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are also engaged in the business of building contractors or speculative builders. Building materials for the carrying on of the employer's contracting or speculative building business often are supplied by the employer himself from or through his building materials establishment. In the analysis of the sales of the building materials establishment for the purpose of determining the qualification of such establishment as a "retail or service establishment" all transfers of stock made by the employer from or through his building materials establishment to his building business for the construction, maintenance or repair of commercial property or any other property not excepted in section 3 (n) of the Act will be considered as sales made by such establishment for resale.

GENERAL TESTS OF EXEMPTION UNDER SECTION 13(a)(2)

§ 779.337 Requirements of exemption summarized.

(a) An establishment which is a "retail or service establishment" within the Act's statutory definition of that term (See discussion in §§ 779.312 to 779.336) must, to qualify as an exempt retail or service establishment under section 13(a)(2) of the Act (See § 779.301), meet both of the following tests:

(1) More than 50 percent of the retail or service establishment's total annual dollar volume of sales must be derived from sales of goods or services (or both) which are made within the State in which the establishment is located; and

(2) Either:

(i) The retail or service establishment must not be in an enterprise of the type described in section 3(s), or

(ii) If the retail or service establishment is in an enterprise of the type described in 3(s), it has an annual volume of sales (exclusive of excise taxes at the retail level which are separately stated) of less than \$250,000.

(b) The language of the statute in section 13(a)(2) expressly excludes from the exemption 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 de-

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scribed in section 3(s)(4) of the Act. No exemption for these is provided under this section even if the establishment meets the tests set forth in paragraph (a) of this section. (See § 779.338(b).) With respect to laundering and dry-cleaning establishments, which Congress found to lack a retail concept (See § 779.317) and had provided with a separate exemption in former section 13(a)(3) of the Act, repealed by the 1966 amendments, this exclusion simply clarifies the congressional intent to cover employees in such work under section 3(s)(2) of the present Act and to make sure that no exemption under 13(a)(2) will be construed so as to defeat the purpose of repealing the prior special exemption.

§ 779.338 Effect of 1961 and 1966 amendments.

(a) The 1961 amendments to the Fair Labor Standards Act narrowed the exemption for retail or service establishments by permitting section 13(a)(2) to be applied only to an establishment which was not in a covered enterprise, or (if it was in such an enterprise) which had an annual gross volume of sales of less than \$250,000 (exclusive of specified taxes). There were certain exemptions to this general principle. These exceptions were set out in section 13(a)(2)(ii) and (iii). The establishments enumerated therein were exempt whether or not they were in a covered enterprise and regardless of the annual dollar volume of sales. They were: Hotels, motels, restaurants, motion picture theaters, seasonally operated amusement or recreational establishments, hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. These establishments were exempt if they met the basic 50 percent in State sales test and the 75 percent retail sales test of section 13(a)(2). The 1966 amendments to the Act repealed sections 13(a)(2)(ii) and (iii). Now to be exempt under section 13(a)(2) hotels, motels, and restaurants must meet the same tests as other retail or service establishments (see § 779.337). Seasonal

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amusement or recreational establishments and motion picture theaters now have special exemptions from both the minimum wage and overtime pay provisions of the Act as provided by the 1966 amendments in sections 13(a)(3) and 13(a)(9) respectively.

(b) Certain establishments which were previously exempt under section 13(a)(2) prior to the 1966 amendments have been specifically excluded from this exemption as a result of the amendments, even though they may still qualify as retail or service establishments under the definition of such an establishment in that section. These are hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. However, such institutions have been recognized as having a retail concept and where the nature of their operations has not changed and where they otherwise satisfy the Act's definition of a "retail or service establishment", certain food service employees employed by such institutions will be considered to be exempt from the Act's overtime pay provisions under section 13(b)(18), exemptions for their administrative or executive employees will not be defeated by nonexempt work occupying less than 40 percent of the employee's time, and full-time students may be employed in accordance with the special minimum wage provisions of section 14 of the Act and part 519 of this chapter.

SALES MADE WITHIN THE STATE

§ 779.339 More than 50 percent intrastate sales required.

The first test specified in section 13(a)(2) is that more than 50 percent of the sales of goods or of services (or of both) of a "retail or service establishment" (Measured by annual dollar volume) must be made "within the State in which the establishment is located". This limitation means that such establishment must be primarily engaged (more than 50 percent) in selling to or serving customers within its State. If the establishment is engaged to the extent of 50 percent or more in selling to

or serving customers outside the State of its location, the requirement is not met and the establishment cannot qualify for exemption.

§ 779.340 Out-of-State customers.

Whether the sale or service is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character. Sales made to the casual cash-and-carry customer of a retail or service establishment, who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and, therefore, is not a sale made "within the State" in which the establishment is located, if delivery of the goods is made outside the State. It should be noted that sales of goods or services that are conditioned upon acceptance or rejection by an out-of-State source are interstate sales and not sales made within the State for purposes of section 13(a)(2). For example, a contract entered into in the State where the customer resides for the delivery of a magazine to the customer's residence, is an interstate sale if the contract must be approved by the out-of-State home office of the company publishing the magazine before it becomes effective.

§ 779.341 Sales "made within the State" and "engagement in commerce" distinguished.

Sales to customers located in the same State as the establishment are sales made "within the State" even though such sales may constitute engagement in interstate commerce as where the sale: (a) Is made pursuant to