

is not susceptible of precise definition. While it is clear that in every franchise a business surrenders some rights, it is equally clear that every franchise does not necessarily deprive an enterprise of its character as an independently owned and operated business. This matter was the subject of legislative consideration in connection with other provisions of the 1961 amendments to the Act. The Senate Report on the amendments, in discussing the effects of franchises and similar arrangements on the scope of the "enterprise" under section 3(r) of the Act, stated as follows:

There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"

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In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the "franchised" establishment the essential prerogative of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, rights or concession. (S. Rep. 145, 87th Cong., first session, p. 42.)

Thus there may be a number of different types of arrangements established in such cases and the determination as to whether the arrangements have the effect of depriving the enterprise of its independent ownership or control will necessarily depend on all the facts. The fact that the distributor hires and controls the employees engaged in distribution of the product does not establish the requisite independence of the distributor; it is only one factor to be considered (*Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6).) Ultimately the determination of the precise scope of such arrangements and their effect upon the independent ownership and control of the enterprise under section 7(b)(3), as well as on the question whether such arrangements

result in creating a larger enterprise, rests with the courts.

§ 794.118 Effect of unrelated activities.

The term "independently owned and controlled" has reference to independence of ownership and control by others. Accordingly, the fact that the petroleum jobber may himself engage in other businesses which are not related to the enterprise engaged in the wholesale or bulk distribution of petroleum products, will not affect the question whether the petroleum enterprise is independently owned or controlled. For example, the fact that the wholesale or bulk petroleum distributor also owns or controls a wholly separate tourist lodge enterprise or job printing business will not affect the status of his enterprise engaged in the wholesale or bulk distribution of petroleum products as an "independently controlled" enterprise.

ANNUAL GROSS VOLUME OF SALES

§ 794.119 Dependence of exemption on sales volume of the enterprise.

It is a requirement of the section 7(b)(3) exemption that the annual gross volume of sales of the enterprise must be less than \$1 million exclusive of excise taxes. This dollar volume test is separate and distinct from the \$250,000 annual gross volume (of sales made or business done) test in section 3(s)(1) of the Act. This latter test is for the purpose of determining coverage as an enterprise engaged in commerce or in the production of goods for commerce; whereas the \$1 million test is for limiting the 7(b)(3) exemption to enterprises with annual sales of less than that amount.

§ 794.120 Meaning of "annual gross volume of sales."

The annual gross volume of sales of an enterprise consists of its gross receipts from all types of sales during a 12-month period (§ 794.122). The gross volume derived from all sales transactions is included, and will embrace among other things receipts from service, credit, or similar charges. However, credits for goods returned or exchanged (as distinguished from "trade-ins"), rebates, discounts, and the like