
ASK KENNEDY

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Special Guest: United States Senator Kevin Cramer

Please welcome this month's guest, Senator Cramer! Senator Kevin Cramer was elected to the United States Senate in November 2018, after serving three terms as North Dakota's At-Large Member of the U.S. House of Representatives. Senator Cramer currently serves on key committees, including Armed Services, Environment and Public Works, Veterans Affairs, and Banking, Housing, and Urban Affairs.

Senator Cramer serves as a key member of the Senate Banking, Housing, and Urban Affairs Committee, which is tasked with addressing critical financial and economic issues. In this role, Senator Cramer works on legislation and oversight related to banking systems, housing policy, consumer financial protection, and economic development. The committee focuses on ensuring the stability of the financial system, expanding access to affordable housing, and safeguarding the rights of consumers. It plays a crucial role in fostering economic stability, safeguarding financial institutions, and addressing the economic needs of individuals and communities across the country.

Member Questions

Question 1: We issue IRAs using our CD terms (i.e., 6 months, etc.) and they are auto-renewing, but they are a savings account, meaning money can be added to the account at any time and are a savings product. We have an IRA agreement where the customer signs and we as the bank sign as custodian. We also issue a CD receipt that includes the term, maturity and interest rate, including the handling of compounding of interest. This receipt is the only thing indicating a "CD," so the question is do we/the bank need to sign this form since it implies it is a CD? Essentially, is an IRA savings account considered a negotiable instrument and thus treated the same as a CD requiring the bank (employee) signature? My

assumption is the CD Receipt form was NOT intended for IRA savings account purposes, but want to confirm whether the signature requirement is here too.

Response: The bank's account documentation and disclosures should comply with [Regulation DD](#). I am not aware that Regulation DD requires *the financial institution's signature* on anything related to CDs, so the signature requirement referred to may be an internal requirement/policy/procedure of your bank.

Alternatively, it appears you may be referring to the definition of "certificate of deposit" in UCC Article 3 ("an instrument *containing an acknowledgment by a bank* that a sum of money has been received by the bank and a promise by the bank to repay the sum of money"). An "acknowledgment" would not necessarily require signature, but again, this is probably a matter of policy of the bank and the forms it uses (and language therein) for certificate of deposit.

Question 2a: When a customer reports a forged endorsement, what supporting documents do we need to obtain from our customer to send the bank of first deposit and what kind of claim letter do we submit?

Response: Within thirty (30) days of the customer reporting the forgery, it would be suggested that you:

1. Determine the name and address of the depository bank.
2. Obtain affidavits:
 - a. Obtain an affidavit from the payee indicating that the endorsement is a forgery, that payee did not endorse the check or authorize the endorsement, the payee did not receive the proceeds or otherwise benefit from the check, and any other relevant details; and/or
 - b. Obtain an affidavit from the payor customer indicating that the payee has reported it did not receive the funds and so forth.
3. Prepare a breach of warranty claim stating that there has been a forged endorsement and your bank is making a breach of warranty claim and requesting payment in the amount of the check. Provide payment instructions and contact information.

Send the affidavits, along with claim and copy of the check to the depository bank.

Question 2b: Another question regarding this endorsement issue:

What is the depositing bank's responsibility when we return a check to them for no endorsement or irregular endorsement? We have gotten tighter on endorsement checking.

There have been a couple of instances where the bank of first deposit just charges their customer a return check fee sends the check back to them rather than guaranteeing the endorsement and running the check back through. So now, while trying to protect ourselves we are having issues where our customers are calling us because the entity they paid is upset the check came back.

Response: The payor's Bank is responsible to the payor to pay on a check that is properly presented. A lack of endorsement means that the check isn't properly presented and therefore you would have a direct liability to your customer the payor.

The bank that presented the check to you has given you a presentation warranty but that warranty does not supersede your warranty to you customer that you will pay the check to the person or entity that they told you to pay.

The accepting bank will likely have a deposit account agreement that allows them to deposit checks without endorsement, but that's between the depositor and their bank. Because banks must give their depositors provisional credit for the deposited check they may or may not feel comfortable taking on that credit risk with that particular customer.

The only other option for your bank is to call your customer and ask them for permission to honor the check.

Question 3: We would like to get rid of loan applications. Are they required?

Response: Regulation B requires creditors to "take written applications for the dwelling-related types of credit covered by § 1002.13(a)." [12 C.F.R. § 1002.4\(c\)](#). Comments to section 1002.4(c) are as follows:

1. Requirement for written applications. Model application forms are provided in appendix B to the regulation, although use of a printed form is not required. A creditor will satisfy the requirement by writing down the information that it normally considers in making a credit decision. The creditor may complete an application on behalf of an applicant and need not require the applicant to sign the application.

2. Telephone applications. A creditor that accepts applications by telephone for dwelling-related credit covered by § 1002.13 can meet the requirement for written applications by writing down pertinent information that is provided by the applicant.

3. Computerized entry. Information entered directly into and retained by a computerized system qualifies as a written application under this paragraph. (See the commentary to § 1002.13(b), *Applications through electronic media and Applications through video*.)

CFPB Posts Filing Instruction Guide for 2025 HMDA Data Submission

The Consumer Financial Protection Bureau (CFPB) has posted the 2025 version of its HMDA Filing Instruction Guide (FIG), available [here](#). Though there are some updates in the FIG, the Federal Financial Institutions Examination Council (FFIEC) stated that there are no significant changes to the submission process for data collected in 2025 and reported in 2026.

CFPB Circular 2024-05: Improper Overdraft Opt-In Practices

The CFPB has issued a [circular](#) addressing the following question:

Can a financial institution violate the law if there is no proof that it has obtained consumers' affirmative consent before levying overdraft fees for ATM and one-time debit card transactions?

The answer is yes, financial institutions can violate the Electronic Fund Transfer Act (EFTA)/Regulation E if there is no proof that it obtained affirmative consent to enrollment in covered overdraft services. Under EFTA/Reg E, the default condition is that consumers are *not* enrolled in covered overdraft services, and financial institutions are prohibited from charging fees for such services until consumers affirmatively consent to enrollment. Note that this rule covers fees in connection with an ATM or one-time debit transaction and does not apply to overdraft fees charged on written checks, recurring debit transactions, or ACH transactions.

Examples of adequate records provided in the circular include:

- For consumers who opt into covered overdraft services in person or by postal mail, a copy of a form signed or initialed by the consumer indicating the consumer's affirmative consent to opting into covered overdraft services would constitute evidence of consumer consent to enrollment.
- For consumers who opt into covered overdraft services over the phone, a recording of the phone call in which the consumer elected to opt into covered overdraft services would constitute evidence of consumer consent to enrollment.
- For consumers who opt into covered overdraft services online or through a mobile app, a securely stored and unalterable "electronic signature" as defined in the E-Sign Act (15 U.S.C. 7006(5)) conclusively demonstrating the specific consumer's action to affirmatively opt in and the date that the consumer opted in would constitute evidence of consumer consent to enrollment.

Accordingly, banks should review their practices related to Regulation E's opt-in requirements and record retention to ensure that adequate records of opt-in are being maintained.

TD Bank Receives Record Fine for Money Laundering

TD Bank will pay a \$1.3 billion penalty to the US Treasury Department's Financial Crimes Enforcement Network (FinCEN) and \$1.8 billion to the US Justice Department and plead guilty to resolve the US government's investigation that the bank violated the Bank Secrecy Act (BSA) and allowed money laundering. As part of the [consent order](#), TD Bank admitted that it willfully failed to implement and maintain an adequate anti-money laundering (AML) program. Deputy Attorney General Lisa Monaco stated that "Every bank compliance official in America should be reviewing [these] charges as a case study of what not to do. And every bank CEO and board member should be doing the same." Read more [here](#) and [here](#).

FinCEN Analysis on Mail Theft-Related Check Fraud

FinCEN issued a [Financial Trend Analysis](#) (FTA) on mail theft-related check fraud incidents based on 15,417 BSA reports filed during a 6-month period. The FTA identifies 3 primary outcomes after checks have been stolen from the mail: (1) alteration followed by deposit; (2) use as a template to create counterfeit checks; and (3) fraudulent signature followed by deposit. FinCEN noted that, in addition to filing a Suspicious Activity Report (SAR), financial institutions that suspect mail theft-related check fraud should refer their customers to the U.S. Postal Inspection Service at 1-877-876-2455 or <https://www.uspis.gov/report>.

NDBA Fraud Forum Summary

The NDBA Fraud Forum was held on September 24, 2024. This meeting of the forum was split into three sessions focusing on the following topics:

1. Structuring Bank Fraud Departments;
2. Interacting with Law Enforcement; and
3. Check Fraud.

Fraud Departments

This session explored building and organizing fraud departments within banks. Overall, it does not appear that there is any uniform organization or practices, with many participants indicating that their bank did not have a dedicated fraud department. Fraud is usually lumped in with BSA. Some banks outsource certain things, such as debit card disputes. Software systems may be able to replace hiring, to a certain extent.

Getting started: It was recommended that banks keep track of and look at what has been lost (by the bank and by customers) due to fraud. One way to do this is by tracking complaints that are specifically related to fraud: look at who they are resolved by and how quickly.

Though fraud departments are not “money makers,” they can save thousands, if not millions, of dollars in the long run. Reputational risk may also be considered.

Different Structures

- *Fraud Fusion Centers* – These work well for small banks where everyone is in one location and there is a direct line to frontline employees.
- *Siloed* – In this scenario, every payment type has a person assigned to it. It is the least preferred because people really aren’t talking to each other.
- *Compartmentalized* – Combination of Fraud Fusion Center and Silo; there are different people coming together to share information.

Law Enforcement

Law enforcement does not replace the job of a fraud department at a bank. Their job is not to get the customer his or her money back.

Banks should decide dollar threshold for reporting to law enforcement. What amount will you report (i.e., more than \$5,000, more than \$10,000). In deciding this amount, banks may want to consider what reporting could entail in the future (i.e., going to trial, testifying). (Banks should remind their customers that customers may directly report to law enforcement even if the bank does not.)

Other sources/tips:

- It was recommended that banks file an [IC3.gov](https://ic3.gov) complaint for every fraud loss. This is a useful tool for banks and law enforcement, and, contrary to popular belief, is not solely limited to reports of internet-based fraud.
- [Consider IAFCI membership.](#)
- [ReportFraud.ftc.gov](https://reportfraud.ftc.gov)

Check Fraud

Check fraud is on the rise even though the use of checks is decreasing. Three overarching rules/legal concepts were discussed relative to the allocation of liability in cases of check fraud:

Midnight Deadline

Payor banks have until the midnight of the banking day following the banking day on which the bank receives a check to return a check or send notice of its dishonor.

ECCHO Rule 9

Where the midnight deadline has passed, Rule 9 allows a paying bank to make a claim against a depositary bank for forged drawer signatures or counterfeit checks. The depositary bank is only liable if there are sufficient funds in the depositing customer's account.

Breach of Warranty

Articles 3 and 4 of the Uniform Commercial Code (UCC) outline a scheme for allocating the loss resulting from an altered check. In general, it shifts losses from the payor bank to the depositary bank through transfer and presentment warranties.



Tip: When you want to make a breach of warranty claim against another bank and need to find their contact information: The ABA Check Fraud Contact Directory allows ABA members and non-members to find contact information for institutions to resolve warranty breach claims and claims for unauthorized and/or fraudulent transfers for wires, ACH, RTP, or FedNow. Link: <https://www.aba.com/banking-topics/risk-management/fraud/check-fraud>.

Ways to Prevent Check Fraud

1. Positive Pay
2. Gel or Permanent Ink
3. High Security Checks
4. Account Monitoring
5. Do not send a check in the mail!

Additional/Final Tips

- A repeated theme weaved throughout the conversation was the importance of educating customers on fraud. Customers can recognize scams if they are educated on how the scammers operate and what banks do versus what banks do not do.
- Banks should also train their frontline customer service to be a little “nosier” because it helps customers and saves their money.

The Fraud Forum will be meeting quarterly in 2025. Three of the meetings will be virtual with one in-person meeting.

Upcoming NDBA Events in 2024 and 2025

NDBA has many exciting and informational events planned for 2024 and 2025. Below are some special dates to mark on your calendars!

- **2024 IRA Fundamentals and Advanced Seminars**
 - October 21-22, 2024 | Bismarck, ND
 - October 23-24, 2024 | Fargo, ND
 - **2024 Health Savings Account Seminar** | October 25, 2024 | Fargo, ND
 - **Loan Documentation and Enforcement** | December 10-11, 2024 (tentative) | Bismarck and Fargo, ND | details regarding registration and group pricing to be provided soon
 - **Bank Management Conference** | February 12, 2025
 - **Washington Summit** | March 17-19, 2025 | Washington D.C.
 - **2025 Tri-State Trust Conference** | April 22-24, 2025
 - **2025 Dakota School of Banking** | June 1-6, 2025 | Jamestown, ND
 - **2025 Quad States Annual Convention** | June 9-11, 2025 | Rapid City, SD
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FDIC Digital Sign Rule Compliance by January 1, 2025!

A friendly reminder that full compliance with the Federal Deposit Insurance Corporation (FDIC) amended regulation for use of the official FDIC name or logo ([12 C.F.R. Part 328](#)) is required by January 1, 2025. In part, the regulation requires banks to display a new “official digital sign” on bank websites, mobile applications, and certain ATMs and other similar devices. In addition, banks must note when a product or service is not FDIC-insured (“non-deposit signs”). Banks should carefully review the final rule and consult with legal counsel as to any questions arising in connection with compliance.

Companies Must File Beneficial Ownership Information by January 1, 2025!

A friendly reminder that the Corporate Transparency Act, enacted in 2021 to curb illicit finance, requires reporting companies created or registered to do business in the United States before January 1, 2024, to file an initial beneficial ownership information (BOI) report by January 1, 2025. Failure to comply with the reporting requirements may lead to civil and criminal penalties.

For more information about filing, visit <https://www.fincen.gov/boi>.
