



MAR 17 2003

Dear

This is in response to your request for an opinion regarding whether a finance and insurance (F&I) salesperson employed by a retail automobile dealership is exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) pursuant to Section 7(i) of the FLSA. It is our opinion that FLSA Section 7(i), 29 U.S.C. § 207(i), exempts the F&I salesperson described by your letter from the FLSA's overtime requirements.

**I. Factual Background**

You indicated that virtually all dealerships offer finance and insurance products to their customers and that, after an agreement to purchase an automobile is reached, a customer typically meets an F&I salesperson at the end of the vehicle sale. Generally, F&I salespeople work along with and as part of the new and/or used car sales departments, and typically are physically located together with those departments. The F&I salespeople complete the paperwork necessary to finalize the sales transaction, including purchase and lease contracts, internal dealership forms, and forms required by various regulatory agencies. The F&I salesperson is paid on a commission basis. If a customer agrees to finance the transaction through one of the companies with which the dealership has a relationship (e.g., manufacturer credit arms such as Ford Motor Credit or American Honda Finance Company), the dealership is paid a participation fee, and the F&I salesperson is paid a percentage of that fee as a commission. If a customer agrees to purchase a warranty or other insurance product (e.g., extended warranties, gap insurance, credit insurance), the dealership is paid a participation fee and the F&I salesperson is again paid a percentage of that fee as a commission. On dealer-installed after-market products (e.g., vehicle security systems, sealants and protectants, window treatments), the F&I salesperson earns a commission based on the dealership's charge for the product. In all cases, F&I salespeople are paid directly by the retail dealership.

You asked for the Department's opinion regarding the exempt status of F&I salespeople based on the following assumptions. The F&I salesperson is employed by a retail automobile dealership and performs all activities within the dealership's physical place of business. The dealership is an establishment with an annual dollar volume of sales of goods or services (or of both) of at least 75 per cent that is not for resale and is recognized as retail sales and service in the retail automobile dealership industry. The F&I salesperson is paid directly and exclusively by the dealership, and is covered by the same benefits package, policies and procedures as other

dealership employees. The regular rate of pay for the F&I salesperson is more than one and one-half times the applicable minimum hourly wage under the FLSA. More than half of the F&I salesperson's compensation for a representative period is in the form of commissions as described above. The dealership does not operate a finance company, insurance company, or any other separate business. As part of its business, the dealership assists customers in financing and insuring vehicle purchases.

## II. Analysis

Section 7(i) of the FLSA exempts from the FLSA's overtime requirements "any employee of a retail or service establishment . . . if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable . . . under section 6 [minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." 29 U.S.C. § 207(i). The Wage and Hour Division's regulatory interpretations of Section 7(i) are contained in 29 C.F.R. §§ 779.410 – 779.421.

To qualify for Section 7(i)'s exemption from the overtime provisions of the FLSA, three conditions must be met:

- (1) the employee must be employed by a retail or service establishment;
- (2) the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage; and
- (3) more than half the employee's total earnings in a representative period must consist of commissions on goods or services.

### A. Finance And Insurance Employees Of Automobile Dealerships Are Employed By A Retail Or Service Establishment.

For Section 7(i) purposes, a "retail or service establishment" is "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." See 29 C.F.R. §§ 779.24 and 779.411; Pub. L. 101-157; 103 Stat. 938 (repealing Former FLSA Section 13(a)(2), 29 U.S.C. § 213(a)(2)); Reich v. Delcorp, Inc., 3 F.3d 1181, 1183 (8<sup>th</sup> Cir. 1993) (FLSA Section 13(a)(2)'s definition of "retail or service establishment" applies to Section 7(i) after Congress repealed Section 13(a)(2)).

Your letter indicates that the dealership is an establishment with an annual dollar volume of sales of goods or services (or of both) of at least 75 per cent that is not for resale and is recognized as retail sales and service in the retail automobile dealership industry. This satisfies the definition of retail or service establishment for Section 7(i) purposes. Accord 29 C.F.R. § 779.320 (partial list of establishments whose sales or service may be recognized as retail, including "automobile dealers' establishments"); 29 C.F.R. § 779.318 (characteristics and examples of retail or service establishments, including a discussion that such an establishment "sells to the general public . . . its automobiles . . . and other goods, and performs incidental

services on such goods when necessary"). Accordingly, we conclude that the automobile dealership described by your letter is a retail or service establishment for purposes of Section 7(i).

The F&I salesperson described in your letter is employed by a retail or service establishment – a retail automobile dealer. 29 C.F.R. § 779.308, for example, explains:

In order to meet the requirement of actual employment "by" the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business.

F&I salespeople are "employed by" the automobile dealer "in activities within the scope of its exempt business." Because Section 7(i) exempts "any employee of a retail or service establishment" if Section 7(i)'s compensation requirements are satisfied, all business performed by such an establishment constitutes "activities within the scope of its exempt business" for purposes of Section 7(i) and 29 C.F.R. § 779.308. Your letter indicates that F&I salespeople work along with and as part of the new and/or used car sales departments; are physically located together with those departments; are paid directly by the retail dealership; are employed by retail automobile dealerships; perform all activities within the dealership's physical place of business; and are covered by the same benefits package, policies, and procedures as other dealership employees. F&I employees are thus employed by a retail or service establishment in activities within the scope of that establishment's exempt business. Because the auto dealership described by your letter is operated as a single establishment, all employees of the establishment are exempt if their compensation complies with the requirements of Section 7(i). Employee duties are irrelevant. See, e.g., Mitchell v. Gammill, 245 F.2d 207, 208-09, 211 (5<sup>th</sup> Cir. 1957) (All employees, including employees who did no retail or service work, were exempt under former FLSA Section 13(a)(2) because the provision exempted "any employee employed by any retail or service establishment" and "[i]n most respects of management it was operated as a unit. It was a single establishment.").

The nature of the employer's business, not the work performed by a particular employee, determines whether establishment-based exemptions, like and including Section 7(i), apply. See, e.g., Hamilton v. Tulsa County Pub. Facilities Auth., 85 F.3d 494, 497 (10<sup>th</sup> Cir. 1996) (establishment-based exemption for "any employee employed by an establishment which is an amusement or recreational establishment" exempts "employees employed by amusement or recreational establishments; it does not exempt employees on the basis of the work performed at an amusement or recreational establishment. It is the character of the revenue producing activity which affords the employer the protection of the exemption"); Marshall v. New Hampshire Jockey Club, 562 F.2d 1323, 1331 n.4 (1<sup>st</sup> Cir. 1977) (establishment-based exemption "turns on the nature of the employer's business, not on the nature of the employee's work"); and Gibbs v. Montgomery County Agricultural Soc., 140 F. Supp. 2d 835, 843-44 (S.D. Ohio 2001) (the employer's principal activities, not the work actually performed by employees, determines the applicability of establishment-based overtime exemption). See, also, Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1119 (5<sup>th</sup> Cir. 1974) ("principal activity" of establishment determines eligibility for establishment-based exemption). To the extent that some courts have issued rulings that could be read as inconsistent with this interpretation (see, e.g., Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18 (5<sup>th</sup> Cir. 1973)), we disagree with them. The correct

interpretation of the FLSA holds to a literal reading of the Act's text. Cf. 29 C.F.R. § 779.23 (“[T]he term establishment . . . refers to a ‘distinct physical place of business’ rather than to ‘an entire business or enterprise’ which may include several separate places of business. . . . [T]his is the meaning of the term as used in sections . . . 7(i), 13(a), [and] 13(b) . . . of the Act.”).

Because the establishment is a retail or service establishment, Section 7(i) exempts all employees whose compensation satisfies the requirements of Section 7(i). Indeed, Section 7(i) is an establishment-based and compensation-based exemption. 29 C.F.R. §§ 779.302-.303. If an establishment qualifies as a retail or service establishment, then any employee employed by that establishment is exempt if the employee's compensation satisfies Section 7(i)'s two other requirements: compensation of one and one-half times the minimum wage and more than one-half derived from commissions on goods or services.

The legislative history of Section 7(i) is also consistent with our view that Section 7(i) is an establishment-based and compensation-based exemption: if the establishment qualifies as a retail or service establishment, all employees of the establishment are exempt so long as they satisfy the compensation requirements of Section 7(i). Conf. Rep. No. 87-327, 1961 U.S.C.C.A.N. 1706, at 1712-13 (May 2, 1961). See also, e.g., Reich v. Delcorp, Inc., 3 F.3d 1181, 1186 (8<sup>th</sup> Cir. 1993) 1186 (In-home carpet cleaning business was a retail or service establishment for Section 7(i) purposes and, without limit, was “entitled to pay its employees in the manner provided in § 207(i).”); Martin v. The Refrigeration School, Inc., 968 F.2d 3, 5 (9<sup>th</sup> Cir. 1992) (If an entity is a “retail or service establishment,” Section 7(i) exempts all “employees whose regular rate of pay is 150 percent of the minimum hourly rate and who receive more than half their compensation by way of commissions.”); Mechmet v. Four Seasons Hotel, Ltd., 825 F.2d 1173, 1174 (7<sup>th</sup> Cir. 1987) (The FLSA's overtime “provisions do not apply to employees of ‘a retail or service establishment’ if the employee's regular rate of pay is more than 1.5 times the minimum wage and if more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.”); and Reich v. Cruises Only, Inc., No. 95-660-CIV-ORL-19, 1997 WL 1507504, at \*6 (M.D. Fla. June 5, 1997) (Travel agency “is a retail or service establishment under 29 U.S.C. § 207(i) and thus is not subject to the [overtime] requirements of § 207(a).”).

In your letter, you indicate that “F&I salespeople work along with and as part of the new and/or used car sales departments, and typically are physically located with those departments.” Even if this means that F&I salespeople operate in a separate “department,” these employees would still qualify as exempt because F&I salespeople are an integral part of retail automobile dealers. See 29 C.F.R. § 779.304(a) (when different departments of a retail or service establishment “are operated as integral parts of a unit, the departmentalized unit taken as a whole ordinarily will be considered to be the establishment contemplated by the exemptions”). See also 29 C.F.R. § 779.305 (Two or more physically separated portions of a business located on the same premises may constitute more than one establishment if they are physically separated from the other activities and “distinct and separate from and unrelated to that portion of the business devoted to other activities.”); and Davis v. Goodman Lumber Co., 133 F.2d 52 (4<sup>th</sup> Cir. 1943) (manufacturing business was separate and distinct from the defendant's retail lumber yard and therefore then-existing retail or service establishment exemption did not apply to employees of the defendant's manufacturing business).

**B. The Finance And Insurance Salesperson's Regular Rate Of Pay Exceeds One And One-Half Times The Minimum Wage.**

As indicated above, Section 7(i) requires that "the regular rate of pay of [an exempt] employee is in excess of one and one-half times the minimum hourly rate applicable . . . under section 6 [minimum wage]." 29 U.S.C. § 207(i). The regular rate of pay of F&I salesperson described by your letter is more than one and one-half times the applicable minimum hourly wage under the FLSA. Accordingly, the F&I salesperson described by your letter satisfies this portion of Section 7(i).

**C. More Than Half The Finance And Insurance Salesperson's Total Earnings In A Representative Period Consists Of Commissions On Goods.**

Section 7(i) also requires that "more than half [an employee's] compensation for a representative period (not less than one month) represents commissions on goods or services." Your letter indicates that more than half of the F&I salesperson's compensation is in the form of commissions.

Furthermore, your letter indicates that the F&I salesperson's compensation represents commissions on goods. FLSA Section 3(i) defines "goods" as including "articles or subjects of commerce of any character." 29 U.S.C. § 203(i). The Department's regulations specifically identify "fiscal and other statements and accounts," "ideas," "insurance policies," "negotiable notes and other commercial paper," and "vehicles" as among "a few illustrations" of "goods." 29 C.F.R. § 776.20. Section 7(i) does not limit the word "goods." More than half of the compensation of the F&I salesperson described in your letter represents commissions on goods for purposes of FLSA Sections 3(i) and 7(i). Accord 29 C.F.R. §§ 776.20 ("goods"), 779.14 (goods), 779.107 (goods defined), 779.247 ("goods" defined), and 779.314 ("goods" and "services" defined).

**III. The Department Of Labor's Long-Standing Position Is That Section 7(i) Exempts Commissioned Finance And Insurance Employees Of Automobile Dealerships.**

Our response to you in this matter reaffirms prior pronouncements by the Administrator of the Wage and Hour Division about the application of Section 7(i). On April 2, 1982, the Wage and Hour Administrator issued an opinion letter that determined that exemption under FLSA Section 7(i) may be applicable to finance and insurance personnel of retail automobile dealerships. That letter responded to an inquiry "concerning whether certain employees compensated on a commission basis may be exempt from overtime pay pursuant to section 7(i) of the Fair Labor Standards Act," including painters of a body shop and finance and insurance employees employed by an automobile dealership that qualified as a retail establishment. The Administrator concluded that "finance and insurance personnel who are commissioned and otherwise meet the requirements under section 7(i) could be exempt under that section, as explained above, but such employees could not qualify for exemption under [a different exemption provided by] section 13(b)(10)." We discuss FLSA Section 13(b)(10), 29 U.S.C. § 213(b)(10), below.

Other letter rulings by the Wage and Hour Division are consistent with the Administrator's 1982 Opinion Letter. See, e.g., Office of Enforcement Policy Letter, Wage & Hour Div. (Oct. 21, 1999) (“[E]mployees of retail or service establishments are exempt from FLSA’s overtime requirements if their regular rate of pay is more than 1.5 times the minimum wage and if more than half their compensation for the representative period represents commissions on goods or services.”); and Administrator Opinion Letter, No. 79280/79-393, Wage & Hour Div. (July 13, 1982) (“[I]t is essential that an employer’s company meet the definition of a retail or service establishment stated in section 13(a)(2) in order to qualify for the section 7(i) exemption. Such an employer is eligible to claim the exemption with respect to those employees whose compensation is primarily on a commission basis.”). Copies of these letters are enclosed.<sup>1</sup>

#### **IV. FLSA Section 13(b)(10) Does Not Exempt Finance And Insurance Employees Of Automobile Dealers.**

Finally, we reaffirm the position taken in the Administrator’s April 2, 1982 Opinion Letter that FLSA Section 13(b)(10), 29 U.S.C. § 213(b)(10), does not apply to the F&I Salesperson described by your letter. Section 13(b)(10) exempts from the FLSA’s overtime requirements:

any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.

29 U.S.C. § 213(b)(10)(A).

Unlike Section 7(i), which exempts “any employee” of the establishment identified in that exemption, Section 13(b)(10) is both an employee-based and establishment-based exemption. Section 13(b)(10) is an employee-based exemption because three and only three categories of employees are exempt: salesmen, partsmen, and mechanics who are “primarily engaged in selling or servicing automobiles, trucks, or farm implements.” 29 U.S.C. § 213(b)(10)(A). Section 13(b)(10) is an establishment-based exemption because employees of these three classes are exempt only if they are “employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” 29 U.S.C. § 213(b)(10)(A).

F&I employees do not qualify for the Section 13(b)(10) exemption because they are not automobile salesmen, partsmen, or mechanics. See, e.g., Gieg v. Howarth, 244 F.3d 775, 776-77 (9<sup>th</sup> Cir. 2001) (noting that FLSA Section 13(a)(19), Section 13(b)(10)’s predecessor, exempted “any employee” and that Congress “intended to

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<sup>1</sup> In Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959), the Court held that a company that engaged in the business of making personal loans and in purchasing conditional sales contracts from dealers in furniture and appliances was not a “retail or service establishment.” The finance company did not satisfy FLSA Section 13(a)(2)’s definition of “retail or service establishment” because it lacked a “retail concept.” The Court did not consider whether the duties of the employees had a “retail concept.” Rather, it only considered whether Congress intended the defendant’s business to be exempt. Section 7(i) exempts “any employee” of an exempt “retail or service establishment” who meets the pay requirements of the exemption. Accordingly, an individual employee’s duties in a “retail or service establishment” are not relevant for purposes of Section 7(i).

narrow significantly" the exemption in 1966 when it eliminated the "any employee" language and instead exempted only three categories of employees -- "salesmen, partsmen and mechanics primarily engaged in selling or servicing automobiles").

\* \* \*

Accordingly, we conclude that: (1) the automobile dealership described by your letter qualifies as a retail or service establishment for Section 7(i) purposes; (2) the finance and insurance salesperson described by your letter is employed by a retail automobile dealership; (3) the compensation of the finance and insurance employee satisfies the compensation requirements of Section 7(i); (4) Section 7(i) exempts the finance and insurance salesperson described by your letter from the overtime provisions of the FLSA; and (5) Section 13(b)(10) does not apply to finance and insurance salespeople.

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 which 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 which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tammy D. McCutchen', with a large, sweeping flourish extending to the left.

Tammy D. McCutchen  
Administrator