community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

YOU ARE ASKING . . . .

Q: Bob's Excavating, Inc. has filed a Chapter 11 bankruptcy. How do I title the "Debtor in possession" account? Can I just leave it as it was set up by Bob in 1998, or do I have to change the title on the account? (He doesn't want to change the account title.)

A: The account name on the bank's records must have the following: (1) the Debtor's name; (2) the case number; and (3) the words "Debtor in Possession" without abbreviations. Checks for the new accounts must be pre-numbered by the printer, and must be imprinted with the words "Debtor in Possession" and the bankruptcy case number. Handwritten, typewritten, or hand-stamped versions of "Debtor in Possession" are *not* acceptable.

The title of the debtor in possession account has to be changed, and Bob's lawyer should advise him that it's not Bob's decision. The U.S. Trustee has the authority under federal law to establish Operating Guidelines and Reporting Requirements for Chapter 11 debtors in possession. The debtor must immediately close pre-petition bank accounts and open new "Debtor in Possession" bank accounts. Accounts must be opened in a financial institution approved by the U.S. Trustee, and all receipts payable to the debtor in possession must be deposited into the debtor in possession account(s). Additionally, the debtor may NOT use any bank accounts other than its disclosed debtor in possession accounts without the prior written approval of the U.S. Trustee, so don't open a separate Bob's Excavating, Inc. account.

Q: Are we violating any regulations if we let the owner of a sole proprietor business account cash checks using the business account when the checks are made payable to him personally?

A: You are not violating any regulations; this is a bank decision and should be handled by the terms of your account agreements. For one thing, you should know whether the bank can collect from the individual or charge the business account if one of the cashed checks bounces - that can depend on the terms of your deposit agreement. There is an endorsement liability under the UCC, but access to the sole proprietor business account to cover that liability can depend on how your deposit agreement is worded.

Q: We send out a number of bank statements electronically. Do any regulations require us to oversee or monitor whether they are being read? If the customer is not opening the e-statements, are we obligated to go back to sending the customer a paper statement?

A: There are no regulations requiring you to monitor whether bank statements are being read when sent electronically, just as you are not required to oversee that paper statements sent through the mail are being read.

Q: Suppose we have 15 checks to charge back to John Doe. Do we need to send a charge back notice for each individual charged back check or can we do one notice for the total amount of the 15 checks?

A: If your bank sends the checks themselves or copies of the checks back with the charge back notice, you can use one notice for the total amount of the charged-back checks. *But*, if you are not sending back the checks or copies, the charge back notice needs to provide certain information about each check being charged back. The best and least risky way to do this is by using a separate notice for each check, and there doesn't seem to be any reason why the notices couldn't all be in the same envelope.

Q: Do we have the right to charge back a check that was deposited into a checking account if the check was payable to someone who was not the owner of the account? The check is payable to Elroy and Ella Smith, but they want to deposit it into Bob Smith's account. Elroy and Ella both endorse the check. Does Bob also have to endorse the check in order for the deposit to go into his account? What if the check is sent back NSF? Do we have the right to charge back Bob Smith's checking account if his endorsement/signature is not on it?

A: Bob does not have to endorse the check in order for it to be deposited into his account. By endorsing the check without including any other words or restrictions, Elroy and Ella have made a blank

endorsement. N.D.C.C. § 41-03-24 (U.C.C. § 3-205). There is nothing in the UCC to prohibit Elroy and Ella's deposit of the check into Bob's account.

You have the right under the UCC to charge the check back whether or not Bob Smith endorsed it, if you can document the fact that the check was indeed deposited into his account. It would be better to have Bob's endorsement because your actions are easier to explain to the customer – "You endorsed it, so you're liable, Bob." But even without Bob's endorsement, you have the charge back right under N.D.C.C. § 41-04-26 (U.C.C. § 4-214), which does not require an endorsement when doing a charge back.

Q: We have a customer who has lost his checkbook at least twice in the past year. During the "lost" periods, people wrote checks on his account. Luckily, he'd let us know and the checks weren't honored. He's also fallen for the scam where someone called him, pretended to be from the IRS, and demanded a $400 payment or go to jail; he gave out his account information in that case. We've told him he has to close his account and open a new one, but he won't do it. He's not elderly or suffering from any cognitive dysfunction, but he is careless and impulsive. What can we do?

A: You can close his account. Generally, banks may close deposit accounts for any reason (inactivity, low usage, etc.) and without notice. Federal banking laws and regulation do not address the closing of deposit accounts; instead, the matter is governed by the account agreement the parties entered into when the account was opened.

Because his account information is out there, it could be alleged that your bank knew or *should have known* that his account might be emptied by scammers (even though it's due to his lack of care). Reasonable or not, he may have an expectation that the bank is monitoring the account; however, you are not obligated to nor can you take the time and resources to police his account. Close it, send him a letter notifying him of the closure, and quote the account agreement language giving you the authority to do so.

Q: Can one owner of a joint checking account add a third person to the account on his own authority alone? A and B have a joint account, and B wants to add C.

A: The account agreement is with two people, A and B, so it will take A and B to modify the account agreement contract. If B wants to add C as a new owner without getting the agreement or approval of A, you may certainly suggest that B and C open a joint account with just the two of them. But you cannot add C without A's agreement.

Keep in mind that our answer is different if the request is to add an attorney-in-fact or agent for B. Unless the account agreement prohibits it, adding C as B's attorney-in-fact and an authorized signer under a Power of Attorney is likely not something you can refuse. In that case, we suggest that you immediately notify A to give him or her the opportunity to dissolve the joint account relationship if he or she objects to having C as attorney-in-fact added as an authorized signer.

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THE LEGISLATIVE SESSION RECENTLY ENDED. WATCH FOR OUR UPDATE AND ANALYSIS OF THE 2019 LEGISLATION IN THE NEXT ISSUE.

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