



FLSA2009-28

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether certain insurance agents qualify for either the outside sales or administrative exemptions under 29 U.S.C. § 213(a)(1).¹ Based on the information provided, it is our opinion that, depending on the duties actually performed, an insurance agent may qualify for either the outside sales or administrative exemption.

Your organization is a trade association representing life insurance companies. You emphasized in your request that, despite being called “insurance agents” regardless of the duties being performed, the insurance agents in question fall under two distinct models: (1) those whose primary duty is sales, and (2) those whose primary duty is servicing clients; marketing, promoting, and servicing their company’s insurance and financial products; collecting and analyzing information regarding their clients’ income, assets, and insurance needs; determining which insurance and financial products best meet each client’s needs and circumstances; and advising clients on the advantages and disadvantages of different insurance and financial products. It is your position that insurance agents in group (1) meet the outside sales exemption, and that insurance agents in group (2) meet the administrative exemption.

Group (1) / Outside Sales Exemption

According to your letter, the primary duty of insurance agents in group (1) is to make sales and obtain orders for life insurance and other insurance and financial products and services. These sales are made directly to clients, primarily through face-to-face meetings at the clients’ homes or places of business. Although these insurance agents perform sales-related activities in their offices, you state that the in-office activities are “incidental to or in conjunction with” the insurance agent’s outside sales activities. Typical duties include:

- The agents sell insurance policies and financial products and services directly to clients, and spend a majority of their time performing tasks directly related to their own sales activities.
- The agents customarily and regularly meet with clients face to face outside of their offices (*e.g.*, at a client’s home or business or at a restaurant or club) to sell insurance policies and financial products.
- The agents communicate with clients by telephone, direct mail, and e-mail as an adjunct to their in-person sales calls, and these communications occur both outside of and

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

within their offices. They also spend time in the office preparing for meetings with current or prospective clients; communicating with clients by telephone, e-mail and letter correspondence; answering clients' questions; preparing and reviewing documents and forms required to sell insurance products; following up on applications; educating themselves about various insurance or financial products; compiling and updating client lists or databases; creating marketing or promotional activities in support of their own sales activities; attending training on the company's products; and attending compliance meetings addressing regulatory issues. In addition to direct selling efforts, agents also conduct research to select the specific types and amounts of insurance products to recommend and sell to clients to best meet the client's needs. You state that the in-office activities are incidental to or in conjunction with the insurance agent's own outside sales activities.

- The agents are responsible for originating their own sales and developing their own client lists by contacting or networking with current or prospective clients and by developing and maintaining relationships with sources of leads and referrals. They make in-person calls on or attend social functions with real estate agents, attorneys, brokers, and other potential sources of referrals and leads. Insurance agents also make presentations at seminars or gatherings of trade associations and civic and non-profit organizations. For instance, the agents may participate in seminars or conferences to explain new products they sell and to identify and attract new clients. You state that these marketing and prospecting activities are incidental to and in conjunction with each insurance agent's own outside sales activities to obtain additional clients and make additional sales.

New agents receive training regarding the company's products, sales techniques, and the regulations governing their sales activities. The agents typically determine their own hours of work and regularly travel to see current and prospective clients during the workday, and sometimes in the evening and on weekends. Other than supervision mandated by regulatory agencies, how agents conduct their business is not subject to supervision on a day-to-day basis.

The agents generally enter into commission arrangements with insurance companies that govern their compensation and they are paid primarily or entirely through commissions on the insurance products they sell to clients. The commissions typically represent a portion of the first year premiums, renewal premiums, and other monies paid to the company by the insurance agent's clients.

Section 13(a)(1) of the FLSA provides an exemption from the statute's minimum wage and overtime requirements for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that 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](#). "Primary duty" means "the principal, main, major, or most important duty that the employee performs." [29 C.F.R. § 541.700](#). Section 3(k) of the FLSA 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](#).

Under [29 C.F.R. § 541.701](#), "[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](#). 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](#). Whether promotional work is to be considered exempt is determined on a case-by-case basis. *Id.*

Based on the information you have provided, the insurance agents in group (1) appear to meet the requirements for the outside sales exemption. First, the agents fulfill the sales requirement of the exemption since, as you state in your letter, their primary duty is to make sales and obtain orders for life insurance and other insurance and financial products and services.

Second, whether the agents 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 face to face outside of the employer's place of business in order to initiate sales, such as at the client's home or business or at a restaurant or club, the agents fulfill the "outside" requirement of the outside sales exemption. The frequency of performing qualifying exempt outside sales activities must be "normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701. You state that the agents "customarily and regularly meet with clients face-to-face- outside of their offices to sell insurance policies and financial products." If by "customarily and regularly" you mean "normally and recurrently" performed every workweek and not on an isolated or one-time basis, then the agents would meet this test. Of course, agents 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 agents may qualify for the outside sales exemption even though they perform some activities at their employers' place of business, so long as the inside sales activity is incidental to and in conjunction with qualifying outside sales activity. *See* 69 Fed. Reg. 22,160, 22,163 (Apr. 23, 2004) (copy enclosed); 29 C.F.R. §§ 541.500(b); *Olivo v. GMAC Mortgage Co.*, 374 F. Supp. 2d 545, 551 (E.D. Mich. 2004). The performance of activities related to the sales of insurance and financial products made outside the employer's place of business does not disqualify the agents 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 agent's outside sales activities. 29 C.F.R. § 541.503; [FOH § 22e02](#); Opinion Letter [FLSA2006-11 \(Mar. 31, 2006\)](#).

Therefore, although each agent 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. The salary basis test is inapplicable to outside sales employees. 29 C.F.R. § 541.500(c).

Group (2) / Administrative Exemption

According to your letter, although the agents in group (2) make some sales, their primary duty is to service the insurance company's business and advise clients on various insurance and financial products, taking into account the agent's knowledge of the needs, goals, and risk tolerance of each client, as well as the agent's knowledge of and experience with the insurance industry and market. Typical duties include:

- The agents meet with current or prospective clients, typically in person, to collect and discuss each client's life insurance and financial information (*e.g.*, assets, income, debts, cash flow, tax status, retirement savings, and financial objectives) and needs.
- The agents analyze the information collected from current and prospective clients and compare and evaluate possible life insurance and financial products to develop individualized advice and strategies for each client based upon each client's insurance and financial status, risk tolerance, needs, and objectives.
- The agents provide individualized advice and recommendations to current and prospective clients on the purchase of life insurance and other financial products. This includes explaining and discussing with clients the advantages and disadvantages of various life insurance and financial products, including the costs, monetary values or returns, death benefits, and risks of each.
- The agents structure transactions to ensure that they result in the maximum benefit for clients, while also conforming with the laws, regulations, and requirements governing the insurance industry (and, where applicable, the securities industry).
- The agents make some sales of life insurance and other financial products.

- The agents engage in promotion and business development activities, including the marketing, servicing, and promoting of the life insurance company's insurance and other financial products and services. They make themselves visible to the public to attract, meet and retain potential new clients for their companies and to explain and promote the life insurance and other financial products offered by the insurance company with which the insurance agent is associated. They also develop business by contacting or networking with current or prospective clients and by developing and maintaining relationships with sources of leads and referrals. They make in-person calls on, or attend social functions with, real estate agents, attorney, brokers, and other potential sources of referrals and leads and make presentations at seminars or gatherings of trade associations and civic and non-profit organizations. For example, they may participate in seminars or conferences to explaining new insurance products and services that are offered, and to identify and attract new clients.

The agents typically determine their own hours of work and regularly meet with current and prospective clients during the workday, and sometimes in the evening and on weekends. They are not subject to constant supervision on a day-to-day basis.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide administrative capacity as defined in 29 C.F.R. Part 541. An employee may qualify for an exemption if all of the duties and salary tests are met.

Under [29 C.F.R. § 541.200\(a\)](#), “employee employed in a bona fide administrative capacity” means “any employee”:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . ;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

You ask that we assume for purposes of this letter that the agents in group (2) meet the salary basis test.

“Work directly related to the management or general business operations” of the employer refers to work in such functional areas as quality control, research, and marketing. [29 C.F.R. § 541.201\(b\)](#). An employee's primary duty is “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a).

Section [541.203](#) includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) “[e]mployees in the financial services industry” who perform duties similar to the agents you describe. Such employees are

ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b). The preamble to the 2004 revisions to the Part 541 regulations reviews the pertinent case law drawn from the financial services industry and concludes:

The Department agrees that employees whose primary duty is inside sales cannot qualify as exempt administrative employees. However, as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 21,122, 22,146 (Apr. 23, 2004); *see also Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002); Opinion Letter [FLSA2006-43 \(Nov. 27, 2006\)](#).

Your describe the primary duty of the agents in this group as including meeting with current or prospective clients, typically in person, to collect and discuss each client's life insurance and financial information; analyzing the information collected from current and prospective clients and comparing and evaluating possible life insurance and financial products to develop individualized advice and strategies for each client based upon each client's insurance and financial status, risk tolerance, needs, and objectives; providing individualized advice and recommendations to current and prospective clients on the purchase of life insurance and other financial products; and structuring transactions to ensure that they result in the maximum benefit for clients, while also conforming with the laws, regulations, and requirements governing the insurance industry (and, where applicable, the securities industry). Based upon the foregoing, we conclude that these agents satisfy the duties requirement under 29 C.F.R. § 541.203(b).²

² Of course if, based on all the facts in a particular case, an agent's primary duty is selling insurance and financial products to clients, the agent will not qualify for the administrative exemption. 29 C.F.R. § 541.203(b).

The agents satisfy the duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer, and by performing duties that include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. §§ 541.200(a)(2)-(3); 541.203(b). Similar to the employees discussed in the 2004 preamble in *John Alden*, *Hogan*, and *Wilshin*—all of whom were found to satisfy the duties requirements of the administrative exemption—the agents service their employer’s financial services business by engaging in promotion and business development activities, including the marketing, servicing, and promoting of the employing firm’s insurance and financial services and products, and by making themselves visible to the appropriate segments of the public in order to meet and retain potential new clients for their employing firm. *See Hogan*, 361 F.3d at 626-28 (insurance agents administratively exempt who serviced and advised existing customers, adapted customer’s policies to their needs, promoted sales, and hired and trained staff, among other duties); *John Alden*, 126 F.3d at 8-14 (administrative exemption applied to insurance marketing representatives who represented company to third party agents, promoted sales, and kept informed about market to help match products with customer needs); *Wilshin*, 212 F. Supp. 2d at 1376-79 (administrative exemption applied to insurance agent who stayed knowledgeable about market and needs of customers, recommended products to clients, provided claims help, promoted company, and directed day-to-day affairs of the office).

The primary duty of the insurance agents you describe includes the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. *See* [29 C.F.R. § 541.202\(a\)](#); *Farmers Insurance Exchange*, Nos. 05-35080, 05-35145, 2006 WL 3026037 at *1 (9th Cir. Oct. 26, 2006) (exemption applies to adjusters who “use discretion to determine whether the loss is covered, set reserves, decide who is to blame for the loss and negotiate with the insured or his lawyer”). The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. *See* 29 C.F.R. § 541.202(c). You indicate that agents must analyze the information collected from current and prospective clients and compare and evaluate possible life insurance and financial products to develop individualized advice and strategies for each client based upon each client’s insurance and financial status, risk tolerance, needs, and objectives, thus satisfying this element of the administrative exemption.

Therefore, although each agent in this second group must be evaluated on an individual basis to determine whether he or she qualifies for the administrative exemption, those agents whose primary duty is administrative, not sales, and whose job duties match those 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 issues 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,

Alexander J. Passantino
Acting Administrator

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