



May 19, 2001

FLSA2001-15

Dear **Name\***,

This is in response to your request for a ruling as to the application of the Fair Labor Standards Act, 29 U.S.C. 201 et. seq., ("FLSA") to the ("SLOC") and its employees. In particular, you have asked whether the SLOC qualifies for the FLSA's minimum wage and overtime exemption in 29 U.S.C. 213 (a)(3)(B) for "any employee employed by an establishment which is an amusement or recreational establishment ... if ... during the preceding calendar year, its average receipts for any six months of such year were not more than 33 and 1/3 per centum of its average receipts for the other six months of such year ...." Application of this provision to the SLOC requires an examination of its "receipts" for 2000 to determine if the average receipts for any six months of 2000 were not more than one third of its average receipts for the other six months of that year.

With your request for ruling you submitted financial data for the SLOC for calendar year 2000. The financial information you provided indicates that, by comparing SLOC's average receipts for any six months of 2000 to the average for the other six months of that year, SLOC satisfies the conditions for application of section 13(a)(3)(B). The average receipts for the months of February, March, May, August, September, and October appear to be less than 33 and 1/3 percent of the average of those receipts actually received in the other six months in 2000. On that basis the SLOC has satisfied the conditions for the exemption and most of the employees of the SLOC would be exempt from the minimum wage and overtime provisions of the FLSA for the year 2001. However, the answer may be different with regard to employees who engage in construction or reconstruction work, such as the erection of new structures or buildings. See Field Operations Handbook (FOH) 25j13. Compare Brennan v. Six Flags over Georgia, 474 F.2d 18 (5<sup>th</sup> Cir. 1973) and Hamilton v. Tulsa County Public Facilities Authority, 85 F3d 494 (10<sup>th</sup> Cir. 1996.)

Because the SLOC appears to satisfy the "receipt" test of section 13(a)(B), I will not address the alternative "seasonality" test of Section 13(a)(3)(A). See Jeffery v. Sarasota White Sox, 64 F.3d 590 (11<sup>th</sup> Cir. 1995).

We trust that the above is responsive to your inquiry.

Sincerely,

Thomas M. Markey  
Acting Administrator

*Note: \* The actual name(s) was removed to preserve privacy.*