**U.S. Department of Labor**
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

**April 27, 2005** **FLSA2005-2NA**

Dear ***Name****,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to certain truck drivers who transport goods only intrastate.

Your client employs approximately 100 truck drivers to transport perishable and non-perishable merchandise from its warehouse in State X to approximately 140 of its retail stores in State X. Approximately 90 percent of the goods shipped to the company's warehouse are produced outside of State X. Employees at the company's headquarters outside of State X order the goods. The out-of-state manufacturers typically ship the goods directly to the company's warehouse, although in some instances (approximately 30 to 40 percent of the time), the company hires a common carrier to pick up the goods from out of state and bring them to the warehouse.

At the time of shipment the goods are not earmarked for a particular retail store. However, it is understood at the time of shipment that the goods will ultimately continue from the warehouse to a retail store within State X. The company orders the out-of-state goods based on various factors, such as past ordering records and projections regarding the quantity of goods that stores will likely need. Once the goods arrive at the warehouse, they are sorted onto pallets and stored on racks as inventory. Individual stores place orders for the goods with the warehouse. The warehouse then fills the orders from the warehouse's existing inventory. When filling orders, the goods are sometimes re-sorted, but they are not repackaged or further processed. The goods typically remain in the warehouse awaiting shipment to the stores from one week to three months. No goods are sold wholesale directly from the warehouse.

Section 13(b)(1) of the FLSA exempts from its overtime pay requirements "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of [the Motor Carrier Act (MCA).]" The Department of Transportation (DOT) has authority to regulate

the safety-affecting employees of motor carriers when the employees operate in interstate commerce, as defined in the MCA.[1] Whether the final intrastate leg of interstate shipments not sent to named recipients, but held in storage between legs of the trip, constitutes interstate commerce turns on whether the shipper has a fixed and persisting transportation intent beyond the terminal storage point at the time of shipments.

We have previously concluded that transportation within a single State from a chain store warehouse to outlets of the chain, of goods brought into the State for sale at the outlets, is covered on traditional "in commerce" grounds under the FLSA and is also transportation in interstate commerce under the MCA. The situation in the chain store cases is "one where goods are shipped from one State and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets. All goods ordered from other States for delivery to the warehouse are ordered to supply the needs of the retail stores, and the shipper will know or can be presumed to know that these stores are the ultimate destination of the goods shipped." Field Operations Handbook §24d02(d); *see also* Opinion Letter dated August 23, 1982, copies enclosed.

Based on the information provided, the overtime pay exemption contained in section 13(b)(1) of the FLSA would apply to the drivers, drivers' helpers, loaders and mechanics whose duties affect the safety of operation of a motor vehicle who are involved in the transportation you described. See Regulations, 29 CFR Part 782.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 questions 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 a 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,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

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

[1] Your letter states that it is your understanding that DOT "has deemed the company's delivery drivers who delivery goods from the company's warehouse to its stores to be wholly intrastate and outside of DOT's jurisdiction," but that DOT has issued no formal or written opinion to your client on the matter. You advised us orally that your understanding was based upon a telephone conversation by your client with someone from DOT. Based on the facts you have presented, your client's understanding is contrary to our understanding of DOT's interpretation of its jurisdiction , based upon our own communications with DOT and the ruling in Ex Parte No. MC-207, 57 Fed. Reg. 19812 (Interstate Commerce Commission, May 8, 1992). If there is an authoritative decision by DOT that transportation of a particular character is not interstate commerce under the MCA, section 13(b)(1) would not apply. See 29 C.F.R. 782.7(b)(2).