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

FLSA2008-8

September 29, 2008

Dear **Name***:

This is in response to your letter requesting an opinion regarding how certain types of revenue generated by your client affect your client's coverage under the Fair Labor Standards Act (FLSA). Although your client's total revenue is currently less than the $500,000 threshold for enterprise coverage under section 3(s)(1)(A) of the FLSA[1], you wish to know whether your client's services of providing veterinary care, shelter, and adoption services for homeless animals qualify as "eleemosynary" and whether certain categories of revenue and non-cash donations generated by your client should be included when making future determinations of enterprise coverage.

Your client is a private, non-profit, charitable organization providing shelter and medical care (including spaying and neutering) for homeless animals and placing animals in adoptive homes. The organization's charter states that gifts and donations made to the organization may be used only to further the charitable purposes of the organization. Your client's total revenue in one recent year was about $414,000. The sources of the revenue were as follows: (a) cash donations from individual and corporate contributors, (b) fees for pet adoptions and sales of spay/neuter certificates, (c) membership dues, and (d) dividends and interest from securities and investments.

Under sections 6 and 7 of the FLSA, the Act's minimum wage and overtime requirements apply to all nonexempt employees of covered "enterprises"—*enterprise coverage*—and to nonexempt employees individually engaged in interstate commerce—*individual coverage*. Your inquiry is limited to the issue of enterprise coverage. Pursuant to sections 3(r) and (s) of the FLSA, enterprise coverage applies to the following employers:

- Federal, state, or local government agencies;

- Hospitals (establishments primarily engaged in offering medical and surgical services to patients who generally remain in the establishment overnight, several days, or for extended periods);

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

- Residential care facilities primarily engaged in (i.e., 50% or more of income attributable to) the care of the sick, aged, mentally ill, or developmentally disabled who live on the premises;

- Preschools, elementary and secondary schools (as determined under state law), and colleges; as well as schools for mentally or physically handicapped or gifted children; and

- Enterprises with a business purpose with an annual dollar volume (ADV) of "sales made or business done" of $500,000 or more and at least two employees engaged in commerce or the production of goods for commerce.

Enterprise coverage, as defined in section 3(s), applies only to activities performed for a business purpose. It typically does not extend to the eleemosynary, religious, educational, or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses. *See* 29 C.F.R. § 779.214; *see also* Wage and Hour Opinion Letters May 3, 1994; and December 16, 1968 (copies enclosed). Thus, as we stated in our December 16, 1968 letter:

> The eleemosynary activities of a charitable organization such as the Humane Society, if operated on a nonprofit basis, would generally be considered to be outside the act's enterprise coverage. In addition, any other activities in which such organization might engage would not provide a basis for enterprise coverage of the employees employed in them unless the annual gross volume of sales made or business done in such activities is $500,000 or more. . . .

Based on the information provided, it appears that most of your client's services qualify as eleemosynary; in any event, your client would not currently be covered on an enterprise basis, because its total revenue is below $500,000 from all income. Because your client anticipates that its total revenue may in the future exceed the statutory threshold, you ask for our determination as to whether various categories of revenue count toward the $500,000 threshold.

Although the FLSA and its implementing regulations are silent regarding whether the four categories of revenue you describe should be included as "sales made or business done" when calculating ADV for enterprise coverage purposes, it has long been our position that income derived from eleemosynary activity should not be included as sales made or business done. Income from contributions, membership fees, or dues (except any part which represents the value of a benefit, other than of token value, received by the payer), or donations (cash or non-cash) used in the furtherance of eleemosynary activities, does not come within the phrase "sales or business done" in section 3(s). Consequently, your client need not count such income in the calculation of its ADV under section 3(s).

Services provided for a fee to customers, such as for spaying/neutering or for pet adoption, are provided for a business purpose to the general public in competition with other businesses (pet stores, kennels, etc) and thus do not qualify as eleemosynary activities. Also, interest and dividends on investments are "sales made or business done" under section 3(s) which must be included in the ADV calculations. *See* Wage and Hour Opinion Letters January 29, 1999; November 4, 1983; October 16, 1974; December 31, 1969; and May 29, 1968.

Please bear in mind that employees of enterprises not covered under the FLSA may still be *individually covered* in any workweek in which they are engaged in interstate commerce, the production of goods for commerce, or activities closely related and directly essential to the production of goods for commerce. Examples of such interstate commerce activities include making/receiving interstate telephone calls, shipping materials to another state, and transporting persons or property to another state. Note, however, that the WHD has a longstanding enforcement position on individual coverage that is contained in the Field Operations Handbook: "As a practical matter, the Wage and Hour Division does not assert *individual coverage* over an employee who is ordinarily engaged in employment which is not covered but who may on isolated occasions spend an insubstantial amount of time performing [such] individually covered work." Field Operations Handbook § 11a01.

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

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

Enclosures: Wage and Hour Opinion Letters January 29, 1999; May 3, 1994; November 4, 1983; October 16, 1974; December 31, 1969; December 16, 1968; May 29, 1968

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