

## ASK KENNEDY

June 2, 2021

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**Question #1:** Can North Dakota banks charge 18% and an annual fee of \$30 for an overdraft line of credit? I was not able to see any restrictions, but just wanted to check/verify.

**Response:** As general counsel for NDBA, I cannot provide legal advice, but I can direct you to North Dakota's usury laws, which are found in sections [12.1-31-02](#) (criminal usury) and [47-14-09](#) (usury for loans of money) of the North Dakota Century Code.

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**Question #2:** I have a CD that is made in this fashion: Father or Mother POD Daughter and Son. First, Son died. Then Mother, then Father. Do the funds go to Daughter only? Or do Son's heirs (the estate) have any claims for these funds?

I looked at N.D.C.C. § 30.1-31-9(2), which states that "there is no right of survivorship in the event of death of a beneficiary, thereafter." I am not sure how to interpret that.

**Response:** Under N.D.C.C. § 30.1-31-9(2)(b), on the death of the sole party or the last survivor of two or more parties, sums on deposit in an account with a P.O.D. designation belong to the surviving beneficiary or beneficiaries.

So, on the death of the sole party or the last survivor of two or more parties (Mother), sums on deposit belong to the surviving beneficiary (Daughter).

\*Note that if you want confirmation of the applicability of 30.1-31-09 to your specific situation, you will need to contact your legal counsel.

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**Question #3:** If we receive a request from a caseworker via form entitled “Official Request for Customer Financial Records” from the North Dakota Department of Human Services, are we required to provide the requested financial information?

The case worker said that we don’t need anything signed from our customer stating that it is okay to release. The customer does not want us to release.

I checked with our compliance auditor, but she suggested I check with you since it would be state law.

**Response:** I cannot offer any specific legal advice on behalf of NDBA, but N.D.C.C. § [6-08.1-03](#) allows a bank to disclose customer information on very few occasions, one of which is the suspicion of financial abuse or exploitation pursuant to N.D.C.C. § [12.1-31-07](#). Also, [Chapter 6-08.5 of the Century Code](#) deals with financial exploitation prevention and provides protections to banks who choose to report suspected financial abuse to law enforcement.

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**Question #4:** I have a question on best practice for customer communication(s) retention. Is there a timeframe we should look at framing our retention policies around for customer communications such as statements, notices, check images, etc.?

I recently purchased the updated retention guide from NDBA but did not see any guidance/information regarding customer communications.

**Response:** I believe the answers to your questions are found in the BSA regulations in [31 C.F.R. Chapter X](#). Check out [this link](#), which states that the records related to the identity of a bank customer must be maintained for 5 years after the account is closed.

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### **Addendum to Bank Records Retention *Quick Notes* 5th Edition**

During the May Ask Kennedy session, Tracy mentioned that the Bank Records Retention *Quick Notes* 5th Edition was available to NDBA members for purchase (contact Jolene German at [jolene@ndba.com](mailto:jolene@ndba.com) to order) and discussed adding an addendum for record retention rules specific to North Dakota. The [Addendum](#) is attached.

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## General Tips: Working with Fintechs

Community banks have a lot to gain from working with financial technology (“fintech”) companies to implement fintech, especially when they are limited in their ability to create their own technology and want to keep up with the latest developments. However, banks must keep in mind that they have several guidelines for vendor management and the outsourcing of technology services.<sup>1</sup> When selecting the vendor, a key consideration is legal and regulatory compliance.<sup>2</sup> “A bank’s use of third parties does not diminish the responsibility of its board of directors and senior management to ensure that the activity is performed in a safe and sound manner and in compliance with applicable laws.”<sup>3</sup> This means that a bank looking at entering into a fintech partnership must perform proper risk assessments and conduct due diligence.<sup>4</sup> Failure to manage risk can result in significant violations of consumer laws and regulations and expose banks to supervisory enforcement action, as well as financial, legal, and reputational risks.<sup>5</sup> Hence, such banks have a responsibility to evaluate the legal and regulatory compliance of the fintech company they are looking at partnering with.

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## Loan Doc Tips: Guaranties

A guaranty is a contract wherein a guarantor promises to be responsible for the debts or performance of another. This part covers what the guaranty should contain and why.

### 1. Indebtedness Covered

A guaranty will only extend to indebtedness covered by the agreement. Usually, a guaranty broadly covers *all* indebtedness of the debtor. Alternatively, it may be limited to one specific debt.

### 2. Absolute

An absolute guaranty is one in which the guarantor absolutely and unconditionally promises payment or performance of the principal contract on default of the principal debtor. Where the guaranty is absolute, there is no prerequisite to sue on the principal obligation – the creditor may directly sue the guarantor on the guaranty. In other words, if the debtor fails to pay the loan, the creditor may sue the guarantor without taking any actions against the debtor.

### 3. Continuing

A “continuing” guaranty is not limited to a particular transaction and will cover future transactions. In other words, if your guarantor signs a continuing guaranty in connection with a particular loan, the same guaranty will cover future loans made to the same debtor.

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<sup>1</sup> <https://www.fdic.gov/regulations/resources/director/virtual/vendor.pdf>

<sup>2</sup> *Id.*; <https://www.banknews.com/blog/best-practices-in-banking-vendor-management/>

<sup>3</sup> <https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>

<sup>4</sup> <https://www.fdic.gov/regulations/resources/director/presentations/dallas/2013-Third-Party-Risk.pdf>

<sup>5</sup> <https://www.fdic.gov/regulations/resources/director/presentations/TPP.pdf>

### **New State Legislation: Repairman’s Liens**

Repairman’s liens are statutory liens authorized by [Chapter 35-13 of the North Dakota Century Code](#). The statutes therein permit blacksmiths, machinists, farm equipment dealers, construction equipment dealers, welders, garage keepers, mechanics, and aviation operators to obtain a lien for their alteration or repair of an automobile, truck, engine, combine, tractor, farm equipment, construction equipment, well machine, aircraft, or watercraft. The lien is for “reasonable charges for work done and materials furnished.”

HB 1366 adds storage fees and transportation costs to those charges for which a repairman can obtain a statutory repairman’s lien, while stating that storage fees may not begin to accrue until 15 days after the owner is requested to take possession of the property. It also updates values required for priority, language concerning lienholders, and includes requirements for notice before foreclosure. Finally, it provides for nonjudicial disposition of property similar to that of UCC Article 9. The latest version of the bill can be found [here](#).

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### **NDBA Resources: Bank Exam Prep Center**

The Coalition of State Bankers Associations (of which NDBA is a member) recently launched the Bank Exam Prep Center, which is a new online resource providing bankers access to valuable information to prepare for upcoming exams. Read more about it [here](#)!

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### **Regulation of the Month *New!***

We receive so many compliance questions concerning banking regulations. As a result, Ask Kennedy is looking at providing you with a broad overview of one regulation per month. This month we have covered [Regulation B/The Equal Credit Opportunity Act](#).

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## **ADDENDUM TO BANK RECORD RETENTION *QUICK NOTES* 5TH EDITION**

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NDBA's Bank Record Retention *Quick Notes* 5th Ed. contains statutes and regulations governing federal record retention requirements. This Addendum focuses on applicable state statutes and regulations.

Where requirements of state and federal statutes and regulations overlap, financial institutions must use the longer of the two record retention periods.

### **FIDUCIARY RECORDS**

Section 6-05.2-03 requires every banking institution exercising fiduciary powers to retain fiduciary records for a period of three years from the later of the termination of the fiduciary relationship to which the records relate or of litigation relating to the account.

### **ACCOUNT RECORDS**

Section 6-08-23, N.D.C.C., states that no bank may be required to preserve and retain its records of accounts or files for a longer period than six years next after the first day of January of the year following the date of such record or files.

Relatedly, section 6-08-24, N.D.C.C., prohibits depositors or other creditors from commencing an action against a bank on any account of claim of any kind after the expiration of the six-year period provided for under section 6-08-23, unless such depositor or creditor has, within such six-year period, made demand in writing on such bank requesting a settlement or adjustment of such claim; provided, however, that ledger sheets showing unpaid balances in favor of depositors may not be destroyed unless a photographic copy is retained in accordance with section 31-08-01.1, and nothing in sections 6-08-23 and 6-08-24 may be construed as limiting the time when actions may be brought to recover such balances.

### **LOAN RECORDS**

Despite the six-year period required under the banking statutes, there are certain documents financial institutions will want to hold onto longer, including original promissory notes and any modifications thereof, mortgages, and guaranties.

### **UNCLAIMED PROPERTY**

North Dakota has adopted the Revised Uniform Unclaimed Property Act (RUUPA), which requires holders of unclaimed property to turn it over to the state after a certain period of time. Banks hold various categories of property subject to such unclaimed property laws. Section 47-30.2-24, N.D.C.C., requires that the holder who files a report shall retain records for ten years after the later of the date the report was filed or the last date a timely report was due to be filed.



## **ELECTRONIC RECORDS**

Note that under North Dakota law, any requirement that a record be retained may be satisfied by retaining an electronic record of the information in the record, as long as it: (a) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and (b) remains accessible for later reference. N.D.C.C. § 9-16-11.

## **OTHER**

Also, note, that once it is discernable that a record may be relevant evidence, it should be retained.

# EQUAL CREDIT OPPORTUNITY ACT (REG B)

## OVERVIEW

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The Equal Credit Opportunity Act (ECOA; [15 U.S.C. §§ 1691 et seq.](#))<sup>1</sup>, implemented by the Bureau of Consumer Financial Protection's Regulation B ([12 C.F.R. Part 1002](#)), prohibits creditors from discriminating against credit applicants on the basis of any of the following characteristics:

- Race;
- Color;
- Religion;
- National origin<sup>2</sup>;
- Sex ([including sexual orientation and gender identity](#));
- [Marital status](#);
- Age (provided the applicant has the capacity to enter into a binding contract)<sup>3</sup>;
- 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

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<sup>1</sup> Title VII of the Consumer Credit Protection Act.

<sup>2</sup> "A creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant's immigration status into account. A creditor may also take into account any applicable law, regulation, or executive order restricting dealings with citizens (or the government) of a particular country or imposing limitations regarding credit extended for their use." Official Interpretation of 12 C.F.R. § 1002.2(z)..

<sup>3</sup> *Elderly* means age 62 or older. [12 C.F.R. § 1002.2\(o\)](#).



- Provide applicants with copies of appraisal reports used in connection with credit transactions.<sup>4</sup>

[12 C.F.R. § 1002.1\(b\)](#). The ECOA and Regulation B apply to *all* credit – commercial as well as personal.<sup>5</sup>

This document covers the two most common violations of Regulation B: marital status discrimination and notices of adverse action.

## **MARITAL STATUS DISCRIMINATION**

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Marital status discrimination is a common violation. Under Regulation B, creditors may not require a spouse to sign a credit instrument unless: (1) the spouse and the applicant are joint applicants; or (2) the creditor has determined that the applicant is not creditworthy.<sup>6</sup> In other words, if the spouses are not joint applicants, creditors can only require the signature of the applicant’s spouse if the applicant does not independently qualify for the loan (after the creditor has made such determination). The creditor cannot require the additional party (joint applicant, guarantor, etc.) to be the spouse. Note that there is an exception where the spouse’s signature is necessary as a matter of state law to provide access to property.

## **NOTICE OF ADVERSE ACTION**

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“Adverse action” is defined by Reg B as:

- A refusal to grant credit in substantially the amount or substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms), and the applicant uses or expressly accepts the credit offered;
- A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor’s accounts; or

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<sup>4</sup> Creditors are required to provide applicants with free copies of all appraisals and other written valuations developed in connection with all credit applications to be secured by a first lien on a dwelling. Creditors must notify applicants in writing that copies of all appraisals will be provided to them promptly.

<sup>5</sup> [Comment for 1002.1](#).

<sup>6</sup> [12 C.F.R. § 1002.7\(d\)\(1\)](#).





- A refusal to increase the amount of credit available to an applicant who has made an application for an increase.<sup>7</sup>

The regulation requires creditors to notify applicants of adverse action in certain instances and within certain time frames.<sup>8</sup>

<b>Creditor Must Provide Notice if it Has:</b>	<b>Notice Must be Provided Within:</b>
Taken adverse action on a completed credit application	30 days after receiving the completed credit application
Taken adverse action on an incomplete credit application	30 days after receiving the incomplete credit application
Taken adverse action on an existing credit account	30 days after taking action on an existing credit account
Made a counteroffer to an application for credit and the applicant does not accept the counteroffer	90 days after making a counteroffer to an application for credit if the applicant does not accept the counteroffer

[Sample notification forms](#) are available for notifying an applicant that adverse action has been taken on an application or account<sup>9</sup>, notice of disclosure of the right to request specific reasons for adverse action, notifying an applicant that an application is incomplete, notices in connection with applications for business credit, notifying an applicant of the right to receive a copy of appraisals, and notifying an applicant for nonmortgage credit that the creditor is requesting applicant characteristic information.

<sup>7</sup> [12 C.F.R. § 1002.2\(c\)\(1\)](#). What is not included in the term is found in 12 C.F.R. § 1002.2(c)(2).

<sup>8</sup> [12 C.F.R. § 1002.9\(a\)\(1\)](#).

<sup>9</sup> Includes non-approval of loan modification agreement.