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Paul Sifton, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, today released the following interpretative bulletin prepared in the Office of the General Counsel.

WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
OFFICE OF THE GENERAL COUNSEL

INTERPRETATIVE BULLETIN

No. 6

THE SCOPE AND APPLICABILITY OF THE EXEMPTION PROVIDED BY SECTION 13(a)(2) OF THE FAIR LABOR STANDARDS ACT OF 1938

GENERAL

1 Section 13(a)(2) of the Act grants an exemption from the minimum wage provisions of Section 6 and the maximum hours provision of Section 7, as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce . . . "*

2 The scope and applicability of Section 13(a)(2) are set forth in the statute itself; if the facts of a particular case satisfy the terms of the section an exemption is automatically available. The statute confers no authority upon the Administrator to extend or restrict the scope of Section 13(a)(2) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts or unless he shall subsequently decide that his prior interpretation is incorrect.

3 Since Section 13(a)(2) grants an exemption from the wage and hour provisions contained in Sections 6 and 7 of the Act, it seems logical in any given case, to

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* The word "whose" in Section 13(a)(2) is interpreted to refer to the selling or servicing of the "establishment" rather than the selling or servicing of any particular "employee" of the establishment.

determine first, whether these sections are applicable by their own terms. Unless an employee is engaged in interstate commerce or in the production of goods for interstate commerce, Sections 6 and 7 are not applicable and, accordingly, it becomes unnecessary to ascertain whether Section 13(a)(2) affords an exemption. In this connection, attention is directed to Interpretative Bulletins No. 1 and No. 5 which discuss generally the coverage of Sections 6 and 7.

4 It should be noted that the test prescribed in Sections 6 and 7 is related to the nature of employment of the particular employee. The criterion used in Section 13(a)(2), on the other hand, is based upon the nature of the business conducted by the employer. Thus, under Sections 6 or 7 some employees of a given industry or of a given employer may be covered and others may not be covered. If, however, the exemption provided by Section 13(a)(2) is applicable because the greater part of the selling or servicing by the retail or service establishment is in intrastate commerce, all employees of the establishment are exempted from Sections 6 and 7.

RETAIL ESTABLISHMENTS

5 The following discussion is intended to indicate the principal attributes of a "retail" establishment. A business enterprise which possesses such attributes will, in our opinion, be a "retail" establishment within the meaning of Section 13(a)(2).

6 A retail establishment sells merchandise to the ultimate consumer for direct consumption and not for purposes of resale in any form. The transactions of sale may take place in the home of the consumer, by mail, by telephone or, most commonly, in retail shops or stores. The neighborhood butcher shop which sells meat to housewives is a typical example of a retail establishment.

7 A retail establishment generally sells its merchandise in small quantities and at prices higher than the price involved in sales to wholesalers or jobbers. Thus, for example, it would seem that a coal company engaged in selling large orders of coal at a discount from the regular retail price would not be a retail establishment under Section 13(a)(2), notwithstanding the fact that the coal is purchased for direct consumption and not for purposes of resale in any form.

8 A retail establishment ordinarily sells "consumers' goods" and such merchandise is sold to purchasers for private consumption and not for industrial or business purposes. Accordingly, it would seem that a concern engaged in selling

manufacturing machinery to manufacturers would not be a retail establishment within the meaning of Section 13(a)(2) even though the machinery was not to be resold. The fact that manufacturing machinery is not "consumers' goods" presents an additional reason for our conclusion, but the result in the illustration would seem to be the same, even though the commodity sold to the manufacturing concern were coal, to be consumed in the course of operations, instead of manufacturing machinery.

9 A retail sale may involve the sale not only of merchandise but also of services incidental or necessary to the use of such goods. Thus, a retail establishment may also perform in connection with its retail selling the usual servicing rendered by enterprises of similar character. The neighborhood grocery gives delivery service to its customers and the radio dealer often renders the service of putting up aerials for his customers.

SERVICE ESTABLISHMENTS

10 Service establishments as used in Section 13(a)(2) may be considered to include generally that large miscellaneous assortment of business enterprises which are similar to retail establishments in character but which may not be accurately classified as such. Such an interpretation is suggested by the manner in which Section 13(a)(2) is drafted. Service and retail establishments are considered in the same sentence, and the same criterion of intrastate commerce is made applicable to both. Typical examples of service establishments, akin to retail establishments, within the meaning of the exemption are restaurants, hotels, laundries, garages, barber shops, beauty parlors and funeral homes.

11 Many of the characteristics outlined above with respect to the retail establishment are helpful in determining whether a given business is a "service establishment" within the meaning of Section 13(a)(2). Service establishments are usually local in character and render a service to the ultimate consumer for direct consumption. The service is usually purchased in small quantities for private use rather than for industrial or business purposes.

12 Numerous letters have been received from banks (both commercial and savings), building and loan associations, personal loan companies, insurance companies, newspapers, telephone companies, radio broadcasting stations, toll bridge companies, water supply companies, electric and gas utilities, stock brokers, security dealers, factors, printing and binding concerns, advertising agencies, commercial art

firms, investment counsel, compilers of mailing lists, credit rating agencies, legal firms, accounting firms, engineering firms, firms engaged in making geological surveys, concerns engaged in compiling and distributing information to lawyers regarding new legal developments, companies engaged in renting construction equipment, companies engaged in supplying watchmen, guards and detectives for industry, building contractors, warehouse companies, machine shops and foundries, drydock companies, companies engaged in contract oil-well drilling and dental laboratory and supply houses. Each asserts that it is engaged in rendering "service". Although we recognize that the foregoing companies perform "services", it is nevertheless our opinion that such enterprises are not, in the ordinary case, sufficiently similar in character to retail establishments to be considered "service establishments" within the meaning of Section 13(a)(2). This opinion is not free from doubt in respect of some of such classes of businesses and does not purport to embrace all possible subclassifications.

13 In a broad sense every business performs "service" yet no one would seriously urge that all types of businesses were eligible for exemption under Section 13(a)(2). It would be surprising indeed, if Congress had intended by the one word "service", as used in the phrase "retail or service establishment", to grant an exemption broad enough to include all of the above-mentioned classes of businesses, and there is nothing in the legislative history of Section 13(a)(2) to support such a conclusion.

14 In attempting to ascertain the scope of Section 13(a)(2) it is necessary to consider that section in relation to the other exemptions provided by Section 13. The long list of specific exemptions set forth in Section 13 manifests a studied effort on the part of Congress precisely to designate the classes of employees to be exempted by the statute. Accordingly, one should be cautious in attempting to stretch the provisions of Section 13(a)(2) so as to cover cases which were not patently intended to be included or which could have been designated easily and accurately in a specific exemption. Many of the foregoing types of business enterprise (e.g., banks, insurance companies, newspapers, utilities, etc.) could have been easily designated for specific exemption and that fact is another reason for our conclusion that such enterprises were not intended to be covered by general language which seems forced and artificial in its application to such cases.

15 In addition, it should be noted that the provisions of certain of the specific exemptions provided in Section 13 buttress our opinion in respect of many of the foregoing classes of businesses. Thus, Congress apparently did not consider

newspaper publishing houses to be "service establishments" within the meaning of Section 13(a)(2), since it was thought necessary to provide a special limited exemption in respect of certain types of newspapers. Similarly, no one would dispute the fact that railroads perform a very valuable "service" to the country, yet it is clear from the provisions of Section 13(b) and Section 15(a)(1) that railroad companies were not considered service establishments within the meaning of Section 13(a)(2). Congress designated in Section 13(a)(9) certain special classes of utilities for specific exemption. If Congress had intended utilities in general to be considered as "service establishments", there would, of course, have been no need for any such specific exemption.

RETAIL OR SERVICE ESTABLISHMENT

16 A determination of the meaning of the word "establishment" in Section 13(a)(2) is necessary not only in order to decide whether an enterprise, or portion thereof, is covered by the exemption but also to ascertain whether the provision of the exemption, requiring that the greater part of the selling or servicing of an establishment be in intrastate commerce, has been satisfied.

17 The unit store will ordinarily constitute the retail or service "establishment" contemplated by the exemption, even though it may be operated as a concession in a hotel, railroad station, or general market. In such cases, the structure of the enterprise is relatively simple and the independent ownership of the particular store or shop will usually be the determining consideration.

18 The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate "establishment" within the meaning of the exemption.

19 We have received many letters with respect to large manufacturing concerns which operate cafeterias or supply stores in their plants for the convenience of their employees. These small adjuncts of the manufacturing plant are engaged in a completely different type of business and are operated incidentally to the principal business of the enterprise. In such cases, the cafeteria or supply store, if separated physically in some manner from the remainder of the plant, will be considered a separate retail or service "establishment" within the meaning of the exemption.

20 The large department store normally is a complicated enterprise engaged in retail selling. It carries a wide variety of lines of merchandise which are ordinarily segregated or departmentalized, not only as to location within the store but also as to operation and records. However, since there is unity of ownership of all departments, and since all departments are operated under one roof, the enterprise, taken as a whole, will ordinarily be considered to be the "establishment" within the meaning of Section 13(a)(2).

21 A few isolated wholesale sales made by a predominately retail enterprise will not preclude such enterprise from being properly designated as a "retail establishment" within the meaning of the exemption. Conversely, a wholesale selling concern may not claim to be a retail "establishment" merely by reason of an occasional retail sale.

22 Many inquiries have been received with respect to business enterprises which in the ordinary course of business engage both in wholesale and retail selling—cases in which the wholesale selling and the retail selling each constitutes a substantial portion of the business. In such cases, the business, taken as a whole, may not be considered to be a "retail establishment" within the meaning of the exemption. This does not mean, however, that Section 13(a)(2) is necessarily inapplicable to the retail portion of the enterprise. If the retail branch of the business is distinct and separate from the wholesale branch—as where a room or rooms are set aside for retail selling—such retail branch taken alone would ordinarily be considered a "retail establishment." On the other hand, if the entire enterprise is consolidated and operated as a distinct or integrated business unit; if there is no physical separation whatever between the wholesale and retail branches of the business, then the exemption would not apply. The enterprise would have to be treated as a whole and as such it could not properly be described as a "retail establishment."

23 As pointed out previously, the fact that no exemption is available under Section 13(a)(2) does not mean that the Act necessarily applies. It is first necessary to determine whether the employee is engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of Sections 6 and 7. Moreover, assuming Sections 6 and 7 do apply, there may be cases in which that closely related portion of Section 13(a)(1) which exempts from the wage and hour provisions of the Act employees engages in a "local retailing capacity" is applicable. The relationship between this provision and the term "retail establishment" in Section 13(a)(2) seems to have caused some confusion. The "local retailing capacity"

exemption relates to particular types of employees. Thus, for exemple, an employee of a wholesale or manufacturing enterprise who is employed in a "local retailing capacity", as that term is defined by the Administrator in Regulation Part 541.3, may be exempt from the coverage of the Act even though the other employees of the enterprise are covered. Section 13(a)(2), on the other hand, exempts all employees engaged in a particular type of establishment.

INTRASTATE COMMERCE REQUIREMENTS

24 In determining whether the greater part of the selling or servicing of a given enterprise is in intrastate commerce (i.e., more than 50 percent of the servicing or selling), two factors should be chiefly considered: (1) The number of sales made within the State in which the establishment is located as compared with the total number of sales of the establishment; (2) The gross income derived from sales made or services performed within the State as compared with the total gross income of the establishment. If an establishment falls properly within the classification of "service or retail establishment" it is immaterial whether such establishment received all its merchandise from, or did all its financing in, a State other than that in which it is located. Only the flow of goods or services in intrastate commerce resulting from the selling or servicing of the particular establishment has any bearing on the availability of this exemption. Selling or servicing is in intrastate commerce if no element of the particular transaction takes place outside the State in which the establishment is located.

25 Whether the greater part of the selling or servicing of a given establishment is in intrastate commerce is in the nature of a descriptive attribute of the particular establishment. The determination of whether or not such establishment possesses the required attribute must be made on the basis of the selling or servicing of the establishment over a reasonable period of time. In some cases a three-year survey will reflect accurately the nature of the business of the establishment. In other cases such a period may be too long or too short. No fixed standard of time can be used to determine what is reasonable in every case.
