

Mortgage Banking Update

PATTON BOGGS LLP | January 11, 2010

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Loan Underwriter for Chase Not Exempt under FLSA

VA Issues Guidance on Disclosing Origination Fees on New GFE

DID YOU KNOW?

If you have any questions or if you require additional information, please

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LOAN UNDERWRITER FOR CHASE NOT EXEMPT UNDER FLSA

A loan underwriter at J.P. Morgan Chase & Co. (Chase) does not qualify for the administrative exemption under the federal Fair Labor Standards Act (FLSA), and thus is eligible for overtime pay, according to a recent decision of the U.S. Court of Appeals for the Second Circuit. *Whalen v. J.P. Morgan Chase & Co.*, No. 08-4092 (2d Cir. November 20, 2009).

Chase treated loan underwriters as covered by the administrative exemption from the FLSA's overtime requirements. To qualify for that exemption, an employee must: 1) "perform work 'directly related to management policies or general business operations' and 2) 'customarily and regularly exercises discretion and independent judgment.'" 29 C.F.R. § 541.2(a). The Second Circuit described underwriter Andrew Whalen's duties as follows:

Whalen's primary duty was to sell loan products under the detailed direction of [Chase's internal document called] the Credit Guide...Underwriters were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision. Their work is not related either to setting 'management policies' nor [sic] to 'general business operations' such as human relations or advertising, 29 C.F.R. § 541.2, but rather concerns the 'production' of loans – the fundamental service provided by the bank.

The Second Circuit reversed the district court's grant of summary judgment in favor of Chase, holding that Whalen was not a bona fide administrator because his work was unrelated to management policies or general business operations. Whalen's work was production (i.e., non-exempt) as opposed to administrative (i.e., exempt). The court emphasized that production work need not lead to the creation of a tangible item. An employee producing an intangible, such as a loan, also may be engaged in non-exempt production work. The key is the "important distinction" between employees who produce the good or service that is the primary output of a business (i.e., non-exempt) and employees who perform general administrative work applicable to any business (i.e., exempt). Since Whalen's job failed to satisfy the first prong of the administrative exemption test, the court did not address whether it satisfied the second prong of customarily and regularly exercising discretion and independent judgment.

Mortgage bankers take heed - every classification by employers of employees under the FLSA is fact-specific. Job title aside, the question always will boil down to the actual responsibilities of the loan underwriter. Underwriters like Whalen, whose work involves the production of loans as opposed to management policies and general business operations, are

LOOKING AHEAD:

Webinar: Preparing for Changes to FHA Appraisals

January 20, 2010

Topic: FHA's impending changes to appraisal order guidelines

Time: 1:00 – 2:00 p.m. EST

Patton Boggs participant:
Michael Waldron

Webinar: 2010 NMLS User Conference & Training

February 11, 2010

Topic: Emerging Issues Pertaining to the NMLS

Time: 9:00 – 10:00 a.m. PST

Patton Boggs participant:
Haydn Richards

likely to be regarded as non-exempt employees. Combinations of those responsibilities will make classification more challenging.

If you would like to discuss how *Whalen* might affect your business, feel free to contact Doug Mishkin (dmishkin@pattonboggs.com) at 202-457-6020 or Lindsey Weber (lweber@pattonboggs.com) at 202-457-5686. Doug is co-chair of the employment practice at Patton Boggs LLP in Washington, D.C., and chair of Legalink, an international network of law firms. Lindsey is an associate also in the firm's Washington, D.C. office.

VA ISSUES GUIDANCE ON DISCLOSING ORIGATION FEES ON NEW GFE

In response to the new form of Good Faith Estimate (GFE) required under the revised Real Estate Settlement Procedures Act rule, the Department of Veterans Affairs (VA) has issued a circular with guidance on how VA origination fees should be disclosed on the GFE. The new GFE consolidates the fees that all originators on the transaction will receive, other than those for the rate chosen, into a single fee called "Our Origination Charge." VA limits the origination fee that a veteran borrower may pay to a one percent origination charge and certain limited allowable fees. The circular, issued on January 7, 2010, explains how to disclose the fees on the GFE where the traditional "origination fee" plus the allowable fees taken together exceed one percent of the loan amount.

VA offers two options for disclosing the fees on the GFE. One option is for lenders to itemize the charges in the empty 800 lines of the HUD-1 Settlement Statement, to the left of the column. In the event that there is insufficient space on the HUD-1 to itemize all of the fees, the lender must provide a separate origination statement, to be signed and dated by the borrower, indicating the purpose of the charge and the amount. If the lender chooses to attach an origination statement, the HUD-1 should not also separately itemize the fees. While VA encourages lenders to comply with the new procedures as soon as possible, it is not requiring that the procedures be followed immediately. All VA loan applications taken on or after May 1, 2010 must comply with this guidance.

Additionally, effective immediately, lenders are no longer required to issue an Interest Rate and Discount Disclosure Statement for VA-guaranteed loans where the new GFE and HUD-1 have been used. In all cases, a copy of the GFE and HUD-1, as well as any copies of invoices for all third party services, must be maintained as part of the origination package. These documents must be submitted to VA if the loan file is requested for review by VA.

DID YOU KNOW?

- Pursuant to the SAFE Act, California Real Estate Broker Licensees making, arranging or servicing loans secured by residential or commercial real property must complete an online Mortgage Loan Activity Notification at the Department of Real Estate's website by January 31, 2010. The penalty for failing to submit the required notification is \$50 per day for the first 30 days the report is not filed and \$100 per day for every day thereafter, up to \$10,000. The Department of Real Estate will also require future business activity reporting.
- Effective January 1, 2010, California Real Estate Broker Licensees must provide both the Mortgage Loan Disclosure Statement (RE 882) and a GFE when originating federally-related mortgage loans. The Department of Real Estate has announced that it is working on a revised combined Mortgage Loan Disclosure Statement/Good Faith Estimate that will comply with California and federal law.
- Effective December 23, 2009, the New York Banking Department (the "Department") amended several regulations applicable to Mortgage Bankers and Mortgage Brokers. Among the amendments, the Department redefined the term "branch" to eliminate the distinction between full service branches and loan solicitation branches. The amended regulations further state that any employee, independent contractor or consultant who does not work from a licensed branch must be assigned to a licensed branch for managerial and regulatory oversight. The regulations also now define what constitutes an impermissible "net branch." Finally, the Department has specified additional language that must be included in application disclosures..

This information is not intended to constitute, and is not a substitute for, legal or other advice. You should consult appropriate counsel or other advisers, taking into account your relevant circumstances and issues. While not intended, this update may in part be construed as an advertisement under developing laws and rules.

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