

# *Loan Officer Compensation Briefing*



October, 2010

# POE Group, Inc.

- ◆ Management consulting firm established in 1997
- ◆ Clients range from small firms to mid caps
- ◆ Areas of Expertise
  - Total reward systems
  - Executive and incentive plan design
  - Performance assessment and feedback systems
- ◆ Practice Emphasis
  - Strong customer service through client relationships
  - Full service in our areas of expertise
  - Communication and education
  - Sharing of knowledge to build client capabilities

# Related Historical Context

- ◆ Fair Labor Standards Act enacted by Congress in 1938 with authority given to DOL to define specific exemptions
- ◆ FLSA addresses:
  - Establishment of a minimum wage
  - Guaranteed time and a half for overtime in certain jobs
  - Prohibited the employment of minors
- ◆ Amendments through the years primarily relating to increase in the minimum wage
- ◆ In a 2001 opinion letter, the Department of Labor concluded that loan officers can satisfy the “duties” prong of the administrative exemption
- ◆ In April 2004, Department of Labor (DOL) issued final rules modernizing its implementation of the "white collar" overtime exemptions in the Fair Labor Standards Act (FLSA); many of these provisions had not been updated in nearly fifty years

# Related Historical Context (Cont.)

- ◆ On September 8, 2006, the Department of Labor issued Opinion Letter FLSA2006-31, in which it confirmed that mortgage loan officers can satisfy the administrative exemption
- ◆ On March 24, 2010 the DOL, its first Administrator's Interpretation No. 2010-1, which stated that employees who perform the typical job duties of a mortgage loan officer do not qualify for the administrative exemption under the FLSA
- ◆ Bonus Legislation for the mortgage industry
  - On August 16, 2010 the Federal Reserve announced new rules for loan officer compensation practices. Compensation cannot be based on a plan that is based on the interest rate or other terms. Compensation based on a fixed percentage of the loan is permitted. Effective date of the new rules are April 1, 2011
  - Under the Mortgage Reform Act (part of Dodd Frank) loan originator incentive pay can be based on a percentage of the loan, or the number of loans closed. Additionally, the loan originator compensation can be no more than 3% of the loan amount. Effective date likely after mid-year 2011 or later

# Review of FLSA Exemptions

## ◆ **Executive Exemption**

- Primarily responsible for the management of the organization or a specific department;
- Regular management responsibility of two or more employees. (This normally includes the authority to hire, fire and discipline.)

## ◆ **Professional Exemption**

### Learned Professional

- Knowledge required to perform the job is of an advanced type in a field of science or learning acquired by a prolonged course of specialized intellectual instruction and study. This is distinguished from general academic education or training;
- Work requires the consistent exercise of discretion and independent judgment;
- The work is predominantly intellectual and varied in character in which the results accomplished cannot be standardized in relation to a given period of time;
- The work outlined above must account for minimally 80% of the total work time spent.

### Creative Professional

- The primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor;
- The work outlined above must account for minimally 80% of the total work time spent.

# Review of FLSA Exemptions (Cont.)

## ◆ **Outside Sales Exemption**

- Regular duties away from the workplace engaged in making sales, obtaining orders or contracts;
- Outside sales must account for minimally 80% of the total work time spent.

## ◆ **Administrative Exemption**

- Paid more than \$23,660 per year or \$455 per week on a salary basis;
- Primary duties must be office or non-manual work directly related to management policies of the general business operations of the organization or its customers;
- The work must require the exercise of discretion and independent judgment;
- The work outlined above must account for minimally 80% of the total work time spent.

## ◆ **Computer-Related Professional Exemption**

- Paid more than \$23,660 per year or \$455 per week on a salary basis or \$27.66 on an hourly basis;
- Performing application system analysis techniques, including consulting with users to determine their hardware and software needs;
- Performing design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- Creation, testing, or modification of computer programs related to machine operating systems.

# Interpretation of DOL's New Position

- ◆ Employees performing “typical loan officer duties” do not qualify for exempt status as an administrative employee
- ◆ Typical duties include:
  - Receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity
  - Collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens
  - Runs credit reports
  - Enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided
  - Assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products; and
  - Compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings
- ◆ It is important to examine the job duties, not the job title of employees

# Interpretation of DOL's New Position (Cont.)

## ◆ Exclusion from administrative exemption

- This exemption was the one endorsed in previous letter rulings by DOL to exempt the loan officer from overtime
- Primary focus of the Administrator's new interpretation was on the requirement that an employee's primary duty must be 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
  - Work related to the management of the employer's business is consistent with accounting, budgeting, quality control, human resources and similar functions
  - Furthermore, residential loan officers do not perform work related to the general business operations of customers since customers are operating from a personal capacity to finance their home
  - Loan officer duties were determined to not be focused on the management of the employer's business, but more related to production or sales

# Alternatives Going Forward

1. Claim a different exemption or reclaim the administrative exemption under FLSA
  - Outside Sales
    - Regular duties away from the workplace engaged in making sales, obtaining orders or contracts;
    - Outside sales must account for minimally 80% of the total work time spent
  - Executive
    - Primarily responsible for the management of the organization or a specific department;
    - Regular management responsibility of two or more employees. (This normally includes the authority to hire, fire and discipline.)
  - Administrative
    - Can apply to commercial loan officers
    - Primary duties must be office or non-manual work directly related to management policies of the general business operations of the organization or its customers

# Alternatives Going Forward

## 2. Consider loan officers independent contractors

➤ There are additional tests to prohibit employers from discriminately making employees independent contractors

- **Behavioral control** - degree the employer directs and controls the details and means by which the worker performs the required services. Behavioral control often focuses on the type of instructions given and training provided to the worker
- **Financial control** - concerns the employer's right to direct or control certain economic aspects of the worker's activities. The concept of financial control is primarily dependent upon how the worker has established his or her business in relation to the employer
- **Relationship between the parties** - relationship concept relates to the parties' intent concerning control (i.e. providing benefits, project based work, filing W-2 forms)

## 3. After careful analysis, consider the employees performing the duties non-exempt and make adjustments as required

# Potential Adjustments for the Non-Exempt Loan Officer Alternative

- ◆ As with all non-exempt employees, procedures must be put in place to track time worked
- ◆ Overtime, and the need to calculate overtime on variable compensation, only occurs when weekly hours worked exceed forty
  - Instruct employees that all overtime worked must be approved in advance
  - Manage staffing so OT does not occur or is minimized
- ◆ Compensation earned by employees by commissioned employees
  - As exempt employees, additional compensation is earned through production regardless of hours worked
  - As non-exempt employees, additional compensation is earned through production and the amount of time worked (assuming hours worked exceed forty)
  - Overtime eligibility may suggest some changes in how the work is managed
    - Realistic, but specific production quotas should be set and enforced – we can no longer let the commission or incentive plan force select out inefficient employees
    - Consider using variable compensation in the pay mix, if not already employed
    - Overtime model

# Immediate Next Steps

- ◆ If you classify loan officers as exempt employees, validate their status in light of DOL's Administrator's Interpretation No. 2010-1
  - If the exemption is changed to non-exempt, consider recalculating overtime not paid since the new administrator's interpretation
  - Obtain legal advise if this is sufficient or if it necessary to go back two years
- ◆ If you employ variable compensation for your loan officers, review the plan in light of the Federal Reserve's new rules on loan originator compensation and steering
  - The rule is effective April 1, 2011
  - Consider plan changes for the beginning of the year
- ◆ Monitor the dynamic nature of the pending legislation to ensure you are current with changes

# Calculating Overtime for Commission Employees

- ◆ When an employee is paid (in whole or in part) on a commission basis, the employer may choose to pay the commissions less frequently than each week, but in doing so the employer cannot avoid the overtime requirements
- ◆ When the commissions are paid, the employer must retroactively divide the commissions earned among the applicable workweeks in the amounts actually earned (or, failing that, reasonably presumed to have been earned) for each week, in order to calculate the regular rate of pay and any overtime due for those weeks
- ◆ Basic overtime calculation
  - Joe works a total of 52 hours for the week
  - His rate of pay is \$15.00 per hour
  - He also earns a 0.6% commission on loans closed of \$250K or \$1,500
  - $52 \text{ hours} \times \$15 \text{ per hour} = \$780$  straight time pay
  - $\$780 + \$1,500 \text{ commission} = \$2,280$  regular compensation
  - $\$2,280 \text{ divided by } 52 \text{ hours worked} = \$43.85$  regular rate of pay
  - $(\$43.85 * 0.5) \times 12 \text{ hours} = \$263.08$  overtime compensation
  - Joe is paid  **$\$2,280 + \$263.08 = \$2,543.08$**