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## ASK KENNEDY

January 8, 2025

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### Member Questions

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**Question 1:** If a company is being forced to change their name due to naming rights of another company, after updating a security agreement and UCC filings, what other documents should be modified to secure the debt and reflect the new legal name? Such as the note and (modified) mortgage?

**Response:** I generally complete Modification Agreements for each of my loan documents, amending the name of the Borrower/Debtor. With each Agreement recognizing the new Borrower/Mortgagor/Debtor/Grantor name.

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**Question 2:** We have a demand feature on all our agriculture / commercial / real estate loans: “payable on demand, but if no demand is made then (lists the payments)”. What is the best practice you have seen and/or any recommendations in what direction to proceed (remove it or leave the demand feature on)?

We also have a Minimum Interest Charge listed as “I may have to pay a penalty, \$7.50 minimum interest charge”. I have heard that according to ND Statute, you are not able to have penalty for prepayment.

**Response:** I haven’t seen your loan documents, but I generally support a payable on demand feature on promissory notes, unless such a feature would be prohibited by law and that would only be the case if there is a federal regulatory prohibition. Furthermore, your loan documents are generally generated by a supplier like Jack Henry, Bankers Systems or Laser Pro and they come with a warranty of enforceability.

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**As far as your second question, North Dakota is particular about default rates of interest but not prepayment penalties. And, again, your loan document provider's warranties would cover prepayment penalty clauses.**

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**Question 3:** A question for you on ND statute as it relates to funeral trust accounts. We have had a funeral director in South Dakota inform us that North Dakota no longer allows for funeral trust accounts in banks; they indicated that investors are required to utilize life insurance policies as the savings/investment vehicle. Are you aware of any change in our state laws around this?

**Response:** The Director is wrong. North Dakota does still allow for the deposit of pre-need funeral accounts. See N.D.C.C. § 43-10.1-03.1, titled "Payments on pre-need funeral contracts to be deposited – Depository shall keep record of deposit – Personal property storage." This law was last addressed in the 2021 legislative session.

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### **2025 Legislative Session**

NDBA is currently working on (and in support of) the following bills for the 2025 Legislative Session:

#### ***The Uniform Commercial Real Estate Receivership Act***

Receivership procedures vary widely from state to state. North Dakota's receivership law has not changed much in the last 80 years, and broadly provides discretion to individual courts to prescribe the authority and powers of receivers case-by-case. The Uniform Commercial Real Estate Receivership Act (UCRERA) provides a consistent set of rules for receiverships involving commercial property, which in turn creates more predictability for lenders.

#### ***The Uniform Electronic Estate Planning Documents Act***

The Uniform Electronic Estate Planning Documents Act (UEEPDA) addresses the execution of estate planning documents, including wills, trusts, and powers of attorney, in electronic form. It allows for the online execution of wills while maintaining legal safeguards to ensure authenticity. It fills a gap in the law and complements the Uniform Electronic Transactions Act and Uniform Electronic Wills Act.

#### ***The Uniform Special Deposits Act***

The Uniform Special Deposits Act (USDA) as drafted by the Uniform Law Commission (ULC), addresses so-called "special deposits," which are deposits of money at a bank created for a particular purpose where the person entitled to the money is not determined until the occurrence of a specified event or contingency occurs.

This uniform law provides legal clarity as to the use of special deposits. Importantly, the act reduces legal uncertainties related to the attributes that make a deposit "special" and the rights of the parties interested in the special deposit, their respective creditors, and the bank holding the special deposit prior to the resolution of the contingency.

### ***Virtual Currency Kiosk Fraud Prevention***

The proposed bill aims to address the misuse of crypto-currency kiosks as tools for committing financial crimes by regulating the same with licensing and registration requirements for operators, required disclosures and fraud prevention software, daily transaction limits, and fee caps.

### ***Garnishment Fee Increase***

The bill proposes to increase the garnishment disclosure fee from \$25 to \$40. The proposal will amend sections 32-09.1-05 and 32-09.1-10 of the North Dakota Century Code in order to ensure that fees for ND OMB and other non-state government garnishees' fees are aligned. The last time the amount was updated was in 2005, when the fee was increased from \$10 to \$25. The increase from \$25 to \$40 is consistent with inflation since 2005.

It is anticipated that NDBA will begin providing 2025 Legislative Updates at <https://www.ndba.com/communications/LegislativeUpdates/> as it has done for past legislative sessions.

Additionally, we are working on a one-page document summarizing why North Dakota banks matter, a draft of which is attached hereto. We'd love to hear your thoughts!

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### **Challenges to CFPB Overdraft Final Rule**

On December 12, 2024, the Consumer Financial Protection Bureau (CFPB) issued a final rule requiring that banks with more than \$10 billion in assets either: (a) charge \$5; (b) offer overdraft as a courtesy by charging a fee that covers no more than costs or losses; or (c) continue to extend profit-generating overdraft loans if they comply with longstanding lending laws, including disclosing applicable interest rates. The rule was set to take effect on October 1, 2025. For more information, visit <https://www.consumerfinance.gov/about-us/newsroom/cfpb-closes-overdraft-loophole-to-save-americans-billions-in-fees/>.

Banks and banking trade groups, including the American Bankers Association, have sued the CFPB over the rule, claiming that the CFPB is exceeding its regulatory authority with the new rule.

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### **Rocket Homes Sued by CFPB for Illegal Kickback Scheme**

The CFPB has sued Rocket Homes for allegedly incentivizing real estate brokers and agents to steer homebuyers toward Rocket Mortgage, LLC for loans, violating federal laws. According to the CFPB, Rocket Homes gave incentives in exchange for brokers' and agents' mortgage lending and settlement service referrals, and required that said brokers and agents steer clients away from other competing loan products. Providing kickbacks for referrals and steering consumers both constitute violations of the Real Estate Settlement Procedures Act (RESPA). To read more, visit <https://www.consumerfinance.gov/about-us/newsroom/cfpb-files-lawsuit-to-stop-illegal-kickback-scheme-to-steer-borrowers-to-rocket-mortgage/>.

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### **FinCEN Fraud Alert**

On December 18, 2024, the Financial Crimes Enforcement Network (FinCEN) issued an alert (*available at <https://www.fincen.gov/news/news-releases/fincen-warns-fraud-schemes-abuse-its-name-insignia-and-authorities-financial>*) to raise awareness of fraud schemes abusing FinCEN's name, insignia, and authorities for financial gain, including scams that:

- **Exploit beneficial ownership information (BOI) reporting** – Scammers target companies to steal money or personal information (for example, requiring companies to pay a “filing fee” to have them submit BOI to FinCEN). A U.S. government agency will never ask for money to file BOI. *As a reminder, reporting companies are not currently required to file BOI with FinCEN. [See below update!](#)*
- **Misuse FinCEN's Money Services Business Registration tool** – Scammers fraudulently register as MSBs with FinCEN to appear legitimate. The mere fact of MSB registration does not confer any type of approval by FinCEN.
- **Impersonation or misrepresentation of affiliation with FinCEN and its employees** – Scammers contact people through spoofed phone calls, text messages, emails or U.S. Mail, claiming to be FinCEN and either demanding payments for supposed AML/CFT violations and outstanding debts, or claiming that victims are entitled to a financial grant but must first provide their bank account information and make a payment to FinCEN. FinCEN does not collect debts or offer grants.

Please review the alert for details on how to identify a scam and red flags to watch out for. Institutions are directed to report incidents to [Treasury's Office of Inspector General](#) and the [Federal Trade Commission](#).

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### **Update: Continued Injunction on Corporate Transparency Act**

The Corporate Transparency Act (CTA) required 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. On December 3, 2024, the U.S. District Court for the Eastern District of Texas issued an [order temporarily enjoining the U.S. Department of the Treasury and the Financial Crimes Enforcement Network \(FinCEN\) from enforcing the BOI reporting requirements of the CTA](#). On December 23, 2024, the injunction was lifted (though the deadline to file was extended from January 1, 2025, to January 13, 2025). Then, on December 26, 2024, the Fifth Circuit again reversed course and the preliminary injunction is now back in place.

Thus, as of the present, pending any further developments, reporting companies subject to the January deadline are **not** required to file initial BOI reports. Additionally, any company that has already reported is not required to update or correct any previously reported information. For more information, visit <https://fincen.gov/boi>.

Note: Banks have a continued responsibility to collect BOI from certain customers that seek to open accounts as part of Customer Due Diligence (CDD) requirements, which are separate from the CTA BOI requirements.

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### **Upcoming Events**

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

- **Bankers Day at the Capitol** | January 28, 2025 | [Details](#) | [Register Online](#)
- **Bank Management Conference** | February 12, 2025 | [Register Online](#)
- **Washington Summit** | April 7-9, 2025 | [Details](#)
- **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 8-10, 2025 | Rapid City, SD | Full Agenda and Registration Materials Coming in March

## Why Banks Matter

The considerable role of North Dakota banks within the communities they serve is undeniable. There are 67 state-chartered banks in North Dakota, with branches spread across 146 communities.<sup>1</sup> There are several factors that make North Dakota banks an integral part of the economic and social fabric of their local areas.

### ***Community Development***

Bank employees live and work in the small rural communities spread throughout our state; they meet with and provide services to customers every day and are naturally motivated to see that their own communities thrive. North Dakota banks often participate in local events and development projects, contributing to the overall well-being and growth of the community.

### ***Relationship-Based Banking***

North Dakota banks offer personalized services and build close relationships with their customers, which means they can offer more flexible and tailored financial solutions compared to larger institutions. They also administer Bank of North Dakota programs throughout the state.

### ***Local Economic Support***

North Dakota banks reinvest a significant portion of their deposits back into the local area through loans to small businesses, farms, and individuals. This helps stimulate local economic growth and job creation.

North Dakota banks further provide re-investment into their communities under the Community Reinvestment Act (CRA). The CRA reinforces lending practices that work to meet the credit and banking needs of the entire community in which the bank sits, including low and moderate-income areas.

In addition, North Dakota banks pay state taxes, which fund things that our state needs.

### ***Highly Regulated***

Banks are highly regulated institutions designed to ensure trust and stability. Through strict oversight by state and federal agencies, banks are required to follow rigorous standards for security, transparency, and risk management. This regulatory framework not only protects customers' funds but also ensures that banks operate responsibly, contributing to economic growth. Their trustworthiness allows individuals and businesses to safely save, borrow, and transact, fostering confidence in the financial system as a whole.

### ***Fraud Prevention***

Banks are essential in fraud prevention, serving as a first line of defense in safeguarding individuals' and businesses' financial assets. With advanced security systems, transaction monitoring, and fraud detection technologies, banks can identify and mitigate suspicious activities in real time. By educating customers about scams and collaborating with law enforcement to combat financial crimes, banks help protect the integrity of the financial system while fostering trust and confidence among their clients.

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<sup>1</sup> <https://www.nd.gov/dfi/about-dfi/banks/banks-search>