

---

## ASK KENNEDY

May 1, 2024

---

Topics Covered:

- Member Questions
- Special Guest: Dorothy Lick, NDBA Senior Vice President of Education, will be joining us to discuss the 2024 NDBA/SDBA Annual Convention taking place on June 3-5, 2024, at the Delta Hotel by Marriott in Fargo, North Dakota
- CFPB's Overdraft Plan is Unlawful Price Control, Banks Say
- Agencies Extend Applicability Date of Certain Provisions of the Community Reinvestment Act Final Rule
- ABA Money Mule Webinar
- Upcoming NDBA Events and Trainings

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.

---

### Member Questions

**Question #1:** Do you see other banks removing all hold harmless clauses from their stop payment forms similar to this?

**Response:** Many different laws, rules and regulations have a bearing on ACH operations, and the applicability of a particular law, rule or regulation is dependent upon the particular transaction. Some of the relevant authorities include:

- The Electronic Fund Transfer Act (EFTA) as implemented by Regulation E, applies to transactions to and from consumer accounts and provides various protections to consumer users of electronic fund transfers. Under Regulation E, a consumer can stop payment of a preauthorized EFT from his or her account by notifying an institution orally or in writing at least 3 business days prior to the scheduled date of transfer. See 12 C.F.R. § 1005.10(c). The financial institution may require the consumer to give written confirmation of a stop-payment order within 14 days of an oral notification; if written confirmation is required and the consumer fails to provide it, the oral stop-payment order ceases to be binding after 14 days. *Id.* EFTA states that a financial institution shall be liable to a consumer for all damages proximately caused by the financial institution's failure to stop payment of a preauthorized transfer from a consumer's account when instructed to do so in accordance with the terms and conditions of the account. 15 U.S.C. § 1693h(a)(3). If the failure is not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures

reasonably adapted to avoid any such error, the financial institution shall be liable for actual damages proved. 15 U.S.C. § 1693h(c).

- For recurring debits, NACHA similarly requires a bank to honor an oral or written stop payment order provided at least 3 banking days before the scheduled date of any debit entry to a consumer account. OR 3.7.1.1. For single entries, NACHA requires that a bank honor a stop payment order “at such time and in such manner as to allow [the bank] a reasonable opportunity to act upon the order.” OR 3.7.1.2. For entries to non-consumer accounts, there must also be a reasonable opportunity to act upon the order.
- Uniform Commercial Code (UCC) Article 4 governs check transactions and UCC Article 4A governs funds transfers.

In September 2020, the Consumer Financial Protection Bureau’s Supervisory Highlights provide additional guidance on this topic stating:

- EFTA and Regulation E ...provide consumers with rights to stop preauthorized payments. Under EFTA, consumers have the right to stop payment, subject only to those limitations set forth in EFTA and Regulation E. Regulation E contains a comprehensive list of actions consumers must take in order to make an effective request to stop payment. The list does not include agreeing to indemnify and hold the financial institution harmless for costs that may arise from honoring the valid stop payment request or agreeing not to hold the institution liable if it is unable to stop payment due to inadvertence, accident, or oversight.
- Examiners found that one or more financial institutions required consumers to sign stop payment request forms and deposit agreements in which the consumers agreed to indemnify and hold the institutions harmless for various claims and expenses arising from the institutions honoring stop payment requests. This included not holding the financial institutions liable if they were unable to stop the payment due to inadvertence, accident, or oversight. As this language requires more of consumers than EFTA and Regulation E allow, the stop payment forms and deposit agreements impermissibly waived consumers’ rights in violation of, and waived the institutions’ liability under, EFTA and Regulation E for certain failures to stop payment.
- In response to the examiners’ findings, the financial institutions revised their deposit agreements and stop payment forms to ensure they do not contain any waivers of rights in violation of EFTA.

This CFPB highlight is limited to the alteration of stop payment rights under EFTA/Regulation E. As noted above, there are various other laws, rules and

regulations relative to payment systems. Accordingly, banks will likely want to avoid overbroad indemnification/hold harmless provisions when it comes to stop payment orders subject to EFTA/Regulation E (i.e., preauthorized EFTs from consumer accounts), but the same concerns may not apply to all transactions.

**Question #2:** **If we remove these clauses and the customer doesn't provide us with all of the information or it is incorrect and we fail to stop the items, then would we be held liable for any costs?**

**Response:** Absent customer-bank agreement, liability will be allocated in accordance with the law and/or regulation that is applicable to that particular transaction.

Here, your reference to "items" indicates you are referring to checks, which are governed by UCC Article 4 rather than EFTA/Regulation E. See 41-04-04(1)(i) ("Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by [UCC Article 4A] or a credit or debit card slip.").

UCC Article 4 provides the following right to stop payment of an "item":

41-04-34. (4-403) Customer's right to stop payment - Burden of proof of loss.

1. A customer or any other person authorized to draw on the account may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in section 41-04-31. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.
2. A stop order is effective for six months after the time it is received, but it lapses after fourteen calendar days if the original order was oral and was not confirmed in a record within that period. A stop order may be renewed for additional six-month periods by a record given to the bank within a period during which the stop order is effective.
3. The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop payment order may include damages for dishonor of subsequent items pursuant to section 41-04-3.

Accordingly, a customer's failure to describe a check with "reasonable certainty" or to timely provide such stop payment order may preclude bank liability under UCC Article 4.

**Question #3: Does ND Law have anything to say about this?**

**Response:** North Dakota law does not supersede/change the requirements of EFTA/Regulation E, so EFTA/Regulation E and the above-outlined language of the CFPB Supervisory Highlight would not be affected where applicable.

Article 4

North Dakota has adopted UCC Article 4 (N.D.C.C. Chapter 41-04), which, as noted above, provides specific rights to customers to stop payment on checks (see statute cited in response to Question #2).

Note: UCC Article 4 provides for variation of its provisions as follows:

41-04-03. (4-103) Variation by agreement - Measure of damages - Action constituting ordinary care.

1. The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement may not disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. The parties may, however, determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.
2. Federal reserve regulations and operating circulars, clearinghouse rules, and the like have the effect of agreements under subsection 1, whether or not specifically assented to by all parties interested in items handled.
3. Action or nonaction approved by this chapter or under federal reserve regulations or operating circulars constitutes the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearinghouse and similar rules or with a general banking usage not disapproved by this chapter, constitutes prima facie the exercise of ordinary care.
4. The specification or approval of certain procedures by this chapter does not constitute disapproval of other procedures that may be reasonable under the circumstances.
5. The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care.

If there is also bad faith, it includes any other damages the party suffered as a proximate consequence.

#### Article 4A

North Dakota has also adopted UCC Article 4A (N.D.C.C. Chapter 41-04.1), which governs funds transfers but generally does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (EFTA). See N.D.C.C. § 41-04.1-08(1). So, again, it will not affect the rights afforded under EFTA/Regulation E where applicable.

Article 4A provides the following with respect to the cancellation and amendment of a payment order:

#### 41-04.1-19. (4A-211) Cancellation and amendment of payment order.

1. A communication of the sender of a payment order canceling or amending the order may be transmitted to the receiving bank orally or in a record. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.
2. Subject to subsection 1, a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.
3. After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.
  - a. With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.
  - b. With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order that is a duplicate of a payment order previously issued by the sender, that orders payment to a

beneficiary not entitled to receive payment from the originator, or that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

4. An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.
5. A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issuance of a new payment order in the amended form at the same time.
6. Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.
7. A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.
8. A funds-transfer system rule is not effective to the extent it conflicts with subdivision b of subsection 3.

**Question #4:** **Is removing these hold harmless clauses something that you would recommend that we as bankers do? If so, are we losing a lot of our protections?**

**Response:** In general, it is recommended that banks work with their counsel to review any agreements with customers to determine whether the provisions are consistent with the applicable laws, rules and regulations. Whether removal of hold harmless clauses is necessary or warranted will be dependent on the particular type of customer, account, and/or transaction contemplated



**Question #5:** When the owner of a safe deposit box is deceased, does the Collection by Affidavit for access to the safe deposit box need to be drafted and signed by any attorney or does it need to go through the Court?

**It sounds as though the surviving kids want to access the box to find the signed will, but we have no death certificate, Personal Rep docs, or any idea as to the size of the estate.**

**Response:** The Affidavit of Collection for a Small Estate does not need to be drafted or signed by an attorney nor does it need to go through the Court. Any person claiming to be the successor of the decedent may present the Affidavit to the Bank. The successor may draft the Affidavit on their own or have someone else prepare it for them to sign. The Affidavit must meet the requirements of 30.1-23-01(1)(a-d).

30.1-23-05 Allows a person to search a safe deposit box for a will ONLY after the Bank has been furnished **satisfactory** proof of death and upon giving the Bank an Affidavit that satisfies the requirements of 30.1-23-05. Do you know if the person who leased the safe deposit box has died? If so, then 30.1-23-05 might be applicable but they would still need to present an Affidavit to the Bank. The section allows the will to be removed but you may want to make sure to get a copy of it before it leaves the Bank.

**Question #6:** What is the proper procedure when an individual has a court ordered judgment against a customer of a bank?

**Response:** Funds in a bank account cannot be released to a third party without proper due process under the law and generally require an execution to be delivered to the bank for the release of funds.

Executions are not just the presentation of a Judgment and only in the case of a Garnishment can a lawyer present a Execution. For all other situations such as to enforce a judgment generally the sheriff must present the execution to seek funds.

Lastly keep in mind that the bank owes a duty of confidentiality to its customers and cannot disclose customer information without valid legal process. An individual that presents a copy of a judgment is not entitled to customer information.

**Question #7:** Is a search warrant the appropriate document for a request of information? No one is named in the document. Account number provided does not match any accounts.

**Response:** Banks can disclose customer information to law enforcement or others if the request is made via valid legal process. A search warrant is valid legal

process. But with that said. If the account number is incorrect, the Police Department for which the search warrant was issued will need a new or amended search warrant with the correct account information.

**Question #8:** Customer passed away in January. She owned a business and has a loan with Bank. She was married but legally separated from her husband. Family says there is a Will but no one has been able to find it. The estranged husband came to the bank with an affidavit for collection of personal property of the deceased customer. He wants to take over the loan and property. The estranged husband has been making payments on deceased customer's behalf but doesn't want to continue if the family decides to step in and take property from him.

**Response:** My advice is that the Bank should not give estranged husband advice on what he should or shouldn't do. Nor should the Bank negotiate with the estranged husband. He will need to contact a lawyer to establish what his rights are and then communicate to the Bank what rights he claims to have outside of any probate of his estranged wife's estate.

**Question #9:** What is a Controllable Electronic Record under Article 12 of the UCC?

**Response:** Ryan Ames will provide a full explanation of the attached article describing Controllable Electronic Records: [Attachment](#).

---

### **Dorothy Lick Joins us to Discuss the 2024 NDBA/SDBA Annual Convention**

This year there is a special FIRST-TIME ATTENDEE RATE OF \$195.00 for the annual convention. Don't miss this opportunity to join North and South Dakota banks for an incredible convention where we will be reminded that our connection, commitment, and sense of community is *LIMITLESS!* NDBA staff is hard at work planning a dynamic convention program, sure to inform and inspire.

As a gift to our devoted Ask Kennedy listeners, Dorothy Lick will be giving away one free admission for a first time NDBA/SDBA Annual Convention attendee. If you are a first time attendee, put your name in the chat and Dorothy will draw one lucky winner.

Event information and registration forms can be found at the attached link: [Information & Registration](#)

Hotel room information can also be found at the attached link: [hotel room block](#), Please note the last day to reserve a hotel room at the discounted group rate is May 2, 2024.



### **CFPB's Overdraft Plan is Unlawful Price Control, Banks Say**

In January 2024, the US government released a new rule which banks would only be able to charge overdrawn customers what it costs for them to break even for covering the overdraft. The new rule would effectively eliminate the average \$35 charge customers currently pay for overdrawing their accounts and implement caps of \$3, \$6, \$7, or \$14 instead. This regulation could lower bank income by as much as \$3.5 billion each year.

Banks are now concerned that the CFPB will contravene its founded statute if it limits how much they can charge when a customer overdraws their account. The rule would let banks treat the overdraft as a loan to its customers that charges interest, but the 2010 Dodd-Frank Act, which created the CFPB, prohibits the agency from setting interest rates, and therefore, banks are stating that such caps ranging from \$3-\$14 amount to illegal limits on interest.

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

---

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

On March 21, 2024, federal bank regulatory agencies issued an interim final rule extending the applicability date of certain CRA Final Rule provisions 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.

---

### **ABA Money Mule Webinar**

Shortly after this presentation of Ask Kennedy the ABA, Department of Justice, and U.S. Postal Inspection Service will be hosting a free webinar which will discuss the federal Money Mule Initiative. They will discuss how to identify and stop money mules, and how to educate consumers about avoiding these scams all together.

If interested register at the attached [link](#).

---

### **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 NDBA/SDBA Annual Convention** | June 3-5, 2024 | Delta Hotel by Marriott, Fargo ND. [Information & Registration](#) | [hotel room block](#)

## TRAINING

- **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](#)