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June 17, 2009

Ms. Patricia Davidson
District Director
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Post Office Box 907
Albuquerque, New Mexico 87103

Via Facsimile
(505) 248-6108
and U.S. Mail

Re: 1) Treatment of our letter to you of April 24, 2009, as a request for formal Opinion of the Administrator and

2) Request for formal Opinion of the Administrator to confirm that the restriction in 29 U.S.C. § 213(h) means only that an employer may not claim an overtime exemption under a different provision for the *same class of employees* but may claim FLSA exemptions as to employees in other classes if applicable criteria are met, for example, under the provisions of 29 U.S.C. § 213(a)(1) or any other full or partial exemption for which such other employees of the employer are eligible

Dear Ms. Davidson:

Requested formal Opinion of the Administrator on the application of Sections 13(h) and (i) of the Act.

First, thank you for returning my telephone call to let me know the status of my April 24 letter request addressed to you. Thank you also for arranging to submit that letter, with the accompanying exhibits, to the Administrator for a new formal Administrator Opinion concerning the proper calculation of overtime under 29 U.S.C. §§ 213(h) and (i). As you are aware, among the exhibits to the April 24 letter are a formal Administrator Opinion letter by Administrator Maria Echaveste dated October 19, 1995, to the Honorable Bill Frist, Senator from Tennessee, and a formal Administrator Opinion letter, also from Ms. Echaveste, to Mr. Lee Todd of the Southern Cotton Ginners Association of the same date. These letters confirmed the by then long-established Interpretation, relied on by Ginners throughout the country, that the Section 7 overtime wage payment

requirements are met by Ginners otherwise qualifying for the Section 13(h) and (i) partial overtime exemptions for up to 14 calendar weeks when they pay workers who are employed more than 40 hours in a workweek one and one-half times their regular rate *either* for hours worked over 10 in a workday *or* for hours worked over 48 in a workweek, whichever results in the greater amount for the employee, *but not for both* hours worked over 10 in a workday and for hours worked over 48 in a workweek.

We trust that on the Administrator's review of the principles under which overtime is calculated when employers pay an overtime premium after eight (8) hours (or any other number of hours in a workday) as provided for in Sections 7(e)(5) and 7(h) and the provisions of Sections 13(h) and 13 (i), the Administrator will conclude the above statement of the statutory requirement is accurate, as the Division has recognized and the cotton ginners' industry has understood since at least 1974.

We also understand that until and unless there is an authoritative change of position by the Division, as reflected in a formal Administrator Opinion or in a notice by other means, the Division will enforce overtime requirements of the Act as met by a ginner for up to 14 workweeks in which an employee, who works more than 40 hours in a workweek, is not employed in any nonexempt work outside the scope of the cotton ginning industry requirements of Sections 13(h) and (i), respectively, and is paid overtime at a rate not less than one and one-half the times the regular rate at which he is employed for all hours worked in such workweek in excess of ten (10) in any workday or in excess of forty-eight (48) in a workweek, *whichever is greater*, and will not require ginners to pay overtime both for hours worked over 10 in a workday *and* for hours worked over 48 in a workweek.

Request for additional confirmation via formal Administrator Opinion as to application of overtime exemptions to other classes of employees who meet requirements for exemption from overtime under other provisions of 29 U.S.C. § 213 or § 207.

As you are aware, under Section 13(h) of the Act, "[a]ny employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title." I understand that training materials of the Wage-Hour Division reflect its position, also stated in the Field Operations Handbook, that cotton ginner employers who receive a partial exemption under Section 13(h) may lawfully utilize other overtime exemptions under both 29 U.S.C. § 207 and § 213 for other classes of employees who qualify for those overtime exemptions. For example, an employee who is otherwise eligible for exemption from the minimum wage and maximum hour requirements of the Act pursuant to requirements of 29 U.S.C. § 213(a)(1), the so-called "white collar exemptions," is not precluded from exempt status because his or her employer does claim the Section 13(h) exemption with respect to other classes of employees. Obviously, if Section 13(h) were interpreted to mean that an employer who claimed that exemption could use

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absolutely no other exemption, the whole purpose for creating 29 U.S.C. § 213(i), applicable only to cotton ginneries, would be abolished, clearly not the intent by the Congress in creating Section 13(i) in 1977.

As noted above, the Interpretation for which we request a formal Opinion is the position stated in the Division's Field Operations Handbook:

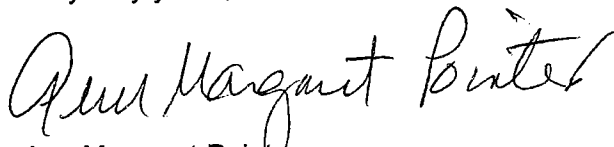
Thus, for example, if an employer claims Sec 13(h) for certain employees in the establishment, he or she cannot claim other Sec 7 or Sec 13 exemptions for them, but can utilize Secs 13(a)(1), 13(i), or 13(j) for non-Sec 13(h) activities by other employees.

FOH 20u(b)(1).

Conclusion.

Thank you again for your courtesy and promptness in moving this matter forward.

Very truly yours,



Ann Margaret Pointer
For FISHER & PHILLIPS LLP

AMP:sjw

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SENT TO: Ms. Patricia Davidson
District Director
TELECOPIER NUMBER: (505) 248-6108
SENT BY: Ann Margaret Pointer, Esquire
DIRECT DIAL NUMBER: (404) 240-4223
NUMBER OF PAGES: 4 (INCLUDING COVER PAGE)

Please see letter that follows.

Thank you.

TELECOPY OPERATOR: Susan Wray

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DATE, TIME	06/17 16:02
FAX NO./NAME	915052486108257890005
DURATION	00:01:09
PAGE(S)	04
RESULT	OK
MODE	STANDARD ECM

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