

Chapter 21

RETAIL OR SERVICE ESTABLISHMENT EXEMPTIONS FROM SECTIONS 6 AND 7

Source: FOH Modernization revision 687, published 04/20/2016. Substantive revisions made *after* 04/20/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 04/20/2016 can be found at the link beside this chapter at www.dol.gov/whd/foh.

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21a RETAIL OR SERVICE ESTABLISHMENT EXEMPTIONS: GENERAL

21a00 General provisions.

- (a) Section 13(a)(2) provides an exemption from sections 6 and 7 for any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(5)), if more than 50 percent of such establishment’s annual dollar volume (ADV) of sales of goods or services is made within the state in which the establishment is located, and such establishment is not in an enterprise described in section 3(s).

Additionally, section 13(g) provides that the minimum wage exemption component of section 13(a)(2) shall not apply with respect to any covered employee employed by an establishment which is part of a conglomerate (*see* FOH 25o).

- (b) The exemption does not apply to establishments of enterprises including public enterprises, and any retail or service establishment controlled by a conglomerate pursuant to section 13(g) even though the establishment is not an enterprise (as defined in section 3(r)) (*e.g.*, company store owned by a coal company).
- (c) A “retail or service establishment” shall mean an establishment 75 percent of whose ADV of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

21a01 Application of section 13(a)(2).

- (a) Section 13(a)(2) applies to all employees employed by any retail or service establishment which meets the tests for the exemption except:

- (1) an establishment or employee engaged in laundering, cleaning or repairing clothing or fabrics (however, *see* FOH 12e03); or
 - (2) an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(5); or
 - (3) an establishment to which section 13(a)(2) is inapplicable because of section 13(g).
- (b)** The application of section 13(a)(2) was changed by the 1977 amendments through changes to section 3(s). *See* section 3(s), FOH 12b00(d)(1), and FOH 12d00. The following illustrates this relationship:
- (1) *All enterprises covered under sections 3(s)(1), 3(s)(2), 3(s)(3), 3(s)(4), 3(s)(5), or 3(s)(6), whichever is applicable*

Retail or service establishments of such enterprises cannot qualify for section 13(a)(2).
 - (2) *An enterprise comprised exclusively of retail or service establishments which met the ADV test on 6/30/1978 but later did not*

An establishment of such an enterprise must continue to pay its employees the minimum wage in effect on the day before the increase in the statutory ADV level took effect. *See* FOH 12d. If the ADV later falls below \$250,000.00, section 13(a)(2) is applicable. Section 13(a)(2) will remain applicable to such an establishment until the ADV for the enterprise rises to the current ADV under section 3(s)(2) (\$362,500.00).
 - (3) *An enterprise comprised exclusively of retail or service establishments which was not covered under section 3(s)(2) on 6/30/1978*

An establishment of such an enterprise would be exempt under section 13(a)(2) unless and until the enterprise meets the *expanded* annual gross volume (AGV) tests of section 3(s)(2):

\$275,000.00 effective 07/01/1978

\$325,000.00 effective 07/01/1980

\$362,500.00 effective 01/01/1982
- (c) Hospitals, nursing homes, and certain schools do not qualify for section 13(a)(2) (*see* FOH 12f).
 - (d) A veterinary hospital is not a “hospital” within the meaning of this exclusion from section 13(a)(2). Therefore, a veterinary hospital may qualify for section 13(a)(2) if the tests are met.
 - (e) Schools described in section 3(s)(5) are excluded from exemption under section 13(a)(2). However, in some cases, particularly in colleges or universities, the school enterprise may operate (or lease for operation) on the campus a separate and distinct physical place of business (*see* 29 CFR 779.302 -.305), which invites the patronage of the public (including

students and faculty) and which standing alone meets all the tests for exemption as a retail or service establishment. In such cases, such a separate establishment shall be tested for exemption in the same manner as any other retail or service establishment. For example, if a college operates a bookstore which sells at the retail level and the store is a separate place of business open to the general public as well as the students and faculty of the university, having its own employees, management, accounts, and records, and meets other tests specified in the exemption, the employees in the bookstore may be exempt from the FLSA's pay requirements.

21a02 Employees employed by a new retail or service establishment before it opens for business.

Situations may be encountered where employees are hired prior to the opening of a new retail or service establishment to prepare the premises for occupancy, to receive and arrange the stock, and to perform other activities which are a necessary incident to opening the establishment for business. To the extent that these are employees of the establishment itself, and not central office or warehouse employees assigned to do this preparatory work for a chain, they are employed by an establishment which, when open, will be a retail or service establishment. In such cases these employees will be treated as employed by a retail or service establishment in applying section 13(a)(2). *See* 29 CFR 779.269, "Computations for a new business."

21a03 Use of FOH chapter 21 and 29 CFR 779.

29 CFR 779 contains the basic interpretations by the Administrator of the Wage and Hour Division (WHD) of the scope and terms of the retail and service establishment and related exemptions. FOH 21 supplements these interpretations.

21a04 Exemption effect on FLSA child labor and recordkeeping requirements.

The retail or service establishment exemptions provide exemption only from sections 6 and 7. They do not provide exemption from the child labor and recordkeeping provisions of the Fair Labor Standards Act (FLSA). *See* 29 CFR 779.500 -.515.

21a05 (Reserved.)

21a06 Employees employed in the work of more than one establishment of the same employer.

29 CFR 779.309 -.311 sets forth the principles to be followed in determining whether an employee who is employed in the work of more than one establishment of his employer in the same workweek is "employed by" a retail or service establishment for purposes of exemption. The principles may be further illustrated in the case of a tailor, who may make alterations upon clothing in one retail establishment which was sold in another of his employer's retail establishments. In such cases the tailor at any given time during the week is actually performing alterations which are incidental to the specific retail sales of a particular retail establishment and is engaged in the work of such exempt establishment itself and thus is employed by the establishment while so engaged. An employee would not, therefore, be disqualified for exemption in any workweek when he is employed by an exempt retail establishment at all time during the workweek even though not employed by the same exempt establishment for the entire week. *See* 29 CFR 779.369(g) for the application of this principle to morticians.

21a07 Incidental processing and servicing distinguished from manufacturing.

- (a) Processing incidental to retail selling of goods or services is not a manufacturing activity. For example, a grocery store may grind coffee, a drug store may prepare prescriptions, a restaurant may process food, a clothing store may make alterations on suits, or a repair garage may grind valves. The applicability of a retail or service exemption to the establishment or to the individual employees is not affected by the performance of such processing activities which are incidental to retail selling or servicing.
- (b) Work performed on the customer's own goods where the completed job will not result in the creation of a different product from that which the customer brought in will be considered as "services" for purposes of the retail or service exemptions, and, if recognized in the particular industry as retail services, will be considered as such for purposes of determining the applicability of the exemption. For example, the recapping of a tire for a customer, the upholstering of a chair for a customer, the repairing of an automobile for a customer regardless of the degree of repairs, the rebuilding of a pair of shoes for a customer, or the rebuilding of a typewriter for a customer, are regarded as the performance of services for purposes of the application of the retail or service establishment exemptions. Where, however, the job would result in the creation of a different product from that which the customer brought in such as, for example, where a truck or a bus is made out of the customer's automobile, or where a suit of clothes is made out of a piece of cloth the customer brought in, the activity of making the truck, the bus, or the suit of clothes is a manufacturing activity and employees engaged in such activities, to be exempt, must qualify under section 13(a)(4).
- (c) If the activity is not performed on the customer's own goods as in FOH 21a07(b) above but is performed for commercial purposes, as, for example, where old tires are purchased by an establishment and recapped for purposes of sale, or old typewriters are purchased and rebuilt for purposes of sale, or old furniture is purchased and reupholstered for purposes of sale, the manufacturing involved in these operations would not constitute a "service" for purposes of the retail and service exemptions. To be exempt employees engaged in these activities must qualify for exemption under section 13(a)(4).

21a08 Establishments engaged in making sales through outside salesmen.

A retail or service establishment within the meaning of the FLSA is one which is open and available to the general public, with which it has direct dealings, either in person or by telephone or by mail. *See* 29 CFR 779.319. An establishment which merely distributes goods to outside salesmen (or door-to-door canvassers), or merely delivers goods sold by such outside salesmen, does not qualify as a retail or service establishment even though, on occasion, it may make some retail sales on the premises.

21a09 Establishments located on instrumentalities or facilities of commerce.

The fact that an establishment is located on an instrumentality or facility of commerce, including government installations, does not of itself preclude the possible applicability of a retail or service establishment exemption. It is possible under certain circumstances, for example, that employees of a post exchange or barbershop located on a military installation may be subject to a retail or service establishment exemption if all the tests for exemption are met.

21a10 Vending machine establishments.

- (a) Some independently owned and operated vending machine companies install, control, service, and supply with merchandise their vending machines located in plants, buildings, transportation terminals, and the like. Such vending machine installations operate and function independently of the plant or building in which they are located, under a lessor-lessee arrangement. Typically, the machines are installed in groups or banks, in some cases together with tables and/or benches. There may be several groups of these machines in one building. Employees called matrons or hostesses are assigned to keep the machines filled, offer assistance to customers, make change, maintain the area, and generally see to the operation of the machines; inside routemen may be assigned to stock these machines. In such cases where the machines are independently owned and operated by the vending machine firm and are attended by its employees, it is the position of the WHD that each group or bank of machines may constitute a separate and distinct establishment; in some cases those vending locations (perhaps one or more groups) which are located in the same building can be considered a single establishment if operated as such. Since sales through vending machines are considered retail, the employees employed at these locations may qualify for exemption under section 13(a)(2) if the tests are met. Section 13(b)(8) may also apply since the food stations will qualify as restaurants. Similarly, an employee who services two or more groups of machines may qualify for exemption per FOH 21a06 as he or she is considered engaged in retail activities and not central office functions.
- (b) In many cases the groups or banks of machines as described in FOH 21a10(a) above are controlled by a central office and/or commissary kitchen or warehouse located off the premises which purchases merchandise, prepares food and performs accounting, clerical, and related duties. These central offices, etc., do not qualify as retail establishments and employees employed by the firm at such locations are not exempt.
- (c) In some cases, usually in larger plants, the vending machine company may operate an office located on the premises to supervise all operations of the firm in the particular plant. Such an office may include a storage area for merchandise for the machines. The storage area and office serve only the food banks located at the particular plant. The employees employed by the firm work exclusively at this location and the office keeps its own records and orders its own supplies. Hostesses and routemen are employed by this office to service the machines located at various points in the plant. In such a case the firm is operating a business possessing unity of ownership, unity of operations, unity of function, and though consisting of separate stations or food banks the business at the location is consolidated and operated as a functionally integrated unit. Where a business with such characteristics is located in one plant, factory, or building and serves no outside establishments, the parts of such a business, including the office, storage area, and food banks will be considered one single establishment for purposes of exemption. As such, sections 13(a)(2) and 13(b)(8) may apply if the tests are met.

21b ESTABLISHMENT DETERMINATIONS

21b00 Establishment: single concession.

A concession such as one in a ball park which supplies its stands and hawkers with hot dogs, popcorn, and the like from one central commissary is a single establishment for the purposes of the retail and service establishment exemptions. The business possesses unity of ownership, unity of operations, unity of functions, and though broken into units known as

stands, is consolidated and operated as an integrated unit. The stands and the vendors do not have independent characters of their own as establishments, for they are on a temporary relationship to the commissary and fulfill the functions of departments for an establishment. Only together with the commissary can they constitute a definable establishment. Thus, unlike a commissary serving a chain of retail stands operated in a transportation terminal or similar area, the concession commissary does not in essence perform a warehouse function for a group of establishments within the meaning of the FLSA, but is rather fundamentally a necessary complement to an integrated retail establishment. This business operates on the same premises of the ball park stadium, and no other establishments separate the parts of the business.

21b01 **Establishment: multiple concessions.**

The fact that the firm's concessions are under one roof, as in the case of a firm which leases space at an airport terminal building, a railway station, or similar restricted area, does not of itself create a single establishment. (Nor is this situation comparable to that involving the operation of leased departments within the meaning of 29 CFR 779.225 or 29 CFR 779.306.) A determination as to whether the operations constitute one or more than one establishment must be made. Among the factors to be taken into consideration are the relative physical location of the units, the degree of segregation along functional lines, whether or not there is a common supervisory staff, the amount of employee interchange, and the extent to which separate sales or other records are kept. If it is found the operations constitute more than one establishment, each individual establishment must meet the tests for exemption. With respect to employees who perform work for more than one of the establishments, *see* FOH 21a06.

21b02 **Casinos in hotels.**

- (a) In some cases a hotel and a gambling casino are operated in conjunction with each other, often in the same building. In view of the normal physical and functional separation of casino operations in a hotel setting, as influenced by the differences in legal requirements for hotels as such and for casino operations, the casino will be considered a separate establishment under the principles expressed in 29 CFR 779.305. *See* FOH 21cg00.
- (b) In such combined establishments there are various employees such as bookkeepers, custodial workers, maintenance workers, porters, and others whose work relates in part to the casino as well as to the hotel. For enforcement purposes, such an auxiliary employee will be considered to be within any exemption for which the hotel qualifies (*e.g.*, sections 13(a)(2) or 13(b)(8) in any workweek in which 20 percent or less of his time is allocable to the work of the nonexempt casino).

21b03 **Open to the public.**

- (a) Where membership in an establishment may be purchased, without restriction, by the general consuming public, the business may qualify as a "retail or service establishment" for purposes of section 13(a)(2) and also may qualify for section 13(a)(3).
- (b) Whether such an establishment is open to the public or is a private club is a factual determination. Some of the factors which are of primary importance in the determination of whether membership is selective are:

- (1) whether the existing members have any control over the administration of applicants for membership (*e.g.*, whether there is a membership committee selected by the members to represent them, or whether there is a blackball system by which individual members can reject an applicant even though he might have been recommended by another member);
- (2) whether the existing members have any control over revocation of membership of other members;
- (3) whether the recommendations of members are required on applications;
- (4) whether the number is limited in any way other than by the capacity of the facilities;
- (5) whether there are any genuine qualifications for membership (*e.g.*, residence in a particular location, position in a particular social or economic class, or good reputation or character); and
- (6) whether the members exercise control over the operations of the establishment.

While there are other facts which determine whether an establishment serves the public or is a private club, the above are the core factors. *See* 29 CFR 779.319.

21c SPECIFIC APPLICATIONS: RETAIL CONCEPT AND SALES CRITERIA

21c00 Purpose and use.

The interpretations contained in FOH 21c illustrate the application of the principles set out in 29 CFR 779 to specific situations involving the retail concept, sales for resale, and the making of sales of goods or services recognized as retail. The examples selected have been chosen primarily to serve as guides in those situations where the principle involved is of widespread application or where field experience has indicated a specific need.

21ca00 Advertising distribution.

The distribution of advertising is a service which is the same in nature whether it is performed for a retail store, a mail-order house, or a manufacturer, or to advertise a parade or political rally, or to urge a segment of the public to organize itself. Such services are totally unrelated to the concept of a retail service, as it is commonly and traditionally understood, and are not recognized as retail services.

21ca01 Airport limousine service.

Employees performing activities in connection with the operation of an airport limousine or other transportation terminal limousine service are not within the section 13(a)(2) exemption. Such activities are wholly lacking in any retail concept and are not, therefore, within the scope of their employer's otherwise exempt retail business. *See* 29 CFR 779.308.

21ca02 Airports: aviation sales and services.

There is no concept of retailing in the operation of an airport as such nor is the sale of aviation supplies, parts, or services recognized as retail in the industry. *See* 29 CFR 779.317.

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21ca03 **Auto, truck, and trailer rental.**

- (a) An establishment engaged exclusively or nearly so in the business of renting and leasing trucks or trailers to commercial and industrial firms is not normally considered to be within the retail concept since its services are performed in the midst of commercial transactions rather than at the retail distribution level.
- (b) The rental of trucks or trailers by establishments other than those described in FOH 21ca03(a) above may be recognized as retail. In such cases, if the sale of a type of truck or trailer is recognized as retail, then the rental of such truck or trailer may also be recognized as retail. *See* 29 CFR 779.371.
- (c) The rental of passenger cars ordinarily is retail. In making a determination as to the status of rentals the tests set out in 29 CFR 779.371 for the sales of such vehicles should be used.
- (d) Vehicles used by rental firms in leasing and renting operations are ordinarily sold after the vehicles have outlived their usefulness for leasing or rental purposes. Such sales are included in the establishment's ADV of sales. Where the vehicles are sold to used car dealers for resale, as is frequently the case, such sales are not recognized as retail.

21ca04 **Auto repairs.**

- (a) Repairs of cars for other garages which in turn charge their customers for the repairs are sales for resale.
- (b) Repairs of cars for used car dealers, prior to their sale by such dealers, are sales for resale.
- (c) Repairs of cars used by employees at the expense of their employers, to whom the bills are sent directly, are retail sales.
- (d) Repairs on privately owned cars even though paid for directly by insurance companies are retail sales.

21ca05 **Ambulance services.**

See 29 CFR 779.369. This section provides that an employee of a mortuary will continue to be within an otherwise applicable section 13(a)(2) exemption if he devotes an insubstantial amount of his time in the workweek (not more than 20 percent) in performing nonexempt ambulance transportation activities. These same principles are equally applicable where nonexempt ambulance transportation activities are performed by employees of other types of retail establishments, such as a garage or a general merchandise store.

21ca06 **Apartment houses.**

The leasing or renting of space to tenants of apartment houses lacks the retail concept necessary to qualify an establishment as a retail or service establishment under section 13(a)(2). *See* 29 CFR 779.317. The sale of leasehold interests in real property is not included in the "sales of goods or services" in which a retail or service establishment (as defined in section 13(a)(2)) must engage. Receipts from such leasing or rental activities are included in the ADV of the enterprise for purpose of amended section 3(s)(1).

21ca07 Auto license plate sales by retail establishments.

Some privately owned retail establishments operate auto tag agencies or auto license bureaus and sell auto license plates. The sales of auto license plates are sales to which the retail concept does not apply, and the gross price of the plates is included in the ADV for purpose of section 13(a)(2).

21cb00 Baby chicks.

The sale of baby chicks for raising and reselling is a sale for resale, and furthermore is not recognized as a retail sale in the industry. Such sales are between the producer and the grower and are far removed from the retail level of distribution.

21cb01 Boatyards.

- (a) The two types of establishments found in this industry are boatyards, where boats are built or large boats are repaired, and the marina, which includes yacht basins, yacht clubs, and repair establishments where small boats are serviced or repaired. Both the boatyards and the marina usually sell boats, boat supplies, and accessories.
- (b) Boatyards are not recognized as retail establishments in the industry and are not the type of establishment contemplated by the exemption. A sales analysis should never be necessary of such an establishment. A marina, however, is the type of establishment which is recognized as retail in the industry. It may qualify for the section 13(a)(2) exemption and its sales may be analyzed.
- (c) To distinguish between a boatyard and a marina note the permanent physical facilities for repairing boats. Boatyards have facilities, such as a railway, for taking large boats out of the water for repairs. Marinas do not have such facilities. Occasionally, a marina may utilize manpower or a portable crane to take a boat out of the water but this does not transform the marina into a boatyard, since large boats normally cannot be taken out of the water in this manner. The servicing of large boats by a marina is a retail service because it is of the same general type the marina provides for small boats.
- (d) Operations of individual establishments in this industry may change. For example, a marina may, after a time, broaden out and acquire equipment until it has the characteristics of a boatyard even though it may still retain the title of marina. Or, a boatyard may find, because of a change in the nature of its customers, that it now only services small boats and that its railway is no longer in use. Thus, the facilities of an establishment are important but not necessarily conclusive as to its status.

21cb02 Beauty preparations and cosmetics.

Sales to beauty shops of beauty preparations, such as creams, lotions, and rinses, which are used upon the persons of the beauty shops' customers as a part of the service rendered, are sales for resale regardless of whether the customer is charged separately for these items.

21cc00 Contract mail hauling.

Employees performing activities in connection with the hauling of mail under contract with the Post Office Department are not within the section 13(a)(2) exemption. Such activities are

wholly lacking in any retail concept and are not, therefore, within the scope of their employer's otherwise exempt retail business. *See* 29 CFR 779.308.

21cc01 **Contract post offices.**

- (a) The remuneration which a contract post office receives from the government should not be included in the sales analysis. The receipts from sales of goods or services are the monies collected from the public for the sales of stamps, money orders, and the like. Such sales are not recognized as retail. With reference to money orders only, the fees are counted and not the money transmitted.
- (b) An employee engaged in performing post office work in an exempt retail or service establishment is "employed by" such an establishment within the meaning of 29 CFR 779.308 unless he is employed by the Post Office Department. If the establishment, including the contract post office, meets the tests of the retail exemption, all employees employed by it will be exempt. However, the employer may claim that the postal substation and the retail establishment constitute separate establishments, and such a claim will be allowed if the conditions for segregation contained in 29 CFR 779.305 are met.
- (c) An auxiliary employee of an exempt retail or service establishment performing general office, custodial, maintenance, or messenger work for a nonexempt contract postal station will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

21cc02 **Concrete blocks and flues.**

Sales of concrete blocks and flues may be recognized as retail sales. Such items are considered to be building materials and sales shall be classified as retail or nonretail in accordance with the principles set out in 29 CFR 779.335 -.336, 29 CFR 779.355, and FOH 21cL00.

21cd00 **(Reserved.)**

21cd01 **Driving schools.**

The retail concept does not apply to establishments engaged in the activity of selling and giving driving instructions and preparing members of the public for examination given by the state for driver's license.

21ce00 **Exterminating service.**

- (a) Exterminator service establishments may be recognized as retail. However, where the facilities and equipment of an establishment are designed for the service of factory or commercial buildings and are of a type which the general consuming public does not ordinarily have occasion to use, the services are specialized and are not traditionally recognized as retail within the meaning of the exemption even though the firm may also, occasionally, render services to the general consuming public. On the other hand, if the exterminating facilities and equipment used in servicing commercial buildings are no different from those used in servicing private residences, such services may be regarded as retail.

- (b) Exterminating services performed regularly and repeatedly for a commercial or industrial firm under contract, covering an extended period of time, constitute maintenance operations and are not, therefore, recognized as retail services.

21cf00 Farm implement sales.

- (a) Sales of new or used farm implements and farm machinery, including such items as gardening and lawn care equipment, are recognized as retail regardless of whether they are purchased by farmers or non-farmers. Servicing and repair of such items, and sales of parts for them, are also recognized as retail. *See* 29 CFR 779.371(e).
- (b) Sales of equipment such as the specialized types of construction and processing machinery set out in 29 CFR 779.371(e)(3) which are not normally used in farming operations are not recognized as retail sales.
- (c) Certain types of equipment, such as land levelers, may be used both in construction and in farming operations. Where exemption depends on the retail or nonretail nature of sales of such multi-purpose equipment, the facts shall be obtained and submitted through channels to the regional solicitor of labor (RSOL) for an opinion.

21cf01 Florists' Telegraph Delivery sales.

- (a) Sales of flowers to consumers through Florists' Telegraph Delivery (FTD) are considered retail sales. Under the FTD arrangement, in order to serve retail customers who wish flowers delivered at distant locations, other member florists have agreed that the flowers sold by the establishment to which the customer comes will be supplied and delivered by an establishment in whose delivery area the recipient is located. Each member establishment will both sell flowers for delivery from the stock of other members and deliver from its own stock flowers sold by them, with settlement made periodically through clearing house procedures. The ADV allocable to either of these activities, as computed under FOH 21cf01(b) below, is counted as receipts from retail sales and/or services for purposes of the 75 percent test in section 13(a)(2).
- (b) The ADV for purposes of enterprise coverage and the application of section 13(a)(2) shall be determined as follows: Florist A takes an order from a customer and receives full payment (\$20.00) for the flowers plus \$2.00 for the telegram and service charge, a total of \$22.00. The order is telegraphed to Florist B who delivers the flowers to the recipient. As a result of this transaction, Florist A retains 20 percent of the sales price, plus the charges (\$6.00 in all) and Florist B receives 80 percent of the sales price (\$16.00). In such a case Florist A must include the total amount received by him (\$22.00) from the customer in his ADV; Florist B must include in his ADV the total amount he or she receives in the transaction (\$16.00). If Florist A is in Colorado and Florist B in Illinois, the interstate sales for purposes of the 50 percent test as set out in FOH 21cf01(c) below would be (\$22.00) for Florist A and (\$16.00) for Florist B. In the above example, Florist A's ADV would also include any additional amounts charged the customer for taxes, except that any excise taxes at the retail level which are separately stated are not to be computed as part of the ADV for purposes of the monetary test of section 3(s)(2).
- (c) In any case where a florist's establishment meets the statutory definition of a "retail or service establishment" and is not part of a covered enterprise, it is still necessary to determine for purposes of the section 13(a)(2) exemption whether more than 50 percent of the

establishment's ADV of sales is made within the state. For example, Florist A in Colorado receives an order for flowers to be delivered in Illinois; he wires the order (FTD) for Florist B in Illinois to deliver the flowers. The sale is an interstate sale for purposes of section 13(a)(2), both with respect to the florist in Colorado and the florist in Illinois. Also included as interstate sales for this purpose are sales by a florist for direct delivery by him into another state. In determining the ADV for purpose of this test, *see* FOH 21cf01(b) above.

21cg00 Gambling receipts.

The receipts from gambling activities are not recognized as receipts from retail sales or services. Thus, for example, employees engaged in the operation of a gambling casino are not within the section 13(a)(2) exemption.

21cg01 Golf shops in country clubs.

In the ordinary case a golf shop in a country club is not open to the public and cannot qualify for the section 13(a)(2) exemption (*see* 29 CFR 779.317). However, if such a golf shop is open and available to the general public as well as to club members and is a "distinct physical place of business" separate from other facilities and qualifies as an "establishment" the section 13(a)(2) exemption may apply if the tests are met.

21cg02 Gasoline sales to truckers.

Sales of gasoline at the ordinary gasoline service establishment (not a truck stop) by the tankful to truckers for use in the operation of the vehicle are generally recognized as retail sales notwithstanding that discounts such as 2 cents per gallon are allowed or that the sales are made on a credit card basis. *See* 29 CFR 779.371(c)(6).

21cg03 Civic and convention centers.

- (a) Civic and convention centers whether publicly or privately owned or operated are normally engaged primarily in the business of renting space to business and civic organizations attracted to the locality. In order to attract conventions such centers sell their capability to house business meetings, trade shows, auto and boat shows, open-air exhibitions, and mass meetings, including the directly related ancillary capabilities (*i.e.*, parking lot, recreation, eating facilities, etc.). Such rental of space to business and civic organizations constitutes a business activity lacking the retail concept. *See* FOH 21ca06.
- (b) The fact that independent contractors are engaged to cater food and beverages to the various groups and participants in activities held at the centers does not alter the nonretail character of the centers. Also, the fact that certain exemptions (*e.g.*, sections 13(a)(2), 13(b)(8), or 14) may be applicable to employees of such independent contractors, depending upon circumstances and character of the contractor's business, does not affect the applicability of the FLSA to employees of the center.

21ch00 Hotels, motels, and restaurants: competitive bid sales.

In determining the application of the section 13(a)(2) exemption to hotels, motels, and restaurants, sales resulting from competitive bids are not considered characteristic of retail selling and are not generally recognized as retail. For example, certain contracts for

furnishing meals and/or lodging to government employees or military personnel may be let on the basis of competitive bid procedures. *See* 29 CFR 779.328(d).

21ci00 Industrial maintenance services.

An organization which cleans air ducts, elevator shafts, air conditioning equipment, ventilating systems, flues, stacks, and the like, and repairs and refills fire extinguishers, fireproofs drapes, decorations, show booths, and the like, and performs maintenance work almost entirely for commercial or industrial establishments is performing specialized services which the general consuming public does not ordinarily have occasion to use. The organization is not engaged in activities which are traditionally recognized as retail even though it may also sometimes sell goods or render services to the general consuming public.

21cj00-k00 (Reserved.)

21cL00 Lumber and building materials sales to contractors or builders.

- (a) The lumber and building materials determination (*see* 29 CFR 779.355) together with section 3(n) form the basis for determining which sales are not for resale and are recognized as retail in the industry. In applying the tests of the lumber and building materials determination and section 3(n) to sales of materials to contractors or builders it is necessary to take into consideration, also, the general principles contained in 29 CFR 779.327 -.329 and 29 CFR 779.335 -.336 which relate to retail and wholesale sales in general and sales for resale.
- (b) The sale of lumber and building materials to contractors or builders for residential, farm or commercial construction, repair or maintenance are sales for resale unless excluded from this category by section 3(n). In order for such sales for to be excluded for the category of “for resale” all the tests of section 3(n) must be met (*see* 29 CFR 779.335 -.336). The tests are:
 - (1) the goods sold must be used in residential or farm building construction, repair, or maintenance, *and*
 - (2) the sale must be recognized as a bona fide retail sale in the industry.

With respect to the first test contained in section 3(n) it is clear that sales of materials to contractors for use in the construction, repair, or maintenance of apartment houses, motels, churches, schools, or other commercial or industrial structures are sales for resale. Such structures are not “residential” buildings of the type contemplated by section 3(n).

- (c) With respect to the second test of section 3(n), in determining whether sales of lumber and building materials are recognized as bona fide retail sales in the industry, it is necessary first to test such sales under the lumber and building materials determination. If they are not recognized as retail under the principles set forth in the determination, they will not meet the second test of section 3(n). It does not follow, however, that all sales recognized in the determination as retail are recognized as bona fide retail sales for purposes of section 3(n). Thus, although the determination, among other things, recognizes sales in other than direct carload lots as retail sales (*see* 29 CFR 779.355(b)(3)), regard must be given to the legislative history and WHD position that sales of lumber to a contractor to build a whole residential subdivision are not recognized as bona fide retail sales under section 3(n) (*see* 29 CFR 779.335). There may, therefore, be certain circumstances under which sales in other than direct carload lots are *not* recognized as bona fide retail sales within the meaning of section

3(n). For example, some contractors engaged in the building of subdivisions may build only a few houses at a given time, and possibly purchase materials in lot quantities sufficient to construct only one house at a given time. Where such lumber sales are made pursuant to a contract, agreement or understanding that the dealer is to supply the contractor with all his lumber requirements for a subdivision consisting of a fixed or indefinite number of houses such sales would not be recognized as retail regardless of whether the lumber is to be delivered in small quantities as construction progresses or all at one time (*see* 29 CFR 779.328(c)). Consequently, such sales would not qualify for exclusion from the category of sales for resale under section 3(n).

- (d) Situations may be encountered where a contractor is engaged in building a number of houses on scattered lots and is purchasing the materials for his own use in total amounts as great as a contractor who is building a whole subdivision. Where, as in FOH 21cL00(c) above, the total amount of materials contemplated for delivery pursuant to a direct or indirect contract, agreement or understanding between the dealer and the contractor is materially in excess of the total quantity of goods which might reasonably be purchased by a member of the general consuming public during the same period, under section 3(n) such sales would not be recognized as bona fide retail sales. Of course, in those instances where a contractor is purchasing materials to build a single house only, whether or not in behalf of the home owner, such a sale may be recognized as being a bona fide retail sale within the meaning of section 3(n).
- (e) Where the retail or non-retail nature of sales to contractors or builders cannot be determined on the basis of the above principles and such questions are determinative of the compliance status of the establishment, the facts shall be obtained and the matter referred through channels to the RSOL for an opinion.

21cL01 Laundry operations by employees of hotels, motels, or restaurants.

WHD will consider employees of a hotel, motel, or restaurant engaged in performing laundering, cleaning, or repairing of clothing or fabrics (*see* FOH 12e03) including those who work on the establishment's own fabrics or clothing or those of its employees or guests or for other establishments in the enterprise, or for outside customers or for other persons as outside the section 13(a)(2) exemption even though employed by an establishment which qualifies for the exemption. *See* FOH 21cs02.

21cL02 Laundry and similar establishments excluded from the section 13(a)(2) exemption.

Section 13(a)(2) does not apply to central laundry or dry cleaning establishments; those laundry or dry cleaning establishments (generally known in the trade as valet shops or will-call or pick-up and delivery stations) which receive from and return to their customers clothing or fabrics for laundering, cleaning, or repairing at a central laundry or dry cleaning establishment; linen supply services; or rug and carpet cleaning establishments (whether cleaning is performed on the employer's premises or at the customer's home). Coin-operated laundries (laundromats) and self-service cleaners are excluded from section 13(a)(2) because Congress made it plain that they are to be treated like other laundry and cleaning establishments. *See* FOH 12e01 and FOH 21h08.

21cL03 Libraries.

- (a) A public library, in selecting and promoting books for the benefit of the community; providing assistance and facilities for reference, research, and study; housing and promoting literary, esthetic, and civic programs and activities, is engaged in the improvement of the cultural level of the community, a purpose entirely foreign to retail activities. Therefore, a public library cannot qualify as a retail or service establishment for purposes of section 13(a)(2), nor can a public library employ full-time students as a retail or service establishment pursuant to section 14(b).
- (b) A library establishment which is part of an institution of higher education may not qualify for the section 13(a)(2) exemption but may employ full-time students pursuant to new section 14(b).

21cm00 Meals sold to airlines.

Sales of meals to airlines to be served to its passengers are sales for resale.

21cm01 Medical, surgical, and hospital equipment and supplies.

Sales of specialized medical, surgical, and hospital equipment and supplies, which the general consuming public does not ordinarily have occasion to buy, are not recognized as retail sales.

21cm02 Motion picture films and equipment.

- (a) 8 mm film rentals or sales are retail sales. The servicing, sale, and rental of 8 mm motion picture equipment are retail sales.
- (b) 35 mm film rentals are not retail sales. The servicing, sale, and rental of 35 mm motion picture equipment are not retail sales.
- (c) **16 mm film and equipment rentals**
 - (1) Rentals of 16 mm films or 16 mm equipment to roadshowmen who charge admissions to the showing are sales for resale.
 - (2) Rentals of 16 mm films or 16 mm equipment to private individuals for home showing are retail sales.
 - (3) Rentals of 16 mm films, or 16 mm equipment to schools, churches, industrial concerns, clubs, and the like, where no admission charge is made by the purchaser, are not sales for resale. However, where an admission charge is made, it would be considered a sale for resale.
 - (4) Rentals of 16 mm films or equipment to schools, churches, industrial concerns, clubs, and the like, on the same basis as to private individuals are retail sales. However, rentals of 16 mm films or equipment pursuant to a contract, setting forth terms and conditions of the showing of the film, are not retail sales.

21cm03 Moving and storage.

- (a) **Local and long distance moving**

Local and long distance moving (including packing and unpacking) of household goods and the contents of offices, institutions, and business establishments, where the service is rendered to the ultimate consumer and the warehouseman performs all the services including the hauling, is recognized as a retail service. Sales by a moving company, where it has other companies perform the packing, crating, local pick-up, local delivery at destination, and unpacking, are not recognized as retail sales in the industry. To the extent that the company is engaged only in transportation, it is similar to other common or contract carriers by motor vehicle or railroad or water carriers.

(b) Storage

Permanent and temporary storage (including packing and cartage to and from the warehouse) of household goods and the contents of offices, institutions, and business establishments, where the service is rendered to the ultimate consumer, is recognized as a retail service. Sale of such services to other moving companies is a sale for resale.

(c) Packing and shipping

Packing of household goods and the contents of offices, institutions, and business establishments, transportation to a warehouse, crating or packing in special containers or a lift van, and transportation to a railroad or steamship line for shipment by rail or water to destination, where the service is rendered to the ultimate consumer, is recognized as a retail service. The receipt of inbound containers, lift vans, and crated goods at the railroad depot or steamship pier or warehouse, the unpacking and uncrating, and delivery onto the customer's premises, where the service is rendered to the ultimate consumer, is also recognized as a retail service. Sale of such services to other moving companies or to a railroad or steamship line is a sale for resale.

(d) Commercial warehousing and distributions

Storage and distribution of inventory for business concerns is not recognized as a retail service.

(e) Carpet and furniture cleaning

Carpet and furniture cleaning are services which are considered laundering, cleaning, or repairing clothing or fabrics and thus employees engaged in these activities are excluded from section 13(a)(2).

(f) Sale of furniture, chair rental, etc.

The sale of furniture, fur storage services other than commercial, home inspection services, and piano and chair rentals are recognized as retail. However, if such sales are not made to the ultimate consumer but to other companies for sale by them to their customers, they are sales for resale.

(g) Heavy hauling and rigging

Heavy hauling and rigging, which are specialized services performed only for industrial customers as part of their industrial operations, are not recognized as retail services.

(h) Commissions

Commissions received by local warehousemen, as agents for sales of services to be performed by other companies are brokerage fees and not receipts from retail sales.

(i) Rentals and reimbursements

Receipts from the rental of vehicles and receipts from other moving companies in payment for packing and other services are receipts from sales for resale.

(j) Moving and storage sales within the state

The sale of a packing and transportation service to permanent storage or to the customer's premises within the state in which the establishment is located is a sale made within the state. Also, the sale of a packing and transportation service to temporary storage or to a railroad depot or pier within the state is a within the state, even though the goods eventually leave the state, if the sale does not include any arrangement or through rate for transportation outside of the state, and the customer makes his own arrangements with the railroad or steamship line for further shipment of his goods.

(k) Moving and storage sales outside the state

The sale of a job or moving to another state is not a sale made within the state. Receipts from other moving companies, for services in connection with, or commissions for the sale of, an interstate moving job are not receipts from sales made within the state. Likewise, receipts from a packing and transportation service to temporary storage or to a railroad depot within the state are not receipts from a sale made within the state, if the service performed is a part of an interstate shipment to be delivered in another state. Where the goods being temporarily stored are in transit from the state, in which the warehouse in question is located, to another state, or from another state to the state in which the warehouse is located, the receipts derived from such temporary, in-transit storage are not receipts from a sale within the state in which the establishment is located. If the local warehouseman undertakes to arrange for the interstate railroad transportation for the owner of the goods, the entire movement from origin to destination must be viewed as one interstate shipment.

21cm04 Medicines and drugs.

Sales to physicians and hospitals of medicines, drugs, and the like, to be used in the treatment of their patients, are sales for resale regardless of the quantities involved.

21cm05 Mortuaries.

- (a)** Mortuaries may collect burial insurance premiums and receive a commission from the insurance company on such collections. If the employees of the insurance company sell the insurance and the mortuary acts as a mere collection agency for the insurance company, only the commissions received and not the total premiums collected are counted as sales for purposes of computing the AGV of sales. On the other hand, if the mortuary actually sells the insurance, the total premiums received are counted for this purpose. The commissions for collection of burial insurance, or the actual sales of the insurance are considered to be nonretail sales in applying (*see* section 13(s)(2)).

- (b) In some cases burial insurance policies provide that the insurance company itself will provide funeral services within the limits of the policy. Where such services (including furnishing a casket, etc.) are performed by a mortuary under agreement or contract with the insurance company, the mortuary is considered to be selling its services to the insurance company. The policyholder's right to the services arises out of a collateral contractual agreement with the insurance company and not from any agreement between the policyholder and the mortuary. In computing the ADV of the mortuary which provides funeral services under a burial insurance policy not sold by the mortuary itself, *only* the actual amount of reimbursement (for services and merchandise) received from the insuring company, rather than the face value of the policy, will be counted. Sales for such services through an agreement with an insuring company are sales for resale for purposes of section 13(a)(2). For example, a burial policy with a face value of \$600.00 provides actual funeral services of only \$410.00; the remaining \$190.00 goes to the insurer. The \$410.00 reimbursement is counted in measuring the ADV of the mortuary and is a sale for resale.

On the other hand if the burial insurance policy provides for paying certain funeral expenses to or in behalf of policy holders, the fact that payment may be made directly to the mortuary by the insurance company does not make the sales of such services sales for resale. This is analogous to a garage performing repair services on damaged automobiles and being paid directly by the insurance company. *See* FOH 21ca04.

- (c) In making sales of funeral services, some mortuaries have listings (catalogs) of various types of monuments for sale by monument companies which they show to their customers. In some cases, mortuary employees may show monuments purchased by other customers. The mortuary takes orders which are sent to monument companies, with the customers paying either the funeral home or the monument company. For its services the mortuary receives a commission based on a percentage of the sales price. In such situations employees of the mortuary are engaged in selling the monuments to its customers and consequently the total price of the monuments and not merely the commissions received must be counted in computing the AGV of sales. Such sales are retail (*see* 29 CFR 779.363). These same principles will also apply where a mortuary sells memorials or flowers in a similar manner.
- (d) Some mortuaries may advance cash to their customers so that the customer may purchase certain items. If such advances are made solely for the convenience and benefit of the family of the deceased and the funeral home makes no profit, the amounts repaid are not to be included in computing the ADV of sales made or business done for purposes of section 3(s). On the other hand, if interest is charged, it (*i.e.*, the interest) would be included in the AGV of the enterprise and would be considered nonretail for purposes of section 13(a)(2).

21cm06 **Mobile homes.**

The sale (not for resale) to an individual of a mobile home which meets the definition of a "trailer" for purposes of section 13(b)(10) (as described in 29 CFR 779.372(c)(3)), is considered to be a retail sale. *See* FOH 21em01.

21cn00 **(Reserved.)**

21co00 **Optometrist.**

Sales of eyeglasses and optometric services to private individuals are retail sales. *See* FOH 21eo00 for *Optician*.

21co01 Orthopedic and prosthetic sales.

In applying the tests of section 13(a)(2) to the sales of orthopedic and prosthetic appliances, such as shoes, braces, trusses, and artificial limbs, the sales of such devices directly to individuals are recognized as retail in the industry. The sales of appliances to charitable and government organizations in which the appliances are custom made and fitted for the use of particular individuals (even though paid for by the organization on the basis of a competitive bid) are recognized as retail sales. Sales of appliance or devices to institutions for stock and not intended for use by particular patients are not recognized as retail sales.

21cp00 Painting.

Contractors engaged in such activities as painting, sandblasting, or tuckpointing are *not* performing services within the retail concept. *See* 29 CFR 779.317.

21cp01 Parcel checking in transportation terminal.

Parcel checking in a transportation terminal is a service performed for travelers and is so closely allied with transportation as to be considered an integral part of it. For this reason, such service is not within the retail concept even though it is operated as a concession separate from the transportation company and separate from the through-baggage checking service.

21cp02 Pawnshops.

The lending of money to individuals who offer personal property as security for such loans is not a retail service. Therefore, all receipts from loan transactions, and from activities incidental thereto, such as sales of the securities for loans, are not receipts from sales of goods or services recognized as retail in the particular industry. However, sales of goods by the pawnshop, purchased originally for resale, are recognized as retail sales.

21cp03 Photography.

(a) Commercial

The receipts derived from commercial photography are not recognized as receipts from retail sales or services. Commercial photography is the taking of photographs for business organizations such as taking photographs for use in newspaper advertisements, magazines, brochures, catalogues, and the like. Furthermore, these may be sales for resale.

(b) School and university annuals

Since the production of school annuals, in the usual situation, is essentially a student activity, the taking of photographs of students for publication in school and university annuals is recognized as retail sales or services even though the school, acting as an intermediary, arranges for the taking of the photographs at a discount.

(c) Individual

The receipts derived from taking photographs for individuals for their own personal use are receipts from retail sales or services. *See* FOH 21ep00.

21cp04 **Plumbing and heating equipment.**

- (a) The function of distributors of plumbing and heating equipment is to bring together for plumbers, contractors, jobbers, builders, and dealers a large number of products from manufacturers of plumbing and heating fixtures and fittings. Distributors do not engage in plumbing contracting but operate at the wholesale distribution level. Sales by such establishments, with the possible exception of sporadic sales to individuals, usually at marked-up prices, are not recognized as retail in the industry.
- (b) The retailer-wholesaler in this field is of a hybrid nature, performing the function of distributor and retailer. Such establishments have list prices for the general consuming public and a trade or discount price for plumbers, contractors, jobbers, builders, or other dealers. Only those sales to the general consuming public at list prices are recognized as retail sales in the industry. *See* 29 CFR 779.321(c) and (d).

21cp05 **Paint sales.**

- (a) Paint, varnish, and related items are not within the “lumber and building materials” determination contained in 29 CFR 779.355. No formal determination has been issued for the paint industry.
- (b) For purposes of a retail sales analysis, sales of paint, varnish, and related products are recognized as retail to the extent that such sales are made without any appreciable discount and involve purchases of small quantities such as would be sold to members of the general consuming public to satisfy their everyday needs. On the other hand, sales either in substantially larger quantities or at substantially greater discounts than those typically made to members of the general consuming public are not recognized as retail sales. *See* 29 CFR 779.327 -.329.
- (c) In applying the principles set out in FOH 21cp05(b) above, it is necessary to take into consideration certain purchasing practices which are prevalent generally throughout the paint industry (*see* 29 CFR 779.328). For example, sales to painters and painting or building contractors and other large commercial users are generally made in substantially larger quantities or at substantially greater discounts than those made to members of the general consuming public. In addition, such purchasers often enter into informal business arrangements or understandings (as discussed in 29 CFR 779.328(c)) whereby particular sales, although involving relatively small quantities, are discounted on the basis of volume purchased over a period of time. Such sales agreements generally result in purchases over a given time which materially exceed purchases made by a typical member of the general consuming public to fill his or her own needs and are thus regarded as nonretail sales. Of course, sales to painters or other commercial users to satisfy some immediate need or requirement for a small quantity of goods and within the range of the store’s typical retail discounts may be recognized as retail sales.
- (d) The term “for resale” is explained in 29 CFR 779.330 -.336. Sales of paint, varnish, and related items to such purchasers as painters and painting or building contractors are sales for resale (unless excluded from this category by section 3(n)) if the items are part of a job being done for the purchaser’s customer. For example, a painter may buy paint to paint a store for the owner or a painting contractor may buy paint to paint a warehouse for a manufacturing firm. In order for sales to be excluded from the category of “for resale” all the tests of section 3(n) must be met (*see* IB 779.335 and 779.336). The tests are:

- (1) The goods sold must be used in residential or farm building construction, repair, or maintenance, *and*
- (2) The sale must be recognized as a bona fide retail sale in the industry.

Thus, if in making a retail sales analysis, a sale is determined to be nonretail in accordance with the principles set out in FOH 21cp05(b) above, section 3(n) would have no application. Similarly, sales of paint to painters or painting contractors for use in the construction, repair, or maintenance of commercial or industrial structures or any other structures not specifically included in section 3(n) are regarded as sales for resale and may not be considered for exclusion from this category under section 3(n).

21cp06 Parking lots and garages.

- (a) The operation of public parking lots is recognized as rendition of a retail service (*see* 29 CFR 779.320).
- (b) Certain parking lots may contract with hotels to provide parking for guests. Such sales, whether on a per car or monthly or some other basis are considered sales for resale. This is true notwithstanding that the cost of the parking is included in the room rate (*i.e.*, no extra charge is made for the space). The contract is between the hotel and the garage and the hotel resells the space to the customer. Also the fact that such sales may or may not be made at a discount does not alter their status as sales for resale.
- (c) If a parking lot provides parking spaces to customers of a retail store such as a park and shop agreement, such sales are, as in FOH 21cp05(b) above, considered as sales for resale. Insofar as the park and shop customer pays the difference for the parking privilege when he uses the lot beyond the allotted stamped period of free parking given him by the merchant, that part of the parking is retail sale of the parking to the customer and not a sale for resale.
- (d) In some cases a company may contract with the parking lot for spaces for the use of its customers. In such cases if there is no charge made by the lot to the customer, such sales are considered sales for resale.
- (e) If a parking lot or garage is open to the general public and otherwise meets section 13(a)(2) exemption requirements, the fact that a high percentage of the customers may come from one building (*e.g.*, an office building or apartment complex) will not per se destroy the nature of the establishment as a public parking lot or the application of section 13(a)(2).
- (f) The fact that many customers pay for parking on other than a daily basis (*i.e.*, weekly, etc.) has no effect on the retail nature of such sales provided that the car is parked in any open available space. However, the lease of a specific designated space for one's exclusive use is not recognized as retail.

21cp07 Parking lots or garages located at transportation terminals.

A parking lot or garage located at an airport or other transportation terminal is so closely related to the passengers' interstate journeys that it is considered a part of the transportation industry; it is considered an essential part of the operation of the terminal establishment as an interstate transportation facility. Consequently such an establishment cannot qualify for the section 13(a)(2) exemption.

21cp08 Photofinishing receiving stations.

- (a) Certain photofinishing companies operate small receiving stations for film to be processed, known as kiosks. Such kiosks are often located in shopping center parking lots and are operated by one or two individuals. These kiosk-type establishments sell film and accessories at the retail level as well as receive film for developing and processing from the general public.
- (b) Such kiosks may be considered establishments for purposes of section 13(a)(2) and the exemption may apply if the tests are met.

21cq00 (Reserved.)

21cr00 Reception centers for foreign migratory workers.

Reception centers for foreign migratory workers are instrumentalities of commerce to provide food and shelter for such workers as they move from the point of origin to the point of destination with the entire program and facilities under government control. These centers are neither restaurants, hotels, nor a combination of both, but are government controlled privately operated facilities not open for the benefit of the public. They are not, therefore, within the retail concept or subject to retail service establishment exemption.

21cr01 Religious articles.

Sales of religious articles to individuals are recognized as retail sales. Sales to religious organizations at special discounts in quantities materially in excess of those which a member of the general consuming public would buy, are not retail sales. The sale of church supplies, suitable only for church use, such as alters and pews, is not a retail sale.

21cr02 Reupholstering furniture for hotels.

Reupholstering and recovering furniture for hotels or apartment houses in large quantities at a discount is not recognized as a retail service in the industry.

21cs00 Sporting goods.

Sales of sporting goods to teams and clubs, as well as sales of sporting goods to schools and to governments, are not retail sales.

21cs01 Stationery and office equipment.

- (a) For purposes of 29 CFR 779.367 office machines and equipment, typically stocked and sold by commercial stationers and considered by the WHD to be the subject of retail sales, include the following equipment and small-type office machines:

<u>Equipment</u>	<u>Machines</u>
Copyholders	Adding machines
List finders	Checkwriters

Papercutters	Dictating or transcribing machines
Pencil sharpeners	Hand-addressing machines
Postal scales	Hand-duplicating machines
Punches and perforators	Numbering and dating machines
Safes and chests	Personal computers
Staple removers	Sealing machines
Staplers	Time stamps
	Typewriters (except as noted in FOH 21cs01(b) below)

- (b) For purposes of 29 CFR 779.367(b)(6), the following are specialized machines and equipment not regularly stocked by commercial stationers and the sale, service, repair, or rental of these items is not recognized as retail by the WHD:

Accounting machines	Teleprinters
Addressing machines, electric	Typewriters, electric, other than portable
Bank vaults	Typewriters, extended carriage
Duplicating machines, electric	

21cs02 Shoe repair shops.

The activities of a shoe repair establishment are not considered to constitute engagement in “laundering, cleaning, or repairing clothing or fabrics,” and thus such an establishment may qualify for the section 13(a)(2) exemption if the tests are met. *See* FOH 12e02.

21ct00 Television sets, parts, installation and repair services.

- (a) The installation of television sets for home use and the repair of the sets, whether or not under a service contract, are recognized as retail services in the industry. Similarly, the sale of television parts to home users, whether or not in connection with the repair of a home television set, is a retail sale of goods.
- (b) Television repair services performed by a television service company for home users under service contracts between the service company and the customer, obtained by the company through the efforts of television dealers, are not sales of services to the dealers for resale to their customers. In such cases, the dealer acts as an agent for the television service company in the sale of television service to the home user. Receipts from the sales of service in this manner to home users are receipts from the sale of retail services.

- (c) On the other hand, where the contract is between the television dealer and the home user, and a service company performs the work on behalf of the dealer, the sales of the services are sales for resale.

21ct01 Transportation tickets.

- (a) The receipts from the sale of transportation tickets are not receipts from sales recognized as retail in the industry. Furthermore, the sale of a ticket for an interstate journey is not a sale made within the state. The item actually sold is an interstate trip which takes place across state lines.
- (b) If an establishment sells transportation tickets on a commission basis, the total receipts from such sales (rather than just the amount of commissions) are counted in determining sales.
- (c) An employee of a retail establishment who sells transportation tickets is employed within the scope of his employer's retail business and will be exempt provided the establishment meets the tests for exemption.

21ct02 Towing and wrecker services.

The retail concept does not apply to establishments which are primarily engaged in performing towing and heavy duty wrecker services for bus and trucking companies, police departments or other governmental agencies. The business of such establishments is more nearly akin to transportation than to retailing for purposes of the FLSA. There may, of course, be other towing or wrecker services performed in the usual course of business by a typical gasoline service station or automobile repair garage, such as hauling in stalled or wrecked vehicles for repair, which are done in a context and under circumstances which may be recognized as retail in the industry.

21ct03 Truck stops.

- (a) 29 CFR 779.317 provides that truck stops are among the types of establishments to which the retail concept does not apply (*see* 29 CFR 779.371(c)(6)).
- (b) Generally a truck stop is an establishment, often departmentalized, providing service station facilities designed for highway carriers. In addition to fueling facilities for trucks and buses, it may include food service facilities, sleeping quarters for truckers, and a compound where trucks are parked and serviced. It is characterized by long approaches and exits, and wide spaces between fuel pumps which make services more convenient for large trucks. A truck stop carries gasoline, diesel fuel, various parts and accessories and often has ice available for re-icing of cargo trucks. Limited truck repair service is usually available. Those providing maintenance service have specialized equipment, such as oversized tire equipment, designed especially for truck servicing. The primary source of revenue is generally the sale of diesel fuel which is used almost exclusively by large trucks, heavy tractors, buses, and construction equipment. A high percentage of the sales of truck stops are made to the trucking industry, not the general public.
- (c) To determine whether a food service facility in a truck stop qualifies as a separate establishment, apply the tests in 29 CFR 779.305. In order to be considered as a separate establishment, the food service portion must:

- (1) be physically separated from the other activities of the truck stop;
 - (2) be functionally operated as a separate unit, having separate books and records reflecting separate accounting of its revenues and expenses; and
 - (3) have no interchange of employees with the other units of the truck stop.
- (d) With regard to FOH 21ct03(c)(2), the food service facility must operate as a separate restaurant which encourages the patronage of the general public (not just truckers) in order to be considered functionally separate. Whether this part of the functional separation test is met depends upon all the facts in each individual case. The following factors are significant in this regard and should be explored:
- (1) Does the truck stop's advertising make clear that it has a separate restaurant which welcomes the general public?
 - (2) Does it actively encourage public patronage by newspaper ads, highway signs, and similar means, such as providing lunches for business clubs, featured menus for families, special days, children's portions and the like?
 - (3) Does it discourage patronage by the general public?
 - (4) Do sales rise substantially in the summer vacation months or other periods when families are on the road?
- (e) The requirement of no interchange of employees (item FOH 21ct03(c)(3) above) has reference to the indiscriminate use of employees in both units. This requirement is met where the interchange is only occasional (*see* 29 CFR 779.305). Interchange typically refers to employees who physically work in both units. Thus, the no-interchange test is not met where a cashier regularly works in the food service facility at meal times and in the other portions of the truck stop at other times. On the other hand, where a bookkeeper is located in one unit but works on the payroll records of both the food service facility and the other portions of the truck stop, this activity would not in itself defeat the requirement that there be no interchange of employees.
- (f) Where a food service facility in a truck stop is a separate restaurant establishment under the standards listed above, employees of the restaurant who also perform work for the non-exempt establishment during the same workweek are not employed by a restaurant during such workweek (*see* 29 CFR 779.311(a)). Thus, a bookkeeper who maintains records for both units is not within the restaurant exemption. On the other hand, employees of a separate restaurant establishment who irregularly perform an insignificant amount of incidental work for the non-exempt unit are within the exemption.

Note: this revision drops the requirement that 50 percent of the food sales must be made to the general consuming public. It recognizes that many eating facilities may meet the functional separation test even though they are located in truck stops. However, such eating facilities must serve and be open to the general public rather than be restricted to a particular group.

21ct04 **Temporary help firms.**

The retail concept does not apply to establishments that specialize in supplying part-time or full-time employees who perform nursing care and domestic work in private homes and health care institutions.

21cu00 **(Reserved.)**

21cv00 **Vending machine installation and maintenance.**

An establishment engaged in the business of installing, servicing, or repairing coin-operated vending machines is not within the retail concept.

21cw00 **Well drilling.**

The drilling of wells is a construction-type activity and is not within the retail concept.

21cw01 **Wrecking or dismantling buildings.**

- (a) Building demolition or wrecking companies operate typically as contractors who bid on the demolition of particular buildings. In such bids, the company estimates its labor, equipment, and overhead costs, the salvageable value of materials (unless the materials are to be retained by the owner), and a margin for profit. Contractors engaged in the demolition or wrecking of buildings are generally recognized as part of the construction industry. Most of their jobs are to clear land for further construction. The demolition contractor operates as a construction contractor, ordinarily figuring his profit on the contracts for demolition jobs rather than on markups of goods procured and kept in stock for sale to customers. For these reasons, employees engaged in such wrecking activities are not employed by a retail or service establishment.
- (b) Where a wrecking company has a separate place of business in which it maintains a stock of used (and perhaps some new) building materials for sale to customers, which it operates in the same manner as establishments of other building materials dealers, it may qualify as a retail establishment. In making a retail sales analysis, the ADV of sales made by the building materials establishment will not include the company's receipts from wrecking contracts and from sales of the salvaged materials made at demolition sites. The latter receipts are attributable to the wrecking or demolition establishment of whose activities they are a part, rather than to the building materials establishment.
- (c) The exemption would not apply to employees, working in or out of an exempt building materials establishment, who during the week engage in work that is a part of the wrecking establishment of the same employer. This would be true regardless of how such employees are carried on the payroll, and irrespective of whether they work at demolition sites or in the retail establishment on such work. *See 29 CFR 779.311.*
- (d) If a building wrecking company operates both its wrecking business and its building materials business from the same premises, each business will be treated as a separate establishment and the same rules as in FOH 21cw01 paragraphs (b) and (c) above will apply. *See 29 CFR 779.336.*
- (e) leaning used bricks by knocking off mortar with a hammer, removing nails from lumber, cutting off termite-ridden portions from lumber, and the cutting to size and threading of pipe constitute activities which are incidental to the making of sales. An establishment so engaged

is not making or processing goods within the meaning of the FLSA section 13(a)(4) exemption.

21cw02 Wallpaper sales.

The principles expressed in FOH 21cp05 with regard to paint sales are equally applicable in classifying wallpaper sales as retail or nonretail.

21d RETAIL ESTABLISHMENTS MAKING OR PROCESSING GOODS FOR SALE: FLSA SECTION 13(a)(4): GENERAL PRINCIPLES

21d00 General provisions and 29 CFR 779.

- (a) Section 13(a)(4) provides an exemption from sections 6 and 7 of the act for any employee employed by an establishment which qualifies as an exempt retail establishment under section 13(a)(2) of the FLSA and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells (provided that more than 85 percent of such establishment's ADV of sales of goods so made or processed is made within the state in which the establishment is located.)
- (b) 29 CFR 779.345 -.350 set forth the WHD position regarding the applicability of section 13(a)(4).

21d01 Where FLSA section 13(a)(4) exemption is inapplicable.

- (a) Where an establishment meets the requirements of the section 13(a)(2) exemption, but fails to meet the additional requirements provided under section 13(a)(4), all employees employed by the establishment, other than employees engaged in the making or processing activities, will be exempt under section 13(a)(2). In such a case it is, therefore, necessary to determine which employees are engaged in the making and processing activities and thus are not eligible for the section 13(a)(2) exemption.
- (b) Where clerical, messenger, or custodial employees work for both the selling as well as the manufacturing part of the establishment, the section 13(a)(2) exemption will apply to such employees, *for enforcement purposes* if in any workweek no more than 20 percent of their time is allocable to the manufacturing portion of the establishment. *See* 29 CFR 779.368.

21d02 Homeworkers employed by exempt establishment.

The section 13(a)(4) exemption does not extend to homeworkers.

21d03 Recordkeeping under section 13(a)(4).

- (a) To furnish proof of an exemption under section 13(a)(4), a retail establishment may find it necessary to keep detailed records showing not only where its sales were made, but which sales were of goods made or processed by it. Without this more detailed record, the establishment may be able to prove that at least 50 percent of its ADV of sales was made within the state but not be able to prove that at least 85 percent of the goods made or processed by it were sold within the state.

- (b) While generally a claim by an establishment to exemption under section 13(a)(4) must be supported by records, care shall be exercised not to impose an unnecessary recordkeeping burden on the establishment. However, if the establishment makes or processes goods which it does not sell within the state and a proper determination of exemption under section 13(a)(4) will be difficult in the future without this additional sales information, the establishment shall be advised of the wisdom of showing such additional data in its records.

21d04 Example of application of section 13(a)(4) requirements.

- (a) As an example of how the percentage requirements for exemption under section 13(a)(4) might be applied, the following illustration is offered. The ABC Bakery Shop, located at Portchester, New York (NY), near the NY-Connecticut boundary, does all of the baking of breads and pastries and the selling of these bread and pastries at the same establishment, and in addition purchases milk and cream for resale to its customers. It sells and delivers not only to private individuals for home consumption, but also to certain restaurants and roadside diners located in NY and nearby Connecticut.

- (b) An analysis of its ADV of sales discloses:

(1)	Sales of bread and pastries	\$90,000.00
(2)	Sales of other goods (milk, ice cream)	\$10,000.00
(3)	Sales of all goods	\$100,000.00
(4)	Sales to restaurants and roadside diners for resale	\$14,000.00
(5)	Sales recognized as retail sales in the particular industry and not for resale	\$86,000.00
(6)	Sales of all goods within NY state	\$76,000.00
(7)	Sales of all goods outside NY state	\$24,000.00
(8)	Sales of bread and pastries within NY state	\$70,000.00
(9)	Sales of bread and pastries outside NY state	\$20,000.00

- (c) The establishment meets the qualification that 50 percent or more of its ADV of sales must be made within the state in which it is located: \$76,000.00 out of a total of \$100,000.00.
- (d) The establishment meets the qualification that 75 percent or more of its sales are recognized as retail in the industry and not for resale: \$86,000.00 out of \$100,000.00.
- (e) The establishment does not meet the qualification that 85 percent of its ADV of sales of the goods made by it, namely the breads and pastries, must be sold within the state: only \$70,000.00 out of \$90,000.00 is sold within the state.
- (f) Because it does not meet the requirement that 85 percent of its ADV of sales of the goods made by it must be sold within the state, the ABC Bakery Shop cannot be exempted under section 13(a)(4), and the employees making the breads and pastries are not exempt.

However, since the establishment meets the requirements for exemption under section 13(a)(2), all other employees employed by it are exempt, except those who engaged in producing breads and pastries.

21e APPLICATION OF SECTION 13(a)(4): RETAIL RECOGNITION OF ESTABLISHMENT

21e00 Purpose and use.

FOH 21e contains examples relating to retail recognition in the industry of establishments engaged in making or processing the goods sold. These examples are to be used in conjunction with 29 CFR 779 for the purpose of distinguishing establishments recognized as retail from factories for which there is no retail recognition in the particular industry.

21ea00 Auto engines or transmissions rebuilt.

An establishment which removes engines or transmissions from cars and replaces them with engines or transmissions rebuilt on the premises is engaged in manufacturing and is not recognized as a retail establishment in the industry under section 13(a)(4).

21ea01 Auto wrecking.

An establishment engaged in wrecking automobiles would not be exempt under section 13(a)(4) since a wrecking yard is not recognized as a retail establishment. It does not matter that the wrecking activities consist of dismantling automobiles to salvage parts sold at retail. The sale of new or used automobile parts to individuals for their own use is recognized as retail sales, whether the sales are made by a service garage or a wrecking company. An auto wrecking establishment, although it is not recognized as a retail establishment for section 13(a)(4) purposes, may be entitled to the section 13(a)(2) exemption if it meets the statutory tests for the latter exemption. If it is exempt under section 13(a)(2) only, those employees not engaged in the wrecking or dismantling activities will be exempt. Sales of junk are not recognized as retail.

21eb00 Bakeries.

A bakery which sells through special outlets or which makes virtually all of its sales at the homes of its customers through driver-salesmen is not recognized as a retail establishment in the particular industry.

21ec00 Canvas covers.

The section 13(a)(4) exemption does not apply to a manufacturing establishment which makes and sells canvas products such as truck covers, hay stack covers, luggage covers, combine canvases, cream can lid covers, miscellaneous canvas bags, or other canvas products manufactured to specifications of the purchaser.

21ec01 Concrete blocks, flues, and pipe manufacture.

- (a) An establishment engaged in manufacturing concrete blocks, flues, and pipes is not recognized as a retail establishment in the industry and, therefore, would not qualify for exemption under section 13(a)(4).

- (b) Situations may be encountered where an establishment engaged in the sale of lumber and other building materials at retail makes or processes concrete blocks and flues at the establishment and sells them there. In such a case, where the making or processing of concrete blocks, flues, and other materials at the establishment is not so extensive as to characterize the establishment as a manufacturing establishment, and if it is determined that the establishment as a whole is recognized as a retail establishment and meets the other tests of section 13(a)(2) and section 13(a)(4), the employees making and processing the concrete blocks and flues will be considered as within the section 13(a)(4) exemption.

21ec02 Concrete ready-mix.

- (a) An establishment engaged in producing and selling ready-mix concrete is not recognized as a retail establishment in the industry and, therefore, cannot qualify for exemption under section 13(a)(4).
- (b) Since the production and sale of ready-mix concrete is entirely foreign to the retail concept, employees engaged in making or processing ready-mix concrete cannot be exempt under section 13(a)(4) even though the establishment may otherwise qualify for the section 13(a)(2) exemption. Further, transit-mixed concrete or any ready-mix concrete with respect to which some processing in transit is required to keep it in condition for its intended use at the point of delivery to the customer is not made or processed at the retail establishment.

21ec03 Curtains, slip covers, and draperies.

An establishment which sells readymade curtains at retail, and also makes curtains, slip covers, and draperies to order for private individuals, may be recognized as a retail establishment under section 13(a)(4).

21ed00 Dairy plants.

- (a) Establishments which manufacture milk into butter, processed cheese, condensed and evaporated milk, ice cream, and the like are engaged in manufacturing activities and are not recognized as retail.
- (b) Establishments engaged in the pasteurization and consumer distribution of fluid milk may also make and distribute orange drink and such milk products and byproducts as premium milk, homogenized milk, regular milk, skim milk, cream, bulk milk, cottage cheese, buttermilk, and sour cream. Such establishments are not regarded as manufacturing establishments in the industry, but rather as part of the distributive trade and may be recognized as retail establishments. The fact that goods made or processed on the premises are sold by the establishment through outside salesmen will not defeat the exemption provided all of the other requirements of section 13(a)(4) are met. *See 29 CFR 779.348(c).*

21ee00 (Reserved.)

21ef00 Farm implements manufacture.

An establishment manufacturing farm implements such as tomato planters, land planes, farm trailers, harvesting equipment, and fertilizer spreading equipment is not recognized as a retail establishment in the industry.

21ef01 **Fertilizer manufacturers.**

An establishment engaged in the manufacture of fertilizer or similar products is not recognized as a retail establishment.

21eg00-h00 **(Reserved.)**

21ei00 **Ice substations and vending machines.**

Sales of ice by an establishment through its unattended automatic vending machines separate from the ice plant are attributable to the establishment for purposes of section 13(a)(2) tests, and such sales do not defeat an otherwise applicable exemption under section 13(a)(4). On the other hand, an establishment that sells through an attended substation separate from the ice plant does not meet the requirement of the section 13(a)(4) exemption that the goods made at the establishment must be sold at the establishment.

21ej00-k00 **(Reserved.)**

21eL00 **Lumber and building materials dealers.**

29 CFR 779.354 -.356 set forth the criteria for applying section 13(a)(4) to lumber and building materials dealers who make or process the goods they sell.

21em00 **Mattress manufacture.**

An establishment engaged in the custom manufacturing of mattresses, box springs, hollywood headboards, and the like, is not recognized as a retail establishment in the particular industry.

21em01 **Mobile home manufacturers.**

An establishment engaged in the manufacture of mobile homes and house trailers is not recognized as a retail establishment.

21en00 **(Reserved.)**

21eo00 **Optician.**

An optician's establishment, making or processing optical goods at the establishment, such as grinding lenses which it sells at retail to private individuals, is recognized as a retail establishment under section 13(a)(4).

21ep00 **Photographic studios: developing and printing.**

If a photographic studio meets the tests of section 13(a)(2) (*see* FOH 21cp03), the exemption is not defeated for employees employed by the establishment to develop and print (including homeworkers doing coloring and tinting) the photographs taken. Such activities are considered to be incidental to the primary retail service performed: the skillful taking of photographs. However, if the establishment is also engaged in developing and printing exposed film received from its customers or other establishments, such developing and printing activities are regarded as the manufacturing of pictures lacking the retail concept.

Consequently, if employees so engaged are employed by an establishment exempt under section 13(a)(2), they are exempt only if the tests of section 13(a)(4) are met.

21f-g (RESERVED)

21h RETAIL OR SERVICE ESTABLISHMENTS: EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS: FLSA SECTION 7 (i)

21h00 General provisions and 29 CFR 779.

- (a) Section 7(i) provides an exemption from section 7(a) for any employee of a retail or service establishment “if (1) the regular rate of pay such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.”
- (b) WHD’s position with regard to the application of the section 7(i) exemption is set forth in 29 CFR 779.410 -421.

21h01 Recordkeeping requirements.

The recordkeeping requirements with respect to employees for whom the overtime exemption under section 7(i) is taken are set forth in 29 CFR 516.16. While failure to maintain such records would constitute a recordkeeping violation, it does not in itself invalidate an otherwise applicable exemption.

21h02 Representative period for applying section 7(i) to new employees.

- (a) 29 CFR 779.417(d) indicates that the same representative period for purposes of section 7(i)(2) may be used for a group of employees where it can be demonstrated that the factors affecting the proportionate relationship between total compensation and compensation representing commissions will be substantially identical for all of the employees in the group. If a new employee becomes part of a group, all of whom clearly meet the test of section 7(i)(2) based on the representative period designated for them, the new employee may also be treated for enforcement purposes as meeting the test of section 7(i)(2) from the start of his employment if it can reasonably be expected that, considering the experience and other qualifications of the new employee, there will be no significant difference as to the proportionate relationship between the types of compensation in his situation from that prevailing for the other members of the group. Similarly, if a new employee is hired to fill a specific job previously occupied by an employee for whom substantial information as to compensation is available, and if it can reasonably be expected that the proportionate compensation for the new employee will not be substantially different from that of the previous employee, the period applicable to the previous employee can be applied to the new employee.
- (b) In situations when it cannot reasonably be expected that the proportionate compensation of a new employee will correspond to that shown in the representative period applicable to a group or to the prior occupant of the position, as may happen, for example, in the case of a

new employee who is inexperienced, the WHD will, for enforcement purposes, permit the employer to determine compliance with section 7(i)(2) on the basis of the new employee's earnings experience (of not less than 1 month) until the completion of the full representative period applicable to other employees in the department or establishment.

21h03 Regular rate determinations under section 7(i)(1).

- (a) A week-by-week determination of the regular rate for purposes of section 7(i)(1) is not necessary if the earnings are consistently and obviously higher than required to meet the test. However, situations may be encountered where the test is not clearly met and specific determinations of the regular rate for particular weeks are required. This will present no difficulty in the ordinary case. However, if the employee is paid commissions under a pay plan involving balancing factors, complex problems as to the regular rate are raised. For example, a guarantee plan may operate on a formula basis which reflects the cumulative effect of the employee's sales work with the understanding that additional payments will be made when the amount due from commissions over the period exceeds the total compensation previously paid. Or, the guarantee plan may include a provision that if commissions allocable to a particular workweek fail short of the guarantee the amount of the insufficiency will be carried forward as a deficit and deducted from an overage in some future workweek. In such cases the WHI shall obtain the facts as to the operation of the pay plan and submit the matter through channels to the RSOL for an opinion.
- (b) In determining whether or not the employee's regular rate of pay is in excess of one and one-half times the minimum hourly wage as required by section 7(i)(1) of the FLSA, the employer may divide the employee's total earnings attributed to the *pay period* by the employee's total hours worked during such pay period. Total earnings include commissions, any part of a draw that exceeds commissions, and supplemental payments, if any, that may have been paid to the employee. Supplemental payments means payments that have been made in order to increase the employee's earnings to an amount in excess of one and one-half times the minimum hourly wage.

21h04 Commissions computed as a percentage of charges for services.

- (a) Some retail or service establishments compute an employee's compensation on the basis of percentage of the charge to the customer, such as the charge for labor or the charge for service and parts used in repair. Compensation computed in this manner represents commissions on goods or services for purposes of applying section 7(i). Employees whose compensation (either in whole or in part) is frequently computed in this fashion are barbers, beauty shop operators, household appliance repairmen, and automobile mechanics.
- (b) Some auto service garages compensate mechanics or painters on the basis of commissions which are based on a percentage of the estimated labor charges to recondition used cars which are subsequently sold. Such payments represent commissions on goods or services for purposes of section 7(i). The term "commissions or services" includes commissions measured by value as well as by sale of services and the value of such services is ultimately reflected in the price of the used cars worked on.
- (c) Some auto service garages pay employees a flat fee to recondition used cars which are subsequently sold. Such payments which are paid without regard to the value of the service performed do not represent commissions on goods or services for purposes of section 7(i). Such employees are considered to be compensated on a piece rate basis and not on the basis

of commissions. Commissions, for purposes of section 7(i), usually denotes a *percentage* of the amount of monies paid out or received (*see* FOH 21h04(b) above). However, *see* FOH 21h04(d) below.

- (d) Some auto service garages and car dealerships compensate mechanics and painters on the following basis: the painter or mechanic gets so much a flat rate hour for the work he or she performs. A “flat rate” hour is not an actual clock hour. The painter or mechanic may work only 7, 8, or 9 hours a day and still receive credit for 10, 11, or 12, etc., flat rate hours depending upon how much work he or she has done. Each job is assigned a certain number of hours for which the customer is charged, regardless of the actual time it takes to perform the job. The employee is given a certain proportion of that charge expressed in terms of so many dollars and cents per flat rate hour rather than in terms of a percentage of the charge to the customer. The dealer does not change the employee’s share per flat rate hour if the charge to the customer is changed. In such situations the WHD will not deny that such payments represent commissions on goods or services for purposes of section 7(i) (*see* 29 CFR 778.117 and 29 CFR 779.413(b)). Such employment will qualify for exemption under section 7(i) provided all the other tests of the exemption are met.

21h05 Failure to choose a representative period.

29 CFR 516.16, 29 CFR 779.415, and 29 CFR 779.417 require the employer to choose a representative period and such period must be designated and substantiated in the employer’s records. The absence of such a designation is a violation of the recordkeeping requirements (*see* FOH 21h01) and may be grounds for denying application of the exemption. However, in order to avoid unjustifiably penalizing an employer in the case of a first investigation, retroactive selection of the representative period by the employer shall be allowed if such period meets the requirements of 29 CFR 779.417.

21h06 Commissions paid to department or store managers.

In some cases a department manager or store manager is paid a commission on all or some of the sales made by his department or store. For purposes of applying section 7(i) to such a manager, these payments are considered to represent commissions on goods or services, even though the other employees actually made all or most of the sales. The role, position and function of the manager greatly contribute to the sales of his store or department.

21h07 Service charges may be commissions.

- (a) A service charge levied on its customers by an establishment (*e.g.*, hotel, motel, or restaurant), for services rendered by waiters, waitresses, or other such service employees (*see* FOH 30d04(a)), may qualify as a commission pursuant to section 7(i). This is so because a service charge that is completely or partially paid to such employees is keyed to sales since it bears a direct relationship to the goods and services which the establishment sells, and it is a specific percentage of the bill presented to the customer. Accordingly service employees paid such service charges may qualify for section 7(i) if the other tests are met.
- (b) Tips, however, are not commissions for purposes of section 7(i).

21h08 Laundry and similar establishments excluded from section 7(i) exemption.

Section 7(i) does not apply to any employee of an establishment which derives more than 25 percent of its ADV from laundering, cleaning, or repairing clothing or fabrics, including rug and carpet cleaning, or other nonretail activities, since such an establishment would not qualify as a retail or service establishment as defined in section 13(a)(2). *See* FOH 21cL02 for discussion of types of establishments included from section 13(a)(2).

21i MOTION PICTURE THEATERS: SECTION 13(b)(27)

21i00 General provisions.

- (a) Effective 05/01/1974, section 13(b)(27) of the FLSA provides an exemption from the overtime provisions for “any employee employed by an establishment which is a motion picture theater.”
- (b) There are no monetary tests under section 13(b)(27) nor is it necessary in order for the exemption to apply that the establishment be a retail or service establishment as defined in section 13(a)(2). The exemption may thus apply without regard to whether or not the establishment is itself a covered section 3(s) enterprise, or is a part of one.

21i01 Motion picture theater defined.

The definition set out in 29 CFR 779.384 shall be used to identify establishments to which the section 13(b)(27) exemption will apply. As a rule-of-thumb the establishment will be considered to be “primarily engaged in the exhibition of motion pictures” if 50 percent or more of the presentation time is devoted to the showing of motion pictures.

21i02 Application of section 13(a)(2).

While it is not necessary that an establishment be a retail or service establishment for section 13(b)(27) to apply, such establishments may qualify for the section 13(a)(2) exemption if the tests are met.

21i03 Application of section 13(a)(3).

The section 13(a)(3) exemption may apply to drive-in theaters if the tests are met.

21j (RESERVED)

21k HOTELS, MOTELS, RESTAURANTS: SECTION 13(b)(8)

21k00 General provisions.

- (a) Section 13(b)(8) of the amended FLSA, effective 05/01/1976, provided a partial overtime exemption for, “(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is employed by an establishment which is a hotel, motel, or restaurant and who receives compensation for employment in excess of forty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he or she is employed. (B) Any employees of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-four hours in any workweek at a rate not less than one and one-half times the regular rate at which he or she is employed.”

- (b) Effective 05/01/1977, maid and custodial workers in hotels and motels became entitled to overtime compensation after 40 hours in a week; all other nonexempt employees in hotels and motels and all nonexempt employees in restaurants remained at a 46 hour week through 1977.
- (c) The 1977 Amendments phased out section 13(b)(8) in two steps:
 - (1) Effective 01/01/1978, section 13(b)(8) is amended by requiring overtime compensation for hours in excess of 44 per week for employees previously limited to 46 hours; and
 - (2) Effective 01/01/1979, section 13(b)(8) is repealed and thus on that date overtime is required for hours over 40 per week.
- (d) There are no monetary tests which must be met in order for the exemption to apply nor is it necessary that the establishment meet the definitions of a “retail or service establishment.” The exemption may thus apply without regard to whether or not the establishment is itself a covered section 3(s) enterprise, or is a part of one. *See* 29 CFR 779.382 -.383, 29 CFR 779.386, and 29 CFR 779.387.)

21k01 Applicable overtime standard.

Overtime compensation at a rate not less than one and one-half times the regular rate of pay must be paid as follows:

<u>Date effective</u>	<u>Old section 13(b)(8)(B)</u>	<u>Old section 13(b)(8)(A)</u>
05/01/1976	Overtime after 44 hours	Overtime after 46 hours
05/01/1977	Overtime after 40 hours	Overtime after 46 hours
05/01/1978	Overtime after 40 hours	Overtime after 44 hours
05/01/1979	Overtime after 40 hours	Overtime after 40 hours

21k02 Maid and custodial workers in hotels and motels.

A custodial employee is one who guards and protects or maintains the premises of the hotel or motel facility in which he is employed. This includes an employee who performs janitorial functions, who keeps the facility clean, who tends the heating system, makes minor repairs, and the like. It includes housemen and gardeners. It also includes employees of the facility engaged in activities incidental to the operation of the hotel or motel, such as maids and custodial employees in the facility’s beauty or barber shops, valet, restaurant, and the like. It includes employees engaged in laundering, cleaning, or repairing clothing or fabrics of

guests. Overtime protection is thus afforded to those who have duties such as laying carpets and rugs and arranging furniture, and to those who have duties such as making beds, dusting furniture, and replenishing linen.

21k03 Restaurants in private clubs.

- (a) A question has been raised concerning the applicability to employees of a country club's dining room of the section 13(b)(8) exemption for "any employee employed by an establishment which is a... restaurant." The WHD will consider this exemption applicable to employees of a private club who are engaged in preparing or serving food or beverages on its premises to its members and guests. Typical of the employees within the exemption are cooks and kitchen service employees, bus boys, waiter and waitresses, bartenders, snack bar attendants, and other similar employees engaged in the preparation and serving of food or beverages on club premises. In other words, the employees engaged in a club's food and beverage service could qualify as employees employed by an establishment which is a restaurant even though their work may take them into other areas of the club premises. Thus, the food and beverage employees may provide service, for example, to members and guest at poolside, in the locker rooms, on terraces, on the lawn, in cardrooms, or in other recreation areas without loss of the exemption.
- (b) As described in FOH 21k03(a) above, our position that these exemptions will be considered to apply to the club's food and beverage service employees has the effect of a general determination, applicable only to such club's food and beverage service employees has the effect of a general determination, applicable only to such clubs, that the employees described will be considered to qualify under section 13(b)(8) as employed by an establishment which is a... restaurant." This means that we will not, in individual cases, question whether they are employed by an identifiable separate establishment on the premises which is a restaurant. The exemption does not apply to other service employees, such as those who maintain the tennis courts, the swimming pool, or who attend to the general running of the club even though such employees may work in the same areas as the food and beverage service employees.
- (c) The term "private clubs" as used in FOH 21k03(a) and (b) above refers to private clubs where membership requirements disqualify them for the section 13(a)(2) exemption, but which offer to members and guest a meal service of the kind provided by restaurants. Examples of clubs which may have such membership restrictions and may offer such restaurant service to members and guests are country, town, swimming pool, tennis, golf, ski, and beach clubs, and lodges of fraternal orders.

21k04 Incidental activities by employees of a restaurant, hotel, or motel.

(a) Gift items, souvenirs, and tobacco products

Employees employed by an establishment which is a hotel, motel, or restaurant in activities connected with the incidental sale of such items as gifts, souvenirs, and tobacco products will be considered as within the scope of the business and hence subject to the exemption.

(b) Custodial work limitation for food service employees of a hotel or motel

Food service employees of a hotel or motel are considered to come within section 13(b)(8) if they do not spend a substantial amount of their time in the workweek (more than 20 percent)

in custodial services in the dining and kitchen premises of the hotel or motel. Custodial services include mopping the kitchen floor, vacuuming the dining room rug, cleaning adjacent restrooms, etc. On the other hand, these employees would lose the section 13(b)(8) exemption if they perform any custodial services in the workweek not directly related to maintaining the dining and kitchen premises, such as cleaning guest rooms or cleaning the hotel lobby. Kitchen and dining room employees (including banquet workers) are not performing custodial services when they wash dishes, clean tables, carry out dishes, and set tables. Thus, time spent by hotel and motel waitresses, bus boys, and banquet workers in such activities will not be counted in the 20 percent tolerance.

21k05 Multi-unit motel, hotel, or restaurant organization central functions.

Employment in central functions of a firm operating more than one hotel, motel, or restaurant establishment, as in the case of employees of a central office, warehouse, garage, or commissary which serves a chain of exempt hotels, motels, or restaurants would not be within the exemption since such employees are not employed by any single exempt establishment.

21k06 Section 13(b)(8) may apply to a restaurant employee engaged in laundering.

Prior to 05/01/1974, the section 13(b)(8) exemption applied to any employee employed by an establishment which is a hotel, motel, or restaurant including those engaged in laundering. Employees of a restaurant engaged in laundering are subject to section 13(b)(8).

21k07 Hotel employees: construction activities.

Hotel employees who engage in work that is in the nature of construction or reconstruction do not qualify for the section 13(b)(8) exemption in any workweek in which they are so engaged. For example, employees employed by a hotel as maintenance personnel but who perform renovation construction activities such as tearing down walls, digging ditches, and jackhammer work, are not within the section 13(b)(8) exemption in any workweek that some (there is no tolerance for such nonexempt work) construction work is performed. *See* FOH 25j13.

21k08 Campsites and campgrounds.

Campsites and campgrounds are not considered hotels and motels for purposes of section 13(b)(8).

21k09 “Restaurant” defined.

- (a) General guidance in defining “restaurant” is contained in 29 CFR 779.387. A restaurant may be further identified as an establishment engaged in serving prepared food and beverages selected by the patron from a full menu. Waiter or waitress service is usually provided (except in some cafeterias) and the establishment has dining (*i.e.*, seating) facilities and equipment. Thus, establishments known as cafes, cafeterias, coffee shops, diners, dining rooms, lunchrooms, tea rooms, etc., may qualify as restaurants.
- (b) There are many types of retail establishments that sell prepared food or beverages for consumption on the premises or for immediate consumption that are clearly not restaurants, such as drinking places, social caterers, and ice cream and frozen custard stands. This

distinction is not so readily apparent with respect to establishments, such as quick-service food establishments, primarily engaged in selling limited lines of refreshments and prepared food items, such as hamburgers, fried and barbecued chicken, pizza, etc., for consumption on or near the premises or for take-home consumption. Such establishments range from carry-outs, which have no seating facilities and cannot qualify as restaurants, to establishments that have tables and booths, parking for eating in one's car, and take-home containers. Whether a quick-service food establishment is a restaurant pursuant to section 13(b)(8) depends on the facts in a particular situation. Such quick-service food establishments that do not provide the characteristic employee services and the physical and functional equipment and furnishings that patrons require for consumption of meals on the premises are not restaurants for purposes of section 13(b)(8). On the other hand, where a particular quick-service food establishment does provide the customary employee and dining room services, pursuant to the above and 29 CFR 779.387, the WHD will not deny the exemption. As in cafeterias, the fact that waiters and waitresses may not be employed would not alter this position. The present examples in 29 CFR 779.387 of refreshment stands and lunch counters should be interpreted in the light of and consistent with the discussion above.

- (c) The case of *Foodservice and Lodging Institute, Inc., et al. v. Dunlop* which challenged the above position, has been tried in the United States District Court for the District of Columbia. On 09/30/1975, the court stated that it appeared the plaintiffs (*see Institute, et al.*) "failed to establish that the ruling and opinion letter challenged herein are plainly unreasonable or in conflict with the intent of Congress...." The Court granted the Secretary of Labor's motion for summary judgment and denied plaintiff's motion for injunctive relief and dismissed the case with prejudice. The Institute has filed a notice of appeal on the case, however. If the Department of Labor prevails in the appeal process, the Institute will not be able to raise this challenge on its merits again. They will have to wait for a specific case to try the issues. The WHD will continue to apply such exemptions under the guidelines of FOH 21k09 and 29 CFR 779.387.
- (d) The on the premises test referred to above does not necessarily mean a physical structure. For example, a garden restaurant or sidewalk cafe could qualify as a restaurant if it provides the customary employee and dining room services and facilities.
- (e) Where the patrons of a drive-in food service establishment with no seating facilities are served in their cars, the establishment is not a restaurant within the meaning of the exemption.