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

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-32. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings 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). Wage and Hour Opinion Letter FLSA2009-32 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement

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

FLSA2009-32

This Opinion Letter is withdrawn.
January 16, 2009

Dear **Name*:**

This is in response to your request for an opinion regarding whether five of your client's positions qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).* Based on the information you furnished about the employees' job descriptions, we believe the Field Information Analyst (FIA) and the Supervisory Special Agent (SSA) positions qualify for the administrative and executive exemptions, respectively. The Analyst 1, Analyst 2, and Special Agent (SA) positions, however, do not appear to qualify for the administrative exemption.

You state that your client combats fraud and theft in the insurance industry by gathering, analyzing, and distributing information to member companies and law enforcement agencies; conducting investigative operations; providing educational services; and communicating messages on theft and fraud to member companies and the public.

Analyst 1

The primary duties of Analyst 1 are using analytical methodologies and technical skills to recognize and extract relevant information from internal and external sources, evaluating the pertinence and accuracy of the information, analyzing and predicting patterns of activity that indicate potential fraud, and preparing reports documenting the results. Your client, law enforcement agencies, and member companies use the information to make decisions on whether to pursue criminal charges against perpetrators.

Other duties include: handling assignments that are fluid in nature and lack clear steps to reach the stated objective; developing self-initiated inquiries related to industry issues that impact member companies; presenting findings and proposed recommendations; advising your client's management team on administrative issues, including appropriate allocation of resources; and determining new procedures to prevent, detect, and investigate fraud. Analyst 1 develops, manages, documents, and utilizes professional relationships, and works closely with member companies, law enforcement agencies, and others.

Analyst 2

The primary duties of Analyst 2 are similar to Analyst 1, except Analyst 2 does not develop self-initiated inquiries related to industry issues. Other duties of Analyst 2 include directing project resources if assigned a leadership role for a particular project.

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

Field Information Analyst

The FIA's primary duties are managing the collection of information and coordinating the collection efforts of area personnel, which include SAs and special investigative units of member companies, with minimal supervision and guidance. The FIA's other duties include evaluating and approving information entered into a database by area personnel to ensure accurate and relevant information; reviewing SA reports to capture items of specific value; identifying fraudulent schemes; producing case assessment reports; reviewing SA recommendations; setting a security designation on reports; training and mentoring new analysts; evaluating and assisting the development of new software applications to improve investigative functions; marketing strategic and tactical information products to member companies; advising management on administrative issues such as appropriate allocation of resources; developing self-initiated inquiries related to industry issues and presenting findings and proposed recommendations; and determining new procedures to prevent, detect, and investigate fraud.

Supervisory Special Agent

The SSA's primary duty is the management of the data entry department for the U.S. and Mexico border, including the supervision of more than two full-time data entry personnel. The SSA's other duties include ensuring the timely and accurate collection and entry of information into a database; training data entry personnel; handling all personnel decisions; monitoring subordinates' work load; and advising management on administrative issues such as the appropriate allocation of resources.

Special Agent

The SA's primary duties are initiating and conducting criminal investigations, collecting and analyzing relevant data, and deciding which cases to submit to law enforcement and/or prosecutors for consideration of legal action. The SA's other duties include testifying as an expert witness; interacting with member companies, law enforcement, and government agencies on behalf of your client; providing training to member companies and law enforcement agencies; identifying new clients; advising management on administrative issues such as appropriate allocation of resources; and determining new procedures to prevent, detect, and investigate crime.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime exemption for executive and administrative employees as defined in 29 C.F.R. Part 541. An employee employed in a bona fide administrative capacity may qualify for the administrative exemption if 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.

We note the salary and actual duties performed, not the occupational title and job classification, will determine whether the employee is exempt. *See* 29 C.F.R. § 541.2. For purposes of this opinion, we assume the employees in question receive at least $455 per week on a salary basis.

With regard to the type of work that qualifies for the administrative exemption,

> [t]he phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

29 C.F.R. § 541.201(a). Examples of management or general business operations work include quality control, marketing, research, personnel management and public relations. 29 C.F.R. § 541.201(b).

Under the second criteria for the administrative exemption test,

> an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed.

29 C.F.R. § 541.202(a). Section 541.202(c) notes, "[t]he exercise of discretion and independent judgment implies that the employee has the authority to make an independent choice, free from immediate direction or supervision." The regulations cite several factors "to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance":

> whether the employee has authority to . . . interpret, or implement management policies or operating practices; . . . whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; . . . [and] whether the employee provides consultation . . . to management.

29 C.F.R. § 541.202(b).

The preamble to the Department's 2004 revision of Part 541 notes that federal courts generally find that although a case by case analysis is required, employees meeting two or three of the indicators in 29 C.F.R. § 541.202(b) exercise discretion and independent judgment. *See* 69 Fed. Reg. 22,122, 22,143 (Apr. 23, 2004).

The administrative exemption thus has requirements pertaining to the "type of work performed" and "the level of importance or consequence of the work performed." *Id.* at 22,139. With regard to the type of work performed, the preamble explains that "the administrative exemption covers only employees performing a particular type of work—work related to assisting with the running or servicing of the business." *Id.* at 22,141. Furthermore,

> this exemption is intended to be limited to those employees whose duties relate "to the administrative as distinguished from the 'production' operations of a business." Thus, it relates to employees whose work involves servicing the business itself—employees who "can be described as staff rather than line employees, or as functional rather than departmental heads."

Id. Although the production-versus-staff dichotomy is not dispositive, it "is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption." *Id.*

We believe that Analyst 1 and 2 provide ongoing, day-to-day gathering, analyzing, and reporting of information rather than performance of administrative functions directly related to managing your client's business. *See* 29 C.F.R. § 541.201(b). From the information provided, the primary duty of Analyst 1 and Analyst 2 is production of analytical reports. Such activity does not directly relate to the management or general business operations of your client or your client's customers within the meaning of the regulations; rather they fall on the production side of the production-versus-staff dichotomy. *See* Wage and Hour Opinion Letter FLSA2006-20NA (Sept. 8, 2006).

Similarly, the SA's activities relate to the ongoing, day-to-day investigative services, rather than administrative functions directly related to managing your client's business or that of your client's customers. *See* 29 C.F.R. § 541.201(b). The SA's primary duties are conducting investigations and collecting and analyzing data. Such activities do not relate to the management or general business operations of your client within the meaning of the regulations. *See* Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005). Like Analyst 1 and Analyst 2, the SA generally works in furtherance of the primary mission of your client and therefore is engaged in "production" work. Based upon the information provided, it is our opinion that Analyst 1, Analyst 2, and the SA fail to meet the requirement of § 541.200(a)(2) and therefore do not qualify for the administrative exemption under section 13(a)(1) of the FLSA.

We believe the FIA's primary duties of managing the collection of intelligence information, coordinating the collection efforts of area personnel and evaluating and approving information to ensure accuracy and relevancy directly relates to the functional area of quality control. *See*

29 C.F.R. § 541.201(b). Therefore, the FIA's primary duty involves the "performance of office or non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(a)(2). We also believe the FIA's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Examples of duties indicating an FIA has "authority to . . . interpret, or implement management policies or operating practices" include evaluating and approving information to ensure accuracy and relevancy, reviewing reports and recommendations, and applying security designation on reports depending on the sensitivity of information. 29 C.F.R. § 541.202(b). In training and mentoring new analysts, the FIA "carries out major assignments in . . . the operations of the business." *Id.*

Based on the information provided, the FIA meets the requirements of § 541.200(a)(1)-(3). Therefore, it is our opinion that the FIA qualifies for the administrative exemption.

Under 29 C.F.R. § 541.100(a), the term "employee employed in a bona fide executive capacity" means "any employee":

(1) Compensated on a salary basis at a rate of not less than $455 per week;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Under 29 C.F.R. § 541.100(a)(2), an exempt executive's "primary duty" must be management of the enterprise or of a customarily recognized department or subdivision of the enterprise. Primary duty is defined in § 541.700(a) as the "principal, main, major, or most important duty that the employee performs." Furthermore, "a customarily recognized department or subdivision must have a permanent status and a continuing function." 29 C.F.R. § 541.103(a).

Management includes "training of employees; . . . directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; [and] disciplining employees." 29 C.F.R. § 541.102.

As to the fourth prong of the executive test, whether an employee's suggestions and recommendations are given "particular weight" will depend upon "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon." 29 C.F.R. § 541.105.

The SSA's primary duties, as you describe them, are included in the type of activities constituting "management" within the meaning of the regulations. The SSA supervises at least two full-time employees, trains employees, monitors employees' work load, evaluates employees, and handles grievances and disciplinary matters. Assuming the SSA manages "a unit with a permanent status and function," and the SSA either has the authority to hire or fire other employees or the SSA's recommendations regarding hiring, firing, and job advancement are give "particular weight," the SSA meets the requirements of 29 C.F.R. § 541.100(a)(2)-(4). 29 C.F.R. §§ 541.103, 541.105. Therefore, it is our opinion that the SSA qualifies for the executive exemption.

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).**