New York State Department of Labor
Andrew M. Cuomo, *Governor*
Colleen C. Gardner, *Commissioner*

February 1, 2011

[redacted]

Re: Request for Opinion
Mortgage Loan Originators
RO-10-0136

Dear [redacted]:

This letter is written in response to your letter dated August 25, 2010, in which you request an opinion on behalf of your client, a community savings bank that employs a number of mortgage loan originators, regarding the overtime requirements for employees who are paid a fixed salary plus commissions for fluctuating workweeks. The number of hours worked by the mortgage loan originators varies weekly, and commissions are typically paid out at approximately thirty to sixty days from the closing date of the loan for which the commission is earned. Your letter states that based on recent developments and interpretations of the Federal Fair Labor Standards Act[1], you have advised your client that its mortgage loan originators do not qualify for exemption from the Federal and State wage and hour laws, and that they are eligible to receive overtime pay.

Your letter asks if the mortgage loan originators may be paid a fixed salary for fluctuating hours. Pursuant to 29 CFR §778.114, a federal regulation that this Department follows in interpreting the provisions of the State Minimum Wage Orders, an employee may work for a fixed salary for a fluctuating number of hours pursuant to the clear mutual understanding that the salary is intended to compensate him or her for the hours worked at his or her regular rate. For any overtime hours worked, an employee working under a fluctuating hours schedule would receive payment for all overtime hours worked at one-half of the rate derived from dividing the salary by the number of hours worked during that workweek.

[1] Your letter cites to *Davis v. JPMorgan Chase & Co.*, 587 F. 3d 529 (2d Cir. 2009) and FLSA Administrator's Interpretation No. 2010-1.

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Employees paid on this basis are required to be paid a salary "sufficiently large" to insure that an employee's regular rate would not fall below the minimum wage rate during any workweek. (29 CFR §778.114(c).) For example, an employee who earns a fluctuating workweek salary of $500 who works fifty hours has a derived regular rate of $10 per hour and is, therefore, entitled to an additional $50 for that workweek for the ten overtime hours worked. If that same employee works forty-five hours, his or her derived regular rate for that workweek is $11.11 per hour, and he or she will be entitled to an additional $27.78 for the five overtime hours worked.

First Example:

$500 Fluctuating Workweek Salary
÷ 50 Hours
$10 per hour derived rate

Overtime Premium of $5.00 per hour after 40

$5.00 overtime premium
X 10 Overtime Hours Worked
$50.00 Additional Overtime Pay

Second Example

$500 Fluctuating Workweek Salary
÷ 45 Hours
$11.11 per hour derived rate

Overtime Premium of $5.56 per hour after 40

$5.56 overtime premium
X 5 Overtime Hours Worked
$27.78 Additional Overtime Pay

The federal regulation for the payment of a fixed salary for fluctuating hours does not involve, nor does it appear to contemplate, an employee being paid a fixed salary for fluctuating hours receiving commissions in addition to that salary. However, nothing in those regulations prevents their simultaneous application. The application of the overtime requirements to differed commission payments is addressed in federal regulation 29 CFR 778.119 *et seq.* Regulation 29 CFR 778.119 provides, in relevant part, that if the calculation and payment of a commission cannot be completed until after that employee's regular pay day, the employer "may disregard the commission in computing the regular hourly rate until the amount of the commission can be ascertained." Once that commission may be computed and paid, it must be apportioned back into the employee's earnings for the purposes of overtime through the computation of the employee's regular rate. Thus, in the example above, an employee who works fifty hours in a workweek and is paid a fluctuating workweek salary of $500 and an additional $100 in commissions computed and attributed to that week, that employee's derived rate of pay will be increased to $12 per hour, and the amount owed for overtime will be increased to sixty dollars.

Example:

$500 Fluctuating Workweek Salary
$100 Commissions
÷ 50 Hours
$12 per hour derived rate

Overtime Premium of $6.00 per hour after 40

$6.00 overtime premium
X 10 Overtime Hours Worked
$60.00 Additional Overtime Pay

The examples provided above are for illustrative purposes only. While your letter provides a number of examples and inquiries and requests an application of the Department's opinion to them, this office found that the above examples were more easily communicated. It is important to note that Labor Law Section 191 (1)(c) provides that the terms of an employment agreement between an employer and a commission salesperson shall be in writing, and shall describe how and when a commission is earned.

This opinion is based exclusively on the facts and circumstances described in your letters dated August 25, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel
By: Michael Paglialonga
Michael Paglialonga
Assistant Attorney II

cc: Carmine Ruberto