

UPDATE

News of Developments in the Financial Sector and Related Areas

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Small Business Lending Act

The U. S. House of Representatives has passed President Obama's plan for the proposed \$30 billion Small Business Lending Fund which will provide funds to community banks to support small business lending. The bill is known as the Small Business Lending Act of 2010. The bill is now being addressed by the U. S. Senate. Under the bill, \$30 billion in Trouble Asset Relief Program funds ("TARP") would be transferred to a new program outside of TARP to support small business lending. The bill authorizes the Treasury to make capital investments in community banks with an incentive structure to support new small business lending.

The bill should encourage broader participation by banks in that participants will not face existing TARP restrictions such as limitations relating to executive compensation. Current participants in TARP will be able to convert from the existing TARP program into the new program thereby substantially reducing their costs.

Banks with less than \$1 billion in assets would be able to receive capital investments from the Treasury up to 5% of their risk-weighted assets. Banks between \$1 billion and \$10 billion in assets would be eligible to receive up to 3% of risk-weighted assets. To participate, banks will have to be approved by their primary federal bank regulator. Banks on the FDIC problem bank list or that have been removed from the problem list for less than 90 days are not eligible to participate. An applicant bank must deliver to its primary federal bank regulator a small business lending plan describing how its business strategy and operating goals will allow it to address the needs of small businesses in the areas it serves.

The initial dividend rate for a capital investment provided by the Treasury under the proposed program would begin at 5%, with reductions to as low as 1% if a bank demonstrated specific levels of increased small business lending. During the initial two-year period of participation in the program, banks would receive decreases in the dividend rate based on incremental business lending they achieve over a two-year period, down to a minimum dividend rate of 1%. Banks would realize this reduction in the dividend rate sooner if they made earlier, but consistent progress towards increased lending. The rate would increase if the bank did not increase its small business lending. The rate would increase to 9% at the end of the 4 1/2 – year period following a bank's participation in the program. The capital investment by

the Treasury must be repaid at the end of 10 years. A portion of the bill known as the State Small Business Credit Initiative will allocate federal funds to participating states with capital access programs.

Overtime Pay Mortgage Loan Officers

Earlier this year, the Wage and Hour Division of the U.S. Department of Labor issued Interpretation No. 2010-1 addressing the application of the administrative exemption under Section 13(a)(1) of the Fair Labor Standards Act ("FLSA") to employees who perform typical job duties of a mortgage loan officer. The interpretation withdrew two previous opinion letters that suggested mortgage loan officers were exempt employees. The U.S. Department of Labor ("DOL") noted that a job title does not determine whether an employee is exempt from overtime pay. The employee's actual job duties and compensation determine whether the employee is exempt or nonexempt.

In its investigation, the DOL found that mortgage loan officers receive internal leads and contact potential customers or receive contacts from potential customers generated by direct mail or other marketing activities. Mortgage loan officers collect financial information from customers, run credit reports, enter the collected financial information into a computer program that identifies which loan products may be offered to the customers, assess loan products to match the customers' needs and compile customer documents for forwarding to an underwriter or loan processor.

The DOL noted that exemptions from minimum wage and overtime requirements under the FLSA are to be narrowly construed against the employers seeking to assert them. For an employee to fall within the meaning of an "employee employed in a

bona fide administrative capacity" an employee's job duties and compensation must meet all of the following tests: (i) the employee must be compensated on a salary or fee basis at a rate of at least \$455 per week; (ii) the 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; and (iii) the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

In its investigation, the DOL found that the primary duties of mortgage loan officers were in making sale of loan products, and that they were not entitled to the administrative exemption because they performed production work rather than administrative work related to the management or general business operations of the employer. Employees who perform support functions related to the operations of a business, rather than just producing or selling goods and services offered by the business, are exempt administrative employees.

Employees misclassified as exempt could recover up to three years of overtime wages under FLSA including liquidated damages and attorneys' fees. Financial institutions should carefully review employees' job descriptions and duties to determine whether employees are properly classified under FLSA.

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