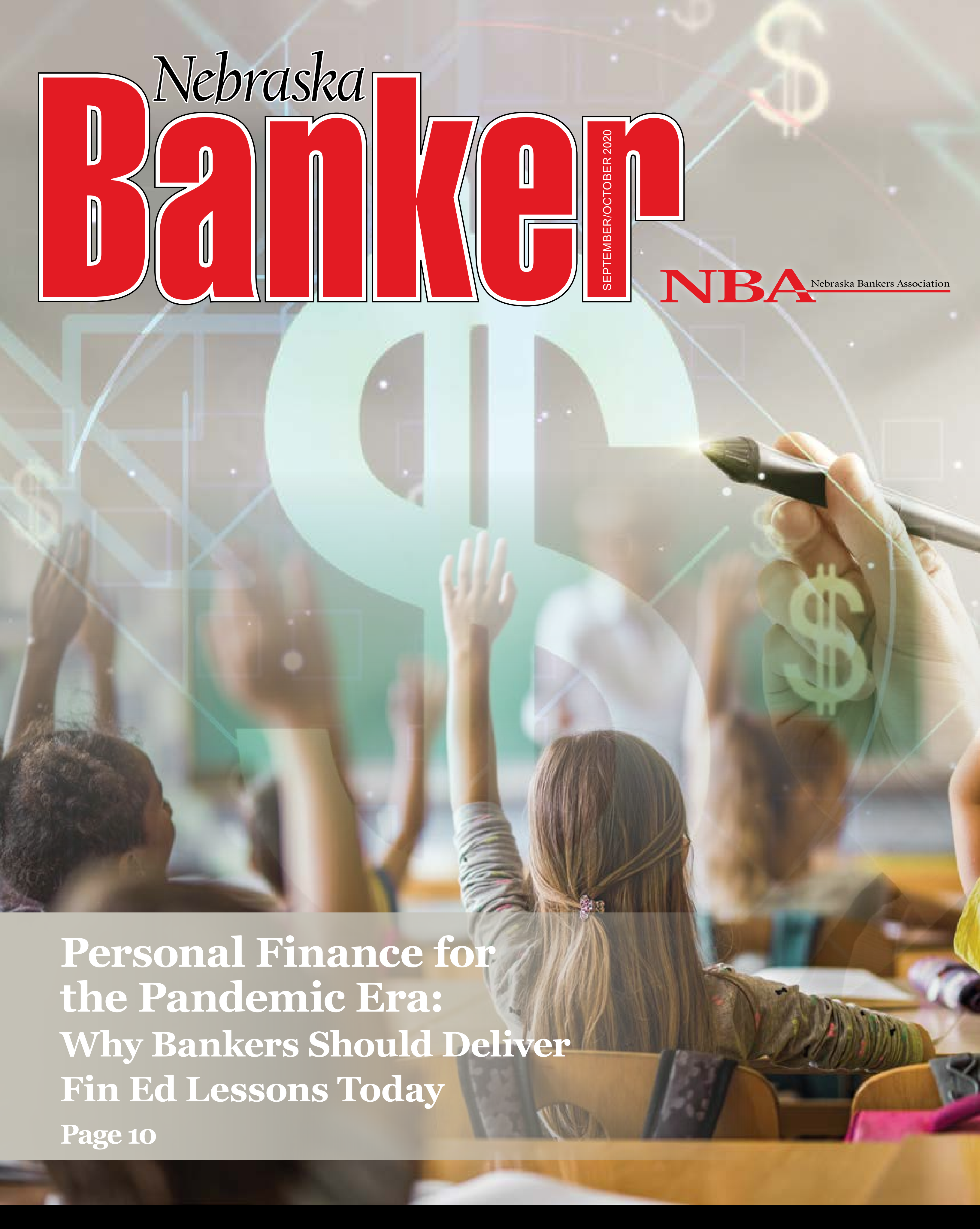
Nebraska Banker
SEPTEMBER/OCTOBER 2020
NBA Nebraska Bankers Association



Personal Finance for the Pandemic Era:

Why Bankers Should Deliver Fin Ed Lessons Today

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OFFICIAL PUBLICATION OF THE NEBRASKA BANKERS ASSOCIATION

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Nebraska Banker

SEPTEMBER/OCTOBER 2020

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Modernizing NBA Philanthropic Efforts

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

NBA FRIENDS:

For several decades, the NBA has directed philanthropic dollars from two different programs, the Nebraska Bankers Educational Foundation (NBEF) and the University of Nebraska NBA Fund through the NBA's University Foundation Allocation Committee (UFAC), to support higher education in Nebraska. These investments have been made with a focus on students, programs and facilities which directly support the banking industry.

NBEF is a stand-alone 501(c)(3) organization, formed in 1990, which annually provides scholarships to Nebraska students who attend Nebraska state or private colleges. The NBEF board of directors provides policy and program direction while NBA staff manages the resources, investment, and administrative functions of the NBEF. Since 2001, several NBEF scholarships are awarded in honor of longtime NBA Legal Counsel Bill Brandt. During the 2020 school year, NBEF awarded $19,000 in scholarships to students at Chadron State College, Concordia University, Creighton University, Doane College, Midland Lutheran, Nebraska Wesleyan University and Wayne State College. Total NBEF assets sit at approximately $610,000. Unfortunately, donations to the NBEF have waned in recent years.

Each year, UFAC directs philanthropic investments to each of the four university campuses UNK, UNL, UNMC and UNO. UFAC provides financial support for student scholarships, NBA professorships and faculty fellows, equipment purchases, etc. Funds provided through UFAC also support the highly successful agricultural banking internship program with the University of Nebraska-Lincoln's Department of Agricultural Economics. The NBA works in partnership with the University of Nebraska systems office annually to solicit and select grant funding proposals. The NBA does not have a specific administrative or investment responsibility related to the funds held by the University of Nebraska Foundation. Banker direction about annual contributions is provided through a separate committee. Each year, UFAC commits approximately $170,000 in support of University priorities.

After analyzing how the NBA supports higher education, as well as how can the organization better refine and integrate philanthropic and workforce development strategies, the NBA board of directors and the NBEF board of directors recently approved the following recommendations and programmatic changes:

1. Change the name of the NBEF to the Nebraska Bankers Association Foundation (NBA Foundation). This name change more closely aligns the Foundation with the Association's activities and allows for better coordination and marketing.

2. Expand allowable uses of the new NBA Foundation to include scholarships and higher education support, banker education, robbery reward programs, support for recovery from natural disasters, financial literacy activities, and an available option for any activities allowed by current IRS guidelines. This change evolved after looking at how the state of Nebraska and the NBA funded recovery efforts following the 2019 floods in northeast Nebraska. Existing NBEF assets will be segregated and retained for student scholarships.

3. While the NBA Foundation and the UFAC will remain separate legal entities, the NBA Board has approved

creation of a new NBA Scholarship Committee. This new committee will plan and oversee all NBA philanthropic, scholarship and workforce development-related investments. Better program and investment should result from this change. Members of this Committee will be appointed like other committees within the NBA's annual structure.

4. As more rural banks look for creative ways to attract the next generation of bankers, the NBA and NBEF Boards gave approval to offer NBA scholarships to community college students interested in banking/business. NBA staff will work with the Nebraska Community College Association in crafting this new initiative.

I want to thank the UFAC Committee members and the NBA and NBEF boards of directors for their encouragement and support for these program changes and new initiatives! If you are interested in supporting the NBA Foundation or the NBA Fund at the University of Nebraska Foundation, please consider making a charitable contribution.

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

Personal Finance for the Pandemic Era:

Why Bankers Should Deliver Fin Ed Lessons Today

Rob Nichols, President and CEO, American Bankers Association

THE PANDEMIC HAS FORCED MANY LESSONS ON US, NOT THE least of which is the importance of being prepared. I don't mean being-well-stocked-on-toilet-paper prepared. I mean having the ability and resources to survive an uncertain and even perilous period. For businesses that clearly requires having a well-crafted and tested business continuity plan. For households, the most important preparedness tool may be a well-funded savings account.

Those who may not have fully appreciated this before COVID-19 certainly understand it now. A Bank Rate survey this summer found that Americans' top financial regret is not having enough emergency savings to withstand the crisis, followed closely by not having enough retirement savings.

This presents a significant opportunity for banks, which can — and should — help support both established and fledgling savers as they pursue their savings goals. Nothing is more fundamental to financial wellness than savings.

Given the massive economic dislocation caused by the pandemic, this may seem an odd time to exhort others to save. Many are suffering from the loss of income and find it challenging to pay their expenses; how can they possibly set aside money for a rainy day when it's already pouring? But there's reason to view this as the ultimate teachable moment, and an ideal time to convert lessons into action.

In a July survey of hourly workers (by DailyPay and Funding Our Future), 51% said that coming out of the pandemic, they are more likely to save for the future, as opposed to 15% who said they were less likely to do so. Meanwhile, 65% said they don't have any type of savings account, and 62% said they would be able to save more if there was an easier way to set aside a portion of their paycheck.

This data points to a clear demand for information and tools to facilitate savings, and banks are a reliable source for both.

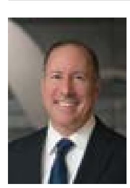
To help banks meet that demand — and prevent financial regrets in the first place by teaching financial fundamentals to today's youth and young adults — the ABA Foundation has adapted its financial capability programming for today's virtual world. Teach Children to Save lessons went virtual in April, and Get Smart About Credit, our fall program, has also been adjusted to include new resources and notes for delivering effective virtual presentations, as well as new modules around saving for the unexpected.

We all know that strong personal finance skills are essential to success in life. A majority of respondents in the latest Charles Schwab Financial Literacy Survey said that money management was the most important skill for children to learn, outranking the dangers of drugs and alcohol, healthy eating and exercise habits and safe driving practices. And nine in ten agreed that a lack of financial education contributes to some of the biggest social issues our country faces, including poverty, unemployment and wealth inequity.

This brings us to another lesson learned from the pandemic: Significant disparities in health, education and job opportunities persist. Those disparities have exposed some populations to greater risk—of catching COVID-19 or losing a job — and they've left some children more vulnerable than others to the adverse effects of school closures.

Education, including financial education, can help reduce these disparities and give all Americans an equal opportunity to prosper. Few are more qualified to deliver lessons in personal finance than bankers, so I strongly encourage you to register as a volunteer for a financial education program today. The ABA Foundation makes it easy — and free. Visit aba.com/FinEd to learn more and sign up. This is one of the most important ways bankers can make a long-term difference in the lives of others.

The more individuals we reach with this valuable information, the better off our communities will be. And there's no doubt it is better to learn personal finance lessons in a class Zoom than in a crisis.



Email Rob Nichols at rnichols@aba.com.

CO-BORROWER VS. GUARANTOR

Austin S. Graves, Baird Holm LLP

RISK IS INHERENT IN ANY LOAN. If a borrower defaults on its repayment obligations, the creditor is left searching for alternative avenues of recovery. The creditor can fortify its security position by having multiple entities promise repayment, either as borrower and co-borrower(s) or as borrower and guarantor(s). There are important differences between the co-borrower and guarantor status. This article examines those differences, as well as important considerations when deciding whether to have an additional party act as either a co-borrower or guarantor.

I. Differences Between a Co-Borrower and a Guarantor

Key differences between a co-borrower and a guarantor arise in (A) repayment obligations, (B) operative statutes of limitations, and (C) available defenses to a deficiency action.

A. Repayment Obligations

The fundamental difference between a co-borrower and a guarantor is that each has different and independent repayment obligations. The co-borrower has a primary obligation to repay the debt under the promissory note and is not a party to the guaranty. Vice versa, the guarantor is not a party to the promissory note, and therefore its contractual obligations differ from that of the co-borrower.[1]

A co-borrower is primarily liable to repay the debt. This means the co-borrower is obligated to make principal and interest payments as provided in the promissory note, and, upon a default, the creditor may seek repayment of the debt from the co-borrower regardless of whether the default was caused by the borrower or any of its fellow co-borrower(s).

A guarantor signs a guaranty document that provides security for repayment of the debt owed by the borrower(s) under the promissory note.[2] A guarantor is only secondarily liable to repay the borrower's debt since the guaranty is a separate and independent contract.[3] Thus, in order to collect repayment from a guarantor, the creditor must first prove a default by the borrower. Although the creditor must show the borrower has defaulted, it does not necessarily follow that the creditor must also exhaust all remedies against the borrower before enforcing repayment under the guaranty.[4] Typically the guaranty will allow the creditor the option to seek repayment from the guarantor before, or at the same time that, it seeks repayment from the borrower.

B. Statute of Limitations

The operative statute of limitations for a deficiency judgment is another important difference. In Nebraska, the trustee under a deed of trust may foreclose on real property securing the promissory note either through formal court processes, a "judicial foreclosure," or exercising its power of sale granted in the deed of trust, otherwise known as "non-judicial foreclosure." When the proceeds from a sale following a judicial or non-judicial foreclosure fails to cover the full amount of the outstanding indebtedness, the creditor may, under certain circumstances, bring an action to recover the amount of the deficiency from the borrower and/or the guarantor (commonly known as a "deficiency judgment" or "deficiency action").[5] The Nebraska Trust Deeds Act (the "Act")[6] requires a creditor to file a claim against the borrower for a deficiency judgment within three months after a non-judicial foreclosure,

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Should the creditor decide to have a third party act as a guarantor, it should seek to obtain an unlimited guaranty from the guarantor and, if more than one guarantor, have all the guarantors agree to be jointly and severally liable for the entire amount of the loan.

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whereas, under Nebraska's general statute of limitations for written contracts, the creditor has five years following a non-judicial foreclosure to file such a claim against a guarantor.[7] The creditor, therefore, must act quickly to collect a deficiency from a borrower, whereas timing is not so crucial concerning a guarantor.

It is important to note that the foregoing discussion applies only in circumstances of non-judicial foreclosures. The general five-year statute of limitations in Nebraska for written contracts applies to deficiency actions brought after a judicial foreclosure.[8]

C. Defenses

Certain defenses are made available under the Act to co-borrowers in the context of deficiency actions, which are not similarly available to guarantors. This is because the Act only applies to actions concerning obligations secured by a deed of trust, such as a borrower's obligations under a secured promissory note.[9] One significant right granted the borrower in the context of a deficiency action is that the court must determine the fair market value of the property foreclosed upon before entering a deficiency judgment against the borrower.[10] The court must then limit its judgment to the amount by which the outstanding indebtedness, plus interest and the costs and expenses associated with the foreclosure sale, exceeds the fair market value of the property as of the date of such sale.[11] There is no fair market valuation requirement in a deficiency action against a guarantor because the Act does not apply to an action based on a guaranty.[12]

Guarantors also have defenses that are not available to co-borrowers. However, the guaranty typically includes a myriad of waivers that effectively negate many of these defenses.

II. Choosing Between a Co-Borrower and a Guarantor

When deciding whether to have a third-party affiliated with the primary borrower act as a co-borrower or a guarantor, a good way to gauge the correct structure is to ask: who will receive and use the money? A simple example is a loan to a limited liability company with individual members holding all membership interests in the company. If the company, not its members, will receive all the loan funds directly and use the funds for its business operations, the company should be the sole borrower, and its members should guaranty the loan.

Should the creditor decide to have a third party act as a guarantor, it should seek to obtain an unlimited guaranty from the guarantor and, if more than one guarantor, have all the guarantors agree to be jointly and severally liable for the entire amount of the loan. This maximizes the recovery the creditor can obtain from each guarantor. In the event the creditor needs to seek repayment from the guarantors, it would then have the option of (i) filing a suit naming all the guarantors jointly, (ii) naming any one of them individually, or (iii) naming more than one, but not all, of the guarantors together. In any case, the creditor may obtain a judgment against any one or more of the guarantors for the entire amount of the debt still owed.

If the guarantors do not agree to an unlimited guaranty that makes them jointly and severally liable for the entire debt, the creditor could propose the guarantors still agree to joint and several liability but cap the recovery amount. The cap could be the same for each guarantor, or it could vary among the guarantors, and it could be set as a specific dollar amount or as a certain percentage of the loan. This would still allow the creditor the option of suing all the guarantors in one lawsuit, or each one individually. However, the amount the creditor could ultimately collect from each guarantor would then be limited by the relevant cap agreed to in the guaranty.

[1] *Boxum v. Munce, 16 Neb.App. 731, 740, 751 N.W.2d 657, 663 (2008) (citing National Bank of Commerce Trust & Sav. Assn. v. Katleman, 201 Neb. 165, 266 N.W.2d 736 (1978); In re Estate of Williams, 148 Neb. 208, 26 N.W.2d 847 (1947)).*

[2] *See Mutual of Omaha Bank v. Murante, 285 Neb. 747, 752, 829 N.W.2d 676, 681 (2013).*

[3] *Id. (citing NEBCO, Inc. v. Adams, 270 Neb. 484, 704 N.W.2d 777 (2005)).*

[4] *See Id. at 753-54, 829 N.W.2d at 681-82 (the Supreme Court of Nebraska found that the terms of a guaranty permitted the lender to enforce payment under the guaranty without first exhausting its remedies against the borrower).*

[5] *See First Nat. Bank of Omaha v. Davey, 285 Neb. 835, 839-40, 830 N.W.2d 63, 67 (2013).*

[6] *NEB. REV. STAT. §§ 76-1001–76-1018 (2020).*

[7] *NEB. REV. STAT. §§ 76-205(1) and 76-1013 (2020).*

[8] *Davey, 285 Neb. at 846-47, 830 N.W.2d at 71.*

[9] *Murante, 285 Neb. at 752, 829 N.W.2d at 681.*

[10] *NEB. REV. STAT. § 76-1013 (2020).*

[11] *Id.*

[12] *Murante, 285 Neb. at 752, 829 N.W.2d at 681.*

Austin S. Graves is an Associate Attorney at Baird Holm LLP in Omaha, Nebraska. His practice focuses on various aspects of corporate law.

EDUCATION CALENDAR

Due to the COVID-19 (Coronavirus) event recommendations and related schedule changes, please visit https://www.nebankers.org/education.html or call the NBA Education Center at (402) 474-1555 for the most current event calendar updates.

OCTOBER 2020

BSA/AML Compliance Management
October 14
Virtual Offering

Commercial Lending Schools
October 19-23, Manhattan, Kan.
Bluemont Hotel

Women in Banking Conference
October 21-22
Virtual Offering

Summit on Regulatory Issues
October 30
Virtual Offering

NOVEMBER 2020

Bank Investment, Funding and Economic Outlook Conference
November 5-6
Virtual Offering

Principles of Commercial/Ag Loan Documentation
November 18
Virtual Offering

DECEMBER 2020

Agriculture & Beyond Workshops
December 8
Virtual Offering

NBA Nebraska Bankers Association

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 may also visit the NBA website at https://www.nebankers.org/education.html.

Becoming a Credible Challenge for Information Security

Cody Delzer, Vice president / Information Security Consultant - SBS CyberSecurity, LLC

IF WE'VE LEARNED NOTHING else from the COVID-19 Pandemic, it's that you may consider yourself a financial institution, but you're really a technology company. We rely on technology to operate our businesses and support our customers. Imagine where we would be, right now, without technology!

Appointing an IT or IS expert (there is a difference) to sit as a full-time member of your board of directors is an excellent next-step to making sure your organization is appropriately protecting its technology investment. There's a good chance your board consists of ownership, certain members of senior management, and external advisors that provide valuable insight that assists in your business model or market. Why not have a dedicated technology or information security expert as a board resource also? Financial institutions are starting to explore this option. Perhaps doing so isn't in the cards for your financial institution; however, the responsibility to become a "credible challenge" to IT or IS decisions still falls to the board.

Regulation

The FFIEC defines a "credible challenge" as being actively engaged, asking thoughtful questions, and exercising independent judgment. The FFIEC mentions being a credible challenge in three sections of two Handbooks, specifically the Management and Business Continuity Handbooks in the following excerpts:

Management Handbook Section I.A.1 board of directors Oversight states, "While the board may delegate the design, implementation, and monitoring of certain IT activities to the steering committee, the board remains responsible for overseeing IT activities and should provide a credible challenge to management."

Management Handbook Section III.D.7 Reporting states, "Recipients of IT risk reports should have the authority and responsibility to act on the reported information, provide a credible challenge for the information contained in the reports, and be held accountable for the outcomes."

Business Continuity Handbook Section IX Board Reporting states, "Board minutes should reflect business continuity discussion (including credible challenges) and approvals.

Becoming a Credible Challenge

It is expected that the board of directors take an active involvement in the oversight of information security by becoming a credible challenge. While the appointment of an IT or IS expert to your institution's board can help improve your institution's insight and credibility regarding cybersecurity, in some cases, such an appointment is simply not feasible.

Additionally, adding an IT or IS expert to the board does not automatically make you a credible challenge. Improving any Board's ability to be a credible challenge starts with learning how to ask better cybersecurity questions. Here's a list of better questions to ask when new technology is being evaluated, or threats are identified to help you get started. The first three questions pertain directly to governance, and the last three questions have to do with operations:

1. How is this addressed in our risk assessment process? There are many types of risk assessments, but all systems, processes, and vendors must be included in a risk assessment. Those risk assessments should determine if the system, process, or vendor fits the board's risk appetite. Asking this question will assist in providing greater insight to the board as to how the risk assessment process works, and where these individual topics fit in.

2. How have we covered this in our policy? Policy needs not to detail how things are accomplished, but rather who is responsible for the policy's execution, along with the expected

format and frequency of execution. Asking this question will assist in ensuring adequate policy coverage of systems, processes and vendors.

3. How do we have this independently audited? Have our risk assessments determined this system, process or vendor be high risk? If so, how is this thing tested and how frequently? Is a requirement for testing this thing addressed in our policy?

4. How is our institution addressing this issue? When properly answered, this question will contain information from the previous three questions. It is risk assessed through this process, which is governed by this policy, and it's independently tested in this way. However, more elaboration can be provided here.

5. How do we help our customers address this issue? Will this issue affect our customers? If so, what can we do to reduce risk or reduce agitation among our customers? Again, when properly answered, this question will contain information from the first three questions.

6. How do we ensure our vendors have addressed this issue? This question is only relevant if the system or process in question is outsourced; however, it is important to consider. Your vendor risk assessment should identify your levels of vendor risk. But the answer to this question may be more issue-specific and rely on the results of an ongoing vendor review to fully understand. It may be a new topic that would not have been covered in a previous review and could warrant a conversation with the vendor to determine how the issue may be addressed. Again, when properly answered, this question will contain information from the first three questions.

The Big Takeaway

Examiners expect adequate oversight of information security from the board of directors. The board may delegate these responsibilities, but the board must present a credible challenge to management. Becoming a credible challenge means asking better questions to successfully provide oversight and accountability to senior management and the committees with whom responsibility for information security lies. Appointing an IT or IS expert to your board of directors is an excellent step to becoming a credible challenge, as is outlining a framework to ask better questions like those listed above. Hopefully, in time, having Directors with a background in technology becomes common practice. If this is a step your organization has already taken, great! Until that time, Boards must ensure they provide a credible challenge to information security management, regardless of expertise.

For more information, contact Reece Simpson at 605-270-3916 or reece.simpson@sbscyber.com. SBS delivers unique, turnkey cybersecurity solutions tailored to each client's needs, including risk management, consulting, on-site and virtual auditing, network security and education. Learn more at www.sbscyber.com.

Changes to Eligible Retained Income

John Berteau, Associate General Counsel for Compliance Alliance

IN RESPONSE TO THE POTENTIAL ECONOMIC EFFECTS OF THE coronavirus, the OCC, FRB and FDIC ("the agencies") published an interim final rule on March 20, 2020, proposing to revise the definition of eligible retained income. On March 26, 2020, the FRB published an interim final rule which revised the definition of eligible retained income for institutions subject to the FRB's total loss-absorbing (TLAC) rule. The agencies recently published a final rule which made final both of these interim final rules without changes. The goal of this final rule is to help strengthen the ability of banks and TLAC institutions to continue lending and conducting other financial intermediation activities during stress periods by making distribution limitations more gradual, as intended by the agencies.

Under the capital rule, banks must maintain a buffer of regulatory capital above their required minimum risk-based capital and leverage ratio requirements to avoid restrictions on capital distributions. The agencies established the capital buffer requirements to encourage better capital conservation and to enhance the resilience of the banking system during stress periods. Capital buffer requirements, as initially implemented, were intended to gradually limit the ability of banks to distribute capital if their capital ratios fell below certain levels.

Banks under the capital rule were generally subject to a fixed capital conservation buffer requirement, composed solely of common equity tier 1 capital, of greater than 2.5% of risk-weighted assets. On March 4, 2020, the FRB introduced a stress capital buffer requirement, which provides that a covered holding company will receive a new stress capital buffer requirement on an annual basis, which replaced the existing greater than 2.5% capital conservation buffer requirement.

Under the capital rule, if a banking organization's capital ratios fall within its applicable minimum-plus-buffer requirements, the maximum amount of capital distributions it can make is a function of its eligible retained income. Before the issuance of the March 2020, interim final rule, the capital rule generally defined eligible retained income as four quarters of net income, net of distributions and associated tax effects not already reflected in net income. The interim final rule revised the definition to be:

> "(i) The eligible retained income of a national bank, or Federal savings association is the greater of:
>
> (A) The national bank's or Federal savings association's net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and
>
> (B) The average of the national bank's or Federal savings association's net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter."

The revised definition of "eligible retained income" under this final rule applies to all of an organization's buffer requirements, including the fixed greater than 2.5% capital conservation buffer and the countercyclical capital buffer. Once the stress capital buffer requirements apply October 1, 2020, the revised definition would also apply to all parts of a covered holding company's buffer requirements. Having one definition of "eligible retained income" for all organizations under the capital rule should simplify the regulatory capital framework and ensures fairness across organizations of all sizes.

The requirements in the total loss-absorbing capacity (TLAC) rule build on and complement the capital rule. Back in 2016, the FRB issued the TLAC rule to require the largest and most important bank holding companies (U.S. based) and foreign banking organizations (U.S. operations) to maintain a minimum TLAC amount, consisting of minimum amounts of long-term debt and tier 1 capital. Also, the TLAC rule prescribed buffer requirements above the minimum TLAC amount, which institutions must maintain to avoid restrictions on capital distributions.

As with the capital rule, the TLAC buffer requirements were established to encourage better capital conservation and enhance the resilience of the banking system during stress periods. TLAC buffer requirements were implemented to gradually limit the ability of institutions to make capital distributions under certain circumstances, thereby strengthening the ability of these institutions to continue lending and conducting other financial intermediation activities during stress periods.

Institutions with a TLAC level that falls below the applicable minimum plus-buffer requirements face limitations on capital distributions, in a manner designed to parallel the restrictions on capital distributions under the capital rule. The maximum amount of capital distributions that a TLAC covered company can make is limited as a percentage of its eligible retained income, as defined in the TLAC rule.

Before the issuance of the March 2020, interim final rule, the TLAC rule generally defined eligible retained income as net income for the four calendar quarters preceding the current calendar quarter, based on the globally systematic important U.S. bank holding companies' FR Y-9C, net of any distributions and associated tax effects not already reflected in net income. This final rule revised the definition to be:

> "(i) The eligible retained income of a global systemically important BHC is the greater of:
>
> (A) The global systemically important BHC's net income, calculated in accordance with the instructions to the FR Y-9C, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and
>
> (B) The average of the global systemically important BHC's net income, calculated in accordance with the instructions to the FR Y-9C, for the four calendar quarters preceding."

These revised definitions of eligible retained income should allow institutions to gradually reduce distributions as they enter periods of stress and provide institutions with stronger incentives to continue to lend and carry on other business functions. Although both interim final rules were effective as of the date they were published, the new final rule will be effective January 1, 2021.

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