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## ASK KENNEDY

### October 11, 2023

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- Rick Clayburgh Gives Recap of NDBA Board Meeting with CFPB Director, Rohit Chopra
- Member Questions
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- Christie Huber Obenauer and Rick Clayburgh, Elected to Serve on 2023-2024 ABA Board of Directors
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#### **Rick Clayburgh Gives Recap of NDBA Board Meeting with CFPB Director, Rohit Chopra**

NDBA President, Rick Clayburgh is joining us to give a recap of the meeting the NDBA Board had with CFPB Director, Rohit Chopra on Friday, October 6<sup>th</sup>.

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#### **Member Questions**

**Question #1:** Are there any other documents required by North Dakota state law that need to be provided to the consumer on a paid off non-real estate installment loan, other than a copy of the paid promissory note?

**Response:** No, there is no separate North Dakota law for consumer non-real estate installment loans. UCC Article 3, found in Chapter 41-03 of the North Dakota Century Code is applicable to promissory notes as physical negotiable instruments. Sometimes the borrower/maker will ask for the original to be returned, however, a notation directly on the promissory note stating it has been paid will suffice.

**Question #2:** Has ACRE been approved in the legislature? When will banks know about it, its enactment, and the benefits?

**Response:** ACRE has not been approved. It had a hearing in the House in July, but like a lot of things it hasn't been voted on yet. I was provided information that there was "talk" about including it in the appropriations vote, but that is not likely to happen and that there is a push to have it voted on along with the SAFER Banking Act.

### **SAFER Banking Act**

On Wednesday, September 27, the Secure and Fair Enforcement Regulation (SAFER) Banking Act was passed in the U.S. Senate. This new bill aims to give the marijuana industry access to banking services by providing legal protection to banks or other financial institutions that offer services to state-legal marijuana businesses.

In October 2022, President Biden requested that the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) re-evaluate marijuana's current status as a Schedule I substance under the Controlled Substance Act (CSA). A Schedule I substance is the most restrictive and includes substances seen as having no medical use and high potential for abuse, whereas a Schedule III substance is considered to have an accepted medical use and relatively lower potential for abuse.

According to a report from the Congressional Research Service, the Drug Enforcement Agency (DEA) is likely to follow HHS and FDA to move marijuana from a Schedule I to a Schedule III under CSA. The report lists potential impacts of rescheduling, one of which states that rescheduling would make Internal Revenue Code Section 280E inapplicable to marijuana businesses, allowing marijuana and marijuana-related businesses to take deductions. To view the report, please visit this [link](#).

In the last ten years, there have been forty-seven states that have legalized some form of cannabis, whether for medical or recreational purposes. Cannabis is currently classified as an illegal substance under the Controlled Substance Act, which has created conflicts between Federal and State laws and resulted in financial institutions being reluctant to conduct business with legitimate, State-sanctioned entities related to cannabis. Due to this, the businesses and employees are unable to access deposit accounts, securing lines of credit, obtaining commercial and residential mortgages, and accepting credit and debit cards while operating a retail business.

The SAFER Banking Act aims to resolve these issues by providing safety for banks, credit unions, payment processors, and other financial institutions that provide services to these State-sanctioned businesses. This will shift businesses and their employees away from cash-reliant businesses and allow them to utilize the financial institutions, which helps create more public safety for the communities where these businesses are located. For more information on the SAFER Banking Act bill, please visit this [link](#).

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### **Pregnant Workers Fairness Act**

The Pregnant Workers Fairness Act (PWFA) is a new law that went into effect on June 27, 2023, which requires covered employers to make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical condition of a qualified employee" unless the employer can demonstrate undue hardship. This law applies to private and public sector employers with at least 15 employees, employment agencies, and labor organizations.

For more information on the Act, please visit this [link](#).

## Regulating FedNow

The Board of Governors of the Federal Reserve (“Board” or “Fed”) has developed a real-time payment and settlement system service called FedNow<sup>SM</sup> Service (“FedNow”), which went live on July 20, 2023. Similar to other payment systems, it is regulated in a somewhat patchwork fashion by Regulation J, Uniform Commercial Code (UCC) Article 4A, and Regulation E.<sup>1</sup> This article provides a broad overview of the interplay between these laws and regulations relative to FedNow.

To summarize, new Subpart C of Regulation J and UCC Article 4A generally govern all fund transfers through FedNow with the following exceptions: (1) the provisions of Subpart C trump any inconsistent provisions of Article 4A; and (2) a provision of Regulation E will trump a provision of Subpart C where (a) Regulation E is applicable and (b) that Regulation E provision is inconsistent with the provision of Subpart C.

### **Regulation J, Subpart C**

Regulation J (12 C.F.R. Part 210) provides the legal framework for the collection and return of checks through the Federal Reserve System (subpart A) and specifies terms and conditions governing funds transfers over the Fedwire Funds Service (subpart B). Effective October 1, 2022, the Board adopted a [final rule](#) establishing a new subpart C governing funds transfers made through FedNow. The new subpart specifies the terms and conditions under which Reserve Banks will process funds transfers over FedNow.

### **Uniform Commercial Code Article 4A**

Article 4A of the Uniform Commercial Code (“UCC”)<sup>2</sup> provides comprehensive rules governing the rights and responsibilities of parties to funds transfers. Subpart C of Regulation J incorporates the provisions of UCC Article 4A in Appendix A,<sup>3</sup> meaning that UCC Article 4A is generally applicable to all transfers over FedNow. However, the express provisions of Subpart C “supersede or preempt any inconsistent provisions of Article 4A as set forth in appendix A...or as enacted in any state.”<sup>4</sup>

### **Regulation E**

A funds transfer from a consumer originator or a funds transfer to a consumer beneficiary could be carried out through FedNow and could potentially be subject to the Electronic Fund Transfer Act (“EFTA”) ([15 U.S.C. §§ 1693 et seq.](#)) and its implementing Regulation E ([12 C.F.R. Part 1005](#)).<sup>5</sup> “If so, the funds transfer continues to also be governed by subpart C, except that, in the event of an inconsistency

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<sup>1</sup> Other sources of information include the FedNow Operating Procedures, [Operating Circular 8](#), [FedNow<sup>SM</sup> Service Readiness Guide](#), and FedNow Service Technical Specifications.

<sup>2</sup> UCC Article 4A has been adopted by North Dakota as Ch. 41-04.1, N.D.C.C.

<sup>3</sup> 12 C.F.R. § 210.40(b)(1).

<sup>4</sup> *Id.*

<sup>5</sup> 12 C.F.R. § 210.40(b)(4).

between the provisions of subpart C and the EFTA, the EFTA shall prevail to the extent of the inconsistency.”<sup>6</sup> The following example is provided within subpart C<sup>7</sup>:

[A] funds transfer may be initiated from a consumer's account at a depository institution, and the depository institution may execute that payment order by sending a conforming payment order to a Reserve Bank through the FedNow Service. If that transfer is subject to the EFTA, then examples of how the provisions of subpart C may govern the transfer include, but are not limited to, the following:

(i) Where the consumer subsequently gives timely notice that the transfer was an unauthorized electronic fund transfer to its depository institution and exercises the right to obtain a refund under the EFTA, the depository institution would be required to comply with the EFTA and the applicable provisions of the EFTA would govern the institution's obligations to its customer, even if under subpart C the institution does not have a right to receive a refund or reverse the payment order sent to the Reserve Bank through the FedNow Service.

(ii) Where the customer properly asserts an error under the EFTA with respect to the transfer and exercises the right to obtain a refund to correct the error under the EFTA, the depository institution would be required to comply with the EFTA and the applicable provisions of the EFTA would govern the institution's obligations to its customer, even if under subpart C the institution is obliged to pay its payment order sent to the Reserve Bank through the FedNow Service.

In short, you should look to the underlying relationship and determine whether EFTA / Regulation E applies<sup>8</sup> and resolve conflicting provisions between EFTA / Regulation E and Subpart C of Regulation J as appropriate.

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### **FedNow and CBDCs**

Many people have been asking about the relationship between FedNow and central bank digital currencies (CBDCs). In short, they are unrelated.

FedNow is a real time payment (RTP) and settlement system. RTP systems provide immediate funds availability to the receiver. Prior to the Fed’s creation of FedNow, the only platform for real-time payments was the private RTP network launched by The Clearing House Payments Company L.L.C. in 2017.

A CBDC is a form of digital money that would be a liability of the Federal Reserve. When using a CBDC, transactions could occur in real-time. However, the Fed has made no decision on issuing a CBDC and would not do so without Congressional approval.<sup>[1]</sup> Thus, the creation of FedNow neither helps nor hinders the development or issuance of a U.S. CBDC.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Regulation E “applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer’s account.” [12 C.F.R. § 1005.3\(a\)](#).

<sup>[1]</sup> <https://www.federalreserve.gov/faqs/is-fednow-replacing-cash-is-it-a-central-bank-digital-currency.htm>

## **Christie Huber Obenauer and Rick Clayburgh, Elected to Serve on 2023-2024 ABA Board of Directors**

The ABA's Nominating Committee has finalized the official slate of candidates which was presented for election at the ABA's annual meeting on October 8-10<sup>th</sup> in Nashville, TN. We are excited to announce that Christie Huber Obenauer, CEO and President of Union State Bank of Hazen, was elected to serve on the 2023-2024 ABA Board of Directors. She will join NDBA president and CEO, Rick Clayburgh, among those serving as directors on the ABA's board. Congrats to Rick and Christie!

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## **Chamber of Commerce of the U.S. vs. Consumer Financial Protection Bureau**

In March of 2022, the Consumer Financial Protection Bureau (CFPB) updated its Supervision and Examination Manual to direct examiners to root out discrimination against unspecified protected classes and disparate-impact discrimination. The CFPB invoked its unfair, deceptive, or abusive acts and practices (UDAAP) authority as covering this type of conduct. A group of trade associates sued the CFPB in the Eastern District of Texas, claiming the update exceeded the CFPB's authority under the Appropriations Clause and the Dodd-Frank Act, and on September 8, 2023 the court agreed and granted the plaintiff's motion for summary judgement.

The court analyzed whether the CFPB's authority to regulate UDAAP under the Dodd-Frank Act included "discriminatory" practices. The court determined that the expansive interpretation of UDAAP lacked the "exceedingly clear language" because "the Dodd-Frank Act treats discrimination and unfairness as distinct concepts. The Dodd-Frank Act does not define or include discrimination within its definition of "unfairness", which makes "its definition of 'unfairness' at least vague as to the topic of discrimination". For more information of the court's decision, visit this [link](#).

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## **NDBA Useful Resources**

- CFPB Issues Updated Small Business Data Collection Rule FAQs | The Consumer Financial Protection Bureau updated its frequently asked questions regarding its section 1071 rule. The Updated FAQs covered topics including refinanced loans and agricultural-purpose credit loans under the rule, the exclusion of consumer-designated credit from the rule, and the rule's coverage of merchant cash advances. To view the FAQs, please visit [this link](#).
- CFPB Announces Rulemaking to Prohibit Medical Debt Information on Credit Reports | CFPB recently announced that it is beginning its rulemaking process designed to prohibit consumer reporting companies from including medical debts and medical debt collection information on consumer reports. For additional information, visit [this link](#).
- CFPB Publishes List of Applicable HUD Regulations and Guidance | CFPB recently provided updates on information on compliance with the Real Estate Settlement Procedures Act (RESPA) to release a "non-exhaustive" list of regulations and guidelines issued by the U.S. Department of Housing and Urban Development that the Bureau applies in its current activities. For additional information, visit [this link](#).

- FinCEN Releases Beneficial Owner Reporting Compliance Guide | In September, FinCEN announced and published a Small Entity Compliance Guide aimed to assist the small business community in complying with the beneficial ownership information reporting rule. To view the final rule, visit [this link](#).

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### **Upcoming NDBA Events in 2023**

NDBA has many exciting and informational events planned for 2023. Below are some special dates to mark on your calendars!

#### **CONFERENCES**

- **Bank Management Conference** | February 16-17, 2024 | Westin Kierland, Scottsdale AZ
- **2024 Tri-State Trust Conference** | Delta Hotel by Marriott, Fargo ND
- **Washington Summit** | March 18-20, 2024 | Marriott Marquis, Washington, DC
- **2024 NDBA/SDBA Annual Convention** | June 3-5, 2024 | Delta Hotel by Marriott, Fargo ND

#### **TRAINING**

- **Annual Security Seminar** | October 17, 2023 | Bismarck, ND or Virtual | Register [here](#).
- **2023 Effective Leadership** | November 28-29, 2023 | Bismarck, ND | Register [here](#)