paid or incurred in carrying on any trade or business of that member, those expenses may be taken into account as contract research expenses by another member of the group provided that the other member—

(i) Reimburses the member paying or incurring the expenses; and

(ii) Carries on a trade or business to which the research relates.

(4) *Lease payments.* The amount paid or incurred to another member of the group for the lease of personal property owned by a member of the group is not taken into account for purposes of section 41. Amounts paid or incurred to another member of the group for the lease of personal property owned by a person outside the group shall be taken into account as in-house research expenses for purposes of section 41 only to the extent of the lesser of—

(i) The amount paid or incurred to the other member; or

(ii) The amount of the lease expenses paid to the person outside the group.

(5) *Payment for supplies.* Amounts paid or incurred to another member of the group for supplies shall be taken into account as in-house research expenses for purposes of section 41 only to the extent of the lesser of—

(i) The amount paid or incurred to the other member; or

(ii) The amount of the other member's basis in the supplies.

(j) *Effective date.* These temporary regulations are applicable for taxable years ending on or after May 24, 2005. Generally, a taxpayer may use any reasonable method of computing and allocating the credit for taxable years beginning before the date these regulations are published in the **Federal Register** as final regulations. However, paragraph (b), relating to the computation of the group credit, and paragraph (c), relating to the allocation of the group credit, will apply to taxable years ending on or after December 29, 1999, if the members of a controlled group, as a whole, claimed more than 100 percent of the amount that would be allowable under paragraph (b). In the case of a controlled group whose members have different taxable years and whose members use inconsistent methods of allocation, the members of the controlled group shall be deemed to have, as a whole, claimed more than 100 percent of the amount that would be allowable under paragraph (b).

§ 1.41–8 [Removed]

■ **Par. 5.** Section 1.41–8 is removed.

■ **Par. 6.** Section 1.41–8T is added to read as follows:

§ 1.41–8T Special rules for taxable years ending on or after January 3, 2001 (temporary).

(a) *Alternative incremental credit.* At the election of the taxpayer, the credit determined under section 41(a)(1) equals the amount determined under section 41(c)(4).

(b) *Election*—(1) *In general.* A taxpayer may elect to apply the provisions of the alternative incremental research credit (AIRC) in section 41(c)(4) for any taxable year of the taxpayer beginning after June 30, 1996. If a taxpayer makes an election under section 41(c)(4), the election applies to the taxable year for which made and all subsequent taxable years unless revoked in the manner prescribed in paragraph (b)(3) of this section.

(2) *Time and manner of election.* An election under section 41(c)(4) is made by completing the portion of Form 6765, ''Credit for Increasing Research Activities,'' relating to the election of the AIRC, and attaching the completed form to the taxpayer's timely filed (including extensions) original return for the taxable year to which the election applies. An election under section 41(c)(4) may not be made on an amended return.

(3) *Revocation.* An election under this section may not be revoked except with the consent of the Commissioner. A taxpayer is deemed to have requested, and to have been granted, the consent of the Commissioner to revoke an election under section 41(c)(4) if the taxpayer completes the portion of Form 6765 relating to the regular credit and attaches the completed form to the taxpayer's timely filed (including extensions) original return for the year to which the revocation applies. An election under section 41(c)(4) may not be revoked on an amended return.

(4) *Special rules for controlled groups*—(i) *In general.* In the case of a controlled group of corporations, all the members of which are not included on a single consolidated return, the designated member must make (or revoke) an election under section 41(c)(4) on behalf of the members of the group. An election (or revocation) by the designated member under this paragraph (b)(4) of this section shall be binding on all the members of the group for the credit year to which the election (or revocation) relates.

(ii) *Designated member.* For purposes of this paragraph (b)(4) of this section, for any credit year, the term *designated member* means that member of the group that is allocated the greatest amount of the group credit under paragraph (c) of § 1.41–6T. If the members of a group compute the group credit using different methods (either the method described in section 41(a) or the AIRC method of section 41(c)(4)) and at least two members of the group qualify as the designated member, then the term *designated member* means that member that computes the group credit using the method that yields the greater group credit. For example, A, B, C, and D are members of a controlled group but are not members of a consolidated group. For the 2005 taxable year, the group credit using the method described in section 41(a) is $10x. Under this method, A would be allocated $5x of the group credit, which would be the largest share of the group credit under this method. For the 2005 taxable year, the group credit using the AIRC method is $15x. Under the AIRC method, C would be allocated $5x of the group credit, which is the largest share of the group credit computed using the AIRC method. Because the group credit is greater using the AIRC method and C is allocated the greatest amount of credit under that method, C is the designated member. Therefore, C's section 41(c)(4) election is binding on all the members of the group for the 2005 taxable year.

(5) *Effective date.* These temporary regulations are applicable for taxable years ending on or after May 24, 2005.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: May 16, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05–10247 Filed 5–23–05; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Part 75

[Docket No. CRM 103; AG Order No. 2765–2005]

RIN 1105–AB05

Inspection of Records Relating to Depiction of Sexually Explicit Performances

AGENCY: Department of Justice

ACTION: Final rule.

SUMMARY: This rule amends the record-keeping and inspection requirements of 28 CFR part 75 to bring the regulations up to date with current law, to improve understanding of the regulatory system, and to make the inspection process effective for the purposes set by Congress in enacting the Child Protection and Obscenity Enforcement

Act of 1988, as amended, relating to the sexual exploitation and other abuse of children.

DATES: This final rule is effective June 23, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew Oosterbaan, Chief, Child Exploitation and Obscenity section, Criminal Division, United States Department of Justice, Washington, DC 20530; (202) 514–5780. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

On June 25, 2004, the Department of Justice published a proposed rule in the **Federal Register** at 69 FR 35547, to update the regulations implementing the record-keeping requirements of the Child Protection and Obscenity Enforcement Act of 1988. The proposed rule updated those regulations to account for changes in technology, particularly the Internet, and to implement the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. 108–21, 117 Stat. 650 (April 30, 2003) (''2003 Amendments''). The statute requires producers of sexually explicit matter to maintain certain records concerning the performers to assist in monitoring the industry. *See* 18 U.S.C. 2257. The statute requires the producers of such matter to ''ascertain, by examination of an identification document containing such information, the performer's name and date of birth,'' to ''ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name,'' and to record this information. 18 U.S.C. 2257(b). Violations of these record-keeping requirements are criminal offenses punishable by imprisonment for not more than five years for a first offense and not more than ten years for subsequent offenses. *See* 18 U.S.C. 2257(i). These provisions supplement the federal statutory provisions criminalizing the production and distribution of materials visually depicting minors engaged in sexually explicit conduct. *See* 18 U.S.C. 2251, 2252.

The record-keeping requirements apply to ''[w]hoever produces'' the material in question. 18 U.S.C. 2257(a). The statute defines ''produces'' as ''to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer-generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted.'' 18 U.S.C. 2257(h)(3).

The Attorney General, under 18 U.S.C. 2257(g), issued regulations implementing the record-keeping requirements on April 24, 1992. *See* 57 FR 15017 (1992); 28 CFR 75. In addition to the record-keeping requirements specifically discussed in section 2257, the regulations require producers to retain copies of the performers' identification documents, to cross-index the records by ''[a]ll names(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter,'' and to maintain the records for a specified period of time. 28 CFR 75.2(a)(1), 75.3, 75.4.

Most recently, in 2003, Congress made extensive amendments to the child exploitation statutory scheme based on detailed legislative findings, which the Department adopts as grounds for proposing this rule. *See* 2003 Amendments.

The Department agrees with each of these findings, and hereby amends the regulations in 28 CFR part 75 to comport with these specific findings. As explained more fully below, the rules implement a more detailed inspection system to ensure that children are not used as performers in sexually explicit depictions.

Need for the Rule

Recent federal statutory enactments and judicial interpretations have highlighted the urgency of protecting children against sexual exploitation and, consequently, the need for more specific and clear regulations detailing the records and inspection process for sexually explicit materials to assure the accurate identity and age of performers.

The identity of every performer is critical to determining and assuring that no performer is a minor. The key Congressional concern, evidenced by the child exploitation statutory scheme, was that all such performers be verifiably not minors, *i.e.* not younger than 18. 28 U.S.C. 2256(1), 2257(b)(1). Minors—children—warrant a special concern by Congress for several reasons as discussed more specifically in relation to the inspection process. Children themselves are incapable of giving voluntary and knowing consent to perform or to enter into contracts to perform. In addition, children often are involuntarily forced to engage in sexually explicit conduct. For these reasons, visual depictions of sexually explicit conduct that involve persons under the age of 18 constitute unlawful child pornography.

This rule provides greater details for the record-keeping and inspection process in order to ensure that minors are not used as performers in sexually explicit depictions. The rule does not restrict in any way the content of the underlying depictions other than by clarifying the labeling on and record-keeping requirements pertaining to, that underlying depiction. Cf. 27 CFR 16.21 (alcoholic beverage health warning statement; mandatory label information). However, compliance with the record-keeping requirements of this part has no bearing on the legality or illegality of the underlying sexually explicit material.

Moreover, the growth of Internet facilities in the past five years, and the proliferation of pornography on Internet computer sites or services, requires that the regulations be updated. In the rule, a number of definitions are revised to facilitate the application of the rule to the modern modes of communication.

Response to Public Comments on the Proposed Rule

The Department of Justice published the proposed rule on June 25, 2004, and comments were due to the Department on or before August 24, 2004. The following discussion responds to comments received from the public and explains why the Department either adopted changes or declined to adopt changes to the proposed rule in response to the comments. Many commenters commented on identical issues, and as a result, the number of comments exceeds the number of issues addressed below. Commenters addressed issues that can be separated into five general categories: General Legal Issues; Vagueness/Overbreadth Issues; Burdensomeness; Privacy Concerns; and Miscellaneous Issues.

General Legal Issues

Four commenters commented that the proposed rule encroached on adult citizens' constitutional right to view pornography under the guise of protecting children from exploitation. The Department disagrees with this comment. The final rule does not impinge upon the constitutionally protected right to free speech. This claim was fully litigated following enactment of the statute and the publication of the first version of the section 2257 regulations. The D.C. Circuit, while invalidating certain

provisions of the regulations, held in *American Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir.1994), that the statute and its implementing regulations were content-neutral measures that served the compelling state interest in protecting children and were therefore ''constitutional as they apply to the vast majority of the materials affected by them, namely, the commercially produced books, magazines, films, and videotapes that cater to ''adult'' tastes.'' Id. at 94.

Citing the Tenth Circuit's holding in *Sundance Assoc., Inc.* v. *Reno*, 139 F.3d 804 (10th Cir.1998), several commenters commented that the rule's application to secondary producers exceeds the Department's statutory authority. Furthermore, the commenters claimed that application of the rule to secondary producers as defined by the rule would have an unconstitutionally burdensome and chilling effect, and four commenters noted that small businesses would be particularly burdened with regard to maintaining segregated records, copies of depictions, and cross-indexed records. In Sundance, the court held that the statutory definition of producer did not distinguish between primary and secondary producers and entirely exempted from the record-keeping requirements those who merely distribute or those whose activity ''does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted.'' 18 U.S.C. 2257(h)(3). In contrast, the D.C. Circuit in *American Library Ass'n* v. *Reno* implicitly accepted that the distinction between primary and secondary producers was valid. The D.C. Circuit there held that the requirement that secondary producers maintain records was not a constitutionally impermissible burden on protected speech, particularly since secondary producers can comply by maintaining copies of the records of the primary producers, an option permitted by this rule. In so holding, the court implicitly considered the distinction between primary and secondary producers to be legitimate. Consistent with the D.C. Circuit's holding, which the Department believes reflects the correct view of the law, the Department declines to adopt these comments. For the same reason, the Department declines to adopt the comment of four commenters that the exclusions to the definition of producer in § 75.1(c)(4)(iii) eliminate the reference to primary and secondary producers contained in § 75.1(c)(1)–(2).

More specifically, two commenters commented that the expanded definition of producer to include any person who creates a computer-generated image is contrary to the ruling in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), which permits restrictions only on those who produce depictions of actual persons. The commenters claimed, too, that the provision is contradictory in that it covers computer-generated images while limiting its coverage to ''depiction[s] of actual sexually explicit conduct.'' 28 CFR 75.1(c)(1)–(2). Thus, the commenters argued, all statutory references to computer-generated images and depictions not involving possible child abuse to actual children in their creation should be removed. The Department notes that the Supreme Court in *Ashcroft* v. *Free Speech* Coalition determined that virtual child pornography could not be constitutionally prohibited under that statute, which did not require that the material be either obscene or the product of sexual abuse. The ruling does not, however, restrict the government's ability to ensure that performers in sexually explicit depictions are not in fact children. Nevertheless, the Department has made a slight change to the final rule in response to these comments by clarifying that the rule applies to those who digitally manipulate images of actual human beings but not to those who generate computer images that do not depict actual human beings (*e.g.*, cartoons).

Thirty-three commenters commented that the rule included an improper starting date from which records must be maintained. These commenters claimed that the Department previously stated, in accordance with the court's order in *American Library Ass'n* v. *Reno*, Civil Action No. 91–0394 (SSS) (D.D.C. July 28, 1995), that July 3, 1995, was the effective date for enforcement of section 2257. Nevertheless, the commenters said, §§ 75.2(a), 75.6, and 75.7(a)(1) of the proposed rule refer to November 1, 1990, and §§ 75.2(a)(1) and (2), 75.6, and 75.7(a)(1) refer to May 26, 1992. The commenters argued that the effective dates of the regulation should be changed to be consistent with the Department's representations or, in the alternative, made purely prospective in order to provide producers a chance to comply. Further, they argued, no obligations should be imposed concerning images made prior to the effective date.

Based on the Department's decision not to appeal *American Library Ass'n* v. *Reno* and its representation regarding the effective date of the regulation to non-parties to *American Library Ass'n* v. *Reno*, the Department has amended the proposed rule and in the final rule makes July 3, 1995, the effective date of the regulation and imposes no obligations on producers concerning sexually explicit depictions manufactured prior to that effective date.

Several commenters commented that the provision permitting seizure of records is unconstitutionally broad, could lead to prior restraint, and does not define what specific materials may be seized. The Department declines to adopt this comment. The Department notes that the regulatory and inspection scheme outlined in the final rule is a constitutional exercise of government power and, therefore, the presence of a law enforcement officer on the premises of the entity being inspected is authorized. In such a case, evidence of a crime may be seized by a law enforcement officer under the plain-view exception to the Fourth Amendment warrant requirement, and the materials seized do not need to be specifically described in the regulation that authorized the inspection.

Four commenters objected to the inclusion in the definition of producer of parent organizations and subsidiaries of producers, claiming it was beyond the Department's statutory authority, did not specify which entities must comply with the statute, overrode state laws on business associations, and violated the principles of *Sundance Assoc., Inc.* v. *Reno*. While not confirming the validity of, or adopting, the specific objections of the commenters, the Department has eliminated the inclusion of parent and subsidiary organizations in the definition of producer.

Citing *American Library Ass'n* v. *Reno*, three commenters claimed that the proposed rule's requirement to ascertain performers' aliases appeared to impose an obligation on the producer to verify all aliases, whereas, according to them, *American Library Ass'n* v. *Reno* requires only that the producer obtain the aliases from performers themselves. Three commentators claimed that the proposed rule's requirement that information in the label be accurate as of the date on which material is sold violates *American Library Ass'n* v. *Reno*, which required accuracy on the date the material was produced or reproduced.

The Department, having reviewed *American Library Ass'n* v. *Reno*, agrees with the commenters that minor changes should be made to the proposed rule for publication as a final rule in order to comply with the D.C. Circuit's decision. The final rule clarifies that the producers may rely on the representations regarding aliases that

performers make and are not obligated to investigate further. In addition, the final rule requires that information in the label be accurate as of the date the material is produced or reproduced.

The Department rejects, however, two commenters' claims that the Department does not have authority to require a date on the label in the first instance. Although section 2257 does not explicitly require a date on the label, the Attorney General has the statutory authority to issue appropriate regulations to implement the section and has determined that the purposes of the section cannot be accomplished without such a date. There would be no way to determine whether a performer is underage without knowing the date that the material was produced or reproduced.

Two commenters commented that the proposed rule did not exempt printers, film processors, and video duplicators from the definition of producer, as required by *American Library Ass'n* v. *Reno*. The Department adopts this comment, and the final rule provides such an exemption.

One commenter commented that section 2257 was restricted to producers of sexually explicit material that was produced with materials that had traveled in interstate or foreign commerce or was intended to be shipped, or was in fact shipped, in interstate or foreign commerce, while the proposed rule applied to ''[a]ny producer'' of any sexually explicit depiction with no such limitation. The Department agrees that the regulation needs to contain the same federal jurisdictional nexus as the statute. The Department has therefore accordingly amended the proposed rule so that the final rule contains a limitation such that it applies only to producers of material that was produced with materials that had traveled in interstate or foreign commerce or was intended to be shipped, or was in fact shipped, in interstate or foreign commerce.

One commenter commented that protecting children could be accomplished by requiring a credit card to access a pornographic website. The commenter apparently erroneously confused this regulation, which is designed to protect children from being exploited as performers, with protecting children from viewing pornography, which is the subject of other statutes and regulations. No change is being made in response to this comment.

Vagueness/Overbreadth

Thirty-two commenters commented that the definitions of URL and URL associated with the depiction are vague. According to the commenters, it is not clear what constitutes a copy of a Web page, which may be constantly changing, for purposes of maintaining a copy of the depiction. The commenters claim that some sites may use technologies that may not even use a URL for downloading a picture (*e.g.*, peer-to-peer systems, telephonic bulletin boards, and other technologies). Furthermore, they claim, requiring the use of certain technologies to comply with the statute presents a situation in which unconstitutional restrictions are placed upon the manner and media in which content is presented. The Department declines to adopt this comment with regard to the concern that web pages are constantly changing. It is for this very reason that the proposed rule required producers to maintain copies of every iteration of a web page in order to create a record of which performers were featured over the course of time. The Department adopts this comment insofar as it notes that some sites do not utilize URLs for downloading, and will modify the rule to require records of the URL or, if no URL is associated with the depiction, another uniquely identifying reference associated with the location of the depiction on the Internet.

In addition, thirty-three commenters commented that it is unclear whether the term copy in the rule refers to only digital images, computer-generated images, and web cam images, or whether there must be a copy of the image that was in the magazine and film in the records, as well. The Department has amended the rule to clarify that there must be copy of any and every depiction, whether digital, computer-generated, print in a magazine, or on film. Maintaining copies of each depiction is critical to making the inspection process meaningful, whether those copies be in digital, paper, or videotape format. Reviewing identification records in a vacuum would be meaningless without being able to cross-reference the depictions, and having the depictions on hand is necessary to determine whether in fact age-verification files are being maintained for each performer in a given depiction. In addition, without the depictions, inspectors could not confirm that each book, magazine, periodical, film, videotape or other matter has affixed to it a statement describing the location of the records, as required by the existing regulations.

Twenty-four commenters commented that the exclusion of providers of web-hosting services who do not manage the content of the site or service is vague and may be under-inclusive because some services manage or control certain website content, *e.g.*, advertisements, but not the sexually explicit content. According to the commenters, it is similarly unclear whether editing content only for copyright infringement purposes would constitute control of content. The Department adopts this comment. The exclusion of providers of web-hosting services who reasonably cannot manage the content of the site will be clarified to exclude providers of web-hosting services who reasonably cannot manage the sexually explicit content of the site (for either technical or contractual reasons).

Three commenters also commented that the definition of secondary producers as those who ''manage content'' on a computer site could be construed to include those who operate posting services such as Usenet, bulletin boards, and other similar services. According to those commenters, someone who removes illegal material such as child pornography could thereby submit themselves to the requirements of Part 75, while if that person did not remove such material, the person would be liable to prosecution for hosting child pornography. The Department declines to adopt this comment. Operators of such sites are obligated by law to remove child pornography from their sites and to report the attempt to post such pornography to law enforcement. Compliance with that legal obligation could not be construed as converting the operator into a producer of pornography for purposes of section 2257 and this regulation.

Five commenters commented that the definitions of producer and secondary producer would encompass on-line distributors of pornography who digitize the covers of videos, DVDs, and magazines but are not involved in the actual production of the material. One of these commenters also claimed that the definition of producer should be changed to allow on-line distributors to rely upon records provided to them by the immediately preceding secondary producer, in accordance with the Department's representation to the court in *American Library Ass'n* v. *Reno.* The Department declines to adopt these comments. The definition of producer is of necessity broad enough to encompass those who digitize images—even for distribution purposes—because in so doing, a new sexually explicit depiction is created. The Department has determined that it is not possible to change the definition in such a way as to exclude distributors while not also creating an unacceptable loophole in the coverage of the regulation. This

definition does not alter the Department's representation to the court in *American Library Ass'n* v. *Reno,* and it remains true that a secondary producer not in privity with the primary producer may rely upon records provided to it by the immediately preceding secondary producer. However, on-line distributors who digitize depictions on the covers of videos, DVDs, magazines, and other material such that new depictions are created and displayed on the Internet are covered by the definition of producer and must maintain the required records.

Three commenters commented that it is unclear whether the requirement that the statement include date of production, manufacturing, publication, duplication, reproduction, or re-issuance must include all of the listed events or only one. In addition, according to these commenters, the only relevant date for the statute's purposes is the date of creation, *i.e.*, the date the actual live event was depicted. Finally, claimed these commenters, the term date of production is also vague in that it is not clear how a producer should date a film made over several days. The Department declines to adopt this comment. Given the statute's purpose of protecting minors against sexual exploitation, with respect to primary producers, clearly the date of production is the most pertinent because it will reflect the youngest age of the performer involved. Secondary producers should list whichever date or dates are relevant to their conduct. Moreover, this requirement already existed before the proposed rule was published, and therefore, this comment does not pertain to the proposed rule. *See* 28 CFR 75.6(a)(2) (2003).

Two commenters commented that the definition of picture identification card is vague, in particular because it does not include documents issued by a foreign government but does include as an example a foreign passport. In response to these comments, the Department has clarified that the definition includes a foreign government-issued passport or any other document issued by a foreign government or a political subdivision thereof only when both the person who is the subject of the picture identification card and the producer maintaining the required records are located outside the United States. The definition also clarifies that it includes a U.S. government-issued Permanent Resident Card (commonly known as a ''Green Card'') or other U.S. government-issued Employment Authorization Document.

Two commenters commented that the proposed rule did not define qualifications for, or process for authorization of, inspectors. The Department declines to adopt this comment. Through 18 U.S.C. 2257 Congress has authorized the Attorney General to inspect records, and the Attorney General may delegate this authority to any agency deemed appropriate by virtue of the Attorney General's delegation authority under 28 U.S.C. 510.

One commenter commented that the inclusion in the definition of secondary producer of anyone who ''enters into a contract, agreement, or conspiracy'' to produce a sexually explicit depiction was irrational because such a person was not likely to have had a relationship with the performer and may not have had knowledge of the content of the depiction. The Department declines to adopt this comment. The statute contemplates such relationships as being covered by its requirements.

One commenter commented that the definition of a primary producer as anyone who ''digitizes an image'' could be read to include anyone who scans or digitizes a photograph or negative. The commenter suggested that someone who performs that activity should be exempted from the record-keeping requirements in the same way that photo processors are exempt under § 75.1(c)(4)(i). The Department adopts this comment and has clarified in the final rule that someone who solely digitizes a pre-existing photograph or negative as part of a commercial enterprise and has no other commercial interest in the production, reproduction, sale, distribution, or other transfer of the sexually explicit depiction is exempt from the requirements of § 75. As reflected in the phrase ''has no other commercial interest in the production, reproduction, sale, distribution, or other transfer of the sexually explicit depiction,'' this definition is intended to apply to businesses that are analogous to photo processors in their lack of commercial interest in the sexually explicit material, and who are separate and distinct from the on-line distributors of pornography who digitize the covers of videos, DVDs, etc., who are included in the definition of secondary producer, as discussed above.

One commenter commented that the requirement regarding the placement of the statement in films and videotapes in § 75.8 was unclear as to whether the statement was required in the ''end credits,'' ''end titles,'' or ''final credits'' and what constituted those sections of the film. The commenter also suggested that § 75.8(b) and (c) be combined more easily to describe the placement of the statement. The Department adopts this comment. It has combined § 75.8(b) and (c) and clarified that the statement must appear in the end credits of films and videotapes that have such end credits, which are defined as the section of the film that lists information about the production, direction, distribution, names of performers, or any other matter that is normally understood as constituting ''end credits'' of a commercial film or videotape.

One commenter commented that the definition of sell, distribute, redistribute, and re-release in § 75.1(d) is redundant because it restricts the terms to their commercial meaning but then notes that the terms do not apply to noncommercial or educational distribution. In addition, the commenter comments, it provides examples of the type of education institutions whose distributions would not be covered. According to the commenter, this list is also redundant. The Department declines to adopt this comment. The definition's plain language is not redundant; rather, it is as specific as possible regarding what is commercial and what is noncommercial. In addition, the examples clearly constitute a non-exhaustive list of institutions and clarify the meaning of the term noncommercial.

One commenter commented that the rule should define the term transfer, as used in section 2257, in order to, *e.g.*, specify whether the statement is required if a husband mails to his wife a sexually explicit videotape depicting the couple engaged in consensual sexual activity. The Department declines to adopt this comment. The Department believes that the definition of sell, distribute, redistribute, and re-release in § 75.1(d) subsumes the statute's use of the term transfer, which is not used in the proposed or final rule in a way requiring definition. In addition, the definition in § 75.1(d) makes clear that only commercial transfers are covered and the hypothetical transfer that the commenter posits would by the plain meaning of the rule never be covered.

One commenter commented that the requirement that the statement appear on the home page of a Web site is vague because many web sites operate with subdomains, making the actual homepage or principal URL difficult to identify. The Department declines to adopt this comment. Subdomains, as the name implies, are URLs that share the top-level domain name's basic URL and have additional identifying address information to provide additional content on a separate Web page. Each subdomain thus has its own homepage

and each homepage must feature the statement. For example, *http://www.usdoj.gov* is the full domain name of the Web site of the Department of Justice. *http://www.usdoj.gov/criminal* is the Web page of the Criminal Division, which is hosted by the Department's Web site. Under this rule, *http://www.usdoj.gov* would be required to have a statement and that statement would cover anything contained on *http://www.usdoj.gov/criminal.* However, *http://www.ojp.usdoj.gov* is a subdomain of the full domain *http://www.usdoj.gov* and would be required to have its own statement on that page, which would then cover any material on a Web page linked to it, such as *http://www.ojp.usdoj.gov/ovc/,* the Web page of the Office for Victims of Crime.

One commenter commented that the exception under § 75.1(c)(4)(iv–v) for Web hosting, electronic communication, and remote computing services should be extended to 18 U.S.C. 2257(f)(4). Providers of Web hosting, bulletin boards, or electronic mail services could be found liable for not ascertaining that the appropriate label was affixed to a depiction transferred by one of their users. The Department declines to adopt this comment, which would require an amendment to the statute and is beyond the authority of the Department to change by regulation. Moreover, the Department notes that 18 U.S.C. 2257(f)(4) makes it a crime for a person ''knowingly to sell or otherwise transfer'' any sexually explicit material that does not have a statement affixed describing the location of the records. Thus, knowledge on the part of the transferor is an element of the offense.

One commenter commented that the proposed rule's record-keeping requirements were troublesome in light of the 2003 amendment to section 2257(d), which authorizes the use of such records as evidence in prosecuting obscenity or child pornography cases. According to the commenter, this violates the Fifth Amendment right against mandatory self-incrimination. The Department declines to adopt this comment, for two reasons. First, the comment is not directly related to the rule but rather is directed at the statute. Second, the amendment to section 2257(d) does not violate the Fifth Amendment since some sexually explicit materials are protected speech and not obscene. Hence, the reporting requirement is not directed at ''a highly selective group inherently suspect of criminal activities.'' *Albertson* v. *Subversive Activities Control* Bd., 382 U.S. 70, 79 (1965).

One commenter commented that the definition of producer is too broad, such that one depiction may have multiple primary producers, including, *e.g.,* the photographer and a different individual who digitizes the image. The commenter argued that the definition should be written so that each depiction has only one primary producer. The Department declines to adopt this comment. The Department does not believe that logic, practicability of record-keeping or inspections, or the statue dictates that there be one and only one primary producer for any individual sexually explicit depiction. Any of the persons defined as primary producers has easy access to the performers and their identification documents and should therefore each have responsibility individually and separately of maintaining the records of those documents.

Two commenters commented that the definition of producer in the proposed rule was too broad and would encompass a convenience store that sold sexually explicit magazines or a movie theater that screened R-rated movies. The Department declines to adopt this comment. As the rule makes clear, mere distributors of sexually explicit material are excluded from the definition of producers and under no plausible construction of the definition would a movie theater be covered merely by screening films produced by others.

One commenter commented that it was not clear in the proposed rule whether, in cases in which it is discovered that a performer is underage, the possessors of those images are required to destroy copies of images required in the records in order to comply with the child pornography laws. The Department declines to adopt this comment because existing statutes make clear that it is unlawful knowingly to produce, advertise, distribute, transport, receive, or possess child pornography. *See* 18 U.S.C. 2251, 2252, and 2252A. Producers, like all citizens, must comply with those statutes. Nothing in the rule changes or obscures these existing legal obligations. Furthermore, there is a good-faith defense to possession of child pornography for the destruction or reporting to law enforcement of its existence. *See* 18 U.S.C. 1466A(e).

Burdensomeness

Thirty-six commenters commented that even if the effective date were changed to July 3, 1995, the regulation would be overly burdensome on secondary producers because producers would be required to obtain records for thousands—even hundreds of thousands—of sexually explicit depictions dating back a number of years. These commenters claimed that secondary producers would likely be unable to locate many of those records from primary producers who may have moved, shut down, or otherwise disappeared. According to the commenters, those secondary producers who could not locate such records would be forced to remove the sexually explicit depictions, which would be a limit on constitutionally protected material.

The Department declines to adopt these comments. Producers were on notice that records had to be kept at least by primary producers for depictions manufactured after July 3, 1995. In addition, commenters were similarly on notice that the D.C. Circuit, in *American Library Ass'n* v. *Reno,* had upheld the requirement that secondary producers maintain records. The Department is not responsible if secondary producers chose to rely on the Tenth Circuit's holding in Sundance and not to maintain records while ignoring the D.C. Circuit's holding in *American Library Ass'n* v. *Reno.* A prudent secondary producer would have continued to secure copies of the records from primary producers after July 3, 1995. If those records, which are statutorily required, are not currently available, then the commenters are correct that they will be required to comply with the requirements of all applicable laws, including section 2257(f). They are incorrect, however, to claim that this would result in an impermissible burden on free speech. As the D.C. Circuit held, the government has a compelling state interest in protecting children from sexual exploitation. If the producers (primary and secondary) of sexually explicit depictions cannot document that children were not used for the production of the sexually explicit depictions, then they must take whatever appropriate actions are warranted to comply with the child exploitation, obscenity, and record-keeping statutes. The First Amendment is not offended by making it unlawful knowingly to fail or refuse to comply with the record-keeping or labeling provisions of this valid statute.

Two commenters commented that secondary producers should not be required to maintain records at all because they are not proximate enough to the production of the depictions to secure the requisite information, and their retention of records would not further the purpose of the statute. One commenter commented that secondary producers should only be required to

retain on file the contact information for the primary producers' custodians of records. The Department declines to adopt these comments. As publishers of sexually explicit material, secondary producers are equally responsible for protecting minors from exploitation as the primary producers who photograph sexually explicit acts. Most importantly, secondary producers are equally covered by the terms of section 2257. In addition, the D.C. Circuit in *American Library Ass'n* v. *Reno,* held that such a requirement was not unconstitutionally burdensome.

Thirty-five commenters commented that the indexing and cross-indexing requirements are unduly burdensome and argued that the records should be indexed only by the performer's legal name, the name used in the depiction, or the title of the depiction. The Department declines to adopt these comments. As the D.C. Circuit held in *American Library Ass'n* v. *Reno,* the indexing and cross-indexing requirements were not unduly burdensome. Word-processing, bookkeeping, and database software commonly in use by businesses and even for home computers can accomplish the indexing and cross-indexing required by the rule. The Department continues to believe that investigators must be able to access records through cross-indexing in order to ensure completeness and to enable investigation on the basis of less-than-full information.

Thirty-two commenters commented that the requirement that a copy of each depiction be maintained would be unduly burdensome, leading to vast stocks of magazines and videotapes, and even storage of computer images would be unmanageable and prohibitive for small businesses. Thirty-five commenters also commented that the requirement to keep copies of each image is impossible to comply with due to the vast amount of data involved in storing digital images, especially, *e.g.,* producers of live streaming video. The Department declines to adopt these comments. Maintaining one copy of each publication, production, or depiction is critical to making the inspection process meaningful. Commercial publishers and producers can reasonably be expected to comply. Furthermore, modern computer and disk storage capacities make digital archiving and back-up relatively inexpensive and space-efficient. Finally, reviewing identification records in a vacuum would be meaningless without being able to cross-reference the depictions, and having the depictions on hand is necessary to determine whether in fact age-verification files are being maintained for each performer in a given depiction. In addition, without the depictions, inspectors could not confirm that each book, magazine, periodical, film, videotape or other matter has affixed to it a statement describing the location of the records, as required by the existing regulations. Exceptions cannot be made for producers of digital depictions, and indeed, it is likely less onerous to store digital images than paper images. Children are just as easily exploited in live streaming video as in any other visual medium. Therefore, an exception cannot be made for producers of live streaming video.

Thirty-nine commenters commented that the requirement that records be available for inspection during specified normal business hours and any time business is conducted would be impossible for small businesses to meet, especially those run on a part-time basis or during non-traditional hours. These commenters pointed out that the prior regulations simply provided that the availability be reasonable. The Department adopts this comment. The Department can accept that the producers of the sexually explicit depictions subject to the statute do not necessarily maintain traditional 9 a.m. to 5 p.m. business hours. Accordingly, the rule will be adjusted to permit inspections during the producer's normal business hours. To the extent the producer does not maintain or post regular business hours, producers will be required to provide notice to the inspecting agency of the hours during which their records will be available for inspection, which must total no less than twenty (20) per week, in order to permit reasonable access for inspectors.

Thirty commenters commented that the proposed rule's requirement that the statement appear on the homepage of a Web site would lead to excessively lengthy statements that could deter viewers from downloading site content. The commenters suggested that web sites should be permitted to provide links that open windows to complex disclosure statements. In response to these comments, the Department has amended the proposed rule such that the final rule permits web sites to contain a hypertext link that states, ''18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement,'' that will open in a separate window that contains the required statement.

Five commenters commented that the requirement that copies of each image be kept together with the records would interfere with the requirement that records be segregated. According to these commenters, hard copies of depictions cannot, by definition, be held together with electronic copies, and if computer records are kept, it is not possible for a producer to segregate records stored on a computer because they are all found on the same storage device. Further, claimed the commenters, the requirement under § 75.2(e) that records be segregated from other records, not contain other records, or be contained within other records is vague. They claimed that it is unclear whether copies of records may never be in any other company files, which would be an irrational requirement and would open inadvertent misfilings to criminal prosecution.

The Department declines to adopt this comment. The requirement that records maintained pursuant to section 2257 be segregated not only streamlines the inspection process but protects producers from unbridled fishing expeditions. Inspectors should not be faced with situations in which they have to sift through myriad filing cabinets to find the records they are seeking, and producers should not be faced with the risks that such exploration might create. Hard copies, electronic copies, or files consisting of both can be segregated in separate storage containers or hard drives (or even in separate directories or folders on a hard drive) in/on which no other records are held. Two commenters commented that the implicit requirement that records be kept at a place of business is unreasonable and argued that the regulation should permit third-party custody of records. The Department declines to adopt this comment. Permitting a third party to possess the records would unnecessarily complicate the compliance and inspection processes by removing the records from the physical location where they were initially collected, sorted, indexed, and compiled. For example, producers could provide false names and addresses to the third party as a means to avoid scrutiny by law enforcement. Historically, producers have used front corporations in order to evade both law enforcement and tax authorities. Permitting third-party custodianship would exacerbate this problem. Custodians could, for example, disclaim any responsibility for the condition or completeness of the records or be unable to provide additional information regarding the status of the records. Permitting such third-party custodians in the final rule would thus require additional regulations to ensure that the third-party custodian could guarantee the accuracy

of the records, would act as a legally liable agent of the producer, and would raise other administrative issues as well.

Furthermore, permitting a third party to maintain the records would, if anything, exacerbate the concerns of numerous commenters regarding the privacy of information on performers and businesses by placing that information in the hands of another party.

Three commenters commented that the record-shifting requirements under §§ 75.2(a) and (b) are impermissibly burdensome. According to the commenters, primary producers would resist turning over records that contain trade secrets, such as the identities of performers. The Department declines to adopt these comments. The D.C. Circuit Court clearly held in *American Library Ass'n* v. *Reno* that the record-keeping requirements were not unconstitutionally burdensome. Any primary producer who fails to release the records to a secondary producer is simply in violation of the regulations and may not use the excuse that the records contain alleged trade secrets to avoid compliance.

Three commenters commented that the requirement that the statement appear in font size equal in size to the names of the performers, director, producer, or owner, whichever is larger, and no smaller in size than the largest of those names, and in no case in less than 11-point type, in black on a white, untinted background amounts to forced speech, would ruin the aesthetic quality of web pages and other media, and is impractical. Another commenter commented that the requirement that the statement appear in a certain typeface cannot apply to web sites, whose appearance depends on the viewer's computer. In response to these comments, the Department has revised final rule to require that the statement appear in typeface that is no less than 12-point type or no smaller than the second-largest typeface on the website, and in a color that contrasts with the background color. Regarding the claim that such an administrative label constitutes forced speech, the Department notes that the federal government imposes a range of such requirements, such as nutritional labels on food products and safety warnings on a myriad of products.

Two commenters commented that the length of retention of records was too long and could multiply to include excessively long periods of time. The commenters also claimed that the periods of time in the proposed rule were contrary to the D.C. Circuit's opinion in *American Library Ass'n* v. *Reno.* The Department declines to adopt this comment. The regulation provides for retention of records for seven years from production or last amendment and five years from cessation of production by a business or dissolution of the company. The Department does not believe that these limits are unreasonable. The only way to satisfy the commenters' objection that the periods of time can multiply would be to impose a blanket short period of time no matter what changes to the records were made. Such a change would frustrate the ability to ensure that records were maintained up-to-date and prevent inspectors from examining older records to determine if a violation had been committed. In addition, the time periods, contrary to the claim of the commenters, do not violate *American Library Ass'n* v. *Reno.* In that case, the D.C. Circuit held that § 75 could not require records to be maintained for as long as the producer remained in business and allowed a five-year retention period ''[p]ending its replacement by a provision more rationally tailored to actual law enforcement needs.'' 33 F.3d at 91. The Department has determined that the seven-year period is reasonable, thus satisfying the court's directive. The production of child pornography statute of limitations was increased in the PROTECT Act from five years to the life of the child, and the increase contained in the regulation seeks to comport with that extended statute of limitations.

Finally, the Department wishes to clarify that the statute requires that each time a producer publishes a depiction, he must have records proving that the performers are adults. Thus, if a producer purges his or her records after the retention period but continues to use a picture for publication, the producer would be deemed in violation of the statute for not maintaining records that the person depicted was an adult. Records are required for every iteration of an image in every instance of publication.

One commenter objected to the proposed rule's lack of prior announcement of inspections. Advance notice, the commenter stated, would allow producers to put records in proper order and ensure that someone would be on the premises when investigators visited. The rule should specify what happens in cases in which no one is present when the investigator arrives. The Department declines to adopt this comment. Advanced notice would provide the opportunity to falsify records in order to pass inspection. Lack of specific case-by-case notice prior to inspection will promote compliance with the statute and encourage producers to maintain the records in proper order at all times, as is contemplated by the statute. The rule will specify that inspections are to occur during the producer's normal business hours. The inspection process clearly does not contemplate warrantless forced entry solely because no one is present when the investigator arrives.

One commenter commented that the proposed rule appeared to require hard copies of records and suggested that digital copies be permitted in order to simplify storage and indexing. The Department adopts this comment. Records may be maintained in either ''hard'' (paper) form or digital form, provided that they include scanned forms of identification and that there is a custodian of records who can authenticate each digital record. The regulation has been revised to clarify this point.

One commenter commented that the regulation should permit the statement to be located on main menu screen of a DVD, rather than requiring the statement to appear in the movie itself. The Department declines to adopt this comment. The statement cannot be severed from the actual depiction because that could lead to confusion on the part of the public as to the applicability of the statement in cases, for example, when there is more than one film on a DVD or when a movie on a DVD is also available in other contexts in which the statement must be appended (*e.g.*, posted on a Web site).

One commenter commented that the list of acceptable forms of performer identification in the proposed rule is unduly restrictive and argued that college and employer identification cards should be acceptable. The Department declines to adopt this comment. The regulation properly requires a government-issued identification document because other forms of identification are too susceptible to forgery to accomplish the purposes of the Part.

One commenter who supported the proposed rule stated that he created a system to help webmasters comply with the rules and protect the identity of individuals depicted in the images while allowing verification by law enforcement. The commenter stated that no webmasters took advantage of his system because, he said, they believe that there is an extremely remote possibility of being prosecuted for non-compliance and that the Sundance ruling protects them. The comment tends to demonstrate that the claim by industry groups that the rule is unconstitutionally burdensome is

exaggerated. Nonetheless, the Department does not endorse this commenter's particular system as it has no means to determine whether the system actually works.

One commenter commented that the provision for inspections every four months is too frequent and is an invitation for harassment. Some businesses are so small and static that the required records are unlikely to change over a particular four-month period. The Department declines to adopt this comment. The regulations necessarily are designed to provide an adequate inspection interval for the most prolific producers as well as the relatively small-scale producers. The Department has determined that limiting the frequency of inspections to every four months will allow inspectors to keep pace with major producers while at the same time avoid excessive inspections of smaller producers. Moreover, four months denotes the maximum frequency of inspections; inspectors may inspect less frequently at their discretion.

Privacy

Sixty-two commenters commented that revealing personal information of performers, for example, in the form of their addresses on drivers' licenses used as identification documents in compliance with this regulation, is an invasion of performers' privacy and could lead to identity theft or violent crimes. Forty commenters commented that including the names and addresses of businesses where the records at issue are located would similarly lead to crimes against those businesses. The Department declines to adopt these comments. While the Department is certainly concerned about possible crimes against performers and businesses that employ them, the necessity of maintaining these records to ensure that children are not exploited outweighs these concerns. Furthermore, specifically regarding personal information about performers required to be provided to primary producers, the Department notes that the information required is no different from that required by other forms of employee or business records, such as social security numbers and dates of birth required for tax reporting purposes, emergency contact numbers in case of health problems, or addresses used to transmit paychecks. Regarding information about producers, such as their physical location, that those producers must include in their statements, the Department notes that producers are already required, under the current Part 75 regulations, to include that information. Finally, regarding personal information about performers that must be transmitted to secondary producers, the Department again notes, first, that such information is already required by the current Part 75 regulations, and, second, that none of the commenters presented any evidence that a hypothetically possible crime, such as the stalking of a performer, was in any way tied to the dissemination of the information about a performer provided to a producer in compliance with Part 75.

Another commenter proposed that secondary producers be required to store sanitized (*i.e.*, without personal information such as home address) hard or digital copies of performers' identification documents along with a notarized affidavit from the primary producer stating the location of the complete records. The Department declines to adopt this comment. Although the Department understands the commenter's desire to protect private information about performers from being too widely disseminated, it believes that the suggested plan would be overly burdensome on primary producers and add an unnecessary layer of complexity to the record-keeping process. Primary producers would be required first to sanitize the identification documents and then to draft, sign, and pay for a notarized affidavit. It is simpler and less burdensome simply to have primary producers transfer a copy of the records to secondary producers.

One commenter also commented that the proposed rule may force foreign primary producers to violate foreign laws regarding protection of information. If primary producers in foreign countries decide to comply with their home privacy laws and not provide materials to U.S. entities, the regulation will chill the availability of materials and speech to U.S. citizens. The Department declines to adopt this comment. The rule is no different from other forms of labeling requirements imposed on foreign producers of, *e.g.*, alcohol, tobacco, or food items that are imported into the United States. In order to sell in the U.S. market, foreign producers must comply with U.S. laws. This rule applies equally to any sexually explicit material introduced into the stream of commerce in the United States no matter where it was produced. Foreign producers have the option of not complying with the rule, but then their access to the U.S. market is justly and lawfully prohibited.

Miscellaneous

Five commenters commented that the proposed rule would hurt U.S. businesses and remove money from the U.S. economy by driving the pornography industry to other countries. In addition, these commenters claimed, most sexually explicit web sites are, in any event, already located in other countries and the rule would be ineffective in regulating them. Similarly, one commenter commented that the proposed changes will be ineffective in addressing the problem of child pornography because most, if not all, of child pornography web sites are located outside the United States.

The Department disagrees with these comments. First, the purpose of the statute, and the rule to implement it, is not to drive the pornography industry out of the United States. Rather, the purpose is to protect children from sexual exploitation, and the rule is designed to do so while not burdening protected speech. The D.C. Circuit, in *American Library Ass'n* v. *Reno*, held that the current regulations are not unconstitutionally burdensome, and the final rule is merely a refinement and update of those regulations. Thus, the pornography industry should not in fact be driven overseas. Indeed, the commenters do not provide any evidence either for their proposition that most sexually explicit web sites are in fact based abroad or for their proposition that those web sites that are located in the United States will relocate. Second, the Department does not currently exercise jurisdiction over foreign web sites, but it must promulgate regulations within its legitimate jurisdiction in the United States in order to accomplish the purpose of the statute.

Two commenters suggested that rather than regulating sexually explicit Web sites, the Department should invest more resources into fighting child pornography through education of parents and children and through enhanced criminal investigation. In response, the Department points out that it currently invests significant resources in criminal investigation and prosecution of child pornography and in other activities to promote the protection of children. The final rule is part of this effort and is aimed at preventing any child pornography from being produced under the guise of constitutionally protected sexually explicit depictions and must necessarily require legitimate businesses to maintain the records at issue. One commenter supported the Department's

position, as the commenter stated, because of concern about exploitation of children.

One commenter commented that certain types of files—*e.g.*, .jpeg and .gif photos—cannot have a statement appended when uploaded. The Department declines to adopt this comment. The rule makes clear that whenever Internet depictions are involved, the statement must appear on the website's home page, not on the image itself.

One commenter commented that the term technologies is improperly used in § 75.1(a), which states that the proposed rule's definitions of terms ''are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes * * *.'' The Department declines to amend the proposed rule in response to this comment. The Department believes the commenter may have misunderstood the sentence. As § 75.1(a) explains, the definitions in the rule are not used in their technical senses and do not, therefore, exclude any particular type of technology, or technologies, currently existing or invented in the future on the basis of the language used in the Part.

The same commenter objected to the proposed rule's use of the phrase ''myriad of'' in the definition of the term Internet in § 75.1(f). The Department declines to adopt this comment. According to Merriam-Webster's Collegiate Dictionary (11th ed., 2003), ''Recent criticism of the use of myriad as a noun, both in the plural form myriads and in the phrase myriad of, seems to reflect a mistaken belief that the word was originally and is still properly only an adjective * * *. The noun myriad has appeared in the works of such writers as Milton (plural myriads) and Thoreau (a myriad of), and it continues to occur frequently in reputable English. There is no reason to avoid it.'' Merriam-Webster's Collegiate Dictionary 821 (11th ed., 2003).

One commenter commented regarding a minor drafting error in which § 75.2(a)(1) of the proposed rule incorrectly referenced the definition of an identification document in 18 U.S.C. 1028. The Department has eliminated entirely the reference to 18 U.S.C. 1028, which is redundant in light of the final rule's defined term picture identification card.

One commenter suggested that the regulation state that no person convicted of pedophilia, endangerment of a minor, or any sexual misconduct involving a minor be eligible to produce sexually explicit material or act as custodian of records required by the regulation. The Department is unable to adopt this comment, because the suggestion goes beyond the Department's authority to implement the statute.

Two commenters suggested alternative means to implement the statute. One suggested that the Department establish a national ''sex ID'' system with which performers would register with the government in a national database. In the commenter's scheme, the model would receive an ID number that would be superimposed on images of the performer, enabling federal law enforcement officers to determine compliance with the rule by cross-referencing the ID numbers with the database. Another suggested that each producer store required identification records, indexed by URL, on a computer server in a password-protected folder made available to law enforcement. The Department declines to adopt these suggestions because it believes that they would be more burdensome on both the Department and producers to create, implement, and manage than the record-keeping system established by the rule. In addition, creation of such systems would likely require several years' work and delay implementation of the statute's record-keeping requirements.

Similarly, two commenters suggested specific additions to the record-keeping requirements in the proposed rule. One commented that two forms of identification should be required of performers. The Department declines to adopt this comment because it believes that one form of valid photo identification is sufficient to establish the identity and age of the performer and that requiring more would be overly burdensome on businesses and performers themselves.

One commenter commented that the exemption statement in the rule is unnecessary and redundant because if no statement is necessary, then the regulation does not apply and no statement of any kind can be required. The Department declines to adopt this comment for three reasons. First, the Department notes that the exemption-statement requirement was included in the previous version of the regulation. Second, the commenter is wrong to state that it is redundant. Since a primary or secondary producer could possess various sexually explicit depictions, some subject to the regulation and some not, it would be necessary for the producer to label both types, rather than only label those that are subject to the rules and give the impression both to the public and to government inspectors that the producer is not in compliance with the regulation. Third, the lack of an exemption statement could lead to a waste of resources by prompting inspections where none were needed because, unbeknownst to the inspector, the producer was exempt from the regulation.

One commenter commented that Internet Presence Providers (IPPs) should receive the same exemption from the rule as Internet Service Providers (ISPs). The Department understands that IPPs are similar to ISPs in that they both act as hosts for web pages that are created and owned by other persons. It appears, however, that IPPs can also take on other responsibilities, including managing the operations of web sites themselves. The Department has amended the proposed rule to exclude web-hosting services to the extent that their employees are not, and cannot reasonably be, engaged in managing the sexually explicit content of the site (for either technical or contractual reasons). The Department does not believe it is appropriate to provide a blanket exemption from the regulation for IPPs because it would enable owners of such web sites to disclaim responsibility for complying with the regulation by asserting that the IPPs are actually engaged in regulated activities while also exempting IPPs in toto, thus leading to a gap in coverage of producers.

One commenter commented that the regulation should specify that a record-keeper may refuse to speak to an investigator or may leave the premises during an investigation, so that no questions arise regarding whether the inspection rises to the level of custodial interrogation. The Department declines to adopt this comment. A record keeper's conduct during an inspection will not be regulated. To the extent that it becomes necessary in any given case, both the government and the individual will have available to them the full panoply of constitutional and legal protections and authorities to allow a court to determine, in the normal course of any prosecution that may arise and on a case-by-case basis, whether a custodial interrogation occurred at the time of inspection, and will bear the consequences of the court's determination.

One commenter commented that the proposed rule did not define how an inspector could copy physical or digital records during an inspection. The Department declines to adopt this comment. The inspectors will avail themselves of a portable photocopier or means to copy digital records (*e.g.*, computer disks) as needed, and the final

rule does not need to include details such as these.

One commenter commented that it is unclear whether a producer that provides content to a secondary producer must maintain a list of its URLs. According to the commenter, keeping such a list would be impossible, given the number of URLs and the fact that many URLs are generated dynamically, making the requirement technologically impossible. Further, claimed the commenter, if a URL is required to be indexed with an identification record, one URL (the site entrance) should be sufficient. In addition, the commenter commented, URLs outside the direct control of the content provider should not be covered under the regulations, and secondary producers should be permitted to simply list the producer's 2257 statement on the home page.

The Department declines to adopt this comment. The Department understands that it would not be possible to track or maintain records of dynamically generated URLs. The existing regulations require producers to maintain the names of the performers ''indexed by the title or identifying number of the book, magazine, film, videotape, or other matter.'' *See* 28 CFR 75.2(a)(2). The rule updates this requirement expressly to include Internet depictions by requiring that this indexing also include any static URLs associated with depictions of that performer and to maintain a copy of the depiction with the static URL associated with the depiction. Existing regulations require any producer to affix a statement describing the location of the records, and permit producers to provide the address of the primary producer, or, for secondary producers satisfying the requirements of § 75.2(b), the address of the secondary producer. *See* 28 CFR 75.6, 75.6(b); *see also* 28 CFR 75.2(b) (permitting secondary producers to maintain records by accepting copies of records from a primary producer). This rule merely updates this requirement to expressly cover Internet depictions.

Regulatory Procedures

Regulatory Flexibility Act

The Department of Justice has drafted this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The Department of Justice drafted this rule to minimize its impact on small businesses while meeting its intended objectives. Based upon the preliminary information available to the Department through past investigations and enforcement actions involving the affected industry, the Department is unable to state with certainty that this rule, if promulgated as a final rule, will not have any effect on small businesses of the type described in 5 U.S.C. § 601(3). Accordingly, the Department has prepared a final Regulatory Flexibility Act analysis in accordance with 5 U.S.C. 604, as follows:

A. Need for and Objectives of This Rule

Recent federal statutory enactments and judicial interpretations have highlighted the urgency of protecting children against sexual exploitation and, consequently, the need for more specific and clear regulations detailing the records and inspection process for sexually explicit materials to assure the accurate identity and age of performers.

The identity of every performer is critical to determining and assuring that no performer is a minor. The key Congressional concern, evidenced by the child exploitation statutory scheme, was that all such performers be verifiably not minors, *i.e.* not younger than 18. 18 U.S.C. 2256(1), 2257(b)(1). Minors—children—warrant a special concern by Congress for several reasons as discussed more specifically in relation to the inspection process. Children themselves are incapable of giving voluntary and knowing consent to perform or to enter into contracts to perform. In addition, children often are involuntarily forced to engage in sexually explicit conduct. For these reasons, visual depictions of sexually explicit conduct that involve persons under the age of 18 constitute unlawful child pornography.

This rule merely provides greater details for the record-keeping and inspection process in order to ensure that minors are not used as performers in sexually explicit depictions. The rule does not restrict in any way the content of the underlying depictions other than by clarifying the labeling on, and record-keeping requirements pertaining to, that underlying depiction. Cf., *e.g.*, 27 CFR 16.21 (alcoholic beverage health warning statement; mandatory label information). However, compliance with the record-keeping requirements of this part has no bearing on the legality or illegality of the underlying sexually explicit material.

Moreover, the growth of Internet facilities in the past five years, and the proliferation of pornography on Internet computer sites or services, requires that the regulations be updated. In the final rule, a number of definitions are revised to accomplish the application of the rule to the modern modes of communication.

B. Description and Estimates of the Number of Small Entities Affected by This Rule

A ''small business'' is defined by the Regulatory Flexibility Act (RFA) to be the same as a ''small business concern'' under the Small Business Act (SBA), 15 U.S.C. 632. Under the SBA, a ''small-business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA. *See* 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632).

Based upon the information available to the Department through past investigations and enforcement actions involving the affected industry, there are likely to be a number of producers of sexually explicit depictions who hire or pay for performers and who, accordingly, would come under the ambit of the proposed rule. However, none of the changes made by this rule affect the number of producers that would be covered. The rule clarifies the meaning of an existing definition and how that definition covers electronic sexually explicit depictions, but does not expand that definition.

Pursuant to the RFA, in the proposed rule the Department encouraged all affected commercial entities to provide specific estimates, wherever possible, of the economic costs that this rule will impose on them and the benefits that it will bring to them and to the public. The Department asked affected small businesses to estimate what these regulations will cost as a percentage of their total revenues in order to enable the Department to ensure that small businesses are not unduly burdened. No specific estimates of the economic costs that the rule would impose were received.

The regulation has no effect on State or local governmental agencies.

C. Specific Requirements Imposed That Would Impact Private Companies

The final rule provides clearer requirements for private companies to maintain records of performers of sexually explicit depictions to ensure that minors are not used in such sexually explicit depictions. The final rule requires that these records be properly indexed and cross-referenced. In the proposed rule, the Department specifically sought information from affected producers on the costs of the record-keeping, indexing, and cross-referencing requirements. No commenters provided such information beyond qualitative assessments, which

are addressed in the Responses to Public Comments section of this Supplemental Information.

Nevertheless, the Department is aware from those qualitative statements that certain alternatives to the rule are possible. For example, two commenters commented that the regulation should permit third-party custody of records in order to reduce the burdens of storing material at a producer's place of business and of maintaining certain business hours in order to be available for inspection. The Department believes that allowing third-party custody, however, would be detrimental to the goals of the statute. It would unnecessarily complicate the compliance and inspection processes by removing the records from the physical location where they were initially collected, sorted, indexed, and compiled. Furthermore, permitting a third party to maintain the records would, if anything, exacerbate the concerns of numerous commenters regarding the privacy of information on performers and businesses by placing that information in the hands of another party.

Other alternatives suggested by commenters included the establishment of a national ''sex ID'' system with which performers would register with the government in a national database, and the creation of a password-protected database of identification records available to law enforcement. As explained above, the Department believes that they would be more burdensome on both the Department and producers to create, implement, and manage than the record-keeping system established by the rule. In addition, creation of such systems would likely require several years' work and delay implementation of the statute's record-keeping requirements.

The Department has, however, adopted numerous changes to the proposed rule in response to comments that it was too burdensome. For example, because commenters argued that the requirement that the statement appear on the homepage of any web site was too burdensome, the final rule permits web sites to contain a hypertext link that states, ''18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement,'' that will open in a separate window that contains the required statement. Likewise, in response to public comments, the Department amended the proposed rule such that the final rule no longer requires businesses to be available for inspection from 8 a.m. to 6 p.m. every day, but rather permits inspections during the producer's normal business hours. Further, the Department modified the requirements regarding the size and typeface of the statement in response to public comments, as well as clarified that records may be maintained in either ''hard'' (paper) form or digital form.

At the same time, the Department also rejected potential changes that would extend the burdensomeness of the rule. For example, the Department did not adopt a comment that two forms of identification should be required of performers.

For these reasons, the Department believes that, although private companies will be affected by the rule, the costs are reasonable in light of the purpose of the statute and that it has imposed the regulation in the least burdensome manner possible.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, § 3(f). Accordingly this rule has been reviewed by the Office of Management and Budget.

The benefit of the regulation is that children will be better protected from exploitation in the production of sexually explicit depictions by ensuring that only those who are at least 18 years of age perform in such sexually explicit depictions. The costs to the industry include slightly higher record-keeping costs and the potential time spent assisting inspectors in the process of inspecting the required records. In the proposed rule, the Department expressly encouraged all affected commercial entities to provide specific estimates, wherever possible, of the economic costs that this rule will impose on them. Notwithstanding that request, not a single commenter provided any data on this aspect of the rule. Accordingly, the costs that this final rule will impose remain uncertain.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This regulation meets the applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

This rule modifies existing requirements to clarify the record-keeping requirements pursuant to Congressional enactments and the development of the Internet.

This rule contains a new information collection that satisfies the requirements of existing regulations to clarify the means of maintaining and organizing the required documents. This information collection, titled Inspection of Records Relating to Depiction of Sexually Explicit Performances, has been submitted to the Office of Management and Budget (OMB) for approval. Although comments were solicited from the public, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, in the proposed rule, no comments were received.

List of Subjects in 28 CFR Part 75

Crime, Infants and children, Reporting and recordkeeping requirements.

■ Accordingly, the Attorney General amends chapter I of title 28 of the Code of Federal Regulations as follows:

■ 1. Part 75 of title 28 CFR is revised to read as follows:

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990 AND PROTECT ACT; RECORD-KEEPING AND RECORD INSPECTION PROVISIONS

Sec.
75.1 Definitions.
75.2 Maintenance of records.
75.3 Categorization of records.
75.4 Location of records.
75.5 Inspection of records.
75.6 Statement describing location of books and records.
75.7 Exemption statement.
75.8 Location of the statement.

Authority: 18 U.S.C. 2257.

§ 75.1 Definitions.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257, and as provided in this section. The terms used and defined in these regulations are intended to provide common-language guidance and usage and are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes (*i.e.*, 47 U.S.C. 230, 231).

(b) *Picture identification card* means a document issued by the United States, a State government or a political subdivision thereof, or a United States territory, that bears the photograph and the name of the individual identified, and provides sufficient specific information that it can be accessed from the issuing authority, such as a passport, Permanent Resident Card (commonly known as a ''Green Card''), or other employment authorization document issued by the United States, a driver's license issued by a State or the District of Columbia, or another form of identification issued by a State or the District of Columbia; or, a foreign government-issued equivalent of any of the documents listed above when both the person who is the subject of the picture identification card and the producer maintaining the required records are located outside the United States.

(c) *Producer* means any person, including any individual, corporation, or other organization, who is a primary producer or a secondary producer.

(1) A *primary producer* is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or picture of, or digitizes an image of, a visual depiction of an actual human being engaged in actual sexually explicit conduct.

(2) A *secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.

(3) The same person may be both a primary and a secondary producer.

(4) Producer does not include persons whose activities relating to the visual depiction of actual sexually explicit conduct are limited to the following:

(i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplicators;

(ii) Mere distribution;

(iii) Any activity, other than those activities identified in paragraphs (c) (1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) A provider of web-hosting services who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service; or

(v) A provider of an electronic communication service or remote computing service who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service.

(d) *Sell, distribute, redistribute, and re-release* refer to commercial distribution of a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, but does not refer to noncommercial or educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations.

(e) *Copy,* when used:

(1) In reference to an identification document or a picture identification card, means a photocopy, photograph, or digitally scanned reproduction, and

(2) When used in reference to a sexually explicit depiction means the sexually explicit image itself (*e.g.,* a film, an image posted on a web page, an image taken by a webcam, a photo in a magazine, etc.).

(f) *Internet* means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which constitute the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(g) *Computer site or service* means a computer server-based file repository or file distribution service that is accessible over the Internet, World Wide Web, Usenet, or any other interactive computer service (as defined in 47 U.S.C. 230(f)(2)). Computer site or service includes without limitation, sites or services using hypertext markup language, hypertext transfer protocol, file transfer protocol, electronic mail transmission protocols, similar data transmission protocols, or any successor protocols, including but not limited to computer sites or services on the World Wide Web.

(h) *URL* means uniform resource locator.

(i) *Electronic communications service* has the meaning set forth in 18 U.S.C. 2510(15).

(j) *Remote computing service* has the meaning set forth in 18 U.S.C. 2711(2).

(k) *Manage content* means to make editorial or managerial decisions concerning the sexually explicit content of a computer site or service, but does not mean those who manage solely advertising, compliance with copyright law, or other forms of non-sexually explicit content.

(l) *Interactive computer service* has the meaning set forth in 47 U.S.C. 230(f)(2).

§ 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a depiction of an actual human being engaged in actual sexually explicit conduct that is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce and that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995 shall, for each performer portrayed in

such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of a picture identification card. For any performer portrayed in such a depiction made after July 3, 1995, the records shall also include a legible copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible copy of a picture identification card. For any performer portrayed in such a depiction after June 23, 2005, the records shall include

(i) A copy of the depiction, and

(ii) Where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction or, if no URL is associated with the depiction, another uniquely identifying reference associated with the location of the depiction on the Internet.

(2) Any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in such a depiction made after July 3, 1995, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter. Producers may rely in good faith on representations by performers regarding accuracy of the names, other than legal names, used by performers.

(3) Records required to be created and maintained under this part shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter.

(b) A producer who is a secondary producer as defined in § 75.1(c) may satisfy the requirements of this part to create and maintain records by accepting from the primary producer, as defined in § 75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the time the primary producer actually films, videotapes, or photographs, or creates a digitally or computer-manipulated image, digital image, or picture, of the visual depiction of an actual human being engaged in actual sexually explicit conduct. If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to § 75.2(a)(2).

(d) For any record created or amended after June 23, 2005, all such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records and such records shall thereafter be maintained in accordance with this paragraph.

(e) Records required to be maintained under this part shall be segregated from all other records, shall not contain any other records, and shall not be contained within any other records.

(f) Records required to be maintained under this part may be kept either in hard copy or in digital form, provided that they include scanned copies of forms of identification and that there is a custodian of the records who can authenticate each digital record.

§ 75.3 Categorization of records.

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

§ 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

§ 75.5 Inspection of records.

(a) *Authority to inspect.* Investigators authorized by the Attorney General (hereinafter ''investigators'') are authorized to enter without delay and at reasonable times any establishment of a producer where records under § 75.2 are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of the Act and any other provision of the Act (hereinafter ''investigator'').

(b) *Advance notice of inspections.* Advance notice of record inspections shall not be given.

(c) *Conduct of inspections.*

(1) Inspections shall take place during the producer's normal business hours

and at such places as specified in § 75.4. For the purpose of this part, ''normal business hours'' are from 9 a.m. to 5 p.m., local time, Monday through Friday, or any other time during which the producer is actually conducting business relating to producing depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, producers must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than twenty (20) hours per week.

(2) Upon commencing an inspection, the investigator shall:

(i) Present his or her credentials to the owner, operator, or agent in charge of the establishment;

(ii) Explain the nature and purpose of the inspection, including the limited nature of the records inspection, and the records required to be kept by the Act and this part; and

(iii) Indicate the scope of the specific inspection and the records that he or she wishes to inspect.

(3) The inspections shall be conducted so as not to unreasonably disrupt the operations of the producer's establishment.

(4) At the conclusion of an inspection, the investigator may informally advise the producer of any apparent violations disclosed by the inspection. The producer may bring to the attention of the investigator any pertinent information regarding the records inspected or any other relevant matter.

(d) *Frequency of inspections.* A producer may be inspected once during any four-month period, unless there is a reasonable suspicion to believe that a violation of this part has occurred, in which case an additional inspection or inspections may be conducted before the four-month period has expired.

(e) *Copies of records.* An investigator may copy, at no expense to the producer, during the inspection, any record that is subject to inspection.

(f) *Other law enforcement authority.* These regulations do not restrict the otherwise lawful investigative prerogatives of an investigator while conducting an inspection.

(g) *Seizure of evidence.* Notwithstanding any provision of this part or any other regulation, a law enforcement officer may seize any evidence of the commission of any felony while conducting an inspection.

§ 75.6 Statement describing location of books and records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued on or after July 3, 1995, shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter to affix the statement.

(b) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter) or, if there is no title, an identifying number or similar identifier that differentiates this matter from other matters which the producer has produced;

(2) The date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter; and, (3) A street address at which the records required by this part may be made available. The street address may be an address specified by the primary producer or, if the secondary producer satisfies the requirements of § 75.2(b), the address of the secondary producer. A post office box address does not satisfy this requirement.

(c) If the producer is an organization, the statement shall also contain the name, title, and business address of the individual employed by such organization who is responsible for maintaining the records required by this part.

(d) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, digitally or computer-manipulated image, digital image, picture, or other matter is produced or reproduced.

(e) For the purposes of this section, the required statement shall be displayed in typeface that is no less than 12-point type or no smaller than the second-largest typeface on the material and in a color that clearly contrasts with the background color of the material. For any electronic or other display of the notice that is limited in time, the notice must be displayed for a sufficient duration and of a sufficient size to be capable of being read by the average viewer.

§ 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) and of this part if:

(1) The matter contains only visual depictions of actual sexually explicit conduct made before July 3, 1995, or is produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995;

(2) The matter contains only visual depictions of simulated sexually explicit conduct; or,

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) and of this part.

§ 75.8 Location of the statement.

(a) All books, magazines, and periodicals shall contain the statement required in § 75.6 or suggested in § 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears.

(b) In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in § 75.6 or § 75.7 shall be presented at the end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer.

(c) Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture, shall contain the required statement on its homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, ''18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement.''

(e) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

Dated: May 17, 2005.

Alberto R. Gonzales,

Attorney General.

[FR Doc. 05–10107 Filed 5–23–05; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–05–029]

Drawbridge Operating Regulations; Berwick Bay, (Atchafalaya River) Morgan City, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the BNSF Railway Company Vertical Lift Span Bridge across Berwick Bay, mile 0.4, (Atchafalaya River, mile 17.5) at Morgan City, St. Mary Parish, Louisiana.

DATES: This deviation is effective from 8 a.m. until 4 p.m. on Wednesday, June 8, 2005.

ADDRESSES: Materials referred to in this document are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building, Room 1313, 500 Poydras Street, New Orleans, Louisiana, 70130–3310 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Bridge Administration Branch maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: Phil Johnson, Bridge Administration Branch, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: The BNSF Railway Company has requested a temporary deviation in order to replace the railroad signal circuits of the BNSF Railway Railroad Vertical Lift Span Bridge across Berwick Bay, mile 0.4 (Atchafalaya River, mile 17.5) at Morgan City, St. Mary Parish, Louisiana. Replacement of the signal circuits is necessary to turn the lining of signals across the bridge into a fully automatic operation so that the bridge will be in full compliance with requirements of the Federal Railroad Administration. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 8 a.m. until 4 p.m. on Wednesday, June 8, 2005. There may be times, during the closure period, when the draw will not be able to open for emergencies.

The bridge provides 4 feet of vertical clearance in the closed-to-navigation position. Thus, most vessels will not be able to transit through the bridge site when the bridge is closed. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational craft including sailboats and powerboats. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 13, 2005.

Marcus Redford,

Bridge Administrator.

[FR Doc. 05–10277 Filed 5–23–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–05–033]

Drawbridge Operation Regulations; Pascagoula River, Pascagoula, MS

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the CSX Transportation Railroad Bridge across the Pascagoula River, mile 1.5, at Pascagoula, Jackson County, Mississippi. This deviation allows the bridge to remain closed to navigation during the morning and afternoon time periods for four consecutive days. During the second day of the deviation, the bridge will remain closed to navigation continuously for ten hours. The deviation is necessary to repair the drive motor and associated hydraulic components of the draw span operating mechanism.

DATES: This deviation is effective from 8 a.m. on Monday June 13, 2005 until 6 p.m. on Thursday, June 16, 2005.

ADDRESSES: Materials referred to in this document are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building, room 1313, 500 Poydras Street, New Orleans, Louisiana 70130–3310 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Bridge Administration Branch of the Eighth Coast Guard District maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: The CSX Transportation Company has requested a temporary deviation in order to repair the main drive motor and associated hydraulic components of the operating mechanism of the CSX Transportation Railroad Bascule Span Bridge across the Pascagoula River, mile 1.5, at Pascagoula, Jackson County, Mississippi. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 8 a.m. to noon and from 1 p.m. to 6 p.m. on Monday, June 13, 2005, Wednesday, June 15, 2005, and Thursday, June 16, 2005. On Tuesday, June 14, 2005, the bridge will remain closed to navigation continuously from 8 a.m. until 6 p.m. to facilitate installation of a shaft. A temporary deviation was previously approved to complete these repairs in March 2005; however, the required replacement parts were unavailable. The bridge owner has obtained all of the required parts and is now ready to complete the repairs. The repairs are necessary for continued safe operation of the draw span.

As the bridge has no vertical clearance in the closed-to-navigation position, vessels will not be able to transit through the bridge site when the bridge is closed. Navigation on the waterway consists of small cargo ships, tugs with tows, fishing vessels and