Nebraska Banker

NOVEMBER/DECEMBER 2017

NBA Nebraska Bankers Association

Connecting With the NExt Generation

Bank On Nebraska Challenge

OFFICIAL PUBLICATION OF THE NEBRASKA BANKERS ASSOCIATION

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ENGAGING OUR STATE IN THE BANK ON NEBRASKA CHALLENGE

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

DURING THE NBA'S RECENTLY COMPLETED STRATEGIC PLANNING process, one issue that came to the forefront during almost every focus group, planning discussion, and personal interview was the need to more proactively market Nebraska's banking industry and the positive impact Nebraska banks have on Nebraska communities, families, and individuals. It also became evident that addressing this task was going to require some nontraditional strategies, especially in reaching out and connecting with the "NExt Generation" of Nebraskans.

With the approval and support of the NBA Board of Directors, your association will publicly launch the Bank On Nebraska Challenge for Nebraska's high school students on January 15, 2018. This statewide competition will challenge today's young people to submit short videos recognizing and highlighting the important role Nebraska banks play in their communities, schools, and families. Students will be encouraged to upload their videos between February 19 and March 25.

Members of the NBA's Young Bankers of Nebraska Committee will be tasked with reviewing and scoring the videos. The finalists' videos will be announced on April 6. Subsequently, the public will be asked to vote for their favorite video online through a customized website, much like they might vote for the

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MAKING THINGS HAPPEN

Rob Nichols, President & CEO, American Bankers Association

YOU'VE HEARD THE SAYING THAT THERE ARE THREE KINDS OF people in the world: people who make things happen, people who watch things happen, and people who wonder what happened. In my experience, the women and men who lead America's banks fall decidedly into the first camp.

It could be because you lead the institutions that serve as the engine of America's economy—and together, you comprise one of the most important industries in our nation. It could also be because most of the bankers I meet and talk to in my travels are deeply engaged in industry affairs. They are at their state association's convention, serving on its board, or volunteering on one of ABA's many councils, working groups, or committees. They are tending not only to what their employees, customers, and communities need, but also to what the industry, economy, and country need to thrive.

This extra service makes a big difference. When bankers engage in their association's affairs or in advocacy, a host of good things happen. Some examples:

It was a member of ABA's "official family," for instance, who suggested ABA fly down to Houston and Naples following Hurricanes Harvey and Irma and capture on video—for all to see—how banks and bank employees were responding to the local disasters. The result of that suggestion is a video—which you can view at aba.com/HurricaneResponse—that showcases how bankers lead their communities in difficult times.

We've been promoting this video widely and encouraging bankers to do the same because it tells such an important and positive story about our industry. I'm grateful to Bob Jones of United Bank in Atmore, Ala., who serves on the ABA Foundation Board and also chairs the Fund for Economic Growth, for suggesting this.

Bankers serving on ABA's Community Bankers Council, along with senior loan officers and others at member banks, made a big difference when they provided us essential feedback during the Consumer Financial Protection Bureau's rulemaking on small-dollar loans. Their comments, which we relayed in letters and meetings with bureau officials, resulted in a critically important exemption for banks from the CFPB's final rule requiring short-term, small-dollar loans to meet an ability-to-repay test.

Banker involvement was also the key to scoring improvements last year to the Call Report for smaller banks. We are seeking to replicate that success as the agencies undertake a review of their safety and soundness exams. That's why ABA invited regulators to listen in on two banker conference calls we hosted on the topic—so that regulators could hear bankers' perspectives early on in their review process.

And of course, bankers' engagement on the CFPB's arbitration rulemaking not only helped shape ABA's policy position on the issue, it ultimately helped persuade Congress to overturn the rule, securing a critical win for bank customers who would have lost access to a resolution option that was faster, more economical, and more beneficial to consumers than class-action litigation.

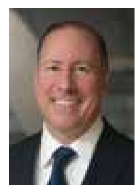
The truth is, we rely on bankers to inform and guide everything we do, from our comment letters on regulatory proposals and advocacy communications, to conference content and online training. That is the only way associations can succeed.

So my appeal to you is this: Help us help you. We are fortunate to have many engaged bankers, but we need more. We especially want to make sure tomorrow's bank leaders are engaging today.

ABA Chairman Ken Burgess told the crowd at our annual convention that he learned the importance of actively participating in association and industry affairs early on from his dad, who was involved with both the Texas Bankers Association and Independent Bankers Association of Texas, as well as ABA. It's a legacy he is passing on to his staff, and I hope our other banker volunteers will do the same.

Odds are that whatever position you hold in your bank, you possess expertise that your state association and ABA are eager to tap. Look for opportunities to join a working group or serve on a committee (see opportunities at aba.com/Committees). Respond to surveys asking your views on an issue or business practice. Tell us what your bank needs help with to succeed.

Guide us, use us. That's why we are here. And it's how, together, we make good things happen.



Email Rob Nichols at nichols@aba.com.

EDUCATION CALENDAR

FEBRUARY 2018

State Government Relations Forums
February 1 – Lincoln –
Cornhusker Marriott Hotel

Bank Technology Conference
February 6 – Lincoln –
Cornhusker Marriott Hotel

Marketing & Retail Banking Conference
February 7 – Lincoln –
Cornhusker Marriott Hotel

Mid-Winter IRA Workshops
February 12-13 – Lincoln –
Cornhusker Marriott Hotel
February 14-15 – North Platte –
Holiday Inn Express

Health Savings Account Seminar
February 16 – North Platte –
Holiday Inn Express

Bank Executive Conference
February 21-25 – Maui –
Kea Lani Hotel & Spa

MARCH 2018

School of Lending Principles
March 5-9 – Grand Island –
Hotel Grand

Tri-State Leadership & HR Conference
March 27-28 – Overland Park –
Overland Park Marriott

Supervisor Boot Camp
March 8-9 – Lincoln – NBA Office

APRIL 2018

Spring Agri-business Conference
April 3-4 – Kearney – Holiday Inn

School of Banking Fundamentals
April 9-13 – Manhattan, Kan. –
Bluemont Hotel

MAY 2018

NBA Annual Convention
May 2-4 – La Vista –
Embassy Suites Omaha

Nebraska Deposit Account Administration Workshops
May 15 – Kearney – Holiday Inn
May 17 – Omaha – Marriott Hotel

Operations School
May 15-17 – Grand Island – Hotel Grand

BSA/AML Compliance Management Workshops
May 16 – Kearney – Holiday Inn
May 18 – Omaha – Marriott Hotel

JUNE 2018

NBA Annual Golf Outing
June 7 – Hastings – Lochland Country Club

Relationship & Business Development School
June 19-21 – Topeka, Kan. –
KBA Board Room

JULY 2018

Agricultural Lending School
July 23-27 – Grand Island – Hotel Grand

AUGUST 2018

YBON Annual Conference
August 2-3 – Lincoln –
Cornhusker Marriott Hotel

Real Estate Lending Compliance Conference
August 23-24 – Lincoln –
Cornhusker Marriott Hotel

SEPTEMBER 2018

Fall Agri-business Conference
September 6-7 – Lincoln –
Cornhusker Marriott Hotel

Bank Compliance School
September 10-14 – Manhattan, Kan. –
Bluemont Hotel

Fall IRA Workshops
September 17-18 – Lincoln –
Embassy Suites Hotel
September 19-20 – North Platte –
Embassy Suites Hotel

Fall Group Meetings
September 25 – Scottsbluff –
Scottsbluff Country Club

September 26 – North Platte –
Holiday Inn Express
September 27 – Kearney – Holiday Inn

OCTOBER 2018

Fall Group Meetings
October 2 – Lincoln – Embassy Suites
October 3 – La Vista –
Embassy Suites 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

Principles of Commercial Lending School
October 22-26 – Manhattan, Kan. –
Bluemont Hotel

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

For more information about these live and online education events and training tools, contact the NBA Education Center at (402) 474-1555 or nbaeducation@nebankers.org. You also may visit the NBA website at www.nebankers.org/index.php/education.html.

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winners on American Idol. Students selected as finalists, along with their parent/guardian and teacher, will be invited to the 2018 NBA Annual Convention on Friday, May 4, at which time the winning video will be announced.

To encourage student participation, contest finalists will be awarded a $529 scholarship as well as a MacBook. In addition, the home school of the contest finalists will be provided $529 in unrestricted funds to be used at the direction of the participating teacher for supplies or other classroom needs. The producer of the winning video, as selected by the voting public, will receive an additional $2,000 scholarship. Finally, there will also be a special $1,000 prize for the funniest video, as selected by the YBON Committee members, and 10 randomly selected $100 Visa gift card prizes.

This video contest, as you might be thinking, is clearly outside of the box for the association and our member institutions; however, we know that today's young people view life through a vastly different prism. The targeted students grew up during the Great Recession, when banks of all sizes were portrayed in a negative light by media sources at every turn. These students also are accustomed to relying on online platforms for their news, information, and entertainment. To help us reach this market and facilitate such a unique process, the NBA has engaged Red Thread, a Lincoln, Neb.-based, marketing firm that specializes in multimedia and fostering connections with today's teenagers. In addition to coordinating the video contest, NBA staff has also asked this marketing firm to develop some additional materials to showcase the many career opportunities available in the banking field.

To be successful in this effort, the NBA needs help from every member institution. Specifically, we ask that you:

1. Make a personal phone call or send an email to your high school superintendent/principal to promote the video contest. Material will be sent to you in early January.

2. Reach out to the business teachers at area high schools and encourage them to recruit student participants. One NBA Board member suggested that local schools should give extra credit for participation!

3. Openly discuss the video contest at an upcoming service club or chamber of commerce meeting.

4. Proactively discuss the video contest with your bank staff so they can actively discuss and encourage student participation. A few member institutions will be offering local prizes to area students that participate.

5. Include information about the video contest in marketing and promotional pieces that your institution provides to customers (and their children).

6. Actively use your bank's social media channels to promote the Bank On Nebraska Challenge, the contest website at www.BankOnNE.com (coming soon!), and the Twitter hashtag #BankOnNE.

7. If a student features your bank in one of their videos, feel free to highlight the video on your bank's website and marketing materials.

8. Obtain a contest poster at an upcoming NBA educational program and display it in your bank.

9. When the finalists are announced in April, encourage your staff, customers, and community members to vote for their favorite video. It would be exciting to see banks and communities support the student finalists with organized voting efforts.

10. Attend the NBA Annual Convention to show your support for the students.

Specific details about this contest as well as contest rules can be found at: www.BankOnNE.com starting January 1, 2018. Should you have any questions about this statewide marketing initiative, please feel free to reach out to me at (402) 474-1555 or richard.baier@nebankers.org.

Email Richard J. Baier at richard.baier@nebankers.org.


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THE OTHER CRA

Jeff Makovicka, Kutak Rock LLP

WHAT'S THE CONGRESSIONAL Review Act (CRA)[1] , you ask? If you don't know, you're not alone. For more than 16 years, Congress has been silent as to its use. A relatively obscure law, the CRA establishes a special set of procedures through which Congress can nullify final regulations issued by a federal agency. The CRA is an oversight tool Congress may use to prevent a regulation issued by a federal agency from taking effect.

Prior to the Trump administration, only once has an adopted rule been invalidated under the CRA—that occurred in 2001, when a rule on ergonomic standards, adopted by the Occupational Safety and Health Administration (OSHA) at the end of the Clinton administration, was disapproved in the early days of the Bush administration. The CRA gives a successor president and Congress, when acting together, an easier route to overturn the midnight rules of an outgoing presidential administration. Once a new president settles in and reorganizes the direction of his or her administrative state, the CRA typically loses its utility.

Congressional Review Act

In simple terms, the CRA grants Congress: (1) proper notification of new agency regulations and (2) the authority to use a joint resolution of disapproval to overturn a rule. Under the CRA, Congress is empowered to review new federal rules issued by federal agencies and to nullify those rules through an expedited legislative process. The law provides Congress with 60 legislative days (or days in which Congress is in a particular session) to overturn a rule by submitting a "joint resolution of disapproval," which only requires approval by a simple majority in both chambers.[2] Importantly, the CRA establishes a special set of "fast track" legislative procedures that effectively make a joint resolution of disapproval filibuster-proof in the Senate. If the resolution is signed by the president, the CRA provides that the rule at issue shall not take effect (or continue)[3] and may not be reissued in "substantially the same form" unless Congress approves the rule with a new law.[4] In other words, if disapproved, the rule no longer has the force of law and compliance is no longer required.

Although the current president and Congress have already successfully used the CRA on several occasions[5], the first Consumer Financial Protection Bureau (CFPB) rule fell victim to the CRA in late October 2017. The current political conditions are ripe for further congressional use and the CFPB has been put on notice.

CFPB Arbitration Rule

In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress directed the CFPB to study pre-dispute arbitration agreements and issue regulations restricting the use of arbitration agreements if such rules would be in the "public interest" and for the "protection of consumers."[6] Dodd-Frank required that the findings in any such rule be consistent with the study. A three-year study was conducted and the CFPB released its results in March 2015. The CFPB found that barring certain financial providers from blocking consumer class actions through arbitration agreements would better enable consumers to enforce their rights and obtain redress when their rights are violated.[7]

After the release of the study, the CFPB issued a proposed arbitration rule on May 24, 2016. On July 10, 2017, the CFPB published a final arbitration rule[8] effective September 18, 2017, with a March 19, 2018, mandatory compliance date.

There were two parts to the arbitration rule. First, the rule prohibited covered providers of consumer financial products and services from relying on pre-dispute arbitration agreements to prevent consumers from pursuing class actions in court and required language in arbitration agreements reflecting this

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The overturn of the arbitration rule and using the CRA against future rule writing by the CFPB could be viewed positively by the financial services industry initially, but could be more of a problem down the road.

limitation. Second, the CFPB required covered providers who include predispute arbitration agreements in their contracts to submit certain arbitration information to the CFPB for review and publication. The CFPB intended to publish collected materials with redactions on its website to "provide greater transparency into the arbitration of consumer disputes," and planned to use the collected information to monitor "arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further [CFPB] action."[9]

Shortly after CFPB promulgation, Congress introduced a resolution under the CRA to kill the arbitration rule before it took effect. Vice President Mike Pence broke a 50-50 tie in the Senate on October 24, 2017, narrowly passing S.J. Res. 47 disapproving the arbitration rule.[10] On November 1, 2017, President Trump signed the resolution.[11]

Following President Trump's signing, Acting Comptroller of the Currency Keith Noreika praised the president's action as "a victory for consumers and small and midsize banks across the country" by stopping a rule "that likely would have significantly increased the cost of credit for hardworking Americans and taken away a valuable tool for resolving differences among banks and their customers."[12] The national bank regulator said that the move "preserves a choice for consumers who can choose among financial providers that offer services with arbitration clauses and those that do not."

With this action by the president and Congress, the arbitration rule is dead, at least for now. Under the CRA, not only is the CFPB barred from enforcing the arbitration rule, but likewise the arbitration rule may not be re-promulgated in "substantially the same" form without an enactment of Congress. During a GOP-controlled Congress, that action is unlikely.

The scope of this "substantially the same" standard, however, has not been addressed by the courts. Can the CFPB craft a new arbitration rule different enough to avoid being "substantially the same"? Any such attempt by the CFPB will surely be challenged.[13]

Are CFPB Arbitration Restrictions Completely Dead?

Although the arbitration rule is dead without a chance of re-introduction in "substantially the same" form, the CFPB is not entirely shut out from regulating arbitration clauses. The CFPB could conceivably resort to doing it the old fashion way, on a case-by-case basis using its existing enforcement and supervisory authority (UDAAP anyone?). This, however, seems unlikely as Director Cordray has resigned and as such, regulation by enforcement may slow considerably.

Moreover, the demise of the arbitration rule does not affect other current restrictions on arbitration. For example, in 2006, Congress passed the Military Lending Act, which disallows mandatory arbitration clauses in connection with certain loans made to service members (this is still the law). Four years later, in Dodd-Frank, Congress barred mandatory arbitration clauses in certain residential mortgage contracts. As such, the arbitration rule is dead but other CFPB limitations remain.

CFPB's Future CRA Risk

What does this mean for the CFPB going forward? The fact that Congress actually succeeded in coordinating and overturning the arbitration rule using the CRA could be problematic for the CFPB, with respect to additional rules it puts forward. For example, the CFPB has recently finalized a rule that would largely overhaul the small dollar lending industry, and that rule could be subject to a similar overturn by Congress. And the new CFPB Fair Debt Collection rules are expected to be proposed shortly. Because of this CRA success by the president and Congress, the CFPB could be discouraged from promulgating more rules.

That result would not necessarily be good news for banks, as the CFPB still would have its full enforcement authority and could continue down a path of regulating by enforcement, as compared to regulating by rules. Banks are already critical of the CFPB for seeming to avoid a rules-based form of regulation in favor of using enforcement (e.g., UDAAP) to effectively regulate similarly situated banks.

As such, the overturn of the arbitration rule and using the CRA against future rule writing by the CFPB could be viewed positively by the financial services industry initially, but could be more of a problem down the road.

Will the CRA Go Silent Soon?

As mentioned, prior to President Trump, the only successful use of the CRA was President Bush overturning President Clinton's ergonomics rule promulgated at the end of Clinton's term. President Trump was successful in overturning the arbitration rule, a rule that began in the

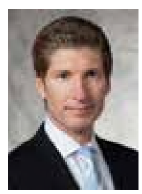
Obama administration and was finalized by a President Obama appointee (Director Cordray). In both instances, a new Congress and a new president (of different parties from the outgoing president) used the CRA to overturn regulations issued at the end of the previous administration. In other words, the CRA gave the incoming Congress and president a tool to overturn a departing president's "midnight" regulations. Since a president is unlikely to disapprove of his own agencies' rules, the CRA has been regarded as inconsequential except during a presidential transition. A recent U.S. Government Accountability Office (GAO) ruling may change this.

On October 19, 2017, the U.S. GAO issued a relatively rare legal determination concluding that the federal banking agencies' 2013 Interagency Guidance on Leveraged Lending is a rule subject to the CRA.[14] The GAO found that the CRA's definition of "rule" is "broad, and includes both rules requiring notice and comment rulemaking and those that do not, such as general statements of policy." Moreover, the GAO determined that the Leverage Lending Guidance does not fall within any of the CRA's three exceptions to the definition of "rule," which pertain to: (1) rules of particular applicability; (2) rules relating to agency personnel or management; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. The GAO's conclusion that the Leverage Lending Guidance is a rule subject to the CRA potentially could open the door for Congress to disapprove and invalidate the Leverage Lending Guidance.

Although it is unclear whether any CRA resolution regarding the Leverage Lending Guidance will be proposed, U.S. Sen. Pat Toomey released the following statement regarding the determination: "This is an important reminder that agencies have a responsibility to live up to their obligations under the Congressional Review Act. When they don't, Congress should hold them accountable. I will explore steps to do so."

Given the GAO's broad reading of the applicability of the CRA, the determination may be an example of how the CRA could be expanded to bank guidance. Although the banking implications remain unclear, the determination has the potential to lead to enhanced congressional review of old and new bank regulator actions, including policy statements.[15]

[1]5 U.S.C. §801 et seq. (1996).
[2]See 5 U.S.C. § 802(a).
[3]See 5 U.S.C. § 801(b)(1).
[4]See 5 U.S.C. § 801(b)(2).
[5]15 so far.
[6]See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public L. No. 111-203, 124 Stat. 1376 (2010).
[7]Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015).
[8]See Bureau of Consumer Financial Protection; Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (12 CFR Pt. 1040) ("FR Release").
[9]FR Release, 82 Fed. Reg. at 33210.
[10]The Senate vote followed earlier House passage of H.J. Res. 111.
[11]To no avail, in a personal letter dated October 30, 2017, CFPB Director Richard Cordray pleaded to President Trump to veto the arbitration disapproval resolution. In what Cordray termed a personal appeal, he wrote: "Many have told me I am wasting my time writing this letter—that your mind is made up and that your advisors have already made their intentions clear. But this rule is all about protecting people who simply want to be able to take action together to right the wrongs done to them. When people are wronged or cheated, they deserve the chance to pursue their legal rights."
[12]Acting Comptroller of the Currency Statement following the President's Signature Overturning the Consumer Financial Protection Bureau's Rule on Arbitration Agreements (November 1, 2017).
[13]Passage of the CRA resolution by Congress—and its signing by the president—also brings to an end legal challenges to the arbitration rule. For example, the U.S. Chamber of Commerce, the American Bankers Association, and several other financial services trade groups recently challenged the arbitration rule in federal court. See Complaint for Declaratory and Injunctive Relief, Chamber of Commerce of US, et al. v. Consumer Financial Protection Bureau, et al., No. 3:17-cv-02670-D (N.D. Tex., Sept. 29, 2017). On November 2, 2017, the Chamber of Commerce, et al, filed a Notice of Voluntary Dismissal with the court stating that "[b]ecause the [CFPB] rule has been invalidated pursuant to the Act, and therefore has no continuing effect, Plaintiffs hereby voluntarily dismiss this action without prejudice." The court entered an order dismissing the case.
[14]See Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending, B-329272 (GAO, Oct. 19, 2017). The GAO's determination was issued at the request of Sen. Pat Toomey (R-PA), who inquired by letter whether the Leverage Lending Guidance should be subjected to congressional approval as a "rule" under the CRA. According to the American Banker, in a separate letter, Sen. Toomey requested an opinion as to whether the CFPB's indirect auto finance guidance issued in March 2013 is a "rule" under the CRA. Toomey seeks GAO's help in reviewing agency guidance, American Banker (March 2017). As of this writing, the GAO has not responded to the indirect auto finance request.
[15]The GAO has made prior determinations on whether guidance or other issuances are rules in at least 11 prior instances but this is the first determination on bank regulator guidance. See Congressional Research Service, The Congressional Review Act: Frequently Asked Questions, No.7-5700 (Nov. 17. 2016). Seven of those resulted in finding a "rule" for purposes of the CRA (similar to the determination for the Leverage Lending Guidance). Notably, none of those led to a joint resolutionof Congress disapproving the guidance/rule. It is unclear whether that record will remain intact with congressional review, if any, of the Leverage Lending Guidance.



For more information, contact Jeff Makovicka at Kutak Rock LLP at (402) 346-6000 or jeff.makovicka@kutakrock.com. Makovicka is a member of Kutak Rock LLP's banking practice group where he concentrates on bank matters.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FROM OUR DESKTOPS TO OUR PHONES, we are a connected society. We check email, social networking sites, news sites, message boards, and a large variety of other websites on a daily basis without thinking about the security implications of having billions of devices connected to countless interconnected servers that are run by people we have never met through an Internet infrastructure that was created without security in mind. While this is scary enough from a personal standpoint, it has even larger implications for businesses that store and transmit confidential company and customer data. Actions may be taken, however, to help mitigate some of the security concerns that go hand in hand with Internet browsing.

First, it is extremely important to limit system and network privilege levels for employees with Internet access. A recent analysis of Microsoft vulnerabilities by the security company Avecto revealed 94 percent of critical Microsoft vulnerabilities reported in 2016 were found to be mitigated by removing local administrative rights.[1] In other words, if your employees don't have local administrator rights on their systems, the vast majority of critical Microsoft vulnerabilities would already be addressed without additional controls. Now, at times, a vendor will push for local administrator privileges for employees in order for the vendor's software to run without issues. While this was acceptable many years ago, it is no longer a viable option, and other controls such as limiting elevated privileges to certain directories through whitelisting should be considered instead. In addition to normal users, it is perhaps even more important that domain administrators do not browse the web while logged in but instead use a standard account for normal tasks and only elevate when necessary. While an argument can be made that domain administrators are typically more security minded than the standard employee, they also have far greater capacity to install malware on all of the systems in the network domain.

Secondly, restrictions should be in place for connecting to the Internet. This includes not only general ingress (incoming traffic) and egress (outgoing traffic) filtering at the firewall level but also blocking access to sites and site categories that are not necessary for business use. At the firewall level, any known malicious IP addresses should be blacklisted and access to/from any external IP should not be allowed but instead limited to IPs for the core provider, IT vendor, etc. As far as site category blocking is concerned, a number of categories should be restricted from all employees such as gambling, adult, and file sharing while other categories such as webmail, cloud file storage, and social networking should be restricted from most employees with exceptions granted for legitimate business use only if approved by the board and senior management. It is surprising how often we see a disconnect between the number of security controls in place for company email through Exchange/Outlook and the wide-open access granted for personal email sites. Malicious email is being sent to ALL available email addresses, and personal web-based email is possibly even a bigger threat than business email due to the lack of controls in place.

Finally, it all comes down to the user, which is both an encouraging and frightening statement. All it takes is one individual to download ransomware or visit a malicious site for company systems to be compromised. Because of this, most businesses take a defense-in-depth approach that includes firewalls, antivirus, effective patch management procedures, email filtering, and various other items; however, sometimes this approach skimps on training the employee who is actually using company systems and accessing critical data. Hardware and software are important, but these controls will fail from time to time. At that point, it is up to the individual employees to maintain effective security. They need to be informed and reminded about acceptable Internet usage and then tested to ensure this knowledge is retained and put into practice.

In summary, even though it was created without security in focus, the Internet can be safely surfed if the proper precautions are taken, effective controls are put into place (and tested!), and users are trained to be aware of the sites they visit and the actions they take when connected to the web.

[1]https://www.avecto.com/news-and-events/news/94-of-critical-microsoft-vulnerabilities-itigated-y-removing-admin-rights

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BERT ELY'S FARM CREDIT WATCH®

Shedding Light on the Farm Credit System, America's Least Known GSE

THE FOUR FCS BANKS ARE COMMERCIAL BANKS?

THE FOUR FARM CREDIT SYSTEM BANKS ARE AMONG THE WORLD'S 50 safest commercial banks, according to a recent press release issued by the online magazine Global Finance. (View the release at http://bit.ly/SafestBanks.) AgriBank was ranked No. 19, CoBank No. 25, AgFirst No. 28, and Farm Credit Bank of Texas No. 30. The press release states that the banks on its list of the safest commercial banks "were selected through an evaluation of long-term foreign currency ratings—from Moody's, Standard & Poor's, and Fitch." Apart from their equity capital, the Farm Credit System (FCS) banks are almost entirely funded with debt issued by the Federal Farm Credit Banks Funding Corporation and are jointly and severally liable for that debt. Global Finance, though, did not acknowledge that fact nor the fact that the four FCS banks are government-sponsored enterprises (GSEs) implicitly backed by the federal government; they are also the beneficiaries of a $10 billion cost-free line of credit from the U.S. Treasury. Five U.S. bank holding companies also made the top-50 list: U.S. Bancorp (21), BNY Mellon (40), State Street (43), Northern Trust (44), and Wells Fargo (49).

It is absolutely appalling that Global Finance fails to understand that the FCS banks are not commercial banks. Even worse, when I explained that rather obvious fact to the editors at Global Finance, they would not acknowledge it. More troubling, when CoBank touted its inclusion in the list of Global Finance's 50 safest banks in a news release (go to http://bit.ly/CoBank-GFList), it failed to note that its outstanding debt is raised for it by the Funding Corporation and that it was erroneously included in Global Finance's companion list of the world's safest commercial banks. CoBank's failure to publicly state it should not be characterized as a commercial bank is a tacit admission that it does not mind being viewed by Global Finance's readers as a commercial bank. Worse, for at least the last six years, CoBank news releases have cited it as being ranked by Global Finance as one of the world's safest banks without pointing out the magazine's error in characterizing it a commercial bank. **If CoBank has no objection to repeatedly being called a commercial bank, then it should be regulated as if it were a commercial bank.**

In an attempt to set the record straight, I emailed the editors at Global Finance to explain that the FCS banks are not commercial banks and that they are largely funded by the unranked Funding Corporation. On September 29, Andrea Fiano, Global Finance's editor, emailed a substantive reply but failed to address my central complaint—the magazine's characterization of the FCS banks as commercial banks when they clearly are not. Worse, on October 6, Global Finance published a list of the "Safest 25 Commercial Banks in the World," which is merely the top 25 banks from its earlier list of the 50 safest commercial banks. Accordingly, this list included AgriBank and CoBank. So far, Fiano has failed to respond to a follow-up query as to why Global Finance continues to call the FCS banks commercial banks. Hopefully, Global Finance will soon drop the FCS banks from its list of the safest commercial banks.

The FCS' regulator, the Farm Credit Administration (FCA), should object to any mischaracterization of any FCS institution, if for no other reason than to protect its regulatory turf. Certainly, if a widespread belief developed that FCS banks are commercial banks, then political pressure would build to subject them to oversight by the bank regulators, specifically the OCC and the Federal Reserve. The FCA has indicated that it will respond to my request for a comment on Global Finance's mischaracterization of the FCS banks as commercial banks. I will share that response with Farm Credit Watch (FCW) readers after I receive it. Finally, I emailed CoBank to request that it inform the magazine that CoBank is not a commercial bank and to cease publicizing, even indirectly, that it, and the other three FCS banks, are among the world's safest commercial banks. So far, CoBank has not responded to this request.

What Is Happening at Lone Star Ag Credit?

As previously reported in FCW, on August 9, Lone Star Ag Credit, the FCS association headquartered in Fort Worth, Texas, issued a Notification of Non-Reliance on Previously Issued Financial Statements Applicable to the financial statements Lone Star issued for 2016 and the first quarter of 2017. In a parallel move, the FCA dropped from its website Lone Star's quarterly call reports for 2016 and the first quarter of 2017. Apart from the Notification of Non-Reliance, Lone Star has posted

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absolutely nothing on its website about the "appraisal and accounting irregularities affecting a segment of the Association's lending portfolio" that triggered the withdrawal of its financial statements and call reports, nor has it posted any other information about this accounting fiasco. While visitors to the site will learn about the 2017 Lone Star Ag Credit Dove Hunt Invitational and the Annual Appreciation Event for Corsicana Stockholders, there is no listing of the association's current management or of recent management changes, if any, as well as corrective actions being taken to fix Lone Star's accounting problems. As cooperatives, FCS associations should be fully transparent to their member/borrowers—that is definitely not the case today at Lone Star.

Will FCSA & Frontier Farm Credit Ever Merge?

In the October 2014 FCW, I wrote about a "strategic alliance" that Frontier Farm Credit, which serves the eastern third of Kansas, entered into with Farm Credit Services of America (FCSA), the largest FCS association, which serves Nebraska, Wyoming, South Dakota, and Iowa. At June 30, 2017, FCSA had assets of $26.9 billion while Frontier had assets of $2 billion. To the best of my knowledge, there are no other strategic alliances in the FCS universe. According to a letter FCSA sent to its member/borrowers when the "strategic alliance" was formed, the two associations "will be jointly managed under a single team of [FCSA] leaders."

The question then was why didn't Frontier simply merge with FCSA? That question still resonates today as the FCSA management team runs Frontier even though Frontier has its own board of directors. Presumably the FCSA managers in Kansas take their marching orders from Frontier's directors, even if those directors have adopted policies that differ from policies adopted by FCSA's directors. Although there is a coordinating committee comprised of directors from both associations, it is puzzling how one management team can be responsible to two independent boards of directors, especially given the degree of operational integration of the two associations. The arbitrary manner in which income and expenses are divided between the two associations, as summarized in their respective annual reports, reinforces the key question: Why haven't Frontier and FCSA merged? Reasons not to merge are not at all evident, which raises this question: What is the real reason they have not merged? As is the case in the Lone Star Ag Credit situation, the lack of transparency here is very troubling, and should be especially so for Frontier's member/borrowers since Frontier is very much the junior partner in this alliance. Worse for Frontier's member/borrowers, they are stuck in the alliance because Frontier no longer has its own management team.

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Reform Farm Credit: Help educate the public, the press, and policymakers. Get the facts, take a stand at http://reformfarmcredit.org.

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 Farm Credit Watch by email or to manage your subscription, visit ABA Member Email Bulletins at www.aba.com/Tools/Ebulletins/Pages/default.aspx. For other inquiries, please contact Barbara McCoy at the ABA at (800) BANKERS or bmccoy@aba.com.

FAMILY FARMER BANKRUPTCY CLARIFICATION ACT OF 2017 ENACTED INTO LAW

Donald L. Swanson, Koley Jessen

FINANCIALLY STRAPPED FARMERS and their lenders finally get some much-needed bankruptcy tax relief. Normally, pre-bankruptcy income and capital gains tax claims have a priority and non-dischargeable status in bankruptcy—and the same taxes, when arising during bankruptcy, add an administrative claim status.

Some Farm History

Such normal rules had a devastating impact on farmers and their lenders during the farm crisis of the 1980s. Here is some farm history that might help explain why.

- The number of U.S. farms reached a peak of 6.8 million in 1935 (according to USDA statistics at http://bit.ly/USDAfarm). That was, of course, in the midst of the Great Depression. Farmers were among the many who suffered in those days, with added disadvantages of drought, grasshopper plagues, and dust storms that destroyed crops and crippled farming in the Midwest.
- Then, the number of farms began a four-decades-long decline to around 2.5 million in the mid-1970s. I remember as a youngster (back in the '60s and early '70s) riding with my grandpa on Sunday afternoon drives around our rural Nebraska countryside, as he pointed to abandoned homesteads dotting the land and told stories of families who lived and farmed at each place. These people made their living from the land—few had other sources of income.
- Then, the 1980s become a re-enactment of the 1930s' debacle for farmers. Only this time the culprits driving farmers off the land were high interest rates (i.e., 18 percent per annum) and plummeting prices for farm products and land. Today, I could do with my grandchildren the same Sunday afternoon drives that I had with my Grandpa and point to abandoned farmsteads that were occupied and active in the days of my youth.
- What's happened since the 1980s is this: career farmers are tilling many, many more acres than before; lots of people farm as a hobby or avocation; and the number of people making their living on a farm continues to shrink. To illustrate, look what's happened to high schools in farming communities: class sizes of 40 students in the '70s, for example, might now be in the teens or less and consolidated with another school.
- Farming in the 1900s focused heavily on labor, with machinery playing a limited but increasingly important role over time; imagine, for example, plowing an entire quarter section of ground with a Farmall M tractor and a three-bottom plow and then planting the same area with a two-row or four-row lister. Today's farming is the opposite, preferring large equipment and technology over labor; e.g., envision a huge tractor pulling a planter making swaths 25 yards wide with GPS precision.
- Today's large farming operations are often referred to as "corporate farming," when a common reality is that these are the same family farms of decades past—they're just farming more land.

During the farm crisis of the 1980s, many farm families were ready and willing to leave the farm and pursue a different occupation—but they couldn't. Here's why: if they sold out (either voluntarily or by foreclosure), the income and capital gains tax bill would be huge—something they could never hope to repay. So, many tried to hold on by bankruptcy filings and other means, but often to no avail—they ended up incurring the tax anyway. This created huge problems for farmers and their lenders!

Congress Addresses the Problem

In a better-late-than-never mode, Congress finally addressed the problem—in

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2005. An amendment that year to Chapter 12 of the Bankruptcy Code added the following tax benefit for farmers (§ 1222(a)(2)(A)):

> A tax "claim" arising from "the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation" will be treated as a general unsecured claim and can be discharged under a Chapter 12 plan.

This amendment, at the very least, allowed a farmer (who's eligible for Chapter 12) to sell out and move on to another occupation without being saddled with unaffordable amounts of tax liability.

It also provided an opportunity for farmers and their lenders to work cooperatively toward common goals. Such an opportunity would have solved many problems had it existed during the 1980s' farm crisis.

Battling the IRS

In subsequent years, the IRS sought help from federal courts to limit the impact and effect of this farmer-friendly provision—with varying levels of success. For example:

- A win for farmers: In Kudsen v. IRS, 581 F.3d 696 (8th Cir. 2009), the Eighth Circuit Court of Appeals ruled in favor of farmers and against the IRS on two issues: (i) the § 1222(a)(2)(A) phrase "any farm asset" includes both breeding and slaughter stock, and (ii) the correct method for allocating taxes between income from sales of farm assets and income from other sources is the method that's best for farmers—not the one best for the IRS.
- A win for the IRS: In Hall v. U.S., 566 U.S. 506 (2012), the U.S. Supreme Court ruled in favor of the IRS by narrowly construing the § 1222(a)(2)(A) tax benefit and limiting its effect to sales made prior to bankruptcy filing; so, taxes arising from sales made during the Chapter 12 case would hold the same administrative and non-dischargeable status as before.

The IRS' Supreme Court victory in Hall v. U.S. became a big loss for farmers. Here are a couple reasons why:

- A financially stressed debtor is often unable to sell real estate or other assets outside of bankruptcy because junior lienholders, who are out of the money, won't release their liens without a premium payment the debtor cannot afford.
- One of the things bankruptcy is good at doing (there aren't many such things) is this: selling assets at top dollar. So, it would make sense for a farmer, wanting to liquidate in part or in full, to sell assets within a Chapter 12 case. But the technical ruling in Hall v. U.S. eliminates the Chapter 12 tax benefit, if the debtor attempts to do so.

The New Law

Congressmen from farm states have been working for years to legislatively overturn the Hall v. U.S. ruling that limits the Chapter 12 tax benefit. They finally achieved success on October 26, 2017, when President Trump signed the Family Farmer Bankruptcy Clarification Act of 2017 (H.R. 2266)—view the bill at http://bit.ly/HR2266—into law. This act, sponsored by Senate Judiciary Committee Chairman Charles E. Grassley (R-IA) and Sen. Al Franken (D-MN), passed the Senate on October 24, 2017, by a vote of 82 to 17—all of which proves, once again, that bankruptcy issues tend to be apolitical and nonpartisan.

This new act eliminates the old § 1222(a)(2)(A) referenced above that the U.S. Supreme Court construed narrowly, replacing it with a new section at the end of Chapter 12, titled:

> "§ 1232. Claim by a governmental unit based on the disposition of property used in a farming operation."

Here are the essential terms of this new section (statutory language is in italics, and bold face is added for emphasis):

"Any unsecured claim of a governmental unit . . . that arise before the filing of the petition, **or that arises after the filing of the petition and before the debtor's discharge** . . . *, as a result of the sale, transfer, exchange, or other disposition of any property used in the debtor's farming operation—*

–shall be treated as an unsecured claim arising before the date on which the petition is filed;

–shall not be entitled to priority under section 507;

–shall be provided for under a plan; and

–shall be discharged in accordance with section 1228."

When a Chapter 12 debtor wants to take advantage of this tax benefit, **"the debtor shall serve notice of the claim on the governmental unit,"** after which "the governmental unit may file a proof of claim not later than 180 days after the date on which such notice was served."

This new law will benefit farmers who want to partially or fully liquidate. It will also benefit their lenders, who always prefer voluntary liquidation over foreclosure. And it will allow farmers and their lenders to work cooperatively toward a common goal, rather than allowing tax problems to force them into an adversarial posture.

Conclusion

In today's environment of financial stress for farming communities, this new bankruptcy law is a welcome addition to the options available for financially strapped farmers and their lenders.

For more information, contact Donald L. Swanson at Koley Jessen PC LLO at (402) 343-3726 or don.swanson@koleyjessen.com. Swanson is a shareholder of the firm and has been practicing business bankruptcy law for more than three decades, representing all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. He has extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, he has a decades-long background in resolving multi-party disputes while representing committees and trustees.

OUTSOURCING CASH VAULT MANAGEMENT GAINS TRACTION AT COMMUNITY BANKS

Tracy Dreessen, Manager of Customer Service & Sales Coordinator, Rochester Armored Car

FOR YEARS NOW, THE LARGER BANKS have been realizing the benefits of outsourcing cash management to a Cash-In-Transit (CIT) or armored car carrier, while community banks were left to handle all cash management tasks internally, often with an increase in risk and operation costs. But that is changing as more community banks turn to outsourcing to reduce liabilities and improve operational efficiencies.

Within the last few years, the trend of outsourcing has been on the rise. In 2014, Mark Lowers, founder and CEO of Lowers Risk Group, explained in his article, "Understanding the Relationships in the Cash Industry," that a need to control cost and risk are the driving forces behind this recent change. "The CIT system serves banks, including the Federal Reserve, by providing the transportation, storage, processing, accounting, and other services that financial institutions need to ensure the right amounts of cash get to where they are needed," stated Lowers' article. "With the extensive geographic dispersion of branch banks and ATMs, it is no longer cost-effective for each and every bank to provide all the cash management services it needs. Today, third-party businesses in the cash management system can support multiple banks, including providing a level of risk management the industry demands."

Better Technology, Better Access

Improved technology also has played a role in more community banks adopting the option of using an armored carrier for more than just secure transportation. As technology improves so does the opportunity for community and regional banks to tap into all the benefits outsourcing offers. With the development of more secure systems and standardized file transmissions between armored car carriers and their banking customers, smaller banks are now in the position to take full advantage of an outsourced cash vault. Often that includes access to a secure web portal with the ability to review real-time activity, monitor inventory levels, alter orders, and access a variety of robust reporting tools.

Banks like Omaha, Neb.-based, American National Bank have seen firsthand how outsourcing can change day-to-day operations. Scott Logsdon, vice president of American National Bank, said managing simple tasks like changing ATM loads is now done online through a secure web portal at the staff's convenience. The online technology provides us with up-to-date inventory totals whenever we access the secure web portal and other key information that makes us more efficient, he said.

Secure, automated ordering systems, like the one Logsdon uses, enable banks to better manage risk by setting limits for each user while maintaining a consistent system. All branches, correspondent banks, and commercial customers order from one system and one cash vault in smaller, more manageable ordering increments. This eliminates the frustration and potential for errors often associated with emailed and faxed orders.

More Than a Reduction in Risk & Operating Costs

Banks are quickly realizing that there are more benefits to outsourcing than improved efficiency, reduced risk, and lowered operational costs. Once the logistics of cash management is eliminated, the bank is once again able to focus on its customers. Often chosen by customers for the promise of personalized service, this is especially key for regional and community banks.

To maximize the benefits of outsourcing, banks should verify that the armored car carrier it partners with is able to deliver the following services as part of its cash vault management:

- secure currency and coin storage,
- cash order preparation and deposit verification,
- inventory management,
- and access to a secure web portal in addition to any file transmissions that may be put in place.

Choosing the Right Partner

Selecting the right armored car carrier is critical to the success of outsourcing cash vault management. Here are a few questions to ask during the selection process.

- What experience does the staff have in cash vault management services?
- Is the company financially stable?
- How has the company adopted and implemented industry best practices?
- Does the company carry cash management insurance?
- How often are audits performed? Are they strictly internal or is a third-party auditor used?
- Does the company use a reliable cash management and logistics system such as NamSys Currency Controller®?

Tracy Dreessen is the manager of customer service and sales coordinator at Rochester Armored Car. Contact Dreessen today for a FREE guide on "Outsourcing Cash Management Services" by calling (402) 952-4087 or emailing tdreessen@rocarmco.com. For more information on the services Rochester provides, visit RochesterArmoredCar.com.

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