

Federal Register publication.² Three letters generally favored the proposed regulations and seven letters were generally opposed to their adoption. An Agricultural Forum held by the Commission on April 22, 2008 served as an additional venue for the presentation of views with respect to the proposed rulemaking and a related Commission proposal to revise the Federal speculative position limits delineated in Commission regulation 150.2.³

Collectively, the comments received in response to the proposed rulemaking and at the Commission's April 22 Agricultural Forum reflected differing perspectives on a wide range of issues of substantive import to the proposed rulemaking. The issues covered by the commenters, both in favor and opposed to the Commission's proposal to adopt a risk management exemption from the Federal speculative position limits, included product margin requirements, the convergence of cash and futures transaction prices, the impact of commodity-linked instruments traded on national securities exchanges on CFTC regulated transactions, the degree of transparency for market participation, and the quantification of the impact of speculative trading on market volatility. In light of the wide range of divergent positions that have been put forth by interested parties, the current market conditions for the contracts that would be affected by the proposed rulemaking, and in order to determine whether further consensus among the affected parties should be sought, the Commission has determined to withdraw the proposed rulemaking pending further consideration of the relevant issues.

Issued by the Commission June 2, 2008, in Washington, DC.

David Stawick,

Secretary of the Commission.

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DEPARTMENT OF JUSTICE

28 CFR Part 75

[Docket No. CRM 105; AG Order No. 2966-2008]

RIN 1105-AB19

Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performances

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend record-keeping, labeling, and inspection requirements to implement provisions of the Adam Walsh Child Protection and Safety Act of 2006 that require producers of depictions of simulated sexually explicit conduct to maintain records documenting that performers in those depictions are at least 18 years of age. The rule also implements provisions of the Adam Walsh Act that create a certification regime for the exemption of producers, in certain circumstances, from those requirements and from similar requirements for producers of visual depictions of the lascivious exhibition of the genitals or pubic area of a person.

DATES: Written comments must be received by August 5, 2008.

ADDRESSES: Written comments may be submitted to: Andrew Oosterbaan, Chief, Child Exploitation and Obscenity Section, Criminal Division, United States Department of Justice, Washington, DC 20530; Attn: "Docket No. CRM 105."

Comments may be submitted electronically to www.regulations.gov by using the electronic comment form provided on that site. Comments submitted electronically must include "Docket No. CRM 105" in the subject box. You may also view an electronic version of this rule at the www.regulations.gov site.

Facsimile comments may be submitted to: (202) 514-1793. This is not a toll-free number. Comments submitted by facsimile must include "Docket No. CRM 105" on the cover sheet.

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:

Public Comments

Please note that because the Department of Justice is now fully

operational using the www.regulations.gov site, the Child Exploitation and Obscenity Section, Criminal Division has deactivated the e-mail address for electronic comments that it published in rulemakings before the Department started using www.regulations.gov. In order to ensure that electronic comments are received by the Department, commenters submitting electronic comments must use the electronic comment form provided on the www.regulations.gov site.

Please also note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify in that paragraph what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must identify prominently any confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment might not be posted on www.regulations.gov.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Additional Information" paragraph.

Discussion

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248 ("the Act"). As described in more detail below, section

² **Federal Register** Comment File 07-015, available at <http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2007/07-015.html>.

³ Revision of Federal Speculative Position Limits, 72 FR 65483 (November 21, 2007) (to be withdrawn).

503(a) of the Act provides that producers of visual depictions of simulated sexually explicit conduct “shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.” 18 U.S.C. 2257A(a).

The Act requires producers of visual depictions of simulated sexually explicit conduct to:

(1) Ascertain, by examination of an identification document containing such information, the performer’s name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) 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

(3) Record * * * the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

Id. 2257A(b).

Furthermore, the Act requires that producers of material covered by the statute “shall maintain the records * * * at their business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.” *Id.* 2257A(c).

Producers also must “cause to be affixed to” matter containing the visual depictions covered by section 2257A “a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located,” *Id.* 2257A(e)(1), and the Act makes it illegal, *inter alia*, “for any person knowingly to sell or otherwise transfer, or offer for sale or transfer” any such matter “which does not have affixed thereto * * * a statement describing where the records required by this section may be located,” *id.* 2257A(f)(4).

Violation of these requirements is a misdemeanor, subject to imprisonment for not more than one year, a criminal fine, or both. *See id.* 2257A(i)(1).

The Act also created an exemption from the record-keeping requirements of section 2257A. One part of this exemption states that section 2257A does not apply to matter that (1) is intended for commercial distribution, (2) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable name and age information regarding all performers for purposes such as Federal and State tax, labor, and other laws, and (3) is not produced,

marketed, or otherwise made available in circumstances such that an ordinary person would conclude that it is child pornography. *See id.* 2257A(h)(1)(A). The other part of this exemption states that section 2257A does not apply to matter that (1) is produced by someone subject to the authority and regulation of the Federal Communications Commission enforcing federal bans on the broadcast of obscene, indecent, or profane programming, and (2) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable name and age information regarding all performers, for purposes such as federal and state tax, labor, and other laws. *See id.* 2257A(h)(1)(B).

The Act also permits such a certification for producers of visual depictions of the lascivious exhibition of the genitals or pubic area of a person (hereinafter “lascivious exhibition”) for which record-keeping, inspection, and labeling requirements apply under 18 U.S.C. 2257. *See id.* 2257A(h)(1)(A), (B). Section 2257 requires that producers of depictions of actual sexually explicit conduct maintain identity and age records for performers in those depictions, and the Act amended section 2257, *inter alia*, to cover lascivious exhibition. *See id.* 2257(h)(1) (as amended by section 502(a)(4) of the Act).

Background

In enacting section 2257 in 1988, Congress imposed record-keeping requirements related to visual depictions of actual sexually explicit conduct. Section 2257 has been critical to protecting children from exploitation as performers in visual depictions of sexually explicit conduct. Children are incapable of giving voluntary and knowing consent to perform in such depictions. The consequences to children depicted in them are devastating and can follow them for years or even their entire lives. Furthermore, viewers of such depictions themselves may sexually abuse children, and pedophiles use such depictions to feed their predilections and to groom potential victims. Performers in such depictions therefore must not be minors.

In the Act, Congress filled two gaps left by the original statute by amending section 2257 to cover lascivious exhibition and by enacting section 2257A to cover simulated sexually explicit conduct, while at the same time creating an exemption from these new record-keeping requirements in certain

circumstances. (The language of section 2257A is based largely on the language in section 2257, but only the former contains the exemption and certification regime described above.) The record-keeping, inspection, and labeling requirements in sections 2257 and 2257A are designed to ensure that no minor will be exploited through depictions of actual or simulated sexually explicit conduct, whether produced deliberately or negligently.

Chapter 110 of title 18 (“Sexual Exploitation and Other Abuse of Children”) covers both actual and simulated sexually explicit conduct. Specifically, it defines “sexually explicit conduct” as:

(A) * * * actual or *simulated*—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person; (B) For purposes of subsection 8(B) of this section [part of the definition of “child pornography”], “sexually explicit conduct” means—(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious *simulated* sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or *simulated* lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. 2256(2) (emphases added).

The terms “simulated” and “actual” also appear together in numerous States’ child-exploitation statutes. *See* Alaska Stat. § 11.41.455; Ariz. Rev. Stat. § 13–3551; Ariz. Rev. Stat. § 13–3553; Ark. Code Ann. § 5–27–302; Cal. Penal Code § 311.11; Colo. Rev. Stat. § 18–6–403; Conn. Gen. Stat. § 53a–193; Fla. Stat. § 827.071; Ga. Code Ann. § 16–12–100; Idaho Code Ann. § 18–1507; 720 Ill. Comp. Stat. Ann. 5/11–20.1; Kan. Stat. Ann. § 21–3516; Ky. Rev. Stat. Ann. § 531.300; La. Rev. Stat. Ann. § 14:81.1; Mass. Ann. Laws ch. 272 § 29C; Mich. Comp. Laws Serv. § 750.145c; Minn. Stat. § 617.246; Miss. Code Ann. § 97–5–33; Mo. Rev. Stat. § 573.010; Mont. Code Ann. § 45–5–625; Nev. Rev. Stat. § 200.725; N.H. Rev. Stat. Ann. § 649–A:2; N.M. Stat. Ann. § 30–6A–3; N.Y. Penal L. § 263.00; N.D. Cent. Code § 12.1–27.2–01; Okla. Stat. tit. 21 § 1024.1; Or. Rev. Stat. § 163.665; R.I. Gen. Laws § 11–9–1.3; S.D. Codified Laws § 22–24A–2; S.D. Codified Laws § 22–24A–3; Tenn. Code Ann. § 39–17–1003; Tex. Penal Code Ann. § 43.25; Utah Code Ann. § 76–5a–2; Utah Code Ann. § 76–5a–3; Va. Code Ann. § 18.2–

390; Wash. Rev. Code § 9.68A.011; W. Va. Code § 61–8C–1; Wis. Stat. § 948.01; Wyo. Stat. Ann. § 6–4–303. Accordingly, “simulated” in the context of sexually explicit conduct is neither a novel nor an uncommon term.

These statutes recognize that a child may be harmed both physically and psychologically in the production of visual depictions of simulated sexually explicit conduct, even if no sexually explicit conduct actually takes place. Furthermore, producers of visual depictions of actual sexually explicit conduct often substitute a visual depiction of simulated sexually explicit conduct (so-called “soft-core” pornography) in place of the actual sexually explicit conduct; then the soft-core pornography is often distributed more widely than the unedited version of the same production. In such cases, the protection of children from exploitation in the production of a visual depiction of actual sexually explicit conduct necessitates that producers of visual depictions of simulated sexually explicit conduct also be required to maintain records and label their products.

The Proposed Rule

Section 2257’s requirements are implemented in 28 CFR part 75. On July 12, 2007, the Department of Justice (“the Department”) published a proposed rule amending part 75 to implement those provisions of the Act that amended section 2257. See *Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct* [CRM Docket No. 104; RIN 1105–AB18], 72 FR 38033 (Jul. 12, 2007).

This proposed rule would make additional amendments to part 75 to implement section 2257A. As explained above, sections 2257 and 2257A operate in tandem to protect children from exploitation in visual depictions of sexually explicit conduct. Part 75 has undergone significant public comment and several courts have found it to be a constitutional exercise of governmental authority. See *Am. Library Ass’n v. Reno*, 33 F.3d 78 (DC Cir. 1994); *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005) (“*Free Speech I*”); *Free Speech Coalition v. Gonzales*, 483 F. Supp. 2d 1069 (D. Colo. 2007) (“*Free Speech II*”); *Connection Distrib. Co. v. Gonzales*, 2006 WL 1305089, 2006 U.S. Dist. LEXIS 29506 (N.D. Ohio, May 10, 2006). Although one court invalidated part 75 as *ultra vires* to the extent it regulated those whose activity “does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers

depicted,” see *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804, 806 (10th Cir. 1998) (quoting 18 U.S.C. 2257(h)(3) (1998)), Congress subsequently amended the statute (see section 502(a)(4) of the Act) and adopted the Attorney General’s interpretation of section 2257. Cf. *Free Speech Coalition II*, 483 F. Supp. 2d at 1076 (suggesting the enactment of section 502 of the Act moots the plaintiff’s *ultra vires* challenge to part 75).

Because part 75 has been tested and upheld in the courts, and given the similarities between sections 2257 and 2257A, the Department has chosen to apply the existing requirements for visual depictions of actual sexually explicit conduct (under section 2257) to visual depictions of simulated sexually explicit conduct (under section 2257A) with regard to the records at issue, the time, place and manner of inspection of those records, and the labeling of matter containing such visual depictions. The proposed rule therefore proposes to change references in the Department’s part 75 regulations (as proposed in CRM Docket No. 104; RIN 1105–AB18) from “actual sexually explicit conduct” to “actual or simulated sexually explicit conduct,” where appropriate, and to make other minor textual changes as necessary to regulate simulated sexually explicit conduct.

This proposed rule also makes two additional changes to part 75 to implement section 2257A: it defines “simulated sexually explicit conduct” and it implements a certification regime for producers of actual sexually explicit conduct constituting lascivious exhibition and for producers of simulated sexually explicit conduct.

Definition of “simulated sexually explicit conduct”

As noted above, “sexually explicit conduct” is defined in section 2256(2)(A) with reference to certain physical acts and with reference to both “actual” and “simulated” performance of those acts. No definition of “actual” or “simulated” is contained in section 2256 or anywhere else in chapter 110. When first published in 1990, amended in 2005, and proposed to be amended in 2007, part 75 did not adopt a definition of “actual,” because the Department believed that in the context of the acts described, the meaning of the term was sufficiently precise for regulatory purposes. Public comments on the previous versions of part 75 did not address the definition of “actual,” nor has the meaning of that term arisen in litigation regarding the regulations.

With the extension of part 75 to cover simulated conduct, however, and with

the statutory provision for a certification regime for simulated conduct, the Department believes that a definition of the term “simulated sexually explicit conduct” is necessary. A definition will make clear to the public what types of conduct come within the ambit of the regulation, as distinct from conduct not covered at all, and what types of conduct will be eligible for the certification regime.

The Department starts its analysis of the proper definition of the term for regulatory purposes with the term’s plain meaning. The dictionary defines “simulated” as “made to look genuine.” *Merriam-Webster’s Collegiate Dictionary* 1162 (11th ed. 2003).

The Department believes that an objective standard—that is, one defined in terms of a reasonable person viewing the depiction—is appropriate to add to this basic definition. The proposed rule’s definition of “simulated sexually explicit conduct” thus reads as follows: “[S]imulated sexually explicit conduct means conduct engaged in by performers in a visual depiction that is intended to appear as if the performers are engaged in actual sexually explicit conduct and does so appear to a reasonable viewer.”

No federal court has interpreted the definition of “simulated” in the context of chapter 110. The definition above, however, is based on the plain meaning of the term and is supported by extrinsic sources of meaning. Chapter 110 was created by the Protection of Children Against Sexual Exploitation Act of 1977, which defined “sexually explicit conduct” to include both “actual or simulated” acts. See Protection of Children Against Sexual Exploitation Act of 1977, Public Law 95–225, § 2(a), 92 Stat. 7 (1978). That statute did not define “simulated,” however, and the legislative history of the act does not indicate that Congress considered defining that term. See S. Rep. No. 438, 95th Cong., 1st Sess. (1977); H.R. Report No. 696, 95th Cong., 1st Sess. (1977). When Congress amended chapter 110 in 1984, it considered defining “simulated” but ultimately did not do so, thereby leaving the definition of that term to the discretion of the Attorney General.

As noted above, most states have laws similar to the federal statute criminalizing production, distribution, and possession of simulated sexually explicit conduct involving a minor. A number of those states’ statutes, in contrast to section 2257A, define “simulated,” and therefore may inform the federal definition of that term in part 75. State definitions of “simulated” generally fall into three categories:

(1) Definitions based on giving the appearance of actual sexually explicit conduct. For example: "An act is simulated when it gives the appearance of being sexual conduct." Cal. Penal Code § 311.4(d)(1); 14 V.I. Code § 1027(b). "'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct." Utah Code Ann. § 76-5a-2(9). "Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted."

Mass. Ann. Laws ch. 272, § 31; N.H. Rev. Stat. Ann. § 649-A:2(III).

(2) Definitions based on depiction of genitals that gives the impression of actual sexually explicit conduct, such as: "'Simulated' means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct." Ariz. Rev. Stat. § 13-3551(10); Miss. Code Ann. § 97-5-31(f); Mont. Code Ann. § 45-5-620(2).

(3) Definitions based on (a) the depiction of uncovered portions of the body and (b) that gives the impression of actual sexually explicit conduct, such as: "'Simulated' means the explicit depiction of [sexual] conduct * * * which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks." Fla. Stat. § 827.071(1)(i). "'Simulated' means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks." Tex. Penal Code § 43.25(a)(6). "'Simulated' means the explicit depiction of any [sexual] conduct * * * which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks." N.Y. Penal L. § 263.00(6).

The definitions categorized above as "based on giving the appearance of actual sexually explicit conduct" are closest to that proposed by the Department in this proposed rule. The other two definitions, which require the actual depiction of nudity, are overly restrictive in that a child may be exploited in the production of a visual depiction of simulated sexually explicit conduct even if no nudity is present in the final version of the visual depiction. The producer of the depiction may arrange the camera or the body positions to avoid depicting uncovered genitals,

breasts, or buttocks yet still cause harm to the child by having him or her otherwise realistically appear to be engaging in sexually explicit conduct.

It is also important to note that "simulated" in this context does not mean "virtual." For purposes of chapter 110, including sections 2256, 2257, and 2257A, and for purposes of part 75, "simulated sexual explicit conduct" means conduct engaged in by real human beings, not conduct engaged in by computer-generated images that only appear to be real human beings. Although Congress did attempt to criminalize production, distribution, and possession of "virtual" child pornography on the basis that it contributed to the market in child pornography involving real children, the Supreme Court held that the child-protection rationale for the criminalization of child pornography under *Ferber* did not apply to images in which no real children were harmed. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51 (2002). Section 2257A does not cover such "virtual" child pornography, but rather "simulated" sexually explicit conduct, the production of which, as noted above, can exploit a real child. The Court's decision in *Ashcroft* is thus not relevant to sections 2257 or 2257A, or part 75, which for clarity's sake consistently refers to sexually explicit conduct engaged in by an "actual human being."

Exemption From Statutory Requirements for Visual Depictions of Lascivious Exhibition or Simulated Sexually Explicit Conduct in Certain Circumstances and an Associated Certification Regime

As outlined above, Congress in the Act filled two gaps left by the original section 2257 by amending section 2257 to cover lascivious exhibition and by enacting section 2257A to cover simulated sexually explicit conduct. In enacting section 2257A, Congress determined it would be appropriate, in certain circumstances, to exempt producers of visual depictions of lascivious exhibition (for which records must be kept under section 2257, as amended by the Act) and producers of visual depictions of simulated sexually explicit conduct (for which records must be kept under section 2257A) from statutory requirements otherwise applicable to such visual depictions. *See* 18 U.S.C. 2257A(h).

The safe harbor provision in the statute in essence permits certain producers of visual depictions of lascivious exhibition or simulated sexually explicit conduct to certify that

in the normal course of business they collect and maintain records to confirm that performers in those depictions are not minors, while not necessarily collected and maintained in the format required by part 75. Where a producer makes the required certification, matter containing such visual depictions is not subject to the labeling requirements of the statute.

The Department has crafted a certification regime (described in detail below) that implements the safe harbor in such a way as to permit such producers, in accordance with the statute, to be subject to lesser record-keeping burdens than those in part 75, while still protecting children from sexual exploitation.

Who May Certify

Any entity that meets the statutory requirements for eligibility, which are incorporated verbatim in the proposed rule, may certify that it meets the requirements of section 2257A(h). In addition, an entity may certify for sub-entities that it owns or controls if the names of the sub-entities are listed in such certification and are cross-referenced to the matter for which the sub-entity served as the producer.

Both United States and foreign entities may certify. In the case of a certification by a foreign entity, the foreign entity, which may be unlikely to collect and maintain information in accordance with United States federal and state tax and other laws, may certify that it maintains the required information in accordance with their foreign equivalents. The Department considers the statute's broad description of laws and other documentation that satisfy the certification to provide authority for this treatment of foreign entities.

The certification must be signed by the chief executive officer of the entity making the certification, or in the event an entity does not have a chief executive officer, the senior manager responsible for overseeing the entity's activities.

The certification regime in the proposed rule is similar for producers of lascivious exhibition and producers of simulated sexually explicit conduct but differs in some material respects, as described below.

Time Period for Certification

The certification must be filed every two years. The Department could have chosen a shorter period for certification, a longer period, or a permanent certification. The Department believes, however, that two years is a reasonable period to ensure that certifications remain up to date without imposing

overly onerous burdens on regulated entities.

In order to establish certifications on the record as soon as possible, the Department will require an initial certification due 180 days after the publication of this proposed rule as a final rule. This schedule will provide sufficient time for entities to determine if they wish to certify in compliance with the regulatory requirements. All subsequent certifications will be due on the same date at two-year intervals. The initial certification and all subsequent certifications must be filed within a period of five business days concluding on the due date (*i.e.*, if the due date were on a Friday, and there were no federal holiday during that week, the certification would have to be filed on Monday, Tuesday, Wednesday, Thursday, or Friday of that week). The Department must have confidence that the certification covers all depictions subject to record-keeping requirements for the previous period. Initial certifications of producers who begin production after the publication of this proposed rule but before the expiration of the 180-day period preceding its publication as a final rule will be due within a period of five business days concluding on the last day of the 180-day period. Initial certifications of producers who begin production after the expiration of the 180-day period, but before the expiration of the two-year period following the 180-day period, are due within 60 days of the start of production (unless the start of production occurs within 60 days of the expiration of the two-year period, in which case the certifications are due on the expiration date of the two-year period). In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or federal holiday.

Enforcement of the Certification

All of the statements in the certification are subject to investigation and a false certification will violate section 2257A and potentially other criminal statutes.

Form and Content of the Certification

The certification regime in the proposed rule requires that a producer provide a letter to the Attorney General that:

(1) Sets out the statutory basis under which it and any sub-entities, if applicable, are permitted to avail themselves of the safe harbor;

(2) Certifies that regularly and in the normal course of business, the producer and any sub-entities, if applicable, collect and maintain individually identifiable information regarding all performers employed by the producer who appear in visual depictions of simulated sexually explicit conduct or of lascivious exhibition;

(3) Lists the titles, names, or other identifying information of visual depictions (or matter containing them) that include non-employee performers;

(4) Lists the titles, names, or other identifying information of visual depictions (or matter containing them) produced since the last certification;

(5) Certifies that any foreign producers of visual depictions acquired by the certifying entity either maintain the records required by section 2257A or have themselves provided certifications to the Attorney General, and the producers making the certifications have copies of those records or certifications; or, for visual depictions of simulated sexually explicit conduct only, have taken reasonable steps to confirm that the performers are not minors;

(6) Lists the titles, names, or other identifying information of the foreign-produced visual depictions (or matter containing them) that include performers for whom no information is available but for whom the U.S. entity has taken reasonable steps to confirm that the performers are not minors;

(7) Certifies that U.S. primary producers of visual depictions acquired by the certifying entity either maintain the records required by section 2257A or certify themselves under the statute's safe harbor, and that the producer making the certification has copies of those records or certification(s). *See* 28 CFR 75.1(c)(1) (defining a primary producer as "any person who actually films, videotapes, photographs, or creates" a visual depiction of sexually explicit conduct).

Statutory Basis for the Certification

The first requirement listed above is straightforward—the entity providing the certification must state why it is entitled to certify under the terms of the statute. This will include citation to the specific subsections of the statute under which it is making the certification and to basic evidence justifying that citation. Specifically, the letter should either cite 18 U.S.C. 2257A(h)(1)(A) and 28 CFR 75.9 and state that the visual depictions listed in the letter are "intended for commercial distribution," "created as a part of a commercial enterprise" that meets the requirements of 18 U.S.C. 2257A(h)(1)(A)(ii), and are "not

produced, marketed or made available * * * in circumstances such tha[t] an ordinary person would conclude that * * * [they] contain a visual depiction that is child pornography as defined in section 2256(8)" or cite 18 U.S.C. 2257A(h)(1)(B) and 28 CFR 75.9 and state that the visual depictions listed in the letter are "subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent or profane programming" and are "created as a part of a commercial enterprise" that meets the requirements of 18 U.S.C. 2257A(h)(1)(B)(ii).

Certification of Collection and Maintenance of Records

The second requirement is the certification under either subsection 2257A(h)(1)(A)(ii) or (B)(ii). Under either subsection, the certifier must demonstrate its compliance with the following five enumerated elements: the entity (1) "regularly and in the normal course of business collects and maintains" (2) "individually identifiable information" (3) "regarding all performers, including minor performers employed by [the entity]" (4) "pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards" (5) "where such information includes the name, address, and date of birth of the performer." The Department will consider any entity's procedures that include these basic elements to be in compliance with the certification.

To the extent that these terms are not self-explanatory, the proposed rule defines them as follows:

"Regularly and in the normal course of business collects and maintains" means any business practice(s) that ensure that the producer confirms the identity and age of employees who perform in visual depictions of sexually explicit conduct.

"Individually identifiable information" means that information about the name, address, and date of birth is capable of being retrieved for any employee who appears in a specified visual depiction.

"All performers, including minor performers" means all performers who appear, no matter how briefly, in a visual depiction of lascivious exhibition or simulated sexually explicit conduct. The term "minor" in the statute could be interpreted to mean performers under the age of 18, which is the way the term "minor" is used elsewhere in chapter 110. Such an interpretation in this context, however, would be redundant, as the purpose of the record-keeping

requirements is to ensure record-keeping for “all performers,” the first term in the phrase. Hence, the Department interprets the term to refer to performers who appear for only a limited period of time in the context of the overall visual depiction. “All performers, including minor performers” does not mean all performers in any matter that may contain a discrete (or several discrete) visual depictions of lascivious exhibition or simulated sexually explicit conduct. Rather, it means only those performers in the discrete visual depiction(s). That is, an entity that produces a two-hour-long movie containing a single visual depiction of lascivious exhibition or simulated sexually explicit conduct lasting five minutes need only collect and maintain records on the performers in that five-minute visual depiction.

“Employed by” means performers who receive pay for performing in the visual depictions or are otherwise in an employer-employee relationship with the producer of the visual depiction as evidenced by oral or written agreements. This definition is important, because by use of the term “employed by,” the statute appears to permit a producer to make the certification even if there are performers who appear in its visual depictions for whom it does not regularly and in the normal course of business collect and maintain individually identifiable information. It is possible, for example, that persons with whom the producer has no employer-employee relationship may appear in the background of a visual depiction or may engage in sexually explicit conduct in the background of a depiction of non-sexually explicit conduct. Because of the language of the statute, a producer in that circumstance may still certify and remove itself from the coverage of the entire record-keeping requirements of the section, even without collecting and maintaining individually identifiable information for the non-employee performers. The language of the statute permits no other construction of the certification regime.

As a result of this language, however, there is a risk that a performer who is a minor could appear in a depiction produced by an entity that has made a certification and not be detected because the minor was not “employed by” the certifying entity. In addition, there is a risk that a producer may seek to evade the record-keeping requirements by certifying that he maintains records on all employees and then producing his visual depictions with performers—such as his own

children—whom he claims are not his employees.

In the first case, the Department recognizes that a producer might not collect and maintain regularly and in the normal course of business individually identifiable information on non-employees. At the same time, the Department believes that the scenario described above—that is, the production of visual depictions of lascivious exhibition or of simulated sexually explicit conduct in which bona fide non-employees perform—will be very rare.

The Department is more concerned about the possibility of evasion, as in the second scenario described above. For that reason, the Department has included a slightly broader definition of “employed by” than simply financial remuneration. The definition would include anyone who, even if not for pay, intentionally performs or is required to perform in a visual depiction of sexually explicit conduct intended for commercial distribution that is produced by someone meeting the definition of a primary or secondary producer. See 28 CFR 75.1(c)(2) (generally defining a “secondary producer” as “any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues” a visual depiction of sexually explicit conduct).

The Department considers it unnecessary to define the phrase “pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards.” As guidance to employers, however, the Department will consider any document that contains a verified name, address, and date of birth of a performer to satisfy this requirement.

The Department considers the phrase “where such information includes the name, address, and date of birth of the performer” to be self-explanatory.

List of the Titles, Names, or Other Identifying Information of Visual Depictions That Include Non-Employee Performers

As an extra precaution against evasion, the third requirement is a list of all visual depictions or matter containing visual depictions in which non-employees have engaged in sexually explicit conduct. This provides the Department with notice and a record that such visual depictions by the producers exist and, if necessary, enables the Department to investigate the bona fides of the certifying entity. At the same time, the list is not so burdensome as to vitiate the purpose of the certification regime in the first

instance, namely, reducing the burdensomeness of the record-keeping requirements. Rather than maintaining age verification records, copies of each performance, etc., the certifying entities need only provide a list of their productions that include depictions of lascivious exhibition or simulated sexually explicit conduct by non-employee performers.

List of the Titles, Names, or Other Identifying Information of Visual Depictions Produced Since the Last Certification

The fourth requirement is necessary to provide the Department with both a notice and a record regarding which depictions or matters are subject to the certification. The Department considered simply allowing entities to make a blanket assertion that they maintain the required records on all employees who perform in all matter they produce. The Department determined, however, that depiction-specific information will enable investigators more easily to determine whether a visual depiction is covered by the section 2257A certification regime. The list submitted by a certifying entity must include the titles, names, or other identifying information of visual depictions acquired by the certifying entity from foreign or U.S. primary producers.

Certification for Entities Acquiring Foreign-Produced Matter

The fifth requirement is a subsidiary certification for entities acquiring matter subject to the record-keeping requirements from foreign producers. The Department understands that many producers in the United States acquire films and other matter that may contain visual depictions of lascivious exhibition or simulated sexually explicit conduct from producers abroad. In order to produce that matter for the U.S. market and comply with the law, the U.S. entity acquiring the matter must certify either that the foreign producer in the first instance maintained the records required by the statute and that the U.S. entity has copies of those records, or that the foreign entity has certified on its own that it (the foreign producer) maintains foreign-equivalent records in the normal course of business, and that the U.S. entity has a copy of that certification. The Department believes it is appropriate for the exemption to apply based on certifications that foreign producers maintain foreign-equivalent records because foreign countries generally have tax and employment laws requiring identification of employees that are

substantially similar to requirements under U.S. law.

There may be cases where a U.S. entity acquires foreign-produced matter and cannot certify the information above. In such a case, the U.S. entity would not be able to produce the matter in the United States. Denying the market in the United States access to a large amount of foreign-produced matter, however, could be construed as a burden on American citizens' First Amendment right to free expression. At the same time, the Department cannot risk permitting either foreign children to be exploited in the visual depictions produced for the U.S. market or evasion of the statute by unscrupulous U.S. producers.

Therefore, U.S. entities making the certification may certify that to the extent that they have acquired visual depictions or matter containing visual depictions of simulated sexually explicit conduct from foreign entities and to the extent that the primary foreign producer does not either maintain the records required by the statute or provide a certification to the Attorney General itself, the entity making the certification has made reasonable efforts to ensure that no performer in any such foreign visual depiction is a minor.

The same process will not be available for visual depictions of lascivious exhibition acquired from foreign entities. The risks of exploitation of children in such visual depictions and the risk of evasion of the record-keeping requirements are too great to permit the accommodation for visual depictions of simulated sexually explicit conduct outlined above. The Department is concerned that providing a method for weaker enforcement of section 2257 with regard to lascivious exhibition would undermine the existing section 2257 requirements. The Department notes, however, that Congress clearly considered non-compliance with record-keeping requirements concerning visual depictions of simulated sexually explicit conduct (under section 2257A) to be a less serious crime than non-compliance with analogous requirements for visual depictions of actual sexually explicit conduct (under section 2257), as exemplified by the misdemeanor penalty for violation of the former section versus the felony penalty for violation of the latter section.

List of All Foreign-Acquired Matter for Which Records of Performers Are Not Available

The sixth requirement is that the entity making the certification must include a list of the visual depictions or matter including those visual depictions for which no records exist but for which the certifying entity has made reasonable efforts to ensure that no performer in any visual depiction is a minor. As with the case of non-employee performers, this list will provide the Department with notice and a record that such visual depictions exist and if necessary, enable investigation of such matter. At the same time, the requirement of the list and a certification of reasonable efforts by the secondary producer in the United States will provide significant protection without unduly infringing on constitutional rights. The risk of evasion is mitigated by the severe criminal penalties for production of child pornography that would apply to any matter covered by the record-keeping requirements.

Certification of Record-Keeping by Primary Producers

The seventh requirement is that, as with foreign primary producers, an entity acquiring visual depictions must certify either that the primary producer in the first instance maintained the records required by the statute and that the certifying entity has copies of those records, or that the primary producer has certified separately that it (the primary producer) has made a certification and that the acquiring entity has a copy of that certification.

Effective Dates

In accordance with current law, the proposed rule retains July 3, 1995, as the effective date of the rule's requirements for secondary producers related to depictions of actual sexually explicit conduct. (The current regulations, published in 2005, adopted July 3, 1995, as the effective date of enforcement of section 2257 based on the court's order in *American Library Association v. Reno*, No. 91-0394 (SS) (D.D.C. July 28, 1995)) The proposed rule also states that producers of visual depictions of actual sexually explicit conduct made after July 3, 1995, the effective date of the regulations published in 1992, and before June 23, 2005, the effective date of the current regulations published in 2005, may rely on picture identification cards issued by private entities such as schools or private employers that were valid forms of required identification

documentation under the provisions of part 75 in effect on the original production date. Finally, the proposed rule's effective date concerning depictions of simulated sexually explicit conduct will be 90 days after its publication in the **Federal Register** as a final rule.

Regulatory Procedures

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-612 ("RFA"), the Department of Justice has drafted this proposed 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 RFA analysis in accordance with 5 U.S.C. 604, as follows:

A. Need for and Objectives of This Rule

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 of actual or simulated sexually explicit conduct verifiably not be minors, *i.e.*, not younger than 18 years of age. *See* 18 U.S.C. 2256(1), 2257(b)(1), 2257A(b)(1). Congress has recognized that minors warrant special concern in this area. Children themselves are incapable of giving voluntary and knowing consent to perform or to enter into contracts to perform such conduct. In addition, children often are forced to engage involuntarily in sexually explicit conduct. For these reasons, visual depictions of actual and simulated sexually explicit conduct that involve persons under the age of 18 constitute unlawful child pornography. *See* 18 U.S.C. 2256(8).

This proposed rule amends certain provisions of the existing regulations and adds other provisions to these regulations to conform to the Act, as described above.

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

The RFA defines a "small business" as equivalent to a "small business concern" under the Small Business Act ("SBA"). *See* 5 U.S.C. 601(3)

(incorporating by reference the definition of "small business concern" in 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* 15 U.S.C. 632(a).

Based upon the information available to the Department, there are likely to be a significant number of small businesses that are producers of visual depictions of simulated sexually explicit conduct.

Pursuant to the RFA, the Department requests 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.

The proposed rule has no effect on State or local governmental agencies.

C. Specific Requirements Imposed That Would Impact Private Companies

The proposed rule imposes requirements on private companies with respect to visual depictions of simulated sexually explicit conduct to ensure that minors are not used in such depictions. Specifically, the rule imposes certain name- and age-verification and record-keeping requirements on producers of visual depictions of simulated sexually explicit conduct concerning the performers portrayed in those depictions. The proposed rule, however, provides an exemption from these requirements applicable in certain circumstances.

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The Department 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 rule is that children will be protected from exploitation in the production of visual depictions of simulated sexually explicit conduct by ensuring that only those who are at least 18 years of age perform in such depictions. The costs to the industry include what the Department believes to be slightly higher record-keeping costs. The Department encourages all affected commercial entities to provide specific estimates, wherever possible, of the economic costs that this rule will impose on them.

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 Executive Order 12988 § 3(a), (b)(2).

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. *See* 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 for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; 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 proposed rule expands the scope of existing requirements to conform to newly enacted legislation. It also implements the newly enacted legislation's exemption from these expanded requirements applicable in certain cases. It contains a revised collection of information that clarifies the means of maintaining and organizing the required documents.

The Department has submitted the following information-collection request to the Office of Management and Budget ("OMB") for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed

collection of information is published to obtain comments from the public.

Any comments received during the comment period should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this collection of information:

(1) *Type of collection of information:* Revision of a currently approved collection.

(2) *Title:* Inspection of Records Relating to Depictions of Simulated Sexually Explicit Performances.

(3) *Agency form number, if any:* None.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Business or other for-profit entities.

Other: None.

Abstract: This rule proposes to amend the record-keeping, labeling, and inspection requirements of 28 CFR part 75 to account for the enactment of the Adam Walsh Child Protection and Safety Act of 2006.

(5) An estimate of the total number of respondents, the amount of time estimated for an average respondent to respond, and the total public burden (in hours) associated with the collection:

The Department is unable to estimate with any precision the number of entities producing visual depictions of simulated sexually explicit conduct. Because the issue of the number of entities producing visual depictions of simulated sexually explicit conduct is a new issue that has arisen precisely because of section 2257A, there does not appear to be much available information concerning the number of entities producing such material. As a partial indication, according to the U.S. Census Bureau, in 2002 there were 11,163 establishments engaged in motion picture and video production in the United States. Based on a rough assumption that 10% were engaged in

the production of visual depictions of simulated sexually explicit conduct, the Department estimates that approximately 1116 motion picture and video producing establishments would be covered. (The Department does not certify this estimate and invites comment on the assumptions upon which it is based.) The underlying statute provides an exemption from these requirements applicable in certain circumstances, and it requires producers to submit certifications to qualify for this exemption. The Department has no information concerning the number of otherwise covered entities that would qualify for this statutory exemption, nor is it able to estimate this number. For entities that qualify for the statutory exemption, however, the Department estimates that it would take less than 20 hours per year at an estimated cost of less than \$25.00 per hour to prepare the biennial certification required for the statutory exemption. The Department's burden hour estimate for preparing the biennial certification required for the statutory exemption recognizes that the certification must take the form of a letter indicating that the producer regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers employed by that person, and shall include a list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition produced since the last certification, as well as a list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition that include non-employee performers. The Department assumes that the certification's main burden would be to require producers to maintain a list of the visual depictions produced during the certification period, and that the majority of the work to prepare the certification would be performed by administrative staff. Based on the Department's assumption that 90% of such entities would qualify for the exemption, the total annual cost for the entities qualifying for the statutory exemption would be approximately \$21,500 per year. Again, the Department does not certify the accuracy of these numbers and invites comment on the assumptions outlined above.

Based on the Department's assumption that 3,000,000 visual depictions of simulated sexually explicit conduct are created each year and that it requires 6 minutes to complete the record-keeping requirement for each depiction, the

record-keeping requirements would impose a burden of 300,000 hours. Based on the Department's assumption that producers of 90% of these depictions would qualify for the statutory exemption from these requirements, the requirements would only impose a burden of 30,000 hours. Assuming further that the record keeping requirements will cost \$6.00 per hour to complete and \$0.05 for each image of a verifiable form of identification, the total annual cost for the 10% of entities not qualifying for the statutory exemption would be \$181,500. Again, the Department does not certify the accuracy of these numbers and invites comment on the assumptions outlined above.

The Department notes that steps taken to minimize the burden of these requirements on small entities include the statutory exemption requiring only that such entities prepare the certification necessary for the exemption.

All comments and suggestions, or questions regarding additional information, should be directed to 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. Comments should also be sent to: Lynn Bryant, Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Patrick Henry Building, 601 D Street, NW, Washington, DC 20530.

List of Subjects in 28 CFR Part 75

Crime, Infants and children, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, part 75 of chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; PROTECT ACT; ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006; RECORD-KEEPING AND RECORD INSPECTION PROVISIONS

1. The authority citation for part 75 is revised to read as follows:

Authority: 18 U.S.C. 2257, 2257A.

2. The title of part 75 is revised to read as set forth above.

3. Amend § 75.1 by revising paragraphs (c)(1), (c)(2), (c)(4) introductory text, and (d), and further amend as proposed on July 12, 2007, at

72 FR 38038 by revising paragraph (m) and adding paragraphs (o), (p), (q), (r), and (s), to read as follows:

§ 75.1 Definitions.

* * * * *

(c) * * *

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

(2) *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 or simulated 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 or simulated sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.

* * * * *

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

* * * * *

(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 or simulated 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.

* * * * *

(m) *Date of original production or original production date* means the date the primary producer actually filmed, videotaped, or photographed, or created a digitally or computer-manipulated image, digital image, or picture, of the visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct.

* * * * *

(o) *Simulated sexually explicit conduct* means conduct engaged in by performers in a visual depiction that is intended to appear to be actual sexually explicit conduct and does so appear to a reasonable viewer.

(p) *Regularly and in the normal course of business collects and maintains* means any business practice that ensures that the producer confirms the identity and age of employees who perform in visual depictions of sexually explicit conduct.

(q) *Individually identifiable information* means that information about the names, addresses, and dates of birth of employees is capable of being retrieved on the basis of a name of an employee who appears in a specified visual depiction.

(r) *All performers, including minor performers* means all performers who appear in a visual depiction of lascivious exhibition of the genitals or pubic area or simulated sexually explicit conduct, no matter for how short a period of time.

(s) *Employed by* means, in reference to a performer, one who receives pay for performing in a visual depiction or is otherwise in an employer-employee relationship with the producer of the visual depiction as evidenced by oral or written agreements.

4. Amend § 75.2 by revising the introductory text of paragraph (a) and paragraphs (a)(1), (a)(2), (c) and (d), to read as follows:

§ 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, or of an actual human being engaged in simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER OF THE FINAL RULE**], 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 prior to production of the depiction. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER OF THE FINAL RULE**], the records shall also include a legible hard copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible hard copy of a picture identification card. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct made after June 23, 2005, or of an actual human being engaged in simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER OF THE FINAL RULE**], the records shall include a copy of the depiction and, where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction. If no URL is associated with the depiction, the records shall include another uniquely identifying reference associated with the location of the depiction on the Internet. For any performer in a depiction performed live on the Internet, the records shall include a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.

(2) Any name, other than the 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 a visual depiction of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER OF THE FINAL RULE**], 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.

(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 or simulated 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 an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated 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 paragraph (a)(2) of this section.

(d) For any record of a performer in a visual depiction of actual sexually explicit conduct created or amended after June 23, 2005, or of a performer in a visual depiction of simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER OF THE FINAL RULE**], 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 an Internet computer site or service). If the producer subsequently produces an additional book, magazine, film, videotape, digitally or computer-manipulated image, digital image, picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated 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 name(s) of the performer to the existing records and such records shall thereafter be maintained in accordance with this paragraph.

* * * * *

5. Amend § 75.6 by revising paragraph (a) to read as follows:

§ 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, picture, or other matter (including but not limited to an Internet computer site or service) 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 after July 3, 1995, or in simulated sexually explicit conduct made after [DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE], 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. In this paragraph, the term "copy" includes every page of a Web site on which appears a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct.

* * * * *

6. Revise § 75.7 to read as follows:

§ 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) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part if:

- (1) The matter contains only visual depictions of actual sexually explicit conduct made before July 3, 1995, or was produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995;
- (2) The matter contains only visual depictions of simulated sexually explicit conduct made before [DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE];
- (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 then 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) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part.

7. Amend § 75.8 by revising paragraph (d) to read as follows:

§ 75.8 Location of the statement.

* * * * *

(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 every page of a Web site on which appears a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct.

* * * * *

8. Amend part 75 by adding § 75.9 to read as follows:

§ 75.9 Certification of records.

(a) *In general.* The provisions of §§ 75.2 through 75.8 shall not apply to a visual depiction of actual sexually explicit conduct constituting lascivious exhibition of the genitals or pubic area of a person or to a visual depiction of simulated sexually explicit conduct if all of the following requirements are met:

- (1) The visual depiction is intended for commercial distribution;
- (2) The visual depiction is created as a part of a commercial enterprise;
- (3) Either—
 - (i) The visual depiction is not produced, marketed, or made available in circumstances such that an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in 18 U.S.C. 2256(8), or
 - (ii) The visual depiction is subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent, or profane programming; and
- (4) The producer of the visual depiction certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, whom he employs pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names,

addresses, and dates of birth of the performers.

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(b) *Form of certification.* The certification shall take the form of a letter addressed to the Attorney General and signed by the chief executive officer of the entity making the certification or, in the event the entity does not have a chief executive officer, the senior manager responsible for overseeing the entity's activities.

(c) *Content of certification.* The certification shall contain the following:

(1) A statement setting out the basis under 18 U.S.C. 2257A and part 75.9 under which the certifying entity and any sub-entities, if applicable, are permitted to avail themselves of the safe harbor, and basic evidence justifying that basis.

(2) The following statement: "I hereby certify that [name of entity] [and all sub-entities listed in this letter] regularly and in the normal course of business collect and maintain individually identifiable information regarding all performers employed by [name of entity] who appear in visual depictions of simulated sexually explicit conduct or of lascivious exhibition of the genitals or pubic area";

(3) A list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area (or matter containing them) that include non-employee performers;

(4) A list of the titles, names, or other identifying information of visual depictions of simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area (or matter containing them) produced since the last certification;

(5) If applicable because the visual depictions at issue were produced outside the United States, the statement that: "I hereby certify that the foreign producers of the visual depictions listed above either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or have certified to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications." For visual depictions of simulated sexually explicit conduct only, the producer may provide the following statement instead:

"I hereby certify that [name of entity] has taken reasonable steps to confirm that the performers in the visual depictions listed below are not minors."

(6) If applicable, a list of the titles, names, or other identifying information of the foreign-produced visual depictions (or matter containing them) of simulated sexually explicit conduct for whom records of the performers appearing in them are not available but for whom the certifying entity has taken reasonable steps to confirm that the performers in them are not minors.

(7) If applicable, the statement that: "I hereby certify that the primary producers of visual depictions secondarily produced by [name of entity] and listed above either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code or have certified to the Attorney General that they regularly and in the normal course of business collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications."

(d) *Entities covered by each certification.* A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of the sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entities served as the producers.

(e) *Frequency of certification.* An initial certification is due [DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE]. Subsequent certifications are due every two years from that date. The initial certification and all subsequent certifications must be filed within a period of five business days concluding on the due date (*i.e.*, if the due date were on a Friday, and there were no federal holiday during that week, the certification would have to be filed on Monday, Tuesday, Wednesday, Thursday, or Friday of that week). Initial certifications of producers who begin production after [DATE OF PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE] but before [DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE] are due on [DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL

REGISTER OF THE FINAL RULE] and must be filed within a period of five business days concluding on the due date. Initial certifications of producers who begin production after [DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE] but before [DATE TWO YEARS AFTER 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE] are due within 60 days of the start of production (unless the start of production occurs within 60 days of [DATE TWO YEARS AFTER 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE]), in which case the certifications are due on [DATE TWO YEARS AFTER 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THE FINAL RULE] and must be filed within a period of five business days concluding on the due date. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or Federal holiday.

Dated: May 30, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8-12635 Filed 6-5-08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 151

[USCG-2004-19621]

RIN 1625-AA89

Dry Cargo Residue Discharges in the Great Lakes; Notice of Public Meeting

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meetings.

SUMMARY: The Coast Guard announces that public meetings for the May 23, 2008 notice of proposed rulemaking (NPRM) on dry cargo residue discharges in the Great Lakes and its supporting Draft Environmental Impact Statement (DEIS) will be held in Duluth, Minnesota, and Cleveland, Ohio, in July 2008. The proposed rule would allow the continued discharge of certain non-toxic and non-hazardous bulk dry cargo residues in the Great Lakes. Existing prohibitions on discharges in certain areas would be continued, and additional sensitive and protected areas

would be defined as no-discharge zones. Recordkeeping and reporting requirements would be imposed, and the voluntary use of measures to control residues would be encouraged.

DATES: The public meetings will be held on the following dates:

- Duluth, MN, July 15, 2008 from 1 p.m. to 5 p.m.
- Cleveland, OH, July 17, 2008 from 1 p.m. to 5 p.m.

The previously announced deadline for receiving public comments on the Coast Guard's notice of proposed rulemaking (NPRM) and DEIS is July 22, 2008.

ADDRESSES: The Coast Guard will hold the public meetings at the following addresses:

- Duluth: Holiday Inn, 200 West First Street, Duluth, MN 55802, phone 218-727-7492.
- Cleveland: The Forum Conference Center, One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114, phone 216-241-6338.

You may also submit comments identified by Coast Guard docket number USCG-2004-19621 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

- (1) *Online:* <http://www.regulations.gov>.
- (2) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.
- (3) *Fax:* 202-493-2251.
- (4) *Hand delivery:* Room W12-140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, contact LT Heather St. Pierre, Project Manager, Environmental Standards Division, Coast Guard, via telephone at 202-372-1432 or via e-mail at Heather.J.St.Pierre@uscg.mil. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-493-0402.

SUPPLEMENTARY INFORMATION:

Comment Submissions

In the NPRM published May 23, 2008 (73 FR 30014), we previously requested public comments and provided information on how to submit them in writing. All written comments received