

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

OCTOBER 2022

Editor's Note: Fintechs Take Note

Victoria Prussen Spears

What Fintech Companies Need to Know About Key Federal and State Privacy Requirements

Daniel Forester, Melissa Baal Guidorizzi, Sulina Gabale and Ryan McKenney

The Gloves Come Off: CFTC Takes Swing at Alleged Bitcoin Fraud

Alexandra C. Scheibe and Ethan M. Heller

Cryptocurrency as Commodities? Bipartisan Senate Bill Proposes Comprehensive Legislation to Regulate Digital Assets

Phillip C. Bauknight and Benjamin M. Ebbink

Responsible Financial Innovation Act: Proposed Tax and Reporting for Digital Assets

Andrea S. Kramer, John T. Lutz, William R. Pomierski and Andrew M. Granek

Second Circuit Considers Whether Syndicated Term Loans Are Securities

Peter I. Altman, Douglas A. Rappaport, Daniel I. Fisher, Jaisohn Jungbin Im and Jesse Michael Brush

Adviser's ESG Disclosures End Up in SEC's Greenwashing Crosshairs

Daniel M. Hawke, Jane Norberg, Christian D. H. Schultz, Erik Walsh, Ellen Kaye Fleishhacker, Jonathan E. Green and Jonathan S. Martel

Department of Labor Sued in Crypto 401(k) Guidance Lawsuit

Phillip C. Bauknight and Ron M. Pierce

What the C-Suite and Board Should Know About the New CCO Certification Requirement From DOJ

Mark A. Rush and Nadia J. Brooks

First Settlement with Non-Bank Lender Exemplifies DOJ's Commitment to Its "Combatting Redlining Initiative"

Paul F. Hancock, Olivia Kelman and Lanette Suárez Martín

U.S. Supreme Court Decision Reconfirms Availability of Municipal Bond Financing for Religious Organizations

Jenna Magan, Stephen Spitz, and Marc Bauer

European Regulatory Overhaul for Crypto Firms on the Horizon

Christopher Hurn and Joshua Kaplan



LexisNexis

THE BANKING LAW JOURNAL

VOLUME 139

NUMBER 9

October 2022

| | |
|---|-----|
| Editor's Note: Fintechs Take Note Victoria Prussen Spears | 495 |
| What Fintech Companies Need to Know About Key Federal and State Privacy Requirements Daniel Forester, Melissa Baal Guidorizzi, Sulina Gabale and Ryan McKenney | 498 |
| The Gloves Come Off: CFTC Takes Swing at Alleged Bitcoin Fraud Alexandra C. Scheibe and Ethan M. Heller | 507 |
| Cryptocurrency as Commodities? Bipartisan Senate Bill Proposes Comprehensive Legislation to Regulate Digital Assets Phillip C. Bauknight and Benjamin M. Ebbink | 513 |
| Responsible Financial Innovation Act: Proposed Tax and Reporting for Digital Assets Andrea S. Kramer, John T. Lutz, William R. Pomierski and Andrew M. Granek | 516 |
| Second Circuit Considers Whether Syndicated Term Loans Are Securities Peter I. Altman, Douglas A. Rappaport, Daniel I. Fisher, Jaisohn Jungbin Im and Jesse Michael Brush | 520 |
| Adviser's ESG Disclosures End Up in SEC's Greenwashing Crosshairs Daniel M. Hawke, Jane Norberg, Christian D. H. Schultz, Erik Walsh, Ellen Kaye Fleishhacker, Jonathan E. Green and Jonathan S. Martel | 525 |
| Department of Labor Sued in Crypto 401(k) Guidance Lawsuit Phillip C. Bauknight and Ron M. Pierce | 529 |
| What the C-Suite and Board Should Know About the New CCO Certification Requirement From DOJ Mark A. Rush and Nadia J. Brooks | 532 |
| First Settlement with Non-Bank Lender Exemplifies DOJ's Commitment to Its "Combatting Redlining Initiative" Paul F. Hancock, Olivia Kelman and Lanette Suárez Martín | 536 |
| U.S. Supreme Court Decision Reconfirms Availability of Municipal Bond Financing for Religious Organizations Jenna Magan, Stephen Spitz, and Marc Bauer | 540 |
| European Regulatory Overhaul for Crypto Firms on the Horizon Christopher Hurn and Joshua Kaplan | 543 |

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at (800) 252-9257
Email: matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call
Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

BARKLEY CLARK

Partner, Stinson Leonard Street LLP

CARLETON GOSS

Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER

Partner, Rivkin Radler LLP

SATISH M. KINI

Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY

White & Case LLP

PAUL L. LEE

Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE

Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN

Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2022 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

First Settlement with Non-Bank Lender Exemplifies DOJ's Commitment to Its "Combatting Redlining Initiative"

*By Paul F. Hancock, Olivia Kelman and Lanette Suárez Martín**

The Department of Justice announced the federal government's first redlining lawsuit and settlement with a non-bank mortgage lender to resolve allegations that Trident Mortgage Company avoided providing mortgage credit services to minority communities in the Philadelphia, Pennsylvania area. The authors of this article discuss the lawsuit and settlement.

The U.S. Department of Justice ("DOJ") is following through on promises to take aggressive action against what it describes as "modern-day redlining." Together with the Consumer Financial Protection Bureau ("CFPB"), the DOJ announced the federal government's first redlining lawsuit and settlement with a non-bank mortgage lender to resolve allegations that Trident Mortgage Company ("Trident") avoided providing mortgage credit services to minority communities in the Philadelphia, Pennsylvania area. The attorneys general of Pennsylvania, New Jersey, and Delaware also participated in the investigation and obtained settlements.

All mortgage industry participants should take heed: Redlining remains a top enforcement priority, and assessing your institution's redlining risk profile should be a top compliance priority. Open questions linger, but carefully scrutinizing the Trident complaint and consent order is a critical first step toward understanding the DOJ's methodology for building a redlining case against a non-bank lender.

GEOGRAPHIC SCOPE

The geographic area in which a lender's performance will be measured is a threshold issue for a redlining review, which compares an institution's provision of credit in racially different areas. Historically, redlining defendants in

* Paul F. Hancock and Olivia Kelman are partners at K&L Gates LLP, and Lanette Suárez Martín is an associate at the firm, handling government enforcement, litigation, and compliance matters, with a concentration on fair lending and fair servicing. They regularly counsel clients on issues arising under the federal Fair Housing Act, Equal Credit Opportunity Act, Community Reinvestment Act, Home Mortgage Disclosure Act, and consumer protection laws prohibiting deceptive, unfair and abusive practices. Olivia serves as practice group coordinator for the firm's financial institutions and services litigation group. Resident in the firm's Miami office, the authors may be contacted at paul.hancock@klgates.com, olivia.kelman@klgates.com and lanette.martin@klgates.com, respectively.

government enforcement actions were depository institutions subject to the Community Reinvestment Act (“CRA”), which requires banks to delineate an “assessment area” and then to help meet the credit needs of all segments of the communities in that self-defined geography. However, because non-banks are not covered by the CRA, they are not required to define “assessment areas.”

The Trident complaint provides some guidance to non-banks regarding the views of the DOJ and CFPB on this question, indicating that it evaluated the lender’s “self-defined lending footprint” or “market area,” which allegedly consisted of “the entire Philadelphia MSA.” Trident allegedly “received 80% of its mortgage applications” in the Philadelphia metropolitan statistical area (“MSA”), signaling that regulators may also consider a non-bank’s overall lending volume in scoping the geography. In our experience, lenders frequently have policies, strategic plans, or other formal or informal documentation that describe a “footprint” or “market area,” and compliance teams should carefully review the accuracy of those statements.

MINORITY COMMUNITIES

With respect to Trident, the DOJ and CFPB defined the redlined “minority” communities as those where 50 percent or more of the population “identified as Black, Hispanic, Asian, Native American, Native Hawaiian, or Pacific Islander in the U.S. Census.” The DOJ’s other redlining settlements in the last year defined “minority communities” more narrowly, focusing on the provision of credit to majority-Black and Hispanic areas. The definition of “minority communities” used in the Trident lawsuit may reflect the melting pot nature of the Philadelphia MSA, which the complaint describes as 20 percent African American, 10 percent Hispanic, six percent Asian, and 61 percent non-Hispanic white. To accurately evaluate redlining risk, institutions must be aware of the unique demographic makeup in the areas in which they do business and tailor their analyses appropriately.

PEER LENDERS

Redlining evaluations typically involve comparing a lender’s relative performance in serving minority communities to the performance of other lenders—but which other lenders are appropriate for comparison? Identifying an institution’s “peers” can be one of the most challenging aspects of a redlining analysis. In a recent redlining settlement against a traditional bank, the DOJ defined “peer lenders” as “similarly-situated financial institutions that received between 50 percent and 200 percent of the Bank’s annual volume of home mortgage loan applications.” The Trident complaint, in contrast, does not

define the group of lenders the DOJ identified as the non-bank's "peers," though it might be possible to reverse-engineer the peer group based on the lending statistics that are alleged.

Importantly, the complaint alleges that Trident received reports from third-party vendors showing that its volume in minority neighborhoods was low relative to the performance of its peers. To the extent an institution outsources fair-lending analyses to third-party vendors or conducts analyses in-house, compliance officials should review the peer groups used in those reviews, as they may be difficult to later dispute. Also, if the analyses show room for improvement, it is essential to properly elevate the issue to management and develop an action plan for minority market penetration.

PHYSICAL LOCATIONS AND LOAN OFFICERS

Trident's business model involved renting space in the offices of an affiliated real estate company. The DOJ and CFPB alleged that Trident had a physical presence in 53 offices, but 51 were located in white areas and only two were located in minority communities. Additionally, Trident's loan officers were assigned to work in offices located in white areas, 64 of its 68 loan officers were white, and Trident allegedly generated business and hired new loan officers based on recommendations from its existing mostly white loan officers.

In evaluating an institution's level of redlining risk, the Trident complaint confirms the importance of considering the physical location of offices and loan officers, as well as the racial makeup of an institution's sales force and its ability to generate business in all segments of the communities in which the business operates. Of course, the trend of online mortgage lending continues to be observed industry-wide, and the significance of the physical-presence issue will depend on the institution's business model.

MARKETING TO MINORITY POPULATIONS

The DOJ and CFPB alleged that models in Trident's marketing materials appeared to be white and that a third-party vendor engaged by Trident developed marketing materials that focused only on majority-white areas. Lenders developing marketing campaigns should take care to ensure that the materials do not indicate an impermissible preference and should carefully oversee any third-party marketing vendors to confirm that campaigns are appropriately designed to reach all segments of the community, including minority and nonminority areas.

EGREGIOUS EMAILS

The facts alleged by the DOJ and CFPB—which Trident denied in resolving the lawsuit—include emails that were allegedly received and distributed by Trident employees containing language that the government viewed as racial slurs and evidence of overt discrimination in mortgage lending. Compliance officials should be aware that investigations of illegal discrimination may now be more likely to involve reviews of electronically stored email communications, which can be costly and burdensome. Regular training of employees on fair-lending compliance and on company policies regarding email usage is critical.

The Trident lawsuit (and settlement) is the seminal redlining enforcement action against a non-bank lender, representing a seismic shift in the historical approach to redlining matters. Banks and non-banks alike should follow a proactive approach to evaluating current (and historical) fair-lending risks and ensuring adequate internal fair-lending controls to mitigate any potential redlining claims.