#Retweet the #CFPB: How Social Media is Affecting Consumer Advocacy

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Social media has become an integral part of our society, and now it's playing a big role in our industry, too. The Consumer Financial Protection Bureau (CFPB) is harnessing the power of Facebook and Twitter not only to create a platform for their educational services, but to gather complaints from consumers. Financial service providers are starting to see a hike in the number of complaints filed with the CFPB, and the CFPB's online presence may have a lot to do with that.

The CFPB has two Facebook pages (www.facebook.com/CFPB and www.facebook.com/CFPBMilitary) and a Twitter account (@CFPB) from which it posts material multiple times per week. (No Instagram account, however.) On Twitter, tweets are usually focused on the CFPB's educational goals, like making sure consumers have the resources necessary to properly evaluate loan products and providing answers to frequently encountered financial questions. Recently, @CFPB has been featuring a video about Jorge, a man living in New York who encountered problems removing his bankruptcy from his credit reports. The two-and-a-half minute video features Jorge retelling his experience contacting the Better Business Bureau and the CFPB to have his bankruptcy properly noted on his credit report. Most importantly, the page hosting the video includes several links to the CFPB's online complaint portal. Although it is a frequent tweeter with almost 48,000 followers as of early August 2015, @CFPB tends to be fairly passive and focused more on distributing knowledge than fielding complaints.

Facebook, on the other hand, tends to invite more active participation by those who follow the CFPB's page. Regardless of topic, virtually every post on the CFPB's main page contains at least one comment in which a consumer details an issue he or she has experienced with a financial institution. These comments are almost always non sequiturs, but the consumers garner responses from people all over the country. In some cases, the CFPB responds to the Facebook user by replying to the comment and providing a link to its online complaint portal and complaint hotline. This situation occurred in late July when the CFPB posted the video featuring Jorge on its Facebook page. Roughly an hour after the video was posted, a Facebook user posted a comment discussing frustration with her refinanced mortgage loan. Throughout the next few days, other users chimed in with similar experiences. About four days after the original comment, the CFPB responded to all the users on the thread and provided a link to its online complaint portal.

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Within the CFPB, there is a team dedicated to military personnel and their families called the CFPB Servicemember Affairs, and this team has its own separate Facebook page. Like the CFPB's main page, the military-focused page is used mainly to advance the CFPB's educational goals. The Servicemember Affairs page also contains consumer testimonials, but with a focus on servicemembers. For instance, in mid-July, the CFPB Servicemember Affairs page posted a video featuring Captain Jamison, a Judge Advocate Officer for the Air Force who reached out to the CFPB on behalf of an air force servicemember. The servicemember was having a difficult time getting his mortgage lender to approve a short sale. Says Jamison: "He came to me, I reached out to the CFPB and after reaching out, within about two weeks the bank responded and said the short sale was approved."

Unlike the CFPB's main page, however, the Servicemember Affairs page does not receive significant traffic. As of early August 2015, 48,482 Facebook users "like" and follow the main CFPB Facebook page, while only 1,705 users follow the Servicemember Affairs page. Similarly, the Servicemember Affairs page is much quieter; most of the posts have not received any comments from users.

The CFPB's Facebook pages get noticed by consumers not just for their content, but because they provide a platform for disgruntled consumers to congregate and exchange information. Facebook is a breeding ground for so-called "hate pages" – pages dedicated to trashing a specific person or company – on nearly every company imaginable. A quick search for "[insert a financial institution name here] sucks!!!" or "[insert a financial institution name here] ripoff" on Facebook will yield at least two "hate pages." Those pages serve as a meeting ground for disgruntled consumers around the world and allows consumers to share information and, importantly, document templates. In fact, one of the "hate pages" associated with a prominent national mortgage servicer features several links to templates for "qualified written requests" for consumers to send, promising that "the bank will fold in two weeks" if the consumer sends that letter.

The most unfortunate part of the rise of social media (and the internet at large) in the financial services sphere is that it is now much easier for disgruntled consumers to resort to filing a complaint or lawsuit before engaging other dispute resolution techniques. Financial servicing clients must be more prepared than ever to deal with CFPB complaints and an onslaught of generic, written demands for information from its customers, when a phone call would have been enough to fix the issue.

The CFPB reports that it has processed more than 650,000 complaints in its relatively short existence, thanks in some measure to its online complaint portal. The CFPB has always been committed to using grass-roots methods for engaging consumers and gathering complaints, and its social media presence is simply an extension of that commitment.

The New Paradigm in Vendor Management Under the CFPB

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This past July marked the fifth anniversary of the creation of the Consumer Financial Protection Bureau (CFPB), a period marked by sweeping changes to the regulatory and administrative environment in which financial institutions in this country operate, not least in regard to their relationship with the third-party vendors that routinely aid them in providing financial products and services to consumers. Title X of the Dodd-Frank Act authorizes the CFPB to (a) obtain and examine reports from supervised banks and nonbanks for compliance with Federal consumer financial law "and for other related purposes," and to exercise enforcement authority when violations are identified; and (b) to exercise supervisory and enforcement authority over supervised service providers, including the authority to examine their operations on-site. The extent of this authority, however, has not yet been judicially determined, leaving supervised financial institutions to rely upon the pronouncements of the CFPB itself to ascertain the scope and requirements of its oversight.[1]

What the CFPB Is Watching

When it comes to compliance standards, the CFPB's website states that its Supervision and Examination Manual (Manual) "is our guide for examiners to use in overseeing companies that provide consumer financial products and services. Our manual describes how the CFPB supervises and examines these providers and gives our examiners direction on how to determine if companies are complying with consumer financial protection laws." Under the CFPB's guidelines, all officers, employees and audit personnel should receive specific, comprehensive training that reinforces and helps implement written policies and procedures. This training must include requirements for compliance with Federal consumer financial laws,[2] including prohibitions against unlawful discrimination and unfair, deceptive, and abusive acts and practices. The training therefore cannot be limited to the board and management, but must be received by each person in the company, specifically tailored as appropriate to the function that they individually perform. Moreover, the training must be adaptive over time, revised to respond to new regulatory requirements, newly offered products or services, and new marketing or distribution channels.

Who The CFPB Is Watching

The CFPB has since extended this obligation to cover the conduct of third parties. In its April 13, 2012 bulletin, the CFPB stated that "[s]upervised banks and nonbanks are expected to oversee their business relationships with *service providers* in a manner that ensures compliance with Federal consumer law" and that "[d]epending on the circumstances, legal responsibility may lie with the supervised bank or nonbank, as well as with the supervised service provider." This obligation includes, but is not limited to:

[1] *See, e.g., State Nat'l Bank of Big Spring v. Lew, et al.*, No. 13-5247 (D.C.Cir. July 24, 2015) – held that regulated banks have standing to challenge the constitutionality of the CFPB, *but* remanded for additional briefing on the specific question of whether the CFPB *is* unconstitutional or not. Until that's decided, what the CFPB says, controls.

[2] The Manual enumerates the laws that financial institutions must comply with and that are therefore to be included in the training, which are (a) the Real Estate Settlement Procedures Act (RESPA), (b) the Truth-in-Lending Act (TILA), (c) the Electronic Funds Transfer Act (EFTA), (d) the Fair Debt Collection Practices Act (FDCPA), (e) the Homeowners Protection Act (HPA), (f) the Fair Credit Reporting Act (FCRA), (g) the Gramm-Leach-Bliley Act (GLBA), and (h) the Equal Credit Opportunity Act (ECOA).

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- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law.

- Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities.

- Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive or abusive acts or practices (UDAAP).

- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law.

- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.

Examples of how seriously the CFPB takes the forgoing obligation may be found in multiple enforcement actions taken in the past year. In *In re U.S. Bank, N.A.*, the CFPB brought an action against U.S. Bank based upon the conduct of Affinion, a third party vendor. Specifically, U.S. Bank marketed identity protection products, including credit monitoring and credit retrieval services, and referred interested customers to Affinion, which offered for sale, sold and administered the products pursuant to agreements with U.S. Bank. The consent order found that U.S. Bank's customers who enrolled for the products were required to provide sufficient written authorization, as required by the FCRA, but found that in many cases some time passed before the written authorization was obtained, or the authorization was never obtained at all, or the authorization could not be processed by the credit reporting agencies because they were unable to match the customer's identification information with the agency's own records. As a result, customers were billed the full fee for the products even when they were not receiving all of the advertised benefits of the product. U.S. Bank itself was held liable because its service provider management and quality assurance procedures failed to prevent, identify, or correct the billing for services that were not provided. Consequently, in addition to being ordered to take corrective actions, including, but not limited to, regular on-site audits of Affinion, U.S. Bank was ordered to reserve approximately $48 million for restitution redress payments, and was fined a further $5 million.

In *In re Guarantee Mortgage Corporation*, GMC was found to be in violation of consumer financial laws for improperly compensating a third-party marketing firm based upon resulting loan originations. The consent order permanently enjoined GMC, its officers, agents, employees and attorneys from making or receiving compensation payments for loan originations in violation of TILA, and imposed a civil fine of $228,000.00. More significantly, recognizing the insolvency of GMC, the order made the fine payable by the owners of GMC to the extent that the company itself could not pay the fine.

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Finally, in *In re Citibank, N.A.*, Citibank was found liable as a result of the conduct of Citicorp Credit Services, Inc. (USA) (CCSI). The consent order found that CCSI's misconduct had included (a) deceptive acts related to the marketing, sale and membership retention for credit card add-on products; (b) telemarketing of credit card add-on products, in violation of the Telemarketing Sales Rule;[3] (c) improper billing and administration of the credit card add-on products; and (d) improper collection of delinquent accounts. In consequence, Citibank was ordered to deposit $700 million into a trust account for restitution to the injured consumers, and was fined a further $35 million.

Who You Need To Be Watching

As noted earlier, per the CFPB, the obligation extends to "service providers." The question, then, is who is a "service provider?" Under Dodd-Frank, a "service provider" is "any person that provides a material service to a covered person in connection with the offering or provision by such person of a consumer financial product or service, including a person that (i) participates in designing, operating or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than knowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes)." The statute exempts certain categories of persons providing space for advertisements or performing ministerial services of the type provided to business generally (like notaries). Yet essential terms and phrases (like "provides," "participates" and "processes") are not defined in Dodd-Frank, nor has the CFPB elected to clarify their meaning, leaving interpretation of whether someone qualifies as a service provider open to case-by-case analysis. However, in the mortgage servicing context, the CFPB defined the phrase "service provider personnel" in its April 13, 2012 memo to include personnel "responsible for handling foreclosure proceedings," allowing that foreclosure counsel would probably be included. And, as seen in the above enforcement actions, the term "service provider" clearly encompasses (a) identity protection vendors; (b) outside marketing firms; and (c) third-party providers of credit card add-on products

That said, the proper characterization of a number of important players is left in limbo. For example, in those instances where the involvement of a title company or an attorney is required by statute (like Texas home equity loans) or by best practices (like title insurance), does that third-party become a "participant" in the "operation" of the loan, and therefore a "service provider" for whom the lender may be held liable? Does the scope of the term extend to appraisers? To surveyors? To escrow agents? What about inspectors or property preservation firms? How about the issuers of force-placed insurance? All of the aforementioned are traditionally independent contractors over whom the lender or servicer exercises minimal control, yet each plays as much or more of a role in the origination or servicing of a loan than does foreclosure counsel, and might, "depending on the circumstances," be deemed to be a service provider.

[3] 16 C.F.R. §§ 310.3(c), 310.4(a)(7).

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What You Need To Be Doing

In light of the foregoing, best practice is to assume that, save and except for those that are expressly exempted, any person or entity that plays a role in the loan origination or servicing process may be deemed to be a service provider, and should be supervised as such. Consequently, vendor agreements should (a) contain or expressly incorporate written policies and procedures crafted to ensure vendor compliance with consumer financial protection laws and regulations; (b) establish a regular reporting procedure to document vendor compliance; and (c) provide for periodic auditing of the vendor to confirm compliance. Moreover, given that CFPB complaints and requests for information typically require a fairly quick turnaround, the financial institution should create and maintain an indexed, readily searchable archive that accurately documents (a) past and present vendor contracts; (b) vendor reporting; (c) audits of vendors; (d) communications, both written and oral, with vendors concerning compliance issues; (e) any internal communications concerning vendor management policies and compliance issues, including, but not limited to, minutes of any applicable executive committee or board of directors meetings; and (f) any corrective actions taken by or with respect to vendors found to be non-compliant. While the foregoing is no guarantee of safety, it would, in the event of a CFPB action, go a long way toward showing good faith on the part of the financial institution and provide the ability to respond timely and completely.

A Treasure Trove: Publication of Complaint Data by the CFPB

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The CFPB complaint database was created with altruistic intentions. They envisioned a tool that consumers could use to search a downloadable database for research on a product or specific lender, just as they would research any other service they use in their day to day lives. But who is using this data the CFPB is collecting and publishing? You can be certain that the CFPB has, and that it will use the aggregated data to focus in on areas of concern for upcoming exams and possible enforcement actions.

Then there is the looming fear that the searchable data will be used for less benevolent purposes by plaintiffs' attorneys trolling for ammunition in their current cases against a specific lender or servicer pending in the same jurisdictions – or worse yet, for possible class actions. Remember, this data is searchable and sortable by date received, zip code, state, keywords, products, issues, sub issue and lenders.

This is troublesome enough. And when you combine it with the disclaimer language from the CFPB's own website – ***"We don't verify all the facts alleged in these complaints, but we take steps to confirm a commercial relationship"*** – troublesome turns into a nightmare. If you haven't already looked at the database, it's worth reviewing the accusations and information that are being presented. The database can be found here: www.consumerfinance.gov/complaintdatabase/.

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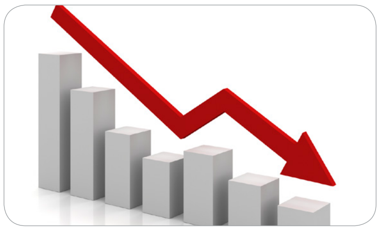

In the CFPB's final policy statement, they confirm their intention was to offer companies the option of responding to the public narrative with a public facing response of their own. This was met by an industry push back that stated in part: "companies would be limited in their ability to provide public-facing unstructured narrative responses...limited by laws such as the Gramm-Leach-Bliley Act, Regulation P, the Fair Credit Reporting Act, Regulation V, and the Fair Debt Collection Practices Act." It would also be very costly and burdensome to staff a department trained in the risks involved in drafting responses that would be viewable by the public.

The result was the CFPB providing a set list of nine options that companies can utilize as their public response. They are:

1. Company acted appropriately as authorized by contract or law;

2. Company disputes the facts presented in the complaint;

3. Company believes the complaint is a result of an isolated error;

4. Company believes the complaint is the result of a misunderstanding;

5. Company believes complaint represents an opportunity for improvement;

6. Company believes complaint caused principally by actions of third party outside the control or direction of the company;

7. Company can't verify or dispute the facts in the complaint;

8. Company believes the complaint is a result of a discontinued policy or procedure and; and

9. Company chooses to not provide a public response.

10. Can you guess the most popular response? It's not surprising to learn that the industry overwhelmingly chooses number nine, No Public Response.

This database may be unfair to our industry, but while we have it, we recommend that any company that is responding to CFPB complaints review the complaints and corresponding aggregated data attributed to them in this database. It can be a quick and cost-effective way to see if you have a spike or trend in complaints for any product area, service or specific region. Customer complaints are a great way for service providers to get ahead of any issues before they become costly litigation matters.

Flaws and All, CFPB's Arbitration Study Sparks Vigorous Debate over Next Steps in Regulating Mandatory Arbitration Clauses

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As expected, the reaction to the Consumer Financial Protection Bureau's (CFPB) arbitration study report, released in March 2015, has been vociferous. All sides of this important debate are loudly proclaiming that their arguments for, or against, mandatory arbitration clauses have been vindicated; or alternatively, that the study is unfair, misleading and should not be used to support regulatory action in this area.

The CFPB's arbitration study examined six different consumer finance markets, including credit cards, checking accounts, prepaid cards, payday loans, private student loans and mobile wireless contracts. The report criticizes the use of mandatory, pre-dispute arbitration agreements in financial contracts with consumers. The CFPB found mandatory arbitration clauses to be detrimental to consumers' interests when compared to class action litigation.

After the study was released, 58 members of Congress wrote to CFPB Director Richard Cordray commending the CFPB for completing its study, reiterating the position that mandatory arbitration is "designed to stack the deck against consumers," and urging the CFPB to swiftly start the rulemaking process to eliminate the use of mandatory arbitration clauses in consumer contracts. Not to be outdone, the CFPB also received a letter from 85 Republican members of the House and Senate heavily criticizing the report as lacking in fairness and transparency, and asking the CFPB to reopen the study and allow for public comment.

Prominent consumer finance trade associations, including the American Bankers Association, the Consumer Bankers Association, and the Financial Services Roundtable, share the Republican congress-members' view. The trade associations submitted detailed comments and highlighted some of the CFPB's pro-arbitration findings that contradict the study's final conclusions. The associations advocate that the CFPB must conduct additional research into a number of other issues prior to any rulemaking, including customer satisfaction with the arbitration process, the economic consequences of an arbitration ban, and whether a ban would hurt consumers in light of U.S. Supreme Court case law making it more difficult to obtain class certification.

Many lenders are lauding the empirical critique of the CFPB's study done by George Mason University law professor Todd Zywicki, and University of Virginia law professor Jason Scott Johnston. The professors argue that the CFPB's report does not support adoption of sweeping regulation of mandatory consumer arbitration clauses. According to the professors, the CFPB's data does not allow for meaningful comparisons between arbitration and class actions because the study compares arbitration *awards*

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(i.e. an award entered by the arbitrator after hearing all the evidence) to class action *settlements*, inviting "a false apples-to-oranges comparison." The professors also fault the study for including data on class action settlements involving lawsuits against debt collection agencies. The CFPB said it was limiting its examination of class settlements to disputes in which an arbitration clause might have applied, but debt collectors are not parties to a consumer's arbitration agreement with a creditor and so these settlements should have been excluded. The professors conclude that more evidence is needed before the CFPB can proclaim consumers are harmed by arbitration and would instead "benefit from unleashing class action litigation more routinely."

There remains significant hurdles for the CFPB to overcome before it can take any rulemaking action on this issue. Now that the report has been finalized, the CFPB has the attention of lawmakers on both sides of the aisle. Notably, members of the House Appropriations Committee recently approved a measure that will prohibit funding for the CFPB to issue a final rule on the use of arbitration until the CFPB conducts a "thorough" (and likely peer-reviewed) study. It remains to be seen how quickly the CFPB will act on this report, but we all will be watching closely.

Financial Services Industry: Be Aware of Proposed White Collar Overtime Regulations

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The financial services area received a defeat earlier this year when the United States Supreme Court in March upheld the Department of Labor's (DOL) Administrative Interpretation concluding that mortgage loan officers do not qualify for the administrative exemption to the Fair Labor Standards Act (FLSA). Collective actions in this area have resulted in significant settlements, including a reported $36 million settlement for residential loan appraisers who were determined not to be exempt from the FLSA's overtime and recordkeeping requirements. The DOL has now proposed a significant change to the salary requirement for an employee to be exempt from the FLSA's overtime and recordkeeping that will impact millions of workers, including those in the financial services area. Positions that previously were classified as exempt under either the executive or administrative exemption may need to be re-examined, even if the employee's job duties meet the requirements for the exemption. Positions that could be impacted if they do not satisfy the new salary requirement include branch managers, assistant branch managers, commercial appraisers, department managers and lending specialists.

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Financial Services Industry: Be Aware of Proposed White Collar Overtime Regulations, *continued*

This issue began with a March 13, 2014, memorandum from President Barack Obama directing the DOL)to "modify," "streamline" and "simplify" the federal regulations regarding exemptions to overtime under the FLSA. The goal? To increase the number of workers eligible for overtime.

On June 30, 2015, the DOL announced the highly-anticipated proposed changes to the overtime regulation. Although there was much speculation about the DOL attempting to simplify the job duties tests for overtime exemptions, they made no such changes. Instead, the department proposed an increase in the salary level required for exemption to overtime from $455 per week ($23,660.00 per year) to $970 per week ($50,440.00 per year) for 2016. The DOL also increased the salary level for the exemption for highly compensated individuals from $100,000.00 per year to $122,148.00 per year. Additionally, the DOL indicated that they intend to include a mechanism to update automatically the salary level annually through a percentage tied to the Consumer Price Index. The new regulations also may include some limited ability to include bonus in determining if the salary level is met. Although the DOL made no changes to the job duties test required for exemption, there is still a possibility that a future change could be proposed, since the department asked for comments on such changes.

The 295-page Notice of Proposed Rulemaking (NPRM) outlines the DOL's proposed changes and also includes extensive commentary on the rationale for the changes and the expectations regarding its applications.

Here are some of the more significant questions and our answers:

1. **What is the difference between an "exempt" and "non-exempt" employee? Is this the same as salaried versus hourly?**

Short Answer: An exempt employee is ineligible for overtime, while a non-exempt employee is eligible. This distinction is commonly called "classification." Exempt/non-exempt is not the same as salaried/hourly. The FLSA, which is the federal law governing wage and hour issues, has three basic requirements: payment of the federal minimum wage ($7.25 per hour), overtime pay for time worked over 40 hours in a workweek and record keeping.

The FLSA, however, "exempts" certain employees from the minimum wage and overtime pay requirements. There is a common misperception that paying an employee a salary means they are "exempt" from overtime. This is not true. Payment of a salary is only one of the requirements for exemption. To qualify for the exemption, employees must:

a. Be paid on a salary basis (employers cannot reduce the salary because of quality/quantity of work or when employee works less than a full day);

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b. Be paid a certain salary level (currently $455/week or $23,660 annually); and

c. Meet a designated job duties test (that shows the employee primarily performs certain supervisory duties, compared with hourly workers performing "line" work).

These requirements are set forth in detail in the DOL overtime regulations. If all three of these requirements are not met, the employee is non-exempt. Job titles do not determine exempt status. Employers are required to pay non-exempt employees overtime and to maintain certain records of work hours for non-exempt employees.

2. Do I have to increase my affected managers' pay?

Short Answer: No. Although this is one of the myths that is being spread about the proposed regulation, there is no requirement to increase any individual's pay. Businesses have other options such as placing managers and other previously exempt employees on an hourly rate or classifying the employee as a salaried non-exempt employee where the employee is quoted a salary rate, with the realization there will be overtime owed for all hours over 40 per work week.

3. Can I just make sure my managers do not work more than 40 hours per week?

Short Answer: You can make it a policy that managers cannot work overtime, but if they violate the policy, and they do not qualify for exemption, you must pay them overtime. Unless the manager meets all the tests for being exempt, including the new salary level requirement, the employer has an obligation to keep track of the employee's hours. Failure to do so can have two consequences. First, it is a violation of the record-keeping requirements and can subject an employer to a fine from the DOL, and we expect the DOL will be sending plenty of auditors out to ensure compliance. Second, if the employee claims that they did work overtime hours for which he or she was not paid, and the company has not kept adequate records, the employer is at the mercy of whatever believable story the employee can produce as to how many hours he or she worked during the relevant period. An employer can have a policy in place that prohibits an employee from working overtime; however, if the employer "knew or should have known" that the employee worked in excess of 40 hours in a workweek, they will still be required to pay the overtime. However, the employee can be disciplined for violating the overtime policy.

4. Under the proposed new rule, which employees will be exempt from overtime?

Short Answer: Salaried employees who make at least $50,440.00 annually and perform primarily "white collar" or supervisory duties will be exempt. The new proposed DOL overtime regulations increase the salary level (Test #2 above) from $455.00 per week ($23,660.00 annually) to $970 per week ($50,440.00 annually). These amounts will also be indexed for inflation, to combat the time lag these amounts experienced from their last adjustment many years ago. To maintain the exemption, the employees will still need to be paid on a salary basis and meet the job duties test (which, at this point, the DOL did not amend).

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5. **Will commissions or bonuses be counted as part of the $50,440.00 per year salary level test?**

Short Answer: Bonuses? Probably, but to a limited extent. Commissions? Doubtful. The DOL is "considering" whether to allow nondiscretionary bonuses that are tied to productivity, profitability and/or specified performance metrics to satisfy some portion of the salary level requirement. The department suggests limiting bonus payments to satisfy only 10 percent of the weekly salary level and that "employees would need to receive the bonus payments monthly or more frequently."

At this point, the DOL is rejecting the idea of counting commissions toward the salary level requirement. The department is seeking comments on the appropriateness of including commissions as part of the nondiscretionary bonus and other incentives that could partially satisfy the salary level test. It also appears that the DOL is not considering counting any other paid benefits toward satisfaction of the salary level test.

6. **Can we limit the number of overtime hours these non-exempt employees work?**

Short Answer: Definitely. No employer is required to guarantee overtime work or pay an employee more compensation as a non-exempt employee than what the employee was earning as an exempt employee. Employers should have an overtime policy stating when and if overtime is allowed (e.g., if an employee is required to get prior authorization of the overtime and from whom). If an employer knew or should have known an employee is working unauthorized overtime, however, the employer may discipline the employee in accordance with the overtime policy, but will still owe the employee the overtime pay.

7. **What are the most important considerations for employers when analyzing these proposed changes?**

Short Answer: Hidden overtime or time outside of the normal working hours that must now be tracked. Most exempt employees do not keep records of their hours. Therefore, many employers do not have adequate data on the number of hours their exempt employees are working. When these exempt employees are re-classified as non-exempt (because they no longer meet the salary level test), these hours will need to be tracked and any hours over 40 in a work week will be considered overtime. Many FLSA lawsuits allege employers failed to include time spent by non-exempt employees performing work activities outside of their normal shifts. Non-exempt employees may perform a variety of potentially compensable job-related activities during their "off-the-clock" time, such as taking work home, making/receiving job-related telephone calls and e-mails at home, working through lunch, working before or after regular shifts, taking care of work-related equipment or job-related "volunteer" work. This compensable time must be considered when re-classifying employees and working within the employer's payroll budget.

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8. If this rule goes into effect, will we have to convert all of our salaried exempt employees making less than $50,440.00 per year to hourly employees?

Short Answer: No, hourly is not the same as non-exempt. An employee can be non-exempt and still paid a salary. The FLSA does not require that non-exempt employees be paid hourly. When properly done, it is perfectly legal to have a salaried non-exempt employee. A non-exempt salaried arrangement is simply when an employer pays a non-exempt employee a fixed salary for the week instead of paying the employee by the hour. The employee receives overtime pay based on the salary for every hour worked over 40 during the week. The employer still has to track employees' work hours every week regardless of the method of payment.

9. When will this rule go into effect?

Short Answer: Although we cannot definitively predict when the DOL will publish its final rule, we believe it will happen in early 2016, and employers will have to be in compliance as of the effective date of the rule, which can range anywhere from 30 to 120 days after the final rule is published. The administration has been very vocal about its desire to see this change in the law implemented quickly, so we expect a short compliance period (i.e., less than 120 days). Some published speculation predicts the timing will precede the Fall 2016 election by a sufficient period to allow political campaigns to take credit for increasing take-home pay in the election cycle. The possibility that the effect of the final rule will be to reduce hours worked, rates of pay, bonuses or employment is likely not part of the political calculus.

10. What should we do now?

Short Answer: Take advantage of the time before the final rule is issued to identify and correct any mistakes. Employers should identify the affected employees and possible issues relating to the re-classification of those employees, such as budgetary effects, workforce effects (job/compensation restructuring), employee morale, etc. Does your time keeping mechanism work with the additional employees? Is it possible to get the same work hours under the employer's current payroll budget? How is the information going to be communicated to employees and what is the potential effect on morale and work performance? Right now is also an opportunity to analyze and to correct any misclassification. The changes in the law are being reported in mainstream news, so employees will be expecting changes of some type. Employers must weigh the increased costs of compensation and recordkeeping against the cost of simply moving managers above the new ceiling to eliminate the cost and risk of compliance. As many labor markets are tightening and pay is rising from market forces, this regulatory uncertainty is one more factor to consider in determining compensation and labor costs.