

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 prior orders from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's order; or (c) is made to a customer for use in interstate commerce or in production of goods for such commerce.

COMPUTING ANNUAL DOLLAR VOLUME  
AND COMBINATION OF EXEMPTIONS

**§ 779.342 Methods of computing annual volume of sales.**

The tests as to whether an establishment qualifies for exemption under section 13(a)(2) of the Act are specified in terms of the "annual dollar volume of sales" of goods or of services (or both) and percentages thereof. The "annual dollar volume of sales" of an establishment consists of the gross receipts from all sales of the establishment during a 12-month period. The methods of computing it for purposes of determining whether the establishment qualifies under the tests of the exemption are the same as the methods of calculating whether the annual gross volume of sales or business of an enterprise or an establishment meets the statutory dollar tests for coverage. These are discussed in §§ 779.265 to 779.269. However, for purposes of the exemption tests the specified percentages are based on annual dollar volume before deduction of those taxes which are excluded in determining whether the \$250,000 test is met. The exemption tests are in terms of the annual dollar

volume of the establishment. This will include dollar volume from transactions with other establishments in the same enterprise, even though such transactions within an enterprise may not be part of the annual gross volume of the enterprise's sales made or business done (see § 779.259).

**§ 779.343 Combinations of exemptions.**

(a) An employee may be engaged in a particular workweek in two or more types of activities for each of which a specific exemption is provided by the Act. The combined work of the employee during such a workweek may not satisfy the requirements of either exemption. It is not the intent of the Act, however, that an exemption based on the performance of one exempt activity should be defeated by the performance of another activity which has been made the basis of an equivalent exemption under another provision of the Act. Thus, where an employee during a particular workweek is exclusively engaged in performing two or more activities to which different exemptions are applicable, each of which activities considered separately would be an exempt activity under the applicable exemption if it were the sole activity of the employee for the whole workweek in question, as a matter of enforcement policy the employee will be considered exempt during such workweek. If the scope of such exemptions is not the same, the exemption applicable to the employee will be equivalent to that provided by whichever exemption provision is more limited in scope.

(b) In the case of an establishment which sells both goods and services at retail and which qualifies as an exempt establishment under section 13(a)(2), but cannot, as a whole, meet the tests of section 13(a)(4) because it sells services as well as goods, a combination of section 13(a)(2) and 13(a)(4) exemptions may nevertheless be available for employees of the establishment who make or process, on the premises, goods which it sells. Such employees employed by an establishment which, as a whole, meets the tests set forth in section 13(a)(2), will be considered exempt under this combination exemption if the establishment, on the basis of all

**§ 779.345**

**29 CFR Ch. V (7-1-06 Edition)**

its activities other than sales of services, would meet the tests of section 13(a)(4).

(c) Where two or more exemptions are applicable to an employee's work or employment during a workweek and where he may be exempt under a combination of exemptions stated above, the availability of a combination exemption will depend on whether the employee meets all the requirements of each exemption which it is sought to combine.

ENGAGING IN MANUFACTURING AND PROCESSING ACTIVITIES; SECTION 13(a)(4)

**§ 779.345 Exemption provided in section 13(a)(4).**

The section 13(a)(4) exemption (see § 779.301) exempts any employee employed by a retail establishment which meets the requirements for exemption under section 13(a)(2), even though the establishment makes or processes on its own premises the goods that it sells, provided, that more than 85 percent of such establishment's annual dollar volume of sales of the goods so made or processed is made within the State in which the establishment is located, and other prescribed tests are met.

**§ 779.346 Requirements for exemption summarized.**

An establishment to qualify for exemption under section 13(a)(4) must be an exempt retail establishment under section 13(a)(2); that is, 75 percent of its annual dollar volume of sales of goods must not be for resale, 75 percent of its annual dollar volume of sales of goods must be recognized as retail in its industry, over 50 percent of its annual dollar volume of sales of goods must be made within the State in which the establishment is located, and its annual dollar volume of sales must be under \$250,000. In addition, the establishment must meet the following three tests:

(a) The establishment must be recognized as a retail establishment in the particular industry.

(b) The goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods.

(c) More than 85 percent of the establishment's annual dollar volume of sales of the goods which it makes or processes must be made within the State in which the establishment is located. (See Act, section 13(a)(2); H. Rept. No. 1453, 81st Cong. first session, p. 27; *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388.)

**§ 779.347 Exemption limited to "recognized retail establishment"; factories not exempt.**

The section 13(a)(4) exemption requires the establishment to be recognized as a retail establishment in the particular industry. This test limits the exemption to retail establishments only, and excludes factories as such and establishments to which the retail concept does not apply. In other words this test requires that the establishment as a whole be recognized as a retail establishment although it makes or processes at the establishment the goods it sells. Typical of the establishments which may be recognized as retail establishments under the exemption are custom tailor shops, candy shops, ice cream parlors, bakeries, drug stores, optometrist establishments, retail ice plants and other local retail establishments which make or process the goods they sell and meet the other tests for exemption. Clearly factories as such are not "recognized retail establishments" and would not be eligible for this exemption. (See 95 Cong. Rec. pp. 11001, 11200, 11216, and 14942.)

**§ 779.348 Goods must be made at the establishment which sells them.**

(a) Further to make certain that the exemption applies to retail establishments only and not to factories, an additional requirement of the exemption is that the goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods. The exemption does not apply to an establishment which makes or processes goods for sale to customers who will go to other places to buy them. Thus an establishment that makes or processes any goods which the employer will sell from another establishment, is not exempt. If the establishment making the goods does not sell such goods but