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

May 11, 2006 FLSA2006-9NA

Dear **Name***:

This is in response to your letter regarding whether certain bonus payments to employees may be excluded from the calculation of the regular rate of pay for overtime purposes under Fair Labor Standards Act (FLSA) section 7(e)(3)(a) (copy enclosed). It is our opinion that the payments made pursuant to your client's bonus plan must be included in the regular rate.

Each year on the same date, your client pays a bonus to employees if the company exceeds certain base-line goals the preceding year related to return on assets, return on equity, deposit growth, and efficiency ratio. An employee must be employed at the end of the year to qualify for a bonus. An employee must be on the payroll throughout the year in order to be eligible for the full-year bonus; employees who are employed less than one year but more than four months qualify for a fractional bonus, *e.g.*, an employee employed seven months would qualify for seven twelfths of the full-year bonus. Employees who are employed less than four months are not eligible for a bonus. The bonus due each employee is based in part on the ratio of his or her total earnings to the total earnings for all eligible employees. In a discussion with a member of the Wage and Hour Division staff, you noted that employees are informed of the plan's overall details and bonus eligibility criteria.

The FLSA includes in the regular rate of pay all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded by section 7(e). One such exclusion, recognized in section 7(e)(3)(a), is for discretionary bonuses. As indicated in 29 C.F.R. § 778.211(b) (copy enclosed):

> In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a).

As further explained in 29 C.F.R. § 778.211(c) (copy enclosed):

> The bonus, to be excluded under section 7(e)(3)(a), must not be paid "pursuant to any prior contract, agreement, or promise." . . . Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category.

After reviewing the information provided, it is our opinion that the bonuses are not discretionary under 29 C.F.R. § 778.211 (copy enclosed). You stated that your client pays a bonus to its employees if the company exceeds certain goals in the preceding year related to return on assets, return on equity, deposit growth, and efficiency ratio. Benchmarks such as these suggest that the bonus payments are promised to employees as an incentive for increased or sustained productive efforts. Thus, the bonus plan you described in your letter to the Department falls into the category of non-discretionary bonuses described in 29 C.F.R. § 778.211(c). *See* Wage and Hour Opinion Letters September 21, 2004; November 5, 1999; and January 23, 1997 (copies enclosed). Additionally, both the fact of payment and the amount of payment are not a matter of the employer's discretion; rather, your client announces the criteria for earning the bonus to the employees well in advance. Thus, there appears to be a prior promise or agreement pursuant to which your client abandoned its discretion with regard to paying the bonuses. *See* 29 C.F.R. § 778.211(b). For the above reasons, the

bonuses must be included in the calculation of the regular rate of pay for overtime purposes. *See* 29 C.F.R. § 778.208 (copy enclosed). Please refer to 29 C.F.R. § 778.209 (copy enclosed) for the proper method of inclusion of bonuses in the regular rate.

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,

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

Enclosures:
FLSA section 7(e)
29 C.F.R. §§ 778.208-.209, 778.211
Wage and Hour Opinion Letters September 21, 2004; November 5, 1999; and
January 23, 1997

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