
ASK KENNEDY

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DISCLAIMER: THESE MATERIALS PROVIDE GENERAL INFORMATION AND ARE INTENDED FOR EDUCATIONAL PURPOSES ONLY. THESE MATERIALS DO NOT PROVIDE, NOR ARE THEY INTENDED TO SUBSTITUTE FOR, LEGAL ADVICE.

Question #1: If we have a parent and a minor child as joint account holders on a checking account, can we provide the minor the account documents through the E-sign process as long as we follow the E-sign rule? Is there any ND law that would prohibit this?

Response: Yes, banks are allowed to send a minor child and an adult, who are joint account holders, the account documents through E-sign process, and this is not prohibited by any North Dakota law. The only North Dakota law that may be applicable is N.D.C.C. § 14-10-10, which states that minors can disaffirm almost all contracts they enter. However, that is negated by having an adult as joint account holder. 15 U.S. Code § 7001 states that contracts or other records relating to transactions may not be denied legal effect, validity or enforceability solely because it is in electronic form. So as long as a bank follows their E-sign process and the process adheres to federal regulations, they should be able to send account documents electronically.

Question #2: Regarding individuals with SBA EIDL loans, are farm products covered by SBA’s lien?

Response: SBA does not require farm products to serve as collateral on COVID-19 EIDL loans. SBA’s standard UCC-1 is not set up to create a security interest in any farm products, including agricultural commodities, crops, and/or livestock, and SBA has no intent to create a lien on any of these items.

Question #3: Hypothetical: A single-party account holder passes away with a POD beneficiary on the account; however, the beneficiary has not yet come into the bank to claim the funds. The bank receives an Affidavit for Collection of Personal Property of the Decedent in the mail requesting the bank to remit funds of \$3,000 to the state. The balance of the account is \$4,000, which would leave \$1,000 for the beneficiary.

Is the POD beneficiary entitled to the entire balance in the account at time of death, even though she has not yet come into the bank to collect the funds? Because the beneficiary has not been able to make it to the bank yet, will the receipt of the Affidavit of Collection trump the POD rules?

Response: There are a few statutes that come into play in response to this hypothetical. The primary statute is NDCC 30.1-31-12, which talks about the rights of creditors in decedent's accounts when there are outstanding claims against the decedent at the time of death. Further, NDCC 30.1-31-19 also provides protections to Financial Institutions that comply with the Affidavit for Collection of Personal Property of the Decedent. Lastly, the Affidavit itself attests in paragraph 8 that the bank may comply without recourse of the POD.

A link to a copy of the Affidavit, as well as links to the applicable statutes, can be found below:

[Affidavit](#)

[NDCC 30.1-31-12](#)

[NDCC 30.1-31-19](#)

Question #4: Where do banks and our farm customers stand from a regulatory perspective in ND if they are growing hemp? Are there any best practices in how we administer these files?

Response: Following the passage of the 2014 Farm Bill, the NDDA worked under federal guidelines to oversee an Industrial Hemp Pilot Research Program aimed at active producers of hemp in the state of North Dakota. At the time, the goal was to move towards a more permanent solution following the 2018 Farm Bill; while the 2018 Farm Bill did have some changes, there was not much that happened in regard to state hemp laws despite the fact that the pilot program was due to end in 2021. Consequently, following the 2019 session, the North Dakota State legislature enacted HB 1349 as an emergency measure to extend North Dakota's hemp program. The 2019 version of the state's hemp law (N.D. Cent. Code, § 4.1-18.1-01) contained minimal changes from the original measure passed in 2014. With the 2019 emergency measure set to expire at the end of 2021, the state legislature enacted another emergency measure (HB 1045) to extend the hemp program once again. Consequently, North Dakota currently operates under the changes of HB 1045, which included changes to the definition of hemp and the possession amount required to be in violation of state law.

For the latest on North Dakota's Hemp Regulations & Updates please click [here](#).

Loan Workouts with Bob Fossum

We would like to welcome Bob Fossum here today! Bob is a loan workout specialist and the Vice President for Farmers & Merchants Bank of North Dakota in Tolna, and he is here with us today to share his years of wisdom in working with distressed credit and troubled assets. Please join me in giving Bob a virtual round of applause!

“AEI.Ag Presents” Ag Podcast

In the ever-changing world of agriculture, along with a constantly shifting economy, it is important for those in the finance sphere to stay on top of the many changes and updates in the ag community that may affect them. AEI.Ag Presents is an award-winning podcast series that dives into agricultural issues through the lens of history and economics to consider what we can learn and how to think about the challenges faced both today and in the future, while also providing in-depth analysis about key trends currently impacting the farm economy. Give it a listen at the link below:

<https://aei.ag/podcast/>

Electronic Funds Transfer Disclosure

The Bank of North Dakota has recently updated their disclosures regarding electronic fund transfers (EFTs). The Electronic Funds Transfer Act requires financial institutions to provide certain information to customers regarding EFTs. The disclosure included applies to consumer accounts only, and services may be limited depending on the type of BND account. Please click on the following link to view the disclosure:

<https://bnd.nd.gov/pdf/Electronic-Funds-Transfer-Disclosure.pdf>

FDIC & CFPB Update

Biden Administration & “Junk” Fees

On October 26, 2022, the CFPB and the Biden administration announced that they are taking action to eliminate all “junk fees,” such as fees for deposited checks that are returned unpaid, surprise banking overdraft fees, hidden hotel booking fees, and cable (TV) termination charges. Biden also stated that his administration is creating fines for banks that penalize customers for depositing checks that bounce. Additionally, the administration is creating fines for banks that charge surprise overdraft fees for transactions that are authorized into a positive balance but later settle into a negative balance. The CFPB is also developing rules and guidance that would reduce credit card late fees that reportedly costs credit card holders \$24 billion each year; further, the administration has encouraged banks to reduce the fees they charge consumers across-the-board while also encouraging the CFPB to formulate additional rules addressing other types of junk fees.

CFPB Lawsuit

The CFPB also released bulletins containing specific guidance about two bank deposit fee practices (surprise overdraft fees & blanket NSF re-presented fees) that are “likely unfair and unlawful under existing law.” The CFPB has based this guidance on the UDAAP, which prohibits an act or practice if (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.

These new UDAAP practices drafted by the CFPB pose a significant problem for the banking industry, as ultimately these new regulations will create numerous regulatory fines for banks and financial institutions. Placing this broad of an umbrella over what can be considered unfair, deceptive, or abusive will lead to substantial confusion and numerous violations against banks for many different transactions.

Consequently, in response to the announced guidance, the ABA, US Chamber, and Texas Bankers’ Association have filed a suit challenging CFPB’s legislative action on anti-discrimination grounds. At the core of the lawsuit is the contention that, by enforcing the aforementioned regulations and standards through an examination or enforcement process rather than legislation, the CFPB will have effectively created a mandatory compliance rule without any notice, comments, or consideration as required by the Administrative Procedures Act.

You can find the CFPB guidance, along with its most recent bulletin and updates, here:

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/>

FDIC Stablecoin Concerns

In a speech on October 20, FDIC Acting Chair Martin Gruenberg spoke on the regulation of crypto-assets and the current risks the banking industry faces when rolling out crypto-related products. Among his comments, Gruenberg emphasized that before banks engage in crypto-asset related activities, it is important to ensure that: (a) the specific activity is permissible under applicable laws and regulations; (b) the activity can be engaged in a safe and sound manner; (c) the bank has put in place appropriate measures and controls to identify and manage the novel risks associated with those activities; and (d) the bank can ensure compliance with all relevant laws, including those related to anti-money laundering/countering the financing of terrorism, and consumer protection. Focusing specifically on stablecoins, and particularly on payment stablecoins, he noted that the banking industry must continue examining the potential benefits associated with payment stablecoins, while also noting that the industry cannot ignore the significant safety and soundness risks. He pointed to three important features that could be implemented to make stablecoins safer:

- Subject to prudential regulation
 - Backed dollar-for-dollar by high-quality, short-dated U.S. Treasuries
 - Transacted on permissioned ledger systems with robust governance and compliance mechanisms
 - Issuing of payment stablecoins through a bank subsidiary
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Finally, he pointed out the importance of the disclosure and consumer protection issues that need to be addressed by the financial industry, emphasizing that any payment stablecoin system should work in a complementary way with the upcoming FedNow service and any CBDC issued by the Fed if that were to occur. Overall, the FDIC continues to maintain that payment stablecoins could be significantly safer than available stablecoins if they were subject to more effective and efficient regulation.

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Chapter 11 Subchapter V Bankruptcies: What Banks Need to Know

In August 2019, the Small Business Reorganization Act, was approved by Congress and went into effect on February 19, 2020. This Act created a new subsection V for Chapter 11 bankruptcies. This subchapter initially applied to small business debtors, who had a total amount of noncontingent, liquated, secured, and unsecured debt under \$2,725,625.00, adjusted every three years in accordance with changes to the Consumer Price Index. Subchapter V was modified in 2020, when the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). The CARES Act modified Subchapter V by raising the debt cap from \$2,725,625.00 to \$7,500,000.00, but the increased cap was set to expire on March 27, 2021. The March 27, 2021, expiration date was extended for another year to March 27, 2022, by the COVID-19 Bankruptcy Relief Extension Act, and was subsequently codified into law when the President signed the Bankruptcy Threshold Adjustment and Technical Corrections Act, on June 21, 2022.

The Bankruptcy Threshold Adjustment and Technical Corrections Act broadened the potential debtor pool for Subchapter V cases. First, it reestablished the increased debt cap of \$7,500,000.00 for Subchapter V cases. Second, the definition of “small business debtor” for Subchapter V bankruptcies was amended, prior to enactment debtors could be excluded if they were affiliates of any corporation, even if not publicly traded, now only the debtors who are affiliates of publicly traded corporations are excluded from proceeding under Subchapter V. In re Phenomenon Mktg. & Entm't, LLC, No. 2:22-bk-10132-ER, 2022 Bankr. LEXIS 2105, at *3 (Bankr. C.D. Cal. Aug. 1, 2022).

Subchapter V makes it easier for small business debtors to reorganize and maintain control of their business, instead of liquidating, by reducing the associated costs and reducing the burdens placed on the debtor under a normal Chapter 11; for example, an official committee of unsecured creditors is not appointed at the start of the bankruptcy and can only be appointed “for cause.” Moreover, the cost and expense for the creditor committee, in a Subchapter V bankruptcy, is placed on the creditor, whereas in a normal Chapter 11 the debtor would have to pay fees associated with the creditors committee. The role of the trustee is also different; in a Subchapter V case, the trustee acts more like a mediator and helps facilitate the development of a consensual plan of reorganization and is not afforded the investigative powers that a typical Chapter 11 trustee has.

Another major difference is that Subchapter V debtors are not required to promptly pay post-petition claims. Subchapter V allows debtors to pay post-petition claims over the course of three years, whereas a typical Chapter 11 requires debtors to pay these claims in the ordinary course of business or on the effective date of the plan. Subchapter V cases also have an expedited timeline which requires debtors to move quickly; for example, a typical Chapter 11 can take months, if not years, whereas a Subchapter V case requires the debtor to submit their plan for reorganization three months after filing for bankruptcy. Lastly, only the debtor can



file a plan under Subchapter V, and the plan can be confirmed over the dissent of the unsecured creditors even if they are not being paid in full, as long as the plan is “fair and equitable.”

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Upcoming NDBA Events - 2023

The North Dakota Banker’s Association has many exciting and informational events planned for 2023. Below are some special dates to mark on your calendars –

- **January 18, 2023: Bankers Day at the Capitol**
 - **January 19, 2023: Bank Management Conference & Legislative Dinner**
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