tanks or facilities of a number of cus-

mbers from a bulk supply of the prod-

uct transported by tank truck, motor

transport, or other motor carrier oper-

ated by the enterprise. Such deliveries

are to be contrasted with such typical

small-quantity individual deliveries as

those made into the tank of a motor

vehicle for use in its propulsion.

§ 794.134 Distribution “for resale.”

A sale made to a customer engaged in

the bulk distribution of petroleum

products will be included in the 25 per-

cent limitation only if the customer

engages in the bulk distribution of pe-

troleum products “for resale”. Except

with respect to a specific exclusion in

section 3(m) regarding certain building

materials, the word “resale” is not de-

fined in the Act. The common meaning

of “resale” is the act of “selling

again”. A sale is made for resale when

the seller knows or has reasonable

cause to believe that what is sold by

him will be resold by the purchaser in

the same or a different form. Where the

sale is thus made for resale, it does not

matter what ultimately happens to the

subject of the sale. Thus, the fact that

goods sold for resale are consumed by

fire or no market is found for them and

they are therefore never resold does

not alter the character of the sale

which is made for resale. In considering

whether there is a sale of petroleum

products for resale in any specific situa-

tion, the term “sale” includes, as de-

finied in section 3(k) of the Act, “any

sale, exchange, contract to sell, con-

signment for sale, shipment for sale, or

other disposition.”

APPLICATION OF EXEMPTION TO
EMPLOYEES

§ 794.135 Employees who are exempt.

If an enterprise engaged in distribu-
tion of petroleum products satisfies all
the conditions specified in section
7(b)(3) as previously discussed, the par-
tial exemption provided by this section
from the Act’s general overtime pay re-
quirements will be applicable to all
employees employed by their employer
in activities of the enterprise for which
the exemption was intended if, but
only if, such employees are com-
pensated in accordance with the com-
pen

sation requirements of section
7(b)(3) (see § 794.100).

§ 794.136 Employees whose activities
may qualify them for exemption.

The activities for which the section
7(b)(3) partial exemption was intended
are discussed generally in §§794.103
through 794.104. In accordance with the
principles there set forth, those em-
ployees employed in an enterprise
which qualifies for application of the
exemption, who are engaged in the
storage and delivery of petroleum pro-
ducts for the enterprise, and those em-
ployees whose work is required for the
performance of the activities in the
wholesale or bulk distribution of the
petroleum products or the related ac-
tivities customarily performed as an
incident to or in conjunction with such
distribution in the enterprises of the
industry which distributes such prod-
ducts, are employees for whom the em-
ployer may take the exemption pro-
vided they are paid in accordance with
the special compensation provisions of
section 7(b)(3). Thus, so long as these
payment requirements are met, the ex-
emption is applicable not only to such
employees as drivers, helpers, loaders,
dispatchers, and warehousemen en-
gaged in the bulk delivery and storage
of petroleum products, but also to such
employees as office, management, and
sales personnel, maintenance, custo-
dial, protective personnel, and any oth-
ers, who engage in related functions
customarily carried on by such enter-
prises in the industry in conjunction
with the wholesale and bulk distribu-
tion of the petroleum products.

§ 794.137 Effect of activities other than
“wholesale or bulk distribution of
petroleum products.”

As previously noted, in some cases
the related activities performed
through unified operation or common
control for a common business purpose
which are included in the enterprise
under the definition in section 3(r) of
the Act may include activities other
than the wholesale or bulk distribution
of petroleum products. Examples are
tire recapping or gasoline station serv-
ices, the sale and servicing of oil burn-
ers, or the distribution of coal, ice,
feed, building supplies, paint, etc. In

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some instances, as in the case of oil-burner servicing, these other activities are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. As indicated in §794.104, employees of the enterprise who engage in such activities are within the general scope of the exemption. However, activities which are not customary practices of enterprises in the industry of wholesale or bulk distribution of petroleum products are not within the scope of the intent of the section 7(b)(3) exemption. For example, construction activities, operation of a sporting goods store, scrap paper and metal activities, the operation of a general repair garage, etc., are not the type of activities for which the section 7(b)(3) exemption was intended. Thus, where an enterprise engaged in the wholesale or bulk distribution of petroleum products operates a general repair garage, a mechanic servicing the automobiles and trucks brought to the garage by customers will not for that reason be within the exemption provided by section 7(b)(3), although the exemption provided by section 13(a)(2) may apply to him if the garage qualifies as an exempt retail or service establishment under the tests provided in that section of the Act. On the other hand, mechanics employed by an enterprise engaged in the wholesale or bulk distribution of petroleum products for the purpose of keeping the distribution equipment of the enterprise in good repair would come within the 7(b)(3) exemption.

§ 794.138 Workweek unit in applying the exemption.

(a) As is true generally with respect to provisions of the Act concerning compensation for overtime hours of work (see §§778.100 through 778.105 of this chapter, Overnight Transportation Co. v. Missel, 316 U.S. 572), the unit of time to be used in determining the application of all provisions of the section 7(b)(3) exemption to an employee is the workweek. As defined in §778.105 of this chapter, an employee’s workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted.

(b) By its terms (§794.100), section 7(b)(3) exempts an employer from any statutory responsibility he might otherwise have for a violation of section 7(a) of the Act “by employing any employee for a workweek in excess of that specified in such subsection” without paying the overtime compensation prescribed therein. “If such employee is so employed * * * by an * * * enterprise” qualifying under section 7(b)(3) for application of its provisions to such employment and if such employee receives the compensation which section 7(b)(3) requires. Accordingly, for section 7(b)(3) to apply to any workweek when an employee is employed for hours in excess of those specified in section 7(a), it must be established that in such workweek he is employed by his employer in the exempt activities of an enterprise described in section 7(b)(3) and that the compensation received by him for his work in such workweek satisfies the special pay requirements of section 7(b)(3).

§ 794.139 Exempt and nonexempt activities in the workweek.

The general nature of the activities of a wholesale or bulk petroleum distribution enterprise in which an employee must be engaged in order to come within the intent of the section 7(b)(3) exemption is discussed in §§794.136 through 794.137. In each case where an employee of the enterprise is engaged for a substantial portion of his workweek in activities which do not appear to be a part of the wholesale or bulk distribution of petroleum products, it will be necessary to examine such activities and the manner and extent of their performance to determine whether they are included in or are foreign to the activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products. If they are foreign