PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

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INTRODUCTORY

REQUIREMENTS FOR EXEMPTION

AUTHORITY: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219.

SOURCE: 37 FR 12084, June 17, 1972, unless otherwise noted.

Subpart A—Introductory

§ 780.0 Purpose of interpretative bulletins in this part.

It is the purpose of the interpretative bulletins in this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of the provisions of the Fair Labor Standards Act of 1938, as amended, which exempt certain employees from the minimum

wage or overtime pay requirements, or both, when employed in agriculture or in certain related activities or in certain operations with respect to agricultural or horticultural commodities.

§ 780.1 General scope of the Act.

The Fair Labor Standards Act is a Federal statute of general application which establishes minimum wage, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. These requirements are applicable, except where exemptions are provided, to employees in those workweeks when they are engaged in interstate or foreign commerce or in the production of goods for such commerce or are employed in enterprises so engaged within the meaning of definitions set forth in the Act. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act, and with specified recordkeeping requirements contained in part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 780.2 Exemptions from Act's requirements.

The Act provides a number of specific exemptions from the general requirements described in § 780.1. Some are exemptions from the overtime provisions only. Others are from the child labor provisions only. Several are exemptions from both the minimum wage and the overtime requirements of the Act. Finally, there are some exemptions from all three—minimum wage, overtime pay, and child labor requirements. An employer who claims an exemption under the Act has the burden of showing that it applies (*Walling* v. *General Industries Co.*, 330 U.S. 545; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290). Conditions specified in the language of the Act are ''explicit prerequisites to exemption'' (*Arnold* v. *Kanowsky*, 361 U.S. 388). ''The details with which the exemptions in this Act have been made preclude their enlargement by implication'' and ''no matter how broad the exemption, it is meant to apply only to'' the specified activities (*Addison* v. *Holly Hill*, 322 U.S. 607; *Maneja* v. *Waialua*, 349 U.S. 254). Exemptions provided in the Act ''are to be narrowly construed against the employer seeking to assert them'' and their application limited to those who come ''plainly and unmistakably within their terms and spirit'' (*Phillips* v. *Walling*, 334 U.S. 490; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Arnold* v. *Kanowsky*, 361 U.S. 388).

§ 780.3 Exemptions discussed in this part.

(a) The specific exemptions which the Act provides for employment in agriculture and in certain operations more or less closely connected with the agricultural industry are discussed in this part 780. These exemptions differ substantially in their terms, scope, and methods of application. Each of them is therefore separately considered in a subpart of this part which, together with this subpart A, constitutes the official interpretative bulletin of the Department of Labor with respect to that exemption. Exemptions from minimum wages and overtime pay and the subparts in which they are considered include the section 13(a)(6) exemptions for employees on small farms, family members, local hand harvest laborers, migrant hand harvest workers under 16, and range production employees discussed in subpart D of this part, and the section 13(a)(14) exemption for agricultural employees processing shade-grown tobacco discussed in subpart F of this part.

(b) Exemptions from the overtime pay provisions and the subparts in which these exemptions are discussed include the section 13(b)(12) exemption (agriculture and irrigation) discussed in subpart E of this part, the section 13(b)(13) exemption (agriculture and livestock auction operations) discussed in subpart G of this part, the section 13(b)(14) exemption (country elevators) discussed in subpart H of this part, the section 13(b)(15) exemption (cotton ginning and sugar processing) discussed in subpart I of this part, and the section 13(b)(16) exemption (fruit and vegetable

§ 780.4 Matters not discussed in this part.

The application of provisions of the Fair Labor Standards Act other than the exemptions referred to in § 780.3 is not considered in this part 780. Interpretative bulletins published elsewhere in the Code of Federal Regulations deal with such subjects as the general coverage of the Act (part 776 of this chapter) and of the child labor provisions (subpart G of part 1500 of this title which includes a discussion of the exemption for children employed in agriculture outside of school hours), partial overtime exemptions provided for industries of a seasonal nature under sections 7(c) and 7(d) (part 526 of this chapter) and for industries with marked seasonal peaks of operations under section 7(d) (part 526 of this chapter), methods of payment of wages (part 531 of this chapter), computation and payment of overtime compensation (part 778 of this chapter), and hours worked (part 785 of this chapter). Regulations on recordkeeping are contained in part 516 of this chapter and regulations defining exempt administrative, executive, and professional employees, and outside salesmen are contained in part 541 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

§ 780.5 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

§ 780.6 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (*Mitchell* v. *Zachry*, 362 U.S. 310; *Kirschbaum* v. *Walling*, 316 U.S. 517). Court decisions supporting interpretations contained in this bulletin are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift*, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950; 15 FR 3290; Secretary's Order 13–71, May 4, 1971, FR; Secretary's Order 15–71, May 4, 1971, FR). Interpretative rules under the Act as amended in 1966 are also authorized by section 602 of the Fair Labor Standards Amendments of 1966 (80 Stat. 830), which provides: ''On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.'' As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this bulletin where it appears that they will contribute to a better understanding of the interpretations.

§ 780.7 Reliance on interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. In addition, the Supreme Court has recognized that such interpretations of this Act ''provide a

practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it'' and ''constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'' Further, as stated by the Court: ''Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.'' (*Skidmore* v. *Swift*, 323 U.S. 134). Some of the interpretations in this part are interpretations of exemption provisions as they appeared in the original Act before amendment in 1949, 1961, and 1966, which have remained unchanged because they are consistent with the amendments. These interpretations may be said to have congressional sanction because ''When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended. 63 Stat. 920.'' (*Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; accord, *Maneja* v. *Waialua*, 349 U.S. 254.)

§ 780.8 Interpretations made, continued, and superseded by this part.

On and after publication of this part 780 in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as this part 780. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendments of 1966 are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met in the consideration of the exemptions discussed. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this bulletin may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or to any Regional Office of the Division.

§ 780.9 Related exemptions are interpreted together.

The interpretations contained in the several subparts of this part 780 consider separately a number of exemptions which affect employees who perform activities in or connected with agriculture and its products. These exemptions deal with related subject matter and varying degrees of relationships between them were the subject of consideration in Congress before their enactment. Together they constitute an expression in some detail of existing Federal policy on the lines to be drawn in the industries connected with agriculture and agricultural products between those employees to whom the pay provisions of the Act are to be applied and those whose exclusion in whole or in part from the Act's requirements has been deemed justified. The courts have indicated that these exemptions, because of their relationship to one another, should be construed together insofar as possible so that they form a consistent whole. Consideration of the language and history of a related exemption or exemptions is helpful in ascertaining the intended scope and application of an exemption whose effect might otherwise not be clear (*Addison* v. *Holly Hill*, 322 U.S. 607; *Maneja* v. *Waialua*, 349 U.S. 254; *Bowie* v. *Gonzales* (C.A. 1), 117 F. 2d 11). In the interpretations of the several exemptions discussed in the various subparts of this part 780, effect has been given to these

principles and each exemption has been considered in its relation to others in the group as well as to the combined effect of the group as a whole.

§ 780.10 Workweek standard in applying exemptions.

The workweek is the unit of time to be taken as the standard in determining the applicability of an exemption. An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week. If in any workweek an employee does only exempt work, he is exempt from the wage and hour provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in 1 workweek and not in the next. But the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is upon the employer.

§ 780.11 Exempt and nonexempt work during the same workweek.

Where an employee in the same workweek performs work which is exempt under one section of the Act and also engages in work to which the Act applies but is not exempt under some other section of the Act, he is not exempt that week, and the wage and hour requirements of the Act are applicable (see *Mitchell* v. *Hunt*, 263 F. 2d 913; *Mitchell* v. *Maxfield*, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 69, 781; *Jordan* v. *Stark Bros. Nurseries*, 45 F. Supp. 769; *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n*, 80 F. Supp. 953, affirmed 181 F. 2d 697; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880–883). On the other hand, an employee who performs exempt activities during a workweek will not lose the exemption by virtue of the fact that he performs other activities outside the scope of the exemption if the other activities are not covered by the Act.

§ 780.12 Work exempt under another section of the Act.

The combination (tacking) of exempt work under one exemption with exempt work under another exemption is permitted. For instance, the overtime pay requirements are not considered applicable to an employee who does work within section 13(b)(12) for only part of a workweek if all of the covered work done by him during the remainder of the workweek is within one or more equivalent exemptions under other provisions of the Act. If the scope of such exemptions is not the same, however, the exemption applicable to the employee is equivalent to that provided by whichever exemption provision is more limited in scope. For instance, an employee who devotes part of a workweek to work within section 13(b)(12) and the remainder to work exempt under section 7(c) must receive the minimum wage and must be paid time and one-half for his overtime work during that week for hours over 10 a day or 50 a week, whichever provides the greater compensation. Each activity is tested separately under the applicable exemption as though it were the sole activity of the employee for the whole workweek in question. The availability of a combination exemption depends on whether the employee meets all the requirements of each exemption which is sought to combine.

Subpart B—General Scope of Agriculture

INTRODUCTORY

§ 780.100 Scope and significance of interpretative bulletin.

Subpart A of this part 780, this subpart B and subparts C, D, and E of this part together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of sections 3(f), 13(a)(6), and 13(b)(12) of the Fair Labor Standards Act of 1938, as amended. Section 3(f) defines ''agriculture'' as the term is used in the Act. Section 13(a)(6) provides exemption from the minimum wage and overtime pay provisions of the Act for certain employees employed in ''agriculture,'' as so defined. Section 13(b)(12) provides an overtime exemption for any employee employed in agriculture. As appears more fully in subpart A of this part 780, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon

which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

§ 780.101 Matters discussed in this subpart.

Section 3(f) defines ''agriculture'' as this term is used in the Act. Those principles and rules which govern the interpretation of the meaning and application of the Act's definition of ''agriculture'' in section 3(f) and of the terms used in it are set forth in this subpart B. Included is a discussion of the application of the definition in section 3(f) to the employees of farmers' cooperative associations. In addition, the official interpretations of section 3(f) of the Act and the terms which appear in it are to be taken into consideration in determining the meaning intended by the use of like terms in particular related exemptions which are provided by the Act.

§ 780.102 Pay requirements for agricultural employees.

Section 6(a)(5) of the Act provides that any employee employed in agriculture must be paid at least $1.30 an hour beginning February 1, 1969. However, there are certain exemptions provided in the Act for agricultural workers, as previously mentioned. (See §§ 780.3 and 780.4.)

§ 780.103 "Agriculture" as defined by the Act.

Section 3(f) of the Act defines ''agriculture'' as follows:

> ''Agriculture'' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

§ 780.104 How modern specialization affects the scope of agriculture.

The effect of modern specialization on agriculture has been discussed by the U.S. Supreme Court as follows:

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill. In this way functions which are necessary to the total economic process of supplying an agricultural produce become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a powerplant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755 cf. *Maneja* v. *Waialua*, 349 U.S. 254).

§ 780.105 "Primary" and "secondary" agriculture under section 3(f).

(a) Section 3(f) of the Act contains a very comprehensive definition of the term ''agriculture.'' The definition has two distinct branches (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755). One

has relation to the primary meaning of agriculture; the other gives to the term a somewhat broader secondary meaning for purposes of the Act (*NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714).

(b) First, there is the primary meaning. This includes farming in all its branches. Listed as being included ''among other things'' in the primary meaning are certain specific farming operations such as cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry. If an employee is employed in any of these activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm. (*Farmers Reservoir Co.* v. *McComb*, supra; *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398.)

(c) Then there is the secondary meaning of the term. The second branch includes operations other than those which fall within the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with ''such'' farming operations (*Farmers Reservoir Co.* v. *McComb*, supra; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Maneja* v. *Waialua*, 349 U.S. 254).

(d) Employment not within the scope of either the primary or the secondary meaning of ''agriculture'' as defined in section 3(f) is not employment in agriculture. In other words, employees not employed in farming or by a farmer or on a farm are not employed in agriculture.

Exemption for ''Primary'' Agriculture Generally

§ 780.106 Employment in "primary" agriculture is farming regardless of why or where work is performed.

When an employee is engaged in direct farming operations included in the primary definition of ''agriculture,'' the purpose of the employer in performing the operations is immaterial. For example, where an employer owns a factory and a farm and operates the farm only for experimental purposes in connection with the factory, those employees who devote all their time during a particular workweek to the direct farming operations, such as the growing and harvesting of agricultural commodities, are considered as employed in agriculture. It is also immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field. Similarly, the mere fact that production takes place in a city or on industrial premises, such as in hatcheries, rather than in the country or on premises possessing the normal characteristics of a farm makes no difference (see *Jordan* v. *Stark Brothers Nurseries*, 45 F. Supp. 769; *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283; *Damutz* v. *Pinchbeck*, 158 F. 2d 882).

Farming in All Its Branches

§ 780.107 Scope of the statutory term.

The language ''farming in all its branches'' includes all activities, whether listed in the definition or not, which constitute farming or a branch thereof under the facts and circumstances.

§ 780.108 Listed activities.

Section 3(f), in defining the practices included as ''agriculture'' in its statutory secondary meaning, refers to the activities specifically listed in the earlier portion of the definition (the ''primary'' meaning) as ''farming'' operations. They may therefore be considered as illustrative of ''farming in all its branches'' as used in the definition.

§ 780.109 Determination of whether unlisted activities are "farming."

Unlike the specifically enumerated operations, the phrase ''farming in all its branches'' does not clearly indicate its scope. In determining whether an operation constitutes ''farming in all its branches,'' it may be necessary to consider various circumstances such as the nature and purpose of the operations of the employer, the character of the place where the employee performs his duties, the general types of activities there conducted, and the purpose and function of such activities with respect to the operations carried on by the employer. The determination

may involve a consideration of the principles contained in § 780.104. For example, fish farming activities fall within the scope of the meaning of ''farming in all its branches'' and employers engaged in such operations would be employed in agriculture. On the other hand, so-called ''bird dog'' operations of the citrus fruit industry consisting of the purchase of fruit unsuitable for packing and of the transportation and sale of the fruit to canning plants do not qualify as ''farming'' and, consequently, employees engaged in such operations are not employed in agriculture. (See *Chapman* v. *Durkin*, 214 F. 2d 360 cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363 cert. denied, 348 U.S. 897.) However, employees gathering the fruit at the groves are considered agricultural workers because they are engaged in harvesting operations. (For exempt transportation, see subpart J of this part.)

CULTIVATION AND TILLAGE OF THE SOIL

§ 780.110 Operations included in "cultivation and tillage of the soil."

''Cultivation and tillage of the soil'' includes all the operations necessary to prepare a suitable seedbed, eliminate weed growth, and improve the physical condition of the soil. Thus, grading or leveling land or removing rock or other matter to prepare the ground for a proper seedbed or building terraces on farmland to check soil erosion are included. The application of water, fertilizer, or limestone to farmland is also included. (See in this connection §§ 780.128 *et seq.* Also see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755.) Other operations such as the commercial production and distribution of fertilizer are not included within the scope of agriculture. (*McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755.)

DAIRYING

§ 780.111 "Dairying" as a farming operation.

''Dairying'' includes the work of caring for and milking cows or goats. It also includes putting the milk in containers, cooling it, and storing it where done on the farm. The handling of milk and cream at receiving stations is not included. Such operations as separating cream from milk, bottling milk and cream, or making butter and cheese may be considered as ''dairying'' under some circumstances, or they may be considered practices under the ''secondary'' meaning of the definition when performed by a farmer or on a farm, if they are not performed on milk produced by other farmers or produced on other farms. (See the discussions in §§ 780.128 *et seq.*)

AGRICULTURAL OR HORTICULTURAL COMMODITIES

§ 780.112 General meaning of "agriculture or horticultural commodities."

Section 3(f) of the Act defines as ''agriculture'' the ''production, cultivation, growing, and harvesting'' of ''agricultural or horticultural commodities,'' and employees employed in such operations are engaged in agriculture. In general, within the meaning of the Act, ''agricultural or horticultural commodities'' refers to commodities resulting from the application of agricultural or horticultural techniques. Insofar as the term refers to products of the soil, it means commodities that are planted and cultivated by man. Among such commodities are the following: Grains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products. Thus, employees engaged in growing wheat, corn, hay, onions, carrots, sugar cane, seed, or any other agricultural or horticultural commodity are engaged in ''agriculture.'' In addition to such products of the soil, however, the term includes domesticated animals and some of their products such as milk, wool, eggs, and honey. The term does not include commodities produced by industrial techniques, by exploitation of mineral wealth or other natural resources, or by uncultivated natural growth. For example, peat humus or peat moss is not an agricultural commodity. *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 f(2d) 209 (C.A.4).

§ 780.113 Seeds, spawn, etc.

Seeds and seedlings of agricultural and horticultural plants are considered

''agricultural or horticultural commodities.'' Thus, since mushrooms and beans are considered ''agricultural or horticultural commodities,'' the spawn of mushrooms and bean sprouts are also so considered and the production, cultivation, growing, and harvesting of mushroom spawn or bean sprouts is ''agriculture'' within the meaning of section 3(f).

§ 780.114 Wild commodities.

Employees engaged in the gathering or harvesting of wild commodities such as mosses, wild rice, burls and laurel plants, the trapping of wild animals, or the appropriation of minerals and other uncultivated products from the soil are not employed in ''the production, cultivation, growing, and harvesting of agricultural or horticultural commodities.'' However, the fact that plants or other commodities actually cultivated by men are of a species which ordinarily grows wild without being cultivated does not preclude them from being classed as ''agricultural or horticultural commodities.'' Transplanted branches which were cut from plants growing wild in the field or forest are included within the term. Cultivated blueberries are also included.

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not ''agricultural or horticultural commodities.'' Christmas trees, whether wild or planted, are also not so considered. It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.160 through 780.164 which discuss the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute ''agriculture.'' For a discussion of the exemption in section 13(a)(13) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

§ 780.116 Commodities included by reference to the Agricultural Marketing Act.

(a) Section 3(f) expressly provides that the term ''agricultural or horticultural commodities'' shall include the commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141–1141j). Section 15(g) of that Act provides: ''As used in this act, the term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producers of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum resin, as defined in the Naval Stores Act, approved March 3, 1923'' (7 U.S.C. 91–99). As defined in the Naval Stores Act, '' 'gum spirits of turpentine' means spirits of turpentine made from gum (oleoresin) from a living tree'' and '' 'gum rosin' means rosin remaining after the distillation of gum spirits of turpentine.'' The production of these commodities is therefore within the definition of ''agriculture.''

(b) Since the only oleoresin included within section 15(g) of the Agricultural Marketing Act is that derived from a living tree, the production of oleoresin from stumps or any sources other than living trees is not within section 3(f). If turpentine or rosin is produced in any manner other than the processing of crude gum from living trees, as by digging up pine stumps and grinding them or by distilling the turpentine with steam from the oleoresin within or extracted from the wood, the production of the turpentine or rosin is not included in section 3(f).

(c) Similarly, the production of gum turpentine or gum rosin is not included when these are produced by anyone other than the original producer of the crude gum from which they are derived. Thus, if a producer of turpentine or rosin from oleoresin from living trees makes such products not only from oleoresin produced by him but also from oleoresin delivered to him by others, he is not producing a product defined as an agricultural commodity and employees engaged in his production operations are not agricultural

employees. (For an explanation of the inclusion of the word ''production'' in section 3(f), see §780.117(b).) It is to be noted, however, that the production of gum turpentine and gum rosin from crude gum (oleoresin) derived from a living tree is included within section 3(f) when performed at a central still for and on account of the producer of the crude gum. But where central stills buy the crude gum they process and are the owners of the gum turpentine and gum rosin that are derived from such crude gum and which they market for their own account, the production of such gum turpentine and gum rosin is not within section 3(f).

''PRODUCTION, CULTIVATION, GROWING, AND HARVESTING'' OF COMMODITIES

§780.117 "Production, cultivation, growing."

(a) The words ''production, cultivation, growing'' describe actual raising operations which are normally intended or expected to produce specific agricultural or horticultural commodities. The raising of such commodities is included even though done for purely experimental purposes. The ''growing'' may take place in growing media other than soil as in the case of hydroponics. The words do not include operations undertaken or conducted for purposes not concerned with obtaining any specific agricultural or horticultural commodity. Thus operations which are merely preliminary, preparatory or incidental to the operations whereby such commodities are actually produced are not within the terms ''production, cultivation, growing''. For example, employees of a processor of vegetables who are engaged in buying vegetable plants and distributing them to farmers with whom their employer has acreage contracts are not engaged in the ''production, cultivation, growing'' of agricultural or horticultural commodities. The furnishing of mushroom spawn by a canner of mushrooms to growers who supply the canner with mushrooms grown from such spawn does not constitute the ''growing'' of mushrooms. Similarly, employees of the employer who is engaged in servicing insecticide sprayers in the farmer's orchard and employees engaged in such operations as the testing of soil or genetics research are not included within the terms. (However, see §§780.128, et seq., for possible exemption on other grounds.) The word ''production,'' used in conjunction with ''cultivation, growing, and harvesting,'' refers, in its natural and unstrained meaning, to what is derived and produced from the soil, such as any farm produce. Thus, ''production'' as used in section 3(f) does not refer to such operations as the grinding and processing of sugarcane, the milling of wheat into flour, or the making of cider from apples. These operations are clearly the processing of the agricultural commodities and not the production of them (*Bowie* v. *Gonzalez*, 117 F. 2d 11).

(b) The word ''production'' was added to the definition of ''agriculture'' in order to take care of a special situation—the production of turpentine and gum rosins by a process involving the tapping of living trees. (See S. Rep. No. 230, 71st Cong., second sess. (1930); H.R. Rep. No. 2738, 75th Cong., third sess. p. 29 (1938).) To insure the inclusion of this process within the definition, the word ''production'' was added to section 3(f) in conjunction with the words ''including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended'' (*Bowie* v. *Gonzalez*, 117 F. 2d 11). It is clear, therefore, that ''production'' is not used in section 3(f) in the artificial and special sense in which it is defined in section 3(j). It does not exempt an employee merely because he is engaged in a closely related process or occupation directly essential to the production of agricultural or horticultural commodities. To so construe the term would render unnecessary the remainder of what Congress clearly intended to be a very elaborate and comprehensive definition of ''agriculture.'' The legislative history of this part of the definition was considered by the U.S. Supreme Court in reaching these conclusions in *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755.

§780.118 "Harvesting."

(a) The term ''Harvesting'' as used in section 3(f) includes all operations customarily performed in connection with

the removal of the crops by the farmer from their growing position (*Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714). Examples include the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery. Employees engaged on a plantation in gathering sugarcane as soon as it has been cut, loading it, and transporting the cane to a concentration point on the farm are engaged in ''Harvesting'' (*Vives* v. *Serralles*, 145 F. 2d 552).

(b) The combining of grain is exempt either as harvesting or as a practice performed on a farm in conjunction with or as an incident to farming operations. (See in this connection *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398.) ''Harvesting'' does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession. For example, the processing of sugarcane into raw sugar (*Bowie* v. *Gonzalez*, 117 F. 2d 11, and see *Maneja* v. *Waialua*, 349 U.S. 254), or the vining of peas are not included. For a further discussion on vining employees, see § 780.139. While transportation to a concentration point on the farm may be included, ''harvesting'' never extends to transportation or other operations off the farm. Off-the-farm transportation can only be ''agriculture'' when performed by the farmer as an incident to his farming operations (*Chapman* v. *Durkin*, 214 F. 2d 360 cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363 cert. denied 348 U.S. 897). For further discussion of this point, see §§ 780.144 through 780.147; §§ 780.152 through 780.157.

Raising of Livestock, Bees, Fur-bearing Animals, or Poultry

§ 780.119 Employment in the specified operations generally.

Employees are employed in the raising of livestock, bees, fur-bearing animals or poultry only if their operations relate to animals of the type named and constitute the ''raising'' of such animals. If these two requirements are met, it makes no difference for what purpose the animals are raised or where the operations are performed. For example, the fact that cattle are raised to obtain serum or virus or that chicks are hatched in a commercial hatchery does not affect the status of the operations under section 3(f).

§ 780.120 Raising of "livestock."

The meaning of the term ''livestock'' as used in section 3(f) is confined to the ordinary use of the word and includes only domestic animals ordinarily raised or used on farms. That Congress did not use this term in its generic sense is supported by the specific enumeration of activities, such as the raising of fur-bearing animals, which would be included in the generic meaning of the word. The term includes the following animals, among others: Cattle (both dairy and beef cattle), sheep, swine, horses, mules, donkeys, and goats. It does not include such animals as albino and other rats, mice, guinea pigs, and hamsters, which are ordinarily used by laboratories for research purposes (*Mitchell* v. *Maxfield*, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 68, 781). Fish are not ''livestock'' (*Dunkly* v. *Erich*, 158 F. 2d 1), but employees employed in propagating or farming of fish may qualify for exemption under section 13(a)(6) or 13(b)(12) of the Act as stated in § 780.109 as well as under section 13(a)(5), as explained in part 784 of this chapter.

§ 780.121 What constitutes "raising" of livestock.

The term ''raising'' employed with reference to livestock in section 3(f) includes such operations as the breeding, fattening, feeding, and general care of livestock. Thus, employees exclusively engaged in feeding and fattening livestock in stock pens where the livestock remains for a substantial period of time are engaged in the ''raising'' of livestock. The fact that the livestock is purchased to be fattened and is not bred on the premises does not characterize the fattening as something other than the ''raising'' of livestock. The feeding and care of livestock does not necessarily or under all circumstances constitute the ''raising'' of such livestock, however. It is clear, for example, that animals are not being ''raised'' in

the pens of stockyards or the corrals of meat packing plants where they are confined for a period of a few days while en route to slaughter or pending their sale or shipment. Therefore, employees employed in these places in feeding and caring for the constantly changing group of animals cannot reasonably be regarded as ''raising'' livestock (*NLRB* v. *Tovrea Packing Co.*, 111 F. 2d 626, cert. denied 311 U.S. 668; *Walling* v. *Friend*, 156 F. 2d 429). Employees of a cattle raisers' association engaged in the publication of a magazine about cattle, the detection of cattle thefts, the location of stolen cattle, and apprehension of cattle thieves are not employed in raising livestock and are not engaged in agriculture.

§ 780.122 Activities relating to race horses.

Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture. For this purpose, a training track at a racetrack is not a farm. Where a farmer is engaged in both the raising and commercial racing of race horses, the activities performed off the farm by his employees as an incident to racing, such as the training and care of the horses, are not practices performed by the farmer in his capacity as a farmer or breeder as an incident to his raising operations. Employees engaged in the feeding, care, and training of horses which have been used in commercial racing and returned to a breeding or training farm for such care pending entry in subsequent races are employed in agriculture.

§ 780.123 Raising of bees.

The term ''raising of * * * bees'' refers to all of those activities customarily performed in connection with the handling and keeping of bees, including the treatment of disease and the raising of queens.

§ 780.124 Raising of fur-bearing animals.

(a) The term ''fur-bearing animals'' has reference to animals which bear fur of marketable value and includes, among other animals, rabbits, silver foxes, minks, squirrels, and muskrats. Animals whose fur lacks marketable value, such as albino and other rats, mice, guinea pigs, and hamsters, are not ''fur-bearing animals'' which within the meaning of section 3(f).

(b) The term ''raising'' of fur-bearing animals includes all those activities customarily performed in connection with breeding, feeding and caring for fur-bearing animals, including the treatment of disease. Such treatment of disease has reference only to disease of the animals being bred and does not refer to the use of such animals or their fur in experimenting with disease or treating diseases in others. The fact that muskrats or other fur-bearing animals are propagated in open water or marsh areas rather than in pens does not prevent the raising of such animals from constituting the ''raising of fur-bearing animals.'' Where wild fur-bearing animals propagate in their native habitat and are not raised as above described, the trapping or hunting of such animals and activities incidental thereto are not included within section 3(f).

§ 780.125 Raising of poultry in general.

(a) The term ''poultry'' includes domesticated fowl and game birds. Ducks and pigeons are included. Canaries and parakeets are not included.

(b) The ''raising'' of poultry includes the breeding, hatching, propagating, feeding, and general care of poultry. Slaughtering, which is the antithesis of ''raising,'' is not included. To constitute ''agriculture,'' slaughtering must come within the secondary meaning of the term ''agriculture.'' The temporary feeding and care of chickens and other poultry for a few days pending sale, shipment or slaughter is not the ''raising'' of poultry. However, feeding, fattening and caring for poultry over a substantial period may constitute the ''raising'' of poultry.

§ 780.126 Contract arrangements for raising poultry.

Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not ''raising of poultry'' and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in ''secondary'' agriculture (see §§ 780.137 *et seq.* and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553).

§ 780.127 Hatchery operations.

Hatchery operations incident to the breeding of poultry, whether performed in a rural or urban location, are the ''raising of poultry'' (*Miller Hatcheries* v. *Boyer*, 131 F. 2d 283). The application of section 3(f) to employees of hatcheries is further discussed in §§ 780.210 through 780.214.

PRACTICES EXEMPT UNDER ''SECONDARY'' MEANING OF AGRICULTURE GENERALLY

§ 780.128 General statement on "secondary" agriculture.

The discussion in §§ 780.106 through 780.127 relates to the direct farming operations which come within the ''primary'' meaning of the definition of ''agriculture.'' As defined in section 3(f) ''agriculture'' includes not only the farming activities described in the ''primary'' meaning but also includes, in its ''secondary'' meaning, ''any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market or to carriers for transportation to market.'' The legislative history makes it plain that this language was particularly included to make certain that independent contractors such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included within the definition of agricultural employees (see *Bowie* v. *Gonzalez*, 117 F. 2d 11; 81 Cong. Rec. 7876, 7888).

§ 780.129 Required relationship of practices to farming operations.

To come within this secondary meaning, a practice must be performed either by a farmer or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed. In addition, the practice must be performed ''as an incident to or in conjunction with'' the farming operations. No matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the ''secondary'' meaning of ''agriculture.'' Thus, employees employed by commission brokers in the typical activities conducted at their establishments, warehouse employees at the typical tobacco warehouses, shop employees of an employer engaged in the business of servicing machinery and equipment for farmers, plant employees of a company dealing in eggs or poultry produced by others, employees of an irrigation company engaged in the general distribution of water to farmers, and other employees similarly situated do not generally come within the secondary meaning of ''agriculture.'' The inclusion of industrial operations is not within the intent of the definition in section 3(f), nor are processes that are more akin to manufacturing than to agriculture (see *Bowie* v. *Gonzales*, 117 F. 2d 11; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398; *Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Budd*, 350 U.S. 473).

PRACTICES PERFORMED ''BY A FARMER''

§ 780.130 Performance "by a farmer" generally.

Among other things, a practice must be performed by a farmer or on a farm in order to come within the secondary portion of the definition of ''agriculture.'' No precise lines can be drawn which will serve to delimit the term ''farmer'' in all cases. Essentially, however, the term is an occupational title and the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a ''farmer'' is engaged in order to qualify for the title. If this test is met, it is immaterial for what purpose he engages in farming or whether farming is his sole occupation. Thus, an employer's status as a ''farmer'' is not altered by the fact that his only purpose is to obtain products useful to him in a nonfarming enterprise which he conducts. For example, an employer engaged in raising nursery stock is a ''farmer'' for purposes of section 3(f) even though his purpose is to supply goods for a separate establishment where he engages in the retail distribution of nursery products. The term ''farmer'' as used in section 3(f) is not confined to individual persons. Thus an association, a partnership, or a corporation which engages in actual farming operations may be a ''farmer'' (see *Mitchell* v. *Budd*, 350 U.S. 473). This is so even where it operates ''what might be called the agricultural analogue of the modern industrial assembly line'' (*Maneja* v. *Waialua*, 349 U.S. 254).

§ 780.131 Operations which constitute one a "farmer."

Generally, an employer must undertake farming operations of such scope and significance as to constitute a distinct activity, for the purpose of yielding a farm product, in order to be regarded as a ''farmer.'' It does not necessarily follow, however, that any employer is a ''farmer'' simply because he engages in some actual farming operations of the type specified in section 3(f). Thus, one who merely harvests a crop of agricultural commodities is not a ''farmer'' although his employees who actually do the harvesting are employed in ''agriculture'' in those weeks when exclusively so engaged. As a general rule, a farmer performs his farming operations on land owned, leased, or controlled by him and devoted to his own use. The mere fact, therefore, that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer so engaged as a ''farmer.'' Such an employer would stand, in packing or handling the product, in the same relationship to the produce as if it were from the fields or groves of an independent grower. One who engaged merely in practices which are incidental to farming is not a ''farmer.'' For example, a company which merely prepares for market, sells, and ships flowers and plants grown and cultivated on farms by affiliated corporations is not a ''farmer.'' The fact that one has suspended actual farming operations during a period in which he performs only practices incidental to his part or prospective farming operations does not, however, preclude him from qualifying as a ''farmer.'' One otherwise qualified as a farmer does not lose his status as such because he performs farming operations on land which he does not own or control, as in the case of a cattleman using public lands for grazing.

§ 780.132 Operations must be performed "by" a farmer.

''Farmer'' includes the employees of a farmer. It does not include an employer merely because he employs a farmer or appoints a farmer as his agent to do the actual work. Thus, the stripping of tobacco, i.e., removing leaves from the stalk, by the employees of an independent warehouse is not a practice performed ''by a farmer'' even though the warehouse acts as agent for the tobacco farmer or employs the farmer in the stripping operations. One who merely performs services or supplies materials for farmers in return for compensation in money or farm products is not a ''farmer.'' Thus, a person who provides credit and management services to farmers cannot qualify as a ''farmer'' on that account. Neither can a repairman who repairs and services farm machinery qualify as

a ''farmer'' on that basis. Where crops are grown under contract with a person who provides a market, contributes counsel and advice, make advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

§ 780.133 Farmers' cooperative as a "farmer."

(a) The phrase ''by a farmer'' covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative association, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed ''by a farmer'' but for farmers. Therefore, employees of a farmers' cooperative association are not generally engaged in any practices performed ''by a farmer'' within the meaning of section 3(f) (*Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Goldberg* v. *Crowley Ridge Ass'n.*, 295 F. 2d 7; *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, 181 F. 2d 697). The legislative history of the Act supports this interpretation. Statutes usually cite farmers' cooperative associations in express terms if it is intended that they be included. The omission of express language from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives.

(b) It is possible that some farmers' cooperative associations may themselves engage in actual farming operations to an extent and under circumstances sufficient to qualify as a ''farmer.'' In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed in ''agriculture.''

PRACTICES PERFORMED ''ON A FARM''

§ 780.134 Performance "on a farm" generally.

If a practice is not performed by a farmer, it must, among other things, be performed ''on a farm'' to come within the secondary meaning of ''agriculture'' in section 3(f). Any practice which cannot be performed on a farm, such as ''delivery to market,'' is necessarily excluded, therefore, when performed by someone other than a farmer (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Chapman* v. *Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897). Thus, employees of an alfalfa dehydrator engaged in hauling chopped or unchopped alfalfa away from the farms to the dehydrating plant are not employed in a practice performed ''on a farm.''

§ 780.135 Meaning of "farm."

A ''farm'' is a tract of land devoted to the actual farming activities included in the first part of section 3(f). Thus, the gathering of wild plants in the woods for transplantation in a nursery is not an operation performed ''on a farm.'' (For a further discussion, see § 780.207.) The total area of a tract operated as a unit for farming purposes is included in the ''farm,'' irrespective of the fact that some of this area may not be utilized for actual farming operations (see *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; In re Princeville Canning Co., 14 WH Cases 641 and 762). It is immaterial whether a farm is situated in the city or in the country. However, a place in a city where no primary farming operations are performed is not a farm even if operated by a farmer (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

§ 780.136 Employment in practices on a farm.

Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks

of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed ''on a farm.'' Whether such employees are engaged in ''agriculture'' depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141 through 780.147; that is, whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§ 780.104 through 780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed ''on a farm'' for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed ''on a farm'' so long as such work is done entirely on farms save for an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within section 3(f). For example, airport employees such as mechanics, loaders, and office workers employed by a crop dusting firm would not be agriculture employees (*Wirtz* v. *Boyls dba Boyls Dusting and Spraying Service* 230 F. Supp. 246, aff'd per curiam 352 F. 2d 63; *Tobin* v. *Wenatchee Air Service*, 10 WH Cases 680, 21 CCH Lab Cas. Paragraph 67,019 (E.D. Wash.)).

''SUCH FARMING OPERATION''—OF THE FARMER

§ 780.137 Practices must be performed in connection with farmer's own farming.

''Practices * * * performed by a farmer'' must be performed as an incident to or in conjunction with ''such farming operations'' in order to constitute ''agriculture'' within the secondary meaning of the term. Practices performed by a farmer in connection with his nonfarming operations do not satisfy this requirement (see *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Mitchell* v. *Budd*, 350 U.S. 473). Furthermore, practices performed by a farmer can meet the above requirement only in the event that they are performed in connection with the farming operations of the same farmer who performs the practices. Thus, the requirement is not met with respect to employees engaged in any practices performed by their employer in connection with farming operations that are not his own (see *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Mitchell* v. *Hunt*, 263 F. 2d 913; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Bowie* v. *Gonzalez*, 117 F. 2d 11). The processing by a farmer of commodities of other farmers, if incident to or in conjunction with farming operations, is incidental to or in conjunction with the farming operations of the other farmers and not incidental to or in conjunction with the farming operations of the farmer doing the processing (*Mitchell* v. *Huntsville Nurseries*, supra; *Farmers Reservoir Co.* v. *McComb*, supra; *Bowie* v. *Gonzalez*, supra).

§ 780.138 Application of the general principles.

Some examples will serve to illustrate the above principles. Employees of a fruit grower who dry or pack fruit not grown by their employer are not within section (f). This is also true of storage operations conducted by a farmer in connection with products grown by someone other than the farmer. Employees of a grower-operator of a

sugarcane mill who transport cane from fields to the mill are not within section 3(f), where such cane is grown by independent farmers on their land as well as by the mill operator (*Bowie* v. *Gonzalez*, 117 F. 2d 11). Employees of a tobacco grower who strip tobacco (i.e., remove the leaves from the stalk) are not agricultural employees when performing this operation on tobacco not grown by their employer. On the other hand, where a farmer rents some space in a warehouse or packinghouse located off the farm and the farmer's own employees there engage in handling or packing only his own products for market, such operations by the farmers are within section 3(f) if performed as an incident to or in conjunction with his farming operations. Such arrangements are distinguished from those where the employees are not actually employed by the farmer. The fact that a packing shed is conducted by a family partnership, packing products exclusively grown on lands owned and operated by individuals constituting the partnership, does not alter the status of the packing activity. Thus, if in a particular case an individual farmer is engaged in agriculture, a family partnership which performs the same operations would also be engaged in agriculture. (*Dofflemeyer* v. *NLRB*, 206 F. 2d 813.) However, an incorporated association of farmers that does not itself engage in farming operations is not engaged in agriculture though it processes at its packing shed produce grown exclusively by the farmer members of the association. (*Goldberg* v. *Crowley Ridge and Fruit Growers Association*, 295 F. 2d 7 (C.A. 8).)

§ 780.139 Pea vining.

Vining employees of a pea vinery located on a farm, who vine only the peas grown on that particular farm, are engaged in agriculture. If they also vine peas grown on other farms, such operations could not be within section 3(f) unless the farmer-employer owns or operates the other farms and vines his own peas exclusively. However, the work of vining station employees in weeks in which the stations vine only peas grown by a canner on farms owned or leased by him is considered part of the canning operations. As such, the cannery operations, including the vining operations, are within section 3(f) only if the canners can crops which he grows himself and if the canning operations are subordinate to the farming operations.

§ 780.140 Place of performing the practice as a factor.

So long as the farming operations to which a farmer's practice pertains are performed by him in his capacity as a farmer, the status of the practice is not necessarily altered by the fact that the farming operations take place on more than one farm or by the fact that some of the operations are performed off his farm (*NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714). Thus, where the practice is performed with respect to products of farming operations, the controlling consideration is whether the products were produced by the farming operations of the farmer who performs the practice rather than at what place or on whose land he produced them. Ordinarily, a practice performed by a farmer in connection with farming operations conducted on land which he owns or leases will be considered as performed in connection with the farming operations of such farmer in the absence of facts indicating that the farming operations are actually those of someone else. Conversely, a contrary conclusion will ordinarily be justified if such farmer is not the owner or a bona fide lessee of such land during the period when the farming operations take place. The question of whose farming operations are actually being conducted in cases where they are performed pursuant to an agreement or arrangement, not amounting to a bona fide lease, between the farmer who performs the practice and the landowner necessarily involves a careful scrutiny of the facts and circumstances surrounding the arrangement. Where commodities are grown on the farm of the actual grower under contract with another, practices performed by the latter on the commodities, off the farm where they were grown, relate to farming operations of the grower rather than to any farming operations of the contract purchaser. This is true even though the contract purports to lease

the land to the latter, give him the title to the crop at all times, and confer on him the right to supervise the growing operations, where the facts as a whole show that the contract purchaser provides a farm market, cash advances, and advice and counsel but does not really perform growing operations (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286).

''SUCH FARMING OPERATIONS''—ON THE FARM

§ 780.141 Practices must relate to farming operations on the particular farm.

''Practices * * * performed * * * on a farm'' must be performed as an incident to or in conjunction with ''such farming operations'' in order to constitute ''agriculture'' within the secondary meaning of the term. No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all of such commodities are the products of that farm. Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agriculture if the practice is performed upon any commodities that have been produced elsewhere than on such farm (see *Mitchell* v. *Hunt*, 263 F. 2d 913). The construction by an independent contractor of granary on a farm is not connected with ''such'' farming operations if the farmer for whom it is built intends to use the structure for storing grain produced on other farms. Nor is the requirement met with respect to employees engaged in any other practices performed on a farm, but not by a farmer, in connection with farming operations that are not conducted on that particular farm. The fact that such a practice pertains to farming operations generally or to those performed on a number of farms, rather than to those performed on the same farm only, is sufficient to take it outside the scope of the statutory language. Area soil surveys and genetics research activities, results of which are made available to a number of farmers, are typical of the practices to which this principle applies and which are not within section 3(f) under this provision.

§ 780.142 Practices on a farm not related to farming operations.

Practices performed on a farm in connection with nonfarming operations performed on or off such farm do not meet the requirement stated in § 780.141. For example, if a farmer operates a gravel pit on his farm, none of the practices performed in connection with the operation of such gravel pit would be within section 3(f). Whether or not some practices are performed in connection with farming operations conducted on the farm where they are performed must be determined with reference to the purpose of the farmer for whom the practice is performed. Thus, land clearing operations may or may not be connected with such farming operations depending on whether or not the farmer intends to devote the cleared land to farm use.

§ 780.143 Practices on a farm not performed for the farmer.

The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted. Thus, where such an employer other than the farmer performs certain work on a farm solely for himself in furtherance of his own enterprise, the practice cannot ordinarily be regarded as performed in connection with farming operations conducted on the farm. For example, it is clear that the work of employees of a utility company in trimming and cutting trees for power and communications lines is part of a nonfarming enterprise outside the scope of agriculture. When a packer of vegetables or dehydrator of alfalfa buys the standing crop from the farmer, harvests it with his own crew of employees, and transports the harvested crop to his off-the-farm packing or dehydrating plant, the transporting and plant employees, who are not engaged in ''primary'' agriculture as are the harvesting employees (see *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714), are clearly not agricultural employees. Such an employer cannot automatically become an agricultural employer by

merely transferring the plant operations to the farm so as to meet the ''on a farm'' requirement. His employees will continue outside the scope of agriculture if the packing or dehydrating is not in reality done for the farmer. The question of for whom the practices are performed is one of fact. In determining the question, however, the fact that prior to the performance of the packing or dehydrating operations, the farmer has relinquished title and divested himself of further responsibility with respect to the product, is highly significant.

PERFORMANCE OF THE PRACTICE ''AS AN INCIDENT TO OR IN CONJUNCTION WITH'' THE FARMING OPERATIONS

§ 780.144 "As an incident to or in conjunction with" the farming operations.

In order for practices other than actual farming operations to constitute ''agriculture'' within the meaning of section 3(f) of the Act, it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm, as explained in §§ 780.129 through 780.143. They must also be performed ''as an incident to or in conjunction with'' these farming operations. The line between practices that are and those that are not performed ''as an incident to or in conjunction with'' such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. Industrial operations (*Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398) and processes that are more akin to manufacturing than to agriculture (*Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Budd*, 350 U.S. 473) are not included. This is also true when on-the-farm practices are performed for a farmer. As to when practices may be regarded as performed for a farmer, see § 780.143.

§ 780.145 The relationship is determined by consideration of all relevant factors.

The character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances in the light of the pertinent language and intent of the Act. The result will not depend on any mechanical application of isolated factors or tests. Rather, the total situation will control (*Maneja* v. *Waialua*, 349 U.S. 254; *Mitchell* v. *Budd*, 350 U.S. 473). Due weight should be given to any available criteria which may indicate whether performance of such a practice may properly be considered an incident to farming within the intent of the Act. Thus, the general relationship, if any, of the practice to farming as evidenced by common understanding, competitive factors, and the prevalence of its performance by farmers (see § 780.146), and similar pertinent matters should be considered. Other factors to be considered in determining whether a practice may be properly regarded as incidental to or in conjunction with the farming operations of a particular farmer or farm include the size of the operations and respective sums invested in land, buildings and equipment for the regular farming operations and in plant and equipment for performance of the practice, the amount of the payroll for each type of work, the number of employees and the amount of time they spend in each of the activities, the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations, the amount of revenue derived from each activity, the degree of industrialization involved, and the degree of separation established between the activities. With respect to practices performed on farm products (see § 780.147) and in the consideration of any specific practices (see §§ 780.148–780.158 and 780.205–780.214), there may be special factors in addition to those above mentioned which may aid in the determination.

§ 780.146 Importance of relationship of the practice to farming generally.

The inclusion of incidental practices in the definition of agriculture was not intended to include typical factory workers or industrial operations, and the sponsors of the bill made it clear that the erection and operation on a farm by a farmer of a factory, even one using raw materials which he grows, ''would not make the manufacturing * * * a farming operation'' (see 81 Cong. Rec. 7658; *Maneja* v. *Waialua*, 349 U.S. 254). Accordingly, in determining whether a given practice is performed ''as an incident to or in conjunction with'' farming operations under the intended meaning of section 3(f), the nature of the practice and the circumstances under which it is performed must be considered in the light of the common understanding of what is agricultural and what is not, or the facts indicating whether performance of the practice is in competition with agricultural or with industrial operations, and of the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations (see *Bowie* v. *Gonzales*, 117 F. 2d 11; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Vives* v. *Seralles*, 145 F. 2d 552; *Mitchell* v. *Hunt*, 263 F. 2d 913; *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398; *Mitchell* v. *Budd*, 350 U.S. 473; *Maneja* v. *Waialua*, supra). Such an inquiry would appear to have a direct bearing on whether a practice is an ''established'' part of agriculture. The fact that farmers raising a commodity on which a given practice is performed do not ordinarily perform such a practice has been considered a significant indication that the practice is not ''agriculture'' within the secondary meaning of section 3(f) (*Mitchell* v. *Budd*, supra; *Maneja* v. *Waialua*, supra). The test to be applied is not the proportion of those performing the practice who produce the commodities on which it is performed but the proportion of those producing such commodities who perform the practice (*Maneja* v. *Waialua*, supra). In *Mitchell* v. *Budd*, supra, the U.S. Supreme Court found that the following two factors tipped the scales so as to take the employees of tobacco bulking plants outside the scope of agriculture: Tobacco farmers do not ordinarily perform the bulking operation; and, the bulking operation is a process which changes tobacco leaf in many ways and turns it into an industrial product.

§ 780.147 Practices performed on farm products—special factors considered.

In determining whether a practice performed on agricultural or horticultural commodities is incident to or in conjunction with the farming operations of a farmer or a farm, it is also necessary to consider the type of product resulting from the practice—as whether the raw or natural state of the commodity has been changed. Such a change may be a strong indication that the practice is not within the scope of agriculture (*Mitchell* v. *Budd*, 350 U.S. 473); the view was expressed in the legislative debates on the Act that it marks the dividing line between processing as an agricultural function and processing as a manufacturing operation (*Maneja* v. *Waialua*, 349 U.S. 254, citing 81 Cong. Rec. 7659–7660, 7877–7879). Consideration should also be given to the value added to the product as a result of the practice and whether a sales organization is maintained for the disposal of the product. Seasonality of the operations involved in the practice would not be very helpful as a test to distinguish between operations incident to agriculture and operations of commercial or industrial processors who handle a similar volume of the same seasonal crop. But the length of the period during which the practice is performed might cast some light on whether the operations are conducted as a part of agriculture or as a separate undertaking when considered together with the amount of investment, payroll, and other factors. In some cases, the fact that products resulting from the practice are sold under the producer's own label rather than under that of the purchaser may furnish an indication that the practice is conducted as a separate business activity rather than as a part of agriculture.

PRACTICES INCLUDED WHEN PERFORMED AS PROVIDED IN SECTION 3(f)

§ 780.148 "Any" practices meeting the requirements will qualify for exemption.

The language of section 3(f) of the Act, in defining the ''secondary'' meaning of ''agriculture,'' provides that any practices performed by a farmer or on a farm as an incident to or in conjunction with such (his or its) farming operations are within the definition. The practices which may be exempt as ''agriculture'' if so performed are stated to include forestry or lumbering operations, preparation for market, and delivery to storage or to market or to carriers for transportation to market. The specification of these practices is illustrative rather than limiting in nature. The broad language of the definition clearly includes all practices thus performed and not merely those named (see *Maneja* v. *Waialua*, 349 U.S. 254).

§ 780.149 Named practices as well as others must meet the requirements.

The specific practices named in section 3(f) must, like any others, be performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, for this condition applies to ''any'' practices brought within the secondary meaning of agriculture as defined in that section of the Act. Thus the preparation for market, by a farmer's employees on a farm of animals to be sold at a livestock auction is not within section 3(f) if animals from other farmers and other farms are also handled. The practice is not performed as an incident to or in conjunction with ''such'' farming operations, that is, the operations of the farmer by whom, or of the farm on which, the livestock is raised (*Mitchell* v. *Hunt*, 263 F. 2d 913).

PREPARATION FOR MARKET

§ 780.150 Scope and limits of "preparation for market."

''Preparation for market'' is also named as one of the practices which may be included in ''agriculture.'' The term includes the operations normally performed upon farm commodities to prepare them for the farmer's market. The farmer's market normally means the wholesaler, processor, or distributing agency to which the farmer delivers his products. ''Preparation for market'' clearly has reference to activities which precede ''delivery to market.'' It is not, however, synonymous with ''preparation for sale.'' The term must be treated differently with respect to various commodities. It is emphasized that ''preparation for market,'' like other practices, must be performed ''by a farmer or on a farm as an incident to or in conjunction with such farming operations'' in order to be within section 3(f).

§ 780.151 Particular operations on commodities.

Subject to the rules heretofore discussed, the following activities are, among others, activities that may be performed in the ''preparation for market'' of the indicated commodities and may come within section 3(f):

(a) *Grain, seed, and forage crops.* Weighing, binning, stacking, drying, cleaning, grading, shelling, sorting, packing, and storing.

(b) *Fruits and vegetables.* Assembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing. (See In the Matter of J. J. Crosetti, 29 LRRM 1353, 98 NLRB 268; In the Matter of Imperial Garden Growers, 91 NLRB 1034, 26 LRRM 1632; *Lenroot* v. *Hazelhurst Mercantitle Co.*, 59 F. Supp. 595; *North Whittier Heights Citrus Ass'n* v. *NLRB*, 109 F.2d 76; *Dofflemeyer* v. *NLRB*, 206 F.2d 813.)

(c) *Peanuts and nuts (pecans, walnuts, etc.).* Grading, cracking, shelling, cleaning, sorting, packing, and storing.

(d) *Eggs.* Handling, cooling, grading, candling, and packing.

(e) *Wool.* Grading and packing.

(f) *Dairy products.* Separating, cooling, packing, and storing.

(g) *Cotton.* Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

(h) *Nursery stock.* Handling, sorting, grading, trimming, bundling, storing, wrapping, and packing. (See *Jordan* v. *Stark Brothers Nurseries*, 45 F. Supp. 769; *Mitchell* v. *Huntsville Nurseries*, 267 F.2d 286.)

(i) *Tobacco.* Handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading.

(j) *Livestock.* Handling and loading.

(k) *Poultry.* Culling, grading, cooping, and loading.

(l) *Honey.* Assembling, extracting, heating, ripening, straining, cleaning, grading, weighing, blending, packaging, and storing.

(m) *Fur.* Removing the pelt, scraping, drying, putting on boards, and packing.

SPECIFIED DELIVERY OPERATIONS

§ 780.152 General scope of specified delivery operations.

Employment in ''secondary'' agriculture, under section 3(f), includes employment in ''delivery to storage or to market or to carriers for transportation to market'' when performed by a farmer as an incident to or in conjunction with his own farming operations. To the extent that such deliveries may be accomplished without leaving the farm where the commodities delivered are grown, the exemption extends also to employees of someone other than the farmer who raised them if they are performing such deliveries for the farmer. However, normally such deliveries require travel off the farm, and where this is the case, only employees of a farmer engaged in making them can come within section 3(f). Such employees would not be engaged in agriculture in any workweek when they delivered commodities of other farmers, however, because such deliveries would not be performed as an incident to or in conjunction with ''such'' farming operations, as explained previously. If the ''delivery'' trip is within section 3(f) the necessary return trip to the farm is also included.

§ 780.153 Delivery "to storage."

The term ''delivery to storage'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market. The fact that the commodities have been subjected to some other practice ''by a farmer or on a farm as an incident to or in conjunction with such farming operations'' does not preclude the inclusion of ''delivery to storage'' within section 3(f). The same is true with respect to ''delivery to market'' and ''delivery to carriers for transporation to market.''

§ 780.154 Delivery "to market."

The term ''delivery * * * to market'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to market. It ordinarily refers to the initial journey of the farmer's products from the farm to the market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler or processor to which the farmer delivers his products. Delivery to market ends with the delivery of the commodities at the receiving platform of such a farmer's market (*Mitchell* v. *Budd*, 350 U.S. 473). When the delivery involves travel off the farm (which would normally be the case) the delivery must be performed by the employees employed by the farmer in order to constitute an agricultural practice. Delivery by an independent contractor for the farmer or a group of farmers or by a ''bird-dog'' operator who has purchased the commodities on the farm from the farmer is not an agricultural practice (see *Chapman* v. *Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897). However, in the case of fruits or vegetables, the Act provides a special overtime pay exemption for intrastate transportation of the freshly harvested commodities from the farm to a place of first marketing or first processing, which may apply to employees engaged in such transportation regardless of whether they are employed by the farmer. See subpart J of this part 780, discussing the exemption provided by section 13(b)(16).

§ 780.155 Delivery "to carriers for transportation to market."

The term ''delivery * * * to carriers for transportation to market'' includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing

animals or their pelts, and poultry to any carrier (including carriers by truck, rail, water, etc.) for transportation by such carrier to market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler, or processor to which the farmer delivers his products. As in the case of ''delivery to market,'' when it involves travel off the farm (as would normally be the case) the delivery must be performed by the farmer's own employees in order to constitute an agricultural practice. Employees of the carrier who transport to market the commodities which are delivered to it are not within the scope of agriculture.

TRANSPORTATION OPERATIONS NOT MENTIONED IN SECTION 3(f)

§ 780.156 Transportation of farm products from the fields or farm.

Transportation of farm products from the fields where they are grown or from the farm to other places may be within the ''secondary'' meaning of agriculture, regardless of whether the transportation is included as ''delivery to storage or to market or to carriers for transportation to market'': *Provided only,* That it is performed by a farmer or on a farm as an incident to or in conjunction with the farming operations of that farmer or that farm. Of course, any transportation operations which are part of, and not subsequent to, the ''primary'' farming operations are also within section 3(f). These principles have been recognized by the courts in the following cases, among others: *Maneja* v. *Waialua*, 349 U.S. 254; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Bowie* v. *Gonzales*, 117 F. 2d 11; *Calaf* v. *Gonzales*, 127 F. 8d 934; *Vives* v. *Serralles*, 145 F. 2d 552; *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 398. If not performed by the farmer, transportation beyond the limits of the farm is not within section 3(f), even when performed by a purchaser of the unharvested commodities who has harvested the crop. The scope of section 3(f) includes the harvesting employees but does not extend to the employees transporting the commodities off the farm (*Chapman* v. *Durkin*, 214 F. 2d 360, cert. denied, 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, cert. denied, 348 U.S. 897).

§ 780.157 Other transportation incident to farming.

(a) Transportation by a farmer or on a farm as an incident to or in conjunction with the farming operations of the farmer or of that farm is within the scope of agriculture even though things other than farm commodities raised by the farmer or on the farm are being transported. As previously indicated, transportation of commodities raised by other farmers or on other farms would not be within section 3(f). The definition of agriculture clearly covers the transportation by the farmer, as an incident to or in conjunction with his farming activities, of farm implements, supplies, and fieldworkers to and from the fields, regardless of whether such transportation involves travel on or off the farm and regardless of the method used. The Supreme Court of the United States so held in *Maneja* v. *Waialua*, 349 U.S. 254. Transportation of fieldworkers to or from the farm by persons other than the farmer does not come within section 3(f). However, under section 13(b)(16) of the Act, discussed in subpart J of this part 780, an overtime pay exemption is provided for transportation, whether or not performed by the farmer, of fruit or vegetable harvest workers to and from the farm, within the same State where the farm is located. In the case of transportation to the farm of materials or supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment, etc., would be incidental to the farmer's actual farming operations. Thus, truckdrivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in ''agriculture.''

(b) With respect to the practice of transporting farm products from farms to a processing establishment by employees of a person who owns both the farms and the establishment, such practice may or may not be incident to or in conjunction with the employer's farming operations depending on all the pertinent facts. For example, the

transportation is clearly incidental to milling operations, rather than to farming, where the employees engaged in it are hired by the mill, carried on its payroll, do no agricultural work on the farms, and report for and end their daily duties at the mill where the transportation vehicles are kept (*Calaf* v. *Gonzales*, 127 F. 2d 934). On the other hand, a different result is reached where the facts show that the transportation workers are farm employees whose work is closely integrated with harvesting and other direct farming operations (*NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; and see *Vives* v. *Serralles*, 145 F. 2d 552). The method by which the transportation is accomplished is not material (*Maneja* v. *Waialua*, 349 U.S. 254).

OTHER UNLISTED PRACTICES WHICH MAY BE WITHIN SECTION 3(f)

§ 780.158 Examples of other practices within section 3(f) if requirements are met.

(a) As has been noted above, the term ''agriculture'' includes other practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations conducted by such farmer or on such farm in addition to the practices listed in section 3(f). The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work. Section 3(f) includes, for example, secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm. (*Damutz* v. *Pinchbeck*, 66 F. Supp. 667, aff'd. 158 F. 2d 882). Employees of a farmer who repair the mechanical implements used in farming, as a subordinate and necessary task incident to their employer's farming operations, are within section 3(f). It makes no difference that the work is done by a separate labor force in a repair shop maintained for the purpose, where the size of the farming operations is such as to justify it. Only employees engaged in the repair of equipment used in performing agricultural functions would be within section 3(f), however; employees repairing equipment used by the employer in industrial or other nonfarming activities would be outside the scope of agriculture. (*Maneja* v. *Waialua*, 349 U.S. 254.) The repair of equipment used by other farmers in their farming operations would not qualify as an agricultural practice incident to the farming operations of the farmer employing the repair workers.

(b) The following are other examples of practices which may qualify as ''agriculture'' under the secondary meaning in section 3(f), when done on a farm, whether done by a farmer or by a contractor for the farmer, so long as they do not relate to farming operations on any other farms: The operation of a cook camp for the sole purpose of feeding persons engaged exclusively in agriculture on that farm; artificial insemination of the farm animals; custom corn shelling and grinding of feed for the farmer; the packing of apples by portable packing machines which are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed; the culling, catching, cooping, and loading of poultry; the threshing of wheat; the shearing of sheep; the gathering and baling of straw.

(c) It must be emphasized with respect to all practices performed on products for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Mitchell* v. *Hunt*, 263 F. 2d 913; *NLRB* v. *Olaa Sugar Co.*, 242 F. 2d 714; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880; *Lenroot* v. *Hazelhurst Mercantile Co.*, 153 F. 2d 153; *Jordan* v. *Stark Bros. Nurseries*, 45 F. Supp. 769).

Subpart C—Agriculture As It Relates To Specific Situations

FORESTRY OR LUMBERING OPERATIONS

§ 780.200 Inclusion of forestry or lumbering operations in agriculture is limited.

Employment in forestry or lumbering operations is expressly included in agriculture if the operations are performed ''by a farmer or on a farm as an incident to or in conjunction with such farming operation.'' While ''agriculture'' is sometimes used in a broad sense as including the science and art of cultivating forests, the language quoted in the preceding sentence is a limitation on the forestry and lumbering operations which will be considered agricultural for purposes of section 3(f). It follows that employees of an employer engaged exclusively in forestry or lumbering operations are not considered agricultural employees.

§ 780.201 Meaning of "forestry or lumbering operations."

The term ''forestry or lumbering operations'' refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild or planted Christmas trees are included. (See the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the section 13(a)(13) exemption for forestry or logging operations in which not more than eight employees are employed.) ''Wood working'' as such is not included in ''forestry'' or ''lumbering'' operations. The manufacture of charcoal under modern methods is neither a ''forestry''. nor ''lumbering'' operation and cannot be regarded as ''agriculture.''

§ 780.202 Subordination to farming operations is necessary for exemption.

While section 3(f) speaks of practices performed ''in conjunction with'' as well as ''incident to'' farming operations, it would be an unreasonable construction of the Act to hold that all practices were to be regarded as agricultural if the person performing the practice did any farming, no matter how little, or resorted to tilling a small acreage for the purpose of qualifying for exemption (*Ridgeway* v. *Warren*, 60 F. Supp. 363 (M.D. Tenn.); in re Combs, 5 WH Cases 595, 10 Labor Cases 62,802 (M.D. Ga.)). To illustrate, where an employer owns several thousand acres of timberland on which he carries on lumbering operations and cultivates about 100 acres of farm land which are contiguous to such timberland, he would not be engaged in agriculture so far as his forestry or lumbering operations are concerned. In such case, the forestry or lumbering operations would clearly not be subordinate to the farming operations but rather the principal or a separate business of the ''farmer.''

§ 780.203 Performance of operations on a farm but not by the farmer.

Logging or sawmill operations on a farm undertaken on behalf of the farmer or on behalf of the buyer of the logs or the resulting lumber by a contract logger or sawmill owner are not within the scope of agriculture unless it can be shown that these logging or sawmill operations are clearly incidental to farming operations on the farm on which the logging or sawmill operations are being conducted. For example, the clearing of additional land for cultivation by the farmer or the preparation of timber for construction of his farm buildings would appear to constitute operations incidental to ''such farming operations.''

§ 780.204 Number of employees engaged in operations not material.

The fact that the employer employs fewer than a certain number of employees in forestry and lumbering operations does not provide a basis for their being considered as agricultural employees. This is to be distinguished from the exemption provided by section 13(a)(13) (discussed in part 788 of this chapter) which is limited to employers employing not more than eight employees in the forestry or logging operations described therein.

NURSERY AND LANDSCAPING OPERATIONS

§ 780.205 Nursery activities generally.

The employees of a nursery who are engaged in the following activities are employed in ''agriculture'':

(a) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees (but not Christmas trees), and shrubs, vines, and flowers;

(b) Handling such plants from propagating frames to the field;

(c) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

§ 780.206 Planting and lawn mowing.

(a) The planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities, or where it constitutes a practice performed by a farmer or on a farm as an incident to or in conjunction with farming operations (as where it is part of the subordinate marketing operations of the grower of such trees or bushes). Thus, employees of the nurseryman who raised such nursery stock are doing agricultural work when they plant the stock on private or public property, trim, spray, brace, and treat the planted stock, or perform other duties incidental to its care and preservation. Similarly, employees who plant fruit trees and berry stock not raised by their employer would be considered as engaged in agriculture if the planting is done on a farm as an incident to or in conjunction with the farming operation on that farm.

(b) On the other hand, the planting of trees and bushes on residential, business, or public property is not agriculture when it is done by employees of an employer who has not grown the trees and bushes, or who, if he has grown them, engages in the planting operations as an incident, not to his farming operations, but to landscaping operations which include principally the laying of sod and the construction of pools, walks, drives, and the like.

(c) The mowing of lawns, except where it can be considered incidental to farming operations, is not agricultural work.

§ 780.207 Operations with respect to wild plants.

Nurseries frequently obtain plants growing wild in the woods or fields which are to be further cultivated by the nursery before they are sold by it. Obtaining such plants is a practice which is incidental to farming operations. The activities are therefore within the scope of agriculture if performed by a farmer or on a farm. Thus, employees of the nursery are engaged in agriculture when performing these activities. On the other hand, employees of an independent contractor performing these activities off the farm would not be engaged in agriculture. The transplanting of such wild plants in the nursery is performed ''on a farm'' and is an agricultural activity whether performed by employees of an independent contractor or by employees of the nursery.

§ 780.208 Forest and Christmas tree activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. The planting, tending, and cutting of Christmas trees do not constitute farming operations. If such operations on forest products are within section 3(f), they must qualify under the second part of the definition dealing with incidental practices. (See § 780.201.)

§ 780.209 Packing, storage, warehousing, and sale of nursery products.

Employees of a grower of nursery stock who work in packing and storage sheds sorting the stock, grading and trimming it, racking it in bins, and packing it for shipment are employed in ''agriculture'' provided they handle only products grown by their employer and their activities constitute an established part of their employer's agricultural activities and are subordinate to his farming operations. Such employees are not employed in agriculture when they handle the products of other growers (*Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286; *Jordan* v. *Stark Bros. Nurseries & Orchards Co.*, 45 F. Supp. 769). Agricultural activities

would typically include employees engaged in the balling and storing of shrubs and trees grown in the nursery. Where a grower of nursery stock operates, as a separate enterprise, a processing establishment or an establishment for the wholesale of retail distribution of such commodities, the employees in such separate enterprise are not engaged in agriculture (see *Walling* v. *Rocklin*, 132 F. 2d 3; *Mitchell* v. *Huntsville Nurseries*, 267 F. 2d 286). Although the handling and the sale of nursery commodities by the grower at or near the place where they were grown may be incidental to his farming operations, the character of these operations changes when they are performed in an establishment set up as a marketing point to aid the distribution of those products.

HATCHERY OPERATIONS

§ 780.210 The typical hatchery operations constitute "agriculture."

As stated in § 780.127, the typical hatchery is engaged in ''agriculture,'' whether in a rural or city location. Where the hatchery is engaged solely in procuring eggs for hatching, performing the hatching operations, and selling the chicks, all the employees including office and maintenance workers are engaged in agriculture (see *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283).

§ 780.211 Contract production of hatching eggs.

It is common practice for hatcherymen to enter into arrangements with farmer poultry raisers for the production of hatching eggs which the hatchery agrees to buy. Ordinarily, the farmer furnishes the facilities, feed and labor and the hatchery furnishes the basic stock of poultry. The farmer undertakes a specialized program of care and improvement of the flock in cooperation with the hatchery. The hatchery may at times have a surplus of eggs, including those suitable for hatching and culled eggs which it sells. Activities such as grading and packing performed by the hatchery employees in connection with the disposal of these eggs, are an incident to the breeding of poultry by the hatchery and are within the scope of agriculture.

§ 780.212 Hatchery employees working on farms.

The work of hatchery employees in connection with the maintenance of the quality of the poultry flock on farms is also part of the ''raising'' operations. This includes testing for disese, culling, weighing, cooping, loading, and transporting the culled birds. The catching and loading of broilers on farms by hatchery employees for transportation to market are agricultural operations.

§ 780.213 Produce business.

In some instances, hatcheries also engage in the produce business as such and commingle with the culled eggs and chickens other eggs and chickens which they buy for resale. In such a case that work which relates to both the hatchery and produce types of activities would not be within the scope of agriculture.

§ 780.214 Feed sales and other activities.

In some situations, the hatchery also operates a feed store and furnishes feed to the growers. As in the case of the produce business operated by a hatchery, this is not an agricultural activity and employees engaged therein, such as truckdrivers hauling feed to growers, are not agricultural employees. Also office workers and other employees are not employed in agriculture when their duties relate to nonagricultural activities.

Subpart D—Employment in Agriculture That Is Exempted From the Minimum Wage and Overtime Pay Requirements Under Section 13(a)(6)

STATUTORY PROVISIONS

§ 780.300 Statutory exemptions in section 13(a)(6).

Section 13(a)(6) of the Act exempts from the minimum wage requirements of section 6 and from the overtime pay requirements of section 7:

Any employee employed in agriculture: (A) If such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more

than 500 man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than 13 weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age 16 are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock.

§ 780.301 Other pertinent statutory provisions.

(a) Man-day is defined by section 3(u) of the Act as follows:

''Man-day'' means any day during which an employee performs any agriculture labor for not less than 1 hour.

(b) Under section 3(e) of the Act the term employee does not include certain individuals in determining mandays of labor. Section 3(e) provides that:

''Employee'' includes any individual employed by an employer, except that such term shall not, for the purposes of section 3(u) include:

(1) Any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

(2) Any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, and (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than 13 weeks during the preceding calendar year.

(c) The legislative history of the 1966 amendments to the Fair Labor Standards Act indicates that the Congress in enacting minimum wage protection (section 6(a)(5)) for agriculture workers for the first time sought to provide a minimum wage floor for the farmworkers on large farms or agri-business enterprises. The section 13(a)(6)(A) exemption was intended to exempt those farmworkers on the smaller or familysize farms. In keeping with this intention, a labor requirement of 500 man-days was incorporated into the exemption, and certain workers were specifically excluded from the man-day count, as provided in section 3(e) (1) and (2).

§ 780.302 Basic conditions of section 13 (a)(6)(A).

Section 13(a)(6)(A) applies to an employee provided all the following conditions are met:

(a) He must be ''employed in agriculture''

(b) By an ''employer''

(c) Who did not use more than ''500 man-days'' of agriculture labor

(d) During any ''calendar quarter of the preceding calendar year.''

The following sections discuss the meaning and application of these requirements.

§ 780.303 Exemption applicable on employee basis.

Section 13(a)(6)(A) exempts ''any employee employed in agriculture * * * by an employer * * *.'' It is clear from this language that it is the activities of the employee rather than those of his employer which determine the application of the exemption. In other words, the exemption applies only to employees who are engaged in agricultural activities. Thus some employees of the employer may be exempt while others may not. In any case the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer. For a more detailed discussion of what constitutes employment in agriculture, see subpart B of this part.

§ 780.304 "Employed by an employer."

(a) The employer may be an individual, a partnership, or a corporation. It is not necessary that the employer

be a farmer as defined in § 780.131. It is sufficient that he ''uses'' agricultural labor.

(b) In applying this exemption, one of the main criteria is the number of man-days of agricultural labor used by the employer. Section 13(a)(6)(A) provides that the exemption shall not apply to an employee employed in agriculture ''if such employee is employed by an employer who did not * * * use more than 500 man-days of agricultural labor * * *.'' From this language of the statute, the man-days of all agricultural workers, unless specifically excluded, of an employer whether he be the owner of a single farm, the owner of an enterprise consisting of several farms, a tenant farmer, an independent contractor, etc., are to be counted for purposes of section 13(a)(6)(A) whether they are employed at one place or several widely scattered places. For example if an employer owns and operates two farms, it is the total number of man-days used on both farms and not that used on each individual farm that determines whether he meets the 500 man-day test. Likewise independent contractor who harvests crops on different farms during the harvesting season must total all the man-days of agricultural labor used on all such farms except those excludable under section 3(e) in determining whether he meets the 500 man-day test.

§ 780.305 500 man-day provision.

(a) Section 3(u) of the Act defines *man-day* to mean ''any day during which an employee performs agricultural labor for not less than 1 hour.'' 500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. However, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.

(b) All of the employer's employees who are engaged in ''agricultural labor'' except those specifically excluded by section 3(e) (see § 780.301) and those exempt under section 13(a)(14) (see subpart F of this part) must be counted in determining whether the 500 man-day test is met. This is true even though an employee may be exempt from the monetary provisions under another section of the Act. For example, a general manager of a farm may be an exempt executive employee under section 13(a)(1) or a sheepherder may meet the requirements of section 13(a)(6)(E). Regardless of those exemptions, their man-days of employment would be included in the man-day count of the employer.

(c) A farmer whose crops are harvested by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment for the harvest hands. (See § 780.331.) Each employer must include the contractor's employees in his man-day count in determining whether his own man-day test is met. Each employer will be considered responsible for compliance with the minimum wage and child labor requirements of the Act with respect to the employees who are jointly employed.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27520, Oct. 4, 1973]

§ 780.306 Calendar quarter of the preceding calendar year defined.

In applying section 13(a)(6)(A), it is necessary to consider each of the four calendar quarters (January 1–March 31; April 1–June 30; July 1–September 30; October 1–December 31) in the preceding calendar year (January 1–December 31). If in any calendar quarter of the preceding calendar year the employer used more than 500 man-days of agricultural labor, he must comply with the minimum wage requirements of section 6(a)(5) with respect to any employee not otherwise exempt in the current year. Compliance with the Act is required in the current year regardless of the number of man-days of agricultural labor used in the current year. On the other hand, if in the preceding calendar year the number of man-days used did not exceed 500 in any calendar quarter, there is no requirement to comply with respect to employment of agricultural labor in the current calendar year regardless of how many man-days are used in any calendar

quarter of the current calendar year. Such employees are exempt under the basic provisions of section 13(a)(6)(A).

§ 780.307 Exemption for employer's immediate family.

Section 13(a)(6)(B) of the Fair Labor Standards Amendments of 1966 provides a minimum wage and overtime exemption in the case of ''any employee engaged in agriculture * * * if such employee is the parent, spouse, child, or other member of the employer's immediate family.'' The requirements of this exemption, evident from the statutory language, are that the employee be employed in agriculture and that he be a close blood relative, spouse or member of the employer's immediate family. Reference is made to subpart B of this part as to what constitutes employment in agriculture. The section 13(a)(6)(B) exemption applies to such an individual even though he is employed by an employer who otherwise used more than 500 man-days of agricultural labor in a calendar quarter of the preceding calendar year, as discussed in § 780.305.

§ 780.308 Definition of immediate family.

The Act does not define the scope of ''immediate family.'' Whether an individual other than a parent, spouse or child will be considered as a member of the employer's immediate family, for purposes of sections 3(e)(1) and 13(a)(6)(b), does not depend on the fact that he is related by blood or marriage. Other than a parent, spouse or child, only the following persons will be considered to qualify as part of the employer's immediate family: Step-children, foster children, step-parents and foster parents. Other relatives, even when living permanently in the same household as the employer, will not be considered to be part of the ''immediate family.''

[38 FR 17726, July 3, 1973]

§ 780.309 Man-day exclusion.

Section 3(e)(1) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(B). See § 780.301. This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. See § 780.302 *et seq.*

§ 780.310 Exemption for local hand harvest laborers.

Section 13(a)(6)(C) was added to the Act by the Fair Labor Standards Amendments of 1966. The legislative history of the exemption indicates that it was intended to apply to the local worker who goes out on a temporary basis during the harvest season to harvest crops. The exemption was not intended to apply to a full-time farmworker, that is, one who earns a livelihood at farming. For instance, migrant laborers who travel from farm to farm were not intended to be within the scope of this exemption.

§ 780.311 Basic conditions of section 13(a)(6)(C).

(a) Section 13(a)(6)(C) of the Act applies to an employee who:

(1) Is employed in agriculture.

(2) Is employed as a hand harvest laborer.

(3) Is paid on a piece-rate basis.

(4) Is paid piece-rates in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment.

(5) Commutes daily from his permanent residence to the farm on which he is so employed.

(6) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(b) In order for the exemption to apply to an employee, all of the requirements must be met. Since a hand harvest laborer is normally an agricultural worker, while so engaged, such an employee would meet the basic requirements that he be employed in agriculture. Subpart B of this part contains a more detailed discussion of what constitutes employment in agriculture. The meaning and application of the remaining requirements are discussed in the following sections.

§ 780.312 "Hand harvest laborer" defined.

(a) The term hand harvest laborer for purposes of this exemption refers to farm workers engaged in harvesting by hand, or with hand tools, soil grown

crops such as cotton, tobacco, grains, fruits, and vegetables. The term would not include harvesting operations performed by an employee with an electrically powered mechanical device, such as a ''blueberry picking tool.'' ''Hand-harvesting'' refers only to soil-grown crops and does not include any operation involving animals, such as shearing or lambing of sheep and catching chickens. Hand-harvesting is defined as manually gathering or severing the crop from the soil, stems, or roots at its growing position in the fields. Included are integral related operations, closely related geographically and in point of time, which are performed before the transportation to concentration points on the farm.

For example:
(1) Employees who take tobacco leaves from the pickers and string them on poles by hand qualify as ''hand harvest laborers'' because the stringing operation is performed in the field almost simultaneously with the picking and before transportation to the concentration point on the farm (drying shed).
(2) The picking up of tomatoes by hand after hand pulling from the vines is ''hand-harvesting,'' as it is performed where the crop is severed and prior to its transportation to the packing shed.

(b) The definition is limited to harvesting, and the performance by the hand harvester of any nonharvesting operation in the same workweek would cause the loss of the section 13(a)(6)(C) exemption.

For example:
(1) Employees who wrap tomatoes in a packing shed would not qualify, as the wrapping is a nonharvesting operation. (*Schultz* v. *Durrence* (S.D. Ga.) 63 CCH. Lab. Cas. 32,387; 19 W.H. Cases 747.)
(2) Employees who hand pick small undesirable fruit prior to harvesting in order to insure a better crop would not qualify for the exemption. This is a preharvest culling operation performed as a part of the cultivation and growing operations not harvesting.
(3) Employees who chop cotton, since this is a nonharvesting operation.

§ 780.313 Piece rate basis.

The exemption provides that the employee must be paid on a piece-rate basis. To be exempt the employee must be compensated solely on piece rates during the workweek. The exemption does not apply in any workweek in which the employee is compensated on any other basis. For example, if an employee is compensated on an hourly rate for part of the week and on a piece rate for part of the week, the exemption would not be available. Also, if any pieceworker who is otherwise subject to the minimum wage provisions of the Act does not meet all the requirements set forth in this section he must be paid at least the minimum wage for each hour worked in a particular workweek, regardless of the fact he is paid on piece rate unless he is exempted by some other provision of the Act.

§ 780.314 Operations customarily * * * paid on a piece rate basis * * *.

A significant test of the exemption is that the hand harvest operation ''has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment.'' The legislative history is silent on who must customarily and generally recognize the hand harvest operation as having been paid on a piece rate basis. However, considering the context in which the term is used, such recognition must be on the part of agricultural employers and employees and other individuals in the region of employment who are familiar with farming operations and practices in the region and the method of compensation utilized in such operations and practices.

§ 780.315 Local hand harvest laborers.

(a) A requirement of the exemption is that an employee must commute each day from his permanent residence to the farm where he is employed. Thus, the exemption does not apply to a migrant worker who travels to different areas of the country during the harvesting seasons. This would be true even though the worker may remain in the area for a considerable period of time. On the other hand, if a migrant worker actually changes his place of residence and thereafter commutes daily from his permanent residence, the exemption applies from the date of the change of residence if the other tests are met.

(b) The fact that a worker may live on the farm where the operations are performed would not be a reason for

disqualification. For example, if the other tests for the exemption are met, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption. Such family members would be considered to be commuting daily from their permanent residence despite the fact that their residence may be located on the farm at which they are employed.

§ 780.316 Thirteen week provision.

(a) The exemption provides that an ''employee must have been employed in agriculture less than 13 weeks during the preceding calendar year.'' For purposes of determining whether a worker has been employed in agriculture less than 13 weeks during the preceding calendar year, a week is considered to be a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24-hour periods during which the employee worked at least 1 ''man-day.'' Section 3(u) of the Act defines a man-day as ''any day during which an employee performs any agricultural labor for not less than 1 hour.''

(b) In defining the term ''week'' in this manner for purposes of section 13(a)(6)(C) (as well as section 3(e)(2)) comports with the traditional definition of week used in administering all the other provisions of the law. On this basis, the phrase ''employed in agriculture less than 13 weeks'' means that an employee has spent less than 13 weeks in agricultural work, regardless of the number of hours he worked during each one of the 13 weekly units. This position recognizes and accommodates to situations where an employee works very long as well as very short hours during the week. This would accord with the legislative history of this exemption which clearly indicates that it was meant to apply only to temporary workers whose hours of work would undoubtedly vary in length, and would, thereby effectuate the legislative intent.

(c) In determining the 13-week period, not only that work for the current employer in the preceding calendar year is counted, but also that agricultural work for all employers in the previous year. It is the total of all weeks of agricultural employment by the employee for all employers in the preceding calendar year that determines whether he meets the 13-week test. In this respect a self-employed farmer who works as a hand harvest laborer during part of the year is considered to be ''employed'' in agriculture only during those weeks when he is an employee of other farmers. Thus, such weeks of employment are to be counted but any weeks when he works only for himself are not counted toward the 13 weeks.

(d) The 13-week test applies to each individual worker. It does not apply on a family basis. To carry the example in the preceding section further, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption even though the driver had been employed in agriculture as much as 13 weeks in the previous calendar year, so long as the family members themselves had not.

(e) If an employer claims this exemption, it is the employer's responsibility to obtain a statement from the employee showing the number of weeks he was employed in agriculture during the preceding calendar year. This requirement is contained in the recordkeeping regulations in § 516.33 (d) of this chapter.

§ 780.317 Man-day exclusion.

Section 3(e)(2) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(C). (See § 780.301.) This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. (See § 780.302 *et seq.*)

§ 780.318 Exemption for nonlocal minors.

(a) Section 13(a)(6)(D) of the 1966 Amendments to the Fair Labor Standards Act exempts from the minimum wage and overtime provisions ''any employee employed in agriculture * * * if such employee (other than an employee described in clause (C) of this subsection): (1) Is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as

having been, paid on a piece rate basis in the region of employment, (2) is employed on the same farm as his parent of persons standing in the place of his parent, and (3) is paid at the same piece rate as employees over age 16 are paid on the same farm.''

(b) It is clear from the legislative history of the amendments that the exemption was intended to apply, where the other specific tests are met, only to minors 16 years of age or under who are not ''local'' in the sense that they are away from their permanent home when employed in agriculture. Specifically the exemption was intended to apply in the case of the children of migrants who typically accompany their parents in harvesting and other agricultural work. (S. Rept. No. 1487, 89th Cong., second sess., to accompany H.R. 13712, pp. 9 and 10)

§ 780.319 Basic conditions of exemption.

(a) Section 13(a)(6)(D) applies to an employee engaged in agriculture who meets all of the following tests:

(1) Is not a local hand harvest laborer,

(2) Is 16 years of age or under,

(3) Is employed as a hand harvest laborer,

(4) Is paid on a piece rate basis,

(5) Is employed in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,

(6) Is employed on the same farm as his parent or person standing in the place of his parent, and

(7) Is paid at the same piece rate as employees over age 16 are paid on the same farms.

(b) Some of these requirements which are common to both sections 13(a)(6)(C) and 13(a)(6)(D) have already been discussed in connection with section 13(a)(6)(C) and need not be repeated. They are found in §§ 780.311 (employed in agriculture), 780.312 (hand harvest laborer), 780.313 (piece rate basis), and 780.314 (operations customarily * * * paid on a piece rate basis). The other requirements are discussed in the following sections.

§ 780.320 Nonlocal minors.

The exemption applies only to migrant or other than local hand harvest workers 16 years of age or under who do come within the scope of section 13(a)(6)(C) (application to all local hand harvest laborers who commute daily from their permanent residences). (See § 780.315.) A local youth under the prescribed age who commutes daily from his permanent residence to the farm to perform work is not exempt under section 13(a)(6)(D). The exemption may, however, be available for the specified minors who work for short periods of several days or weeks without returning daily to their homes on farms beyond commuting distances from their permanent homes.

§ 780.321 Minors 16 years of age or under.

Section 13(a)(6)(D) by its very terms is available only to employees 16 years of age or under. Accordingly, even though all the other tests of the exemption are met, the exemption is inapplicable in the case of an employee over 16 years of age and the employer must pay to such an employee the applicable statutory minimum wage unless his operations come within the reach of some other exemption, such as section 13(a)(6)(A). Furthermore, although section 13(a)(6)(D) provides a minimum wage and overtime exemption for minors 16 years of age or under, the employer must nevertheless comply with the child labor provisions of the Act prohibiting the employment of minors in agriculture except under certain conditions and circumstances. These provisons are discussed in part 1500, subpart G of this title.

§ 780.322 Is employed on the same farm as his parent or persons standing in the place of his parent.

(a) The words ''employed on the same farm'' are accorded their natural meaning with the usual caution, however, that as in the case of all other exemptions, the exemptive language is to be construed narrowly. (See § 780.2.)

(b) Individuals who are considered as ''his parent or persons standing in place of his parent'' include natural parents, or any other person where the relationship between that person and a

child is such that the person may be said to stand in place of a parent. For example, one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own, is generally said to stand to the child in place of a parent.

§ 780.323 Exemption for range production of livestock.

Section 13(a)(6)(E) which was added to the Act by the Fair Labor Standards Amendments of 1966 provides an exemption from the minimum wage and overtime requirements of the Act for any employee ''employed in agriculture'' if he is ''principally engaged in the range production of livestock.'' It is apparent from the language of section 13(a)(6)(E) that the application of this exemption depends on the type of work performed by the individual employee for whom exemption is sought and on where the work is done. A determination of whether an employee is exempt therefore requires an examination of that employee's duties and where they are performed. Some employees of the employer may be exempt while others may not.

§ 780.324 Requirements for the exemption to apply.

(a) All the following conditions must be met in order for the exemption to apply to an employee:

(1) He must be ''engaged in agriculture'';

(2) Be ''principally engaged'';

(3) On the ''range'', and

(4) In the ''production of livestock.''

(b) Since the raising of livestock is included in the definition of agriculture under section 3(f) of the Act (see §§ 780.119—780.121 of subpart B of this part), the range production of livestock would normally be deemed agriculture work, and, consequently, an employee, during this time he is engaged in such activities, would meet the basic requirement of the exemption that he be ''employed in agriculture.''

The following sections discuss the meaning and application of the other requirements.

§ 780.325 Principally engaged.

(a) To determine whether an employee is ''principally engaged'' in the range production of livestock, one must consider the nature of his duties and responsibilities. To qualify for this exemption the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose. A determination of whether an employee has range production of livestock as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the range production duties is a useful guide in determining whether this is the primary duty of the employee. In the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee's time.

(b) Under this principle, an employee who spends more than 50 percent of his time during the year on the range in the duties designated as range production duties would be exempt. This is true even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.

§ 780.326 On the range.

(a) For purposes of this exemption, ''range'' is defined generally as land that is not cultivated. It is land that produces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. ''Forage'' as used here means ''browse'' or herbaceous food that is available to livestock or game animals.

(b) The range may be on private or Federal or State land, and need not be open. Typically it is not only noncultivated land, but land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor. Typically, also, many acres of range land are required to graze one animal unit (five sheep or one cow) for 1 month. By its nature, range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres.SECTION≤

§ 780.327 Production of livestock.

For an employee to be engaged in the production of livestock, he must be actively taking care of the animals or standing by in readiness for that purpose. Thus, such activities as herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in the raising of livestock and in such immediately incidental duties as inspecting and repairing fences, wells, and windmills would be considered as the production of livestock. On the other hand, such work as terracing, reseeding, haying, and constructing dams, wells, and irrigation ditches would not be considered as the production of livestock within the meaning of the exemption.

§ 780.328 Meaning of livestock.

The term ''livestock'' includes cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm. This is further discussed in § 780.120. Turkeys or domesticated fowl are considered poultry and not livestock within the meaning of this exemption.

§ 780.329 Exempt work.

(a) The standard that must be used to determine whether the individual employee is exempt is that his primary duty must be the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.

(b) Thus, exempt work must be performed away from the ''headquarters.'' The headquarters is not, however, to be confused with the ''headquarters ranch.'' The term headquarters has reference to the place for the transaction of the business of the ranch (administrative center), as distinguished from buildings or lots used for convenience elsewhere. It is a particular location for the discharge of the management duties. Accordingly, the term ''headquarters'' would not embrace large acreage, but only the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The balance of the ''headquarters ranch'' would be the ''range.''

(c) Furthermore, the legislative history indicates that this exemption was not intended to apply to feed lots or to any area where the stock involved would be near headquarters. Its sponsors stated that the exemption would apply only to those employees principally engaged in activities which require constant attendance on a standby basis, away from headquarters, such as herding, where the computation of hours worked would be extremely difficult. Such constant surveillance of livestock that graze and reproduce on range lands is necessary to see that the animals receive adequate care, water, salt, minerals, feed supplements, and protection from insects, parasites, disease, predators, adverse weather, etc.

(d) The man-days of labor of employees principally engaged in the range production of livestock, even though the employees are exempt from the wage and hour requirements of the Act, are included in the employer's man-day count for purposes of application of section 13(a)(6)(A). Thus, if a cattle rancher in a particular calendar quarter uses 200 man-days of such range production labor and 400 man-days of agricultural labor performed by individuals not so engaged, he is required to pay the minimum wage to the latter employees in the following year.

§ 780.330 Sharecroppers and tenant farmers.

(a) The test of coverage for sharecroppers and tenant farmers is the same as that applied under the Act to determine whether any other person is an employee or not. Certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent are covered. Those individuals called sharecroppers and tenants whose work is closeIy directed and who have no actual discretion in controlling farm operations are in fact employees by another name. True independent-contractor sharecroppers or tenant farmers who actually control their farm operations are not employees, but if they employ other workers they may be responsible as employers under the Act.

(b) In determining whether such individuals are employees or independent contractors, the criteria laid down by

the courts in interpreting the Act's definitions of employment, such as those enunciated by the Supreme Court in *Rutherford Food Corporation* v. *McComb*, are utilized. This case, as well as others, made it clear that the answer to the question of whether an individual is an employee or an independent contractor under the definitions in this Act lies in the relationship in its entirety, and is not determined by common law concepts. It does not depend upon isolated factors but on the ''whole activity.'' An employee is one who as a matter of economic reality follows the usual path of an employee. Each case must be decided on the basis of all facts and circumstances, and as an aid in the assessment, one considers such factors as the following:

(1) The extent to which the services rendered are an integral part of the principal's business;

(2) The permanency of the relationship;

(3) The opportunities for profit or loss;

(4) The initiative, judgment, or foresight exercised by the one who performs the services;

(5) The amount of investment; and

(6) The degree of control which the principal has in the situation.

(c) Where a tenant or sharecropper is found to be an employee, he and any members of his family who work with him on the crop are also to be included in the 500 man-day count of the owner or operator of the farm. Thus, where a sharecropper is an employee and his wife and children help in chopping cotton, all the family members are employees of the farm owner or operator and all their man-days of work are counted.

(d) On the other hand, a sharecropper or tenant who qualifies as a bona fide independent contractor is considered the same as any other employer, and only the man-days of agricultural labor performed by employees of such a sharecropper or tenant are counted toward the man-days used by him. If he does not meet the 500 man-day test, he is not required to pay his employees the minimum wage even though those employees are entitled to the minimum wage when working for a separate employer who met the man-day test.

§ 780.331 Crew leaders and labor contractors.

(a) Whether a crew leader or a labor contractor is the employer of the workers he supplies is a question of fact. The tests here are the same as those used to determine whether a sharecropper or tenant is an independent contractor. A crew leader who merely assembles a crew and brings them to the farm to be supervised and paid directly by the farmer, and who does the same work and receives the same pay as the crewmembers, is an employee of the farmer, and both he and his crew are counted as such and paid accordingly if the farmer is not exempt under the 500 man-day test. The situation is not significantly different if under the same circumstances, the crew is hired at so much per acre for their work. This is in effect a group piecework arrangement.

(b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output. As the employer, he has the authority to hire and fire the workers and direct them while working in the fields. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representatives, who takes whatever action he deems appropriate. His opportunity for profit or loss comes from his control over the time and manner of performance of work by his crew and his authority to determine the wage rates paid to his workers.

(c) There is also the common and general practice of an individual who performs custom work such as crop dusting or grain harvesting and threshing or sheepshearing. In the typical case this contractor has a substantial investment in equipment and his business decisions and judgments materially affect his opportunity for profit or loss. In the overall picture, the contractor is not following the usual path

of an employee, but that of an independent contractor.

For example: A sheepshearing contractor who operates in the following manner is considered an independent contractor and therefore an agricultural employer in his own right—he operates his own equipment including power supply from his own trucks or trailers, boards his shearing crew and has complete responsibility for their work and compensation, has complete charge of the sheep from the time they enter the shearing pen until they are shorn and turned out, and contracts with the rancher for the complete operation at an agreed rate per head.

(d) Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, his employees are considered jointly employed by him and the farmer who is using their labor if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment. (*Hodgson* v. *Okada* (C.A. 10), 20 W.H. Cases 1107; *Hodgson* v. *Griffin & Brand* (C.A. 5) 20 W.H. Cases 1051; *Mitchell* v. *Hertzke*, 234 F. 2d 183, 12 W.H. Cases 877 (C.A. 10).) In a joint employment situation, the man-days of agricultural labor rendered are counted toward the man-days of such labor of each employer. Each employer is considered equally responsible for compliance with the Act. With respect to the recordkeeping regulations in 29 CFR 516.33, the employer who actually pays the employees will be considered primarily responsible for maintaining and preserving the records of hours worked and employees' earnings specified in paragraph (c) of § 516.33 of this chapter.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27521, Oct. 4, 1973]

§ 780.332 Exchange of labor between farmers.

(a) Occasionally a farmer may help his neighbor with the harvest of his crop. For instance, Farmer B helps his neighbor Farmer A harvest his wheat. In return Farmer A helps Farmer B with the harvest at his farm.

(b) In a case where neighboring farmers exchange their own work under an arrangement where the work of one farmer is repaid by the labor of the other farmer and there is no monetary compensation for these services paid or contemplated, the Department of Labor would not assert that either farmer is an employee of the other.

(c) In addition, there may be instances where employees of a farmer also work for neighboring farmers during harvest time. For example, employees of Farmer A may help Farmer B with his harvest, and later, Farmer B's employees may help Farmer A. These employees would be included in the man-day count of the farmer for whom the work is performed on the day in question. Since the Act defines man-day to mean any day during which an employee performs any agricultural labor for not less than 1 hour, there may be days on which these employees work for both Farmer A and Farmer B for a ''man-day.'' In that event they would be included for that day in the man-day count of both Farmer A and Farmer B.

Subpart E—Employment in Agriculture or Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

§ 780.400 Statutory provisions.

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.

§ 780.401 General explanatory statement.

(a) Section 13(b)(12) of the Act contains the same wording as did section 13(a)(6) prior to the 1966 amendments. The effect of this is to provide a complete overtime exemption for any employee employed in ''agriculture'' who does not qualify for exemption under section 13(a)(6) (A), (B), (C), (D), and (E) of the 1966 amendments.

(b) In addition to exempting employees employed in agriculture, section 13(b)(12) also exempts from the overtime provisions of the Act employees employed in specified irrigation activities. Prior to the 1966 amendments

these employees were exempt from the minimum wage and overtime pay requirements of the Act.

(c) For exempt employment in ''agriculture,'' see subpart B of this part.

§ 780.402 The general guides for applying the exemption.

(a) Like other exemptions provided by the Act, the section 13(b)(12) exemption is narrowly construed (*Phillips, Inc.* v. *Walling*, 334 U.S. 490; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Fleming* v. *Swift & Co.*, 41 F. Supp. 825; *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283; *Walling* v. *Friend*, 156 F. 2d 429; see also §780.2 of subpart A of this part 780). An employer who claims the exemption has the burden of showing that it applies. (See §780.2) The section 13(b)(12) exemption for employment in agriculture is intended to cover all agriculture, including ''extraordinary methods'' of agriculture as well as the more conventional ones and large operators as well as small ones. Nevertheless, it was meant to apply only to agriculture. It does not extend to processes that are more akin to manufacturing than to agriculture. Practices performed off the farm by nonfarmers are not within the exemption, except for the irrigation activities specifically described in section 13(b)(12). Practices performed by a farmer do not come within the exemption for agriculture if they are neither a part of farming nor performed by him as an incident to or in conjunction with his own farming operations. These principles have been well established by the courts in such cases as *Mitchell* v. *Budd*, 350 U.S. 473; *Maneja* v. *Waialua*, 349 U.S. 254; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607; *Calaf* v. *Gonzalez*, 127 F. 2d 934; *Chapman* v. *Durkin*, 214 F. 2d 363, certiorari denied, 348 U.S. 897; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n.* 80 F. Supp. 953, 181 F. 2d 697.

(b) When the Congress, in the 1961 amendments, provided special exemptions for some activities which had been held not to be included in the exemption for agriculture (see subparts F and J of this part 780), it was made very clear that no implication of disagreement with ''the principles and tests governing the application of the present agriculture exemption as enunciated by the courts'' was intended (Statement of the Managers on the part of the House, Conference Report, H. Rept. No. 327, 87th Cong. first sess., p. 18). Accordingly, an employee is considered an exempt agricultural or irrigation employee if, but only if, his work falls clearly within the specific language of section 3(f) or section 13(b)(12).

§ 780.403 Employee basis of exemption under section 13(b)(12).

Section 13(b)(12) exempts ''any employee employed in * * *.'' It is clear from this language that it is the activities of the employee rather than those of his employer which ultimately determine the application of the exemption. Thus the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities. But the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer.

§ 780.404 Activities of the employer considered in some situations.

Although the activities of the individual employee, as distinguished from those of his employer, constitute the ultimate test for applying the exemption, it is necessary in some instances to examine the activities of the employer. For example, in resolving the status of the employees of an irrigation company for purposes of the agriculture exemption, the U.S. Supreme Court, found it necessary to consider the nature of the employer's activities (*Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755).

THE IRRIGATION EXEMPTION

§ 780.405 Exemption is direct and does not mean activities are agriculture.

The exemption provided in section 13(b)(12) for irrigation activities is a direct exemption which depends for its application on its own terms and not

on the meaning of ''agriculture'' as defined in section 3(f). This exemption was added by an amendment to section 13(a)(6) in 1949 to alter the effect of the decision of the U.S. Supreme Court in *Farmers Reservoir Company* v. *McComb*, 337 U.S. 755, so as to exclude the type of employees involved in that case from certain requirements of the Act. Congress chose to accomplish this result, not by expanding the definition of agriculture in section 3(f), but by adding a further exemption. In view of this approach, it can well be said that Congress agreed with the Supreme Court's holding that such workers are not employed in agriculture. (*Goldberg* v. *Crowley Ridge Assn.*, 295 F. 2d 7.) Irrigation workers who are employed in any workweek exclusively by a farmer or on a farm in irrigation work which meets the requirement of performance as an incident to or in conjunction with the primary farming operations of such farmer or such farm, as previously explained, are considered as employed in agriculture under section 3(f) and may qualify for the minimum wage and overtime exemption under section 13(a)(6) or for the overtime exemption provided agricultural workers under section 13(b)(12). Where they are not so employed, they are not considered as agricultural workers (*Farmers Reservoir Co.* v. *McComb*, supra), but may qualify for the overtime exemption under section 13(b)(12) relating to irrigation work if their duties and the irrigation system on which they work come within the express language of the statute. Where this is the case, it is not material whether the employees are employed in agriculture.

§ 780.406 Exemption is from overtime only.

This exemption applies only to the overtime provisions of the Act and does not affect the minimum wage, child labor, recordkeeping, and other requirements of the Act. The minimum wage rate applicable to emploYees employed in connection with supplying and storing water for agricultural purposes whose exemption from the minimum wage requirements was removed by the 1966 amendments is that provided by section 6(b) of the Act.

§ 780.407 System must be nonprofit or operated on a share-crop basis.

The exemption does not apply to employees employed in the described operations on facilities of any irrigation system unless the ditches, canals, reservoirs, or waterways in connection with which their work is done meet the statutory requirement that they either be not owned or operated for profit, or be operated on a share-crop basis. The employer is paid on a share-crop basis when he receives, as his total compensation, a share of the crop of the farmers serviced.

§ 780.408 Facilities of system must be used exclusively for agricultural purposes.

Section 13(b)(12) requires for exemption of irrigation work that the ditches, canals, reservoirs, or waterways in connection with which the employee's work is done be ''used exclusively for supply and storing of water for agricultural purposes.'' If a water supplier supplies water for other than ''agricultural purposes,'' the exemption would not apply. For example, the exemption would not apply where a portion of its water is delivered by the supplier to a municipality to be used for general, domestic, and commercial purposes. The fact that a small amount of the water furnished for use in his farming operations is in fact used for incidental domestic purposes by the farmer on the farm does not, however, require the conclusion that the water supplied was not exclusively ''for agricultural purposes'' within the meaning of the irrigation exemption in section 13(b)(12). Accordingly, if otherwise applicable, the exemption is not defeated merely because the water stored and supplied through the ditches, canals, reservoirs, or waterways of the irrigation system includes a small amount which is used for domestic purposes on the farms to which it is supplied. On the other hand, if the water supplier should maintain separate facilities for storing and supplying water for domestic use, it is clear that employees employed in connection with the maintenance or operation of such facilities would not be employed in activities to which the exemption applies. Water

used for watering livestock raised by a farmer is ''for agricultural purposes.''

§ 780.409 Employment "in connection with the operation or maintenance" is exempt.

The irrigation exemption provided by section 13(b)(12) applies to ''any employee employed * * * in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways'' of an irrigation system which qualifies for the exemption. The employee, to be exempt, must be employed ''in connection with the operation or maintenance'' of the named facilities; other employees of the irrigation system, not employed in connection with the named activities, are not exempt. The exemption may apply to employees engaged in insect, rodent, and weed control along the canals and waterways of the irrigation system.

Subpart F—Employment or Agricultural Employees in Processing Shade-Grown Tobacco; Exemption From Minimum Wage and Overtime Pay Requirements Under Section 13(a)(14)

INTRODUCTORY

§ 780.500 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart F together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(a)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage and overtime pay provisions of the Act for certain agricultural employees engaged in the processing, prior to stemming, or shade-grown tobacco for use as cigar wrapper tobacco. As appears more fully in subpart A, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The exemptions provided in section 13(a)(6) of the Act for employees employed in agriculture is not discussed in this subpart except in its relation to section 13(a)(14). The meaning and application of the section 13(a)(6) exemption is fully considered in subpart D of this part 780.

§ 780.501 Statutory provision.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage requirements of section 6 of the Act and from the overtime provisions of section 7:

> Any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

§ 780.502 Legislative history of exemption.

The exemption for shade-grown tobacco workers was added to the Act by the Fair Labor Standards Amendments of 1961. The intent of the committee which inserted the provision in the amendments which were reported to the House (see H. Rept. No. 75, 87th Cong., first sess., p. 29) was to exclude from the minimum wage and overtime requirements of the Act ''employees engaged prior to the stemming process in processing shade-grown tobacco for use as cigar wrapper tobacco, but only if the employees were employed in the growing and harvesting of such tobacco''. The Report also pointed out that ''such operations were assumed to be exempt prior to the case of *Mitchell* v. *Budd*, 350 U.S. 473 (1956), as a continuation of the agricultural process occurring in the vicinity where the tobacco was grown''. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. In that form, it would have altered the effect of the Supreme Court's decision in the case of *Mitchell* v. *Budd*, cited above, by bringing the described employees under the exemption provided for agriculture in section 13(a)(6) of the Act. (H. Rept. No. 75, p. 26, and H. Rept. No. 327, p. 17, 87th Cong., first sess.) The Conference Committee, in changing the provision to provide a separate exemption, made it

clear that it was ''not intended by the committee of conference to change * * * by the exemption for employees engaged in the named operations on shade-grown tobacco the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts.'' (H. Rept. No. 327, supra, p. 18.)

§ 780.503 What determines the application of the exemption.

The application of the section 13(a)(14) exemption depends upon the nature of the work performed by the individual employee for whom exemption is sought and not upon the character of the work of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may therefore be exempt while others may not.

REQUIREMENTS FOR EXEMPTION

§ 780.504 Basic conditions of exemption.

Under section 13(a)(14) of the Act all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must work on ''shade-grown tobacco.''

(b) He must be an ''agricultural employee'' employed ''in the growing and harvesting'' of shade-grown tobacco.

(c) He must be engaged ''in the processing * * * of such tobacco'' and this processing must be both ''prior to the stemming process'' and to prepare the tobacco ''for use as cigar wrapper tobacco.'' These requirements are discussed in the foIlowing sections of this subpart.

SHADE-GROWN TOBACCO

§ 780.505 Definition of "shade-grown tobacco."

Shade-grown tobacco to which the exemption applies is Connecticut Valley Shade-Grown U.S. Type 61 and Georgia-Florida Shade-Grown U.S. Type 62.

§ 780.506 Dependence of exemption on shade-grown tobacco operations.

The exemption provided by section 13(a)(14) of the Act is limited to the performance of certain operations with respect to the specified commodity, shade-grown tobacco. Work in connection with any other kind of tobacco, or any other commodity, including any other farm product, is not exempt under this section. An employee must be an agricultural employee variously employed in the growing and harvesting of ''shade-grown tobacco'' and in the described processing of ''such tobacco'' in order that the section 13(a)(14) exemption may apply.

§ 780.507 "Such tobacco."

To be within the exemption, the processing activities with respect to shade-grown tobacco must be performed by an employee who has been employed in growing and harvesting ''such tobacco.'' The term ''such tobacco'' clearly is limited to the specified type of tobacco named in the section, that is, shade-grown tobacco. While a literal interpretation of the term ''such tobacco'' might lead to a conclusion that the exemption extends only to the processing of the tobacco which the employee grew or harvested, it appears from the legislative history that the intent was to extend the exemption to the processing of such tobacco which may be viewed ''as a continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.'' (H. Rept. 75, 87th Cong., first sess., p. 26.) Thus, it appears that the term ''such tobacco'' has reference to the local crop of shade-grown tobacco, raised by other local growers as well as by the processor, and which is being processed as a continuation of the growing and harvesting of such crop in the vicinity.

§ 780.508 Application of the exemption.

(a) As indicated in § 780.504, an employee qualifies for exemption under section 13(a)(14) only if he is an agricultural employee employed in the growing and harvesting of shade-grown tobacco and is engaged in the processing of such tobacco. However, both operations do not have to be performed during the same workweek. Section

13(a)(14) of the Act is intended to exempt any agricultural employee from the minimum wage and overtime provisions of the Act in any workweek when he is employed in the growing and harvesting of shade-grown tobacco, irrespective of the provisions of section 13(a)(6) and whether or not in such workweek he is also engaged in the processing of the tobacco as described in section 13(a)(14). The exemption would also apply in any workweek in which the employee, who grew and harvested shade-grown tobacco, is exclusively engaged in such processing.

(b) An employee so employed in any workweek is considered to be excluded from the ''employee employed in agriculture'' whose exemption from the pay provisions of the Act is governed by section 13(a)(6). Therefore, his man-days of exempt labor under section 13(a)(14) in any such workweek are not to be counted as man-days of agricultural labor within the meaning of section 3(u) of the Act and to which section 13(a)(6) refers.

(c) However, since section 3(u) defines man-day to mean ''any day during which an employee performs any agricultural labor for not less than 1 hour'' in the case of an employee who qualifies for the exemption in some workweeks but not in others under section 13(a)(14), all such man-days of his agricultural labor in the workweeks when he is not exempt under section 13(a)(14) will be counted. In this connection, the performance of some agricultural work which does not relate to shade-grown tobacco by an agricultural employee of a grower of such tobacco will not be considered as the performance of nonexempt work outside the section 13(a)(14) exemption in any workweek in which such an employee is employed by such an employer in the growing and harvesting of such tobacco or in its processing prior to stemming, or both, and engages in other agricultural work only incidentally or to an insubstantial extent.

§ 780.509 Agriculture.

The definition of ''agriculture,'' as contained in section 3(f) of the Act, is discussed in subpart B of this part 780. The principles there discussed should be referred to as guides to the meaning of the terms ''agricultural employee'' and ''growing and harvesting'' as used in section 13(a)(14).

§ 780.510 "Any agricultural employee."

The section 13(a)(14) exemption applies to ''any agricultural employee'' who is employed in the specified activities. The term ''any agricultural employee'' includes not only agricultural employees of the tobacco grower but also such employees of other farmers or independent contractors. ''Any agricultural employee'' employed in the growing and harvesting of shade-grown tobacco will qualify for exemption if he engages in the specified processing operations. The use of the word ''agricultural'' before ''employee'' makes it apparent that separate consideration must be given to whether an employee is an ''agricultural employee'' and to whether he is employed in the specified ''growing and harvesting'' within the meaning of the Act.

§ 780.511 Meaning of "agricultural employee."

An ''agricultural employee,'' for purposes of section 13(a)(14), may be defined as an employee employed in activities which are included in the definition of ''agriculture'' in section 3(f) of the Act (see § 780.103), and who is employed in these activities with sufficient regularity or continuity to characterize him as a person who engages in them as an occupation. Isolated or sporadic instances of engagement by an employee in activities defined as ''agriculture'' would not ordinarily establish that he is an ''agricultural employee.'' His engagement in agriculture should be sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.

§ 780.512 "Employed in the growing and harvesting."

Section 13(a)(14) exempts processing operations on shade-grown tobacco only when performed by agricultural employees ''employed in the growing and harvesting'' of such tobacco. The use of the term ''and'' in the phrase ''growing and harvesting'' may be in recognition of the fact that in the raising of shade-grown tobacco the two operations are typically intermingled;

however, it is not considered that the word ''and'' would preclude a determination on the particular facts that an employee is qualified for the exemption if he is employed only in ''growing'' or only in ''harvesting.'' Employment in work other than growing and harvesting of shade-grown tobacco will not satisfy the requirement that the employee be employed in growing and harvesting, even if such work is on shade-grown tobacco and constitutes ''agriculture'' as defined in section 3(f) of the Act. For example, delivery of the tobacco by an employee of the farmer to the receiving platform of the bulking plant would be a ''delivery to market'' included in ''agriculture'' when performed by the farmer as an incident to or in conjunction with his farming operations (*Mitchell* v. *Budd*, 350 U.S. 473), but it would not be part of ''growing and harvesting.''

§ 780.513 What employment in growing and harvesting is sufficient.

To qualify for exemption the employee must be one of those who ''were employed in the growing and harvesting of such tobacco'' (H. Rept. No. 75, 87th Cong., First Sess., p. 29) and one whose processing work could be viewed as a ''continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.'' (Ibid. p. 26.) This appears to require that such employment be in connection with the crop of shade-grown tobacco which is being processed; it appears to preclude an employee who has had no such employment in the current crop season from qualifying for this exemption even if in some past season he was employed in growing and harvesting such tobacco. Bona fide employment in growing and harvesting shade-grown tobacco would also appear to be necessary. An attempt to qualify an employee for the processing exemption by sending him to the fields for growing or harvesting work for a few hours or days would not establish the bona fide employment in growing and harvesting contemplated by the Act. It would not seem sufficient that an employee has been engaged in growing or harvesting operations only occasionally or casually or incidentally for a small fraction of his work time. (See *Walling* v. *Haden*, 153 F. 2d 196.) Employment for a significant period in the current crop season or on some regular recurring basis during this season would appear to be necessary before an agricultural employee could reasonably be described as one ''employed in the growing and harvesting of shade-grown tobacco.'' The determination in a doubtful case will, therefore, require a careful examination and consideration of the particular facts.

§ 780.514 "Growing" and "harvesting."

The general meaning of ''growing'' and ''harvesting'' of agricultural commodities is explained in §§ 780.117 and 780.118 of subpart B of this part 780, where the meaning of these terms as used in the Act's definition of agriculture is fully discussed. As there indicated, these terms include the actual raising of the crop and the operations customarily performed in connection with the removal of the crops by the farmer from their growing position, but do not extend to operations subsequent to and unconnected with the actual process whereby the agricultural commodities are severed from their attachment to the soil. Thus, while transportation to a concentration point on the farm may be included, ''harvesting'' never extends to transportation or other operations off the farm. The ''growing'' of shade-grown tobacco is considered to include such work as preparing the soil, planting, irrigating, fertilizing, and other activities. This type of tobacco requires special cultivation and is grown in fields that are completely enclosed and covered with cheesecloth shade. The leaves of the plant are picked in stages, as they mature. The leaves are taken immediateIy to a tobacco barn, located on the farm, where they are strung on sticks and dried by heat. Before the drying process is completed, the leaves are allowed to absorb moisture. Then they are dried again. It is not until the end of this drying operation that the leaves are packed in boxes and taken from the farm to a building plant for further processing (see *Mitchell* v. *Budd*, 350 U.S. 473). Under the general principles stated above, ''harvesting'' of shade-grown tobacco is considered to include the removal of the tobacco

leaves from the plant and moving the tobacco from the field to the drying barn on the farm, together with the performance of other work as a necessary part of such operations. Subsequent operations such as the drying of the tobacco in the barn on the farm and packing of the tobacco for transportation to the bulking plant are not included in ''harvesting.''

EXEMPT PROCESSING

§ 780.515 Processing requirements of section 13(a)(14).

When it has been determined that an employee is an ''agricultural employee employed in the growing and harvesting of shade-grown tobacco,'' to whom section 13(a)(14) of the Act may apply, it then becomes necessary to ascertain whether he is ''engaged in the processing * * * of such tobacco, prior to the stemming process, for use as Cigar-wrapper tobacco.''

§ 780.516 "Prior to the stemming process."

The exemption provided by section 13(a)(14) applies only to employees whose processing operations on shade-grown tobacco are performed ''prior to the stemming process.'' (See H. Rept. No. 75, 87th Cong., first sess., p. 26). This means that an employee engaged in stemming, the removal of the midrib from the tobacco leaf (*McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n.*, 80 F. Supp. 953, affirmed 181 F. 2d 697), or in any operations on the tobacco which are performed after stemming has begun will not come within the exemption. Stemming and all subsequent operations are nonexempt work.

§ 780.517 "For use as Cigar-wrapper tobacco."

The phrase ''for use as Cigar-wrapper tobacco'' limits the type of end product which may be produced by the exempt operations. As its name indicates, cigar-wrapper tobacco is used as a cigar wrapper and is distinguished from other types of tobacco which serve other purposes such as filler, pipe, chewing, and other kinds of tobacco. Normally, shade-grown tobacco is used only for cigar wrappers. However, if the tobacco is not being processed by the employer for such specific and limited use, the employee is not engaged in exempt processing operations.

§ 780.518 Exempt processing operations.

The processing operations under section 13(a)(14) include, but are not limited to, ''drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling'' of the shade-grown tobacco. As previously noted, these operations are exempt only if performed on shade-grown tobacco prior to the stemming process to prepare the tobacco for use as cigar wrapper tobacco.

§ 780.519 General scope of exempt operations.

All operations normally performed in the processing of shade-grown tobacco for use as cigar wrapper tobacco, if performed prior to the stemming process and for such use, are included in the exemption. As a whole, this processing substantially changes the physical properties and chemical content of the tobacco, improves its color, increases its combustibility, and eliminates the rawness and harshness of the freshly cured leaf. In the process the leaves are piled in ''bulks'' of about 4,000 pounds each to undergo a ''sweating'' or ''fermentation'' process in which temperature and humidity are carefully controlled. Proper heat control includes, among other things, breaking up the bulk, redistributing the tobacco, and adding water. Proper fermentation or aging requires the bulk to be reconstructed several times. This bulking process may last from 4 to 8 months. When the tobacco is properly dried, cured, fermented, and aged, it is moved to long tables where the leaves are individually graded and sorted, after which they are tied in bundles called ''hands'' of about 30 to 35 leaves each, which are then baled for shipment. Equipment required for the work may include a steam-heated plant, platforms, thermometers, bulk covers, baling boxes and presses, baling mats and packing, sorting, and grading tables. (See *Mitchell* v. *Budd*, 350 U.S. 473, 475.) Employees performing any part of this processing prior to the stemming process, including the operations named in section 13(a)(14), may come

within the exemption if they are otherwise qualified and if the tobacco on which they work is being processed for use as cigar wrapper tobacco.

§ 780.520 Particular operations which may be exempt.

(a) *General.* Section 13(a)(14) lists a number of operations as being included in the processing of shade-grown tobacco. Some of these are, and others are not, themselves ''processing'' in the sense that performance of the operations changes the natural form of the commodity on which it is performed. All of the operations named and described in paragraph (b) of this section, however, are a necessary and integral part of the overall process of preparing shade-grown tobacco for use as cigar wrapper tobacco and, when performed as part of that process and prior to stemming of the tobacco, by an employee qualified under the terms of the section, will provide the basis for his exemption from the minimum wage and overtime provisions of the Act.

(b) *Particular operations*—(1) *Drying.* Drying includes the removal or lowering of the moisture content of the tobacco, whether by natural means or by exposure to heat from ovens, furnaces, etc.

(2) *Curing.* Curing includes removing the tobacco to the curing shed or barn and stringing the tobacco over slats.

(3) *Fermenting.* Fermenting includes the operations controlling the chemical changes which take place in the tobacco as the result of bulking and rebulking.

(4) *Bulking.* Bulking includes piling the tobacco in piles or bulks of about 4,000 pounds each for the purpose of fermenting the tobacco.

(5) *Rebulking.* Rebulking includes the breaking down of the tobacco bulks or piles and rearranging them so that the tobacco on the inside will be placed on the outside of the bulk and tobacco on the outside will be placed inside.

(6) *Sorting.* Sorting includes segregation of the tobacco leaves in connection with the grading and classifying of the cured tobacco.

(7) *Grading.* Grading includes sorting or classifying as to size and quality.

(8) *Aging.* Aging includes the curing process brought about by bulking.

(9) *Baling.* Baling includes the tying of the tobacco into ''hands'' and placing them in bales for shipment.

§ 780.521 Other processing operations.

The language of the section, namely, ''including, but not limited to,'' extends the exemption for processing to include other operations in the processing of shade-grown tobacco besides those specifically enumerated. These additional operations include only those which are a necessary and integral part of preparing the shade-grown tobacco for use as cigar wrapper tobacco. These additional operations, like those enumerated in section 13(a)(14), must be performed before the tobacco has been stemmed. Stemming work and further work on the tobacco after stemming has been performed are nonexempt.

§ 780.522 Nonprocessing employees.

Only those employees who actually engaged in the growing and harvesting of shade-grown tobacco and the specified exempt processing activities are exempt. Clerical, maintenance and custodial workers are not included.

Subpart G—Employment in Agriculture and Livestock Auction Operations Under the Section 13(b)(13) Exemption

INTRODUCTORY

§ 780.600 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart G together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(13) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for certain employees who, in the same workweek, are employed by a farmer in agriculture and also in the farmer's livestock auction operations. As appears more fully in subpart A of this part, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the

Administrator in the performance of their duties under the Act. The general exemptions provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture are not discussed in this subpart except in its relation to section 13(b)(13). The meaning and application of these exemptions are fully considered in subparts D and E of this part 780.

§ 780.601 Statutory provision.

Section 13(b)(13) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1).

§ 780.602 General explanatory statement.

Ordinarily, as discussed in subparts D and E of this part 780, an employee who in the same workweek engages in work which is exempt as agriculture under section 13(a)(6) or 13(b)(12) of the Act and also performs nonexempt work to which the Act applies is not exempt in that week (§ 780.11). Employees of a farmer are not employed in work exempt as ''agriculture'' while engaged in livestock auction operations in which the livestock offered at auction includes livestock raised by other farmers (*Mitchell* v. *Hunt*, 263 F. 2d 913) (C.A. 5); *Hearnsberger* v. *Gillespie*, 435 F. 2d 926 (C.A. 8). However, under section 13(b)(13) an employee who is employed by a farmer in agriculture as well as in livestock auction operations in the same workweek will not lose the overtime exemption for that workweek, if certain conditions are met. These conditions and their meaning and application are discussed in this subpart.

REQUIREMENTS FOR EXEMPTION

§ 780.603 What determines application of exemption.

The application of the section 13(b)(13) exemption depends largely upon the nature of the work performed by the individual employee for whom exemption is sought. The character of the employer's business also determine the application of the exemption. Whether an employee is exempt therefore depends upon his duties as well as the nature of the employer's activities. Some employees of the employer may be exempt in some weeks and others may not.

§ 780.604 General requirements.

The general requirements for exemption under section 13(b)(13) are as follows:

(a) Employment of the employee ''primarily'' in agriculture in the particular workweek.

(b) This primary employment by a farmer.

(c) Engagement by the farmer in raising livestock.

(d) Engagement by the farmer in livestock auction operations ''as an adjunct to'' the raising of livestock.

(e) Payment of the minimum wage required by section 6(a)(1) of the Act for all hours spent in livestock auction work by the employee.

These requirements will be separately discussed in the following sections of this subpart.

§ 780.605 Employment in agriculture.

One requirement for exemption is that the employee be employed in ''agriculture.'' ''Agriculture,'' as used in the Act, is defined in section 3(f) as follows:

> (f) ''Agriculture'' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer

or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

An employee meets the tests of being employed in agriculture when he either engages in any one or more of the branches of farming listed in the first part of the above definition or performs, as an employee of a farmer or on a farm, practices incident to such farming operations as mentioned in the second part of the definition (*Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755). The exemption applies to ''any employee'' of a farmer whose employment meets the tests for exemption. Accordingly, any employee of the farmer who is employed in ''agriculture,'' including laborers, clerical, maintenance, and custodial employees, harvesters, dairy workers, and others may qualify for the exemption under section 13(b)(13) if the other conditions of the exemption are met.

§ 780.606 Interpretation of term "agriculture."

Section 3(f) of the Act, which defines ''agriculture,'' has been extensively interpreted by the Department of Labor and the courts. Subpart B of this part 780 contains those interpretations which have full application in construing the term ''agriculture'' as used in the 13(b)(13) exemption.

§ 780.607 "Primarily employed" in agriculture.

Not only must the employee be employed in agriculture, but he must be ''primarily'' so employed during the particular workweek or weeks in which the 13(b)(13) exemption is to be applied. The word ''primarily'' may be considered to mean chiefly or principally (*Agnew* v. *Board of Governors*, 153 F. 2d 785). This interpretation is consistent with the view, expressed by the sponsor of the exemption at the time of its adoption on the floor of the Senate (107 Cong. Rec. (daily ed., April 19, 1961), p. 5879), that the word means ''most of his time.'' The Department of Labor will consider that an employee who spends more than one-half of his hours worked in the particular workweek in agriculture, as defined in the Act, is ''primarily'' employed in agriculture during that week.

§ 780.608 "During his workweek."

Section 13(b)(13) specifically requires that the unit of time to be used in determining whether an employee is primarily employed in agriculture is ''during his workweek.'' The employee's own workweek, and not that of any other person, is to be used in applying the exemption. The employee's employment must meet the ''primarily'' test in each workweek in which the exemption is applied to him.

§ 780.609 Workweek unit in applying the exemption.

The unit of time to be used in determining the application of the exemption to an employee is the workweek. (See *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572.) A workweek is a fixed and regularly recurring interval of 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 of the workweek for the purpose of escaping the requirements of the Act is not permitted.

§ 780.610 Workweek exclusively in exempt work.

An employee who engages exclusively in a workweek in duties which come within the exemption under section 13(b)(13) and is paid in accordance with the requirements of that exemption, is exempt in that workweek from the overtime requirements of the Act.

§ 780.611 Workweek exclusively in agriculture.

In any workweek in which the employee works exclusively in agriculture, performing no duty in respect to livestock auction operations, his exemption for that week is determined by application of sections 13(a)(6) and 13(b)(12) to his activities. (See subparts D and E of this part.)

§ 780.612 Employment by a "farmer."

A further requirement for exemption is the expressed statutory one that the

employee must be employed in agriculture by a ''farmer.'' Employment by a nonfarmer will not qualify an employee for the exemption.

§ 780.613 "By such farmer."

The employee's primary employment in agriculture during the exempt week is also required to be by ''such farmer.'' The phrase ''such farmer'' refers to the particular farmer by whom the employee is employed in agriculture and who engages in the livestock auction operations as an adjunct to his raising of livestock. Even if an employee may spend more than half of his work time in a workweek in agriculture, he would not be exempt if such employment in agriculture were engaged in for various persons so that less than the primary portion of his workweek was performed in his employment in agriculture by such farmer. For example, an employee may work a 60-hour week and be employed in agriculture for 50 of those hours, of which 20 hours are worked in his employment by the farmer who is engaged in the livestock auction operations, the other 30 being performed for a neighboring farmer. Although this employee was primarily employed in agriculture during the workweek he is not exempt. His primary employment in agriculture was not by the farmer described in section 13(b)(13) as required.

§ 780.614 Definition of a farmer.

The Act does not define the term ''farmer.'' Whether an employer is a ''farmer'' within the meaning of section 13(b)(13) must be determined by consideration of the particular facts, keeping in mind the purpose of the exemption. A full discussion of the meaning of the term ''farmer'' as used in the Act's definition of agriculture is contained in §§ 780.130 through 780.133. Generally, as indicated in that discussion, a farmer under the Act is one who engages, as an occupation, in farming operations as a distinct activity for the purpose of producing a farm crop. A corporation or a farmers' cooperative may be a ''farmer'' if engaged in actual farming of the nature and extent there indicated.

§ 780.615 Raising of livestock.

Livestock auction operations are within the 13(b)(13) exemption only when they are conducted as an adjunct to the raising of livestock by the farmer. The farmer is required to engage in the raising of livestock as a prerequisite for the exemption of an employee employed in the operations described in section 13(b) (13). Engagement by the farmer in one or more of the other branches of farming will not meet this requirement.

§ 780.616 Operations included in raising livestock.

Raising livestock includes such operations as the breeding, fattening, feeding, and care of domestic animals ordinarily raised or used on farms. A fuller discussion of the meaning of raising livestock is contained in §§ 780.119 through 780.122.

§ 780.617 Adjunct livestock auction operations.

The livestock auction operations referred to in section 13(b)(13) are those engaged in by the farmer ''as an adjunct'' to the raising of livestock. This phrase limits the relative extent to which the farmer may conduct livestock auctions and claim exemption under section 13(b)(13). To qualify under the exemption provision, the auction operations should be an established part of the farmer's raising of the livestock and subordinate to it. (*Hearnsberger* v. *Gillespie*, 435 F. 2d 926 (C.A. 8).) The auction operations should not be conducted on so large a scale as to predominate over the raising of livestock. The livestock auction should be adjunct to the farmer's raising of livestock not only when he engages in it on his own account, but also when he joins with other farmers to hold an auction.

§ 780.618 "His own account"—"in conjunction with other farmers."

Under the terms of section 13(b)(13), the farmer may operate a livestock auction solely for his own benefit or he may join with ''other farmers'' to auction livestock for their mutual benefit. (See § 780.614 with regard to the definition of ''farmer.'') Unless the auction is conducted by the farmer alone or with

others who are ''farmers'' the exemption does not apply.

§ 780.619 Work "in connection with" livestock auction operations.

An employee whose agricultural employment meets the tests for exemption may engage in ''other'' employment ''in connection with'' his employer's livestock auction operations under the conditions stated in section 13(b)(13). The work which an employee may engage in under the phrase ''in connection with'' includes only those activities which are a necessary incident to conducting a livestock auction of the limited type permitted under the exemption. Such work as transporting the livestock and caring for it, custodial, maintenance, and clerical duties are included. Work which cannot be considered necessarily incident to the livestock auction is not exempt.

§ 780.620 Minimum wage for livestock auction work.

The application of the exemption is further determined by whether another condition has been met. That condition is that the employee, in the workweek in which he engages in livestock auction activities, must be paid at a wage rate not less than the minimum rate required by section 6(a)(1) of the Act for the time spent in livestock auction work. The exemption does not apply unless there is payment for all hours spent in livestock auction work at not less than the applicable minimum rate prescribed in the Act.

EFFECT OF EXEMPTION

§ 780.621 No overtime wages in exempt week.

In a workweek in which all the requirements of the section 13(b)(13) exemption are met, the employee is exempt from the overtime requirements of section 7 for that entire workweek.

Subpart H—Employment by Small Country Elevators Within Area of Production; Exemption From Overtime Pay Requirements Under Section 13(b)(14)

INTRODUCTORY

§ 780.700 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for employees employed by certain country elevators ''within the area of production,'' as defined by the Secretary of Labor in part 536 of this chapter.

§ 780.701 Statutory provision.

Section 13(b)(14) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm: *Provided,* That no more than five employees are employed in the establishment in such operations * * *.

§ 780.702 What determines application of the exemption.

The application of the section 13(b)(14) exemption depends on te employment of the employee by an establishment of the kind described in the section, and on such employment ''within the area of production'' as defined by regulation. In any workweek when an employee is employed in country elevator activities by such an establishment within the area of production, the overtime pay requirements of the Act will not apply to him.

§ 780.703 Basic requirements for exemption.

The basic requirements for exemption of country elevator employees under section 13(b)(14) of the Act are as follows:

(a) The employing establishment must:

(1) Be an establishment ''commonly recognized as a country elevator,'' and

(2) Have not more than five employees employed in its operations as such; and

(b) The employee must:

(1) Be ''employed by'' such establishment, and

(2) Be employed ''within the area of production,'' as defined by the Secretary of Labor.

All the requirements must be met in order for the exemption to apply to an employee in any workweek. The requirements in section 13(b)(14) are ''explicit prerequisites to exemption'' and the burden of showing that they are satisfied rests upon the employer who asserts that the exemption applies (*Arnold* v. *Kanowsky*, 361 U.S. 388). In accordance with the general rules stated in §780.2 of subpart A of this part, this exemption is to be narrowly construed and applied only to those establishments plainly and unmistakably within its terms and spirit. The requirements for its application will be separately discussed below.

ESTABLISHMENT COMMONLY RECOGNIZED AS A COUNTRY ELEVATOR

§ 780.704 Dependence of exemption on nature of employing establishment.

If an employee is to be exempt under section 13(b)(14), he must be employed by an ''establishment'' which is ''commonly recognized as a country elevator.'' If he is employed by such an establishment, the fact that it may be part of a larger enterprise which also engages in activities that are not recognized as those of country elevators (see *Tobin* v. *Flour Mills*, 185 F. 2d 596) would not make the exemption inapplicable.

§ 780.705 Meaning of "establishment."

The word ''establishment'' has long been interpreted by the Department of Labor and the courts to mean a distinct physical place of business and not to include all the places of business which may be operated by an organization (*Phillips* v. *Walling*, 334 U.S. 490; *Mitchell* v. *Bekins Van and Storage Co.*, 352 U.S. 1027). Thus, in the case of a business organization which operates a number of country elevators (see *Tobin* v. *Flour Mills*, 185 F. 2d 596), each individual elevator or other place of business would constitute an establishment, within the meaning of the Act. Country elevators are usually one-unit places of business with, in some cases, an adjoining flat warehouse. No problem exists of determining what is the establishment in such cases. However, where separate facilities are used by a country elevator, a determination must be made, based on their proximity to the elevator and their relationship to its operations, on whether the facilities and the elevator are one or more than one establishment. If there are more than one, it must be determined by which establishment the employee is employed and whether that establishment meets the requirements of section 13(b)(14) before the application of the exemption to the employee can be ascertained (compare *Mitchell* v. *Cammill*, 245 F. 2d 207; *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262).

§ 780.706 Recognition of character of establishment.

A further requirement for exemption is that the establishment must be ''commonly recognized'' as a country elevator. The word ''commonly'' means ordinarily or generally and the term ''recognized'' means known. An elevator should be generally known by the public as a country elevator. This requirement imposes, on the establishment for whose employees exemption is sought, the obligation to demonstrate that it engages in the type of work and has the attributes which will cause the general public to know it as a country elevator. The recognition which the statute requires must be shown to exist if the employer seeks to take the benefit of the exemption (see *Arnold* v. *Kanowsky*, 361 U.S. 388, 395).

§ 780.707 Establishments "commonly recognized" as country elevators.

In determining whether a particular establishment is one that is ''commonly recognized'' as a country elevator—and this must be true of the particular establishment if the exemption is to apply—it should be kept in mind that the intent of section 13(b)(14) is to ''exempt country elevators that market farm products, mostly grain, for farmers'' (107 Cong. Rec. (daily ed.) p. 5883). It is also appropriate to consider the characteristics and functions which the courts and government agencies have recognized as those of ''country elevators'' and the distinctions which have been recognized between country elevators and other types of establishments. For example, in proceedings to determine industries of a seasonal nature under part 526 of the regulations in this chapter, ''country'' grain elevators, public terminal and subterminal grain elevators, wheat flour mill elevators, non-elevator-type bulk grain storing establishments, and ''flat warehouses'' in which grain is stored in sacks, have been recognized as distinct types of establishments engaged in grain storage. (See 24 FR 2584; 3581.) As the legislative history of the exemption cited above makes clear, country elevators handle ''mostly grain.'' The courts have recognized that the terms ''country elevator'' and ''country grain elevator'' are interchangeable (the term ''country house'' has also been recognized as synonymous), and that there are significant differences between country elevators and other types of establishments engaged in grain storage (see *Tobin* v. *Flour Mils*, 185 F. 2d 596; *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269).

§ 780.708 A country elevator is located near and serves farmers.

Country elevators, as commonly recognized, are typically located along railroads in small towns or rural areas near grain farmers, and have facilities especially designed for receiving bulk grain by wagon or truck from farms, elevating it to storage bins, and direct loading of the grain in its natural state into railroad boxcars. The principal function of such elevators is to provide a point of initial concentration for grain grown in their local area and to handle, store for limited periods, and load out such grain for movement in carload lots by rail from the producing area to its ultimate destination. They also perform a transport function in facilitating the even and orderly movement of grain over the interstate network of railroads from the producing areas to terminal elevators, markets, mills, processors, consumers, and to seaboard ports for export. The country elevator is typically the farmer's market for his grain or the point at which his grain is delivered to carriers for transportation to market. The elevator may purchase the grain from the farmer or store and handle it for him, and it may also store and handle substantial quantities of grain owned by or pledged to the Government under a price-support program. Country elevators customarily receive, weigh, test, grade, clean, mix, dry, fumigate, store, and load out grain in its natural state, and provide certain incidental services and supplies to farmers in the locality. The foregoing attributes of country elevators have been recognized by the courts. See, for example, *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269; *Tobin* v. *Flour Mills*, 185 F. 2d 596; *Holt* v. *Barnesville Elevator Co.*, 145 F. 2d 250; *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262.

§ 780.709 Size and equipment of a country elevator.

Typically, the establishments commonly recognized as country elevators are small. Most of the establishments intended to come within the exemption have only one or two employees (107 Cong. Rec. (daily ed.) p. 5883), although some country elevators have a larger number. (See *Holt* v. *Barnesville Elevator Co.*, 145 F. 2d 250.) Establishments with more than five employees are not within the exemption. (See § 780.712.) The storage capacity of a country elevator may be as small as 6,000 bushels (see *Tobin* v. *Flour Mills*, 185 F. 2d 596) and will generally range from 15,000 to 50,000 bushels. As indicated in § 780.708, country elevators are equipped to receive grain in wagons or trucks from farmers and to load it in railroad boxcars. The facilities typically include scales for weighing the farm vehicles

loaded with grain, grain bins, cleaning and mixing machinery, driers for prestorage drying of grain and endless conveyor belts or chain scoops to carry grain from the ground to the top of the elevator. The facilities for receiving grain in truckloads or wagonloads from farmers and the limited storage capacity, together with location of the elevator in or near the grain-producing area, serve to distinguish country elevators from terminal or subterminal elevators, to which the exemption is not applicable. The latter are located at terminal or interior market points, receive grain in carload lots, and receive the bulk of their grain from country elevators. Although some may receive grain from farms in the immediate areas, they are not typically equipped to receive grain except by rail. (See *Tobin* v. *Flour Mills*, supra; *Mitchell* v. *Sampson Const. Co.* (D. Kan.) 14 WH Cases 269.) It is the facilities of a country elevator for the elevation of bulk grain and the discharge of such grain into rail cars that make it an ''elevator'' and distinguish it from warehouses that perform similar functions in the flat warehousing, storage, and marketing for farmers of grain in sacks. Such warehouses are not ''elevators'' and therefore do not come within the section 13(b)(14) exemption.

§ 780.710 A country elevator may sell products and services to farmers.

Section 13(b)(14) expressly provides that an establishment commonly recognized as a country elevator, within the meaning of the exemption, includes ''such an establishment which sells products and services used in the operation of a farm.'' This language makes it plain that if the establishment is ''such an establishment,'' that is, if its functions and attributes are such that it is ''commonly recognized as a country elevator'' but not otherwise, exemption of its employees under this section will not be lost solely by reason of the fact that it sells products and services used in the operation of a farm. Establishments commonly recognized as country elevators, especially the smaller ones, not only engage in the storing of grain but also conduct various merchandising or ''sideline'' operations as well. They may distribute feed grains to feeders and other farmers, sell fuels for farm use, sell and treat seeds, and sell other farm supplies such as fertilizers, farm chemicals, mixed concentrates, twine, lumber, and farm hardware supplies and machinery. (See *Tobin* v. *Flour Mills*, 185 F. 2d 596; *Holt* v. *Barnesville Elevator Co.*, 145 F. 2d 250). Services performed for farmers by country elevators may include grinding of feeds, cleaning and fumigating seeds, supplying bottled gas, and gasoline station services. As conducted by establishments commonly recognized as country elevators, the selling of goods and services used in the operation of a farm is a minor and incidental secondary activity and not a main business of the elevator (see *Tobin* v. *Flour Mills*, supra; *Holt* v. *Barnesville Elevator Co.*, supra).

§ 780.711 Exemption of mixed business applies only to country elevators.

The language of section 13(b)(14) permitting application of the exemption to country elevators selling products and services used in the operation of a farm does not extend the exemption to an establishment selling products and services to farmers merely because of the fact that it is also equipped to provide elevator services to its customers. The exemption will not apply if the extent of its business of making sales to farmers is such that the establishment is not commonly known as a ''country elevator'' or is commonly recognized as an establishment of a different kind. As the legislative history of the exemption indicates, its purpose is limited to exempting country elevators that market farm products, mostly grain, for farmers who are working long workweeks and need to have the elevator facilities open and available for disposal of their crops during the same hours that are worked by the farmers. (See 107 Cong. Rec. (daily ed.) p.5883.) The reason for the exemption does not justify its application to employees selling products and services to farmers otherwise than as an incidental and subordinate part of the business of a country elevator as commonly recognized. An establishment making such sales must be ''such an establishment'' to come within this exemption. An employer may, however, be engaged in the

business of making sales of goods and services to farmers in an establishment separate from the one in which he provides the recognized country elevator services. In such event, the exemption of employees who work in both establishments may depend on whether the work in the sales establishment comes within another exemption provided by the Act. (See *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262, and infra, § 780.724.)

EMPLOYMENT OF ''NO MORE THAN FIVE EMPLOYEES''

§ 780.712 Limitation of exemption to establishments with five or fewer employees.

If the operations of an establishment are such that it is commonly recognized as a country elevator, its employees may come within the section 13(b)(14) exemption provided that ''no more than five employees are employed in the establishment in such operations''. The exemption is intended, as explained by its sponsor, to ''affect only institutions that have five employees or less'' (107 Cong. Rec. (daily ed.) p. 5883). Since the Act is applied on a workweek basis, a country elevator is not an exempt place of work in any workweek in which more than five employees are employed in its operations.

§ 780.713 Determining the number of employees generally.

The number of employees referred to in section 13(b)(14) is the number ''employed in the establishment in such operations''. The determination of the number of employees so employed involves a consideration of the meaning of employment ''in the establishment'' and ''in such operations'' in relation to each other. If, in any workweek, an employee is ''employed in the establishment in such operations'' for more than a negligible period of time, he should be counted in determining whether, in that workweek, more than five employees were so employed. An employee so employed must be counted for this purpose regardless of whether he would, apart from this exemption, be within the coverage of the Act. Also, as noted in the following discussion, the employees to be counted are not necessarily limited to employees directly employed by the country elevator but may include employees directly employed by others who are engaged in performing operations of the elevator establishment.

§ 780.714 Employees employed "in such operations" to be counted.

(a) The five-employee limitation on the exemption for country elevators relates to the number of employees employed in the establishment ''in such operations.'' This means that the employees to be counted include those employed in, and do not include any who are not employed in, the operations of the establishment commonly recognized as a country elevator, including the operations of such an establishment in selling products and services used in the operation of a farm, as previously explained.

(b) In some circumstances, an employee employed in an establishment commonly recognized as a country elevator may, during his workweek, be employed in work which is not part of the operations of the elevator establishment. This would be true, for example, in the case of an employee who spends his entire workweek in the construction of an overflow warehouse for the elevator. Such an employee would not be counted in that workweek because constructing a warehouse is not part of the operations of the country elevator but is an entirely distinct activity.

(c) Employees employed by the same employer in a separate establishment in which he is engaged in a different business, and not employed in the operations of the elevator establishment, would not be counted.

(d) Employees not employed by the elevator establishment who come there sporadically, occasionally, or casually in the course of their duties for other employers are not employed in the operations of the establishment commonly recognized as a country elevator and would not be counted in determining whether the five-employee limitation is exceeded in any workweek. Examples of such employees are employees of a restaurant who bring food and beverages to the elevator employees, and employees of other employers

who make deliveries to the establishment.

§ 780.715 Counting employees "employed in the establishment."

(a) Employees employed ''in the establishment,'' if employed ''in such operations'' as previously explained, are to be counted in determining whether the five-employee limitation on the exemption is exceeded.

(b) Employees employed ''in'' the establishment clearly include all employees engaged, other than casually or sporadically, in performing any duties of their employment there, regardless of whether they are direct employees of the country elevator establishment or are employees of a farmer, independent contractor, or other person who are suffered or permitted to work (see Act, section 3(g)) in the establishment. However, tradesmen, such as dealers and their salesmen, for example, are not employed in the elevator simply because they visit the establishment to do business there. Neither are workers who deliver, on behalf of their employers, goods used in the sideline business of the establishment to be considered employed in the elevator.

(c) The use of the language ''employed in'' rather than ''engaged in'' makes it plain also that the employees to be counted include all those employed by the establishment in its operations without regard to whether they are engaged in the establishment or away from it in performing their duties. This has been the consistent interpretation of similar language in other sections of the Act.

EMPLOYEES ''EMPLOYED * * * BY'' THE COUNTRY ELEVATOR ESTABLISHMENT

§ 780.716 Exemption of employees "employed * * * by" the establishment.

If the establishment is a country elevator establishment qualified for exemption as previously explained, and if the ''area of production'' requirement is met (see § 780.720), any employee ''employed * * * by'' such establishment will come within the section 13(b)(14) exemption. This will bring within the exemption employees who are engaged in duties performed away from the establishment as well as those whose duties are performed in the establishment itself, so long as such employees are ''employed * * * by'' the country elevator establishment within the meaning of the Act. The employees employed ''by'' the establishment, who may come within the exemption if the other requirements are met, are not necessarily identical with the employees employed ''in the establishment in such operations'' who must be counted for purposes of the five-employee limitation since some of the latter employees may be employed by another employer. (See §§ 780.712 through 780.715.)

§ 780.717 Determining whether there is employment "by" the establishment.

(a) No single test will determine whether a worker is in fact employed ''by'' a country elevator establishment. This question must be decided on the basis of the total situation (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *U.S.* v. *Silk*, 331 U.S. 704). Clearly, an employee is so employed where he is hired by the elevator, engages in its work, is paid by the elevator and is under its supervision and control.

(b) ''Employed by'' requires that there be an employer-employee relationship between the worker and the employer engaged in operating the elevator. The fact, however, that the employer carries an employee on the payroll of the country elevator establishment which qualifies for exemption does not automatically extend the exemption to that employee. In order to be exempt an employee must actually be ''employed by'' the exempt establishment. This means that whether the employee is performing his duties inside or outside the establishment, he must be employed in the work of the exempt establishment itself in activities within the scope of its exempt business in order to meet the requirement of actual employment ''by'' the establishment (see *Walling* v. *Connecticut Co.*, 154 F. 2d 552).

(c) In the case of employers who operate multiunit enterprises and conduct business operations in more than one establishment (see *Tobin* v. *Flour Mills*, 185 F. 2d 596; *Remington* v. *Shaw* (W.D. Mich.) 2 WH Cases 262), there will be employees of the employer who perform central office or central

warehousing activities for the enterprise or for more than one establishment, and there may be other employees who spend time in the various establishments of the enterprise performing duties for the enterprise rather than for the particular establishment in which they are working at the time. Such employees are employed by the enterprise and not by any particular establishment of the employer (*Mitchell* v. *Miller Drugs*, 255 F. 2d 574; *Mitchell* v. *Kroger Co.*, 248 F. 2d 935). Accordingly, so long as they perform such functions for the enterprise they would not be exempt as employees employed by a country elevator establishment operated as part of such an enterprise, even while stationed in it or placed on its payroll.

§ 780.718 Employees who may be exempt.

Employees employed ''by'' a country elevator establishment which qualifies for exemption will be exempt, if the ''area of production'' requirement is met, while they are engaged in any of the customary operations of the establishment which is commonly recognized as a country elevator. Included among such employees are those who are engaged in selling the elevator's goods or services, keeping its books, receiving, handling, and loading out grain, grinding and mixing feed or treating seed for farmers, performing ordinary maintenance and repair of the premises and equipment or engaging in any other work of the establishment which is commonly recognized as part of its operations as a country elevator. An employee employed by such an elevator is not restricted to performing his work inside the establishment. He may also engage in his exempt duties away from the elevator. For example, a salesman who visits farmers on their farms to discuss the storage of their grain in the elevator is performing exempt work while on such visits. It is sufficient that an employee employed by an elevator is, while working away from the establishment, doing the exempt work of the elevator. If the establishment is engaged only in activities commonly recognized as those of a country elevator and none of its employees engaged in any other activities, all the employees employed by the country elevator will come within the exemption if no more than five employees are employed in the establishment in such operations and if the ''area of production'' requirement is met.

§ 780.719 Employees not employed "by" the elevator establishment.

Since the exemption depends on employment ''by'' an establishment qualified for exemption rather than simply the work of the employee, employees who are not employed by the country elevator are not exempt. This is so even though they work in the establishment and engage in duties which are part of the services which are commonly recognized as those of a country elevator. Since they are not employed by the elevator, employees of independent contractors, farmers and others who work in or for the elevator are not exempt under section 13(b)(14) simply because they work in or for the elevator (see *Walling* v. *Friend*, 156 F. 2d 429; *Mitchell* v. *Kroger*, 248 F. 2d 935; *Durkin* v. *Joyce Agency*, 110 F. Supp. 918, affirmed sub. nom. *Mitchell* v. *Joyce Agency*, 348 U.S. 945). Thus an employee of an independent contractor who works inside the elevator in drying grain for the elevator is not exempt under this section.

Employment ''Within the Area of Production''

§ 780.720 "Area of production" requirement of exemption.

(a) In addition to the requirements for exemption previously discussed, section 13(b)(14) requires that the employee employed by an establishment commonly recognized as a country elevator be ''employed within the area of production (as defined by the Secretary).'' Regulations defining employment within the ''area of production'' for purposes of section 13(b)(14) are contained in part 536 of this chapter. All the requirements of the applicable regulations must be met in order for the exemption to apply.

(b) Under the regulations, an employee is considered to be employed within ''the area of production'' within the meaning of section 13(b)(14) if the country elevator establishment by

which he is employed is located in the ''open country or a rural community,'' as defined in the regulations, and receives 95 percent or more of the agricultural commodities handled through its elevator services from normal rural sources of supply within specified distances from the country elevator. A definition of ''area of production'' in terms of such criteria has been upheld by the U.S. Supreme Court in *Mitchell* v. *Budd*, 350 U.S. 473. Reference should be made to part 536 of this chapter for the precise requirements of the definition.

(c) However, it is appropriate to point out here that nothing in the definition places limits on the distance from which commodities come to the elevator for purposes other than the storage of marketing of farm products. The commodities, 95 percent of which are required by definition to come from specified distances, are those agricultural commodities received by the elevator with respect to which it performs the primary concentration, storage, and marketing functions of a country elevator as previously explained (see §780.708). This is consistent with the emphasis given, in the legislative history, to the country elevator's function of marketing farm products, mostly grain, for farmers (see 107 Cong. Rec. (daily ed.) p. 5883). Commodities brought or shipped to a country elevator establishment not for storage or for market but in connection with its secondary, incidental, or side-line functions of selling products and services used in the operation of a farm (see §780.610) are not required to be counted in determining whether 95 percent of the agricultural commodities handled come from rural sources of supply within the specified distances.

WORKWEEK APPLICATION OF EXEMPTION

§780.721 Employment in the particular workweek as test of exemption.

The period for determining whether the ''area of production'' requirement of section 13(b)(14) is met is prescribed in the regulations in part 536 of this chapter. Whether or not an establishment is one commonly recognized as a country elevator must be tested by general functions and attributes over a representative period of time, as previously explained, and requires reexamination for exemption purposes only if these change. But insofar as the exemption depends for its application on the employment of employees, it applies on a workweek basis. An employee employed by the establishment is not exempt in any workweek when more than five employees ''are employed in the establishment in such operations,'' as previously explained (see §§780.712 through 780.715). Nor is any employee within the exemption in a workweek when he is not employed ''by'' the establishment within the meaning of section 13(b)(14) (see §§780.716 through 780.719). This is in accordance with the general rule that the unit of time to be used in determining the application of the Act and its exemptions to an employee is the workweek. (See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. *Mitchell* v. *Hunt*, 263 F. 2d 913; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n*, 80 F. Supp. 953, affirmed 181 F. 2d 697.) A workweek is a fixed and regularly recurring interval of 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.

§780.722 Exempt workweeks.

An employee performing work for an establishment commonly recognized as a country elevator is exempt under section 13(b)(14) in any workweek when he is, for the entire workweek, employed ''by'' such establishment, if no more than five employees are ''employed in the establishment in such operations'', and if the ''area of production'' requirement is met.

§780.723 Exempt and nonexempt employment.

Under section 13(b)(14), where an employee, for part of his workweek, is employed ''by'' an ''exempt'' establishment (one commonly recognized as a

country elevator which has five employees or less employed in the establishment in such operations in that workweek) and the employee is, in his employment by the establishment, employed ''within the area of production'' as defined by the regulations, but in the remainder of the workweek is employed by his employer in an establishment or in activities not within this or another exemption provided by the Act, in the course of which he performs any work to which the Act applies, the employee is, not exempt for any part of that workweek (see *Mitchell* v. *Hunt*, 263 F. 2d 913; *Waialua* v. *Maneja*, 77 F. Supp. 480; *Walling* v. *Peacock Corp.*, 58 F. Supp. 880; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n*, 181 F. 2d 697).

§ 780.724 Work exempt under another section of the Act.

Where an employee's employment during part of his workweek would qualify for exemption under section 13(b)(14) if it continued throughout the workweek, and the remainder of his workweek is spent in employment which, if it continued throughout the workweek, would qualify for exemption under another section or sections of the Act, the exemptions may be combined (see *Remington* v. *Shaw* (W.D. Mich.) 2 WH Cases 262). The employee, however, qualifies for exemption only to the extent of the exemption which is more limited in scope (see *Mitchell* v. *Hunt*, 263 F. 2d 913). For example, if part of the work is exempt from both minimum wage and overtime compensation under one section of the Act and the rest is exempt only from the overtime pay provisions under another section, the employee is exempt that week from the overtime provisions, but not from the minimum wage requirements. In this connection, attention is directed to another exemption in the Act which relates to work in grain elevators, which may apply in appropriate circumstances, either in combination with section 13(b)(14) or to employees for whom the requirements of section 13(b)(14) cannot be met. This other exemption is that provided by section 7(c). Section 7(c), which is discussed in part 526 of this chapter, provides a limited overtime exemption for employees employed in the seasonal industry of storing grain in country grain elevators, public terminal and sub-terminal elevators, wheat flour mills, nonelevator bulk storing establishments and flat warehouses, § 526.10(b)(14) of this chapter.

Subpart I—Employment in Ginning of Cotton and Processing of Sugar Beets, Sugar-Beet Molasses, Sugarcane, or Maple Sap into Sugar or Syrup; Exemption From Overtime Pay Requirements Under Section 13(b)(15)

INTRODUCTORY

§ 780.800 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart I constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(15) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for two industries (a) for employees engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and (b) for employees engaged in the processing of sugar beets, sugar-beet molasses, sugarcane or maple sap, into sugar (other than refined sugar) or syrup. The limited overtime exemptions provided for cotton ginning and for sugar processing under sections 7(c) and 7(d) (see part 526 of this chapter) are not discussed in this subpart.

§ 780.801 Statutory provisions.

Section 13(b)(15) of the Fair Labor Standards Act exempts from the overtime requirements of section 7:

> Any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (other than refined sugar) or syrup.

Section 13(b)(15) supplants two exemptions that were contained in the Act prior to the Fair Labor Standards

Amendments of 1966. The first is former section 13(a)(18), having identical language, which provided a complete exemption for those employed in the ginning of cotton. The second is the former section 7(c) which provided an overtime exemption for the employees of an employer engaged in sugar processing operations resulting in unrefined sugar or syrup.

§ 780.802 What determines application of the exemption.

It is apparent from the language of section 13(b)(15) that the application of this exemption depends upon the nature and purpose of the work performed by the individual employee for whom exemption is sought, and in the case of ginning of cotton on the location of the place of employment where the work is done and other factors as well. It does not depend upon the character of the business of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may be exempt while others may not.

§ 780.803 Basic conditions of exemption; first part, ginning of cotton.

Under the first part of section 13(b)(15) of the Act, the ginning of cotton, all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be ''engaged in ginning.''

(b) The commodity ginned must be cotton.

(c) The ginning of the cotton must be ''for market.''

(d) The place of employment in which this work is done must be ''located in a county where cotton is grown in commercial quantities.'' The following sections discuss the meaning and application of these requirements.

GINNING OF COTTON FOR MARKET

§ 780.804 "Ginning" of cotton.

The term ''ginning'' refers to operations performed on ''seed cotton'' to separate the seeds from the spinnable fibers. (*Moore* v. *Farmer's Manufacturing and Ginning Co.*, 51 Ariz., 378, 77 F. 2d 209; *Frazier* v. *Stone*, 171 Miss. 56, 156 So. 596). ''Seed cotton'' is cotton in its natural state (*Burchfield* v. *Tanner*, 142 Tex. 404, 178 S.W. 2d 681, 683) and the ginning to which section 13(b)(15) refers is the ''first processing'' of this agricultural commodity (107 Cong. Rec. (daily ed.) p. 5887), which converts it into the marketable product commonly known as ''lint cotton'' (*Wirtz* v. *Southern Pickery Inc.* (W.D. Tenn.) 278 F. Supp. 729; *Mangan* v. *State*, 76 Ala. 60, 66) by removing the seed from the lint and then pressing and wrapping the lint into bales.

§ 780.805 Ginning of "cotton."

Only the ginning of ''cotton'' is within the first part of the exemption. An employee engaged in ginning of moss, for example, would not be exempt. The reconditioning of cotton waste resulting from spinning or oil mill operations is not included, since such waste is not the agricultural commodity in its natural state for whose first processing the exemption was provided. (See 107 Cong. Rec. (daily ed.) p. 5887.) The ''cotton,'' ''seed cotton,'' and ''lint cotton'' ginned by ordinary gins do not include ''linter'' or ''Grabbot'' cotton, obtained by reginning cotton seed and hard locks of cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning (*Mississippi Levee Com'rs* v. *Refuge Cotton Oil Co.*, 91 Miss. 480, 44 So. 828, 829). Mote ginning, the process whereby raw motes (leaves, trash, sticks, dirt, and immature cotton with some cottonseed) are run through a ginning process to extract the short-fiber cotton, is not included in the ginning of cotton unless it is done as a part of the whole ginning process in one gin establishment as a continuous and uninterrupted series of operations resulting in useful cotton products including the regular ''gin'' bales, the ''mote'' bales (short-fiber cotton), and the cottonseed.

§ 780.806 Exempt ginning limited to first processing.

As indicated in § 780.804, the ginning for which the exemption is intended is the first processing of the agricultural commodity, cotton, in its natural form, into lint cotton for market. It does not include further operations

which may be performed on the cottonseed or the cotton lint, even though such operations are performed in the same establishment where the ginning is done. Delinting, which is the removal of short fibers and fuzz from cottonseed, is not exempt under section 13(b)(15). It is not first processing of the seed cotton; rather, it is performed on cottonseed, usually in cottonseed processing establishments, and even if regarded as ginning (*Mitchell* v. *Burgess*, 239 F. 2d 484) it is not the ginning of cotton for market contemplated by section 13(b)(15). It may come within the overtime exemption provided in section 7(d) of the Act for certain seasonal industries. (See §526.11(b)(1) of part 526 of this chapter.) Compressing of cotton, which is the pressing of bales into higher density bales than those which come from the gin, is a further processing of the cotton entirely removed from ginning (*Peacock* v. *Lubbock Compress Co.*, 252 F. 2d 892). Employees engaged in compressing may, however, be subject to exemption from overtime pay under section 7(c). (See §526.10(b)(8) of this chapter.)

§ 780.807 Cotton must be ginned "for market."

As noted in §780.804, it is ginning of seed cotton which converts the cotton to marketable form. Section 13(b)(15), however, provides an exemption only where the cotton is actually ginned ''for market.'' (*Wirtz* v. *Southern Pickery, Inc.* (W.D. Tenn.) 278 F. Supp. 729.) The ginning of cotton for some other purpose is not exempt work. Cotton is not ginned ''for market'' if it is not to be marketed in the form in which the ginning operation leaves it. Cotton is not ginned ''for market'' if it is being ginned preliminary to further processing operations to be performed on the cotton by the same employer before marketing the commodity in an altered form. (Compare *Mitchell* v. *Park* (D. Minn.), 14 WH Cases 43, 36 Labor Cases 65, 191; *Bush* v. *Wilson & Co.*, 157 Kans. 82, 138 P. 2d 457; *Gaskin* v. *Clell Coleman & Sons*, 2 WH Cases 977.)

EMPLOYEES ''ENGAGED IN'' GINNING

§ 780.808 Who may qualify for the exemption generally.

The exemption applies to ''any employee engaged in'' ginning of cotton. This means that the exemption may apply to an employee so engaged, no matter by whom he is employed. Employees of the gin operator, of an independent contractor, or of a farmer may come within the exemption in any workweek when all other conditions of the exemption are met. To come within the exemption, however, an employee's work must be an integral part of ginning of cotton, as previously described. The courts have uniformly held that exemptions in the Act must be construed strictly to carry out the purpose of the Act. (See §780.2, in subpart A of this part.) No operation in which an employee engages in a place of employment where cotton is ginned is exempt unless it comes within the meaning of the term ''ginning.''

§ 780.809 Employees engaged in exempt operations.

Employees engaged in actual ginning operations, as described in §780.804 will come within the exemption if all other conditions of section 13(b)(15) are met. The following activities are among those within the meaning of the term ''engaged in ginning of cotton'':

(a) ''Spotting'' vehicles in the gin yard or in nearby areas before or after being weighed.

(b) Moving vehicles in the gin yard or from nearby areas to the ''Suction'' and reparking them subsequently.

(c) Weighing the seed cotton prior to ginning, weighing lint cotton and seed subsequent to ginning (including preparation of weight records and tickets in connection with weighing operations).

(d) Placing seed cotton in temporary storage at the gin and removing the cotton from such storage to be ginned.

(e) Operating the suction feed.

(f) Operating the gin stands and power equipment.

(g) Making gin repairs during the ginning season.

(h) Operating the press, including the handling of bagging and ties in connection with the ginning operations of that gin.

(i) Removing bales from the press to holding areas on or near the gin premises.

(j) Others whose work is so directly and physically connected with the ginning process itself that it constitutes an integral part of its actual performance.

§ 780.810 Employees not "engaged in" ginning.

Since an employee must actually be ''engaged in'' ginning of cotton to come within the exemption, an employee engaged in other tasks, not an integral part of ''ginning'' operations, will not be exempt. (See, for rule that only the employees performing the work described in the exemption are exempt, *Wirtz* v. *Burton Mercantile and Gin Co., Inc.*, 234 F. Supp. 825, aff'd per curiam 338 F. 2d 414, cert. denied 380 U.S. 965; *Wirtz* v. *Kelso Gin Co., Inc.* (E.D. Ark.) 50 Labor Cases 31, 631, 16 WH Cases 663; *Mitchell* v. *Stinson*, 217 F. 2d 210; *Phillips* v. *Meeker Cooperative Light and Power Ass'n* 63 F. Supp. 743, affirmed 158 F. 2d 698; *Jenkins* v. *Durkin*, 208 F. 2d 941; *Heaburg* v. *Independent Oil Mill, Inc.*, 46 F. Supp. 751; *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F. Supp. 969.) The following activities are among those not within the meaning of the term ''engaged in ginning of cotton'':

(a) Transporting seed cotton from farms or other points to the gin.

(b) General maintenance work (as opposed to operating repairs).

(c) General office and custodial duties.

(d) ''Watching'' duties.

(e) Working in the seed house.

(f) Transporting seed, hulls, and ginned bales away from the gin.

(g) Any activity performed during the ''off-season.''

County Where Cotton Is Grown in Commercial Quantities

§ 780.811 Exemption dependent upon place of employment generally.

Under the first part of section 13(b)(15), if the employee's work meets the requirements for exemption, the location of the place of employment where he performs it will determine whether the exemption is applicable. This location is required to be in a county where cotton is grown in commercial quantities. The exemption will apply, however, to an employee who performs such work in ''any'' place of employment in such a county. The place of employment in which he engages in ginning need not be an establishment exclusively or even principally devoted to such operations; nor is it important whether the place of employment is on a farm or in a town or city in such a county, or whether or to what extent the cotton ginned there comes from the county in which the ginning is done or from nearby or distant sources. It is enough if the place of employment where the employee is engaged in ginning cotton for market is ''located'' in such a county.

§ 780.812 "County."

As used in the section 13(b)(15) exemption, the term ''county'' refers to the political subdivision of a State commonly known as such, whether or not such a unit bears that name in a particular State. It would, for example, refer to the political subdivision known as a ''parish'' in the State of Louisiana. A place of employment would not be located in a county, within the meaning of the exemption, if it were located in a city which, in the particular State, was not a part of any county.

§ 780.813 "County where cotton is grown."

For the exemption to apply, the employee must be ginning cotton in a place of employment in a county where cotton ''is grown'' in the described quantities. It is the cotton grown, not the cotton ginned in the place of employment, to which the quantity test is applicable. The quantities of cotton ginned in the county do not matter, so long as the requisite quantities are grown there.

§ 780.814 "Grown in commercial quantities."

Cotton must be ''grown in commercial quantities'' in the county where the place of employment is located if an employee ginning cotton in such place is to be exempt under section

13(b)(15). The term ''commercial quantities'' is not defined in the statute, but in the cotton-growing areas of the country there should be little question in most instances as to whether commercial quantities of cotton are grown in the county where the ginning is done. If it should become necessary to determine whether commercial quantities are grown in a particular county, it would appear appropriate in view of crop-year variations to consider average quantities produced over a representative period such as 5 years. On the question of whether the quantities grown are ''commercial'' quantities, the trade understanding of what are ''commercial'' quantities of cotton would be important. It would appear appropriate also to measure ''commercial'' quantities in terms of marketable lint cotton in bales rather than by acreage or amounts of seed cotton grown, since seed cotton is not a commercially marketable product (*Mangan* v. *State*, 76 Ala. 60). Also, production of a commodity in ''commercial'' quantities generally involves quantities sufficient for sale with a reasonable expectation of some return to the producers in excess of costs (*Bianco* v. *Hess* (Ariz.), 339 P. 2d 1038; *Nystel* v. *Thomas* (Tex. Civ. App.) 42 S.W. 2d 168).

§ 780.815 Basic conditions of exemption; second part, processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

Under the second part of section 13(b)(15) of the Act, the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be engaged in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

(b) The product of the processing must be sugar (other than refined sugar) or syrup.

§ 780.816 Processing of specific commodities.

Only the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap is within the exemption. Operations performed on commodities other than those named are not exempt under this section even though they result in the production of unrefined sugar or syrup. For example, sorghum cane or refinery syrup (which is a by-product of refined syrup) are not named commodities and employees engaged in processing these products are not exempt under this section even though the resultant product is raw sugar. The loss of exemption would obtain for the same reason for employees engaged in processing sugar, glucose, or ribbon cane syrup into syrup.

§ 780.817 Employees engaged in processing.

Only those employees who are engaged in the processing will come within the exemption. The processing of sugarcane to which the exemption applies and in which the employee must be engaged in order to come within it is considered to begin when the processor receives the cane for processing and to end when the cane is processed ''into sugar (other than refined sugar) or syrup.'' Employees engaged in the following activities of a sugarcane processing mill are considered to be engaged in ''the processing of'' the sugarcane into the named products, within the meaning of the exemption:

(a) Loading of the sugarcane in the field or at a concentration point and hauling the cane to the mill ''if performed by employees of the mill.'' (Such activities performed by employees of some other employer, such as an independent contractor, are not considered to be within the exemption.)

(b) Weighing, unloading, and stacking the cane at the mill yard.

(c) Performing sampling tests (such as a trash test or sucrose content test) on the incoming cane.

(d) Washing the cane, feeding it into the mill crushers and crushing.

(e) Operations on the extracted cane juice in the making of raw sugar and molasses: Juice weighing and measurement, heating, clarification, filtration, evaporating, crystallization, centrifuging, and handling and storing the raw sugar or molasses at the plant during the grinding season.

(f) Laboratory analytical and testing operations at any point in the processing or at the end of the process.

(g) Loading out raw sugar or molasses during the grinding season.

(h) Handling, baling, or storing bagasse during the grinding season.

(i) Firing boilers and other activities connected with the overall operation of the plant machinery during grinding operations, including cleanup and maintenance work and day-to-day repairs. (This includes shop employees, mechanics, electricians, and employees maintaining stocks of various items used in repairs.)

§ 780.818 Employees not engaged in processing.

Employees engaged in operations which are not an integral part of processing of the named commodities will not come within the exemption. The following activities are not considered exempt under section 13(b)(15):

(a) Office and general clerical work.

(b) Feeding and housing millhands and visitors (typically this is called the ''boarding house'').

(c) Hauling raw sugar or molasses away from the mill.

(d) Any work outside the grinding season.

§ 780.819 Production must be of unrefined sugar or syrup.

The second part of the section 13(b)(15) exemption is specifically limited to the production ''of sugar (other than refined sugar) or syrup.'' The production of ''refined sugar'' a term which is commonly understood to refer to the refinement of ''raw sugar'' is expressly excluded. Thus, the exemption does not apply to the manufacture of sugar that is produced by melting sugar, purifying the melted sugar solution through a carbon medium process and the recrystallization of the sugar from this solution. Nor does the exemption apply to the processing of cane syrup into refined sugar or to the further processing of sugar, as for example, beet sugar into powdered or liquid sugar.

Subpart J—Employment in Fruit and Vegetable Harvest Transportation; Exemption From Overtime Pay Requirements Under Section 13(b)(16)

INTRODUCTORY

§ 780.900 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart J together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(16) of the Fair Labor Standards Act of 1938, as amended. This section provides exemption from the overtime pay provisions of the Act for employees engaging in specified transportation activities when fruits and vegetables are harvested. As appears more fully in subpart A of this part, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The general exemption provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture, are not discussed in this subpart except in their relation to section 13(b)(16). The meaning and application of these exemptions are fully considered in subparts D and E, respectively, of this part 780.

§ 780.901 Statutory provisions.

Section 13(b)(16) of the Act exempts from the overtime provisions of section 7:

> Any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.

§ 780.902 Legislative history of exemption.

Since the language of section 13(b)(16) and its predecessor, section 13(a)(22) is identical, the legislative history of former section 13(a)(22) still retains its pertinency and vitality. The former section 13(a)(22) was added to the Act by the Fair Labor Standards Amendments of 1961. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. It would have altered the effect of holdings of the courts that operations such as those described in the amendment are not within the agriculture exemption provided by section 13(a)(6) when performed by employees of persons other than the farmer. (*Chapman* v. *Durkin*, 214 F. 2d 360, certiorari denied 348 U.S. 897; *Fort Mason Fruit Co.* v. *Durkin*, 214 F. 2d 363, certiorari denied, 348 U.S. 897.) The amendment was offered to exempt operations which, in the sponsor's view, were meant to be exempt under the original Act. (See 107 Cong. Rec. (daily ed.) p. 4523.) The Conference Committee, in changing the provision to make it a separate exemption made it clear that is was ''not intended by the committee of conference to change by this exemption (for the described transportation employees) * * * the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts.'' (H. Rept. No. 327, 87th Cong., first session, p. 18.)

§ 780.903 General scope of exemption.

The exemption provided by section 13(b)(16) is in two parts, subsection (A), which exempts employees engaged in the described transportation and preparation for transportation of fruits or vegetables, and subsection (B) which exempts employees engaged in the specified transportation of employees who harvest fruits or vegetables. The transportation and preparation for transportation of fruits and vegetables must be from the farm to a place of first processing or first marketing located in the same State where the farm is located; the transportation of harvesters must be between the farm and a place located in the same State as the farm.

§ 780.904 What determines the exemption.

The application of the exemption provided by section 13(b)(16) depends on the nature of the employee's work and not on the character of the employer's business. An employee is not exempt in any workweek unless his employment in that workweek meets all the requirements for exemption. To determine whether an employee is exempt an examination should be made of the duties which that employee performs. Some employees of the employer may be exempt and others may not.

§ 780.905 Employers who may claim exemption.

A nonfarmer, as well as a farmer, who has an employee engaged in the operations specified in section 13(b)(16) may take advantage of the exemption. Employees of contractual haulers, packers, processors, wholesalers, ''bird-dog'' operators, and others may qualify for exemption. If an employee is engaged in the specified operations, the exemption will apply ''whether or not'' these operations are ''performed by the farmer'' who has grown the harvested fruits and vegetables. Where such operations are performed by the farmer, the engagement by his employee in them will provide a basis for exemption under section 13(b)(16) without regard to whether the farmer is performing the operations as an incident to or in conjunction with his farming operations.

EXEMPT OPERATIONS ON FRUITS OR VEGETABLES

§ 780.906 Requisites for exemption generally.

Section 13(b)(16), in clause (A), provides an exemption from the overtime pay provision of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged ''in the transportation and preparation

for transportation of fruits and vegetables''; and

(b) Such transportation must be transportation ''from the farm''; and

(c) The destination to which the fruits or vegetables are transported must be ''a place of first processing or first marketing''; and

(d) The transportation must be from the farm to such destination ''within the same State''.

§ 780.907 "Fruits or vegetables."

The exempt operations of preparing for transportation and transporting must be performed with respect to ''fruits or vegetables.'' The intent of section 13(b)(16) is to exempt such operations on fruits or vegetables which are ''just-harvested'' and still in their raw and natural state. As explained at the time of adoption of the amendment on the floor of the House, the exemption was intended to eliminate the difference in treatment of farmers and nonfarmers with respect to exemption of such ''handling or hauling of fruit or vegetables in their raw or natural state.'' (See 107 Cong. Rec. (daily ed.) p. 4523.) Transporting and preparing for transportation other farm products which are not fruits or vegetables are not exempt under section 13(b)(16). For example, operations on livestock, eggs, tobacco, or poultry are nonexempt. Sugarcane is not a fruit or vegetable for purposes of this exemption (*Wirtz* v. *Osceola Farms Co.*, 372 F. 2d 584).

§ 780.908 Relation of employee's work to specified transportation.

In order for the exemption to apply to an employee, he must be engaged ''in the transportation and preparation for transportation'' of the just-harvested fruits or vegetables from the farm to the specified places within the same State. Engagement in other activities is not exempt work. The employee must be actually engaged in the described operations. The exemption is not available for other employees of the employer, such as office, clerical, and maintenance workers.

§ 780.909 "Transportation."

''Transportation,'' as used in section 13(b)(16), refers to the movement by any means of conveyance of fruits or vegetables from the farm to a place of first processing or first marketing in the same State. It includes only those activities which are immediately necessary to move the fruits or vegetables to the specified points and the return trips. Drivers, drivers' helpers, loaders, and checkers perform work which is exempt. Transportation ends with delivery at the receiving platform of the place to which the fruits or vegetables are transported. (*Mitchell* v. *Budd*, 350 U.S. 473.) Thus, unloading at the delivery point by employees who did not transport the commodities would not be a part of the transportation activities under section 13(b)(16).

§ 780.910 Engagement in transportation and preparation.

Since transportation and preparation for transportation are both exempt activities, an employee who engages in both is performing exempt work. In referring to ''the transportation and preparation for transportation'' of the fruits or vegetables, the statute recognizes the two activities as interrelated parts of the single task of moving the commodities from the farm to the designated points. Accordingly, the word ''and'' between the words ''transportation'' and ''preparation'' is not considered to require that any employee be employed in both parts of the task in order to be exempt. The exemption may apply to an employee engaged either in transporting or preparing the commodities for transportation if he otherwise qualifies under section 13(b)(16).

§ 780.911 Preparation for transportation.

The ''preparation for transportation'' of fruits or vegetables includes only those activities which are necessary to prepare the fruits or vegetables for transportation from the farm to the places described in section 13(b)(16). These preliminary activities on the farm will vary with the commodity involved, with the means of the transportation to be used, and with the nature of operations to be performed on the commodity after delivery.

§ 780.912 Exempt preparation.

The following operations, if required in order to move the commodities from the farm and to deliver them to a place of first marketing or first processing, are considered preparation for transportation: Assembling, weighing, placing the fruits or vegetables in containers such as lugs, crates, boxes or bags, icing, marking, labeling or fastening containers, and moving the commodities from storage or concentration areas on the farm to loading sites.

§ 780.913 Nonexempt preparation.

(a) *Retail packing.* Since the exemption, as expressly stated in section 13(b)(16), includes the transportation of the fruits or vegetables only to places of first marketing or first processing, packing or preparing for retail or further distribution beyond the place of first processing or first marketing is not exempt as ''preparation for transportation.'' (*Schultz* v. *Durrence* (D. Ga.), 19 WH Cases 747, 63 CCH Lab. Cas. secs. 32, 387.)

(b) *Preparation for market.* No exemption is provided under section 13(b)(16) for operations performed on the farm in preparation for market (such as ripening, cleaning, grading, or sorting) rather than in preparation for the transportation described in the section. Exemption, if any, for these activities should be considered under sections 13(a)(6) and 13(b)(12). (See subparts D and E of this part 780.)

(c) *Processing or canning.* Processing is not exempt preparation for transportation. Thus, the canning of fruits or vegetables is not under section 13(b)(16).

§ 780.914 "From the farm."

The exemption applies only to employees whose work relates to transportation of fruits or vegetables ''from the farm.'' The phrase ''from the farm'' makes it clear that the preparation of the fruits or vegetables should be performed on the farm and that the first movement of the commodities should commence at the farm. A ''farm'' has been interpreted under the Act to mean a tract of land devoted to one or more of the primary branches of farming outlined in the definition of ''agriculture'' in section 3(f) of the Act. These expressly include the cultivation and tillage of the soil and the growing and harvesting of any agricultural or horticultural commodities.

§ 780.915 "Place of first processing."

Under section 13(b)(16) the fruits or vegetables may be transported to only two types of places. One is a ''place of first processing'', which includes any place where canning, freezing, drying, preserving, or other operations which first change the form of the fresh fruits or vegetables from their raw and natural state are performed. (For overtime exemption applicable to ''first processing,'' see part 526 of this chapter.) A plant which grades and packs only is not a place of first processing (*Walling* v. *DeSoto Creamery and Produce Co.*, 51 F. Supp. 938). However, a packer's plant may qualify as a place of first marketing. (See § 780.916.)

§ 780.916 "Place of * * * first marketing."

A ''place of * * * first marketing'' is the second of the two types of places to which the freshly harvested fruits or vegetables may be transported from the farm under the exemption provided by section 13(b)(16). Typically, a place of first marketing is a farmer's market of the kind to which ''delivery to market'' is made within the meaning of section 3(f) of the Act when a farmer delivers such commodities there as an incident to or in conjunction with his own farming operations. Under section 13(b)(16), of course, there is no requirement that the transportation be performed by or for a farmer or as an incident to or in conjunction with any farming operations. A place of first marketing may be described in general terms as a place at which the freshly harvested fruits or vegetables brought from the farm are first delivered for marketing, such as a packing plant or an establishment of a wholesaler or other distributor, cooperative marketing agency, or processor to which the fruits or vegetables are first brought from the farm and delivered for sale. A place of first marketing may also be a place of first processing (see *Mitchell* v. *Budd*, 350 U.S. 473) but it

need not be. The ''first place of packing'' to which the just-harvested fruits or vegetables are transported from the farm is intended to be included. (See 107 Cong. Rec. (daily ed.) p. 4523.) Transportation to places which are not first processing or first marketing places is not exempt.

§ 780.917 "Within the same State."

To qualify for exemption under section 13(b)(16), the transportation of the fruits or vegetables must be made to the specified places ''within the same State'' in which the farm is located. Transportation is made to a place ''within the same State'' when the commodities are taken from the farm, hauled and delivered within the same State to first markets or first processors for sale or processing at the place of delivery. The exemption is not provided for transportation to any place of first marketing or first processing across State lines and does not apply to any part of the transportation within the State of fruits or vegetables destined for a place in another State at which they are to be first marketed or first processed. Transportation from the farm to an intermediate point in such a journey located within the same State would not qualify for exemption; it would make no difference that the intermediate point is a place of first marketing or first processing for other fruits or vegetables if it is not actually such for the fruits or vegetables being transported. On the other hand, where the place to which fruits or vegetables are transported from the farm within the same State is actually the place of first marketing or first processing of those very commodities, transportation of the goods across State lines by the first-market operator or first processor, after such delivery to him within the State, does not affect the nature of the delivery to him as one made within the State.

EXEMPT TRANSPORTATION OF FRUIT OR VEGETABLE HARVEST EMPLOYEES

§ 780.918 Requisites for exemption generally.

Section 13(b)(16), in clause (B), provides an exemption from the minimum wage and overtime pay provisions of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged ''in transportation'' of harvest workers; and

(b) The harvest workers transported must be ''persons employed or to be employed in the harvesting of fruits or vegetables''; and

(c) The employee's transportation of such harvest workers must be ''between the farm and any point within the same State.''

§ 780.919 Engagement "in transportation" of harvest workers.

In order for the exemption to apply, the employees must be engaged ''in transportation'' of the specified harvest workers between the points stated in the statute. Actual engagement ''in transportation'' of such workers is required. Engagement in other activities is not exempt work. Drivers, driver's helpers, and others who are engaged in the actual movement of the persons transported may qualify for the exemption. Office employees, garage mechanics, and other employees of the employer who may perform supporting activities but do not engage in the actual transportation work do not come within the exemption. There is no restriction in the statute as to the means of conveyance used; the exempt transportation may be by land, air, or water in any vehicle or conveyance appropriate for the purpose. Employees of any employer who are engaged in the specified transportation activities may qualify for exemption; it is not necessary that the transportation be performed by the farmer. (See § 780.905.)

§ 780.920 Workers transported must be fruit or vegetable harvest workers.

Clause (B) of section 13(b)(16) exempts only those transportation employees who are engaged in transportation ''of persons employed or to be employed in the harvesting of fruits or vegetables.'' Transportation of harvest workers is not exempt unless the workers are fruit and vegetable harvest workers; transportation of workers employed or to be employed in harvesting or other commodities is not exempt work under section 13(b)(16). *Wirtz* v.

Osceola Farms Co., 372 F. (2d) 584 (C.A. 5). Nor does the exemption apply to the transportation of persons for the purpose of planting or cultivating any crop, whether or not it is a fruit or a vegetable crop.

§ 780.921 Persons "employed or to be employed" in fruit or vegetable harvesting.

The exemption applies to the transportation of persons ''employed or to be employed'' in the harvesting of fruits or vegetables. Included in this phrase are persons who at the time of transportation are currently employed in harvesting fruits or vegetables and others who, regardless of their occupation at such time, are being transported to be employed in such harvesting. The conveying of persons to a farm from a factory, packinghouse or processing plant would be exempt where their transportation is for the purpose of their employment in harvesting the named commodities. On the other hand, the transportation of harvest workers, who have been employed in the fruit or vegetable harvest, to such a plant for the purpose of their employment in the plant would not be exempt. The transportation must come within the the intended scope of section 13(b)(16) which is to provide exemption for ''transportation of the harvest crew to and from the farm'' (see 107 Cong. Rec. daily ed. p. 4523).

§ 780.922 "Harvesting" of fruits or vegetables.

Only transportation of employees employed or to be employed in the ''harvesting'' of fruits or vegetables is exempt under clause (B) of section 13(b)(16). As indicated in § 780.920, such harvest workers do not include employees employed or to be employed in planting or cultivating the crop. Nor do they include employees employed or to be employed in operations subsequent to harvesting, even where such operations constitute ''agriculture'' within the definition in section 3(f) of the Act. ''Harvesting'' refers to the removal of fruits or vegetables from their growing position in the fields, and as explained in § 780.118 of this part, includes the operations customarily performed in connection with this severance of the crops from the soil (see *Vives* v. *Serralles*, 145 F. 2d 552), but does not extend to operations subsequent to and unconnected with the actual severance process or to operations performed off the farm. It may include moving the fruits or vegetables to concentration points on the farm, but would not include packingshed or other operations performed in preparation for market rather than as part of harvesting, such as ripening, cleaning, grading, sorting, drying, and storing. If the workers are employed or to be employed in ''harvesting'', it does not matter for purposes of the exemption whether a farmer or someone else employs them or does the harvesting. It is the character of their employment as ''harvesting'' and not the identity of their employer or the owner of the crop which determines whether their transportation to and from the farm will provide a basis for exemption of the transportation of employees.

§ 780.923 "Between the farm and any point within the same State."

The transportation of fruit or vegetable harvest workers is permitted ''between the farm and any point within the same State''. The exempt transportation of such harvest workers therefore includes their movement to and from the farm (see 107 Cong. Rec. (daily ed.) p. 4523). Such transportation must, however, be from or to points ''within the same State'' in which the farm is located. Crossing of State lines is not contemplated. Thus, the exemption would not apply to day-haul transportation of fruit or vegetable harvest workers between a town in one State and farms located in another State. Also, the intent to exempt ''transportation of the harvest crew to and from the farm'' (see 107 Cong. Rec. (daily ed.) p. 4523) within a single State would not justify exemption of the transportation of workers from one State to another to engage in harvest work in the latter State. The exemption does not apply to transportation of persons on any trip, or any portion of a trip, in which the point of origin or point of destination is in another State. Subject to these limitations, however, where employees are being transported for employment in harvesting they may be picked up in

any place within the State, including other farms, packing or processing establishments, factories, transportation terminals, and other places. The broad term ''any point'' must be interpreted in the light of the purpose of the exemption to facilitate the harvesting of fruits or vegetables. Transportation from a farm to ''any point'' within the same State (such as a factory or processing plant) where some other purpose than harvesting is served is not exempt.

Subpart K—Employment of Homeworkers in Making Wreaths; Exemption From Minimum Wage, Overtime Compensation, and Child Labor Provisions Under Section 13(d)

INTRODUCTORY

§ 780.1000 Scope and significance of interpretative bulletin.

Subpart A of this part 780 and this subpart K together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(d) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage, overtime pay, and child labor provisions of the Act for certain homeworkers employed in making wreaths from evergreens and in harvesting evergreens and other forest products for use in making wreaths. Attention is directed to the fact that a limited overtime exemption for employees employed in the decoration greens industry is provided under section 7(c) of the Act (see part 526 of this chapter). The section 7(c) exemption is not limited to homeworkers.

§ 780.1001 General explanatory statement.

Workers in rural areas sometimes engage, as a family unit, around the Christmas holidays, in gathering evergreens and making them into wreaths in their homes. Such workers, under well-settled interpretations by the Department of Labor and the courts, have been held to be employees of the firm which purchases the wreaths and furnishes the workers with wire used in making such wreaths.

REQUIREMENTS FOR EXEMPTION

§ 780.1002 Statutory requirements.

Section 13(d) of the Fair Labor Standards Act exempts from the minimum wage provisions of section 6, the overtime requirements of section 7 and the child labor restrictions of section 12:

> Any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

§ 780.1003 What determines the application of the exemption.

The application of this exemption depends on the nature of the employee's work and not on the character of the employer's business. To determine whether an employee is exempt an examination should be made of the activities which that employee performs and the conditions under which he performs them. Some employees of the employer may be exempt and others may not.

§ 780.1004 General requirements.

The general requirements of the exemption are that:

(a) The employee must be a homeworker;

(b) The employee must be engaged in making wreaths as a homeworker;

(c) The wreaths must be made principally of evergreens;

(d) Any harvesting of the evergreens and other forest products by the homeworkers must be for use in making the wreaths by homeworkers.

§ 780.1005 Homeworkers.

The exemption applies to ''any homeworker.'' A homeworker within the meaning of the Act is a person who works for an employer in or about a home, apartment, tenement, or room in a residential establishment.

§ 780.1006 In or about a home.

Whether the work of an employee is being performed ''in or about a home,'' so that he may be considered a

homeworker, must be determined on the facts in the particular case. In general, however the phrase ''in or about a home'' includes any home, apartment, or other dwelling place and surrounding premises, such yards, garages, sheds or basements. A convent, orphanage or similar institution is considered a home.

§ 780.1007 Exemption is inapplicable if wreath-making is not in or about a home.

The section 13(d) exemption does not apply when the wreaths are made in or about a place which is not considered a ''home''. Careful consideration is required in many cases to determine whether work is being performed in or about a home. Thus, the circumstances under which an employee may engage in work in what ostensibly is a ''home'' may require the conclusion, on an examination of all the facts, that the work is not being performed in or about a home within the intent of the term and for purposes of section 13(d) of the Act.

§ 780.1008 Examples of places not considered homes.

The following are examples of workplaces which, on examination, have been considered not to be a ''home'':

(a) Living quarters allocated to and regularly used solely for production purposes, where workers work regular schedules and are under constant supervision by the employer, are not considered to be a home.

(b) While a convent, orphanage or similar institution is considered a home, an area in such place which is set aside for and used for sewing or other productive work under supervision is not a home.

(c) Where an employee performs work on wreaths in a home and also engages in work on the wreaths for the employer during that workweek in a factory, he is not exempt in that week, since some of his work is not performed in a home.

§ 780.1009 Wreaths.

The only product which may be produced under the section 13(d) exemption by a homeworker is a wreath having no less than the specified evergreen content. The making of a product other than a wreath is nonexempt even though it is made principally of evergreens.

§ 780.1010 Principally.

The exemption is intended to apply to the making of an evergreen wreath. Such a wreath is one made ''principally'' of evergreens. *Principally* means chiefly, in the main or mainly (*Hartford Accident and Indemnity Co.* v. *Casualty Underwriters Insurance Co.*, 130 F. Supp. 56). A wreath is made ''principally'' of evergreens when it is comprised mostly of evergreens. For example, where a wreath is composed of evergreens and other kinds of material, the evergreens should comprise a greater part of the wreath than all the other materials together, including materials such as frames, stands, and wires. The principal portion of a wreath may consist of any one or any combination of the evergreens listed in section 13(d), including ''other evergreens.'' The making of wreaths in which natural evergreens are a secondary component is not exempt.

§ 780.1011 Evergreens.

The material which must principally be used in making the wreaths is listed as ''natural holly, pine, cedar, or other evergreens.'' Other plants or materials cannot be used to satisfy this requirement.

§ 780.1012 Other evergreens.

The ''other evergreens'' of which the wreath may be principally made include any plant which retains its greenness through all the seasons of the year, such as laurel, ivy, yew, fir, and others. While plants other than evergreens may be used in making the wreaths, such plants, whether they are forest products cultivated plants, cannot be considered as part of the required principal evergreen component of the wreath.

§ 780.1013 Natural evergreens.

Only ''natural'' evergreens may comprise the principal part of the wreath. The word ''natural'' qualifies all of the evergreens listed in the section, including ''other evergreens.'' The term *natural* means that the evergreens at the

time they are being used in making a wreath must be in the raw and natural state in which they have been harvested. Artificial evergreens (*Herring Magic* v. *U.S.*, 258 F. 2d 197; *Cal. Casualty Indemnity Exchange* v. *Industrial Accident Commission of Cal.* 90 P. 2d 289) or evergreens which have been processed as by drying and spraying with tinsel or by other means are not included. It is immaterial whether the natural evergreen used in making a wreath has been cultivated or is a product of the woods or forest.

§ 780.1014 Harvesting.

The homeworker is permitted to harvest evergreens and other forest products to be used in making the wreath. The word *harvesting* means the removal of evergreens and other forest products from their growing positions in the woods or forest, including transportation of the harvested products to the home of the homeworker and the performance of other duties necessary for such harvesting.

§ 780.1015 Other forest products.

The homeworker may also harvest ''other forest products'' for use in making wreaths. The term *other forest products* means any plant of the forest and includes, of course, deciduous plants as well.

§ 780.1016 Use of evergreens and forest products.

Harvesting of evergreens and other forest products is exempt only when these products will be ''used in making such wreaths.'' The phrase ''used in making such wreaths'' places a definite limitation on the purpose for which evergreens may be harvested under section 13(d). Harvesting of these materials for a use other than making wreaths is nonexempt. Also, such harvesting is nonexempt when the evergreens are used for wreathmaking by persons other than the homeworkers (see *Mitchell* v. *Hunt*, 263 F. 2d 913). For example, harvesting of evergreens for sale or distribution to an employer who uses them in his factory to make wreaths is not exempt.