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

November 14, 2005 **FLSA2005-53**

Dear ***Name**** :

This is in response to your letter requesting an opinion letter as to the applicability of Fair Labor Standards Act (FLSA) section 7(i) (copy enclosed), which is an exemption for commissioned employees of retail or service establishments. You represent an association of over 4,300 health and athletic clubs in the United States.

You indicate that your member organizations are health and athletic clubs open to the public that meet the needs of millions of Americans who want a convenient place to exercise. The clubs accept as a member anyone who pays the monthly fee, usually between $25 and $75 per month, and any non-member may use the club for a daily fee ranging from $10 to $20. You further indicate that there is "near universal consensus" in the industry that the overwhelming majority of a club's goods and services, which are sold directly to individual customers who exercise at the clubs, are regarded as retail. Finally, you indicate that none or virtually none of the goods and services sold by the clubs are for resale.

The clubs employ instructional employees, such as personal trainers, aerobic instructors and tennis professionals, who the club pays a flat dollar amount or percentage of the club's revenue for lessons or sessions they conduct. The clubs also employ membership sales employees who are paid a flat dollar amount per membership sold or a percentage of the club's revenues per lesson sold. Both of these groups of employees receive more than half their compensation from commissions and receive more than one and a half times the applicable minimum wage each week.

The section 7(i) exemption applies to individual employees of retail or service establishments depending, in part, on their specific earnings. Accordingly, we cannot definitively opine about the exemption as it applies to all of the employees of the thousands of different members of the association, but we do explain how to evaluate the types of payments that you described. To qualify for the section 7(i) 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 under section 6 of the FLSA; and
3) More than half of the employee's total earnings in a representative period must consist of commissions on goods or services.

It is the employer, not the employee, which must satisfy the first element of this test. It must be proved that the employer is a "retail or service establishment." 29 C.F.R. § 779.313 (copies of §§ 779.313-.324 are enclosed) summarizes three criteria that must be met before an establishment can be recognized as a retail or service establishment under the FLSA: the establishment "(a) [m]ust engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale." Typically a retail or service establishment is one that sells goods or services to the general public, servicing the everyday needs of the community by selling products in small quantities to end-users. "The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process." See 29 C.F.R. § 779.318(a); Opinion Letter dated November 9, 2004 (copy enclosed).

Based on the information you provided, and with the assumption that your indication that the "overwhelming majority" of the clubs' goods and services are regarded as retail always means 75% or more, the clubs you describe will qualify as "retail or service establishments," thus meeting the first

element of section 7(i). Note that each establishment must separately meet the 29 C.F.R. § 779.313 criteria discussed above to qualify as a "retail or service establishment."

The final two elements of section 7(i) are dependent upon the employee and not the establishment where they work. You state that the clubs' employees receive at least 1.5 times the federal minimum wage each workweek, which satisfies the first compensation requirement of the exemption. However, your letter does not provide sufficient information to determine whether the employees receive more than half of their earnings in a representative period from bona fide commission payments, as required by section 7(i). The regulation at 29 C.F.R § 779.416(c) provides an interpretation of "bona fide commission rate" as follows:

> 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 (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or the guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

"The whole premise behind earning a commission is that the amount of sales would increase the rate of pay. Thus, employees may elect to work more hours so they can increase their sales, and in turn, their earnings. When a commission plan never affects the rate of pay, the purpose behind using a commission rate also fails." See Erichs v. Venator Group, Inc., 128 F. Supp. 2d 1255, 1260 (N.D. Cal. 2001) (quoting Herman v. Suwannee Swifty Stores, Inc., 19 F. Supp. 2d 1365, 1371 (M.D. Ga. 1998)). Note that all of the compensation plans found in 29 C.F.R. 779.413(a) "except for the 'straight salary or hourly rate' may qualify as 'bona fide commission' plans under § 207(i)." Viciedo v. New Horizons Computer Learning Center of Columbus, Ltd., 246 F. Supp. 2d 886, 896 (S.D. Ohio 2003). Straight salary and hourly payments do not qualify as commissions.

From the information provided, it is not clear whether all of the payment plans used by the clubs involve bona fide commission rates. Your letter refers to compensation by flat dollar amounts per lesson or session conducted for instructional employees, like aerobics instructors, and to flat fees per membership sold for the clubs' membership sales employees. However, your letter also refers to commissions that may be a percentage of a "club's revenue per lesson or session," or of a "club's revenues per lesson sold." Flat fees "paid without regard to the value of the service performed do not represent 'commissions on goods or services' for purposes of Sec[tion] 7(i)." Field Operations Handbook, §21h04(c) (copy enclosed). Rather, employees paid a flat fee "are considered to be compensated on a piece rate basis and not on the basis of commissions. Commissions, for purposes of Sec[tion] 7(i), usually denotes a percentage of the amount of monies paid out or received." Id. (emphasis in original); Opinion Letter dated October 14, 1982 (copy enclosed). Moreover, instructional employees paid a flat fee per lesson or session taught appear likely to earn the same amount each week, contrary to the requirements of 29 C.F.R. § 779.416. Because it appears that employees of the clubs may be compensated in more than one way, we are unable to determine whether they qualify for exemption. However, we hope that the above discussion will be of assistance to you in evaluating each individual employee's status.

For more information on how to properly calculate the final two elements of the section 7(i) exemption, see 29 C.F.R. §§ 779.410-.421 (copies enclosed).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis if 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

questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. 259. See 29 CFR §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: FLSA section 7(i)
29 CFR 779.313- .324, and .410-.421
FOH 21h04
Opinion Letters dated 11/9/2004 and 10/14/1982

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