

TO: Members of the Mortgage Bankers Association

FROM: Kurt Pfothenauer, Senior Vice President, Government Affairs and Public Policy

RE: U.S. Department of Labor Opinion Letter on Exempt Status
of Mortgage Loan Officers issued to MBA

I am pleased to attach an extremely favorable opinion letter from the Administrator of the Wage and Hour Division, U.S. Department of Labor, which we received today. This is the culmination of hard work by MBA and representatives from many member companies, and the opinion is great news for all of us.

Background

Most mortgage banking companies have classified their mortgage loan officers as exempt from the overtime and minimum wage requirements of the federal Fair Labor Standards Act (FLSA). One significant part of the legal basis for this position is found in the U.S. Department of Labor's regulations on the exempt status of certain "white collar" employees. The mortgage banking industry has been targeted by lawsuits alleging that mortgage loan officers must be paid overtime (and at least the minimum wage). As a result, when the Department of Labor undertook revisions of the "white collar" exempt regulations in 2003-2004, MBA submitted detailed comments to the Department on these issues. The revised regulations, which were issued in April 2004, contained very favorable provisions to address our concerns.

Since the revised regulations addressed the status of exempt employees in the financial services industry generally, we decided to ask the head of DOL's Wage and Hour Division for a formal opinion on how these regulations apply to mortgage loan officers. Attached is a copy of our opinion letter request. In addition, we strongly supported DOL's issuance of a favorable opinion earlier this year on use of the "outside sales" exemption.

Summary of the New Opinion

A copy of the new opinion is attached. In brief, DOL has responded positively to each of our three requests, which pertain to the applicability of the "administrative" exemption to mortgage loan officers:

- The opinion agrees that the financial services industry provision in the 2004 regulations applies to mortgage loan officers whose duties are described in MBA's request letter, even if the mortgage loan officers engage in some sales activity.
- The opinion agrees that mortgage loan officers whose duties are described in MBA's request letter satisfy the duties tests for the administrative exemption in the 2004 regulations. The opinion also explains how mortgage loan officers' use of certain software programs or tools is permitted under the exempt status regulations.

- Finally, the opinion agrees that mortgage loan officers who perform administratively exempt duties under the 2004 regulations also meet the administrative duties tests in the prior regulations, which applied to periods prior to August 2004.

Comment

We are very pleased with this opinion, and we believe that it will be very useful to MBA members. We recommend that you consult with your counsel and human resources professionals as to how this opinion applies to your company. While MBA cannot provide legal advice to member companies, we suggest that you and your advisors consider the following matters.

First, and as your counsel or human resources professionals should confirm, this opinion can serve as the basis for legal defenses against overtime and minimum wage claims under the FLSA. In addition, the opinion may serve as the basis for legal defenses against overtime and minimum wage claims under state laws that adopt, mirror, or apply the FLSA regulations.

Second, the opinion makes it clear that it is based solely on the facts set forth in MBA's request letter. We engaged in extensive consultations in the industry before submitting the request letter. Nevertheless, we recommend that you and your advisors compare the facts in the request letter with the employment particulars in your own companies. In addition, we understand that some companies have been considering changes in the duties and compensation of their mortgage loan officers pending receipt of this opinion. We also note that the opinion request, and the opinion, assume that mortgage loan officers are paid on a "salary basis" as defined in the regulations. Thus, we recommend that you review your compensation structures for mortgage loan officers in addition to the duties of mortgage loan officers.

Finally, you should note that the attached opinion letter is exactly as received from DOL. DOL also releases these opinion letters publicly. But, when they do so, they usually remove the requester's name and identifying information. When the opinion letter is released, it will be posted at <http://www.dol.gov/esa/whd/opinion/flsa.htm>. While we wanted to make sure that you were notified promptly, we do not expect to encourage broad press attention to the opinion until DOL releases it publicly. We hope that member companies and their advisors will take the same approach.

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This opinion is the result of significant work by MBA and our member companies. I would like to express our appreciation for the support and involvement of MBA's Legal Issues Committee throughout this process. I would also like to thank our counsel Bob Davis, from Mayer, Brown, Rowe & Maw LLP, for his good advice and effective advocacy during this process. Finally, I would like to thank our own Ken Markison, MBA Senior Director-Regulatory Counsel, who has taken the lead on this project for MBA. If you have questions or would like additional information, please contact directly Ken directly at 202 557 2930 or kmarkison@mortgagebankers.org