ASK KENNEDY
December 14, 2022

Topics Covered:

- Member Questions
- Special Guest: Ann Reich, SVP of Strategic Partnerships at North Dakota Bankers Association
- UDAP, Regulation DD, and FTX Advertising
- Upcoming NDBA Events

Question #1: Is there any state law that requires a skip a payment on a consumer vehicle loan be wet signed (rather than signed & emailed back)?

Response: **There are some challenges with e-signed notes, as they currently lack negotiability, but they can still be e-signed if not sold**.

Question #2: Are banks allowed to purchase back a participation? Are there stipulations on ones we can/cannot? Are Bank of North Dakota participations treated differently?

Response: **The terms of repurchase will be stated specifically in the Participation Contract. Take a look at the particular Participation Agreement and see what it says about buying back the participated portion of the loan. If it is silent, you could make the participant an offer to buy back their portion of the loan.**

Question #3: Can we put the rate to 0.00% on a CD, Checking or Saving account on a customer's account as of the date of death if they are the only owner the account?

Response: **You will need to check the terms and conditions of the CD and Account Agreement. Generally, the bank's contract with the customer will survive after the customer's death and continue to the benefit of their heirs and assigns unless the contract states otherwise.**

Question #4:	I have a couple of questions about death in regard to UTMAs:
Response Note:	**Here is a link to North Dakota's Uniform Transfers to Minors Act: https://www.ndlegis.gov/cencode/t47c24-1.pdf. It will answer each of your questions, but I will point out a few sections that are applicable to each question.**
4(a):	What happens if the custodian dies and another named successor custodian is in place – does the successor custodian become the sole custodian or can the new custodian add another successor as a contingency? Essentially who has the authority to add another custodian?
Response:	**I think that 47-24.1-18(4) answers your question and states that a custodian has the duty to name a successor. It goes further to state how a successor is to be chosen if the current custodian fails to designate their successor.**
4(a)(i)	Do we need to redo our account documentation and core system information to indicate the change in custodians now?
Response:	**You will need to update your system to name the new custodian.**
4(b):	At what age does the child become an adult in the situation above – is it 21 as usual or 18 now?
Response:	**As far as what age the custodianship terminates, see 47-24.1-20. It will depend on who and how the transfer of property was set up and that depends on 47-24.1-04 – 47-24.1-07.**
4(c):	What documents would we need, if any?
Response:	**The documents you will need to see will also depend on who and how the transfer of property was set up. See 47-24.1-04 –47-24.107 again to see if it was a Gift, transfer by a Will or Trust, or by someone obligated to pay the minor.**

Question #5:	Is it true that a financial institution cannot share customer information without the customer's consent unless an exemption applies? Does this include sharing their information with a mailing company to market a new product to them they do not currently have? Additionally, would this include sharing their information with a third party, such as for pre-approved credit card offers?
Response:	**In short, yes, North Dakota banks must obtain customers' affirmative consent before sharing customer information with third parties. North Dakota is somewhat rare in that it is *stricter* than the federal Gramm-Leach-Bliley Act (GLBA) when it comes to the disclosure of customer information to another entity. You must have an "opt in" rather than an "opt out". Opt-out presumes consent unless the customer says no, while opt-in presumes that there is no consent unless the customer says yes. Thus, you should check to see if your bank has received a signed opt-in election from your customer. See below for further information.**

The GLBA generally provides that banks may disclose customer information to nonaffiliated third parties if customers are given notice and a reasonable opportunity to direct that such information not be shared ("opt out"). For an example, see the CFPB Model Form with Mail-In Opt-Out Form. In contrast, North Dakota requires banks to obtain a customer's express consent or opt-in election after notifying the customer of its information sharing practices and policies. *See* North Dakota Administrative Code, Title 13, Article 2, Chapter 21 - §§ 13-02-21-02 and 13-02-21-04.

Additionally, GLBA has a "joint marketing exception" to the opt-out requirement, which allows banks to share personal information with a partner so that the partner may perform services for or functions on behalf of the bank. These services may including marketing the bank's own products or services. To qualify, the bank must: (a) fully disclose to the customer that it is providing such information to a third party and (b) enter into a contractual agreement with the third party that requires the third party to maintain the confidentiality of such information. *See* 15 U.S.C. § 6802. In contrast, North Dakota prohibits banks from disclosing customer information to a nonaffiliated third party under a "joint marketing agreement" unless the bank has first obtained its customer's written consent for the disclosure. A customer's written consent is not required for marketing that is undertaken by a bank on its own behalf or in connection with a nonaffiliated party where the bank does not share customer information with a nonaffiliated party. *See* North Dakota Administrative Code, Title 13, Article 2, Chapter 21 - § 13-02-21-03.

To read more about the unique nature of North Dakota's law, please see the following link: https://privacyrights.org/resources/north-dakota-votes-opt-financial-privacy.

Special Guest:

Ann Reich,
SVP of Strategic Partnerships at North Dakota Bankers Association

We would like to welcome Ann Reich here today! Ann is the Senior Vice President of Strategic Partnerships for the NDBA, and she is here with us today to share about what she and her department provide for the bankers of North Dakota, as well as about some of the resources and groups available through NDBA.

First, Ann will discuss peer groups. The first peer group, Information Technology (IT), was started in 2007. As of 2022 the two newest peer groups are Operations and Teller Supervisor. Other peer groups are Audit, Compliance, Chief Credit Officer (CCO), Chief Financial Officer (CFO), Compliance, Enterprise Risk Management (ERM), Human Resources (HR), Large Bank CRA ($1B+ in asset size), and Marketing. There is no cost to participate, and they host an annual NDBA Peer Group Consortium. The Consortium will be held on July 27, 2023 at the National Energy Center of Excellence on the Bismarck State College Campus. For more information about peer groups, visit the following link: https://www.ndba.com/professional-development/PeerGroups/.

The other item discussed will be associate members and endorsed business partners. NDBA has two membership categories: banks and associate members. NDBA has approximately 100 associate members and 14 of the associate members are endorsed business partners. The NDBA Services Board oversees the for-profit subsidiary and approves the endorsements; endorsed business partners enter into contractual agreements with NDBA Services wherein banks receive discounts and NDBA Services receives a revenue stream to help support NDBA membership efforts. For further information, please visit the following links:

Partner Resources: https://www.ndba.com/strategic-partners/PartnerResources/

2022 Associate Member Guide:
https://www.ndba.com/uploads/publications/2022%20Guide/2022%20Member%20Guide.pdf

UDAP, Regulation DD, and FTX Advertising

With the recent collapse and bankruptcy of FTX, a large cryptocurrency exchange, crypto investors have sued several celebrities who promoted FTX during the Super Bowl, including Tom Brady and Larry David. The lawsuits allege that they engaged in deceptive practices. This is not the first time celebrities have been in trouble for deceptively advertising cryptocurrencies.

Banks are responsible for ensuring that their own advertisements comply with federal law and are free from misleading statements or omissions. There are specific advertising provisions in Regulation DD, the implementing regulation for the Truth in Savings Act (TISA), as well as a broader prohibition on unfair or deceptive acts or practices (UDAP) applicable to advertising and marketing.

Regulation DD's advertising rules apply to any person who advertising an account offered by a depository institution, including deposit brokers.[1] An "advertisement" is a commercial message, appearing in any medium, that promotes directly or indirectly: (1) the availability or terms of, or a deposit in, a new account; and (2) the terms of, or a deposit in, a new or existing account.[2] "[A]dvertisements cannot be misleading or inaccurate or misrepresent an institution's deposit contract."[3]

"[T]ransactions that are in technical compliance with TISA may still be considered as unfair, deceptive, or abusive."[4] The Federal Trade Commission (FTC) Act prohibits Unfair or Deceptive Acts or Practices (UDAP) in or affecting commerce.[5] There are also unfair, deceptive, or abusive acts or practices (UDAAPs) prohibited in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service,[6] including advertisements. The banking agencies have authority

[1] 12 U.S.C. § 1030.1(c).

[2] 12 U.S.C. § 1040.2(b).

[3] https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf

[4] https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf

[5] 15 U.S.C. § 45.

[6] 12 U.S.C. § 5531.

to enforce the FTC Act for the institutions they supervise.[7] Unlike many consumer protection laws, the FTC Act also applies to transactions that may impact business customers as well as individual consumers.[8] An act or practice is unfair when: (i) the act or practice causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or competition.[9] An act or practice is deceptive if: (i) the act or practice misleads of is likely to mislead the consumer; (ii) a reasonable consumer would be misled; and (iii) the presentation, omission, or practice is material. To avoid unfair or deceptive advertisements, institutions should (1) ensure that appropriate policies and procedures are in place, (2) ensure that communication is open and effective among all departments, (3) maintain clear communication with third-party vendors, and (4) ensure that advertisements are reviewed for UDAP compliance before publication.

Upcoming NDBA Events

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**

  Registration Link:
  https://members.ndba.com/eweb/DynamicPage.aspx?webcode=EventInfo&RegPath=EventRegFees&REg_evt_key=efe32c95-a7a2-457e-b3b6-9f994dd3ce45

- **January 19, 2023: Bank Management Conference & Legislative Dinner**

  Registration Link:
  https://members.ndba.com/eweb/DynamicPage.aspx?webcode=EventInfo&RegPath=EventRegFees&REg_evt_key=2ac182a6-e68c-4753-8fae-c882a9f74e7e

[7] https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf; https://www.fdic.gov/news/financial-institution-letters/2004/fil2604a.html

[8] https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf (citing *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 943 (2008) ("The FTC has construed the term 'consumer' to include businesses as well as individuals. Deference must be given to the interpretation of the agency charged by Congress with the statute's implementation.")).

[9] 15 U.S.C. § 45(n).

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HMDA Compliance Update

The Home Mortgage Disclosure Act (HMDA) (12 U.S.C. §§ 2801 et seq.) and its implementing regulation, Regulation C (12 C.F.R. Part 1003[1]), require non-exempt financial institutions to collect, report, and disclose information regarding mortgage loans originated (or for which the institution received completed applications) or purchased by the financial institution during each fiscal year.[2]

In 2015, the Consumer Financial Protection Bureau (CFPB) promulgated a rule (2015 HMDA Rule) exempting financial institutions originating fewer than 25 closed-end mortgage loans in either of the two preceding calendar years. In 2020, CFPB promulgated a rule (2020 HMDA Rule) raising the threshold from 25 to 100.

However, on September 23, 2022, the 2020 HMDA Rule was vacated by the United States District Court for the District of Columbia.[3] As of December 9, 2022, the CFPB has issued a statement and technical amendment acknowledging the change, which will revert to the threshold set out by the 2015 HMDA Rule. Therefore, financial institutions that have originated 25 or more closed-end mortgage loans in the two preceding calendar years will now be subject to compliance with the collection and reporting requirements of HMDA/Regulation C.

*Note: Financial institutions with assets at or below $50,000,000 as of December 31, 2021, are exempt from HMDA collection for 2022[4] altogether.

[1] This links to the version in effect January 1, 2022; however, Regulation C will be amended by the technical amendment discussed herein.

[2] *See* 12 U.S.C. § 2803(a)(1); 12 C.F.R. § 1003.1(c) and 12 C.F.R. § 1003.4(a).

[3] *See Nat'l Cmty. Reinvestment Coal. v. Consumer Fin. Protec. Bureau*, No. 20-2074, 2022 U.S. Dist. LEXIS 174183 (D.D.C. Sept. 23, 2022).

[4] Comment 2(g)-2 to 12 C.F.R. § 1003.2(g).