



September 23, 2005

Alfred B. Robinson, Jr.
Deputy Administrator
Wage and Hour Division
Room S-3502
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Mr. Robinson:

The Mortgage Bankers Association (“MBA”) requests your opinion regarding the exempt status classification of mortgage loan officers under section 13(a)(1) of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, and the Part 541 regulations adopted thereunder. As described in more detail below, mortgage loan officers work with the employer’s customers (hereinafter “customers”) to assist them in identifying and securing the mortgage loan appropriate for their individual financial circumstances and designed to help them achieve their financial goals, including home ownership.¹ This request for an opinion letter focuses on three principal issues related to the application of the FLSA’s Part 541 “administrative exemption” to mortgage loan officers.

First, MBA seeks your opinion as to whether mortgage loan officers performing the primary duties described herein meet the administrative duties tests set forth in the new regulatory example addressing employees in the “financial services industry.” *See* 29 C.F.R. § 541.203(b). In particular, MBA requests confirmation that mortgage loan officers who engage in some sales activity, but not sales activity as their primary duty, as described below, still meet the new administrative duties tests.

Second, we request your opinion whether mortgage loan officers who fall within the scope of new § 541.203(b) are deemed to satisfy the new rule’s administrative duties tests, including the exercise of the necessary discretion and independent judgment. And, on a related point, we seek confirmation that mortgage loan officers still satisfy the administrative duties tests under § 541.203(b), even though they may use certain software programs or tools that are used in

¹ Some MBA members refer to their mortgage loan officers as “mortgage loan representatives,” “mortgage loan consultants,” “mortgage loan originators,” “mortgage bankers,” or similar titles. Such terms are interchangeable, and this letter collectively refers to all such employees as “mortgage loan officers.”

underwriting (*i.e.*, assessing the risk of various loans) and in narrowing a broad field of available mortgage products, requirements, and prices, as described below.

Finally, MBA seeks your opinion whether the principles set forth in the new financial services example, which the Preamble to the new rule makes clear is based on prior case law and is consistent with the prior rule, also equally apply to mortgage loan officers whose exempt status is evaluated under the prior rule. In other words, we request confirmation that mortgage loan officers who perform the duties now described in new § 541.203(b), and as described in this request, also meet the duties requirements under the prior administrative tests. 29 C.F.R. § 541.2 (prior rule).²

The Duties of the Mortgage Loan Officers For Whom MBA Seeks Clarification under the FLSA Administrative Exemption

Mortgage loan officers work under various business models, and their duties vary accordingly. The particular mortgage loan officers for whom MBA seeks clarification of their status under the FLSA administrative exemption (under both the current and prior rules) spend the majority of their working time inside the employer's office (or inside the employee's home office), although some of these same mortgage loan officers also may meet with customers or referral sources (such as realtors and builders) outside the office.³ The primary duties of these mortgage loan officers are described as follows:

Mortgage loan officers work with customers interested in identifying and obtaining a mortgage loan that meets their individual financial needs. Mortgage loan officers respond to and follow up on customer inquiries (sometimes referred to as "leads") that may come from several sources, including responses to company marketing and advertising, online applications or expressions of interest, individuals who register with "find a lender" lists collected by third parties, inbound telephone inquiries, repeat customers, and individuals referred by realtors, builders, and other similar referral sources. Such potential customers already have generally expressed an interest in obtaining a loan or gathering information on how a mortgage product may meet their needs.

After the initial contact with the customer is established, the mortgage loan officer typically begins collecting and analyzing the customer's financial information to assess his or her personal financial circumstances and to determine whether the customer and the property qualify for particular mortgage loan programs. This interview process typically includes inquiries into the customer's income, assets, investments, debt, credit history, prior bankruptcies, judgments,

² These three issues involve application of the administrative duties test. MBA acknowledges that for mortgage loan officers to qualify for the administrative exemption, they must also meet the applicable salary level and salary basis tests. We ask you to assume for purposes of this opinion letter request that mortgage loan officers are paid on a salary basis at a rate of at least \$455 per week, either because they receive a salary of at least \$455 per week or because they receive a guaranteed, non-refundable draw against commission of at least \$455 per week.

³ This request does not address those mortgage loan officers who are customarily and regularly engaged away from the employer's place of business (or away from the employee's home office), and who therefore may qualify for the outside sales exemption either under the new rule at 29 C.F.R. § 541.500 or under the prior rule at 29 C.F.R. § 541.5.

liens, characteristics of the property, and other such information. The mortgage loan officer also gathers and analyzes information about the customer's financial needs and objectives. A customer may be interested in a mortgage loan for reasons too numerous to list in their entirety, but typical examples include purchasing a primary residence; refinancing a home at a lower interest rate or for a different term, or to convert equity into cash; consolidating consumer debt; obtaining a home equity loan to make home improvements or fund college tuition; or buying a vacation home or investment property, just to name a few.

The mortgage loan officer also advises the customer about the various features, including the risks and benefits, of mortgage loan alternatives and works with the customer to identify mortgage loans which meet the customer's needs and objectives. The mortgage loan officer must analyze the information provided by the customer and advise on a host of options and variables, such as mortgage loans vs. home equity lines of credit, fixed vs. variable interest rates, the frequency of rate adjustments, the length of loan terms, the amount of equity required, single loans vs. combinations that involve home equity line of credit or other subordinate loans, interest-only loans, documentation requirements, and various finance options (*e.g.*, down payments, private mortgage insurance (PMI), escrows, interest rates, and point options). Additionally, many mortgage banking companies offer dozens or even hundreds of different mortgage products, and the process for determining the mortgage loan that suits the customer's needs requires specific analysis, evaluation, and advice from the mortgage loan officer.⁴ The mortgage loan officer may have latitude to provide the customer with some variation (although not unlimited variation) in the price of a mortgage loan. Mortgage loan options and variables constantly evolve in response to customer demands and changing market conditions, and mortgage loan officers must stay abreast of these rapid developments to be able to understand and respond to customer needs.

Mortgage loan officers may employ a number of technological tools to help them more efficiently serve the needs of their customers and guide their customers through the loan process. For example, some software programs display available products along with their qualification requirements, terms, and prices, many of which change on a daily or even more frequent basis. These programs enhance the mortgage loan officer's ability to evaluate the array of products, options, and variables to determine which mortgage products might serve the customer's needs. These programs, however, do not select the mortgage loan product that satisfies the customer's needs and objectives. The mortgage loan officer is still ultimately responsible for assessing alternatives and making recommendations to the customer.

Once mortgage products are identified to meet the customer's goals and needs, other technological tools – such as automated underwriting systems – are used by the mortgage loan officer to validate whether the borrower's particular transaction would qualify for the various product(s) identified by the mortgage loan officer. These systems avoid the delays typically associated with traditional underwriting, and thus allow the mortgage loan officer to work

⁴ The Department of Housing and Urban Development has opined that loan origination services must include these types of activities in order to be compensable under the Real Estate Settlement Procedures Act ("RESPA") and to avoid RESPA's prohibition against the payment of kickbacks and referral fees. *See, e.g.*, Department of Housing and Urban Development letter to the Independent Bankers Association of America (February 14, 1995); Real Estate Settlement Procedures Act Statement of Policy 1999-1, 64 Fed. Reg. 10080 (1999).

iteratively with the customer to find a product for which the customer will qualify. These underwriting programs allow the mortgage loan officer to input relevant financial, credit, and property data concerning the particular transaction. The system then advises whether the transaction would qualify or, if not, refers the transaction back to the mortgage loan officer for further information gathering, analysis, and identification of a product for which the customer can qualify. For example, Fannie Mae's Desktop Underwriter ("DU") enables a mortgage loan officer to determine if a particular customer's transaction would qualify as a mortgage product for purchase by Fannie Mae. Similar automated underwriting systems are available for loans to be purchased by Freddie Mac, loans to be insured by the Federal Housing Administration, and loans under other government and wholly private programs. Use of these automated underwriting systems generally gives mortgage loan officers the ability in many instances to communicate a loan prequalification, loan pre-approval, or qualified loan approval directly to the customer, subject only to verification of the information provided by the customer.

It is important to note that these automated underwriting systems inform the mortgage loan officer only as to whether the specific proposed loan for the specific customer and the specific property meets, or does not meet, the eligibility requirements for that specific loan program. Automated underwriting systems do not provide any information to the mortgage loan officer as to whether a particular loan is better than other types of loans for meeting the customer's needs. That analysis and judgment is the job of the mortgage loan officer. Furthermore, in many instances a mortgage loan officer will work creatively with the customer, often over a considerable period of time, to qualify the customer for a more advantageous loan program. For example, a mortgage loan officer might advise the customer to improve his or her credit, obtain a co-signor, wait extra months to build documented income, or save to increase the amount of a down payment. In sum, while technological tools assist the mortgage loan officer's efficiency in assisting the customer, their use does not in any way substitute for the necessary exercise of discretion and independent judgment by the mortgage loan officer.

Section 541.203(b) of the new rule contains two sentences. The first sentence states the duties that qualify as exempt. The second sentence refers to certain employees "whose primary duty is selling financial products" and who are, therefore, non-exempt. There is a sales component to the duties of mortgage loan officers, and mortgage loan officers do spend some time selling mortgage loan products to customers. Specifically, they spend some amount of their working time on customer-specific persuasive sales activity, such as encouraging an individual potential customer to do business with his or her employer's mortgage banking company rather than a competitor, or to consider the possibility of a mortgage loan if they have not expressed prior interest.

In contrast to this customer-specific persuasive sales activity, mortgage loan officers also may engage in "marketing, servicing or promoting the employer's financial products." *See* § 541.203(b). This activity involves the marketing of the employer's mortgage banking company or mortgage loan products generally. It also involves the promotion of brand awareness and the creation of loan demand among realtors, builders, developers, and other such individuals or entities. Such "marketing, servicing or promoting" is, unlike customer-specific persuasive sales activity, exempt activity under the first sentence of the new financial services example.

It is important to note that both customer-specific persuasive sales activity and the activities described in the first sentence of § 541.203(b) may take place in the same discussion with a customer. For example, if a customer is persuaded to do business with the employer's mortgage banking company, the discussion then would evolve into the activities described in the first sentence of § 541.203(b). We ask you to assume for purposes of this opinion letter request that the time spent on customer-specific persuasive sales activity (and thus, as a legal matter, "selling financial products"), as compared to performing the duties set forth in the first sentence of § 541.203(b), represents less than 50% of the mortgage loan officer's working time over a representative period.

In contrast, some personnel involved in the mortgage loan process may spend the majority of their time inside the office prospecting for potential customers who have not previously expressed an interest in obtaining information about a mortgage loan (*e.g.*, personnel who work in a call center environment and who primarily sell financial products as outbound telemarketers). This request recognizes the differences between such personnel and the mortgage loan officers who primarily perform the duties described above. Loan personnel (including some mortgage loan officers) who, over a representative period, spend the majority of their working time inside the office prospecting for customers rather than providing the services described in the first sentence of § 541.203(b) are outside the scope of this request.

The primary duties of mortgage loan officers, as described above, differentiate them from loan processors, who are outside the scope of this request. Loan processors, in addition to coordinating appraisals and title work, review the customer's supporting financial documents (*e.g.*, pay stubs, W-2s, bank statements, tax returns for self-employed individuals) to determine if they meet the documentation requirements associated with the mortgage loan. In contrast with mortgage loan officers, loan processors typically do not analyze individual financial circumstances and objectives or advise the customer on such matters. If the loan processor determines that the customer's documentation cannot satisfy a particular mortgage loan's requirements, the loan processor will often refer the customer back to the mortgage loan officer to explore alternatives. Therefore, loan processors who fit this description are outside the scope of this request.

Issue No. 1: Application of the New Rule's "Financial Services Industry" Example to Mortgage Loan Officers

We believe that mortgage loan officers performing the duties described above are administratively exempt under the new rule. The new rule provides the following example addressing employees in the financial services industry:

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's

financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b).

Mortgage loan officers performing the duties described *supra* meet all four of the criteria set forth in the first sentence of § 541.203(b), and thus appear to fall squarely within the scope of this recognized exemption. Moreover, these same mortgage loan officers, including those engaged in some sales activities as described *supra*, appear to be outside the provision's final disqualifying sentence. These individuals are primarily engaged in performing the permissible exempt duties described in § 541.203(b) and, as noted above, spend less than 50% of their time on sales.

The Preamble explaining the new financial services industry example supports this reading of the new rule. *See* 69 Fed. Reg. 22146 (Apr. 23, 2004) (“[M]any financial services employees qualify as exempt administrative employees, *even if they are involved in some selling to consumers.*”) (emphasis added) (citing cases). Other authority cited in the new rule's Preamble also supports the exempt status of mortgage loan officers. For example, the Department cites a 2001 study commissioned by the Wage and Hour Division titled *The “New Economy” and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA).*” *See* 69 Fed. Reg. 22259 (Apr. 23, 2004). This study, which was based on a survey of DOL wage and hour officials and an independent evaluation of DOL-maintained O*NET job descriptions, found the occupations designated “Loan Counselors” and “Loan Officers” to be administratively exempt.⁵

Issue No. 2: Mortgage Loan Officers' Satisfaction of the New Rule's Administrative Duties Tests, Including the Exercise of Discretion and Independent Judgment

MBA further believes that mortgage loan officers who perform the duties enumerated in the first part of § 541.203(b) are deemed to meet the duties requirements of the new rule's administrative tests, including exercising the requisite discretion and independent judgment. *See* 29 C.F.R. § 541.200 (new rule). The express language of the rule supports this understanding: “Employees in the financial services industry *generally meet the duties requirements for the administrative exemption* if their duties include [certain categories of specified activity].” *See* 29 C.F.R. § 541.203(b) (emphasis added). Furthermore, the Preamble is consistent with this reading of the rule. *See* 69 Fed. Reg. 22146 (Apr. 23, 2004) (“Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, *and which require the exercise of discretion and independent judgment.*”) (emphasis added). We respectfully request your confirmation of this understanding.

⁵ *See also* 69 Fed. Reg. 22248 (Apr. 23, 2004) (reporting survey results of employees designated “[o]ther financial officers” that indicated them to be “[p]robably [e]xempt”).

In addition, MBA seeks confirmation that the use of the various software programs described *supra* that aid the mortgage loan officer in providing advice and services does not eliminate the requisite use of discretion and independent judgment. As noted above, such programs improve the mortgage loan officer's efficiency and enhance his or her ability to serve the customer. However, ultimate responsibility for assessing various loan products and advising the customer still rests with the mortgage loan officer. As such, this position is consistent with the new rule's recognition that the use of "manuals, guidelines or other established procedures containing or relating to . . . financial or other similarly complex matters" does not defeat the administrative exemption. *See* 29 C.F.R. § 541.704. The new rule's Preamble also provides analogous support for the position that a mortgage loan officer may utilize various software programs, in the manner described herein, and still exercise discretion and independent judgment. *See* 69 Fed. Reg. 22188 (Apr. 23, 2004) (distinguishing between manuals that "dictate" results or the application of prescribed skills and other manuals, like the software programs here, that "provide guidance involving highly complex information" and leave employees with "latitude" to make decisions) (citing *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003); *Haywood v. N. Am. Van Lines, Inc.*, 121 F.3d 1066 (7th Cir. 1997)).

Issue No. 3: Mortgage Loan Officers' Exempt Status under the Prior Rule's Administrative Tests

Finally, MBA respectfully requests confirmation from you that mortgage loan officers who perform the duties now described in new § 541.203(b) also meet the prior rule's administrative duties tests. 29 C.F.R. § 541.2 (prior rule). Both rules' primary duties tests contain comparable requirements, set forth generally as: (i) the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (ii) the exercise of discretion and independent judgment. *Compare* 29 C.F.R. § 541.200 (new rule) *with* 29 C.F.R. § 541.2 (prior rule).

In addition, the Preamble to the new rule makes clear that the new financial services industry example is "[c]onsistent with existing case law," in which courts drew the distinction between the primary duty of performing financial services and the primary duty of selling. *See* 69 Fed. Reg. 22145 (Apr. 23, 2004) (citing cases). Similarly, the Preamble also notes that the financial services example modernizes – but remains "consistent with" – the prior rule's § 541.207(d)(2) provision addressing "a customer's man in a brokerage house" – *i.e.*, stockbrokers. *See* 69 Fed. Reg. 22146 (Apr. 23, 2004). Specifically, the previous § 541.207(d)(2) noted that "a customer's man in a brokerage house" exercises discretion and independent judgment "in deciding what recommendations to make to a customer for the purchase of securities." Thus, new § 541.203(b) is a clarification and recognition of, not a departure from, existing law on this issue. Further, we note that the *New Economy* study, *supra*, reached its exempt status conclusions based on the prior rule rather than the new rule. Accordingly, we respectfully request your confirmation that a mortgage loan officer who satisfies the requirements for exemption under the new "financial services industry" example also satisfies the administrative duties tests under the prior rule.

Alfred B. Robinson, Jr.
September 23, 2005

Thank you for your attention to these important issues. If you wish to discuss these issues, please feel free to call me directly at (202) 557-2857, or you may call MBA's outside legal counsel for the matters, Robert P. Davis, with Mayer, Brown, Rowe & Maw, at (202) 263-3207. We look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "Kurt Pfotenhauer". The signature is written in a cursive style with a large, stylized initial "K".

Kurt Pfotenhauer
Senior Vice President, Government Affairs