

Mortgage Banking Update

PATTON BOGGS LLP | January 25, 2010

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DID YOU KNOW?

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WELLS FARGO HOME MORTGAGE CONSULTANTS' ATTEMPT TO RE-CERTIFY CLASS FOR OVERTIME CLAIMS IS DENIED: TAKE HEART AND TAKE NOTE

Home mortgage consultants (HMCs) of Wells Fargo Home Mortgage, whose initial motion for class certification of their claims under California law for overtime pay was granted by the trial court but later reversed on appeal, have failed in their renewed motion for class certification because "a substantial quantity of individual inquiries will be necessary" to address Wells Fargo's defenses that these consultants are exempt from such overtime requirements. *In re: Wells Fargo Home Mortgage Overtime Pay Litigation*, No. C 06-01770 MHP, U.S. District Court for the Northern District of California, filed 1/3/10. Although ordinarily the technicalities of class certification are of interest only to lawyers, this ruling hinges largely on a principle that is essential to Fair Labor Standards Act (FLSA) compliance: whether a particular employee qualifies for an exemption will depend upon the particular facts of that employee's job responsibilities and how s/he fulfills them.

The district court found that HMCs primarily market and sell residential mortgages. They receive a commission based on sales, with a minimum non-recoverable draw against commissions. According to Wells Fargo, HMCs are entrepreneur-type employees with great autonomy in shaping their own business practices. Perhaps as a result of this autonomy, Wells Fargo keeps no reliable time records of the hours worked by HMCs. The HMCs vary by specialization with "prime HMCs" working with borrowers qualifying for the best interest rates, "sub-prime HMCs" assisting borrowers with impaired credit and "reverse mortgage HMCs" focusing on senior citizens. "Renovation HMCs" specialize in home improvement loans, while "builder HMCs" focus on housing developments and "emerging market HMCs" develop relationships with historically underserved communities." Wells Fargo trains but does not supervise the HMCs.

The district court initially granted class certification, explaining that:

Wells Fargo's uniform policies regarding HMCs [that all of them are exempt] weigh heavily in favor of class certification. As numerous courts have recognized, it is manifestly disingenuous for a company to treat a class of employees as a homogenous group for the purposes of internal policies and compensation, and then assert that the same group is too diverse for class treatment in overtime litigation. This is particularly true in a situation such as this, where the difficulty of proving hours worked and compensation received is exacerbated by defendant's complete failure to maintain pertinent records.

LOOKING AHEAD:

RESPA Ready 2010 - What You Need to Know to Comply

January 28, 2010 New Orleans, LA 8:30 - 4:30 p.m., CST
February 4, 2010 Washington, DC 8:30 - 4:30 p.m., EST

Topic: New RESPA Requirements

Patton Boggs Participant:
Richard Andreano

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

New RESPA Regulations for Mortgage Finance: Are You Ready?

February 23, 2010
Topic: New RESPA Requirements
Time: 1:00 – 2:30 p.m. EST

Patton Boggs participant:
Richard Andreano
50% off discount by using this link: www.sp-03.com/r.php?products/tlu3ba?trk=ZDFCT

Relying on these uniform policies, the district court found that common factual and legal issues predominated among class members, warranting class certification pursuant to Federal Rule of Civil Procedure 23(b)(3).

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that the district court had abused its discretion by relying on Wells Fargo's uniform internal exemption policy "to the near exclusion of other factors relevant to the predominance inquiry." *In re Wells Fargo*, 571 F.3d at 59. On remand, the district court, applying Wells Fargo and its companion case *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), denied recertification of the class. The court explained that Wells Fargo's uniform exemption policy was only one factor in determining whether common issues of law and fact predominate among putative class members. In addition, if the employer's exemption defense requires a fact-intensive inquiry into the qualifications of individual employees as class members, the complexity of that inquiry is relevant to the predominance analysis. Finally, where an exemption defense requires a finding of how individual employees spend their time at work, predominance is unlikely unless the plaintiff proposes some method of common proof.

The district court specifically found that plaintiff had not produced "some form of common proof that would absolve this court from inquiring into how each HMC spent their working day."

She has not produced (or even alleged the existence of) any policy that requires HMCs to spend a specified amount of time in or out of the office. At the very least, to determine if each HMC qualified for the outside sales exemption the court would need to conduct "inquiries into how much time each individual [HMC] spent in or out of the office and how the [HMC] performed his or her job; all of this where the [HMC] was granted almost unfettered autonomy to do his or her job." [citation omitted]. Those inquiries would inevitably consume the majority of a trial, and overwhelm the adjudication of common issues.

The fact that each HMC filled out the Uniform Residential Loan Application did not supply the requisite degree of commonality of issues.

Employers of mortgage bankers, and employers generally, can take heart from this ruling -- but they should also take note. The very requirement that stacks the deck against class certification -- proof, individual by individual, of "how much time each individual [loan officer] spent in or out of the office and how the [loan officer] performed his or her job" [citation omitted] -- is the burden an employer bears in proving that each individual is exempt. Mere job titles and administrative groupings of employees do not suffice.

[Douglas B. Mishkin](#) is the co-chair of the employment practice in the Washington, D.C. office of Patton Boggs, and is the Chair of Legalink, an international network of law firms. You can reach him at <mailto:dmishkin@pattonboggs.com> or 202-457-6020.

NEWS FROM THE HILL

We are pleased to announce the creation of a new column - News from The Hill. News from The Hill will contain updates and insight on legislative developments of interest to the financial services industry will be provided by the [Patton Boggs' Financial Services Group](#).

Outlook on 2010 Financial Services Policy Issues

At the outset of 2010, many questions concerning what Congress will accomplish in the financial services policy arena remain unanswered. [Patton Boggs' Financial Services Practice Group](#) has prepared its Outlook on 2010 Financial Services Policy Issues, which provides views on how the 2010 mid-term elections will impact the financial policy debate, as well as a summary of where things stand on four key issues to be addressed in the year ahead: financial regulatory reform, foreclosure mitigation, housing/government-sponsored enterprise reform and tax issues impacting financial services and housing. A copy of the Outlook is available [here](#).

House Committee Considers Executive Compensation; Obama Bank Tax Proposal

On Friday, January 21st, the House Financial Services Committee (HFSC) held a hearing entitled "Compensation in the Financial Industry." The participants included Harvard Law School Professor Lucian Bebchuk, *Corporate Library* Editor Nell Minow and Columbia Business School Professor Joseph Stiglitz.

President Obama's proposed bank tax was one of the primary topics discussed during the hearing. The President has suggested that his budget will include a penalty aimed at the banking industry that could recoup as much as \$117 billion of the \$700 billion in federal bailout money received by banks. Such funds would be generated by imposing a temporary 0.15 percent tax on liabilities deemed excessive and held by financial firms benefiting from the Troubled Asset Relief Program (TARP).

The witnesses agreed that it could be an effective tool to discourage excessive risk-taking by financial firms. Professor Bebchuk noted that "imposing levies on liabilities is a useful approach."

There was a consensus among the panelists that executive pay at finance firms encouraged the excessive risk-taking linked to the financial crisis because compensation packages rewarded short-term profits, as opposed to steady growth over a longer time period. "The intent of the president's proposal is to change incentive," remarked Professor Stiglitz.

In evaluating the President's proposal, the experts predicted that the proposed tax would cause investment strategies to change from high-risk ventures to more conservative instruments, such as direct lending as opposed to derivative products.

Representative Brad Sherman (D-CA) voiced his support for making the results of "say on pay" votes, where shareholders have the opportunity to express approval or disapproval for a public company's executive compensation, binding on boards of directors. Such votes currently do not have any binding impact on executive compensation decisions. Chairman Barney Frank (D-MA) indicated that he believes the non-binding votes are sufficient and provide a valuable forum for shareholders to express their views on compensation.

Republican members expressed outrage over the large bonuses paid to executives at government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, and expressed support for the Republican proposal to change the compensation structure at these agencies to mirror those of the federal government. Representative Brad Garrett (R-NJ) urged that the HFSC consider and pass stronger GSE reform legislation, remarking that it should be a top priority for the Committee.

Chairman Frank alluded to a February HFSC hearing to discuss public sector compensation.

Finally, there was bipartisan agreement among members that companies receiving taxpayer assistance should receive the most scrutiny for executive compensation decisions. Representative Gwen Moore (D-WI) captured the Committee's sentiment when she advocated for greater scrutiny of TARP recipients if future assistance is ever provided to support these financial institutions.

For more details or if you have any questions, please contact any member of the [Patton Boggs Financial Services Group](#).

HUD MOVES FORWARD WITH FHA PROGRAM CHANGES

In testimony before Congress in December 2009 Department of Housing and Urban Development (HUD) Secretary Shaun Donovan [announced plans](#) for changes to strengthen the Federal Housing Administration (FHA) loan program. The proposed changes were addressed in the [December 7, 2009 edition](#) of Mortgage Banking Update.

Last week HUD issued [two Mortgagee Letters](#) (2010-02 and 2010-03) to implement certain changes, and issued an [announcement](#) advising of additional changes to be implemented.

Upfront Premium Increase. In Mortgagee Letter 2010-02, HUD announced an increase in FHA upfront mortgage insurance premiums effective for

loans with case numbers assigned on or after April 25, 2010. The upfront premium for many FHA loans will increase from the current 1.75 percent to 2.25 percent. HUD advised that annual premiums are not changing at this time.

The upfront premiums for various loans will be as follows:

Purchase Money Mortgages and Full-Credit Qualifying Refinances
2.25 percent

Streamline Refinances (all types)
2.25 percent

HOPE for Homeowners (Delinquent Mortgagors)
2.00 percent

Home Equity Conversion Mortgages
2.00 percent

Minimum Credit Score. HUD announced that it will publish a notice in the *Federal Register* to require that borrowers have a minimum FICO score of 580 to qualify for an FHA loan with only a 3.5 percent down payment. Borrowers with FICO scores lower than 580 will be required to have a ten percent down payment. HUD also announced that it will propose reducing the maximum seller contribution from six to three percent of the sales price. HUD plans to publish the proposed changes in the *Federal Register* in February and, after a notice and comment period, implement the proposed changes during the early summer. (It is interesting that HUD announced its plans to implement the changes before it has published and received comments on the changes.)

Lender Performance Rankings. HUD also announced that as of February 1 lender performance rankings will be publicly reported along with the currently available Neighborhood Watch data. The information will be more user-friendly, and the intent of the change is to hold lenders more accountable.

Indemnification. HUD stated plans to implement statutory authority to enforce indemnification provisions for lenders using delegated insuring process. The specifications of the change will be posted in March and after a notice and comment period would go into effect during the early summer. (Again, it is interesting that HUD announced its plans to implement the changes before it has published and received comments on the changes.)

HUD also stated in the announcement that it will seek authority from Congress to expand the ability to require indemnification from FHA mortgagees, and to permit HUD to terminate the origination and underwriting approval for a mortgagee nationwide on the basis of the performance of the mortgagee's regional branches.

DE Authority Termination. In Mortgagee Letter 2010-03, HUD announced that it will systematically review all defaults (i.e., loans that are delinquent 90 or more days) and claims of mortgagees with Direct Endorsement (DE) underwriting authority, and will terminate the DE underwriting authority of mortgagees with excessive default and claim rates. The reviews will occur every three months, and HUD will analyze the performance of every participating mortgagee in each geographic area served by a HUD field office. Only loans with an amortization commencement date that occurred with the prior 24 months will be reviewed.

HUD notes that currently it can terminate the DE underwriting authority of a mortgagee that has a default and claim rate for loans underwritten with an amortization date within the prior 24 months that both (1) exceeds 200 percent of the default and claim rate within the geographic area served by a HUD field office and (2) exceeds the national default and claim rate. For purposes of the new reviews, HUD advises that initially it will focus its attention on mortgagees “showing particularly high default and claim rates.” HUD provides the following initial timetable for the reduction in the credit watch threshold:

24 Month Period Ending Date	Termination Threshold
December 31, 2009	300 percent
June 30, 2010	250 percent
December 31, 2010	200 percent

HUD explains that for the first review period it will terminate the DE underwriting authority of any mortgagee with a default and claim rate that exceeds both the national rate and 300 percent of the field office rate. For reviews after December 31, 2010, the threshold will remain constant at 200 percent of the field office default and claim rate, unless there is a change in the termination threshold announced by HUD in advance of the effective date of the change. A mortgagee will be notified before its authority is terminated.

HUD advises that it will take into account mortgagees with a de minimis number of defaults and claims. HUD also explains that for loans made in underserved census tracts (as defined in the Mortgagee Letter), HUD will compare the mortgagee’s loan performance with the field office average for similar loans.

HUD outlines the available appeal process for a mortgagee that receives a notice that its DE underwriting authority will be terminated for one or more areas. A mortgagee that does not avail itself of the appeal process will have its authority for the applicable areas terminated 60 days from the date of the proposed termination notice. The Mortgagee Letter also addresses the effect of the termination of authority.

If the authority in a given area is terminated for a mortgagee that is the sole sponsor of an FHA loan correspondent in the area, the correspondent will have 30 days to establish a relationship with a new sponsor.

HUD addresses the procedure for a mortgagee to seek reinstatement of its authority, and notes that a mortgagee may seek such reinstatement no earlier than six months after the effective date of the termination.

HUD ANNOUNCES LOSS MITIGATION GUIDANCE

In [Mortgagee Letter 2010-04](#) the Department of Housing and Urban Development (HUD) provides guidance regarding loss mitigation efforts for borrowers who are facing “imminent danger” of default. The guidance is effectively immediately.

A borrower is considered to be facing “imminent default” if the borrower is current or less than 30 days past due on the mortgage loan and is experiencing a significant reduction in income or some other hardship that will prevent him or her from making the next required payment on the mortgage during the month that it is due. The borrower must be able to document the cause of the imminent default. The cause may include, but is not limited to:

1. A reduction in or loss of income that was supporting the mortgage loan (for example, unemployment, reduced job hours, reduced pay or a decline in self-employed business earnings). However, a scheduled temporary shut down of the employer, such as for a scheduled vacation, would not by itself be adequate to support an imminent default.
2. A change in household financial circumstances (for example, death in family, serious or chronic illness or permanent or short-term disability).

A servicer must document in its servicing system the basis for the servicer's determination that a payment default is imminent and retain the documentation used to reach its conclusion, including information on the borrower's financial condition.

The two loss mitigation options that are available for a borrower facing imminent default are a forbearance agreement and the FHA Home Affordable Modification Program (FHA-HAMP).

FHA will permit the use of an informal or formal forbearance agreement for a borrower facing imminent default. The use of a special forbearance agreement is not permitted for such a borrower. An informal forbearance agreement is limited to a term of three months or less, and is an oral agreement. A formal forbearance agreement is a written agreement. The financial analysis for a forbearance agreement should be calculated under the FHA's standard loss mitigation procedures that use a net surplus basis, and the borrower's current and future ability to meet the monthly mortgage obligations must be analyzed as provided in Mortgagee Letter 2000-05,

General Program Requirements, Section H, Evaluation of the Borrower's Financial Condition.

For the FHA-HAMP option, the guidance set forth in Mortgagee Letter 2009-23 must be followed. To qualify for modification under FHA-HAMP, the borrower must first successfully participate in a four-month trial modification period. Servicers must comply with reporting requirements for standard loss mitigation activities before implementation of the FHA-HAMP option, and then comply with the specific FHA-HAMP reporting requirements.

NMLS CONSUMER ACCESS WEBSITE LAUNCHES

As we discussed in our [December 14, 2009](#) Mortgage Banking Update, the Nationwide Mortgage Licensing System was preparing to launch its NMLS Consumer Access website. The website (www.nmlsconsumeraccess.org), which went live on January 25, 2010, allows members of the public to view information concerning licensed mortgage companies, their licensed branch locations, and their licensed mortgage loan originators. With respect to company licenses and registrations, a consumer is able to view the entity's license number, the original issue date for such license, the status of the license and the date upon which the status was granted, and whether the company uses any trade names in a particular state. Aside from being in a position to confirm whether a company maintains an active mortgage license, consumers are able to view the NMLS identification number, business address, telephone and fax numbers, website and e-mail information, assumed name information, branch location information and registered agent information for every entity that has an NMLS Record. It is our understanding that the NMLS Consumer Access website will be updated on a daily basis. In future releases, it is anticipated that information pertaining to affirmative disclosures that appear in the NMLS (such as whether a licensee has been the subject of any administrative actions) will be available for public review.

FCC TO PROPOSE CHANGES TO TELEMARKETING RULES

A The Federal Communications Commission (FCC) announced on January 20, 2010 that it is proposing changes to its telemarketing rules related to prerecorded telemarketing calls. The proposed changes would bring the FCC's rule in line with the Telemarketing Sales Rule promulgated and enforced by the Federal Trade Commission (FTC). The FCC's rule applies to certain entities outside the FTC's jurisdiction, including, among others, banks and insurance companies.

The FCC's rule would prohibit sellers and telemarketers from placing prerecorded telemarketing calls to telephone subscribers unless the subscriber has provided express written consent to receive the calls. The

restriction would apply even if the caller has an established business relationship with the consumer. The proposal also would require prerecorded telemarketing calls to include automated, interactive mechanisms by which a consumer can opt out of receiving future prerecorded messages from the caller.

The FCC's notice of proposed rulemaking is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-18A1.pdf.

DID YOU KNOW?

- On July 1, 2010, the Illinois Anti-Predatory Lending Database Program that presently is in effect for Cook County will be expanded to include Kane, Peoria and Will counties.
 - The Maryland Department of Labor, Licensing and Regulation ("DLLR") changed its Mortgage Servicer Reporting period from a monthly to quarterly schedule. Licensees required to file such reports must still submit their December 2009 report by January 25, 2010. The next Mortgage Servicer Report is due on April 25, 2010, covering the period of January 1, 2010 to March 31, 2010. All subsequent Mortgage Servicer Reports will be due 25 days after the close of the most recent quarter end and shall be filed through the DLLR website in the manner currently required.
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