSAs open at the end of 2017, an increase of 1.2 million from the end of 2016. HSAs also held assets worth roughly \$45.2 billion, an increase of 22 percent over year-end 2016. These numbers continue a trend that the market has seen for many years, but what are some of the transitional factors behind this sustained growth?

Key Growth Factors

When looking at last year's strong asset growth, 2017 was affected by three key factors.

1. **Invested Amounts** – Credit needs to be given where it is due. At the end of 2016, the Dow Jones Industrial Average closed at 19,975. On December 31, 2017, that same index closed at 24,719. This 25 percent market gain accounts for only part of the growth as invested assets grew by 53 percent year over year. HSA owners who were already invested in the market realized strong growth based on the market's success. They had already made the transition from spender, to saver, to investor, and reaped the benefits. The increased asset size also illustrates that a number of new HSA owners made the transition into long-term investing.
2. **Carry-Forward Balances** – Devenir's research shows that for the fourth year in a row, contributions exceeded distributions by more than \$5 billion. This continual carry-forward balance is a key driver in asset growth, but more importantly, it illustrates that a significant percentage of HSA owners are building HSA balances

versus spending or, at times, being forced to spend their flexible savings account balances.

3. **Payroll Deduction** – According to Devenir, the percentage of employee contributions made through payroll deduction increased from 46 percent of the total in 2016 to 63 percent in 2017. In addition, the average contribution increased from \$1,786 to \$1,921.

The last factor is helping to create a macro shift in long-term savings through the use of payroll deduction.

Planning for the Future

Thinking beyond immediate health expenses, a greater number of consumers are looking at HSAs as vehicles for their future health care needs. According to a report released by ConnectYourCare, this trend increased from 40.5 percent in early 2017 to 44.9 percent in early 2018.

Time and experience are shifting how individuals look at HSAs. They continue to evolve along the model of spender, to saver, to investor. But individuals are further evolving by looking at HSAs as a key supplement to future health care expenses in retirement. Remember, estimated health care spending during retirement ranges from \$250,000 to \$400,000 (depending on which article you read).

When saving for retirement, an historically accepted principle has been to contribute (or work up to contributing) the minimum amount necessary to obtain full employer matching dollars in a retirement plan. Hence the phrase "it's free money". But as consumers begin incurring major health care expenses, they'll start connecting the dots between these unexpected expenses and their overall retirement needs. They'll quickly realize that their need for more substantial retirement savings is critical. They'll also start thinking of where to place their payroll deferrals, which could create a possible competition between retirement plan deferrals and HSA deferrals. "Where should I invest my money?" is a question that more employees will be asking of their employers and of their advisors.

Consumer Habits

A study conducted by Alegeus outlined that what consumers believe and what they do can be vastly different when it comes to understanding how to cover expenses for current and future healthcare needs. According to Alegeus' research, 51 percent of the respondents fear unexpected healthcare expenses near-term. In addition, 68 percent believe themselves to be in the saver category (described earlier) where they focus on carrying forward HSA assets year after year. The reality is that only 23 percent of consumers save anything beyond the current year and more than 50 percent underfund their healthcare savings. What

is perhaps the most disheartening statistic from the Alegeus survey is that 70 percent of the participants could not pass a basic HSA knowledge test.

The New Challenge

Those of us who assist employers and their employees through retirement and health care planning are facing a new challenge. A recent article published by the Journal of Financial Planning⁴ indicates that most employees are better off deferring to their HSA first in order to cover the current year's potential expenses. Employees should then begin deferring in their 401(k) plan and work toward maximizing the employer match. The study emphasizes that deferred dollars used for qualified medical expenses are tax-exempt and can provide an immediate benefit if needed. After the employer match is achieved, then employees should begin planning where the next dollars deferred are best served.

Remaining Competitive

Whether you work in a bank or credit union serving local employers or employees, or you're an advisor seeking to strengthen your role with an employer, it is critical to understand that the environment is requiring a stronger knowledge of the role in health care—both near and long-term when employees are seeking answers on where to place those precious deferral dollars. You and your teams will need to understand this new balance in order to remain competitive. ▶



Carrie Horn is a Consultant with the ERISA Compliance Department at Ascensus. In her position, Ms. Horn serves as an instructor for Ascensus seminars, workshops, conferences, and institutes, as well as seminars for specific associations and financial organizations upon request. Ms. Horn also performs compliance reviews of IRA trustees' and custodians' IRA departments, which include assessments of internal controls and procedures, and compliance reviews of IRA documentation, tax reporting, and tax withholding. Ms. Horn is also one of the primary drafters of IRA and qualified retirement plan forms and documents that Ascensus makes available to financial organizations.

Ms. Horn is a graduate of Minnesota State University, Moorhead, with a Bachelor of Science degree in accounting. She has received the designation of Certified IRA Services Professional (CISP) from the Institute of Certified Bankers (ICB), and currently sits on the ICB's CISP Advisory Board. Ms. Horn has also earned the designations of Qualified Pension Administrator (QPA) and Tax-Exempt and Governmental Plan Consultant (TGPC) from the American Society of Pension Professionals & Actuaries (ASPPA). She has been with Ascensus since 1994.

Ascensus helps more than 7 million Americans save for the future—retirement, college, and healthcare—through service and technology solutions. With more than 35 years of experience, the firm offers tailored solutions that meet the needs of banks, credit unions, states, governments, financial professionals, employers, and individuals. Ascensus supports over 50,000 retirement plans, more than 4 million 529 college savings accounts, and a growing number of ABLE savings accounts. It also administers more than 1.5 million IRAs and health savings accounts. For more information about Ascensus, visit www.ascensus.com.



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EDUCATION CALENDAR

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Fall Group Meetings

October 2, Lincoln
Cornhusker Marriott Hotel
October 3, Omaha
Hilton Omaha

October 4, Norfolk
Norfolk Country Club

Advanced School of Banking, Year 1

October 1-5, Manhattan,
Kan. Bluemont Hotel

Women in Banking Conference

October 10-11, Omaha
Embassy Suites Downtown

Banking Cybersecurity Manager Certification

October 15-16, Lincoln
NBA Office

Principles of Commercial Lending School

October 22-26, Manhattan, Kan.
Bluemont Hotel

Summit on Regulatory Issues

October 26, Lincoln
Cornhusker Marriott Hotel

NOVEMBER 2018

Bank Investment, Funding & Economic Outlook Conference

November 1-2, Lincoln
Cornhusker Marriott Hotel

Loan Documentation Workshops

November 13-15, Kearney
Holiday Inn

DECEMBER 2018

Agriculture & Beyond Workshops

December 4, Norfolk
Northeast Community College
December 5, North Platte
Quality Inn & Suites

JANUARY 2019

State Government Relations Forum

January 31, Lincoln
Cornhusker Marriott Hotel

FEBRUARY 2019

Operations Conference

February 5-6, Lincoln
Cornhusker Marriott Hotel

Mid-Winter IRA Workshops

February 11-12, Lincoln
Cornhusker Marriott Hotel

February 13-14, North Platte
Holiday Inn Express

Health Savings Account Seminar

February 15, Lincoln
NBA Office

Bank Executive Conference

February 20-23, Cabo
San Lucas
Pueblo Bonito Golf & Spa Resort

MARCH 2019

School of Lending Principles

March 4-8, Manhattan, Kan.
Bluemont Hotel

Supervisor Boot Camp

March 6-7, Lincoln
NBA Office

APRIL 2019

Spring Agri-business Conference

April 4-5, Kearney
Holiday Inn

School of Banking Fundamentals

April 8-12, Grand Island
Ramada Midtown
Conference Center

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