Compliance Check Up

June 1, 2024

Friends,

Welcome to another edition of the Compliance Check Up.

As promised in our last edition, we asked UBB's USource team to provide our readers with information regarding recent Department of Labor and FTC issuances that may affect your bank. Our feature article is all about those issues.

In other news, the long-awaited Supreme Court decision regarding the constitutionality of the CFPB's funding and structure has been finalized, and the brakes are now off the Bureau. Several items were pending including 1071 and 1033 of the Dodd-Frank Act, among others, and we can expect the Bureau to move forward quickly with many things that were pending, so buckle up everyone.

Along with several new issuances from the regulatory agencies, there were also several enforcement actions published. They are all over the regulatory map and cover a litany of topics, but they are a window into the minds of your examiners and should be reviewed.

Thank you for subscribing to our newsletter. Please share this link with those at your organization or peers who aren't already signed up for the Check Up. If you have any questions or concerns, call us or email your questions to our Compliance Hotline.

Sincerely,

The UBB Compliance Services Team
614-400-2699

The information that follows was provided to us by USource, UBB's human resources consulting division, and reprinted here for your information. We thank the USource Team for their contribution.

Fair Labors Standards Act (FLSA) New Overtime Rule:
The U.S. Department of Labor (DOL) has issued its Final Rule to increase the minimum salary requirements for the "white collar" exemptions from minimum wage and overtime pay requirements under the Fair Labor Standards Act (FLSA).

The increases to the minimum salary level for the white-collar exemptions will take place in two phases over six months from the current $694 per week ($35,568 per year) to:

- July 1, 2024: $844 per week ($43,888 annually)
- Jan. 1, 2025: $1,128 per week ($58,656 annually)

The highly compensated exemption (HCE) total annual compensation level will increase from its current $107,432 per year to:

- July 1, 2024: $132,964 per year
- Jan. 1, 2025: $151,164 per year

To be exempt from overtime under the FLSA's “white collar” executive, administrative and professional exemptions, employees must be paid a salary of at least the threshold amount and meet certain duties tests. If they are paid less or do not meet the tests, they must be paid 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek.

The salary thresholds will be updated every three years to reflect current earnings data, beginning July 1, 2027.

The Final Rule is slated to take effect July 1, 2024. Formal publication in the Federal Register is pending. Whether the Final Rule will take effect July 1 remains to be seen. As with the white-collar rules issued under the Obama and Trump Administrations, legal challenges to the Biden white-collar rule are anticipated. It is possible a federal court will enjoin the DOL from enforcing the Final Rule while the legal challenges are pending, that leaves employers in a difficult position of preparing to comply while the rule’s prospects are unclear.

What Should We Be Doing?

Employers should put a strategy in place to effectuate changes by the July and January deadlines in the event the rule does go into effect. For now, employers need to identify currently exempt employees who do not satisfy the new minimum salary threshold and devise a strategy for compliance.

Conduct your own employee classification audit to ensure that employees are being classified correctly and that their job duties meet the federal requirements for exempt status.

Employers have options to minimize the financial impact of reclassifying employees as nonexempt. These include reducing their rate of pay so that the outcome of any overtime hours worked will be cost-neutral. Employers also can limit nonexempt employees' overtime hours.

FTC Final Rule Bans Most Non-Competes

On April 23, 2024, the Federal Trade Commission ("FTC") issued a final rule effectively banning all existing non-compete agreements and prohibiting new non-competes, concluding that non-competes are an unfair method of competition under Section 5 of the FTC Act with a few exceptions.

What is a "non-compete"?

The final rule defines "non-compete clause" as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the terms or condition." It further defines "term or condition of employment" as including but not limited to "a contractual term or workplace policy, whether written or oral."

Employers should pay particular attention to the phrase "functions to prevent" in the above definition. As used here, it means that any term or condition that is too broad or onerous as to effectively (although maybe not explicitly) prohibit or penalize a worker from accepting other work or starting a new business after the conclusion of their employment will be considered a non-compete clause. *A term that "functions" in such a way will be unenforceable against the worker.*

When does the rule go into effect and what must an employer do?

The Federal Trade Commission's final rule broadly banning non-

compete clauses between employers and workers, which was initially released on April 23, 2024, was published in the Federal Register on May 7, 2024. Therefore, the ban will take effect on September 4, 2024, unless it is enjoined or otherwise delayed by legal challenges.

By September 4, 2024, employers are required to notify workers that it is an unfair method of competition to enforce or attempt to enforce a non-compete clause, and that by the effective date the worker's non-compete clause will not be, and cannot be, legally enforced against them.

The notice must identify the person who entered into the non-compete clause with the worker. The notice can be delivered to the worker in one of four ways: (1) on paper delivered by hand to the worker; (2) by mail at the worker's last known personal address; (3) by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address; or, (4) by text message at a mobile telephone number belonging to the worker. The notice must be clear and conspicuous. The FTC also states that mass communication, such as a mass email to current and former workers, is appropriate.

The rule contains model language for employers to use when notifying their workers. And while it does not appear that an employer *must* use this exact language, the rule contains a safe harbor provision which states that by following the model language the employer complies with the rule.

Does this apply to all workers and all non-competes?
No, there are a few exceptions to the rule.

The rule does not apply to *current* non-compete clauses for senior executives. With respect to senior executives, the rule only affects non-compete clauses entered into *after* the effective date of the rule. A senior executive is a worker who (1) was in a policy-making position; and (2) received a total annual compensation of at least $151,164 in

the preceding year or its equivalent when annualized if the worker was employed during only part of the preceding year. The rule does not apply to a non-compete clause entered into pursuant to the sale of a business entity, the sale of the person's ownership interest in a business entity, or the sale of substantially all of a business entity's operating assets. The rule does not apply if a worker violates his or her non-compete prior to the effective date of the rule, the employer can still pursue appropriate remedies for that violation even once the rule is in effect.

What about State laws?

The rule does not exempt any person from complying with state statutes and regulations regarding non-competes. However, the rule supersedes state laws to the extent that such laws would permit or authorize a person to engage in conduct that the rule deems unlawful.

Legal challenges are already here.

One day after the final rule was announced, the FTC was sued by the US Chamber of Commerce and several other business groups seeking to invalidate the rule. A complaint filed in a Texas federal court alleges that the FTC lacks authority to issue rules defining unfair methods of competition. We will be monitoring this situation and communicate any updates.

What should we be doing?

Despite the pending legal challenges, employers should review their existing non-compete agreements and prepare to issue a notice to their workers. Employers should also review any current non-solicitation, non-disclosure, and other restrictive agreements because, if written broadly enough, such agreements may be unenforceable under the new rule. It is advised to contact an attorney if you feel such agreement may be unenforceable.

Expansion of Fiduciary Definition of ERISA – Effective 9/23/2024

The Department of Labor (DOL) on April 23 finalized the long-awaited

fiduciary rule, which aims to modernize and increase investment advice standards for retirement accounts. The rule will take effect on Sept. 23, 2024.

The Retirement Security Rule, updates the definition of an investment advice fiduciary under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code so that providers adhere to "high standards of care and loyalty" when recommending investments and ensures that financial advisors, brokers and insurance agents are held to the fiduciary standard on rollover individual retirement accounts.

The rule applies a best interest standard to advice that plan sponsors receive about which investments to include in 401(k) and other employer-sponsored plan lineups. The rule, however, clarified that human resource professionals will not be interpreted as giving professional advice when they discuss general aspects of the retirement plan a company provides.

Acting Labor Secretary Julie Su said the rule "protects the retirement investors from improper investment recommendations and harmful conflicts of interest. Retirement investors can now trust that their investment advice provider is working in their best interest and helping to make unbiased decisions."

Where can I find more information?
Federal Register :: Retirement Security Rule: Definition of an Investment Advice Fiduciary

If you're interested in learning more about USource, please contact Karen.VonGuten@ubb.com or 866.394.1984.

LENDING

May 1 – HUD released guidance on April 29th regarding application of the Fair Housing Act to advertising credit and other

real estate-related transactions through digital platforms. In particular, through use of automated systems, such as algorithmic processes and Artificial Intelligence (AI). The guidance is in response to a 2023 Executive Order by President Biden.

May 1 – FHFA announced Fannie Mae and Freddie Mac's new Reconsideration of Value (ROV) policies, which will allow borrowers to challenge appraisals if they believe they are inaccurate or biased.

May 10 - A federal judge in Texas issued a preliminary injunction blocking the CFPB's credit card late fee rule from taking effect on May 14, 2024.

May 16 – The FHFA issued a request for input on the Federal Home Loan Bank's (FHLB) core mission activities as the agency considers next steps for rulemaking. Input must be submitted electronically here by July 15, 2024.

May 17 – In light of ongoing litigation, the CFPB has extended compliance deadlines for the section 1071 rule requiring data collection for certain business loans. The earliest compliance date for high volume lenders will be July 18, 2025.

May 22 – The CFPB issued an interpretive rule to address applicability of Regulation Z to lenders that issue digital user accounts used to access credit, including those that market loans as Buy Now, Pay Later (BNPL).

May 30 – The CFPB issued a request for information (RFI) regarding the impact closing costs charged by providers of mortgages and real estate settlement services have on borrowers. Comments are due by August 2, 2024. Trade groups responded the same day.

DEPOSITS

May 3 – The Federal Reserve announced a request for comment on a proposal to expand operating days of the FedWire Funds Service and the National Settlement Service to 22 hours per day, 7 days per week, every day of the year. Currently, the services are only available Monday through Friday, excluding holidays.

May 13 – The Federal Reserve and CFPB announced the adjusted dollar amounts related to availability of customer funds under Regulation CC that will be effective July 1, 2025.

May 13 – The FDIC will hold webinars on the final rule governing use of the Official Signs and Advertising Statement, Misrepresentations of Insured Status, and Misuse of FDIC's Name or Logo.

May 29 – The CFPB posted a blog in response to an ongoing case with Citibank regarding consumer initiated wire transfer scams via online banking. The Bureau determined that when a bank connects wire transfer capabilities to its online consumer banking platform, and a person authorizes (or a scammer purports to authorize) a transfer online, EFTA applies to the transaction. Trade groups do not agree with the decision.

AML/CFT & FRAUD

May 6 – FinCEN's Director Andrea Gacki spoke of various AML/CFT topics, such as status of AML Act implementation, beneficial ownership registry, enforcement actions, SAR tips, 314(b) participation, and more.

May 9 – A new public-private partnership called *Project Fortress* was launched to help defend the financial system from cyberattacks and provide tools banks can use to scan for cyber vulnerabilities.

May 10 – OFAC issued an interim final rule to require electronic filing of certain submissions and to describe and modify certain reporting requirements related to blocked property and rejected transactions. As of August 8, 2024, requests to release funds must be sent via email to OFACReport@treasury.gov and include the phrase "31 CFR 501.806—Request for a Compliance Release" in the subject line of the email. Comments are accepted until July 10, 2024.

May 10 – OFAC launched its new Sanctions List Service (SLS), which provides users with easy access to up to date sanctions lists and data for immediate download. The SLS also contains a feature that allows creation of custom datasets based on certain sanctions lists and programs.

May 13 – FinCEN and the SEC proposed a rule to apply CIP obligations to certain investment advisors and also issued a Fact Sheet.

May 16 – The U.S. Department of Treasury issued the *2024 National Strategy for Combatting Terrorist and Other Illicit Financing* report, which details how the U.S. will modernize AML/CFT innovation to mitigate risks.

May 29 – The Department of Treasury released the first ever Non-fungible Token (NFT) illicit finance risk assessment.

May 29 – The OCC issued Alert 2024-1 notifying that consumers have reported receiving various forms of fictitious correspondence via email, Google Chat, and the U.S. Postal Service related to up-front scams involving inheritance or beneficiary payouts. Victims are contacted regarding funds being held on their behalf by the OCC and are asked to provide the scammers general personal information.

MISCELLANEOUS

May 3 – The FDIC, OCC, and FRB released the *Third-Party Risk Management, A Guide for Community Banks*. The guide provides potential considerations, resources, and examples through each stage of the third-party relationship life cycle. The OCC issued Bulletin 2024-11, and FDIC issued FIL-19-2024.

May 3 – The OCC, FDIC, and FHFA approved a proposed rule to implement section 956 of the Dodd-Frank Act to establish new requirements for incentive-based compensation for banks based on a tiered approach according to average total consolidated assets of at least $1 billion. The OCC published Bulletin 2024-12, and the FDIC published FIL-21-2024.

May 15 – FDIC Chairman Martin Gruenberg spoke before the Committee on Financial Services on the recent FDIC workplace culture findings, state of the banking industry, condition of the Deposit Insurance Fund, efforts to strengthen regulation and

bank supervision, regulatory initiatives, and more.

May 15 – Acting OCC Comptroller testified on agency priorities before the Committee on Financial Services. Mr. Hsu discussed adaptation to digitization, fairness in banking, the CRA final rule, and more.

May 16 – The Supreme Court ruled the funding mechanism established to fund the CFPB is constitutional. The CFPB issued a statement in response to the ruling.

May 16 – The Federal Reserve is hosting an *Ask the Fed* webinar on June 4, 2024 at 2pmET to provide an update on FedNow. Register here.

May 17 – Federal Reserve Governor Michelle Bowman spoke about regulatory reform and compliance responsibilities, third party risk management, and more.

May 20 – FDIC Chairman Martin Gruenberg announced he is stepping down in light of recent workplace culture events at the agency. He will continue as Chairman until a successor is confirmed.

May 22 – The FDIC published the *2024 Risk Review*, which provides an overview of banking risks in 2023 in five broad categories: market, credit, operational, crypto-asset, and climate-related financial risks.

ENFORCEMENT ACTIONS

May 7 – The Federal Reserve Board issued an enforcement action with First Citizens Bank of Butte in Montana related to AML/CFT deficiencies around board and management oversight, SARs, CDD, staffing, and more.

May 7 – The CFPB issued an order against Chime alleging they failed to refund consumers' remaining balances from closed accounts within 14 days or customer refunds within 90 days. The order requires Chime to pay a $3.25 million civil money penalty, and pay at least $1.3 million in redress to consumers.

May 14 – The CFPB distributed more than $384 million to approximately 191,000 consumers harmed by Think Finance, a Texas-based online lender alleging they deceived borrowers into repaying loans they did not owe.

May 17 – The CFPB sued online lending platform/NBFI Fintech SoLo Funds for allegedly deceiving borrowers about the total cost of loans and illegally extracting fees.

May 17 – The FDIC announced settlement with an Arkansas bank and nine former employees of Loan Production Offices (LPOs) for violations of RESPA, FCRA, HMDA, and UDAP through loans to veterans and their families.

May 23 – The OCC announced enforcement actions for May, including those related to a Michigan bank's risk governance framework, an Illinois bank for unsafe or unsound capital and liquidity risk management and strategic and succession planning, and several actions against former bankers for embezzlement or loan fraud.

May 31 – The FDIC announced April enforcement actions, including deficiencies related to flood insurance, AML/CFT/OFAC program, compliance management system (CMS), governance, credit administration, strategic planning, and more.

HOTLINE QUESTION OF THE MONTH

Q: Have you heard of banks using a QR code for loan applications? If so, what regulatory scrutiny could we potentially face?

A: The QR code should be something that simply shunts the user to a webpage. Depending on how the code is used in conjunction with other material, it might be your "one-click" if you are using it in conjunction with any triggering terms, so you have to be careful how it is displayed and what is displayed with it. For instance, if you are advertising a mortgage loan on social

media and that advertisement includes any of the triggering terms found in Reg. Z and the QR code, scanning that QR code should take the user to wherever the rest of the disclosures are housed, much like a “Learn More” button that might be on a website or digital ad.

If it simply says use the QR code to apply for a loan and there are no triggering terms, it can simply go right to the application form.

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