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Client Alert: Mortgage Loan Officer Classification Under the FLSA

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Recent lawsuits, in Ohio and beyond, have accentuated the risks institutions face under the Fair Labor Standards Act (FLSA) when it comes to how Mortgage Loan Officers (MLOs) are paid. U.S. Department of Labor (DOL) activity in the past several years has further increased those risks. Indeed, in response to a directive from President Obama, the DOL is currently evaluating, and could potentially rewrite, the FLSA's exemptions from its overtime pay requirements, which could also impact MLOs and their employers.

In 2006, the DOL issued two opinion letters stating that MLOs could in fact qualify for the administrative and outside sales exemptions to the FLSA. Thus, depending on the MLOs' duties and compensation structure, they did not need to be paid overtime. In 2010 the DOL changed course, at least in part, when it issued an "administrative interpretation" holding that MLOs could not satisfy the administrative exemption. Thus, MLOs had to receive overtime compensation unless they were exempt on some other basis, such as the outside sales exemption.

The administrative interpretation has been tied up in federal litigation. That dispute could conclude in the coming year, as the Supreme Court has taken two cases – *Perez v. Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association* – stemming from the DOL's administrative interpretation. The DOL is also rewriting the FLSA exemptions, and could easily address the MLO issue in that context as well. Regardless, proposed DOL regulations are expected in the first part of 2015.

With the applicability of the administrative exemption to MLOs in doubt, employers should assess whether their MLOs are in fact exempt under the appropriate guidance. This determination requires a candid evaluation of MLO duties (including the description of the MLO's "primary duty") and their location of services, both of which must (at a minimum) be addressed in order to appropriately comply with the FLSA's requirements. The consideration involves a highly fact-intensive series of questions and legal analysis that can vary not only from institution-to-institution, but also between MLOs employed at the

same institution.

Demonstrating the challenge and potential exposure that properly classifying MLOs can present, institutions have found themselves mired in expensive FLSA misclassification litigation filed by current and former MLOs. Earlier this year, Wells Fargo settled various misclassification and overtime lawsuits regarding its MLOs for a total of \$15 million. An Ohio institution recently settled a similar FLSA collective action filed by its MLOs.

Institutions should carefully analyze their MLO compensation plans in light of this litigation, and the litigation pending before the Supreme Court. We continue to see a litigation trend that began on the coasts move steadily inland, and sweep in more and more regional and community institutions. If you would like assistance with this analysis and the determination of whether your MLOs must be paid overtime, reach out to your Vorys attorney.