

APR 18 2001

OPINION LTR

Dear

This responds to your letter of July 3, 1996, in which you requested reconsideration of the opinion of the Wage and Hour San Francisco Deputy Regional Administrator ("DRA"). In that opinion, the DRA concludes that employees who work as "Home Office Sales Consultants ("HOSC") are not administrative employees for purposes of the overtime pay exemption of the Fair Labor Standard Act ("FLSA"), 29 U.S.C. § 201 et seq. As discussed below, our review of the relevant information leads us to agree with the opinion of the DRA.

Based on the information that you provided, our understanding of the situation is as follows. You represent a company that provides telecommunications products and services to customers who have home offices. The HOSC works primarily in the company's office, and responds to telephone calls from customers and potential customers. As a result of information that the customer provides, the HOSC recommends that the customer purchase certain of the company's products, and/or the products of other companies. Your letters of October 20, 1993, p.5 and July 3, 1996, p. 2, f.n. 1, indicate that the HOSC recommends the products of other vendors pursuant to a partnership agreement between your client and the other companies. Additionally, the HOSC coordinates the sale and installation of the products that the company sells, provides advice, and responds to customer inquiries and complaints. You agree that the HOSC does not qualify for the professional exemption under 29 C.F.R. §541.3.), and do not request an opinion regarding the outside sales exemption under 29 C.F.R. §541.5. (Letter of September 12, 1995, pp. 1-2). Rather, you seek concurrence with your position that the HOSC qualifies for the administrative exemption under the FLSA and 29 C.F.R. §541.2, because of the functions that (s)he performs for the customers of your client.

As a rule, to qualify as a bona fide administrative position, the position must meet all of the requirements contained in the implementing regulations at 29 C.F.R. § 541.2. However, 29 C.F.R. § 541.2(e)(2) indicates that if the employee earns a

salary of at least \$250 per week, it is permissible to use a "short test" to determine whether the exemption applies. Under the first prong of the short test, an individual will qualify for exemption as a bona fide administrative employee if the primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers. This prong of the test requires that the employees perform activities related to the administrative operations of the business instead of "production" or, saleswork if the business is a retail or service establishment. Martin v. Cooper Electric Supply Co. ("Cooper"), 940 F.2d 896, 901 (3d Cir. 1991); 29 C.F.R. §541.205(a). Under the second prong of the short test, the employee's work must include the exercise of discretion and independent judgment. See also 29 C.F.R. § 541.214. In recognizing that the duties related to the management policies or general business operations may be for the employer's customers, the regulations provide the following:

(d) . . . [M]any bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers.

29 C.F.R. § 541.205(d). In light of your representation that the HOSC earns more than \$250 per week, we examined the issue under the short test.

With respect to performing activities related to the administrative operations of the business so as to meet the first prong of the test, the work must be related to "servicing a business," such as "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control". 29 C.F.R. §541.205(b). In Cooper, the court stated that "'[s]ervicing a business within the meaning of 29 C.F.R. § 541.205(b) denotes activity ancillary to an employer's principal production activity. . . ." 940 F.2d at 904-905. Therefore, one must look at the nature of the employer's business in order to determine whether an employee should be classified as either administrative or production. Applying the regulations and guidelines to the situation that you describe, we are unable to see how the work of the HOSC relates to the "management policies or general business operations" of either the employer or its customers.

First, as the DRA noted, your letters reflect that "HOSC's are primarily in the business of selling products and services." (Letter dated January 30, 1996 from DRA to Edward Reeves ("DRA letter", p. 2). In light of the fact that the HOSC is responsible for producing sales, (s)he performs production, and not administrative activities for the company.

Next, as the DRA determined, there is nothing to suggest that the HOSC is performing work of substantial importance to the management policies or general business operations of the company's customers, so as to be subject to the administrative exemption. Despite your description of the activities of the HOSC, we agree with the DRA that any consultative duties that the HOSC performs "appear to be limited in scope and secondary to sales," and "do not appear to differ much from the duties and knowledge required of sellers of complex electronic equipment . . . ." (DRA letter, pp. 2-3). You compare the HOSC to a telecommunications manager for the customer, and state that the HOSC "gives advice on 'how a business should be run or run more efficiently'" and "the proper way to conduct a business, e.g., advising business how to increase financial productivity." While the type of telecommunications system that a customer chooses may have some impact on its efficiency and productivity, it does not change the fact that the primary responsibility of the HOSC is to "produce sales."

We find nothing in your letters that suggests that the advice the HOSC provides goes beyond the duties related to selling certain products, making certain that the sale is completed satisfactorily, and making efforts to promote future sales by maintaining positive relationships with the customer. Cooper, 940 F.2d at 904. Also, contrary to your suggestion, the HOSC is not converted to an administrative employee as a result of periodically recommending products of the company's partners. The Third Circuit in Cooper observed approvingly that the district court in the case had determined that "advising customers of additional products which may be a necessary or beneficial supplement to their existing orders, and 'negotiat[ing]' on behalf of the company to make a sale to a particular customer, . . . are part and parcel to the inside salespersons[sic] responsibility of producing sales . . . ." Cooper, 940 F.2d at 904. Nor is the HOSC position converted to an administrative position under the FLSA because the company uses a marketing strategy that asserts that the HOSC is not a sales person but a business partner or consultant.

The cases that you cite in support of your claim that the HOSC performs work related to the administrative operations of the business are distinguishable from the situation you describe, and

do not warrant a conclusion that the HOSC is an exempt administrative employee. First, there is no indication that the HOSC provides information related to general business operations of the customers. Bratt v. County of Los Angeles, 912 F.2d 1066, 1070 (9th Cir. 1990), cert. den. 498 U.S. 1086 (1991). Next, unlike an administrative exempt Business Analyst who serves as a "first-line in-house reviewer of all proposed sales [by the sales representatives]," and a manager of special marketing related projects, (Reich v. Haemonetics Corporation, 997 F. Supp. 512, 514-515 (D. Mass. 1995)), the HOSC is more akin to the sales representative that the Business Analyst supervises. The HOSC is also unlike an exempt broker (29 C.F.R. § 541.205(c)(5)) or grain merchandiser, who represents "both the buyer and the seller in negotiating, promoting and executing . . . transaction[s]." Herr v. McCormick Grain, 2 Wage and Hour Cas. 2d (BNA) 828, 831 (D. Kan. 1994), vacated and remanded on other grounds, 75 F.3d 1509 (10th Cir. 1996), inasmuch as it appears that the HOSC acts solely on behalf of the employer or the employer's partner, who are sellers, and merely does what is needed to complete sales and to encourage future sales.

In light of the determination that the HOSC position does not meet the first prong of the test for the administrative exemption, it is unnecessary to determine whether the position requires the exercise of discretion and independent judgment so as to be exempt under the second prong of the test. Nevertheless, you did not provide sufficient information regarding how the HOSC carries out responsibilities for us to form an opinion regarding this issue. However, we would like to point out that the fact that the supervisor does not review recommendations of the HOSC is not determinative, inasmuch as sales representatives often recommend products to customers or potential customers without supervisory review.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit 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 request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm that is under investigation by the Wage and Hour

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Division, or that is in litigation with respect to, or requiring compliance with, the provisions of the FLSA.

Sincerely,

Thomas M. Markey  
Acting Administrator