



November 9, 2004

FLSA2004-20

Dear *Name \**,

This is in response to your letter requesting an administrative opinion on the application of Section 7(i) of the Fair Labor Standards Act (FLSA) to your business, Island Stationary Corporation, doing business as The Office Furniture Warehouse.

As you know, Section 7(i) allows for an overtime exemption for commissioned employees of a retail or service establishment when both of the following criteria are met: (a) the employee receives at least one and one-half times the federal minimum wage of \$5.15 per hour, and (b) more than half of the employee's total compensation for a representative period of not less than one month represents commissions on goods or services. 29 U.S.C. 207(i).

Although your letter does not indicate how your employees are paid, if your method of compensation meets these two criteria, the only remaining question is whether *Name \** as a retail or service establishment. Section 779.313 of 29 CFR Part 779 summarizes three criteria that must be met before an establishment can be recognized as a retail or service establishment under the FLSA: the establishment "(a) [m]ust engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale." Typically a retail or service establishment is one that sells goods or services to the general public, serving the everyday needs of the community by selling products in small quantities to end-users. "The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process." See 29 CFR 779.318(a).

You have described your business as a retail furniture dealership, selling small quantities of multiple brand products to the ultimate consumers. You say that in the 1980s, the company "opened its doors to the public at large." Since then, signs, fliers and advertisements in the Yellow Pages have all invited the public at large to shop at your establishment. You state that your company is not a wholesale distributor, but a company that sells in small quantities to users "at the end of the distribution chain." In addition, no manufacturing is done by your company. It is not clear whether the majority of your sales are to other businesses who use your furniture as they conduct their business or to private individuals who buy your products to furnish their "home offices." However, since the products you sell, "desks, file cabinets, chairs, artwork, lamps, decorative, etc.," are recognized as retail in the furniture industry, the proportion of your gross dollar volume of sales that is made to other businesses for use in their offices will not affect the retail nature of those sales. See 29 CFR 779.318; 779.320; and 779.329. Thus, based on the information provided and so long the above criteria are met, *Name \** qualifies as a retail establishment for the purposes of the Section 7(i) exemption from the overtime provisions of the FLSA.

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 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 the above information is responsive to your inquiry.



Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

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