

September 14, 2005

The Honorable Alfred B. Robinson, Jr.  
Deputy Administrator  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Dear Mr. Robinson:

The National Association of Mortgage Brokers (“NAMB”) requests that you provide a written “ruling, approval, or interpretation” regarding overtime obligations under the Fair Labor Standards Act of 1938, as amended (the “FLSA”), as stated below. This request is premised on the understanding that you will respond by exercising the authority under 29 USC §259 that has been delegated to you in your capacity as Deputy Administrator of the Wage and Hour Division of the U.S. Department of Labor. Specifically, we are seeking an opinion as to whether loan officers<sup>1</sup> employed by NAMB members, who perform the job duties described below, fall within the “outside sales” overtime exemption, as defined by the applicable regulations implementing the FLSA, 29 C.F.R. Part 541 (the “overtime regulations”). The guidance requested herein will assist NAMB members in understanding and complying with the new overtime regulations recently issued in 2004.

Below we provide a summary of the past guidance on this matter by the U.S. Department of Labor (“DOL”) and the federal courts, additional background information that includes the primary duties of loan officers and then state the questions that NAMB is requesting DOL to address.

### **1. Past Guidance on the Outside Sales Exemption**

In requesting clarification of the application of the outside sales exemption to loan officers under the new overtime regulations, we are mindful that the DOL and at least one federal court previously have addressed, in part, some of the relevant issues.

#### **A. DOL**

To NAMB’s knowledge, the DOL’s prior opinion letters have not addressed whether mortgage brokerage loan officers may qualify as exempt under the outside sales exemption. The DOL has provided guidance on this issue in the Wage and Hour Division’s Field Operations

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<sup>1</sup> The actual job title may be either loan officer or loan originator and, for purposes of this request, the titles are interchangeable.

Handbook (“FOH”) with respect to finance company employees who obtain or solicit mortgages. The FOH (at 22e-22e04) states that “employees of a finance company which is engaged primarily in servicing mortgages and takes mortgages in its own name may be exempt as outside salesmen if they are customarily and regularly engaged away from their employer’s place of business in obtaining mortgages from brokers and individuals.”

The DOL has addressed the outside sales issue for a group of workers analogous to loan officers – real estate agents – for the purpose of determining duties performed in the employers’ place of business that may be considered exempt in support of outside sales activity. The FOH (at 22e06 (e)) provides clear guidance on this point for loan officers, whose office-based activities essentially are identical to those duties for real estate agents which are considered exempt “if the activities performed are in conjunction with and if furtherance of their outside sales work.” Such exempt duties include: keeping data bases up to date (multiple listing service in the case of real estate agents); communicating by phone call or letter (and presumably, in this modern era by e-mail) with prospects with whom the sales person has been dealing during outside sales activity; meeting in the office with such prospects about the prospect’s particular transaction; calling lists of prospective clients with whom the sales person has had no prior contact; and preparing contracts and other forms required for a sale negotiated during a sales person’s outside sales activity. *See* FOH at 22e06 (e).

## **B. Federal Court Guidance**

NAMB has discovered only one reported federal court decision that discusses the application of the outside sales exemption to mortgage loan officers. The United States District Court for the Eastern District of Michigan, in analyzing facts that are essentially identical to those presented in this letter, ruled that loan officers whose primary duty was selling mortgage loans met the requirements of the outside sales exemption under the FLSA. *Olivo v. GMAC Mortgage Corporation*, 2004 WL 3396230 (E.D. Mich.) (copy attached).

In *GMAC*, the court first considered whether the loan officers were primarily engaged in sales. The *GMAC* decision ruled that the threshold inquiry of whether the primary duty was sales clearly was satisfied, relying on the following factors: the loan officers were hired to originate their own sales of mortgage loans and their job was to solicit new business; loan officers were paid on a commission only basis determined by their individual production (although they could participate in a sales incentive program and new hires typically were paid a salary during their first three months of employment); and loan officers had a great deal of flexibility in how to structure their workday. *Id. at p. 5.*

Next, the *GMAC* decision considered whether the loan officers were regularly engaged in outside sales rather than “inside” sales. The court found that the following activities placed the loan officers squarely within the requirement for outside sales: GMAC expected its loan officers to spend most of their work time outside of the office generating new sales and making new sales contacts; GMAC relied on its loan officers to sell by “contracting prospects, making and maintaining contacts with referral sources ... and using their ... talents and skills to create new sales opportunities;” and loan officers in fact spent a substantial percentage of time outside of the office “soliciting sales and generating or maintaining contacts, and that much of the time spent at the office is devoted to following up on contacts and leads generated during outside sales visits.” *Id. at p. 6.* Like the GMAC

loan officers, the employment circumstances and duties of the NAMB member loan officers described below meet the requirements for the outside sales exemption.

## **2. Background Information**

NAMB is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. NAMB has over 26,000 members and 49 state affiliates nationwide. NAMB is not a party to any pending FLSA litigation nor is it subject to any pending DOL wage and hour audits.

While mortgage broker firms vary greatly in size, typically they are small, independent businesses, employing between five to nine people. A typical office has a broker/owner, a secretary and/or receptionist, one or more loan processors and one or more loan officers. For the most part, mortgage brokers have relationships with numerous lenders. A mortgage broker may have literally hundreds of different loan products available, each of which has unique properties.

This Opinion Letter request focuses on mortgage loan officers who perform their work primarily outside the office, and whose duties typically differ from those loan officers who are office-based<sup>2</sup>. Mortgage brokers hire and rely upon these "sales force" loan officers to sell the loan products offered by the broker. These loan officers are expected to originate their own sales by contacting prospective clients and by developing and maintaining referral sources. In performing their primary duty of sales, these loan officers spend significant time away from the employer's place of business. Loan officers typically maintain considerable flexibility in setting their own hours and in scheduling the tasks they perform during the workday.

With respect to specific primary duties, sales force loan officers:

- Meet in person with prospective clients at locations other than employer's place of business to develop sales opportunities.
- Deal directly and in person with clients to sell loan packages by meeting with clients at their homes or other locations other than employer's place of business.
- Contact with clients by telephone, mail and e-mail is adjunct to personal calls on clients.
- Make in person calls on real estate agents and brokers, financial advisors and other potential referral sources to develop borrower leads.
- Engage in marketing, promotion and business development activities in support of their own sales.
- Are customarily and regularly engaged away from employer's place of business or the loan officer's home office, but spend some time in the office taking loan applications,

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<sup>2</sup> Some loan officers perform their work mainly within the office. These office-based loan officers are not the subjects of this Opinion Letter request.

attending staff meetings, completing necessary paperwork in support of sales and preparing flyers, newsletters and other marketing materials in support of their own sales efforts.

- Obtain credit information and other necessary documentation in support of loan applications and work with loan processors to ensure that loans the loan officer has sold go to closing.

Sales force loan officers typically are paid on a pure commission basis, which is determined based on the loan officers' actual sales production and the value of the loan packages sold. Some brokers may provide additional compensation or may pay recent hires a salary for a short time period (typically three months) while the loan officer begins to develop contacts and generate his or her own sales. Many loan officers have written agreements with their employers that reflect both the primary duty of sales and the commission only compensation structure.

### **3. Assumptions**

In requesting the opinion, we ask the Administrator to assume the Background Information stated above.

### **4. Opinion Request**

Based on the Background Information and the Assumptions stated above, we request an opinion as to whether the loan officers described herein satisfy the outside sales exemption requirements of the overtime regulations, 29 C.F.R. §541.500. Specifically, we ask that the requested DOL opinion confirm that:

- Sales force loan officers perform as their primary duty the sale of loan packages directly to clients/borrowers, which duty meets the requirement of sales within the meaning of DOL's overtime regulations.
- Sales force loan officers are customarily and regularly away from their employer's place of business in soliciting and selling mortgage loan packages to clients/borrowers within the meaning of DOL's overtime regulations by (1) meeting in person with prospective clients at locations other than employer's place of business to develop sales opportunities, (2) dealing directly and in person with clients to sell loan packages by meeting with clients at their homes or other locations other than employer's place of business, and (3) making in person calls on real estate agents and brokers, financial advisors and other potential referral sources to develop client leads and create sales opportunities.
- Certain activities performed by sales force loan officers in the employer's place of business or the loan officer's home office are exempt as they are performed in conjunction with and in furtherance of their outside sales activities, including:
  1. Checking and bringing databases of loan products for sale and referral sources up to date.

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2. Calling, writing to, or communicating by e-mail with, clients or prospects with whom the loan officer has been dealing during his or her outside sales activity.
3. Talking to such clients or prospects in the office about their particular loan transactions.
4. Calling, writing to, or communicating by e-mail with, lists of prospective clients, loan product vendors and referral sources with whom the loan officer may not have had any prior contact.
5. Preparing a loan application and other forms required for a loan sale initiated or negotiated by a loan officer during outside sales activity.

Please contact me if you should require any additional information to respond to this request for an opinion letter.

Respectfully,

National Association of Mortgage Brokers



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James L. Nabors, II  
President 2005-2006

Enclosure