Form F. R. 511(a)

TO Mr. Solomon

FROM Mr. Eccles

April 18, 1950

REMARKS:

I would appreciate your checking into this matter for me and drafting a reply for my signature. It is my knowledge and belief that the McAlister business is a retail business. He is a friend and I would like, if it is possible to do so, to give him a favorable reply.

Thank you.
MSE.

GOVERNOR ECCLES' OFFICE

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Federal Reserve Bank of St. Louis

National Finance Corporation

WARD R. McALISTER, PRESIDENT
JAMES W. OGDEN, MANAGER

FIFTH FLOOR, 68 SOUTH MAIN STREET
SALT LAKE CITY 1, UTAH

TELEPHONE 3-6753

April 7, 1950

Mr. M. S. Eccles
Board of Governors
Federal Reserve System
Washington, D. C.

Dear Marriner:

As you know, when the Wage and Hour Law was amended January 25, 1950, a new formula for determination as to what constituted a retail business which would be exempted, became effective. Stipulation Number Three of this formula requires that the business be considered as "retail" within its own industry. It is our Association's view, and we have so expressed it on numerous occasions, that commercial banks constitute the "wholesalers" of the lending industry and that institutions such as ours are the "retailers." We base this interpretation on the fact we deal directly with the mass of consumers on an individual and local basis.

In order to get confirmation for the Wage and Hour Administrator as to our classification as retailers, we are seeking letters from our banks and from various State Supervisory Officials, and others, verifying this fact. I believe there is probably no one in the country whose opinion as to this matter should bear greater weight than your own, because of your wide and varied experience. It also occurs to me that possibly others may or may not have requested you to express an opinion on this.

If consistent, I would appreciate your setting forth your personal views on the matter, which letter can be directed to me personally. I would then refer your reply to the chairman of our Association's Wage and Hour Committee.

Hoping to hear from you at your earliest convenience, and with kindest personal regards, I am

Sincerely yours,

Ward R. McAlister

WRM:rn

Dear Ward

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BOARD OF GOVERNORS
OF THE
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Office Correspondence

Date April 20, 1950.

To Mr. Solomon

From Mr. Tinsley

Subject: Exemption for "retail or service establishments" under Fair Labor Standards Act

Mr. Ward McAlister, President of the National Finance Corporation of Salt Lake City, Utah, in a letter dated April 7, 1950, addressed to Governor Eccles, stated that it was his Association's view that commercial banks constitute the "wholesalers" of the lending industry and that institutions such as his were the "retailers". He based this interpretation upon the fact that he dealt directly with the mass of consumers on an individual and local basis.

The Fair Labor Standards Amendments of 1949, which were effective January 25, 1950, established a new formula for determination of what constituted a retail business which would be exempt from the provisions of the Act. One of the tests requires that the business be considered as "retail" within its own industry, and Mr. McAlister indicated that he would appreciate an expression of Governor Eccles' opinion. Governor Eccles' personal reply would be referred to the Chairman of Mr. McAlister's Association's Wage and Hour Committee.

The purpose of this memorandum is to record some of the background material of the exemption for "retail or service establishments" under the Fair Labor Standards Act.

On May 24, 1937, President Roosevelt sent a message to the 75th Congress requesting the enactment of minimum wage and maximum hour legislation for those "who toil in factories". Both President Roosevelt and Senator Black, who introduced the bill, made it clear that the bill was based upon the interstate commerce clause and that there were many purely local pursuits and services which no Federal legislation can cover effectively.

When the original bill was debated in the House in 1938, the question was raised whether the law would be applicable to retail and service establishments. Representative Celler of New York proposed an amendment which would exempt such trades and stated: "Dissolve all doubt, dispel all chances of misinterpretation, accept it (that is, his amendment) and then retail dry goods, retail groceries, butchers, clothing stores, department stores will all be exempt."

The Celler amendment as subsequently amended, was passed and was in the Act as finally enacted by Congress in 1938. The amendment was written into section 13(a)(2) and exempted "any employee

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engaged in any retail or service establishment the greater part of whose selling or service is in intrastate commerce". Sponsors of the legislation supported this exemption as one which would exclude from the law the small corner grocery, the small laundry, pants presser, barber shop and the like.

This exemption subsequently was given extensive interpretation both by the courts and administrative rulings. It was held that the meaning to be accorded "retail establishment" involves the legislative intent (42 Fed. Sup. 511), and that "retail" presumably was used in the sense in which it is used in ordinary trade or commercial transactions. (51 Fed. Sup. 61) However, exemption provisions must be narrowly construed (165 F. 2d 65; 161 F. 2d 515), and when the Supreme Court interpreted the exemption, it held that "retail" is restricted to sales made in small quantities to ultimate consumers to meet personal rather than commercial and industrial uses, and that correspondingly it was appropriate to restrict the word "service" to services of ultimate users of them to personal rather than commercial purposes. (Roland Electrical Company v. Walling, Administrator, 326 U. S. 657)

Bills entitled the "Fair Labor Standards Amendments of 1949" were introduced in the 81st Congress, First Session. S. 653 was introduced in the Senate and was reported by Senate Report 640, and H. R. 3190 was introduced in the House and reported by House Report 267. As introduced, the Senate bill made no change in the retail exemption and the House bill substantially would have enacted the administrative and judicial rulings into the statute and would have broadened the employee coverage under the Act.

When H. R. 3190 reached the floor of the House, it was discarded and the so-called "Lucas bill", H. R. 5856, was passed. It amended section 13(a)(2) to read as follows:

> "Any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services submitted within the state in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per cent of whose annual dollar volume of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

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Senator Holland proposed from the Senate floor an amendment to S. 653 which would provide an exemption identical to that provided in H. R. 5856. After much debate, the amendment was passed.

It may be well here to quote from the Conference Report explaining this exemption. It is interesting to note that the Conference Report is the only report which considers the exemption.

"Under paragraph (2) of section 13 (a) as agreed to in conference an establishment is an exempt retail or service establishment if it meets three tests:

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the State in which the establishment is located. * * *

"The second test provides that in order for an establishment to be exempt not less than 75 percent of its annual dollar volume of sales of goods or services (or of both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. * * *

"The third test provides that 75 percent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service. Thus, the sale by a farm implement dealer of farm machinery to a farmer will be retail if the sale is recognized as retail in such industry. So, too, sales by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc., whether made to private householders or to business users, will be retail, so long as they are recognized as retail sales or services in such industries. Likewise, sales or services of hotels, restaurants, barber and beauty shops,

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repair garages, filling stations and the like, whether made or rendered to private householders or to business customers, will be retail so long as they are recognized as retail sales or services in such industries." (House Report 1453, 81st Congress, First Session, at page 24)

There were extensive debates on the floor of Congress on this exemption, and while it is impossible to summarize them, my conclusion is that Congress thought that in the past interpretation of the exemption, there had been a judicial and administrative usurpation of the legislative function and the Congressional intent was to clarify the law by defining the term "retail or service establishment" and by stating the terms under which the exemption should apply. The debates may be found at 95 Cong. Rec. 10999-11004, 11109, 11111-11116, 11123-11125, 11132, 11198-11200, 11203-11204, 11207, 11221-11222, and 11227. Daily Cong. Rec. for August 27, 1949, pp. 12588-12589, for August 30, 1949, pp. 12694-12699, 12717-12746.

Senator Holland, who proposed the amendment, stated that he had been asked various questions about the effect of the proposed amendment and, in his presentation on the floor, stated the questions and answers. Among these were:

"Question. Would the proposed amendment have the effect of exempting banks, insurance companies, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc.?

"Answer. No. These types of businesses are not considered exempt under the retail or service establishment exemption in the present law because the selling and servicing which they do are not generally considered to be retail. The proposed amendment would do nothing to change their nonexempt status under the retail and service establishment exemption. To the extent that Congress intended to exempt any of these businesses it created special exemptions for them. See, for example, section 13 (a) (8) (exemption for small weekly and semiweekly newspapers); section 13 (a) (9) (exemption for local trolleys and local motor bus carriers); section 13 (a) (11) (exemptions for switchboard operators of small telephone exchanges)."

In the Conference Report at page 25, there is the following statement: "The amendment does not specifically exempt banks, insurance companies, building and loan associations, credit companies,

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newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries. Where it was intended that such business have an exemption, one was specifically provided by the law."

The conclusion is inescapable that Congress did not intend to exempt banks, credit companies, etc., from the Act. However, a "retail or service establishment" was defined as one which, having met the other tests "is recognized as retail sales or services in the particular industry". Accordingly, if the National Finance Corporation meets the other tests and is recognized as a "retailer of the lending industry", it may well be exempt.

The following quotations are from the debates on the clause requiring recognition within the particular industry as "retail sales or services". Senator Pepper, who was opposed to the amendment, made the following statement:

> "Now here is another objection to the amendment which is going to clarify ambiguity and eliminate all disputes. It says, 'is not for resale, and is recognized as retail sales or services in the particular industry.' I thought, Mr. President, I heard something about a man not being a judge in his own case. It looks exactly as if Congress intended the industry to be the arbiter. How many lawsuits is it going to take to clarify that provision of this clarifying amendment?
>
> * * * * *
>
> "Mr. President, as was pointed out this afternoon on the floor of the Senate, is it not in the interest of industry to take a liberal interpretation? Is it necessary to prove in court what the industry says the practice is? That means it is taken out of the legislative hands; it is taken out of the forum of the judiciary, and left to the industry to decide what is retail and what is not retail." (Cong. Rec. for August 30, 1949, at page 12740)

Senator Taft, who argued for the amendment, made the following statement:

> "The senior Senator from Florida objected to the suggestion that besides having to be sales in accordance with the principles we have all recognized, the amendment imposed one additional condition, namely, that the sales must be 'recognized as retail sales or services in

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the particular industry.' The senior Senator from Florida says that would give the industries the right to decide the matter for themselves. It would not do so. Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact. It is a question of fact which we are perfectly able to determine.

"Mr. President, there is not any discretion left to the industry. What is a retail sale in a particular industry is for the Administrator and the courts to determine." (Cong. Rec. for August 30, 1949, at page 12743).

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Office Correspondence

Date April 24, 1950.

To Governor Eccles

From Mr. Solomon

Subject: Small Loan Companies as Retailers under Wage-Hour Law

In view of the legislative history of this provision as outlined in the attached memorandum by Mr. Tinsley, I believe it is doubtful that a court or administrative agency would hold small loan companies to be "retailers" under the Wage-Hour Law. With this in mind, I believe the attached draft of letter to Mr. McAlister probably goes about as far as you would wish to go in taking a position on the subject.

Attachment

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Federal Reserve Bank of St. Louis

April 24, 1950.

Mr. Ward R. McAlister, President,
National Finance Corporation,
68 South Main Street,
Salt Lake City 1, Utah.

Dear Ward:

I have your letter of April 7, 1950, regarding the 1950 amendments to the Wage and Hour Law and I am glad to give you my personal views as to whether small loan companies, such as National Finance Corporation, are the "retailers" in the lending industry.

My experience in the field of credit leads me to say that I consider the type of business engaged in by your company -- the advancing of funds in small amounts directly to consumers -- to be the "retail" side of finance. Of course, many banks also do a certain amount of this "retailing" of credit, and they have been doing more of it in recent years. But in most cases it would still be a smaller part of their total business and would not be the dominant activity that it is in the case of a typical small loan company such as National Finance Corporation.

Since I am not a lawyer and did not participate in the preparation of the new "retailer" formula in the Wage-Hour Law, you will realize, of course, that I am not in a position to give a legal interpretation of the 1950 law or to explain the purposes of its draftsmen or sponsors, and I am merely giving you my own personal views without attempting to indicate any opinion of the Board. However, you may feel free to make whatever use of this letter you might consider helpful in throwing light on the status of small loan companies.

With kindest personal regards, I am

Sincerely yours,

M. S. Eccles

FS/ewe
4/24/50

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National Finance Corporation

WARD R. McALISTER, PRESIDENT
JAMES W. OGDEN, MANAGER

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SALT LAKE CITY 1, UTAH

TELEPHONE 3-6753

April 27, 1950

Mr. M. S. Eccles
Board of Governors of the Federal Reserve System
Washington, D. C.

Dear Marriner:

Many thanks for your letter of April 24. I am sure your personal opinion will lend great weight to our argument. Certainly, no one in the country should be recognized as an authority on consumer credit unless it would be you, who have had so much experience with it. Your opinion is especially appreciated because it is unbiased in any way.

It was indeed a pleasure to see you, even for a short time, when you were in Salt Lake recently, and I hope the next time you are out this way, I may have the privilege of a more serious conversation.

With kindest personal regards and all good wishes, I am

Cordially yours,

Ward McAlister

WRM:rn

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