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

August 2, 2005 **FLSA2005-19**

Dear ***Name****,

This is in response to your letter concerning the recent updates to 29 C.F.R. 541 that went into effect on August 23, 2004. You presented three questions regarding whether the updates to the texts of sections 541.102, 541.106, and 541.703, copies enclosed, are substantive changes or merely clarifications of law under the previous regulations in effect prior to August 23, 2004. You inquired because the California Wage Orders interpret the Fair Labor Standards Act (FLSA) exemptions as they were interpreted as of October 1, 2000, the date that the California Wage Orders were promulgated. You have asked us to confirm the following three statements.

Statement 1 (from page 3 of your letter)-"The addition of the two items ('planning and controlling the budget' and 'monitoring or implementing legal compliance measures') [to section 541.102] is a mere clarification that is consistent with the DOL's prior regulations and cases that had construed those regulations."

"[P]lanning and controlling the budget" and "monitoring or implementing legal compliance measures" were added to the list of examples of management activities contained in section 541.102 of the revised final regulations. The list of management activities remained almost the same for the recent revisions except for the above-mentioned additions. The preamble to the revised final regulations explains that several public comments recommended that the list of management activities be expanded to include activities that are not supervisory, but still within the purview of management duties. Therefore, the Department of Labor (Department) added these two activities as examples to reflect its agreement that "management activities are not limited to supervisory activities." 69 Fed. Reg. 22133, April 23, 2004, copy enclosed. It is the Department's position that the executive exemption and the definition of management were not previously limited to "supervisory" functions before the update, but rather included all activities that could be properly described as management, including budgeting and implementing legal compliance measures. Thus the language in section 541.102 regarding "planning and controlling the budget" and "monitoring or implementing legal compliance measures" was a clarification and not a change from the old regulations.

Statement 2 (from page 3 of your letter)- "The inclusion of the 'concurrent duties' language in section 541.106 clarified the prior regulations regarding this issue and reaffirmed that time spent simultaneously performing exempt and nonexempt work qualifies as exempt time under the federal regulations that were in effect on October 1, 2000."

New section 541.106 on concurrent duties is a clarification of the Department's previous position that exempt executive employees can concurrently spend time performing exempt duties at the same time they are performing nonexempt duties, and that the performance of such nonexempt work does not preclude the exemption if an employee's primary duty is management. Section 541.106 incorporated examples originally proposed in both sections 541.106 ("Working supervisors") and 541.107 ("Supervisors in retail establishments") and combined them into one section entitled "concurrent duties." As the Department explains in the preamble to the regulations, section 541.106 codifies existing case law interpreting the prior regulations. "The Department believes that the proposed and final regulations are consistent with current case law [i.e., under the previously-existing regulations], which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the exemption. Numerous courts have determined that an employee can have a primary duty of management while concurrently performing nonexempt duties." 69 Fed. Reg. 22136-7, April 23, 2004, copy enclosed (case citations omitted). Therefore, the language of 29 C.F.R. 541.106 regarding concurrent duties was a clarification and not a change in the Department's position. In fact, some of the examples were derived from the latter portion of former section 541.103 ("Primary duty"). See also, Revised Final section 541.700(c).

Statement 3 (from page 3 of your letter)- "The 'directly and closely related' standards that appeared in section 541.108 of the prior regulations have been republished in section 541.703 of the new regulations without altering the prior regulatory standard, which states that time spent on any work that is 'directly and closely related to' the performance of exempt work is considered time spent on exempt work."

The "directly and closely related" standard in section 541.703 of the new regulations was previously found in former section 541.108. As explained in the preamble at 69 Fed. Reg. 22187, copy enclosed, "the phrase 'directly and closely related' in final section 541.703(a) is taken from the current sections 541.108 and 541.202.…The Department did not intend any substantive change to the meaning of the phrase 'directly and closely related' and intends that the term be interpreted in accordance with the long-standing meaning under the current [i.e., previously-existing] rule." Therefore, the new standard has not changed from the meaning under the prior rule.

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 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. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. 541.102, .106., .703
68 Fed. Reg. 22133-37, 22187-88

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