Nos. 03-35707 and 03-35619

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH C. WICKERSHAM,
Plaintiff-Appellee,

v.

HASELWOOD BUICK-PONTIAC COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington

JERRY GIEG,
Plaintiff-Appellee,

v.

DDR, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of Oregon

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*. These cases present a fundamental question of statutory interpretation concerning the applicability of the exemption from the overtime requirements of the Fair Labor Standard Act ("FLSA" or "Act") under section 7(i) of the Act, 29 U.S.C. 207(i). The district court decisions interpreting section 7(i) are directly contrary to the plain meaning of the statute and the position taken by the Administrator, Wage and Hour Division, in an opinion letter issued on March 17, 2003 (copy attached).

STATEMENT OF THE ISSUE

Whether the section 7(i) exemption from FLSA overtime requirements applies to employees of a retail automobile dealership who earn commissions from selling financing agreements and warranties rather than directly from the sale of automobiles.

STATEMENT OF THE CASE

A. Statement Of The Facts

Wickersham and Gieg were employed by auto dealerships as finance officers. They each filed suit in federal district court seeking unpaid overtime under the FLSA. The respective

defendants, Haselwood Buick-Pontiac Company and DDR, Inc. ("the dealerships"), argued in each case that the plaintiffs were not entitled to overtime because they met all the requirements of the section 7(i) "retail or service establishment" exemption.

The job duties performed by Wickersham and Gieg ("the finance officers") were basically the same.[1] The dealerships paid the finance officers commissions based upon their sales of financing agreements, extended warranties, insurance contracts, and various dealership-installed after-sale items (e.g., paint and fabric protection packages and alarm systems). These commission sales were completed after a separate sales staff of the dealership had sold the automobiles. The finance officers received no commissions from the sale of the vehicle itself.

It is undisputed that the dealerships were retail establishments within the meaning of section 7(i), that more than 50 percent of the finance officers' compensation was based on commissions, and that the compensation the finance officers received from these commission sales was at a rate greater than one and one-half times the federal minimum wage.

[1] Wickersham's job was termed "Finance Manager"; Gieg's job title was "Finance Writer." For a more detailed description of their respective job duties, see Wickersham v. Haselwood Buick-Pontiac Company, No. C01-5557FDB, 2002 WL 32152269, at *1 (W.D. Wash. 2002); Gieg v. DDR, Inc., No. Civ. 98-1563-HA, 2003 WL 21087602, at *3 (D. Or. 2003).

B. The District Court Decisions

Relying upon Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959), the district court in Wickersham, by decision dated August 16, 2002, determined that because Wickersham did not sell automobiles, but rather sold "financing and insurance contracts," his job duties lacked a retail concept. Based on its conclusion that a finance officer's job duties were outside the scope of the defendant's retail or service operation, the court concluded that Haselwood was not exempt as to plaintiff's activities and therefore must comply with the FLSA's overtime requirements. The court was also of the opinion that finding a finance officer exempt under section 7(i) would be inconsistent with the Ninth Circuit's holding in Gieg v. Howarth, 244 F.3d 775 (2001), that a finance officer does not qualify as an automobile salesman within the overtime exemption at 29 U.S.C. 213(b)(10)(A).

In Gieg, the district court, by decision dated March 14, 2003, similarly concluded that "invoking the Section 7(i) exemption requires a clear showing that more than half of an employee's compensation represents commissions on *retail* goods and services, and not *all* goods and services as long as they are sold by a retail or services establishment, as argued by defendant." 2003 WL 21087602, at *4. The court therefore

reasoned that "finance writers for automobile dealerships do not earn commissions on the sales of *goods or services*, as that phrase is fairly interpreted when evaluating the applicability of the exemption found under 29 U.S.C. § 207(i). Since the duties of such employees fall outside the scope of the employers' retail or service business, those employees therefore fall outside of any FLSA exemption that is based upon the employers being a retail or service establishment." Id. at *5.

In each case, the district court granted summary judgment against the dealership on the finance officer's claim for failure to pay overtime under the FLSA.

C. The District Courts' Refusal To Reconsider Based On The Administrator's Opinion Letter

On March 17, 2003, shortly after the district courts had issued their respective decisions, the Administrator of the Wage and Hour Division issued an opinion letter stating that the section 7(i) exemption applies to any employee of a retail or service establishment if at least 50 percent of that employee's compensation represents commissions on sales of goods and services as defined in 29 U.S.C. 203(i) and 29 C.F.R. 776.20 (i.e., "articles or subjects of commerce of any character"), and the employee meets the rate of pay requirement.

Focusing on the plain language of the statute, the Administrator concluded that it is the nature of the employer's business (as a retail or service establishment), as opposed to the work performed by any individual employee, that determines the applicability of the section 7(i) overtime exemption. Op. Letter, p. 3. Addressing the specific facts presented and referring to the regulation at 29 C.F.R. 779.308, the Administrator stated that the finance and insurance ("F&I") salespeople of a retail automobile dealer are "employed by a retail or service establishment in activities within the scope of the establishment's exempt business." Id. Thus, the Administrator concluded that the section 7(i) exemption applies to F&I personnel of retail automobile dealerships who are commissioned and otherwise meet the requirements of section 7(i). The Administrator also noted that her March 17 opinion is consistent with the advice provided in an April 2, 1982 opinion letter, stating that the section 7(i) exemption may be applicable to F&I employees of retail automobile dealerships.

The dealerships moved the respective district courts to reconsider their rulings based on the Administrator's March 17, 2003 opinion letter and the Washington State Supreme Court's intervening decision in Stahl v. Delicor of Puget Sound, Inc., 148 Wash.2d 876 (2003). The district courts, after reviewing

the parties' additional briefing, summarily declined to reconsider their decisions that section 7(i) is inapplicable to finance officers. Wickersham, 2003 WL 22002687 (W.D. Wash. August 11, 2003) (Order Denying Defendant's Motion for Revision); Gieg, No. 98-1563-HA (D. Or. June 20, 2003) (Order), slip op. at 2.[2]

SUMMARY OF ARGUMENT

This Court should reverse the decisions of the district courts based on the plain language of section 7(i), which exempts "any employee of a retail or service establishment" whose regular rate of pay exceeds one and one-half times the applicable minimum wage and who earns more than half of his pay from commissions on goods or services. (Emphasis added.) "Goods," as defined in the Secretary's regulations, include the financing and warranty products that the finance officers sold in earning their commissions. See 29 C.F.R. 776.20. Thus, as spelled out in the Administrator's March 17, 2003 opinion

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[2] Two other district court judges sitting in the Ninth Circuit have similarly declined to follow the Administrator's March 17 opinion letter regarding the applicability of section 7(i) to finance officers employed by auto dealerships. See Bennett v. SLT/TAG Inc., et al., CV 02-65 Order (D. Or. May 8, 2003); Chaloupka, et al. v. SLT/TAG Inc., et al. CV 02-743 (D. Or. May 19, 2003). None of the courts in these cases had the benefit of the Secretary's views as amicus, nor did any directly address the plain language argument put forth by the Secretary in this brief.

letter, finance officers meet all the requirements of section 7(i) and are therefore properly exempt from the FLSA's overtime provisions.

The Secretary's position is also supported by analogous case law determining the applicability of other exemptions under the FLSA. These cases demonstrate that, if the exemption by its terms applies to an overall establishment, individual employees do not have to perform the same type of work that gave rise to the establishment's exemption in order to fall within the exemption. In other words, the finance officers need not be directly engaged in retail sales in order to be subject to the dealership's "retail or service establishment" exemption under section 7(i).

This is not to say that the work of the finance officers need not be performed "within the scope" of the establishment's exempt business, as required by 29 C.F.R. 779.308. The finance officers, however, meet this requirement because their work was directly related and integral to the dealerships' retail sales operations as a whole. These are not cases where employees perform separate and distinct business activities, and thus should be deemed to fall outside the scope of the employer's exempt business. The dealerships did not operate, nor were the

finance officers engaged in, a business separate and distinct from the dealerships' retail auto sales business.

Finally, this Court's decision in Gieg v. Howarth, supra, holding that finance officers employed by an auto dealership do not qualify as automobile salesmen under the overtime exemption at 29 C.F.R. 213(b)(10)(A), does not foreclose the applicability of the section 7(i) exemption in this case. Section 7(i) represents a separate exemption with its own distinct requirements that can be met regardless of the applicability of section 13(b)(10)(A).

ARGUMENT

SECTION 7(i) DOES NOT REQUIRE THAT EMPLOYEES OF RETAIL ESTABLISHMENTS EARN THEIR COMMISSIONS FROM RETAIL SALES IN ORDER FOR THAT OVERTIME EXEMPTION TO APPLY.

A. The Secretary's Interpretation Is Compelled By The Plain Language Of Section 207(i).

"Statutory interpretation begins with the plain language of the statute." United States ex rel. Barajas v. United States, 258 F.3d 1004, 1010 (9th Cir. 2001) (citing United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994)). "It is a well-recognized rule of statutory construction that '[t]he plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results.'" United States ex rel. Barajas, 258

F.3d at 1010 (citing United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999), cert. denied, 531 U.S. 999 (2000)). See also Gieg v. Howarth, 244 F.3d 775, 777 (9th Cir. 2001) ("The 'unambiguously expressed intent of Congress' binds us.") (quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)). See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (stating that courts must first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

Section 7(i) exempts from the FLSA's overtime requirements "any employee of a retail or service establishment . . . if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable . . . under section 6 [minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." Thus, as stated in the Administrator's opinion letter, to qualify for the section 7(i) exemption, three conditions must be met:

(1) the employee must be employed by a retail or service establishment;

(2) the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage; and

(3) more than half the employee's total earnings in a representative period must consist of commissions on goods or services.

The finance officers in both cases meet all the requirements for being considered exempt under section 7(i). Their employers are retail establishments, their rate of pay is greater than one and one-half times the minimum wage, and more than half of their earnings were derived from commissions on "goods" within the meaning of the Act. See 29 C.F.R. 776.20(b) ("[G]oods as defined in the Act are not limited to commercial goods or articles of trade, or indeed, to tangible property, but include articles or subjects of commerce of *any character,*" including such items as "fiscal and other statements and accounts," "ideas," "[i]nsurance policies," "bills of exchange, bills of lading, checks, drafts, negotiable notes and other commercial paper") (internal quotation marks, citations, and footnotes omitted).

The district courts, however, read into the statute a fourth requirement -- that the employees must earn commissions from the sale of retail goods and services. The courts concluded that, even though the finance officers were employed by a retail establishment, they failed to qualify for the

section 7(i) exemption because they earned commissions from the sale of financing and insurance contracts, which are not retail in nature.[3]

This conclusion is contrary to the plain language of the statute. "The term 'any' is generally used to indicate lack of restrictions or limitations on the term modified." United States ex rel. Barajas, 258 F.3d at 1011. See also Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th Cir. 1999) ("According to *Webster's Third New Int'l Dictionary* (3rd ed. 1986), 'any' means 'one, no matter what one'; 'ALL'; 'one or more discriminately from all those of a kind.' This broad meaning of 'any' has been recognized by this circuit.") (citations omitted); Madrid v. Gomez, 150 F.3d 1030, 1036 (9th Cir. 1998) (the court must accept "the plain meaning of the word

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[3] Both district courts relied upon Mitchell v. Kentucky Finance Co., supra, in which the Supreme Court held that a company that engaged in the business of making personal loans and in purchasing conditional sales contracts from dealers in furniture and appliances lacked a "retail concept" and, therefore, was not a "retail or service establishment" within the meaning of 29 U.S.C. 213(a)(2) (repealed, Pub. L. 101-157, § 3(c)(1), 103 Stat. 939 (Nov. 17, 1989)). 359 U.S. at 295. See also 29 C.F.R. 779.317 (listing finance companies and insurance agencies as establishments that lack a "retail concept"). Kentucky Finance Co. is inapposite because that case addresses what is a retail or service establishment, while under section 7(i) the relevant question is whether employees who work for such an establishment are exempt from the overtime requirements of the Act. It is not in dispute that the auto dealerships here are retail establishments.

'any.' In its conventional usage, 'any' means 'ALL-used to indicate a maximum or whole.' It certainly does not mean 'some'").

Applying the statute's plain meaning, the Secretary interprets "any employee," as used in section 7(i), to mean any employee of a retail or service establishment, without any limitations or restrictions other than the conditions specified in the statute (i.e., the employee's rate of pay must exceed one and one-half times the applicable minimum wage and more than half of his earnings must consist of commissions on goods or services).[4] Thus, as the Administrator correctly concluded in her March 17 opinion letter, which is based on the statute's plain meaning, the Act does not require that an employee earn his commissions from the sale of retail goods or services in order for the section 7(i) overtime exemption to apply.

To the extent that this Court deems it necessary to go beyond the plain text of the statute, it has recognized that the Wage-Hour Administrator's opinion letters, although not in the form of legislative rules promulgated pursuant to specific

[4] The Secretary's regulations, consistent with the statute, require that a commission plan must be bona fide in order for the section 7(i) exemption to apply. See 29 C.F.R. 779.416. For example, "[a] commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek." 29 C.F.R. 779.416(c).

congressional authorization, are entitled to deference according to their consistency with past opinions and their power to persuade. See Biggs v. Wilson, 1 F.3d 1537, 1543 (9th Cir. 1993), cert. denied, 510 U.S. 1081 (1994). See also United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000). As the Supreme Court stated in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), the Secretary's interpretive regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." In considering the appropriate weight to be given a Wage-Hour Administrator's opinion letter, this Court emphasized that "[w]hen faced with a problem of statutory construction, federal courts should show 'great deference to the interpretation given the statute by the officers or agency charged with its enforcement.'"[5] Biggs, 1 F.3d at 1543 (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).

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[5] The court in Chaloupka, supra, raised questions concerning the process by which the March 17 opinion letter was issued, stating that it appears that the letter was "generated for purposes of this litigation." Opinion and Order (July 21, 2003), slip op. at 3. The opinion letter was issued in response to a request made by the National Automobile Dealership Association ("NADA"). While the defendant dealerships in the above-captioned cases, as well as those in other cases arising in the Ninth Circuit (see note 2, supra), may be members of the NADA, NADA is not a party in these cases, and the Department was in no way prohibited from issuing the March 17 opinion letter to set forth its position on

This Court should give the Administrator's March 17 opinion letter "great deference" because it is well reasoned and consistent with the only prior opinion directly addressing this issue. In accordance with the fundamental principles of statutory interpretation, the Administrator properly relied on the plain meaning of the statute. Her opinion was also thoroughly reasoned in that she followed the guidance provided by cases construing similar statutory language in other exemptions provided in the Act. Finally, her opinion is consistent with an Administrator's opinion dated April 2, 1982, stating that the section 7(i) exemption may be applicable to finance officers employed by auto dealerships. See Excerpt of Record, pp. 49-50.

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this important issue. Furthermore, there is nothing in the court's discussion of the manner in which the letter was procured to indicate that the opinion itself is unsound and unworthy of deference. Finally, notwithstanding the Chaloupka court's insinuations to the contrary, the Administrator did indeed draft the March 17 opinion letter without any direct assistance from outside parties, a point that is reinforced by that letter's consistency with the April 2, 1982 Wage-Hour Administrator opinion letter mentioned above. Cf. Auer v. Robbins, 519 U.S. 452, 462 (1997) ("There is simply no reason to suspect that the interpretation [put forward in an amicus brief] does not reflect the agency's fair and considered judgment on the matter in question.").

B. Case Law Construing Analogous Exemptions Supports The Secretary's Interpretation That Employees Need Not Engage In Retail Sales To Qualify For The Section 7(i) Exemption.

Although we are aware of no cases arising under section 7(i) directly on point, a number of cases determining the applicability of other exemption provisions in the Act, using similar inclusive language, support the Secretary's interpretation. For example, in Hamilton v. Tulsa County Public Facilities Authority, 85 F.3d 494, 497 (10th Cir. 1996), the court, noting that the FLSA specifically exempts from the minimum wage and overtime requirements "any employee employed by an establishment which is an amusement or recreational establishment," 29 U.S.C. 213(a)(3), rejected an argument that maintenance employees of such an establishment were not subject to the exemption because they were not serving in traditional recreational or amusement activities. The court stated, "By its own terms, § 213(a)(3) of the FLSA exempts employees employed by amusement or recreational establishments; it does not exempt employees on the basis of the work performed at an amusement or recreational establishment. It is the character of the revenue producing activity which affords the employer the protection of the exemption." 85 F.3d at 497. Accord Gibbs v. Montgomery County Agricultural Society, 140 F. Supp.2d 835, 840, 843-44

(S.D. Ohio 2001).[6] See also Marshall v. New Hampshire Jockey Club, 562 F.2d 1323, 1331 n.4 (1st Cir. 1977) (stating that "[t]he § 13(a)(3) exemption turns on the nature of the employer's business, not on the nature of the employee's work").[7]

There also is authority supporting this conclusion in case law interpreting section 13(a)(2), 29 U.S.C. 213(a)(2) (subsequently repealed, see n.3 supra), see Mitchell v. Gammill, 245 F.2d 207, 208-09, 211 (5th Cir. 1957) (the section 13(a)(2) "retail and service establishment" exemption applied to all employees, including those who did no retail or service work); and in case law interpreting section 13(b)(2), 29 U.S.C. 213(b)(2), see McComb v. Union Stock Yards, 168 F.2d 375, 377 (7th Cir. 1948) (the section 13(b)(2) "rail carrier" exemption

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[6] In Gibbs, the court noted that the Fifth Circuit had reached a contrary result in Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18, 19, cert. denied, 414 U.S. 827 (1973). The court in Gibbs, however, specifically declined to follow Six Flags, noting that "the Fifth Circuit reached a contrary conclusion just one year later in Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1119 (5th Cir. 1974), concluding that an employer's 'principal activity should be determinative of [its] eligibility for an exemption.'" 140 F. Supp.2d at 843-44. The district court in Gibbs also noted that the position taken in Hamilton and Texas City is consistent with that taken by the Sixth Circuit in Brennan v. Southern Productions, Inc., 513 F.2d 740, 746-47 (6th Cir. 1975) (looking to the "principal activity of the [employer]" when determining the applicability of the section 13(a)(3) exemption).

[7] The First Circuit also specifically declined to follow Six Flags. 562 F.2d at 1331 n.4.

applied to employees of a railroad which owned a stockyard and related businesses, where the employees were responsible for the guarding and care of the livestock, protection of structures, and traffic control; "[t]he employees' exemption does not depend upon the character of the work performed by them").

The Secretary's interpretation of section 7(i) is also entirely consistent with a recent decision of the Supreme Court of Washington that interpreted a similar state law provision to mean that all employees of a retail and service establishment can be paid pursuant to the "retail sales exemption" regardless of their duties. See Stahl v. Delicor of Puget Sound, Inc., 148 Wash.2d 876, 886 (2003). The court relied in part upon guidance published by the state Department of Labor, stating that "'[i]f the establishment qualifies for the exemption that is, 75

percent of dollar volume is not for resale and is recognized as retail sales or service - then *all employees* whose pay is at least 50 percent comprised from commissions are exempted from the overtime premium . . . whether they work in sales or in other activities.'" Id. at 886-887 (quoting DLI (Department of Labor and Industries) Employment Stds., No. ES.A.10.2, at 1-2) (second emphasis added by court).

C. Finance Officers Are Employed Within The Scope Of A Retail Auto Dealership's Exempt Business Consistent With The Secretary's Regulation at 29 C.F.R. 779.308.

The regulation at 29 C.F.R. 779.308, under the general heading "'Establishment' Basis of Exemptions," states that in order for an exemption to apply to a particular employee hired by a retail or service establishment, he "must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business." In her March 17 opinion letter, the Administrator expressly concluded that F&I salespersons (i.e., finance officers), although not directly engaged in the retail sale of automobiles, are nonetheless employed by the automobile dealership "in activities within the scope of its exempt business" as required by section 779.308.

In reaching this conclusion, the Administrator noted that "F&I salespeople work along with and as part of the new and/or used car sales departments; are physically located together with those departments; are paid directly by the retail dealership; are employed by retail automobile dealerships; perform all activities within the dealership's physical place of business; and are covered by the same benefits package, policies, and procedures as other dealership employees." Op. letter, p. 3. The Administrator also noted that, "[a]s part of its business,

the dealership assists customers in financing and insuring vehicle purchases," but "does not operate a finance company, insurance company, or any other separate business." Id. at 2. She stated that, because F&I salespersons generally work closely with the automobile sales staff (within a single establishment) in completing transactions directly related to the sale of the automobile, such employees "are an integral part of retail automobile dealers." Id. at 3-4. See Gieg, 2003 WL 21087602, at *3 ("[The finance officer's] duties included verifying pertinent information regarding sale deals being made by defendant's sales staff, inputting information into a computer, printing up the necessary bank and Department of Motor Vehicles (DMV) forms, and obtaining the buyer's signature on the paperwork."). See also Gieg v. Howarth, 244 F.3d 775, 777 (9th Cir. 2001) (noting that the work of finance officers, "obtaining financing for customers and offering profitable services," is "ancillary to car sales").

The district courts, however, concluded that because the finance officers did not engage in retail sales, they were not employed in activities within the scope of the dealerships' exempted retail business. Both courts cited the situation described in Davis v. Goodman Lumber Co., 133 F.2d 52 (4th Cir. 1943), which is also cited in section 779.308, as an example of

when an establishment's employee is not employed in the activities within the scope of its exempted business. Davis involved the applicability of the section 13(a)(2) exemption for retail or service establishments to employees of a company primarily engaged in the retail business of selling lumber, but which also engaged to a limited extent in the non-retail manufacture of rollers for cotton mills. The court in Davis held that, because the manufacturing business was "separate and distinct" from the company's retail lumberyard, the exemption did not apply to employees of the company's manufacturing business. 133 F.2d at 54.

This Court in Wirtz v. Western Compress Co, 330 F.2d 19 (9th Cir. 1964), similarly concluded that the exemption at 29 U.S.C. 207(c) for employers engaged in ginning and compressing cotton (subsequently repealed) did not create an employer exemption which would cover all of the employer's employees, regardless of their actual work.[8] The Court stated that if the defendant compressing company "had caused shoe manufacturing machines to be set up and operated in seasonally unused portions of its

[8] In the words of the Court, "The argument that the § 7(c) exemption is an employer exemption, applicable to all employees of such an employer no matter what the particular employees work at or whether the work has any relation to the kind of activity which caused Congress to create the exemption, can be overstretched beyond the breaking point." Western Compress, 330 F.2d at 22.

building, the fact that the shoemakers were employees of a cotton compressing employer would not put them under their employer's § 7(c) exemption from overtime pay, even though they worked at the place of employment where the employer is so (i.e., in the compressing business) engaged." 330 F.2d at 22. On the other hand, the Court acknowledged that the section 7(c) exemption would cover all those employees engaged in "the activities which occur at a compressing plant and which relate to the business of compressing," including "loading, unloading, weighing, sampling, tagging, recording and all the paper work related to the [compressing of cotton]." Id. at 23.

Unlike the facts in Davis or the hypothetical situation posed in Western Compress, neither dealership here maintained on its premises separate and distinct business operations in which the employees in question were engaged. Like the dealership considered by the Administrator in her opinion letter, these dealerships do "not operate a finance company, insurance company, or any other separate business." Rather, the duties performed by the finance officers were an integral, and integrated, part of the their employer's auto dealership operations as a whole. See McComb, 168 F.2d at 378 (holding that watchmen who guarded their employer's loading and unloading facilities were covered by the overtime exemption provided in 29

U.S.C. 213(b)(2), which exempts certain rail carriers, "because they are employees of an employer engaged in the operation of a railroad terminal, and their duties are intimately related to the operation as a whole"). See also Thibodeaux v. Executive Jet International, Inc., 328 F.3d 742, 754 (5th Cir. 2003) (because plaintiff's duties as a flight attendant for a common carrier are "directly related to air transportation," the "common carrier by air" overtime exemption at 29 U.S.C. 213(b)(3) applies).

The decision in Mitchell v. Gammill, supra, also supports the conclusion that only work that is truly functionally distinct should fall outside an establishment's exemption. In Gammill, the court considered whether an employer who operated at the same location several retail businesses, as well as a non-retail "poultry processing department," was a retail establishment exempt under 29 U.S.C. 213(a)(2). The Department of Labor argued that "the poultry department was a separate unit not functionally related to the other departments, and that it was a wholesale enterprise subject to the wage and hour provisions of the [FLSA]." 245 F.2d at 210. The court determined that the employer was entitled to the exemption with respect to all of its employees, including those involved in non-retail activities in the poultry processing department,

because "[i]n most respects of management [the employer's business] was operated as a unit. It was a single establishment."[9] Id. at 211. See also 29 C.F.R. 779.304(a) (when different departments of a retail or service establishment "are operated as integral parts of a unit, the departmentalized unit taken as a whole ordinarily will be considered to be the establishment contemplated by the exemptions"); 29 C.F.R. 779.305 (two or more physically separated portions of a business located on the same premises may constitute more than one establishment for purposes of exemptions if they are physically separated from the other activities and "distinct and separate from and unrelated to that portion of the business devoted to other activities").

It is clear that each of the dealerships, including the financing and insurance functions performed by the finance officers, were operated as a single, integrated retail establishment. It therefore follows that all of dealerships' employees, including the finance officers, are exempt if their method and rate of compensation complies with section 7(i).

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[9] The court noted that, even though a majority of the sales of the poultry department was made to hotels and restaurants, some of the poultry was cooked and served at the company's restaurant and barbecue stand; some was sold at the company's grocery and market; and some was sold directly to individuals for consumption at large parties. 245 F.2d at 209.

D. The Secretary's Position Does Not Conflict With This Court's Previous Decision In Gieg.

In Gieg v. Howarth, supra, this Court held that an auto dealership employee whose primary duties were selling financing and warranties (i.e., a finance officer) did not qualify as an automobile salesman within the overtime exemption at 29 U.S.C. 213(b)(10)(A). Section 13(b)(10)(A) exempts from the FLSA's overtime requirements:

> any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.

The district court in Wickersham stated that "[i]t stands to reason then, that an employee of an automobile dealership with virtually the same job duties as in Gieg would disqualify a 'retail or service establishment' from exemption under § 207(i). To hold otherwise would create a loophole which would abrogate the Ninth Circuit's opinion by encouraging 'retail and service establishments' to seek avoidance of overtime payments pursuant to 207(i), thereby circumventing the exemption available in 213(b)(10)." 2002 WL 32152269, at *6. However, an examination of the marked differences between the section 7(i) and section 13(b)(10) exemptions demonstrates that the district court's statement has no merit.

In her March 17 opinion letter, the Administrator reaffirmed her position that section 13(b)(10)(A) does not apply to F&I salespersons, because they are not automobile salesmen, partsmen, or mechanics. She also noted that section 7(i) provides a separate exemption with distinct requirements. Whereas section 13(b)(10)(A) focuses on three specific types of employees in the vehicle sales industry, section 7(i) more broadly provides an exemption for any employee of a retail or service establishment who satisfies certain compensation requirements. Unlike section 13(b)(10)(A), section 7(i) requires that employees be compensated on a commission basis or at a rate greater than one and one-half times the minimum wage in order to be exempt.

Thus, according to their terms, one of these statutory provisions may exempt a particular employee, while the other may not. As relevant to this case, although the auto dealership finance officers are ineligible for exemption under section 13(b)(10)(A), they can be exempt under section 7(i) where they meet certain compensation requirements. Such a result is compelled by the distinct requirements of each exemption. Congress would not have intended, without expressly stating, that failure to meet the section 13(b)(10)(A) exemption necessarily means an inability to meet the distinct exemption

under section 7(i). Thus, the Administrator's opinion that section 7(i) may, under certain circumstances, apply to F&I salespersons employed by auto dealerships does not conflict with this Court's decision in Gieg.

This point is buttressed by the district court's decision in Gieg v. DDR, Inc., in which the court permitted the defendant auto dealership to "renew an argument" based upon the applicability of section 7(i), following a remand resulting from this Court's determination in Gieg that section 13(b)(10)(A) does not apply to finance officers. 2003 WL 21087602, at *1. The district court stated that "[t]he exemption described by 29 U.S.C. § 207(i) was addressed by the parties on appeal before the Ninth Circuit, but in its remand the Court of Appeals provided no guidance regarding the possible applicability of the exemption in this case."[10] Id. The district court aptly saw no inconsistency in considering the applicability of section 7(i) to F&I personnel following this Court's determination that section 13(b)(10)(A) does not apply to such employees.

CONCLUSION

For the foregoing reasons, the district court decisions granting summary judgment against the dealerships on the finance

[10] This Court did not discuss section 7(i) in its decision in Gieg v. Howarth.

officers' claims for failure to pay overtime in violation of the FLSA should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29 (c)(5) and 32(a)(7)(C), I certify that this brief has been prepared using the following monospaced typeface - Microsoft Word, Courier New, 12 point. Exclusive of the table of contents, table of authorities, certificate of compliance, certificate of service, and addenda, this brief contains 4,945 words.

Nov. 24, 2003
DATE

Ford F Newman
FORD F. NEWMAN

CERTIFICATE OF SERVICE

I certify that on November 24, 2003, I sent true and correct copies of the Brief for the Secretary of Labor as Amicus Curiae by Regular Mail to:

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ADDENDUM

Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

MAR 17 2003

Douglas I. Greenhaus
Director, Environment, Health and Safety
National Automobile Dealers Association (NADA)
8400 Westpark Drive
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Dear Mr. Greenhaus:

This is in response to your request for an opinion regarding whether a finance and insurance (F&I) salesperson employed by a retail automobile dealership is exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) pursuant to Section 7(i) of the FLSA. It is our opinion that FLSA Section 7(i), 29 U.S.C. § 207(i), exempts the F&I salesperson described by your letter from the FLSA's overtime requirements.

I. Factual Background

You indicated that virtually all dealerships offer finance and insurance products to their customers and that, after an agreement to purchase an automobile is reached, a customer typically meets an F&I salesperson at the end of the vehicle sale. Generally, F&I salespeople work along with and as part of the new and/or used car sales departments, and typically are physically located together with those departments. The F&I salespeople complete the paperwork necessary to finalize the sales transaction, including purchase and lease contracts, internal dealership forms, and forms required by various regulatory agencies. The F&I salesperson is paid on a commission basis. If a customer agrees to finance the transaction through one of the companies with which the dealership has a relationship (e.g., manufacturer credit arms such as Ford Motor Credit or American Honda Finance Company), the dealership is paid a participation fee, and the F&I salesperson is paid a percentage of that fee as a commission. If a customer agrees to purchase a warranty or other insurance product (e.g., extended warranties, gap insurance, credit insurance), the dealership is paid a participation fee and the F&I salesperson is again paid a percentage of that fee as a commission. On dealer-installed after-market products (e.g., vehicle security systems, sealants and protectants, window treatments), the F&I salesperson earns a commission based on the dealership's charge for the product. In all cases, F&I salespeople are paid directly by the retail dealership.

You asked for the Department's opinion regarding the exempt status of F&I salespeople based on the following assumptions. The F&I salesperson is employed by a retail automobile dealership and performs all activities within the dealership's physical place of business. The dealership is an establishment with an annual dollar volume of sales of goods or services (or of both) of at least 75 per cent that is not for resale and is recognized as retail sales and service in the retail automobile dealership industry. The F&I salesperson is paid directly and exclusively by the dealership, and is covered by the same benefits package, policies and procedures as other

dealership employees. The regular rate of pay for the F&I salesperson is more than one and one-half times the applicable minimum hourly wage under the FLSA. More than half of the F&I salesperson's compensation for a representative period is in the form of commissions as described above. The dealership does not operate a finance company, insurance company, or any other separate business. As part of its business, the dealership assists customers in financing and insuring vehicle purchases.

II. Analysis

Section 7(i) of the FLSA exempts from the FLSA's overtime requirements "any employee of a retail or service establishment . . . if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable . . . under section 6 [minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." 29 U.S.C. § 207(i). The Wage and Hour Division's regulatory interpretations of Section 7(i) are contained in 29 C.F.R. §§779.410 – 779.421.

To qualify for Section 7(i)'s exemption from the overtime provisions of the FLSA, three conditions must be met:

(1) the employee must be employed by a retail or service establishment;

(2) the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage; and

(3) more than half the employee's total earnings in a representative period must consist of commissions on goods or services.

A. Finance And Insurance Employees Of Automobile Dealerships Are Employed By A Retail Or Service Establishment.

For Section 7(i) purposes, a "retail or service establishment" is "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." See 29 C.F.R. §§ 779.24 and 779.411; Pub. L. 101-157; 103 Stat. 938 (repealing Former FLSA Section 13(a)(2), 29 U.S.C. § 213(a)(2)); Reich v. Delcorp, Inc., 3 F.3d 1181, 1183 (8th Cir. 1993) (FLSA Section 13(a)(2)'s definition of "retail or service establishment" applies to Section 7(i) after Congress repealed Section 13(a)(2)).

Your letter indicates that the dealership is an establishment with an annual dollar volume of sales of goods or services (or of both) of at least 75 per cent that is not for resale and is recognized as retail sales and service in the retail automobile dealership industry. This satisfies the definition of retail or service establishment for Section 7(i) purposes. Accord 29 C.F.R. §779.320 (partial list of establishments whose sales or service may be recognized as retail, including "automobile dealers' establishments"); 29 C.F.R. § 779.318 (characteristics and examples of retail or service establishments, including a discussion that such an establishment "sells to the general public ... its automobiles . . . and other goods, and performs incidental

services on such goods when necessary"). Accordingly, we conclude that the automobile dealership described by your letter is a retail or service establishment for purposes of Section 7(i).

The F&I salesperson described in your letter is employed by a retail or service establishment – a retail automobile dealer. 29 C.F.R. § 779.308, for example, explains:

> In order to meet the requirement of actual employment "by" the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business.

F& I salespeople are "employed by" the automobile dealer "in activities within the scope of its exempt business." Because Section 7(i) exempts "any employee of a retail or service establishment" if Section 7(i)'s compensation requirements are satisfied, all business performed by such an establishment constitutes "activities within the scope of its exempt business" for purposes of Section 7(i) and 29 C.F.R. § 779.308. Your letter indicates that F&I salespeople work along with and as part of the new and/or used car sales departments; are physically located together with those departments; are paid directly by the retail dealership; are employed by retail automobile dealerships; perform all activities within the dealership's physical place of business; and are covered by the same benefits package, policies, and procedures as other dealership employees. F&I employees are thus employed by a retail or service establishment in activities within the scope of that establishment's exempt business. Because the auto dealership described by your letter is operated as a single establishment, all employees of the establishment are exempt if their compensation complies with the requirements of Section 7(i). Employee duties are irrelevant. See, e.g., Mitchell v. Gammill, 245 F.2d 207, 208-09, 211 (5th Cir. 1957) (All employees, including employees who did no retail or service work, were exempt under former FLSA Section 13(a)(2) because the provision exempted "any employee employed by any retail or service establishment" and "[i]n most respects of management it was operated as a unit. It was a single establishment.").

The nature of the employer's business, not the work performed by a particular employee, determines whether establishment-based exemptions, like and including Section 7(i), apply. See, e.g., Hamilton v. Tulsa County Pub. Facilities Auth., 85 F.3d 494, 497 (10th Cir. 1996) (establishment-based exemption for "any employee employed by an establishment which is an amusement or recreational establishment" exempts "employees employed by amusement or recreational establishments; it does not exempt employees on the basis of the work performed at an amusement or recreational establishment. It is the character of the revenue producing activity which affords the employer the protection of the exemption."); Marshall v. New Hampshire Jockey Club, 562 F.2d 1323, 1331 n.4 (1st Cir. 1977) (establishment-based exemption "turns on the nature of the employer's business, not on the nature of the employee's work"); and Gibbs v. Montgomery County Agricultural Soc., 140 F. Supp. 2d 835, 843-44 (S.D. Ohio 2001) (the employer's principal activities, not the work actually performed by employees, determines the applicability of establishment-based overtime exemption). See, also, Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1119 (5th Cir. 1974) ("principal activity" of establishment determines eligibility for establishment-based exemption). To the extent that some courts have issued rulings that could be read as inconsistent with this interpretation (see, e.g., Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18 (5th Cir. 1973)), we disagree with them. The correct

interpretation of the FLSA holds to a literal reading of the Act's text. Cf. 29 C.F.R. § 779.23 ("[T]he term establishment . . . refers to a 'distinct physical place of business' rather than to 'an entire business or enterprise' which may include several separate places of business. . . . [T]his is the meaning of the term as used in sections . . . 7(i), 13(a), [and] 13(b) . . . of the Act.").

Because the establishment is a retail or service establishment, Section 7(i) exempts all employees whose compensation satisfies the requirements of Section 7(i). Indeed, Section 7(i) is an establishment-based and compensation-based exemption. 29 C.F.R. §§ 779.302-.303. If an establishment qualifies as a retail or service establishment, then any employee employed by that establishment is exempt if the employee's compensation satisfies Section 7(i)'s two other requirements: compensation of one and one-half times the minimum wage and more than one-half derived from commissions on goods or services.

The legislative history of Section 7(i) is also consistent with our view that Section 7(i) is an establishment-based and compensation-based exemption: if the establishment qualifies as a retail or service establishment, all employees of the establishment are exempt so long as they satisfy the compensation requirements of Section 7(i). Conf. Rep. No. 87-327, 1961 U.S.C.C.A.N. 1706, at 1712-13 (May 2, 1961). See also, e.g., Reich v. Delcorp, Inc., 3 F.3d 1181, 1186 (8th Cir. 1993) 1186 (In-home carpet cleaning business was a retail or service establishment for Section 7(i) purposes and, without limit, was "entitled to pay its employees in the manner provided in § 207(i)."); Martin v. The Refrigeration School, Inc., 968 F.2d 3, 5 (9th Cir. 1992) (If an entity is a "retail or service establishment," Section 7(i) exempts all "employees whose regular rate of pay is 150 percent of the minimum hourly rate and who receive more than half their compensation by way of commissions."); Mechmet v. Four Seasons Hotel, Ltd., 825 F.2d 1173, 1174 (7th Cir. 1987) (The FLSA's overtime "provisions do not apply to employees of 'a retail or service establishment' if the employee's regular rate of pay is more than 1.5 times the minimum wage and if more than half his compensation for a representative period (not less than one month) represents commissions on goods or services."); and Reich v. Cruises Only, Inc., No. 95-660-CIV-ORL-19, 1997 WL 1507504, at *6 (M.D. Fla. June 5, 1997) (Travel agency "is a retail or service establishment under 29 U.S.C. § 207(i) and thus is not subject to the [overtime] requirements of § 207(a).").

In your letter, you indicate that "F&I salespeople work along with and as part of the new and/or used car sales departments, and typically are physically located with those departments." Even if this means that F&I salespeople operate in a separate "department," these employees would still qualify as exempt because F&I salespeople are an integral part of retail automobile dealers. See 29 C.F.R. § 779.304(a) (when different departments of a retail or service establishment "are operated as integral parts of a unit, the departmentalized unit taken as a whole ordinarily will be considered to be the establishment contemplated by the exemptions"). See also 29 C.F.R. § 779.305 (Two or more physically separated portions of a business located on the same premises may constitute more than one establishment if they are physically separated from the other activities and "distinct and separate from and unrelated to that portion of the business devoted to other activities."); and Davis v. Goodman Lumber Co., 133 F.2d 52 (4th Cir. 1943) (manufacturing business was separate and distinct from the defendant's retail lumber yard and therefore then-existing retail or service establishment exemption did not apply to employees of the defendant's manufacturing business).

B. The Finance And Insurance Salesperson's Regular Rate Of Pay Exceeds One And One-Half Times The Minimum Wage.

As indicated above, Section 7(i) requires that "the regular rate of pay of [an exempt] employee is in excess of one and one-half times the minimum hourly rate applicable . . . under section 6 [minimum wage]." 29 U.S.C. § 207(i). The regular rate of pay of F&I salesperson described by your letter is more than one and one-half times the applicable minimum hourly wage under the FLSA. Accordingly, the F&I salesperson described by your letter satisfies this portion of Section 7(i).

C. More Than Half The Finance And Insurance Salesperson's Total Earnings In A Representative Period Consists Of Commissions On Goods.

Section 7(i) also requires that "more than half [an employee's] compensation for a representative period (not less than one month) represents commissions on goods or services." Your letter indicates that more than half of the F&I salesperson's compensation is in the form of commissions.

Furthermore, your letter indicates that the F&I salesperson's compensation represents commissions on goods. FLSA Section 3(i) defines "goods" as including "articles or subjects of commerce of any character." 29 U.S.C. § 203(i). The Department's regulations specifically identify "fiscal and other statements and accounts," "ideas," "insurance policies," "negotiable notes and other commercial paper," and "vehicles" as among "a few illustrations" of "goods." 29 C.F.R. § 776.20. Section 7(i) does not limit the word "goods." More than half of the compensation of the F&I salesperson described in your letter represents commissions on goods for purposes of FLSA Sections 3(i) and 7(i). Accord 29 C.F.R. §§ 776.20 ("goods"), 779.14 (goods), 779.107 (goods defined), 779.247 ("goods" defined), and 779.314 ("goods" and "services" defined).

III. The Department Of Labor's Long-Standing Position Is That Section 7(i) Exempts Commissioned Finance And Insurance Employees Of Automobile Dealerships.

Our response to you in this matter reaffirms prior pronouncements by the Administrator of the Wage and Hour Division about the application of Section 7(i). On April 2, 1982, the Wage and Hour Administrator issued an opinion letter that determined that exemption under FLSA Section 7(i) may be applicable to finance and insurance personnel of retail automobile dealerships. That letter responded to an inquiry "concerning whether certain employees compensated on a commission basis may be exempt from overtime pay pursuant to section 7(i) of the Fair Labor Standards Act," including painters of a body shop and finance and insurance employees employed by an automobile dealership that qualified as a retail establishment. The Administrator concluded that "finance and insurance personnel who are commissioned and otherwise meet the requirements under section 7(i) could be exempt under that section, as explained above, but such employees could not qualify for exemption under [a different exemption provided by] section 13(b)(10)." We discuss FLSA Section 13(b)(10), 29 U.S.C. § 213(b)(10), below.

Other letter rulings by the Wage and Hour Division are consistent with the Administrator's 1982 Opinion Letter. See, e.g., Office of Enforcement Policy Letter, Wage & Hour Div. (Oct. 21, 1999) ("[E]mployees of retail or service establishments are exempt from FLSA's overtime requirements if their regular rate of pay is more than 1.5 times the minimum wage and if more than half their compensation for the representative period represents commissions on goods or services."); and Administrator Opinion Letter, No. 79280/79-393, Wage & Hour Div. (July 13, 1982) ("[I]t is essential that an employer's company meet the definition of a retail or service establishment stated in section 13(a)(2) in order to qualify for the section 7(i) exemption. Such an employer is eligible to claim the exemption with respect to those employees whose compensation is primarily on a commission basis."). Copies of these letters are enclosed. [1]

IV. FLSA Section 13(b)(10) Does Not Exempt Finance And Insurance Employees Of Automobile Dealers.

Finally, we reaffirm the position taken in the Administrator's April 2, 1982 Opinion Letter that FLSA Section 13(b)(10), 29 U.S.C. § 213(b)(10), does not apply to the F&I Salesperson described by your letter. Section 13(b)(10) exempts from the FLSA's overtime requirements:

> any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.

29 U.S.C. § 213(b)(10)(A).

Unlike Section 7(i), which exempts "any employee" of the establishment identified in that exemption, Section 13(b)(10) is both an employee-based and establishment-based exemption. Section 13(b)(10) is an employee-based exemption because three and only three categories of employees are exempt: salesmen, partsmen, and mechanics who are "primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). Section 13(b)(10) is an establishment-based exemption because employees of these three classes are exempt only if they are "employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. § 213(b)(10)(A).

F&I employees do not qualify for the Section 13(b)(10) exemption because they are not automobile salesmen, partsmen, or mechanics. See, e.g., Gieg v. Howarth, 244 F.3d 775, 776-77 (9th Cir. 2001) (noting that FLSA Section 13(a)(19), Section 13(b)(10)'s predecessor, exempted "any employee" and that Congress "intended to

[1] In Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959), the Court held that a company that engaged in the business of making personal loans and in purchasing conditional sales contracts from dealers in furniture and appliances was not a "retail or service establishment." The finance company did not satisfy FLSA Section 13(a)(2)'s definition of "retail or service establishment" because it lacked a "retail concept." The Court did not consider whether the duties of the employees had a "retail concept." Rather, it only considered whether Congress intended the defendant's business to be exempt. Section 7(i) exempts "any employee" of an exempt "retail or service establishment" who meets the pay requirements of the exemption. Accordingly, an individual employee's duties in a "retail or service establishment" are not relevant for purposes of Section 7(i).

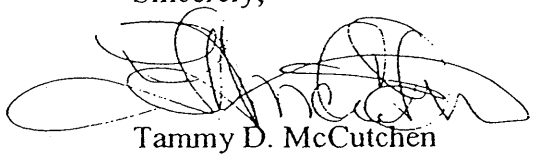
narrow significantly" the exemption in 1966 when it eliminated the "any employee" language and instead exempted only three categories of employees -- "salesmen, partsmen and mechanics primarily engaged in selling or servicing automobiles").

* * *

Accordingly, we conclude that: (1) the automobile dealership described by your letter qualifies as a retail or service establishment for Section 7(i) purposes; (2) the finance and insurance salesperson described by your letter is employed by a retail automobile dealership; (3) the compensation of the finance and insurance employee satisfies the compensation requirements of Section 7(i); (4) Section 7(i) exempts the finance and insurance salesperson described by your letter from the overtime provisions of the FLSA; and (5) Section 13(b)(10) does not apply to finance and insurance salespeople.

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 also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

Sincerely,



Tammy D. McCutchen
Administrator