

ASK KENNEDY December 8, 2021

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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: When is a bank responsible to reimburse customers for forged signatures or endorsements?

Response: Article 4 of the Uniform Commercial Code permits banks to charge customers for items that are “properly payable” (the item is authorized by the customer and complies with any agreement between the customer and the bank). An item containing a forged drawer’s signature or forged indorsement is not properly payable, and banks are generally liable to their drawer customers for payment of such items. However, the bank’s liability may be limited by U.C.C. § 4-406, where the customer has failed to exercise reasonable promptness in examining the bank statement and provide prompt notification to the bank.

Question #2: I have a question about service of garnishments, which I know need to be served on the President or Vice President of the bank. If we call our Branch Managers “President”, is it okay for the garnishment to be served upon them?

Response: Yes, though delivery must still be to a *specifically named* president or vice president (or registered agent).

Check Endorsements

An “endorsement” is a signature (other than that of a signer as maker, drawer, or acceptor) that alone or accompanied by other words is made on a check for the purpose of negotiating the check, restricting payment of the check, or incurring endorser’s liability on the check regardless of the intent of the signer.¹

Blank Endorsements

If an endorsement is made by the holder of an instrument (in this case the payee of a check), and it is not a special endorsement, it is a “blank endorsement.” It usually consists of the signature of the endorser on the back of the check without other words, though it may be accompanied by phrases such as “pay to the order of [space left blank]” “pay to bearer,” “pay to holder,” “pay to bank,” or “pay to cash.”

<p>Front of Check: Pay to the order of John Doe</p> <p>Back of Check: /s/ John Doe</p>
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When endorsed in blank, the check becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.²

Special Indorsement

If an endorsement is made by the holder of a check, whether the check is payable to the order of the holder or is payable to bearer, *and the endorsement identifies a person to whom the holder makes the check payable*, it is a “special endorsement.” When specially endorsed, a check becomes payable to the identified person and may be negotiated only by the endorsement of that person.³

<p>Front of Check: Pay to the order of John Doe</p> <p>Back of Check: <u>Pay to the order of Jane Doe</u> /s/John Doe</p>

¹ N.D.C.C. § 41-03-23 (3-204).

² See N.D.C.C. § 41-03-24(2) (3-205). The holder may convert a blank endorsement that consists only of a signature into a special endorsement by writing, above the signature of the endorser, words identifying the person to whom the instrument is made payable. N.D.C.C. § 41-03-24(3) (3-205).

³ N.D.C.C. § 41-03-24(1) (3-205).

Restrictive Endorsements

A restrictive endorsement is an endorsement that signifies a purpose of deposit or collection (*e.g.*, endorsements accompanied by the words “for deposit,” or “for collection” or any other words manifesting the intent that the check be collected by a bank for the credit of the endorser or the credit of a particular account).⁴ A restrictive endorsement can be blank or special:

<p>Example Blank Restrictive Endorsement:</p> <p>“For deposit only” /s/John Doe</p> <p><i>Blank restrictive because</i></p>
<p>Example Special Restrictive Endorsement:</p> <p>“Pay to T, in trust for B”⁵ /s/John Doe</p>

The depository bank or the payor bank, if it takes the check for immediate payment over the counter, must act consistently with the restrictive endorsement, but an intermediary bank or payor bank that takes the check from a collecting bank is not affected by the endorsement. Any other person is also bound by the endorsement.⁶ Failure to act in accordance with the endorsement creates liability for conversion of the check.

Restrictive Endorsements for Mobile Deposit of Check

Remote deposit capture carries the risk of duplicate presentment (*e.g.*, a customer scans a check to deposit via mobile device and the same check is cashed at a bank). Because of this, Regulation CC⁷ provides an indemnification for the depository bank that accepts an original paper check for deposit for any losses incurred by that depository bank if the loss is due to the check having already been paid.⁸ The bank authorizing its customer to deposit checks remotely is responsible for indemnifying said depository bank.

⁴ N.D.C.C. § 41-03-25 (3-206).

⁵⁵ Note that there are special rules where a check bears an endorsement using words to the effect that payment is to be made to the endorsee as agent, trustee, or other fiduciary for the benefit of the endorser or another person. *See* N.D.C.C. § 41-03-25(4) (3-206(d)).

⁶ Official Comment 3 to U.C.C. § 3-206.

⁷ The Check Clearing for the 21st Century Act (12 U.S.C. §§ 5001-5018), also known as the Check 21 Act is implemented through Regulation CC. *See* [12 C.F.R. § 229.1\(a\)\(1\)](#). Subpart C of Regulation CC covers the indorsement and presentment of checks and electronic checks. *See* [12 C.F.R. § 229.1\(a\)\(3\)](#).

⁸ *See* 12 C.F.R. § 229.34(f)(2).

However, there is an exception to the remote deposit capture indemnity which prevents the depository bank from making an indemnity claim if that paper check it takes contains a restrictive endorsement that is inconsistent with the means of deposit stated on an endorsement to the check, such as “for mobile deposit only.”⁹

Thus, all banks authorizing their customers to use remote deposit should protect themselves from liability for duplicate presentment by adding or requiring¹⁰ a restrictive endorsement such as the following:

[] If this box is checked, this check is for mobile deposit only
[] For mobile deposit only
For mobile deposit only
For mobile deposit only at _____ Bank

Many checks contain preprinted legends on the back that contain a restrictive endorsement preceded by a box to be checked by the payee indicating that the check is being deposited by mobile deposit capture. If the box is checked when the check is deposited via remote deposit capture, the paying bank may refuse to honor the same check later presented in paper form.

Telecommuting or Work From Home Policies

Banks offering employees the option to work from home or other locations should work to create a specific Telecommuting or Work From Home Policy. There are several legal considerations that should be discussed with counsel. Some items you may wish to incorporate:

Process For Securing A Telecommuting Arrangement

- Identify eligibility criteria/eligible positions
- Explain how to submit a formal request and list whose approval is needed
 - Having a formal Telecommuting Request Form allows HR to formally track all telecommuting requests in a fair and non-discriminatory manner
 - Require employee signature and acknowledgment employee has read the policy and will adhere to the terms contained therein

⁹ See 12 C.F.R. § 229.34(f)(3) (“A depository bank may not make an indemnity claim under paragraph (f)(2) of this section if the original check it accepted for deposit bore a restrictive indorsement inconsistent with the means of deposit.”).

Non-Exempt Employees: Tracking Hours and Compensation

- Under the Fair Labor Standards Act (FLSA), non-exempt employees are entitled to overtime pay.
- Under FLSA, employers are required to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers.¹¹
- Employers must compensate non-exempt workers for all hours worked, including overtime hours and “[w]ork not requested but suffered or permitted” – meaning hours the employer knows or has reason to believe work was performed.
 - An employer may have reason to believe work is being performed if the employer should have gained such knowledge of hours through exercising reasonable diligence. Reasonable diligence may involve establishing a timekeeping process that allows and encourages employees to report unscheduled work time.
 - Cannot discourage employees from reporting unscheduled work they perform.
- FLSA requires employers to exercise control to seek that work is not performed if it does not want it performed. A policy prohibiting unscheduled work is not enough; the policy must be enforced.

Ensure Exempt Employees Continue to Meet Exemption Requirements

- Exempt employees are workers meeting one of the overtime pay exemption requirements under FLSA (*i.e.*, not entitled to overtime pay).
- Employers should communicate working expectations and reiterate that existing policies and procedures remain in effect regardless of work location.

Implications for Employees Working in a Different State than Employer

- Taxes (state payroll tax registration and filing requirements)
- Wage and Hour Laws in the State the Employee is Working
 - Different jurisdictions impose different wage and hour requirements, such as minimum wage, paid sick leave, overtime, exemptions, pay frequency, and pay statements.
- Workers’ Compensation
 - Employers are generally required to obtain workers’ compensation insurance in the states in which they employ workers.
- Unemployment insurance
- Business Registration

¹¹ https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

Work Safety

- Safety Requirements
- Injury Protocol
- Worker's compensation insurance coverage for injuries sustained while working remotely

Other/Misc.

- Equipment Requirements
 - Data Security
 - Amendment or Termination
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North Dakota Special Legislative Session

The North Dakota Legislative Assembly held its special session Nov. 8-12, during which they appropriated the state's federal Coronavirus relief funding. North Dakota was given over \$4 billion and appropriated approximately \$3.3 billion in the 2021 legislative session. Of the \$1.007 billion left, the Legislature appropriated \$944 million in the special session, with the remaining \$63 million to be made available during the 2023 legislative session. The major industries that were given appropriations during the November special session were higher education, water infrastructure, natural gas pipeline infrastructure, broadband and career centers. The largest single spending item was the \$150 million for natural gas infrastructure in the state's oil patch to bring more natural gas to eastern North Dakota, which was pushed heavily by Gov. Doug Burgum.

Biden Administration Spending Bill

House lawmakers voted to pass President Biden's expansive spending bill Friday despite heavy partisan opposition and unanswered questions about the cost of its' policies and whether they will be fully covered. The legislation includes funding for expanded child and home care, paid leave, expanded healthcare coverage, an extension on child tax credit payments, green energy investments and tax credits, universal pre-K, affordable housing and various other programs. The administration claims the bill's costs will be fully covered by offset measures included in the spending bill; some of these offset measures include tax hikes on corporations and wealthy individuals, increased IRS tax enforcement and prescription drug pricing reform. The White House says the offsets will generate approximately \$2 trillion in new revenue through 2033, enough to pay for the "Build Back Better Act" and, eventually, to reduce the federal deficit. However, an analysis from the Congressional Budget Office released earlier determined that the spending bill would add \$367 billion to the federal deficit over 10 years, not including the IRS plan's impact. Separately, the nonpartisan agency determined increased IRS tax enforcement would generate about \$127 billion in new revenue, far below the \$400 billion estimate touted by the Treasury Department and the White House. The bill will now go to the Senate, where it will likely be altered before being sent back to the House.

CFPB Focus on Overdrafts

The CFPB has released new data on overdraft fees, along with a press release signaling that it will enhance supervisory and enforcement scrutiny of banks that rely heavily on overdraft fees.¹² ABA President and CEO Rob Nichols challenged the bureau’s findings and emphasized that banks are committed to helping customers make informed choices regarding overdraft options.¹³

CFPB Banking Resources

The CFPB has published a series of helpful guides intended for people involved in four different types of fiduciary roles: power of attorney, court-appointed guardians, trustees, and government fiduciaries. The guides are designed for family members and friends who are designated as agents; banks and financial institutions are encouraged to distribute this guide to customers rather than use it as an organizational guide. The CFPB guides are not to be used as legal advice.

All the guides focus primarily on outlining the powers and duties the agent would have as a fiduciary in their particular roles (POA, trustee, etc.). Some of the information covered includes the basic duties of financial management, avoiding financial exploitation, and relevant government organizations intended to assist the agents in their duties. The guides also lay out these duties by providing a real-world scenario for the “agent” to see what managing their role as a fiduciary for a vulnerable individual would entail.¹⁴

Update to FFIEC BSA/AML Exam Manual

On December 1st, the Federal Financial Institutions Examination Council (FFIEC) released updates to the *bank Secrecy Act/Anti-Money Laundering (BSA/AML) Examination Manual*, which provides instructions to examiners for assessing the adequacy of a bank’s BSA/AML compliance program and its compliance with BSA regulatory requirements.

The new section ([Introduction – Customers](#))¹⁵ provides information and considerations related to certain customers that may indicate the need for bank policies, procedures, and processes to address potential money laundering, terrorist financing, and other illicit financial activity risks. They further remind examiners that no specific customer type automatically presents a higher risk.

¹² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/>

¹³ [ABA Statement on CFPB Overdraft Research](#).

¹⁴ [Guides for managing someone else’s money | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

¹⁵ In addition, the following 3 sections were updated: [Charities and Nonprofit Organizations](#); [Independent Automated Teller Machine Owners or Operators](#); and [Politically Exposed Persons](#).

FinCEN Real Estate Sector Reporting Requirements

FinCEN has released an Advance Notice of Proposed Rulemaking to solicit public comment on a potential rule to address the vulnerability of the U.S. real estate market to money laundering and other illicit activity. It will assist FinCEN in preparing a proposed rule that would enhance the transparency of the domestic real estate market on a nationwide basis and protect the U.S. real estate market from exploitation by criminals and corrupt officials.

2021 Regulatory Recap

This month we're taking a look at the regulations we covered in 2021.¹⁶ This Regulatory Recap provides a broad overview; you can go back to the corresponding month's white paper to obtain more details.

- [Reg B](#) (June White Paper available [here](#))
 - [Reg F](#) (November White Paper available [here](#))
 - [Reg Z](#) (September White Paper available [here](#))
 - [Reg GG](#) (October White Paper available [here](#))
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¹⁶ Note that the August White Paper (available [here](#)) touched on amendments to mortgage servicing rules under Regulation X to assist borrowers affected by COVID-19 and is not discussed more generally here. We can cover Regulation X more in depth in the future, if requested.

REGULATION B (EQUAL CREDIT OPPORTUNITY ACT)

- Regulation B ([12 C.F.R. Part 1002](#)) implements the Equal Credit Opportunity Act (ECOA; [15 U.S.C. §§ 1691 et seq.](#))
- Prohibits creditors from discriminating against credit applicants in any aspect of a credit transaction on the basis of any of the following characteristics:
 - Race;
 - Color;
 - Religion;
 - National origin;
 - Sex (as of March 9, 2021, [includes sexual orientation and gender identity](#));
 - Marital status;
 - Age (provided the applicant has the capacity to enter into a binding contract);
 - The fact that all or part of the applicant’s income derives from any public assistance program; or
 - The fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.
- Regulation B also requires creditors to:
 - Notify applicants of action taken on their applications;
 - Report credit history in the names of both spouses on an account;
 - Retain records of credit applications;
 - Collect information about the applicant’s race and other personal characteristics in applications for certain dwelling-related loans; and
 - Provide applicants with copies of appraisal reports used in connection with credit transactions.
- Some key takeaways:
 - The ECOA and Regulation B apply to *all* credit – commercial as well as personal.
 - Banks are prohibited from making statements, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application (though they are permitted to affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit).
 - Be aware of advertising and social media!
 - Banks are permitted to or even required to inquire about information normally prohibited under Reg B for the purposes of government monitoring, Special Purpose Credit Programs, self-testing, compliance with HMDA, and as otherwise permitted under 12 C.F.R. § 1002.5.
 - Be aware of the rules concerning spousal signatures (a common violation!)
 - Review credit applications

REGULATION F (FDCPA)

- The Debt Collection Final Rules amending Regulation F ([12 C.F.R. Part 1006](#)) (implementing regulation for the Fair Debt Collection Practices Act) were [effective November 30, 2021](#).
- Reg F includes provisions for electronic communications; limitations on telephone call frequency; credit reporting; transfer, sale, or placement of debt; decedent debt; time-barred debts; and debt validation notices.
- Though the Fair Debt Collection Practices Act (FDCPA; [15 U.S.C. §§ 1692 et seq.](#)) generally does not apply to banks, we pointed out the following concerns:
 - Direct impact:
 - Debt collectors are required to give proper debt validation notices. Banks are not required to provide the information required therein, but are incentivized to do so because the debt collectors they hire or sell debts to will be unable to collect without it.
 - Debt collectors can verify email addresses by using an email provided from the bank if certain procedures are used. Banks should find out the policy of the debt collector to assess whether they must comply with procedures to enable the debt collector to qualify for the safe harbor when contacting a consumer via email.
 - Banks sometimes constitute “debt collectors.” The following are considered debt collectors:
 - Any bank that, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect such debts; and
 - A person that receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
 - Banks have responsibilities concerning third parties (*e.g.*, collection agencies, collection attorneys) collecting on behalf of them. These third parties are subject to the FDCPA and Reg F, and banks have a responsibility to evaluate the third party’s ability to perform services in compliance with applicable laws, rules, or regulations. Banks need to understand the requirements of Regulation F to perform due diligence of existing and potential third party collection agencies that are subject to the FDCPA and to fulfill their oversight and monitoring responsibilities.
 - Even though banks may not be subject to the FDCPA/Reg F, the actions prohibited by the same may constitute UDAAP violations.

REGULATION Z (TILA)

- Regulation Z ([12 C.F.R. Part 1026](#)) implements the Truth in Lending Act (TILA; [15 U.S.C. §§ 1601 et seq.](#)).
- Purposes:
 - To promote the informed use of consumer credit by requiring disclosures about its terms and cost
 - To ensure that consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process
 - To effect certain changes in the settlement process for residential real estate that will result in more effective advance disclosure to home buyers and sellers of settlement costs
- TILA/Reg Z generally apply when each of the following four elements are satisfied:
 - Credit is offered or extended to consumers
 - Credit is offered or extended on a regular basis
 - Credit is subject to a finance charge, or payable by written agreement in more than four installments
 - Credit is issued for personal, family, or household purposes
- Consumer Protections:
 - Gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling (Right of Recission – [§ 1026.23](#))
 - Regulates certain credit card practices
 - Provides a fair and timely resolution of credit billing disputes
- Special rules addressing certain charges applicable to credit card accounts under an open-end (not home-secured) consumer credit plan
- Requires a maximum interest rate to be stated in variable-rate contracts secured by the consumer's dwelling
- Imposes limitations on home-equity lines of credit (HELOCs) secured by the consumer's principal dwelling and credit secured by a consumer's principal dwelling in [§ 1026.35](#)
- Regulates certain practices of creditors who extend private education loans
- Imposes certain limitations on increases in costs for mortgage transactions subject to [§ 1026.19\(e\)](#) and [\(f\)](#)

REGULATION GG (INTERNET GAMBLING)

- Regulation GG ([12 C.F.R. Part 233](#)) is the implementing regulation for the Unlawful Internet Gambling Enforcement Act (UIGEA; [31 U.S.C. §§ 5361 et seq.](#)).
- Reg GG requires banks to establish and implement written policies and procedures that are reasonably designed to identify and block or otherwise prevent or prohibit *restricted transactions*.
- What is “reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions” will vary based on the type of designated payment system –
 - Card systems are the only designated payment systems that use a merchant and transaction coding framework that permits participants to identify and block, during processing, transactions with indicia of being restricted transactions. Because of this, card systems may use the implementation of a code system (though banks can choose to use due diligence procedures discussed below instead).
 - Other designated payment systems that do not use formats permitting participants to identify and block restricted transactions during payment processing must use due diligence in opening and maintaining accounts for commercial customers, keeping in mind the following guidance:
 - Assess whether there is a minimal risk of the commercial customer acting as an internet gambling business.
 - No action is required if there is only minimal risk.
 - If there is more than a minimal risk, obtain a statement from the customer declaring that it is not.
 - If the commercial customer *is* engaged in internet gambling business, require the customer to:
 - Present evidence of legal authority to engage in such business;
 - Provide a written commitment to notify the bank of any changes in legal authority; and
 - Provide a third-party certification that the customer has systems in place reasonably designed to ensure that it will remain within the law.
 - Banks must notify all commercial customers that restricted transactions are prohibited from being processed through the account.