

ASK KENNEDY

July 26, 2021

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Question #1: We have a customer with a treasury check made out to a business that is no longer a registered entity and the account with this business's name has been closed. The payment is for a "settlement" and the customer anticipates additional checks coming, so we do not want to set a precedence that we cannot continue with. What options do they have to cash or deposit the check?

Response: Generally speaking, the law implies a warranty of presentment, which means the person presenting the check warrants to your bank that they have the legal right to payment from the maker of check and, from there, your bank will actually be presenting it to whatever bank the check is written on, telling that bank that your bank is entitled to payment. But, if the Treasury denies payment and states that the person that your bank paid wasn't entitled to payment, then your bank's only recourse is to try to get the money back from the customer it paid. Therefore, the guaranty of repayment to your bank is only as good as your customer's warranty to you and the financial strength of your customer.

Question #2: Are banks and/or trust departments allowed to store actual silver/gold bars in safe deposit boxes for customers?

Response: I don't see any reason they wouldn't be able to, unless the terms of their safe deposit box rental agreement prohibits such items from being included.

Also, make sure the customer is aware that the contents will not be insured by FDIC deposit insurance or the bank, and that the customer should obtain its own insurance coverage (*i.e.*, make sure your deposit box agreement disclaims bank liability).

The following link may also be of interest to you; it discusses recent changes made by Wells Fargo restricting liability of loss and providing warnings to safe deposit box holders:

https://safedepositboxinsurance.com/landing_page/wells-fargo/

I hope this gives you some direction, though I strongly suggest you work with an attorney to draft a special deposit box agreement.

Follow-up Question: Thank you for your response. We will review our current safe deposit box rental agreement and review the links you included.

I have another twist to this question: If the client that asked about storing the silver wanted to make it an asset held in their IRA, how would we proceed? They currently have an IRA within the Trust Department that is invested in mutual funds, but they want to add silver bars to the IRA as one of the assets, which to me makes us responsible for the silver.

Response: It looks like the tax code allows for an IRA to purchase actual silver, but there are limitations on what type of IRA and what type of silver. I cannot give any more information as to how to set it up and what is allowed to be "purchased," but I can say there are limitations. If your bank wants to accommodate the customer, I strongly suggest getting a legal opinion of a tax professional and possibly an estate planning lawyer.

Question #3: What is the difference between perfection and CNS (Central Notice)?

Response: Perfecting a security interest in farm products generally requires filing a UCC I Financing Statement in the state the Debtor is located. Central Notice requires filing a CNS statement in in the state where the farm product BUYER is located. *I.e.*, if a ND rancher sells cattle in Nebraska, the Financing Statement must be filed with the North Dakota Secretary of State and the CNS must be filed in Nebraska.

Question #4: Can a loan officer be sued for lender liability in addition to the Bank?

Response: Unfortunately, yes. The bank and the lender will need different counsels. The loan officer and the bank, including officers, will have different charges.

Question #5: Can spouses operate sole proprietorships?

Response: A sole proprietorship must be owned solely by one spouse, with the other spouse working in the business as an employee, unless the business meets the requirements to be a qualified joint venture.¹ The assets of a sole proprietorship are the assets of the individual; if the business is a qualified joint venture the assets can be the assets of both. If the owner of the DBA passes away, and the account has a POD designation, the other spouse can take it over after death.

¹ <https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities>

Hemp and CBD Update

The authorization of hemp production and the status of hemp as a controlled substance was addressed by the federal government through the 2018 Farm Bill. In response, North Dakota passed similar laws (Ch. 4.1-18.1, N.D.C.C.) intended to fill the gaps between North Dakota's regulations and the Farm Bill. Through the 2018 Farm Bill, the USDA was directed to regulate the production of hemp throughout the country via an interim domestic hemp program running through November 1, 2021. The interim program was replaced by a final rule on hemp regulation, effective March 22, 2021.² Some of the key regulations of this final rule include:

- A hemp sampling window increase from 15 to 30 days before harvest (this allows for greater flexibility in THC compliance testing)
- An established indemnity from liability for producers if their THC levels come in at less than 1% of the acceptable level
- An allowance for tribes with an approved USDA plan to exercise primary regulatory authority production of hemp in their territory³
- DEA-registered hemp testing labs
- Performance-based sampling methods (must be USA-approved)⁴

The issue facing North Dakota hemp producers and sellers now is determining to what extent these regulations will restrict their ability to conduct hemp-related business in the state of North Dakota. During the 2021 legislative session, North Dakota amended Ch. 4.1-18.1, N.D.C.C.⁵ with House Bill No. 1045, effective as an emergency order as of April 26, 2021.⁶ For purposes of the new North Dakota statute, the legislature defines "hemp" as any part of the plant *cannabis sativa* L., including the plant itself, its seeds, and any derivatives and extracts of the plant. The legislature further redefined hemp by removing the federal THC standard of 0.3% THC and replacing it with a required total tetrahydrocannabinol concentration level to be determined by the Agriculture Commissioner but not exceeding the amount enumerated in the federal Agriculture Improvement Act. Tetrahydrocannabinol refers to delta-9 concentrations, as well as any variations of such isomer, including delta-7, delta-8, and delta-10, each of which can be synthesized and used to get high.

North Dakota currently continues to operate under guidelines of the 2014 pilot program governing hemp regulation, which requires the North Dakota Department of Agriculture (NDDA) to adopt a USDA-approved state plan in accordance with federal regulations (now the final rule of the 2018 Farm Bill) by January 2022.⁷ The amended N.D.C.C. statute gives the NDDA flexibility to adapt to any changes the federal government makes regarding hemp law to stay within the USDA state-approved plan and fills the loophole in the federal bill that lists delta-8 as a legal THC substance.⁸ The law has a profound effect on any current hemp businesses operating in North Dakota, as well as the future formation of any hemp-related businesses in the state. Under Ch. 4.1-18.1, N.D.C.C, it is prohibited for any legal hemp licensee in the state of North Dakota to engage in the isomerization of cannabinoids to create any isomers of tetrahydrocannabinol, including delta-8, delta-9, and delta-10 tetrahydrocannabinol. Furthermore, said licensees may not sell any hemp or hemp products

that were created using the isomerization of cannabinoids to create delta-8, delta-9, or delta-10 tetrahydrocannabinol.

Any producer who fails to provide a legal description of the land where hemp is grown, fails to provide or obtain a license, or produces a total tetrahydrocannabinol concentration greater than the amount set by the Ag Commissioner must meet all legal guidelines within a deadline set by the Commissioner and must also meet strict additional reporting requirements set by the commissioner for a minimum of two years. Additionally, any growers not abiding by the new law may face losing their license, and anyone who participates in the synthetization of hemp for the purpose of getting high may face criminal charges.

The new law helps to fill the loopholes regarding the legality of THC variants (specifically regarding delta-8) in federal law, but it also helps protect growers and producers in the agricultural community by providing a clarified guideline on the state's regulation of hemp production.⁹ The law still allows for the Ag Commissioner to determine the levels of THC, but also bases the levels on the total amount of THC versus the levels of a specific compound. This important distinction allows producers to clearly regulate their growth, as they are now able to focus on keeping THC concentrations below one level rather than multiple different compound levels. The punishments for any violations of the new statute are clearly enumerated in the writing, and the worry about following any federal guidelines is alleviated by the fact that the House Bill will follow a USDA-approved state plan. In regard to sellers of hemp products, the sale of any variant of delta-8 cannabinoids is prohibited, and such sellers must remove any products resulting from the isomerization of delta-8, delta-9, or delta-10 tetrahydrocannabinols.¹⁰

Compliance Resources

- [The CFPB July 2021 Complaint Bulletin](#)
- [FDIC Consumer Compliance Supervisory Highlights](#)

² <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>

³ <https://www.agriculture.com/news/business/6-key-provisions-of-usda-s-hemp-final-rule-now-in-effect>

⁴ <https://www.ams.usda.gov/rules-regulations/hemp>

⁵ <https://www.legis.nd.gov/cencode/t04-1c18-1.pdf>

⁶ https://legiscan.com/ND/text/1045/id/2376277/North_Dakota-2021-1045-Enrolled.pdf

⁷ <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review>

⁸ https://www.legis.nd.gov/assembly/67-2021/testimony/HAGR-1045-20210107-192-F-BRUNNER_SAMANTHA.pdf

⁹ <https://www.inforum.com/news/government-and-politics/6978483-North-Dakotas-hemp-regulation-bill-gets-a-facelift>

¹⁰ <https://www.delta8.co/governor-doug-burgum-bill-to-ban-delta-8-in-north-dakota/>

Perfection of Drones

Generally, all U.S. aircraft must be registered with the FAA and given an identification “N-Number” under the FAA’s Civil Aviation Registry. Traditionally, unmanned aircraft (drones) did not need to be registered; however, under a new rule titled “Registration and Marking Requirements for Small Unmanned Aircraft”, the FAA has provided an entirely separate online registration system for drones under 55 pounds. Unmanned aircraft over 55 pounds and aircraft owned by a trustee in a trust agreement must still be registered with an N-Number under the traditional system. The Federal Aviation Act provides for the establishment and maintenance of a system for the recording of any conveyance which affects title to, or any interest in, any specifically described aircraft, aircraft engine, aircraft propeller, or spare parts location.¹¹

The recording of lien conveyances is covered by the Federal Aviation Regulations; the signed agreement of the parties in the security agreement must be filed and recorded in the FAA Aircraft Registry. Lenders must closely follow all FAA policies and procedures when perfecting their security interests in aircraft and ensure that all aircraft must be registered with the FAA through either the traditional aircraft system or the separate small drone system. Additionally, lenders must be sure to specifically detail the aircraft and its parts within the security agreement. Lenders will need to know the size of the aircraft in question in order to complete these tasks, and they will need to be cognizant of collateral details when recording the security instrument so that the aircraft, engines, propellers, and spare parts are all accounted for and the interest is protected.¹²

ECORA

The “Enhancing Credit Opportunities in Rural America” (H.R. 1977), otherwise known as ECORA, is a bill set forth to lower the cost of financing real estate intended for farming and ranching. Farming income has been steadily decreasing for nearly 10 years, with a dramatic drop in 2020, and ECORA was created to combat this problem. The bill will stabilize and strengthen future net income, as well as benefit producers who may only get this opportunity to obtain assistance. ECORA works by exempting from taxes the interest on certain loans secured by “agricultural real estate.” Agricultural real estate is (1) real property substantially used for the production of one or more agricultural products; and (2) any single-family residence which is (a) the principal residence of its occupant; (b) located in a rural area with a population of 2,500 or less; and (c) purchased or improved with the proceeds of the loan secured by property used for the production of one or more agricultural products.

¹¹ https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/media/8050-93.pdf

¹² <https://www.jdsupra.com/legalnews/drones-and-other-aircraft-what-lenders-2994815/>

Furthermore, ECORA is primed to reduce the average interest rate on a farm and ranch real estate loan by 21%, thus saving money and lowering the costs for our farming and ranching clients.¹³

¹³ <https://www.aba.com/advocacy/policy-analysis/ecora-issue-update>