
ASK KENNEDY

April 6, 2022

Topics Covered:

- Member Questions
- [Climate-Related Financial Risk](#)
- [Overdraft Protection](#)
- [3 Things You Need to Know Before Entering the 2022 ag Lending Season \(John Schroeder, Partner at Zimney Foster P.C.\)](#)
- [Electronic Funds Transfer Act](#)
- [Upcoming NDBA/SDBA Events](#)

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: When opening a new account, how should a bank have the name on the title appear?

Must the address on an account be a physical address? May a customer change the address on their account after opening from a physical address to a PO Box?

Response: The name on the account should be exactly the same as the name shown on the approved, government-issued ID. The account must also contain an official identification number (SSN, TIN, etc.), date of birth, and a physical address.

To comply with FDIC regulations, the primary registered address on an account (both upon opening and throughout the life of the account) **MUST** be a physical address. A PO box alone is unacceptable; however, a PO box (along with any other alternate or mailing addresses) may be added to the account as part of the bank's due diligence process.¹

Question #2: Regarding Life Insurance Policy as collateral –

We are sending the Assignment of Life Insurance Policy to the Life Insurance Company to add us to perfect our lien and also file a UCC with the life insurance. Is a UCC useful to file on Life Insurance?

Response: Yes, the bank must be identified as an assigned beneficiary on the life insurance policy. Filing a UCC financing statement may be warranted, however, a life insurance policy is not personal property under the UCC because it is exempt from the scope of Article 9.

Question #3: For Commercial Modification that we are adding additional equipment collateral to the loan, should we be filing a new UCC or is it ok to use our blanket UCC already on file? I know that

¹ <https://www.fdic.gov/regulations/safety/manual/section8-1.pdf>

with purchase money, we should file a separate one, but just adding additional equipment we should be ok with our blanket UCC?

Response: **A new financing statement is not required for security agreements that contain an after-acquired property clause, and the collateral is sufficiently described on the financing statement. This can be accomplished by describing the equipment collateral in accordance with N.D. Cent. Code § 41-09-08 (i.e. a categorical description) or by indicating that the financing statement covers all assets or all personal property. N.D. Cent. Code 41-09-75. Therefore, it is likely the blanket financing statement will suffice.**

If you are financing the purchase of the equipment, then the Purchase Money Security Interest rules apply. N.D. Cent. Code § 41-09-44 states that an interest in equipment is perfected when the debtor receives possession of the equipment or within twenty days thereafter. Therefore, if your security agreement contains an after acquired property clause and it is perfected you will automatically be perfected once the debtor receives possession of the collateral and there is no need to file an additional financing statement.

Question #4: For Modifications and Extensions (Change in Terms), do we need to add the guarantors on the modification? If so, are the guarantors required to sign or are we just required to give them a copy?

Response: **Under N.D. Cent. Code § 22-01-15 a loan modification or extension will exonerate the guarantor if the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are impaired or suspended in any manner. Consequently, the guarantor's signature will be required for any loan modification or extension that alters the original obligation or impairs the remedies available to the guarantor. HOWEVER, this section of the Century Code can be waived by the terms and conditions of the guaranty and possibly the loan agreement.**

Question #5: For Commercial Real Estate Loans, we file a Mortgage and also a separate Assignment of Rents. Most banks have went to just filing a mortgage (with assignment of rents verbiage in the mortgage). Do we need to file them both or are we fine with just the mortgage?

Response: **As long as the language creating an Assignment is clearly contained within the Mortgage, and subsequently recorded in the same county as the real property, it is not required to file an Assignment of Rents separately.²**

Question #6 Regarding Online Banking Access –
What liability, if any, does a financial institution face if allowing online banking access to multiple business accounts under one single login?

² <https://www.ndlegis.gov/cencode/t47c35.pdf>

Response: Financial Institutions and their customers are bound by their Electronic Banking Agreement and terms of policy they have signed with the customer in regard to their practice of online banking. Refer to your Institution’s Agreement for determining access.

Typically, online banking agreements will include language that makes the customer responsible for any and all use of the user ID and password. Furthermore, the agreement usually places liability on the customer for any transactions conducted using the online banking terminal.

Additionally, banks should be cautious when customer information will be shared with another person through the single login. N.D. Cent. Code 6-08.1-04 requires a bank to get valid written consent, signed by the customer, before any customer information can be shared with a third-party. When consenting to the disclosure of information the customer is allowed to specify: the time during which the consent will operate, the customer information to be disclosed, and the persons to which the disclosure may be made.

Climate-Related Financial Risk

On May 20, 2021, President Biden signed an Executive Order on Climate-Related Financial Risk ([E.O. 14030](#)). This order called on the Director of the National Economic Council and the National Climate Advisor to work with the Secretary of the Treasury and develop a:

- comprehensive, government-wide strategy regarding the measurement and disclosure of climate-related financial risk to Federal Government programs, assets, and liabilities,
- financing needs associated with achieving net-zero greenhouse gas emissions for the U.S. economy by no later than 2050 and,
- areas in which private and public investments can play complementary roles in meeting these financing needs while advancing economic opportunity, worker empowerment, and environmental mitigation especially in disadvantaged communities and communities of color.

In response to the President’s Executive Order the Office of the Comptroller of Currency (“OCC”) prepared the draft “Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback.” The OCC is looking for feedback on all aspects of the draft principals from large banks with over \$100 billion in total consolidated assets. However, it should be noted that the OCC website says all banks regardless of size will have material exposures to climate-related financial risks.

The principals provided by the OCC are meant to provide a framework for safe and sound management when evaluating climate-related financial risks. The OCC plans to expand the draft principals to incorporate any feedback they receive as well as lay out the roles and responsibilities of bank boards of directors and management.

The draft principals state:

- Banks should include climate-related financial risk exposures and impact in their governance framework
-

- The incorporation of climate-related risks into financial institutions policies, procedures, and limits
- For banks to consider climate-related financial risk when deciding their overall business strategy, in risk determinations, and help guide them in deciding financial, capital, and operation decisions.
- Develop and implement a process that allows banks to identify, measure, monitor, and control climate-related financial risk exposures
- Banks should incorporate an internal reporting, monitoring, and escalation process to facilitate timely and sound decision making for climate-related financial risk mitigation.

The OCC believes banks currently fail to properly identify, measure, monitor, and control the potential physical and transition risks associated with a changing climate and how those changes could adversely affect a bank's safety and soundness, as well as the overall financial system. When the OCC refers "climate-related risks" they are referring physical and transitional risks. Physical risks, include the harm to people and property arising from acute, climate-related events, such as hurricanes, wildfires, floods, and heatwaves as well as chronic shifts in climate, including higher temperatures, precipitation pattern changes, sea level rise, etc. Transitional risks refer to the stress banks and other sectors will face from the shift in policy, consumer and business sentiment, or technologies associated with the changes necessary to achieve a net-zero emissions economy by 2050.

The OCC is an independent bureau of the U.S. Department of the Treasury and is charged with regulating all national banks and federal savings associations as well as federal branches and agencies of foreign banks.

The Financial Stability and Oversight Council (FSOC) also released a new report in response to President Biden's Executive Order 14030. In its report the FSOC identified climate change as an emerging and increasing threat to U.S. financial stability. Additionally, the report called on member agencies to:

- Assess climate-related financial risks to financial stability, including through scenario analysis, and evaluate the need for new or revised regulations or supervisory guidance to account for climate-related financial risks;
- Enhance climate-related disclosures to give investors and market participants the information they need to make informed decisions, which will help regulators and financial institutions assess and manage climate-related risks;
- Enhance actionable climate-related data to allow better risk measurement by regulators in the private sector; and
- Build capacity and expertise to ensure that climate-related financial risks are identified and managed.

Chair of the Federal Reserve Jerome Powell provided an official statement thanking the FSOC for their work on the comprehensive report and offered his full support for its contents. Additionally, the Federal Reserve has set up two committees to develop a better understanding of climate-related risks and incorporate them into its supervision of financial firms. The Federal Reserve is the federal regulator of more than 1,000 state-chartered member banks and cooperates with state bank regulators to supervise these institutions.

Overdraft Protection

On December 8, 2021, the acting Comptroller of the Currency, Michael Hsu, called on banks to implement "responsible overdraft programs that benefit financially vulnerable consumers." Hsu reviewed several banks

who recently made changes to their overdraft programs and identified “several features...that could be modified or recalibrated to support financial health.”

Mainly, Hsu recommended features that include:

- requiring consumers to opt into overdraft programs
- providing a grace period before charging an overdraft fee
- allowing negative balances without triggering an overdraft fee
- offering consumers balance-related alerts
- providing consumers with access to real-time balance information
- linking a consumer’s checking account to another account for overdraft protection
- collecting overdraft or non-sufficient funds fees from a consumer’s next deposit only after other items have been posted and cleared
- not charging separate and multiple overdraft fees for multiple items in a single day
- not charging additional fees when an item is re-presented.

Additionally, Hsu noted that new rules and the credible threat of enforcement action may be needed to bring about overdraft reform the OCC is seeking. At the ABA’s Washington Summit, Hsu reiterated his conversional warning to banks stating: “you don’t want to be the last bank with a traditional overdraft program,” and “banks that hesitate to adopt pro-consumer overdraft programs will soon be negative outliers.” Several large and midsize banks have recently announced changes to their overdraft policy in response to Hsu’s warning.

The ABA released new survey showing consumer’s strong preference for overdraft protection. In fact, 89% of consumers think it is a valuable tool, with 75% saying they were grateful their bank covered the payment instead of returning or declining it.

Ag Lending Issues

Attorney John Schroeder, ag. lending expert, and partner at Zimney Foster P.C., joins us to discuss three things banks should know before entering the 2022 ag season:

1. FSA programs – WHIP+

- The WHIP+ Program provides payments to eligible producers who crop or precluded planting losses from floods, snowstorms, drought, and excessive moisture that occurred in 2018 and 2019.
- An FSA power of attorney (POA), from the borrower, is required before a bank can receive and sign payments from the FSA WHIP+ Program, regardless of any perfected security interests.
- This link contains the [POA form \(FSA-211\)](#) and should also work for crop insurance purposes.

2. Elevator Offsets on Your Crop Proceeds

- Practices he has witnessed:
- Straight offset for past due elevator invoices
- Exchange of checks to repay past due elevator invoices
- Paying family members to avoid putting your bank’s name on proceed checks

3. Who’s Your Landlord-Family Landlord Banking Concerns

-
- Banks should be concerned when the family farm is being leased between family members, especially if there is no written agreement.
 - When there is no written lease agreement in place family members may be inclined to change the terms of the verbal agreement to benefit their family at the detriment of the bank.
 - Banks should obtain a subordination agreement with the landlord acknowledging that the bank gets paid first and ensure a written lease agreement is in place.
-

Electronic Funds Transfer Act

The Electronic Funds Transfer Act (EFTA) was enacted in 1978 for two primary purposes:

1. To provide disclosures to consumers who use electronic fund transfer (EFT) systems
2. To provide consumers with limitations on liability for unauthorized electronic fund transfers

This Act covers all institutions with consumer accounts that can be accessed by EFT devices or that provide EFT services to consumers. An EFT includes any transfer of funds that instructs a financial institution to debit or credit a consumer's account, other than those that originated by check, draft, or paper instrument. (12 CFR 1005.2 and 1005.3). These transfers generally must be initiated through electronic terminal, telephone, computer, or magnetic tape. Section 1005.2 and 1005.3 list the types of transfers that are covered, this list includes but is not limited to, point-of-sale (POS) and ATM transfers, direct deposits or withdrawals, telephone transfers, and transfers initiated through a debit card transaction.

Regulation E defines an unauthorized EFT as an EFT "from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit." 1005.2(m) However, Regulation E also provides that an unauthorized EFT does not include an EFT initiated "by a person who was furnished the access device to the consumer's account by the consumer." 12 CFR § 1005.2(m)(1). An "access device" is a "card, code, or other means of access to a consumer's account...used by the consumer to initiate electronic funds transfers." 12 CFR § 1005.2(a)(1).

An unauthorized transfer includes a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery. For example, when a consumer provides his or her account information to a fraudster pretending to be a bank or other legitimate entity needing the information for something other than making an EFT and the fraudster subsequently uses that information for the purposes of initiating an EFT from that account, the EFT is unauthorized because the information was obtained via fraud, despite the information being given voluntarily. Basically, it depends on how the fraudster obtained the information and the customer's purpose for providing it. For example, if the consumer provides the information as a means to pay someone, even if the customer is tricked into making the payment, it is authorized.

The CFPB provides a couple of examples of unauthorized EFTs that they have dealt with in the past.

1. A third-party calling the consumer and pretending to be a representative from the consumer's financial institution and then tricking the consumer into providing their account login information, texted confirmation code, debit card number or other information that could be used to initiate an EFT out the consumer's account, and
-

-
2. a third party using phishing or other methods to gain access to a consumer’s computer and observe the consumer entering account login information. EFTs stemming from these situations meet the Regulation E definition of unauthorized EFTs.

Both scenarios would meet Regulation E’s definition of an unauthorized EFT and consequently protect the consumer from these fraudulent transfers. Conversely, if a consumer provides account information to a third party to pay that third party, it does not matter if the consumer’s payment was induced by fraudulent means. This distinction turns on the statutory definition for unauthorized EFTs under Regulation E, which is defined as an EFT “from a consumer’s account initiated by a person other than the consumer without **actual authority**...” you provided the third party with actual authority when you consented to the transaction and provided your account information.

Upcoming NDBA and SDBA Events - 2022

The North Dakota Banker’s Association and South Dakota Banker’s Association has many exciting and informational events planned for 2022. Below are some special dates to mark on your calendars –

○ CONFERENCES

- **2022 Tri-State Trust Conference**
April 26-28, 2022 | Delta Hotel by Marriott, Fargo, ND
Sponsor/Exhibitor Registration Form available [here](#).
- **2022 NDBA/SDBA Annual Convention**
June 14-15, 2022 | Radisson Hotel, Bismarck, ND
More information to come.
- **2022 Ag Credit Conference**
October 5-6, 2022 | Delta Hotel by Marriott, Fargo, ND
- **2022 SDBA/NDBA Crypto Webinar**
May 9-10, 2022 | Online

○ SCHOOLS

- **Dakota School of Banking**
June 5-10, 2022 | Jamestown, ND | University of Jamestown
 - **National School for Experienced Ag Bankers**
June 20-23, 2022 | Spearfish, SD | Black Hills State University
-
-