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## ASK KENNEDY

April 3, 2024

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### Topics Covered:

- Special Guests: Pete Jahner President of Kirkwood Bank and Trust, Becca Vogel Private Banking Specialist at Bravera Bank, Alex Kowski Business Banker at Cornerstone Bank, and Kayla Palmer Assistant Vice President of Agricultural Lending at Union State Bank
- Member Questions
- FTX Founder Sam Bankman-Fried Sentenced to 25 years in Prison
- Check Washing and Theft Check Scams
- NDBA Bank Members Attend the ABA Washington D.C. Summit
- Community Reinvestment Act Litigation Continued
- Agencies Extend Applicability Date of Certain Provisions of their Community Reinvestment Act Final Rule
- Upcoming NDBA Events and Trainings

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### **Special Guests: Pete Jahner, Becca Vogel, Alex Kowski, and Kayla Palmer**

Please welcome this month's guests, Pete Jahner, Becca Vogel, and Alex Kowski! Pete is the current president of Kirkwood Bank and Trust in Bismarck and the NDBA Chairman of the Board. Becca is a Private Banking Specialist with Bravera Bank in Dickinson. Alex is a Business Banker at Cornerstone Bank. Kayla is the Assistant Vice President of Agricultural Lending at Union State Bank. Pete, Becca, Alex, and Kayla recently attended the Washington Summit in Washington, D.C. on March 18-20, and had the opportunity to meet with members of Congress and regulators. They will be sharing with you the issues discussed and why they are so important to NDBA. Welcome Pete, Becca, Alex, and Kayla!

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### **Member Questions**

#### **Question #1: When can I initiate a foreclosure on a residential property?**

**Response:** Under Section 1024.41(f) of Regulation X, banks are prohibited from making the first notice or filing for any judicial or non-judicial foreclosure unless:

1. The mortgage is more than 120 days delinquent;
2. The borrower violated the due on sale clause; or
3. Your bank is joining the foreclosure action of a superior or subordinate lien holder.

The most common foreclosure initiation date is when the mortgage loan becomes more than 120 days delinquent. However, banks can serve the Notice

Before Foreclosure and the FDCPA Validation Notice prior to the 120 delinquency date because it does not qualify as a “first notice or filing.” We recommend serving these on your bank’s debtor as soon as the loan becomes 90 days delinquent to speed up the process.

### **The FDCPA Notice**

When hiring an attorney to pursue a foreclosure action, your bank must make sure the attorney is sending an FDCPA Notice to the debtor contemporaneously with their first communication. You can assist an attorney with drafting the FDCPA notice by providing the following:

1. A current payoff statement effective as of the date of the initial communication.
2. A payoff statement effective as of one of the following, whichever is most recent:
  - a. The last statement date, which is the date the last periodic statement or account statement was provided to the debtor.
  - b. The last payment date, which is the date the last payment was applied to the debt.
  - c. The transaction date, which is the date of the transaction that gave rise to the debt; or
  - d. The judgment date, if you already have a judgment and are trying to collect.

Your attorney then must itemize the interest, fees, and expenses which were applied to the debt from one of the validation dates listed above, to the date of the initial communication. Fees and expenses encompass a wide array of items including force placed insurance, late fees, overdraft fees, other protective advances, property tax payments, etc. Assisting your attorney with drafting the FDCPA Validation Notice can help save time and money when initiating a consumer foreclosure.

A model FDCPA Validation Notice can be found at the following [link](#).

**Question #2: Can North Dakota Banks Collect Attorney’s Fees in a Consumer Foreclosure?**

**Response:** No, North Dakota banks are prohibited from collecting attorney’s fees when initiating an action to collect debts due and owing under any promissory note, bond, security agreement, mortgage, or any other evidence of debt. N.D.C.C. § 28-26-04. That is why assisting your attorney with the drafting of the FDCPA Notice can help to reduce the costs associated with collecting consumer debts, and ultimately reduce the amount your bank must spend on attorney’s fees, which are uncollectable.

**Question #3: Can you provide an interpretation on a North Dakota law regarding death of a lessee, specifically what can be done with a will, if located during a safe**

**deposit box search. Minnesota provides specific instructions, but North Dakota is vague. Is there a requirement to make copies or send anywhere, or are we simply allowed to turn it over with the receipt of appropriate affidavits?**

**Response:** It is understandable that there is confusion of subsection (6) which says that nothing can be removed from the box “other than” a will. Does that mean that a person with an affidavit in accordance with subsection (1) can actually remove a will from the box?

It might be most prudent to allow for the removal of the will but to make a copy of the will and note upon the copy or an attachment to the copy of who took the will and if it appeared to be an original because of a wet inked signature.

There often are a lot of questions about safe deposit boxes, and they almost always come with a comparison to clarity of Minnesota’s laws.

**Question #4: Do payable on death accounts (“PODs” or “POD”) on a decedent’s account take precedence over any estate funds/debts as well as impacts to a surviving spouse’s Medicaid benefits?**

**Response:** Yes, if the assets of the estate are sufficient to pay claims made against the estate and statutory allowances for the surviving spouse and children. However, if claims against the estate remain outstanding after estate assets are applied, any money a decedent left in a POD account, must be made available to pay any outstanding claims and the costs associated with probate.

Typically, your bank will not have knowledge of any remaining outstanding claims, and if the beneficiary of the POD account requests that your bank provide funds you may do so. When an estate claimant such as Medicaid is involved, they will send your bank an “AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY OF THE DECEDENT” which can be found at the attached [link](#). Once received your bank can provide the POD account assets directly to the affiant, without liability. In the event that the funds are provided to the beneficiary prior to receiving the affidavit, the payee is answerable and accountable to any person having a superior right to the funds. In no event will your bank be liable to the estate if funds are furnished prior to receiving the affidavit.

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### **FTX Founder Sam Bankman-Fried Sentenced to 25 years in Prison**

On December 12, 2022, Sam Bankman-Fried was arrested in the Bahamas for a laundry list of financial crimes. FTX gained notoriety during the “big game” (everyone knows which game we are talking about, but are unable to write the actual title of the game due to copyright concerns) in 2022, when they aired a commercial starring, Larry David. FTX was charged 6.5 million dollars for the ad spot, and reportedly paid Larry David an additional 10 million dollars for starring in the commercial. During this same period, banks across the United States were getting rung up, and continue to get rung up, for “Junk Fees” while these major crypto currency exchanges are offering similar services with little to no federal oversight.

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### **Check Washing and Check Theft Scams**

Every year the United States Postal Inspection Service recovers more than \$1 billion in fraudulent checks and money orders. Fraudsters are targeting paper checks sent through the mail and once they have the check, they use chemicals to “wash” the check. This “washing” allows them to change the amount or make themselves the payee, which results in them depositing or cashing the check and stealing funds.

The American Bankers Association provides individuals with information on how to protect their mail from these fraudsters. Some precautions individuals can make to protect their mail include getting the mail promptly after delivery, requesting the post office to hold mail when gone for extended periods of time, contacting the sender if mail is not received, and using security envelopes to protect the contents of the mail. For more information on check “washing” and theft, visit this [link](#).

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### **NDBA Delegates Attend the ABA Washington D.C. Summit**

On March 19, 2024, NDBA delegates attended the Washington D.C. Summit to discuss various pieces of legislation and other issues impacting NDBA member banks. Joining us today is Pete Jahner President of Kirkwood Bank, and Chairman of the NDBA Board of Directors, Becca Vogel, Private Banking Specialist at Bravera Bank, Alex Kowski Business Banker at Cornerstone Bank, and Kayla Palmer Assistant Vice President of Agricultural Lending at Union State Bank. Our delegates discussed many issues with North Dakota Senators, including Senator Kevin Cramer and his Legislative Aid, Senator John Hoeven’s Chief of Staff, Legislative Director, and Legislative Aid, and Congressman Kelly Armstrong and his Legislative Aid. The issues our NDBA delegates discussed are briefly summarized below.

**Trigger Leads** | Homebuyers’ Privacy Protection Act (S.3502) and the Protecting Consumers from Abusive Mortgage Leads Act (H.R. 4198), which would amend the Fair Credit Reporting Act (FCRA) to prohibit credit reporting agencies from selling consumer information in certain circumstances.

**Limitations of CFPB’s Small Business Loan Application Data Collection Rule** | Small Lender Act (S. 1159/H.R. 1806), which would exempt lenders originating fewer than 500 small business loans each of the preceding two calendar years and limit the rule’s application to small businesses with gross annual revenues of under \$1 million. Bank Loan Privacy Act (H.R. 1810), which would require the CFPB to engage in rulemaking to determine which small business financial data can be made public.

**Access to Credit for Our Rural Economy (ACRE) Act** | ACRE Act provides tax exemptions for interest earned on bank loans secured by farm real estate, aquaculture facilities, and home mortgage loans in communities of no more than 2,500. ACRE will help deliver approximately \$26,286,256 worth of annual interest savings in North Dakota.

**Credit Union Oversight** | Credit unions receive government subsidies to provide basic consumer banking products to underserved groups and communities, but this \$2 trillion dollar industry has no community benefit reporting requirements and receives minimal congressional oversight.

**SAFER Banking Act** | SAFER Banking Act (S. 2860/H.R. 2891), which will get state-sanctioned cannabis cash off the street and into regulated financial institutions, making our communities safer and the cannabis industry more transparent to regulators, tax authorities and law enforcement.

**Cumulative Impact of Bank Regulations on the Economy** | Conduct robust oversight of bank regulatory proposals that increase capital, cut fee income, and layer on thousands of pages of new regulatory requirements without adequate analysis of cumulative impact on bank customers and community banks.

**Federal Regulation of Stablecoin Issuers** | Apply the same level of federal oversight to stablecoin users as is currently applied to banks in order to limit the risk of charter arbitrage and ensure equivalent consumer protection across all financial service providers.

**Tax Credits** | Banks utilize tax credits to stimulate economic growth and drive private investment in economically distressed rural, urban, and tribal communities. Proposed legislation includes the Main Street Tax Certainty Act, the New Market Tax Credit Act, the Neighborhood Homes Investment Act, and the Affordable Housing Credit Improvement Acts.

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### **Community Reinvestment Act Litigation Continued**

In February’s Ask Kennedy, we informed you that various trade associations, including the American Bankers Association, and the Texas Bankers Association, filed a lawsuit against the Federal Reserve, FDIC, and OCC for allegedly exceeding their authority when promulgating the Final Rule which significantly amended the Community Reinvestment Act (“CRA”). On March 29, 2024, the Northern District of Texas granted the Plaintiff’s request for a preliminary injunction, which prohibits the Federal Reserve, the FDIC, and the OCC from implementation of the amended

CRA rules against the Plaintiffs in this action. In a joint statement issued by the Plaintiffs, they stated:

“While we strongly support the goals of CRA, the final rules exceeded the banking agencies’ regulatory authority and created disincentives for banks to lend to low- and moderate-income communities that need access to credit the most...”

A copy of District Court Judge Matthew Kacsmark Order and Opinion supporting his findings can be found at the following link: [Preliminary Injunction Order](#)

A copy of the Plaintiffs’ Joint Statement can be found at the following link: [Joint Statement](#)

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### **Agencies Extend Applicability Date of Certain Provisions of their Community Reinvestment Act Final Rule**

On March 21, 2024, federal bank regulatory agencies issued an interim final rule extending the applicability date of certain provisions in their CRA final rule and requested comment on the extension. The facility-based assessment areas and public filing provisions were set to take effect on April 1, 2024. However, “to promote clarity and consistency” the agencies delayed their effective dates until January 1, 2026. Consequently, banks will not have to make changes to their assessment areas or their public files, which aligns with the other substantive parts of the 2023 CRA final rule which are also applicable on January 1, 2026.

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### **Upcoming NDBA Events in 2024**

NDBA has many exciting and informational events planned for 2024. Below are some special dates to mark on your calendars!

#### **CONFERENCES**

- **2024 Tri-State Trust Conference** | April 23-25, 2024 | Delta Hotel by Marriott, Fargo ND
- **2024 NDBA/SDBA Annual Convention** | June 3-5, 2024 | Delta Hotel by Marriott, Fargo ND

#### **TRAINING**

- **2024 Dakota School of Lending Principles** | April 2-5, 2024 | Bismarck, ND | Register [Here](#)
- **2024 Women’s Leadership Mastermind** | April 19-May 14, 2024 | Virtual Training | Register [Here](#)
- **2024 New Account Documentation and Compliance** | April 24-25, 2024 | Fargo/Bismarck, ND | Register [Here](#)
- **2024 FDIC Directors’ College** | May 22, 2024 | Bismarck, ND | Register [Here](#)



- **2024 Dakota School of Banking** | June 9-14, 2024 | Jamestown, ND | Register [Here](#)
- **2024 Effective Leadership** | October 15-16, 2024 | Bismarck, ND | Register [Here](#)