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FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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At Gardner, Willis, Sweat & Handelman, we offer a wide range of services including Banking; Bankruptcy; Business Law; Construction Law; Employment Law; Estate and Tax Planning; General Litigation and Appeals; Governmental Law; Real Estate; Trucking Litigation, Workers' Compensation, and Social Security. Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in these and other areas. For a consultation with Sherman, please call at 229-883-2441, or e-mail him at: sherman.willis@gwsh-law.com

All inquiries are confidential.

Ability To Repay/Qualified Mortgage (ATR/QM) Rule Became Effective January 10, 2014

Effective January 10, 2014, lenders must assess the borrower's "ability-to-repay" for virtually all closed-end residential loans (QMs), including purchase mortgages, refinance mortgages, home equity loans, and manufactured housing loans. These ATR/QM rules do not apply to open-end credit plans (Home Equity Line Of Credit [HELOC]), time-share plans, reverse mortgages, temporary or bridge loans with terms of 12 months or less, and construction phase of 12 month or less of a construction-to-permanent loan. "Ability-to-Repay" standards require lenders to consider the borrower's mortgage-related obligations, income or assets, employment status, simultaneous loans, debt, alimony, and child support obligations, payments required for taxes and insurance related to the property, residual income, and credit history.

Product Feature Requirements:

The following are mandatory product feature requirements for **all** QMs:

(a) Points and fees must be less than or equal to 3% of the loan amount for loans greater than $100K; $3,000 for a loan greater than or equal to $60K but less than $100K; 5% of the total loan amount for a loan greater than or equal to $20K but less than $60K; $1,000 for a loan greater than or equal to $12.5K but less than $20K; and, 8% of the total loan amount for a loan less than $12.5K. These amounts may be adjusted annually for inflation by Regulation Z;

(b) The QM must not have negative amortization, must not be interest-only, and must not have a balloon payment. However, balloon payment loans originated until January 10, 2016 that meet the other product features are QMs if originated and held in portfolio by "small creditors," which are defined below. These balloon payment QMs must not have negative amortization or interest-only features and must comply with the points and fees limits for QMs. The balloon payment loan must have a fixed interest rate, amortize over 30 years or less, have a term of 5 years or longer, and not be sold by the creditor; and,

(c) The maximum loan term is 30 years or less.

A loan that meets the foregoing **product feature requirements** can be a QM under any of the following **three main categories**:

(1) The "general definition" category of QMs is any loan that meets the product features requirement with a debt-to-income ratio of 43% or less is a QM.

(2) The "GSE eligible provision" category of QMs is any loan that meets the product feature requirements and is eligible for purchase, guarantee, or insurance by GSE,

FHA, VA, or USDA, regardless of the debt-to-income ratio. This QM category applies for GSE loans as long as the GSEs are in FHFA conservatorship and for federal agency loans until an agency issues its own QM rules, or January10, 2021, whichever occurs first.

(3) The "small creditor category" of QMs provides that if a bank has less than $2B in assets and originates 500 or fewer first mortgages per year, loans made and held in the bank's portfolio are QMs as long as the bank has considered and verified a borrower's debt-to-income ratio (though no specific debt-to-income limit applies).

The ATR/QM rule also implements other provisions of the Dodd-Frank Act that limit prepayment penalties and require that lenders retain records for 3 years after consummation of the mortgage showing compliance with ATR and other provisions.

Georgia Department of Banking and Finance Declaratory Order Should End Dispute Over Whether Overdraft Fees Constitute Interest

In our last Financial Institution Update dated May 17, 2013, we discussed the case of Synovus Bank v. Griner, 321 Ga. App. 359 (2013), where the Georgia Court of Appeals held that overdraft fees could be considered "interest" under Georgia's state usury laws. On October 7, 2013, the Supreme Court of Georgia vacated the Court of Appeals judgment and directed the Court of Appeals to remand (send the case back) to the trial court for further consideration in light of the effect, if any, of the July 3, 2013, Declaratory Order issued by the Georgia Department of Banking and Finance (DBF), which declares that, to provide parity with national banks, overdraft fees imposed by state-chartered banks in connection with deposit accounts are not subject to Georgia's usury laws. A similar Declaratory Order was also issued by DBF with regard to credit unions. While it unclear what has happened at the trial court level, we are confident that the argument that overdraft fees cause violation of usury laws is now moot.

Does "D'Oench, Duhme Doctrine" Extend to Assignees of FDIC?

In Hewitt v. Community & Southern Bank, which was decided by the Court of Appeals on November 14, 2013, a borrower filed a lawsuit against a bank, alleging breach of contract and other claims based on a loan agreement. The bank counterclaimed to enforce a promissory note. The trial court granted summary judgment to the bank as to borrower's claims and as to bank's counterclaim. The borrower appealed and the Court of Appeals affirmed the trial court.

In September 2006, West Georgia National Bank extended a line of credit to Hewitt in the maximum amount of $6 million for a period of 12 months. First National Bank of Georgia became the successor in interest to West Georgia National Bank and extended and renewed the line of credit several times. The last maturity date of the line of credit was October 29, 2009. On January 29, 2010, First National Bank of Georgia was closed by FDIC, as receiver. FDIC subsequently sold, transferred and assigned certain First National Bank of Georgia's assets, including the loan to Hewitt, to Community & Southern Bank. Community & Southern Bank sent a demand letter to Hewitt.

Hewitt then initiated the lawsuit arguing that the initial 2006 loan commitment was supplemented by an oral agreement to give the loan a five year term. The borrower argued that the D'Oench, Duhme doctrine was not applicable because it applied only to the FDIC and not subsequent assignees. The court held that Hewitt's claim of terms different from those in the written agreement was barred by the federal D'Oench, Duhme doctrine. The D'Oench, Duhme doctrine arises from a United States Supreme Court decision and protects bank depositors and federal guarantors of banks by prohibiting reliance on any agreements which are not of record and which would have the effect of misleading creditors or the public authority. Under the doctrine, oral agreements between debtors and failed banks will not be enforced against banking authorities. Moreover, its protection extends not only to the federal guarantor, but to assignees also, such as Community & Southern Bank. Therefore, the borrower's attempt to argue that an oral agreement with prior banking officials modified the written agreements failed. If purchasing assets of failed banks, keep this rule in mind if faced with similar arguments from borrowers.

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This newsletter was prepared by Deena Plaire-Haas. Deena's practice includes representation of financial institutions and businesses in bankruptcy court, drafting contracts and leases, formation of new businesses, general business litigation, and closing complex commercial transactions. She understands the importance of responsiveness, efficiency, anticipation of clients' needs and creative solutions. Contact Deena at (229) 883-2441 or e-mail her at deena.plaire-haas@gwsh-law.com.