

## ASK KENNEDY

October 6, 2021

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**Question #1:** When a bank makes a mistake with the withdrawal/transfer of funds from one customer account to another, must the bank take the loss, or may they take the money back from the incorrectly benefited account?

**Response:** **No. If the bank deposits money to an account in error, it doesn't need permission to remove those funds and deposit them into the correct account. The error may also be corrected by exercising an offset, allowing the bank to charge the account for a debt owed to the bank; these offset policies should be found in the deposit account agreement. Furthermore, a client who elects to spend money incorrectly deposited into their account can potentially face criminal charges for theft or receiving stolen property.**

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**Question #2:** An LLC has only one owner. For tax filing purposes, it is reported on Schedule E of the owner's 1040 tax return. When the Beneficial Ownership Certification was filled out, the SSN of the Beneficial Owner was used. Subsequently, the LLC received a TIN. Is a new Beneficial Ownership Certification required?

**Response:** **Yes. Beneficial Ownership form must be completed by any person opening a new account or updating an existing legal entity account on behalf of a legal entity with any of the following U.S. financial institutions: 1) a bank or credit union; 2) a broker or dealer in securities; 3) a mutual fund; 4) a futures commission merchant; or 5) an introducing broker in commodities. For the purposes of the Beneficial Ownership form, a legal entity includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country, and does not include sole**

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**proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.<sup>1</sup>**

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**Question #3:** There was a question regarding the transferability of Power of Attorney's and what banks are required to do with signatures and accounts in such instances.

**Response:** Will be discussed during Ask Kennedy webinar.<sup>2</sup>

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## **Title Searches and Title Lock**

### **Title Letter/O& E Report**

A Title Letter or Ownership and Encumbrance Report is a statement of the current ownership and encumbrances affecting the property. However, not all encumbrances are covered and the individual creating the report will not examine the chain of title for the property. The individual creating the Report will only look at the last deed recorded to assess who is the apparent record title holder. The information in the report varies depending on who completes the Report. They are often not attorney prepared.

### **Title Opinion**

A Title Opinion is prepared by an attorney. A Title Opinion will assess the chain of title and provide an opinion of the validity of the title vested in the current owner and any other parties having an interest in the property. An updated abstract is usually required to complete the opinion, which is not ordinarily prepared by the attorney providing the opinion. An abstract is simply a summary of the deeds, mortgages and other documents of public record affecting title to the real estate covered. The Title Opinion also details any encumbrances.

### **Title Insurance**

Title Insurance is a form of casualty insurance that pays for damages incurred by the insured party for defects in the title and/or invalidity or unenforceability of mortgage liens. Title Insurance may be underwritten by a title agent (who may or may not be an attorney) approved by the company through which the insurance is placed and licensed by the State in which the property is located. Title insurance is retrospective, it covers defects in title that may have already happened, whereas most other insurance protects from a situation that may happen in the future.

*A memo on Title Lock is [attached](#).*

*By Abigayle Lindgren*

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<sup>1</sup>

<https://www.ffiec.gov/press/pdf/Beneficial%20Ownership%20Requirements%20for%20Legal%20Entity%20CustomersOverview-FINAL.pdf>

<sup>2</sup> <https://www.legis.nd.gov/cencode/t30-1c30.html>

## **New York's LIBOR Statute**

On April 6, 2021, New York's Governor signed into law state legislation aimed at addressing contracts, securities, and instruments that are governed by New York and have interest rates or dividend rates determined by reference to U.S. dollar LIBOR and have no fallback rate provisions or, alternatively, have fallback rate provisions won't work once the U.S. LIBOR is discontinued by June 2023. The legislation will apply to any "contract, security or instrument" governed by New York law that uses "U.S. dollar LIBOR." While many think of indentures as the type of tough legacy contracts contemplated by the legislation, the term "contract, security or instrument" is defined broadly and includes, for example, "mortgages" as well as other debt and equity instruments and obligations.

The legislation, Article 18-C of the New York General Obligations Law, will override the New York Uniform Commercial Code and other New York laws. The legislation was proposed by the Alternative Reference Rates Committee (ARRC), a group of private-market participants brought together by certain U.S. banking and financial markets regulators to guide the transition from LIBOR to a better reference rate. SOFR will be the basis for the ARRC's recommended alternative to LIBOR for use in derivatives and other financial contracts. The legislation's effect on commercial loan agreements is expected to be limited, as most commercial loans are easier to amend most already include flexible fallback provisions. Additionally, since 2017, loans have been drafted to include a large range of fallback provisions that foreshadow the permanent disappearance of LIBOR and its replacement by a recommended benchmark replacement. Many of these potential problems under legacy contracts were entered into years ago, however, nothing in the legislation would technically prevent its application to a new contract that lacks modern fallback provisions. The legislation will affect contracts differently, depending on 1) whether they have fallback provisions saying what happens after the disappearance of LIBOR, and 2) the nature of the fallback provisions.<sup>3</sup>

Similarly, the legislation is expected to have a limited effect on swap transactions and other derivatives governed by ISDA master agreements, as transacting parties are likely to adhere to the LIBOR protocol recently published by ISDA that adds appropriate fallback provisions to such agreements. However, many contracts have no fallbacks or fallback provisions that were drafted, as there had been the assumption that LIBOR would never disappear permanently. The ARRC recently reported that after June 2023, "[a]n estimated \$1.9 trillion in exposures will remain in bonds and securitizations, many of which may have no effective means to transition away from LIBOR upon its cessation."<sup>4</sup>

While many holes remain, particularly regarding what the specifics of the benchmark terms would be, it is likely the ARRC will publish further guidance and remains a crucial source of information to follow.

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<sup>3</sup> <https://www.sidley.com/en/insights/newsupdates/2021/04/new-yorks-legacy-libor-legislation>

<sup>4</sup> <https://www.fsb.org/wp-content/uploads/P020621-1.pdf>

## **IRS Reporting Requirements**

The financial services sector is priming for a battle over a legislative proposal from the Biden administration requiring banks and other institutions to report customer account data intended to bring in more federal tax dollars. The measure is being considered by lawmakers as a source of revenue in the Biden administration's proposed \$3.5 trillion budget reconciliation plan. One of the provisions of the new proposal is to change the IRS reporting requirements for all banks in an effort to close the “tax gap”. Currently, banks are only required to report deposits of \$10,000 or more, however, the proposal would require banks and other financial institutions to report to the IRS on the deposits and withdrawals of all business and personal accounts with a balance of more than \$600.<sup>5</sup>

The ABA is drafting a congressional letter to address the concerns that are arising from this new proposal. The primary issues raised are the concerns that mandating new, broad bank account reporting to the IRS would infringe on the privacy of bank customers, push more people away from a banking relationship and overload the IRS with more personal information about citizens than it can process and keep safe from a cyber-attack. The IRS already experiences 1.4 billion data and cyber-attacks each year, and adding private information only furthers the chance for hacks and subsequent breaches of systems containing valuable private and financial information. Furthermore, while all banks would be affected, small community banks with limited internal resources will be especially burdened by these new requirements, as they will require a massive and expensive compliance effort to track and report transactions on all bank products. The ABA also asserts that the proposal’s claim that these new requirements would be simple and cheap to implement is false because, while having excess raw data in a banking system itself isn’t overly complicated, the compilation and specific required production of this information will be costly and complex. Financial institutions say they already report enormous amounts of data to the Internal Revenue Service, which leads to the IRS collecting more data than it can process; consequently, adding more data that contains little useful information will not assist in the goal of closing the tax gap.

The reporting requirements would not be limited to financial institutions under this proposal. Other accounts with characteristics similar to financial institution accounts will be covered under these information reporting requirements as well; in particular, payment settlement entities would collect Taxpayer Identification Numbers (TINs) and file a revised Form 1099-K expanded to all payee accounts (subject to the same de minimis threshold), reporting not only gross receipts but also gross purchases, physical cash, as well as payments to and from foreign accounts, and transfer inflows and outflows. Similar reporting requirements would apply to crypto asset exchanges and custodians. Separately, reporting requirements would apply in cases in which taxpayers buy crypto assets from one broker and then transfer the crypto assets to another broker, and businesses that receive crypto assets in transactions with a fair market value of more than \$10,000 would have to report such transactions.

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<sup>5</sup> <https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf>

### **DOT and Climate Financial Risks**

The Federal Insurance Office (FIO) of the U.S. Department of the Treasury (Treasury) is issuing this Request for Information (RFI), following the May 20, 2021 Executive Order on Climate-Related Financial Risk, to solicit public input on FIO's future work relating to the insurance sector and climate-related financial risks. FIO's efforts will focus on three initial climate-related priorities, which are described below. Additionally, this RFI seeks input on how FIO's data collection and dissemination authorities can best be used by FIO in support of these priorities, as well as to monitor and assess the insurance sector and climate-related financial risks.<sup>6</sup>

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### **COVID-19 Mandates**

President Joe Biden recently required all employers with 100 or more employees to make sure their workers receive the vaccine or have a COVID-19 test weekly. The Department of Labor's Occupational Safety and Health Administration (OSHA) continues to work on a rule to enforce this mandate; in the short term, an Emergency Temporary Standard has been imposed. OSHA will also enforce a rule that requires these companies to provide paid time off for the time it takes workers to get the vaccine and recover from any symptoms, and any employers that don't comply with the vaccine mandate or paid-time-off requirement can face fines of up to \$14,000 per violation.

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### **Real-Time Payments**

#### **What are Real-Time Payments?**

- Real-time payments (RTP) are payments that are initiated and settled nearly instantaneously through the RTP rail system.
- The rail system refers to platforms or networks via which payments are made.
- These payment networks provide 24x7x365 access, which allows these networks to process transfers at any time including weekends and holidays.

#### **The Value Real-Time Payments Provide Banks**

- Send and receive payments around the clock, 7 days a week, 365 days a year.
  - Customers can Initiate payments from their existing, meaning they will no longer need to set up a separate funding account.
  - Receive payments within seconds after initiating the transaction.
  - Manage cash flow more easily and provide more transparent communication to customers because RTPs connect payment and payment data together in a single transaction.
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<sup>6</sup> <https://www.govinfo.gov/content/pkg/FR-2021-08-31/pdf/2021-18713.pdf>

### **How Does Real-Time Payment Technology Affect Business?**

- Because funds are available much faster, RTPs will likely have significant positive impact on a business's cash flow, which will improve budgeting, financial projections, and overall cash flow management.
- RTPs also help improve operational efficiencies and boost customer engagement and satisfaction.

### **Real-Time Payment Systems and Covid Relief**

- The Treasury Department and the IRS had to send out hundreds of millions of payments to citizens through covid relief bills through traditional payment systems.
- The cost of these Economic Impact Payments is high enough without the cost of printing and mailing check or cards, additionally, human error involved in this process raises the price of these programs even more.
- If the government were able to implement a RTP system every American would have been able to receive their stimulus check the day it was approved by congress, and at far less cost.

### **Government Implementation of Real-Time Payment Systems**

- In August 2019, The Federal Reserve Board announced its development of a RTP rail system called FedNow, which will be launched in 2023.
- In January 2021, the federal reserved launched a FedNow pilot program. The program consisted of more than 200 financial institutions and processors that will help support the development, testing, and adoption of FedNow.

This new instant payment service will enable all financial institutions, of every size, to provide safe and efficient instant payment services in real time, around the clock, all year.

*By Ryan Ames*

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### **Risk Self-Assessment Tool**

Last week, the Cybersecurity and Infrastructure Security Agent (CISA) released an [insider risk self-assessment tool](#) to help organizations gauge their vulnerability to an insider threat incident. The tool is a downloadable PDF that asks users key questions about their organizations to come up with scores to objectively evaluate their immunity to insider threat incidents.

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### **Regulation of the Month**

This month we've covered [Regulation GG](#).

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## TITLE LOCK

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### OVERVIEW:

Home Title Lock is a real property protection service being promoted by Newt Gingrich that claims to protect a landowner against property fraud. Property fraud is when an individual who is not the homeowner creates a fraudulent deed, records it in the county recorder's office (thus making it appear that the true homeowner has transferred the property to the scammer), then using the property to secure a loan. At this point, the scammer pockets the money from the loan, doesn't make the payments on the loan and the property would likely be foreclosed on. Home Title Lock claims to provide the following services to prevent the property fraud:

- 1) 24/7 monitoring of a landowner's title to the property
- 2) Instant alerts if home title lock detects tampering with the landowner's title or mortgage
- 3) Up to \$1,000,000\* in legal fees and expert fees on the landowner's behalf<sup>7</sup>

### TITLE INSURANCE V. TITLE LOCK:

Title lock is very different from title insurance. A title insurance owner's policy is a one-time purchase that protects the homebuyer against any legitimate claim against the validity of the ownership of the property prior to the date the landowner purchased the real property. Title Lock is prospective in nature and requires the landowner to pay a monthly fee to protect against potential future changes in title ownership without the knowledge of the true landowner.

### TITLE LOCK IS AN UNNECESSARY EXPENSE:

There are many critics of Title Lock and their fear mongering tactics used to scare landowners into spending an extra 15 dollars a month. Purchasing Title Lock is not necessary for multiple reasons:

- 1) **Property Fraud is an extremely rare type of theft.** Property fraud is not a common crime that occurs, and purchasing title lock is likely an unnecessary expense.<sup>8</sup>
- 2) **Landowners can easily monitor for fraud themselves.**
  - a. County Records. Landowners can easily monitor and access their county property ownership records online and check the status of their title for free or a minimal fee dependent on the county. Another option is to monitor their property tax statements (which the landowner receives for free or are easily available online), which typically reflects the individual(s) who currently hold title to the property.

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<sup>7</sup> [Property Fraud is a Growing Problem \(hometitlelock.com\)](http://hometitlelock.com)

<sup>8</sup> [2020\\_IC3Report.pdf](#)

- b. Landowners should check credit reports and accounts for unauthorized transactions. Checking credit report and accounts for unauthorized transactions may help a landowner identify any financial action that may have occurred in their name that is fraudulent<sup>9</sup>. This should be a standard practice for any individual wanting to identify and prevent identity theft of any type.
  - c. Pay attention to incoming bills. A landowner should ensure they are receiving all their bills, such as the tax bill, water bill, mortgage bill and so on. Not receiving an expected bill can be a sign of home title fraud or possible identity theft.
- 3) **Home Title Lock cannot prevent a scammer from recording a fraudulent deed.** Title Lock only alerts a homeowner *after* a potentially fraudulent deed has been recorded. It cannot prevent a deed from being recorded with the county recorder's office.
- 4) **Coverage of Legal Fees.** Home title lock claims to cover "up to \$1,000,000\* in legal fees and expert fees" on the landowner's behalf. Nowhere on the title lock website does it go into depth about what exactly the 1,000,000 dollars in coverage actually can be applied to or if there are any caveats to this coverage.

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<sup>9</sup> [BBB Alert: Home Title Fraud](#)



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## REGULATION OF THE MONTH\*

### REG GG: PROHIBITION ON FUNDING OF UNLAWFUL INTERNET GAMBLING

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The Unlawful Internet Gambling Enforcement Act (UIGEA; [31 U.S.C. §§ 5361 et seq.](#)) prohibits any person engaged in the business of betting or wagering from knowingly accepting payments in connection with the participation of another in unlawful Internet gambling.<sup>10</sup> Such transactions are deemed “restricted transactions.”

The implementing regulation for UIGEA, Regulation GG ([12 C.F.R. Part 233](#)), 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.<sup>11</sup> The regulation provides non-exclusive examples of such policies and procedures, which are summarized herein. Note that banks are not required to use the examples and are permitted to design their own policies and procedure so long as they meet the objective (to catch and stop restricted transactions).

#### DUE DILIGENCE

[Unlike card systems](#), most designated payment systems do not use formats that would permit participants to identify and block restricted transactions during payment processing. Because of this, Reg GG has adopted the use of flexible, risk-based due diligence in opening and maintaining accounts for commercial customers.

#### No Action Required If Minimal Risk That Commercial Customer is Engaged in Internet Gambling Business

When a commercial customer applies to open an account, banks should assess whether there is a minimal risk of it acting as an Internet Gambling Business (in addition to its usual due diligence procedures, including KYC). If there is only minimal risk, no further action is required.

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<sup>10</sup> [31 U.S.C. § 5363](#). See also [12 C.F.R. § 233.2](#):

(y) **Restricted transaction** means any of the following transactions or transmittals involving any credit, funds, instrument, or proceeds that the Act prohibits any person engaged in the business of betting or wagering (which does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service) from knowingly accepting, in connection with the participation of another person in unlawful Internet gambling –

- (1) Credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) An electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; or
- (3) Any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution.

<sup>11</sup> 12 C.F.R. § 233.5(a).



### **If More Than Minimal Risk, Obtain Statement from Commercial Customer**

If the bank determines that there is more than a minimal risk that a commercial customer is engaged in an internet gambling business (*e.g.*, commercial customer offers games or contests over the Internet), but the bank does not know for sure, it can satisfy its legal obligations by requiring the customer to declare that it is not engaged in an internet gambling business.

### **If Commercial Customer Is Engaged in Internet Gambling Business, Additional Requirements to Ensure Legality**

If the commercial customer is engaged in an internet gambling business, the bank must require the customer to:

1. Present evidence of legal authority to engage in such business (*i.e.*, a license issued by a State or Tribe, attorney opinion, etc.);
2. Provide a written commitment to notify the bank of any changes in legal authority; and
3. Provide a third-party certification that the customer has systems in place reasonably designed to ensure that it will remain within the law (*i.e.*, prevent improper use of the site by minors or persons in other geographical locations where such gambling is prohibited).

### **Notice to Commercial Customers**

The bank must notify all commercial customers that restricted transactions are prohibited from being processed through the account. This notice can be given “through provisions in the account or commercial customer relationship agreement or otherwise.”<sup>1</sup>

### **CODING FOR CARD SYSTEMS<sup>2</sup>**

Card systems<sup>3</sup> 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.<sup>4</sup> Thus, card systems may use the implementation of a code system, such as transaction codes and merchant/business category codes, that are required to accompany the authorization request for a transaction.<sup>5</sup> In doing so, the bank must meet further requirements of the statute.

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\* Written by Jocelyn A. Dravitz.

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.

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<sup>1</sup> [12 C.F.R. 233.6\(b\)\(3\)](#).

<sup>2</sup> Banks can also choose to use the foregoing due diligence procedures instead of implementing a code system.

<sup>3</sup> Systems for authorizing, clearing and settling transactions in which credit cards, debit cards, pre-paid cards, or stored value cards are used to purchase goods or services or to obtain a cash advance. [12 C.F.R. § 233.2\(f\)](#).

<sup>4</sup> <https://www.federalreserve.gov/supervisionreg/reggcg.htm>

<sup>5</sup> [12 C.F.R. §233.6\(d\)](#).