



March 31, 2006

FLSA2006-11

Dear *Name\**,

This is in response to your request for an opinion regarding whether certain “sales force” mortgage loan officers qualify for the minimum wage and overtime exemption for outside sales employees set forth in section 13(a)(1) of the Fair Labor Standards Act (FLSA) (copy enclosed). It is our opinion that the “sales force” loan officers you describe qualify as exempt outside sales employees.

Your request involves mortgage loan officers, also referred to as loan originators, who perform their work primarily outside the employer’s offices; you expressly exclude from the request loan officers who “perform their work mainly within the office.” The mortgage loan officers at issue meet with customers to sell mortgage loan packages. These “sales force” loan officers are responsible for originating their own sales by contacting prospective clients and by developing and maintaining referral sources. The “sales force” loan officers spend a significant amount of time away from their employer’s place of business in performing their principal duty of selling the loan products offered by their employer. The “sales force” loan officers meet with prospective clients at locations other than the employer’s business, such as a client’s home or other locations away from the employer’s place of business. They meet with clients in person to sell mortgage loan packages; their contact with clients by telephone, mail, and e-mail is adjunct to these in-person contacts. The “sales force” loan officers also obtain credit information and other necessary documentation for the loan application process. They make in-person calls on real estate agents and brokers, financial advisors, and other potential referral sources to develop borrower leads. The “sales force” loan officers also engage in marketing and promotional activities in support of their own sales. The “sales force” loan officers have considerable flexibility to set their working hours and to schedule the tasks they perform during the workday.

You state that the “sales force” loan officers are “customarily and regularly” engaged away from the employer’s place of business and offices in their homes. The “sales force” loan officers spend some time in their employer’s office taking loan applications, attending meetings, completing paperwork, and preparing marketing and sales materials in support of their own sales efforts. Additional activities that may be performed at the employer’s place of business or the employees’ home offices include: checking and bringing databases of loan products for sale and referral services up to date; calling, writing to, or communicating by e-mail with clients or prospects with whom the “sales force” loan officers have been dealing during their outside sales activities; talking to such clients or prospects in the office about their particular loan transactions; calling, writing to, or communicating by e-mail with lists of prospective clients, loan product vendors, and referral sources with whom the “sales force” loan officers may not have had prior contact; and preparing loan applications and other forms for loan sales initiated or negotiated by the “sales force” loan officers during outside sales activities.

Section 13(a)(1) of the FLSA provides an exemption from the minimum wage and overtime requirements of the Act for “any employee employed . . . in the capacity of outside salesman.” The Department’s regulations define that statutory phrase as including “any employee”:

- (1) Whose primary duty is:
  - (i) making sales within the meaning of section 3(k) of the Act, or
  - (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- (2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.



29 C.F.R. § 541.500 (copy enclosed). “Primary duty” means “the principal, main, major, or most important duty that the employee performs.” 29 C.F.R. § 541.700 (copy enclosed). FLSA section 3(k) defines “sale” as “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” See *also* 29 C.F.R. § 541.501 (copy enclosed).

Under 29 C.F.R. § 541.701 (copy enclosed), “[t]he phrase ‘customarily and regularly’ means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ‘customarily and regularly’ includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.”

The regulations provide further guidance regarding what it means to be “engaged away from the employer’s place of business” for purposes of 29 C.F.R. § 541.500. “The outside sales employee is an employee who makes sales at the customer’s place of business or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls.” 29 C.F.R. § 541.502 (copy enclosed). Outside sales employees may perform promotional work as an exempt outside sales activity if it “is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations.” 29 C.F.R. § 541.503 (copy enclosed). Whether promotional work is to be considered exempt is determined on a case-by-case basis. *Id.*

It is the position of the Wage and Hour Division that employees of finance companies who obtain and solicit mortgages may be exempt outside sales employees if they are “customarily and regularly engaged away from their employer’s place of business in obtaining mortgages from brokers and individuals.” Field Operations Handbook (FOH) § 22e02 (copy enclosed). “Work incidental to the employee’s obtaining the mortgage, such as obtaining credit information from the mortgagor, before and after the sale would qualify as exempt work if done with respect to [the employee’s] own sales.” *Id.*

Your letter also refers to FOH § 22e06 (copy enclosed), which lists several activities that real estate sales employees may perform at the employer’s place of business in conjunction with outside sales work without losing the outside sales exemption. These activities include:

1. Bringing a multiple listing book up to date;
2. Calling prospects with whom the sales employee has been dealing during outside sales activities;
3. Dictating or writing letters to such prospects;
4. Talking to such prospects in the office about their particular transactions;
5. Calling a list of prospective buyers or sellers of homes with whom the sales employee has had no prior contact;
6. Preparing a contract and other forms required for a sale negotiated during the sales employee’s outside sales activity; and
7. Talking to a “walk-in” prospect with whom the employee has had no prior contact and showing photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.



*Id.* You suggest that these duties are analogous to the tasks performed by the “sales force” loan officers while at their employer’s place of business or their home office. For purposes of this letter, “employer’s place of business” includes the employee’s home office, because “any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.” 29 C.F.R. § 541.502.

Based on the information you have provided, the “sales force” loan officers appear to meet the requirements for the outside sales exemption. First, the “sales force” loan officers fulfill the sales requirement of the exemption. Their principal duty is the sale of mortgage loan packages. According to WH Opinion Letter January 15, 1971 (copy enclosed), “an employee who actually obtains an application for . . . a loan would be engaged in exempt work; the consideration . . . being the . . . interest paid for the amount loaned.” Therefore, the sale of mortgage loan packages meets the definition of sales in section 3(k) of the FLSA. See FOH § 22e02.

Second, whether “sales force” loan officers are “customarily and regularly engaged away from the employer’s place of business” depends on the extent to which they engage in sales or solicitations, or related activities, outside of the employer’s place or places of business. By meeting clients outside of the employer’s place of business in order to initiate sales, such as at the clients’ homes, the “sales force” loan officers fulfill the “outside” requirement of the outside sales exemption. Activities employees perform that are incidental to their outside sales or solicitations also qualify as exempt outside sales work, but only if the incidental activity is in support of their own sales and not just generally “directed towards stimulating the sales of [the] company.” 69 Fed. Reg. 22,160, 22,163 (Apr. 23, 2004) (copy enclosed). See also 29 C.F.R. §§ 541.500(b) and 541.503. In addition, the frequency of performing qualifying exempt outside sales activities must “normally and recurrently [be] performed every workweek; it does not include isolated or one-time tasks.” 29 C.F.R. § 541.701. This type and frequency of exempt outside sales activity is implicit in your representation that “sales force” loan officers “perform their work primarily outside the office.” Of course, “sales force” loan officers who do not engage in outside sales activity as a normal and recurrent part of their workweek fail to meet the exemption’s requirements.

Finally, the “sales force” loan officers may qualify for the outside sales exemption even though they may perform some activities at their employer’s place of business, so long as the inside sales activity is incidental to and in conjunction with qualifying outside sales activity. See *Olivo v. GMAC Mortgage Co.*, 374 F. Supp. 2d 545, 551 (E.D. Mich. 2004). The performance of activities related to the sales of mortgage loan packages made outside the employer’s place of business does not disqualify the “sales force” loan officer from the exemption. Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the “sales force” loan officer’s own outside sales activities. 29 C.F.R. § 541.503; FOH § 22e02.

Therefore, although each “sales force” loan officer must be evaluated on an individual basis to determine whether he or she qualifies for the outside sales exemption, those employees whose job duties match the duties described above would be exempt from the minimum wage and overtime requirements of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.



We trust that this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Enclosures:

29 C.F.R. §§ 541.500-.503

29 C.F.R. § 541.700-.701

69 Fed. Reg. 22,160, 22,163 (Apr.23, 2004)

FOH §§ 22e02, 22e06

WH Opinion Letter January 15, 1971

*\* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7)*