
ASK KENNEDY

August 4, 2021

Topics Covered:

- Questions from 2021 Dakota School of Banking Students
- NEW North Dakota Unclaimed Property Law: Effective July 1, 2021
- Future of the FDCPA
- Cryptocurrency Watch
- Minority Farmer Debt Relief
- PPP Inquiries
- REMINDER: BND Ag Disaster Relief Program
- Regulation of the Month—Reg. X

Question #1: What happens when a Guarantor of your loan also guaranties loans to other lenders? Is a default on one loan a default on a loan to another lender?

Response: It depends on the terms of default in your loan agreement and Guaranty agreement. **Discussed in more detail on the Ask Kennedy Webinar**

Question #2: What are some of the changes following the new Real Estate Trust Account amendment?¹

Response: Effective August 1, 2021, N.D.C.C. 43-23 governing RE trust accounts has been amended. Most notably, all funds coming into a broker's possession (aside from their own) MUST be placed in a noninterest-bearing account in a federally insured financial institution.² This includes funds to which the broker may have a future claim, as well as all earnest money deposits. All accounts must be labeled as a "Trust Account", and all deposit slips, bank statements, etc. must also be labeled "Trust Account" It should be noted that up to \$500 of a broker's personal fund can be included to counter and bank or service charges the trust account may incur; however, it is alternatively recommended that brokers and banks reach an agreement to take all trust account service charges directly from the broker's business operating account to avoid any bookkeeping hassle. Depositing any "non-trust funds" into a trust account is a serious violation of North Dakota Real Estate License Law and may strip the depositing party of the protections normally given by trusts.³

Follow-up Question: How do these new RE accounts differ from IOLTA accounts?

Response: Under N.D.R.Prof. Conduct 1.15, the Supreme Court of North Dakota mandates an

¹ <https://www.realestatend.org/latest-news/law-changes-take-effect-august-1-2021/>

² <https://www.legis.nd.gov/cencode/t43c23.pdf>

³ https://www.realestatend.org/image/cache/2021.06 -- TrustAccountGuidelines_updated.pdf

Interest on Lawyer Trust (IOLTA) account program in North Dakota⁴. Because of this mandate, **all attorney-managed funds from a client or third-party must always be held in an interest-bearing account.** There are three types of accounts allowed for these funds:

- 1) A separate interest-bearing trust account for the particular client or third person to whom the interest will be paid;
- 2) A pooled interest-bearing account which will compute interest earned by each client or third-person's funds and be paid out to said client or third-party;
- 3) A pooled interest-bearing account for the deposit of all nominal funds or funds expected to be held for a short period of time, the interest of which will be paid to the North Dakota Bar Foundation Inc. for use in law-related public interest programs.⁵

The interest earned from this program provides public education on legal matters as well as an improvement of the administration of justice. The goal of this program is to take short-term or nominal funds or deposits that generally would not be worth putting into a separate interest-bearing account and put them to use for legal education.

Unlike the new RE accounts, IOLTA accounts still must be held in an interest-bearing account with a specific title. The basic procedures of fund deposit and account management remain largely the same; all funds must be immediately placed in an account labeled "Trust Account" or some very similar variation, deposits must not be commingled with broker's personal funds, and the amount in the trust and all transaction processes must be recorded.

Question #3: If the IRS levies the bank on a commercial customer, does the bank have the right of offset?

Response: Generally, no. The right to set off does not defeat an IRS lien. If an IRS tax lien attaches to a property prior to set off, then the bank will take funds encumbered with a federal tax lien, and the government may levy on the bank to obtain the encumbered funds.⁶ However, if deposit accounts are listed in the Note and Security Agreement as collateral, a bank's interest will beat an IRS lien.

Question #4: Is an operating agreement still required for new account documentation of a single-member LLC account?

Response: It is preferred that you request an operating agreement when obtaining documentation for a new account; you may also require the minutes of the LLC as well as a resolution to borrow. It is also acceptable to require an SOS certification of good standing, SOS articles of organization, and a resolution. However, without requiring an operating agreement you run the risk of failing to establish authority to contract

⁴ <https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/1-15>

⁵ https://cdn.ymaws.com/www.sband.org/resource/resmgr/docs/for_lawyers/IOLTAGuide.pdf

⁶ https://www.irs.gov/irm/part5/irm_05-017-003#idm140297476350272

New Unclaimed Property Law

As of July 1, 2021, North Dakota has repealed N.D.C.C. Ch. 47-30.1 and replaced it with N.D.C.C. Ch. 47-30.2. The primary purpose of the change is to bring North Dakota property law into the 21st century, while also allowing the flexibility to change as the world of online business transactions grows. Some of the main changes to the law include:

- Change in requirements of property holders to notify apparent owners of abandoned property
- Modified dormancy period for certain types of property
- Describes an unclaimed property administrator's ability to take custody of properties
- Directs the process for delivering unclaimed property to another state
- Establishes rules for determining if property is abandoned and which state may take custody

For more information, check the resources below:

- **Flyer Link:** <https://ndba.com/uploads/48/NDDTLUnclaimedProperty.pdf>
- **Webinar Link:** <https://www.youtube.com/watch?v=t1fEjW9fc9I>.

The Future of the FDCPA

Two final rules issued under the Fair Debt Collection Practices Act (FDCPA) will become effective January 29, 2022.⁷ The rules are described as follows:

1. The [October 2020 Debt Collection Final Rule](#) addresses the use of communications related to debt collection, clarifying prohibitions on harassment and abuse, false or misleading representations, and unfair practices by debt collectors when collecting consumer debt. [Executive Summary available here](#).
 2. The [December 2020 Debt Collection Final Rule](#) clarifies disclosures debt collectors must provide to consumers at the beginning of collection communications; prohibits debt collectors from making threats to sue or from suing consumers on time-barred debt; and requires debt collectors to take specific steps to disclose the existence of a debt to consumers before reporting it to a consumer reporting agency. [Executive Summary available here](#).
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Cryptocurrency Watch

Cryptocurrency has taken the world by storm, and the legal and banking communities need to be prepared. Changes in cryptocurrency use has the ability to affect policy and procedure far beyond what it may appear. It is extraordinarily important for banks to stay up to date on the details and status of cryptocurrency. Cryptocurrencies (Bitcoin, Ethereum, etc.) rely on blockchain technology to record transactions and store, transfer, and trade cryptocurrencies in a decentralized matter.

It is important to note that cryptocurrencies are one of four subcategories of crypto (digital) assets; Stablecoins, Central Bank Digital Currencies, and Non-Fungible Tokens comprise the other categories. While all the categories continue to grow and will require an extensive amount of knowledge, cryptocurrency remains the primary focus for banks. There is very little regulation of cryptocurrency, and what regulation there is tends to be murky and uncertain. This prevailing uncertainty makes it difficult to determine how crypto is treated by law; crypto is often treated as money, property, or even securities depending on the financial institution or regulator. We are going to start seeing more and more companies attempt to create crypto-related products and services, and the regulations these companies will have to follow will change rapidly. Because regulations vary so widely by jurisdiction and are generally based on the activities involved rather than the asset itself, a single crypto “coin” can be regulated entirely different from one in another jurisdiction.

The rapidly expanding crypto market is a necessary endeavor for banks to undertake, as they should be looking to expand their customers’ access to these assets. Customer interest in these currencies continues to rise, and the immense potential for profitability has made it lucrative for banks to take on crypto companies and their customers as partners and clients. As the crypto market grows, the primary concern of banks should be monitoring the evolving regulations. The unclear treatment of crypto assets lends itself to significant gaps in oversight, and the varying requirements of the crypto regulations can hamper business models and the potential for financial growth. That said, the nature of crypto products and the numerous financial activities they can facilitate will provide a tremendous market for banks moving forward.

Further information can be found by visiting the following link:

<https://www.aba.com/-/media/documents/reports-and-surveys/understanding-cryptocurrency.pdf?rev=c8da125bb39148a0a8280e702b7035f5>

⁷ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-delay-of-effective-date-for-recent-debt-collection-rules/>

Minority Farmer Debt Relief Blocked

White farmers in North Dakota and Minnesota have joined a group across the US alleging that a new \$4 billion debt relief program for “socially disadvantaged” farmers is discriminatory against race. The farmers involved in the lawsuit are looking for inclusion in the relief bill, which is part of the larger \$1.9 trillion COVID-19 American Rescue Plan Act, or for Congress to strike down the law and replace it with a new, race-neutral plan.⁸

Judges in Florida, Wyoming, Illinois, Wisconsin, and Texas have agreed and determined that white farmers were unfairly and unconstitutionally excluded from the Biden administration’s loan forgiveness program for “socially disadvantaged” farmers based on their skin color, with some of the Courts issuing temporary injunctions halting the relief payments to farmers.⁹

Advocates for the debt relief law contend that the funding addresses “longstanding racial equity issues within the department and across agriculture,” as well as attempts to cure “a historic lack of debt relief to disadvantaged farmers. The Biden administration defended the bill, stating that it had an interest in remedying a well-documented history of discrimination against minority farmers. However, Judge Marcia Morales Howard, ruling on the Florida case, stated “it appears that in enacting Section 1005 Congress relies, albeit without any ill intention, on present discrimination to remedy past discriminations”. The “socially disadvantaged” farmers included in the program could qualify for up to 120 percent debt relief under this program, regardless of whether they were profitable or anywhere near foreclosure, while white farmers on the brink of foreclosure would have no recourse under the relief program.¹⁰

The Courts have allowed the Biden Administration to continue preparing the relief program in the event the program is found to be constitutionally permissible.

PPP Inquiries

Banks are likely to face inquiries in the coming months regarding their roles in the Paycheck Protection Program during the pandemic. Senator Elizabeth Warren is leading a charge to determine whether large companies were given more than they deserved while failing to pay agents of borrowers, as well as targeting banks for potentially lending to “fraudulent” companies or individuals through the program. Warren contends that the banks systematically failed to pay agents of borrowers, such as accountants or lawyers, an average of \$22,000. It is also claimed that banks may have violated the Equal Credit Opportunity Act by restricting access to PPP loans for small businesses when they did not have a preexisting relationship with the bank, despite the fact the banks were pressured to get the loans out quickly.

⁸ <https://www.bemidjipioneer.com/news/government-and-politics/7118038-White-Minnesota-North-Dakota-farmers-part-of-discrimination-lawsuit-against-USDA>

⁹ <https://www.agriculture.com/news/business/preliminary-injunction-against-usda-debt-relief-for-minority-farmers>

¹⁰ <https://www.nytimes.com/2021/06/23/us/politics/biden-debt-relief-black-farmers.html>

Banks must be proactive in readying themselves for these potential inquiries. Reviewing and auditing all PPP applications and ensuring there is complete documentation to match the governmental requirements is a good start; going back to the customer to supplement any missing documents would also be beneficial. Additionally, proactive communication with regulators may work to the bank's benefit unless they are confident there will be no issues.

BND Ag Disaster Relief Program

The Bank of North Dakota Ag Disaster Relief program was created to address the needs of livestock producers impacted by the 2021 drought and includes both the Livestock Drought Loan Program and the Livestock Rebuilders Loan Program.¹¹ The BND hosted a webinar addressing the program on August 3, 2021, and keep an eye out as there is likely to be a rerun of the webinar for registered BND members.¹²

Regulation of the Month—Reg. X

On June 28, the CFPB finalized amendments to mortgage servicing rules under Regulation X to assist borrowers affected by COVID-19. The final rule, which includes special safeguards to ensure borrowers have time before foreclosure to explore their loan options, becomes effective on August 31. The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend Regulation X to assist mortgage borrowers affected by the COVID-19 emergency. The final rule establishes temporary procedural safeguards to help ensure that borrowers have a meaningful opportunity to be reviewed for loss mitigation before the servicer can make the first notice or filing required for foreclosure on certain mortgages. In addition, the final rule would temporarily permit mortgage servicers to offer certain loan modifications made available to borrowers experiencing a COVID-19-related hardship based on the evaluation of an incomplete application. The Bureau is also finalizing certain temporary amendments to the early intervention and reasonable diligence obligations that Regulation X imposes on mortgage servicers. This final rule is effective on August 31, 2021.

The ABA is doing a Regulation X Seminar on August 6, 2021, from 12:00-1:15 PM (CT). The seminar will cover the new COVID-19 procedures that all mortgage servicers will be required to follow. The key elements of the rules, as well as a Q&A session on the final rule and how to implement the changes, will be covered. Links to the Webinar registration, as well as the full text of the final rule, are listed below:

<https://www.aba.com/training-events/online-training/regulation-x-mortgage-servicing-final-rule-what-you-need-to-know>

https://files.consumerfinance.gov/f/documents/cfpb_covid-mortgage-servicing_final-rule_2021-06.pdf

¹¹ <https://bnd.nd.gov/ag/>

¹² <https://www.nd.gov/ndda/drought-resources>