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To: Clients and Friends

From: David F. Dulock

Subject: Mortgage Loan Officer Overtime Pay in Light of Recent Cases

Recently we were asked by a client if the invalidation of the March 24, 2010 U.S. Department of Labor Administrator's Interpretation No. 2010-1 (AI 2010-1) by the District of Columbia Circuit Court of Appeals' July 2, 2013 decision in *Mortgage Bankers Assoc. v. Harris*, 720 F.3d 966 (D.C. Cir., 2013), cert. granted, 134 S.Ct. 2820 (U.S. Jun 16, 2014), herein the "*Harris* decision," allows employers to re-classify their mortgage loan officers (MLO) as administrative employees exempt from overtime requirements under the Fair Labor Standards Act (FLSA). Our recommendation is that employers should not re-classify MLO employees as exempt administrative employees based on the *Harris* decision, for the following reasons:

1. The *Harris* decision vacated AI 2010-1 on procedural grounds and did not address the merits of AI 2010-1. The DOL did not follow the federal Administrative Procedures Act (APA) notice and comment rulemaking requirements in issuing AI 2010-1, so the court remanded the case to the district court with instructions to vacate AI 2010-1, stating:

> "[W]e reverse the District Court order dismissing MBA's Motion for Summary Judgment and remand the case with instructions to vacate the 2010 Administrator Interpretation significantly revising the agency's 2006 Opinion Letter. If the Department of Labor ('DOL') wishes to readopt the later-in-time interpretation, it is free to. We take no position on the merits of their interpretation. DOL must, however, conduct the required notice and comment rulemaking." (*Harris*, 720 F.3d at 968.)

2. On June 14, 2014, a petition for writ of certiorari was granted in the *Harris* case by the United States Supreme Court and the case is now on appeal to that Court with oral argument anticipated for later this year.

3. A 2013 article discussing the *Harris* decision - R. Gaytán and J. Kalter, *D.C. Court of Appeals Invalidates Department of Labor's Interpretation of the Exempt Status of Mortgage Loan Officers Under the FLSA*, Godfrey & Kahn S.C. Banking & Financial Institutions *FLASH* (July 2013) - states the DOL could use the APA rulemaking process to formally adopt AI 2010-1 or it could use AI 2010-1 as a guide in a case-by-case approach in its enforcement activities. The article also advises that until additional clarity on this issue becomes available, the safest course of action is to continue to classify MLOs as non-exempt from minimum wage and overtime requirements of the FLSA to reduce the financial risks of misclassification. We find this article persuasive and if you wish to read it, click on the hyperlink *Flash*.

There is also a recent decision from a federal district court in Oklahoma, *Chapman v. BOK Financial Corp.*, 2014 WL 3700870 (N.D. Okla. Jul 25, 2014), in which the district court in a summary judgment hearing held that the defendants did not act willfully for failing to pay their MLOs back overtime wages from March 24, 2010 through January 1, 2011 after they changed their MLOs classification from exempt to

non-exempt effective January 1, 2011 and, thus, the plaintiffs claim for misclassification for that period was time-barred by the FLSA two year statute of limitations. This case does not affect our recommendation or the above reasons for same, but is noted solely because it is a current case dealing with AI 2010-1 and its effect on MLO classification for overtime payment purposes.