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Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct; Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performance; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 75

[Docket No. CRM 104; CRM 105; AG Order No. 3025–2008___]

RIN 1105–AB18; RIN 1105–AB19

Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct; Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performance

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule finalizes two proposed rules and amends the record-keeping, labeling, and inspection requirements to account for changes in the underlying statute made by Congress in enacting the Adam Walsh Child Protection and Safety Act of 2006.

DATES: This rule is effective January 20, 2009. *Compliance date:* The requirements of this rule apply to producers of visual depictions of the lascivious exhibition of the genitals or pubic area of a person and producers of simulated sexually explicit conduct as of March 18, 2009.

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SUPPLEMENTARY INFORMATION: The Child Protection and Obscenity Enforcement Act of 1988, Public Law 100–690, codified at 18 U.S.C. 2257, imposes certain name- and age-verification, record-keeping, and labeling requirements on producers of visual depictions of actual human beings engaged in sexually explicit conduct. Specifically, section 2257 requires producers of such material 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 and maintain this information. 18 U.S.C. 2257(b). Violations of these record-keeping requirements are criminal offenses punishable by imprisonment of not more than five years for a first offense and not more than 10 years for subsequent offenses. *See id.* 2257(i). Any matter containing such visual depictions must be labeled with a statement indicating where the records are located, and those records are subject to inspection by the government. *See id.* 2257(c), (e). These provisions supplement the federal statutory provisions criminalizing the production and distribution of materials visually depicting minors engaged in sexually explicit conduct. *See id.* 2251, 2252.

The regulations in 28 CFR part 75 implement section 2257. On May 24, 2005, the Department of Justice (''the Department'') published a final rule that 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, Public Law 108–21. *See* Inspection of Records Relating to Depiction of Sexually Explicit Performances, 70 FR 29607 (May 24, 2005) (CRM 103; RIN 1105–AB05).

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act, Public Law 109–248 (''the Adam Walsh Act'' or ''the Act''). As described in more detail below, the Act made a number of changes to section 2257 and added section 2257A to title 18, imposing similar record-keeping requirements on producers of visual depictions of simulated sexually explicit conduct. Furthermore, the Act created a certification regime for producers of such conduct and for producers of depictions of one type of actual sexually explicit conduct to exempt them from the detailed regulatory requirements.

This final rule amends the regulations in part 75 to comport with these statutory changes. As described in more detail below, the Department published two separate proposed rules, one to implement the revision to section 2257 and the other to implement the requirements of section 2257A with regard to simulated sexually explicit conduct and its certification regime. This rule finalizes both proposed rules in one rulemaking in order to simplify and coordinate implementation of the Adam Walsh Act. Most importantly, this approach ensures that the requirements of revised section 2257 go into effect in coordination with the effectiveness of the certification regime applicable to it. The final rule also makes numerous changes to the proposed rules that will simplify the regulatory process and lessen the burden on businesses covered by the Act.

Background

Protecting children from sexual exploitation is one of government's most important responsibilities. Children are incapable of giving voluntary and knowing consent to perform in pornography. Furthermore, children often are forced to engage in sexually explicit conduct for the purpose of producing pornography. For these reasons, visual depictions of sexually explicit conduct that involve persons under the age of 18 constitute child pornography under federal law. *See* 18 U.S.C. 2256(8). Producers of such depictions are subject to appropriately severe penalties. *See id.* 2251.

Establishing the identity of every performer in a depiction of sexually explicit conduct is critical to ensuring that no performer is a minor and that, hence, the depiction is not child pornography. Section 2257 has facilitated identification and age-verification efforts by requiring producers to ascertain the identity and age of performers in their depictions and to maintain records evidencing such compliance. Producers are less likely as a result of these requirements to exploit children and to create child pornography through carelessness, recklessness, or deliberate indifference. As for those who intentionally produce material depicting minors engaged in sexually explicit conduct, the statute and regulations provide an additional basis for prosecuting such individuals besides the applicable child-exploitation statutes. In addition, the statute and the regulations ''deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the persons depicted were adults at the time they were photographed or videotaped.'' *Am. Library Ass'n* v. *Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994).

In the Adam Walsh Act, Congress filled two gaps in section 2257 by amending it to cover lascivious exhibition of the genitals or pubic area (''lascivious exhibition'') and by enacting section 2257A to cover simulated sexually explicit conduct, while at the same time creating an exception from these new record-keeping requirements in certain circumstances.

With regard to lascivious exhibition, the Act corrected an anomaly in the definition of ''sexually explicit conduct'' to which section 2257's requirements apply. Prior to the enactment of the Act, section 2257 referenced the definition of ''sexually explicit conduct'' for purposes of Chapter 110 of the U.S. Code in section 2256(2)(A) and listed four of the five categories of conduct included in that section. Section 2257 did not include ''lascivious exhibition of the genitals or

pubic area of any person.'' 18 U.S.C. 2256(2)(A)(v). The Act revised section 2257 to include that category along with the others. *See* Adam Walsh Act, Public Law 109–248 § 502(a)(4). Because part 75 defines ''sexually explicit conduct'' by referencing that term in section 2256(2)(A), part 75 will apply to depictions of ''lascivious exhibition.''

With regard to simulated sexually explicit conduct, it is crucial to note that Chapter 110 of title 18 of the U.S. Code (''Sexual Exploitation and Other Abuse of Children'') already 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;
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> (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).

Numerous States' child-exploitation statutes refer to both simulated and actual sexual conduct. *See* Alaska Stat. § 11.41.455; Ariz. Rev. Stat. § 13–3551; 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 § 263.00; N.D. Cent. Code § 12.1–27.2–01; Okla. Stat. tit. 21 § 1024.1; Or. Rev. Stat. § 163.665; S.D. Codified Laws § 22–24A–2 to –3; Tenn. Code Ann. § 39–17–1003; Tex. Penal Code Ann. § 43.25; Utah Code Ann. § 76–5a–2; 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.

Sections 2257 and 2257A thus operate in tandem to protect children from exploitation in visual depictions of sexually explicit conduct. Part 75 implementing those statutes 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 (D.C. Cir. 1994); *Free Speech Coalition* v. *Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005) (''*Free Speech I*'') (upholding certain aspects of part 75, although preliminarily enjoining others); *Free Speech Coalition* v. *Gonzales*, 483 F. Supp. 2d 1069 (D. Colo. 2007) (''*Free Speech II*''); *but see also Connection Distrib. Co.* v. *Gonzales*, 2006 WL 1305089, 2006 U.S. Dist. LEXIS 29506 (N.D. Ohio, May 10, 2006) (upholding the constitutionality of part 75), *rev'd and remanded sub nom. Connection Distrib. Co.* v. *Keisler*, 505 F.3d 545 (6th Cir. 2007) (striking down section 2257, but not directly addressing the constitutionality of part 75), *vacated and rehearing en banc granted sub nom. Connection Distrib. Co.* v. *Mukasey*, 2008 U.S. App. LEXIS 9032 (6th Cir. Apr. 10, 2008). 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 Assocs., Inc.* v. *Reno*, 139 F.3d 804, 808 (10th Cir. 1998) (quotation marks omitted; alteration in original), Congress subsequently amended the statute, see Adam Walsh Act, Public Law 109–248 section 502(a)(4), and adopted the Attorney General's interpretation of section 2257. Cf. *Free Speech Coalition II*, 483 F. Supp. 2d at 1075 (suggesting that the enactment of section 502 of the Act moots the plaintiff's *ultra vires* challenge to part 75).

The Proposed Rules

Revisions to Section 2257

The Department issued a proposed rule to implement the revisions to section 2257 on July 12, 2007. *See* Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct, 72 FR 38033 (July 12, 2007) (CRM 104; RIN 1105–AB18). The proposed rule reflected the change to the definition of ''actual sexually explicit conduct'' to include lascivious exhibition by adding to the definitional section of the regulations at § 75.1(n). Although proposed part 75 applied to the ''lascivious exhibition of the genitals or pubic area of a person,'' it did not define this term beyond the language of section 2256(2)(A). Case law provides guidance as to the types of depictions that federal courts have considered to be lascivious exhibition of the genitals or pubic area, and the Department will rely on such precedent in the context of section 2257 investigations and prosecutions.

The leading case is *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States* v. *Weigand*, 812 F.2d 1239 (9th Cir. 1987), which provides a list of factors for determining whether a visual depiction constitutes lascivious exhibition:

(1) Whether the focal point of the visual depiction is on the child's genitalia or pubic area;

(2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

(3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(4) whether the child is fully or partially clothed, or nude;

(5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832. Several courts of appeals have relied upon the Dost factors. *See, e.g., United States* v. *Grimes*, 244 F.3d 375 (5th Cir. 2001); *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994); *United States* v. *Wolf*, 890 F.2d 241 (10th Cir. 1989).

The July 2007 proposed rule noted that, although these factors have been used to determine whether visual

depictions of children constituted lascivious exhibition for purposes of criminal prosecution for violations of sections 2251, 2252, and 2252A of title 18, only the third factor is necessarily dependent on the age of the person depicted. The other factors provide guidance as to the types of depictions that would constitute lascivious exhibition for purposes of section 2257 and part 75, as well, even though those sections apply to any performers regardless of age.

The July 2007 proposed rule noted that the applicability of part 75 was to be prospective from the effective date of the Adam Walsh Act. It therefore contemplated that the rule applied only to depictions whose original production date was on or after July 27, 2006. That is, under the proposed rule, records would not be required to be maintained either by a primary producer or by a secondary producer for a visual depiction of lascivious exhibition, the original production date of which was prior to July 27, 2006. In the case of a secondary producer, the proposed rule stated that even if the secondary producer ''produces'' (as defined in the regulation) such a depiction on or after July 27, 2006, he need not maintain records if the original production date of the depiction is prior to that date.

Second, the Adam Walsh Act revised the exclusions in the statute for the operations of Internet companies. Specifically, the Act amended section 2257 by excluding from the definition of ''produces'' the ''provision of a telecommunications service, or of an Internet access service or Internet information location tool * * * or the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication.'' These exclusions are based on the definitions in section 231 of the Communications Act of 1934, 47 U.S.C. 231.

Third, the Adam Walsh Act made several changes in the terminology of the statute. In subsection 2257(e)(1), it added at the end the following: ''In this paragraph, the term 'copy' includes every page of a Web site on which matter described in subsection (a) appears.'' That change was reflected in the proposed rule at §§ 75.1(e)(3), 75.6(a), and 75.8(d). The change materially affects the regulation's labeling requirement as applied to Web sites. Section 75.8(d) of the current regulations permits a producer of a computer site of service or Web site to affix the label stating where the records required under the regulations are located ''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 RecordKeeping Requirements Compliance Statement.' '' Because of the change in the statute, the proposed rule eliminated that portion of the current regulations. The proposed rule required, per the statute, that the statement describing the location of the records required by this part be affixed to every page of a Web site (controlled by the producer) on which visual depictions of sexually explicit conduct appear.

Finally, the Adam Walsh Act confirmed that the statute applies to secondary producers as currently (and previously) defined in the regulations. Specifically, the Act defines any of the following activities as ''produces'' for purposes of section 2257:

> (i) Actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;
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> (ii) Digitizing an image[ ] of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or
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> (iii) Inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content[ ] of a computer site or service that contains a visual depiction of, sexually explicit conduct * * *

18 U.S.C. 2257(h)(2)(A).

It excludes from the definition of ''produces,'' however, the following activities, in pertinent part:

> (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 duplication.
>
> (ii) Distribution;
>
> (iii) Any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers * * *

Id. 2257(h)(2)(B), as amended.

This language replaces the previous definition of ''produces'' in the statute, which stated, in pertinent part, as follows:

> [T]he term ''produces'' means 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) (2000 ed. & Supp. V) (former version).

In enacting the revised language, Congress upheld the Department's consistently held position that the rule's requirements for secondary producers have been in effect since the rule's original publication. As explained by the sponsor of the Act in the House of Representatives:

> Congress previously enacted the PROTECT Act of 2003 against the background of Department of Justice regulations applying section 2257 to both primary and secondary producers. That fact, along with the Act's specific reference to the regulatory definition that existed at the time, reflected Congress's agreement with the Department of Justice's view that it already had the authority to regulate secondary procedures [sic] under the applicable law.
>
> A federal court in Colorado, however, recently enjoined the Department from enforcing the statute against secondary producers, relying on an earlier Tenth Circuit precedent holding that Congress had not authorized the Department to regulate secondary producers. These decisions conflicted with an earlier DC Circuit decision upholding Congress's authority to regulate secondary producers. Section 502 of the bill is meant to eliminate any doubt that section 2257 applies both to primary and secondary producers, and to reflect Congress's agreement with the regulatory approach adopted by the Department of Justice in enforcing the statute.

152 Cong. Rec. H5705, H5725 (2006) (statement of Rep. Pence).

Congress thus rejected the interpretation adopted by the court in *Sundance Associates* v. *Reno*, 139 F.3d 804 (10th Cir. 1998), in favor of the DC Circuit's decision upholding the application of the statute to secondary producers. *Am. Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994). In upholding the constitutionality of the secondary-producer requirements, the D.C. Circuit both recognized the importance of these requirements and effectively rejected the argument that Congress lacked the authority to regulate secondary producers.

In accordance with the current law, the proposed rule retained July 3, 1995, as the effective date of the rule's requirements for secondary producers. (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 one exception was that the proposed rule would not have penalized

secondary producers for failing to maintain required records in connection with those acts of production that occurred prior to the effective date of the Act. While the law would permit the Department to apply the statute and regulations to actions that occurred prior to that date, the Department determined that the proposed rule would not apply in such circumstances to avoid any conceivable *ex post facto* concern.

In addition to implementing the changes in the statute described above, the July 2007 proposed rule clarified several other issues. First, it clarified that primary producers may redact non-essential information from copies of records provided to secondary producers, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm name and age—such as drivers' license number or passport number—may not be redacted, so that its validity may be confirmed. Second, the proposed rule clarified that producers of visual depictions performed live on the Internet need not maintain a copy of the full running-time of every such depiction. Rather, they may maintain a copy that contains running-time sufficient to identify each and every performer with the records needed to confirm his or her age.

Third, the proposed rule clarified that, with regard to the government-issued photo identification required for records, a foreign-government-issued picture identification is acceptable if the performer providing it is a foreign citizen and the producer maintaining the records produces the visual depiction of the performer in a foreign country, no matter whether the producer is a U.S. or foreign citizen. That is, a U.S. producer who produces a depiction of sexually explicit conduct while located in a foreign country may rely on a foreign-government-issued picture identification card of a performer in that depiction who is a foreign citizen. All other requirements of the regulations continue to apply mutatis mutandis—i.e., the producer must examine and maintain a legible copy of the foreign-government-issued picture identification card in his records. Furthermore, a foreign-government-issued picture identification card is not sufficient to comply with the regulations for U.S. citizens, even when abroad. That is, if a U.S. producer travels to a foreign country to produce a depiction of sexually explicit conduct, all U.S. citizens performing in the depiction must have a U.S.-government-issued picture identification card, even though a foreign citizen performing in the same depiction may provide a foreign-government-issued picture identification card. And, as is the case in the current regulation, only a U.S.-government-issued picture identification card complies with the regulations relating to productions in the United States, no matter whether the performer is a U.S. or foreign citizen. The regulation also states that producers of visual depictions 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 under the provisions of part 75 in effect on the original production date. Finally, although it was not necessary to change the text of the regulations for this purpose, the Department clarified at the time that it issued the proposed rule that a producer need not keep a copy of a URL hosting a depiction that the producer produced but over which he exercises no control.

Section 2257A

As noted above, on June 6, 2008, the Department published a proposed rule making additional amendments to part 75 to implement section 2257A. *See* Inspection of Records Relating to Depiction of Simulated Sexually Explicit Performances, 73 FR 32262 (June 6, 2008) (CRM. 105; RIN 1105–AB19). The June 2008 proposed rule contained two key elements—a definition of ''simulated sexually explicit conduct'' and the details of the certification regime.

As to the 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 believed that a definition of the term ''simulated sexually explicit conduct'' was necessary. A definition would 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 started its analysis of the proper definition of the term for regulatory purposes with the term's plain meaning. The word ''simulated'' is typically defined 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 read 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.''

The June 2008 proposed rule's definition was 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, section 2(a), 92 Stat. 7, 8 (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 section 311.4(d)(1); 14 V.I. Code section 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. section 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, section 31; N.H. Rev. Stat. Ann. section 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. section 13–3551(10); Miss. Code Ann. section 97–5–31(f); Mont. Code Ann. section 45–5–625(5)(c).

(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 the 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.''

The second key element of the proposed rule was the crafting of the certification regime. 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 of 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.

In the June 2008 proposed rule, the Department crafted a certification regime that would have implemented 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. The proposed rule would have required producers to include the following information in certifications: (1) The legal basis for the exemption and basic evidence in support; (2) a statement that they collect and maintain the requisite individually identifiable information concerning their employees; (3) a list of the producer's materials depicting simulated sexually explicit conduct or lascivious exhibition that show non-employee performers; (4) a list of the producer's materials depicting simulated sexually explicit conduct or lascivious exhibition produced since the last certification; (5) with respect to foreign-produced material, a statement that the foreign producer of that material either collects and maintains the requisite records or itself has made a certification, or, with respect to material depicting sexually explicit conduct only, a statement that the producer took reasonable steps to confirm that the performers depicted in that material are not minors; (6) if applicable, a list of the foreign-produced material depicting simulated sexually explicit conduct that the producer took reasonable steps to confirm did not depict minors; and (7) if applicable, a statement that the primary producer of material secondarily produced by the certifying producer either collects and maintains the requisite records or itself has made a certification. The proposed rule would also have required that the certification be submitted every two years.

Changes From the Proposed Rules

This final rule makes a number of changes in the proposed rules in response to commenters' concerns. The Department believes that the changes, while still enabling the Department to enforce the statutes, will considerably lessen the burdens on the regulated industries.

Most significantly, as described in more detail below in response to specific comments, the Department has done the following:

- Consolidated the publication of the final versions of the two proposed rules into one final rule;

• Ensured that the regulatory requirements applicable to depictions of actual sexually explicit conduct consisting of lascivious exhibition apply starting on the date of availability of the statutorily provided safe harbor;
• Permitted the use of third-party custodians of records;
• Permitted records to be maintained digitally;
• Clarified the definition of ''simulated sexually explicit conduct'';
• Clarified the exemption from the record-keeping requirements for those engaged in distribution;
• Clarified that, for purposes of the requirement that every page of a Web page contain the disclosure statement, a hyperlink or ''mouseover'' is permitted;
• Eliminated the requirement that statements on the location of records contain a date of production (or any other date), although added a requirement that primary producers create a record of the date of production;
• Clarified the application of the requirements regarding location of the statement to DVDs; and
• Eliminated the detailed information required by the certification regime, and replaced it with a significantly simpler certification.

Comments on the Proposed Rules

The following section reviews comments to the proposed rules and how, if at all, the Department has changed the final rule in response to them. Comments on both proposed rules are included in this section, organized according to the subsections of the rule.

Definitions

The proposed rule outlined several changes to definitions of terms that are contained in 28 CFR 75.1. The Department received a number of comments regarding the proposed definitions.

Picture Identification Card

The proposed rule requires in § 75.1(b) that a producer of actual sexually explicit conduct check a picture identification card issued by a United States or State government entity for a performer who is an American citizen, whether the production occurs in the United States or abroad. Under the proposed rule, a producer abroad may rely on foreign government identification cards for foreign performers, but must maintain a copy of that identification, and a producer may not rely on a foreign identification card for a foreign citizen when production occurs in the United States, but must check a United States identification card in that circumstance. The Department received three comments on this proposal, all of which voiced opposition.

One comment noted that a producer cannot hire a foreign adult performer to work in the United States who lacks American documents, but that if the producer took her across the border, then she could work with foreign documents, a situation the commenter suggested would not help children. The commenter also states that because the proposed rule lacked a good faith exception, a producer operating outside the United States would need to make sure that a performer using foreign documents was not in fact an American citizen. Moreover, the commenter claims that the goal of avoiding errors in immigration status that the proposed rule would therefore achieve did not help children.

The Department declines to adopt this comment. Protecting American citizens is a top priority of the Department, and given the more stringent standards for issuing government identification documents in recent years, the Department believes that children will be best protected by a requirement that American identification documents be provided before an American is hired to engage in sexually explicit conduct. It further believes that conduct within American borders should necessitate that the producer check for American issued identification documents even if the performer is a foreign citizen, so that all producers in this country check the age and identification of all performers. It is true that the rules will differ if the production occurs in foreign countries with foreign performers. Given the Department's resources and concerns regarding comity, the Department continues to believe that the proposed rule best addresses this issue.

One comment expressed the belief that the Department should not always require that a producer obtain a copy of a picture identification card before creating an actual sexually explicit depiction. It hypothesizes the existence of a recording of a sexual act by a Congressman in a public place. It argues that a news organization could not air this recording under the proposed rule in the absence of the checking of a picture identification card, even though the Congressman by constitutional operation must be at least 25 years old.

The Department declines to adopt this comment. Regardless of the apparent age or identity of an individual, the rule appropriately requires that identification be checked to determine that the performer is of legal age. The individual pictured in this hypothetical may only appear to be a Congressman, for instance. Moreover, an entity regulated by the FCC, which the comment presupposes for airing such a depiction, may well be able to utilize the exemption provisions of section 2257A.

The Department has also clarified that a picture identification card must include the performer's date of birth. Such a requirement was implicit in the proposed rule in that picture identification documents issued by government agencies, such as a passport or driver's license, normally contain the individual's date of birth. The final rule makes this requirement explicit.

Producer

The Department received thousands of comments that appear to be part of an orchestrated campaign that opposes the requirement in the proposed rule that adult social-networking sites obtain and maintain personal information concerning their users, including obtaining and maintaining users' photo identification, as well the ability of the Department to inspect such records and invade user privacy without safeguarding the information once observed. They state that it is not feasible to have adult networking sites for thousands of users under the rule, and they note that users of such sites already certify that they are over 18.

The Department does not adopt these comments. First, most social networking sites would appear not to be covered by the statute and the rule under the definition of ''produces'' in section 2257(h)(2)(B)(v) and § 75.1(c)(4)(v), respectively. The statutory definition excludes from ''produces'': ''the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication.'' *See also* 28 CFR 75.1(c)(4)(v) (excluding ''[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''). Therefore, the Department does not accept that such sites cannot operate under the proposed rule, or that such sites must maintain information concerning their users, much less that the Department must be able to inspect such data. However, one who posts sexually explicit activity on ''adult'' networking sites may well be a primary or secondary producer. Users of social networking sites may therefore be subject to the proposed rule, depending on their conduct. That such users may certify without penalty or effective

monitoring that they are over 18 is irrelevant to compliance with the proposed rule, since they may not in fact be above 18. Moreover, depictions such users put on the sites may feature not only themselves but other people who have not even made the unverifiable certification required by a social networking site.

One comment states that the Department must clarify the distinction between secondary producers and distributors. The comment notes that the Act amended the statutory definition of ''produces'' to broaden the distribution exclusion from ''mere distribution'' to ''distribution.'' *See* 18 U.S.C. 2257(h)(2)(B)(ii). The comment states that this means ''distribution'' is not meant to be narrowly construed, and that the Department should thus state that ''unless an entity that disseminates a depiction of sexually explicit conduct is responsible for creating or materially altering its content, or for its physical construction, the entity is engaged in 'distribution' and is exempt from the statute and rules.'' The comment goes on to note that ''non-material alteration'' should include removing or pixilating depictions of sexually explicit conduct.

The Department adopts this comment in part. The Department cannot adopt the comment in toto because doing so would conflict with the statute in that sections 2257(h)(2)(A)(ii) and (iii) include several activities under the definition of ''produces,'' such as digitizing an image, inserting an image on a computer site or service, or managing the sexually explicit content of a computer site or service, that would fall under the comment's proposed definition of ''distribution.'' The Department, however, states in the final rule that, unless activities are described in section 2257(h)(2)(A), an entity whose activities are limited to the dissemination of a depiction of sexually explicit conduct without having created it or altered its content is excluded from the definition of ''producer.''

The Department cannot adopt the suggestion as to ''non-material alteration'' of depictions for two reasons: First, pixilating an image would appear to constitute ''creating a digitally- or computer-manipulated image of an actual human being,'' and thus would fall under the definition of ''produces'' in section 2257(h)(2)(A)(i); second, to the extent images are posted on Web sites, alteration (and subsequent posting on a Web site) of an image would appear to constitute ''inserting * * * [such image] on a computer site * * * or otherwise managing the sexually explicit content'' of such a site. While the comment correctly states that the proposed exclusion is analogous to the exclusion for transmission, which permits a transmitter to delete material that it considers ''obscene * * * or otherwise objectionable'' without being considered to have selected or altered the content of the communication, see 18 U.S.C. 2257(h)(2)(B)(v) (citing 47 U.S.C. 230(c)), Congress did not provide similar language modifying the exclusion for distribution of the image, and thus the Department is limited by the statutory text.

In addition, as described in more detail below, in certain circumstances a pixilated depiction can still constitute lascivious exhibition. *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994). A categorical exemption for persons who pixilated or otherwise obscured depictions would risk creating a loophole for the production of material that is in fact covered by the definition of sexually explicit conduct.

Several commenters ask the Department to exclude news and documentary programming from the definition of ''producer.'' The comments claim that producers of that programming use footage provided by others under the fair use doctrine. The comments posit that if a producer includes news and documentary producers, then such producers either will lose the ability to obtain footage depicting any adult sexual conduct, or will be forced to make payments to the original producer notwithstanding the fair use doctrine.

The Department declines to adopt this comment. The First Amendment does not permit even a bona fide reporter to trade in child pornography in order to create a work of journalism, see *United States* v. *Matthews*, 209 F.3d 338 (4th Cir. 2000), not to mention the possibility that someone might purport to be a news or documentary producer to evade the statute. Accordingly, it is consistent with the law for the final rule to cover journalistic and similar works.

One comment inquires whether a secondary producer is required by the proposed rule's change to § 75.2(a)(1) to ''examin[e] * * * a picture identification card prior to production of the depiction,'' or whether this obligation is limited to the primary producer. The commenter asks that the Department allow an entity that obtains a domestic or foreign-made film or program for American distribution but has no role in the production of that film or program to be considered a ''distributor'' rather than a ''secondary producer'' of such material, and therefore to be exempt from the requirements. The comment would allow secondary producers to disseminate a work in the United States even when a primary producer failed to obtain the required records prior to the date of original production.

The Department declines to adopt this comment. The comment would effectively turn all secondary producers into distributors, exempting them from section 2257's requirements, contrary to the Act's making section 2257 applicable to that activity. A significant goal of the legislation was to eliminate commercial markets for non-commercially produced child pornography. Although the rule does not require secondary producers to check identification themselves, secondary producers should be aware that they incur a significant risk if they do not avail themselves of the identification documents that primary producers have created. Secondary producers who do not check records run the risk that they are distributing child pornography if the performers depicted in fact were not of legal age. Furthermore, to the extent that such foreign-produced material includes only lascivious exhibition, a U.S. secondary producer could avail itself of the provisions of the certification.

One comment notes the proposed rule's elimination of ''mere'' from the term ''mere distribution'' that is contained in the current regulation and requests that the Department add ''or gratuitous transfer'' after the word ''distribution'' in the definition of ''producer'' in § 75.1(c)(4)(ii). The comment suggests that adding ''or gratuitous transfer'' would avoid a potential problem in the meaning of the word ''distribution'' when read in connection with the term's restriction to commercial contexts in § 75.1(d) of the current regulations. The comment believes that the latter provision correctly suggests that the regulations' record-keeping requirements are restricted to commercial production operations. And it requests that the Department to elaborate whether or which transfers should require disclosure statements.

The Department declines to adopt this comment. The definitions in the proposed rule are (with minor grammatical changes to conform to the structure of the regulation) exactly those in the statute, and the Department sees no need for further clarification, particularly with respect to a particular term that itself would have to be defined.

One comment asks the Department to remove the term ''assembles'' from the definition of ''producer'' in § 75.1(c)(2). The Department declines to adopt this comment. As noted above, the

definitions in the regulations are those contained in the statute, and the statutory definition of ''produces'' includes ''assembling * * * a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct.'' 18 U.S.C. 2257(h)(2)(A)(ii).

One comment notes that many depictions will have more than one primary producer, as a depiction can be photographed, then digitized, or be generated by computer from a depiction of an actual person. Various entities could be involved in creating a particular depiction. Each entity or person who performed even one of these tasks would be a primary producer. Moreover, since only secondary producers can rely on copies of documents, the comment requests that the Department provide that only one primary producer should be designated and required to maintain records.

Another comment states that the rules are unclear concerning how many or which producers must be named if there is more than one primary or secondary producer. It notes that parents and subsidiaries may not have the same address. The Department adopts this comment in part by stating that the final rule provides that where a primary producer is a corporate entity, only one primary producer associated with that entity will exist. For purposes of efficiency in inspection, where the corporate parent entity is the primary producer, that is the entity that should be named in the disclosure statement as the keeper of the records.

The Department adopts these comments in part. In response to a similar comment, the final rule published in 2005 stated, ''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 producer 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.'' However, upon reconsideration, the Department has decided to clarify that if multiple individuals are all employed by the same entity, the entity constitutes the ''primary producer'' for purposes of record-keeping, not the individuals.

Similarly, one comment notes that a single reproduction can create numerous secondary producers. Under § 75.1(c)(2), a preexisting photograph can be digitized by one person, inserted on a computer site by another, which is managed by a third, and if each of these is employed by a corporation, then there are now seven secondary producers arising out of a single reproduction, each of whom must now seek and obtain from the primary producer information concerning every depicted performer. The commenter considers this scenario to be unlikely, threatening availability of the depiction.

As with the similar comment regarding multiple primary producers, the Department adopts this comment in part. The Department has clarified that if multiple individuals are all employed by the same entity, the entity constitutes the ''secondary producer'' for purposes of record-keeping, not the individuals. However, there may be multiple secondary producers who are separate entities engaged in separate commercial enterprises—e.g., one company purchases a depiction from the primary producers and publishes it on a Web site and another purchases and publishes the same depiction in a magazine several years later—and who must each maintain the records associated with the depiction.

One comment questions whether § 75.1(c)(4)(v), which allows a Web site such as YouTube to post depictions without having to keep records, allows someone to display a YouTube video on their own Web site and still fall within the exemption because YouTube would not have the records itself and the person downloading from YouTube would not have access to the records. As described in the comment, it would appear that the individual who downloads a depiction of actual sexually explicit material from a another site onto a site that he or she controls is a producer because he or she has ''reproduc[ed]'' or ''insert[ed] on a computer site or service a digital image of, or otherwise manage[ed] 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'' within the meaning of the definition of ''secondary producer'' in § 75.1(c)(2). Whether or not the source for the person is a site such as YouTube, which may not be required to maintain records as a secondary producer, since the original individual producer who posts a depiction on that site is required to affix a disclosure notice to each page of the sexually explicit depiction, a secondary producer who downloads that depiction onto another site should be able to obtain the requisite information for compliance with its own record-keeping and disclosure requirements.

Date of Original Production

The proposed rule defined ''date of original production'' to mean the date that the primary producer actually created the image of actual sexually explicit conduct. One comment requests that the Department define this term in this fashion for primary producers, but, in the case of secondary producers, that the date of original production should also be permitted, at the discretion of the secondary producer, to be the date of the secondary producer's relevant conduct.

The Department adopts this comment. Obtaining the date of the original production from the primary producer should not pose a problem for a secondary producer, since the secondary producer obtains the records of the production from the producer. As explained more fully below, the Department in the final rule has eliminated the requirement that the statement of location of records required by § 75.6 contain a date of original production (or any other date, as in the regulation currently in force). Hence, a secondary producer is not responsible for including that information in a statement that it affixes to material it secondarily produces. However, primary producers, as explained below, will henceforth be required to create and maintain a record of the date of original production, such record being transferred to the secondary producer along with all other records required by part 75.

To the extent that this is a new requirement for both primary and secondary producers that did not exist previous to the proposed rule, the Department clarifies that it applies only prospectively from the date of the publication of this final rule.

Also, in response to a comment, the Department has clarified that if a depiction is made over the course of multiple dates, the date of original production consists of the earliest of those dates. There is no requirement in the rule that any depicted performer be 18 on the date of original production so long as that performer is 18 as of the date that a depiction of that individual is created. Producers who keep records demonstrating that performers are 18 as of the date of original production conform to the requirements of the rule. The final rule has been changed to reflect that in the case of a performer who was under 18 at the time that production began, but became of legal age before he or she was depicted, an alternative date of original production

with respect to that performer is the first date that that performer was actually filmed for the production at issue.

The Department has also clarified the meaning of ''*date of original production*'' with respect to matter that is a secondarily produced compilation of one or more separate, primarily produced depictions. The final rule provides that with respect to such a compilation, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction therein was produced. In the event a performer in any of the individual depictions was under 18 on that date, the alternative date of original production with respect to that performer is the first date that any scene depicting that performer was actually recorded.

Employed by

One comment states that the Department erred in defining ''employed'' in the 2257A proposed rule because the Department cannot make the term broader than it is normally understood by simply defining it broadly. The comment goes on to state that ''[w]e do not think that it is a rare case at all that a producer creates images covered by sections 2257 or 2257A which depict non-employees—as properly understood—in sexual roles. But defining 'employe[e]' more broadly than usual defeats the obvious sense of the safe harbor provision which Congress has promulgated.''

The Department declines to adopt this comment. The definition of ''employed'' used in the proposed rule is consistent with the commonly understood definition, which does not necessarily require that an employee be paid by an employer. One common definition of ''employ'' is ''to use or engage the services of,'' while another is ''to provide with a job that pays wages or a salary.'' *Merriam-Webster Collegiate Dictionary* 408 (11th ed. 2003). Although the commenter seeks to characterize the Department's definition of the term as somehow broader than normal, the Department's definition is wholly consistent with the dictionary definition of the term in that it covers not only a producer providing a person with a job that pays wages but also a producer using or engaging the services of a person. The Department thus does not believe that the proposed rule's definition of ''employed'' is inconsistent with the text of the statute.

Sexually Explicit Conduct

Many comments argue that the *Dost* factors are vague and not readily transferable to an adult, notwithstanding the Department's statements concerning the proposed rule. These comments asserted that inquiring whether setting, pose, and visual depictions are appropriate, natural, or suggestive for a child are nonsensical for adults because such conduct is not improper for adults. One comment maintained that the *Dost* factors represent in this context an inappropriate burden shift from presumed constitutional expression to a presumption of child pornography, and another suggested that an image not otherwise lascivious could be inappropriately found to be lascivious based on its proximity to adult lascivious images.

The Department does not adopt these comments. The Department does not consider application of the *Dost* test to adults to be nonsensical. The point of the factors is to determine whether a particular depiction is of actual sexually explicit conduct for purposes of determining whether compliance with various legal requirements is necessary. The age of the person depicted is irrelevant to whether the image depicts actual sexually explicit conduct, except for one *Dost* factor that is age-dependent and which the proposed rule identified as not being relevant to the depiction's status as actual sexually explicit conduct. If the acts depicted would fall within any of the remaining *Dost* factors if they were performed by a minor, one who produces actual sexually explicit conduct must take the requisite steps necessary to ensure that the individual performing these acts is of legal age. The proposed rule creates no presumption of or against the existence of child pornography. The rule's applicability depends on the image as it is without reliance on any presumptions. The *Dost* factors themselves do not erect any presumption. Nor is the lasciviousness determination made with regard to anything but the depiction that is produced.

One comment, relying on a Court of Appeals decision that accepted the relevance of the *Dost* factors, *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994), maintains that their applicability here would mean that millions of images on Myspace or Youtube or Facebook may require section 2257 compliance even though they do not involve nudity or sexual activity. The comment states that the rule must define exhibition of the genitals to consist only of nude exhibition. Otherwise, it maintains, every photo of male water polo players or other competitive swimmers would be potentially subject to section 2257 record-keeping, as would other depictions of persons in tight clothing suggestive of genitalia.

The Department does not adopt this comment. The comment takes an overly broad reading of the law of child pornography and applies that reading to produce a nonsensical result. The *Knox* case does not stand for the proposition claimed by the comment. It is not the case that pictures of boys' water polo teams constitute child pornography. The images at issue in *Knox* were lasciviously displayed. Although the genitals were clothed in that case, they were covered by thin, opaque clothing with an obvious purpose to draw attention to them, were displayed by models who spread or extended their legs to make the pubic and genital region entirely visible to the viewer, and were displayed by models who danced or gyrated in a way indicative of adult sexual relations. 32 F.3d at 746–47. None of these attributes remotely applies to standard swim team photographs or underwear or other mainstream advertising. Therefore, very few images posted on Myspace or Youtube of clothed individuals would require section 2257 compliance, and the description in this rule of the kinds of images that do so provides clear guidance to the narrow situations in which clothed images would trigger section 2257 compliance.

One comment suggests, as an alternative to the *Dost* factors, that the rule define ''lascivious exhibition of the genitals'' to mean images that display an individual's naked genital area.

The Department declines to adopt this comment. As discussion of the depictions at issue in the *Knox* case shows, there are instances when covered genitals can amount to child pornography. When such images are created, if the performers are under 18, what is being produced is child pornography. The obligations of the proposed rule must apply to producers who create depictions that could constitute lascivious exhibition, so as to reduce the possibility of child exploitation. One comment asks whether the depiction of scantily clad women in a strip club or bedroom would be subject to the regulations and criminal penalties. The comment maintains that the need to pose such a question means that producers would not know what materials trigger the record-keeping requirements, which would cause a chilling effect. The comment claims that creators of widely shown films and television programs who make a mistake in this respect risk prosecution.

The Department does not adopt this comment. The proposed rule rejected a

categorical approach that would state whether every possible depiction was one that fell within a definition. Rather, it adopted the *Dost* factors, which rely on context as well as content. A depiction of scantily clad women in a strip club or bedroom can appear in limitless permutations, and the Department cannot state that all or none would constitute lascivious exhibition of the genitals without consideration of the *Dost* factors. Those factors provide the context that producers and the Department will rely on to determine whether an image depicts actual sexually explicit conduct so as to minimize any chilling effect. Film and television producers are particularly unlikely to risk prosecution for displaying scantily clad performers because of the certification option.

One comment suggested that because of the vagueness of the *Dost* test, a producer may not know that he must obtain identification before production. If the producer does not do so, the comment asks what options are then available to the secondary producer who determines that the *Dost* test applies. The comment maintains that as a result, some producers may not be able to acquire and disseminate a wide range of movies and television programs, especially foreign productions.

The Department does not adopt this comment. Prosecutions for production of child pornography have been upheld by many courts applying the *Dost* test to determine whether a depiction is one that lasciviously exhibits the genitals. *See, e.g., United States* v. *Horn*, 187 F.3d 781 (8th Cir. 1999); *United States* v. *Villard*, 885 F.2d 117, 122 (3d Cir. 1989). That they have done so contradicts the argument that the test amounts to unconstitutional vagueness in defining ''lascivious exhibition.'' A secondary producer who is concerned that a primary producer may have violated the requirements of the statute and the regulation has the options of requesting that the primary producer revisit the issue and examine picture identification cards and compile age records. Furthermore, secondary producers of qualifying material may be able to avail themselves of the certification in section 2257A and its implementing regulation.

One comment disputed the Act's extension of section 2257 to cover lascivious exhibition as closing a previous loophole in that statute. The comment asserts that the prior version reflected a desire to limit the law to depictions that involve actual sexually explicit activity and avoid overbreadth through inapplicability of its provisions to fully clothed adults.

The Department does not adopt this comment. The characterization of the Act is not an operative part of the regulation that requires a response.

One comment requests that the Department distinguish between actual and simulated masturbation in defining actual sexually explicit conduct. The Department declines to adopt this comment. To the extent that this is merely a subset of a larger question as to the distinction between ''actual'' and ''simulated'' conduct, the meaning of ''actual'' conduct with respect to all the conduct covered by the statute and the regulation is clear on its face. To the extent that ''simulated'' was not clear on its face, this final rule regulation contains a definition.

One comment requests that the Department define ''sadistic or masochistic abuse'' because some people believe that safe and consensual bondage is not abuse, and requests that the Department distinguish between actual and simulated sadistic or masochistic abuse. The Department declines to adopt this comment. That term is not a subject of this rulemaking. Moreover, actual sexually explicit conduct depends on the content of what is being displayed, not on whether the content is subjectively considered to be abusive. If belief as to abuse were to control, a producer who determined that nothing was abusive would be able to avoid compliance with the regulations in their entirety, creating massive opportunity for child exploitation.

One comment contends that the definition of ''sexual'' varies among communities and that the final rule should contain more guidance as to the meaning of the term. It asks whether nude photos of a single person's erect penis is sexual, or whether a hand over the pubic area is sexual.

The Department declines to adopt this comment. It believes that the definition of actual sexually explicit conduct contained in the final rule is clear. The Department does not believe that a producer would have any difficulty in determining whether hypothetical depictions of the kind posed by the commenter would constitute actual sexually explicit conduct within the meaning of the rule.

Simulated Sexually Explicit Conduct

In the proposed rule to implement section 2257A, the Department started its analysis of the proper definition of the term for regulatory purposes with the term's plain meaning. The term ''simulated'' is generally defined as ''made to look genuine.'' *Merriam-Webster's Collegiate Dictionary* 1162 (11th ed. 2003). The Department believed 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 read 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.''

Three comments state that the final rule should incorporate the definition of ''simulated sexual intercourse'' provided by the Supreme Court in *United States* v. *Williams*, 128 S. Ct. 1830, 1840–41 (2008). One comment further recommends that the definition should explicitly incorporate by reference the definition in *Williams*. That definition reads, in pertinent part:

> ''simulated'' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera.

Id. While the *Williams* definition refers to ''simulated sexual intercourse,'' not ''simulated sexually explicit conduct,'' the Department understands the comments to recommend that the final rule use the *Williams* definition as appropriately amended to refer to ''simulated sexually explicit conduct,'' not ''simulated sexual intercourse.''

The Department believes that the *Williams* definition conceptually is not dissimilar to that outlined in the proposed rule, and adopts both comments. The final rule thus incorporates a revised definition of ''simulated sexually explicit conduct.''

One comment recommends that the proposed rule's definition of ''sexually explicit conduct'' should refer to 18 U.S.C. 2256(2)(B), not 18 U.S.C. 2256(2)(A). The comment states that the narrower definition at section 2256(2)(B), which would require depictions to be graphic or lascivious, would be more consistent with the state laws the Department rejected in determining how to define ''simulated sexually explicit conduct.''

The Department declines to adopt this comment. The definition at section 2256(2)(B) is limited, by its own terms, to images described in section 2256(8)(B)—images that are ''a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.''

In other words, section 2256(2)(B) has no relevance to a regulation that concerns actual persons as opposed to virtual persons.

All Performers, Including Minor Performers

One comment states that the proposed rule is unclear as to whether the record-keeping requirements apply to all performers in a depiction, or to primary performers, and recommends that the Department should clarify that these requirements apply only to primary performers and not to any background performers in the depiction.

The Department declines to adopt this comment. The commenter did not attempt to define ''primary'' or ''background'' in this context, and the Department has difficulty in doing so. As a practical matter, in many cases it would be difficult to determine whether a performer in a visual depiction of lascivious exhibition or simulated sexually explicit conduct is a ''primary'' or a ''background'' performer. For example, in a lascivious exhibition depiction of a person on a bed, a person depicted in that same image as standing nearby, wearing lingerie, and watching the person on the bed could well be a ''primary'' performer—however that term were to be defined—depending on the level of interaction between that person and the person depicted on the bed. On the other hand, conceivably a fully clothed person could be considered a ''background'' performer even if located on the same bed, again depending on the level of interaction between the performers. Similar confusion would apply in the context of depictions of simulated sexually explicit conduct. In order to avoid such confusion, the Department believes that it is appropriate to require, as stated in the proposed rule, that all performers in depictions of lascivious exhibition or simulated sexually explicit conduct be covered.

Maintenance of Records

Date of Original Production

One comment characterizes the proposed rule as faulty because it does not specifically require that a record be made of the date of original production, although the proposed rule will require that this date be stated in the disclosure statement.

The Department adopts the comment's view that it was an oversight that the proposed rule did not require that a record otherwise be made of the date of production. As noted above, the Department, after careful consideration, has amended the record-keeping requirement to include that a primary producer record the date of original production at the time it examines the picture identification card of the first performer in the depiction. Again, to the extent that this is a new requirement for primary producers, the Department clarifies that it applies only prospectively from the date of the publication of this final rule.

Several comments note that in § 75.2(a)(1) of the proposed rule, producers are required to create and maintain records of the name and date of birth of each performer obtained by the producer's examination of a picture identification card prior to the date of production of the depiction. They point out that the Act made no change to section 2257(b), which is the source of this requirement. The comments ask the Department to state that only the ''examination'' of the picture identification card that must take place prior to the production of sexually explicit images, and not necessarily the creation of a record based on the examination of the picture identification that must occur before production.

The Department declines to adopt these comments. As noted above, the Department believes that in order to fully implement the purpose of the statute, the record must be made at the time of examination of the document and has clarified that in this final rule. Furthermore, the Department requires in the final rule that a primary producer make a record of the date of original production. This record will then flow to secondary producers and enable them to affix the date to the disclosure statement. However, in order to simplify the requirement, the Department has clarified that if a depiction is made over the course of multiple dates, the date of original production consists of the single and earliest of those dates.

One comment states that the original production date is not often available, particularly because it was never a requirement of section 2257. The comment cautions that were the final rule to require keeping this information, hosts of most Web sites will be immediately out of compliance. Another comment notes that the Department stated in its proposed rule that secondary producers need comply only with the rules for material that was produced after the Act's 2006 effective date, and § 75.2(c) states that producers of visual depictions made after 1995 and before 2005 may rely on identification that was valid under the record-keeping and labeling regulations that were in force on the date of original production.

As noted above, the Department adopts the comment seeking prospective application of the record-keeping requirements documenting that identification was checked prior to the occurrence of production. The comment noting that producers may rely on identification rules and record-keeping requirements that applied on the date of original production of the depiction is correct, and demonstrates that Web site owners will not have to conform their existing records to the new requirements, contrary to the statement contained in the comment noted above.

Two comments request that the record-keeping requirements with respect to viewing identification documents prior to production apply only to primary producers. According to the comments, only primary producers have an opportunity to examine picture identification cards prior to the production. At most, the comments ask, secondary producers should be required to examine what they receive from the primary producer that relates to depictions from the primary producer. One of the comments believes that without such an alternative, there will be an effective prohibition on disseminating numerous widely disseminated productions. And even then, it claims, foreign films would not have such documentation because even if a secondary producer could obtain and inspect the required records retroactively, it may be unable to do so because of difficulties in locating performers or because of data protection laws.

The Department adopts these comments in part. It rejects some of the concerns as reflecting a misunderstanding of the requirements of the final rule. A secondary producer is not required under the rule to check identification documents. That is a responsibility only of the primary producer. A secondary producer may risk child pornography offenses, however, if he does not take steps to assure himself that the performer is actually of legal age. Nonetheless, the secondary producer is required by the final rule only to retain records. Those records enable the Department to identify who the primary producer was for any depiction and to verify that the depicted performers were of legal age. The Department believes that to avoid a commercial market in child pornography through the witting or unwitting actions of secondary producers, secondary producers must keep records that each depiction occurred only after the primary producer checked valid identification documents. Were secondary producers to be exempted from this requirement, a real risk of commercial marketing of

illegal product would develop. The comments are mistaken in postulating that the final rule imposes a duty on a secondary producer to locate foreign performers after the fact. What the secondary producer must do, even for foreign productions, is to ensure that it has copies of the records that show that the primary producer checked the legal age of performers prior to the date of original production.

Requirement of Hard Copies

The proposed rule amends § 75.2(a) concerning requirements for maintenance of records. The proposed rule requires that the copy of the identification documents be retained in hard copy form. The Department received four comments regarding the proposed rule's requirements for maintaining copies of identification card records in hard copy form.

Two comments state that nothing in the Act or proposed rule requires that records be kept in hard copy format. It contends that there is no justification with contemporary technology for requiring hard copies. The comment also notes that the proposed rule represents a departure from § 75.2(f), which permits records to be kept in digital form if they include scanned copies of identification documents. Another comment reiterates that point, and adds that electronic copies would permit the passage of records along the chain of distribution as the rules contemplate. Otherwise, records could be divided when shared, which could create losses or errors and put the producer in danger of violating rules by having incomplete or improperly maintained records. This comment asks that the Department return § 75.(2)(a)(1) to its current form by deleting the word ''hard,'' or consider the new requirement for a hard copy of the picture identification document to be satisfied by scanning the identification card or a hard copy of it, and/or by electronic versions that can be printed out to create hard copies at the time of inspection.

The Department adopts these comments. Nothing in section 2257 requires that records be kept in hard copy format, and, indeed, existing § 75.2(f) permits copies of identification documents to be scanned and stored electronically if they can be authenticated by a custodian. The proposed rule did not seek to amend § 75.2(f). The proposed rule's changes to § 75.2(a) that mandate the retention of all copies of identification documents and pictures in hard copy format would create a conflict with the terms of § 75.2(f). The final rule, therefore, amends proposed § 75.2(a)(1) to add ''or digitally scanned or other electronic copy of a hard copy.'' Note, however, that in the event a regulated entity or individual decides to retain records in electronic format, nothing in the Act or the regulations provides that technical difficulties would excuse failure to make the records available at reasonable times for inspection.

One comment notes that in the proposed rule the Department stated that a producer need not keep a copy of a URL hosting a depiction that the producer produced ''but over which he exercises no control.'' The commenter asks that the Department modify this statement to read ''but over which he exercises no corporate control'' or other such language that clarifies that the producer is not responsible for Web sites not owned by the producer.

The Department declines to adopt this comment. Were the Department to state that the producer is not responsible for Web sites the producer does not own, the final rule would not apply to a producer who influenced or directed what happened to the depiction, even if he did not own the Web site. If a producer exercises control over a depiction, whether as an individual or as a corporate entity, and regardless of whether the producer owns the Web site on which the depiction is displayed, then the producer must retain the copy of the URL hosting a depiction that the producer produced. The only exception to this requirement, as noted above, is where an individual who would be a primary producer under the final rule's definition is an employee of a corporate primary producer. Under such circumstances, that individual will not be considered a primary producer.

Redaction

One comment states that the viewer of the identification document need not know the Social Security number or exact birth date of a performer.

The Department does not adopt this comment. The proposed rule quite clearly allows a producer to redact the performer's Social Security number. An exact birth date sometimes may be redacted so long as the year is not obscured. However, if a performer is 18 on the date of original production, the month or even the day of the month must not be redacted if a question would exist whether he was of legal age at the time of the original production.

Compliance Date

In accordance with current law, the final 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).)

In response to a comment stating that the proposed rule created potential confusion by omitting language from the 2007 proposed rule implementing the Adam Walsh Act's changes to section 2257, the Department clarifies, as stated in the preamble to the 2007 proposed rule, *see* 72 FR at 38036, that the one exception is that this final rule would not penalize secondary producers for failing to maintain required records in connection with those acts of production that occurred prior to the effective date of the Adam Walsh Act. The proposed rule also stated 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 stated that the effective date concerning depictions of simulated sexually explicit conduct will be 90 days after it is published in the **Federal Register** as a final rule.

Two comments address the disparity between the statutory effective date of section 2257's coverage of depictions of lascivious exhibition (July 27, 2006) and the statutory effective date of section 2257A (90 days after publication of this final rule implementing section 2257A), which includes the safe harbor provision exempting producers who certify from section 2257's provisions concerning depictions of lascivious exhibition. One comment recommends that the Department make the safe harbor provision retroactive to the July 27, 2006, effective date of section 2257 concerning depictions of lascivious exhibition. The other comment states that the Department should make the effective date of part 75 with respect to depictions of lascivious exhibition the same date as the statutory effective date of section 2257A. This comment further states that setting the same effective date for rules regulating depictions of lascivious exhibition and simulated sexually explicit conduct would ''avoid[ ] potentially fatal vagueness problems under the First Amendment.''

Under either suggestion, the effective date of the safe harbor provision and the regulatory requirements concerning depictions of lascivious exhibition would be the same.

The Department adopts these comments in part. The final rule provides that the regulatory requirements applicable to depictions of lascivious exhibition apply starting 90 days after the publication of this final rule.

Two comments argue that the proposed rule creates First Amendment vagueness and ex post facto problems because individuals did not create records as of the effective date of the proposed rule which they did not think would be necessary. The Department does not accept the comment that the proposed rule created any First Amendment vagueness problem, *see American Library Ass'n, supra,* but does accept the comment insofar as the proposed rule would operate retroactively and, as stated above, modifies the compliance date accordingly.

Two comments state that to avoid retroactivity, the final rule should not apply to material that is actually sexually explicit only because it displays lascivious exhibition of the genitals and that was acquired by a secondary producer prior to the compliance date of the regulation. One of these comments requests the Department, if it adopts a different standard, to define ''acts of production,'' so that a secondary producer would know based on an acquisition date or other standard what content required record-keeping and what did not.

The Department declines to adopt this comment. Although the Department is sympathetic to the concerns expressed in the comment, and wishes to avoid retroactivity, it does not agree that the date that a secondary producer obtained the image displaying lascivious exhibition of the genitals should determine whether the regulation applies. There is no requirement in the existing or proposed rules that secondary producers document the date they obtained particular depictions. Were the Department to adopt the comment, unscrupulous secondary producers could claim that they acquired any depiction created before the final rule's compliance date prior to that date. Secondary producers who wished to demonstrate in good faith that their collections contained depictions that were obtained only after the compliance date of the final rule would be obliged to mark every such depiction currently in their possession to prove that they possessed it as of that date. Moreover, the Department would have no way of proving that the producer acquired the depiction prior to the compliance date of the final rule. The Department seeks to ensure that prohibited depictions were not created on or after the compliance date as herein modified. This concern derives from the statutory language, which turns on the date of production. The date that the secondary producer acquired the image is of no relevance. A secondary producer will be able to comply with the final regulation on an exclusively prospective basis by determining that appropriate procedures were followed for such depictions that were originally produced after the compliance date of the final rule.

Another comment requests that, even if the Department were to adopt a prospective compliance date, the final rule not apply to images (as opposed to depictions) created before the compliance date, i.e., a digitization of a previously existing depiction. The comment points out that a digital image made after the compliance date could be based on an initial depiction that could be older. The producer of the digital image could not use that earlier depiction, even if it were eighty years old, because it could not reconstruct the records. Therefore, the comment concludes that the final rule should be limited to images first created before the compliance date. The comment also states that the Department must accept that it cannot address preexisting content.

The Department declines to adopt this comment. The Department does agree that because the final rule will apply prospectively, it cannot address preexisting depictions that constitute actual sexually explicit material only because they display lascivious exhibition of the genitals. However, the Department can address digitized or other modified versions of preexisting content where the modifications occur after the final rule's compliance date. In light of the changed compliance date of the rule, any preexisting depiction of lascivious exhibition of the genitals that is not now digitized can be digitized before the rule takes effect. That will avoid the problem stated by the comment. Any secondary producer after that date who digitizes a depiction without obtaining records showing that the depiction was in accordance with the final rule will either need to obtain another digitized version of the depiction that does so or track down the primary producer of either the original or another digitized version of the depiction to create the records.

One comment notes that the statutory language on this point is broader than the language of the proposed rule. The statute says that section 2257 does not apply to ''any depiction of actual sexually explicit conduct'' involving lascivious exhibition of the genitals that was produced ''in whole or in part'' prior to the compliance date. The comment states that the final rule should track that language.

The Department declines to adopt this comment. The comment implies that under the statutory language, any depiction of lascivious exhibition of the genitals that was produced after the compliance date of the final rule is not covered by section 2257 if any other part of the image was produced before the compliance date. The Department does not so read the statute. There are five situations in which the statutory language discussed could apply, and the Department believes that it is important to set forth the applicability of the statutory language to each.

First, prior to the compliance date of the final rule, a depiction could have been created of lascivious exhibition of the genitals and no other form of actual sexually explicit conduct as that term is defined after the compliance date of the final rule. Prior to the final rule, this was not a depiction of actual sexually explicit conduct. If the depiction were modified or another depiction connected to it that did not contain lascivious exhibition or another form of actual sexually explicit conduct, then the final rule would not apply because the lascivious exhibition of the genitals was produced before the compliance date of the final rule.

Second, a depiction produced before the compliance date could have contained neither actual sexually explicit conduct as that term was then defined nor lascivious exhibition of the genitals. If a producer then altered or added to the depiction, or to a connected depiction, a depiction of lascivious exhibition of the genitals after the compliance date, this comment implies, the depiction would be one of lascivious exhibition of the genitals that was ''in part'' created after the compliance date of the final rule, and the final rule would not apply. The Department disagrees. No depiction of lascivious exhibition of the genitals was contained in this image before the compliance date of the regulation. All such material appeared only after the compliance date of the regulation, and, therefore, such material is covered by the final rule.

Third, a depiction of actual sexually explicit material as it was then defined, but which did not depict lascivious

exhibition of the genitals, could have been produced before the compliance date of the final rule. After that date, a producer might then add lascivious exhibition of the genitals to the depiction itself or to a connected depiction. According to the implication of the comment, section 2257 could not apply to the depiction that contains lascivious exhibition of the genitals because it was produced in part prior to the compliance date of the final rule. In fact, the image was already covered by the statute because it displayed actual sexually explicit content as that term was defined prior to the compliance date of the final rule. Nothing in the Act made material that was previously subject to section 2257 lose that status. No depiction of actual sexually explicit conduct involving lascivious depiction of the genitals was produced in whole or in part prior to the compliance date. Notwithstanding that the depiction of lascivious exhibition was added after the compliance date, the depiction nonetheless is subject to section 2257. Otherwise, any depiction of actual child pornography could be taken out of the scope of section 2257 by modifying or connecting to such an image a depiction of lascivious exhibition of the genitals that was produced prior to the compliance date of the final rule. A statute passed to enhance prosecution of child pornography cannot reasonably be read so as to prevent the prosecution of all child pornography offenses through such a simple subterfuge.

Fourth, a depiction could have been produced prior to the compliance date of the final rule that depicted lascivious exhibition of the genitals and no other form of actual sexually explicit conduct. Suppose that after the compliance date of the final rule, another depiction of lascivious exhibition of the genitals were then added, whether or not it also displayed any other example of actual sexually explicit conduct. The implication of the comment is that the depiction contains lascivious exhibition of the genitals that was produced ''in part'' before the compliance date of the final rule, and therefore is beyond the reach of the final rule. Under this theory, even if the after-added actual sexually explicit conduct were in fact child pornography, section 2257 could not apply because the earlier image contained a depiction of lascivious exhibition of the genitals that was produced prior to the compliance date of the regulation. The Department disagrees. It will treat each such image separately. The depiction of lascivious exhibition of the genitals that was produced before the compliance date of the final rule will not be governed by the final rule although some of the image was produced after its compliance date. This is the case because part of the depiction was produced before the compliance date. The connected depiction of actual sexual sexually explicit conduct in this example was produced after the compliance date of the rule, and must conform to its strictures.

Fifth, a depiction could have been produced before the compliance date of the rule that contained both lascivious exhibition of the genitals and actual sexually explicit conduct as it was defined before passage of the Adam Walsh Act. Then, following the compliance date of the final rule, the depiction could have had appended to it any form of actual sexually explicit conduct, including actual child pornography. Under the implication of the comment, the depiction would contain, in part, lascivious exhibition of the genitals that was produced before the compliance date of the Act, and, therefore, none of the material would be subject to the final rule. Under this approach, even the material that was actual sexually explicit conduct under its pre-Act definition would no longer be covered by section 2257. The Department disagrees. There is no indication that Congress intended to accomplish that result. Under this approach, every example of child pornography—even those that have been subject to section 2257—could never yield a prosecution if it were appended to a depiction of lascivious exhibition of the genitals that was produced before the compliance date of the final rule. No such result is required. In this circumstance, each depiction would be treated separately. The part of the depiction that involved only lascivious exhibition of the genitals and was produced prior to the compliance date of the final rule would not be subject to the final rule. The other parts of the depiction would be subject to the final rule, either because they were examples of actual sexually explicit conduct as that term was defined before the compliance date of the final rule or they were produced after the compliance date of the final rule and met the definition of the term as it existed upon that compliance date.

Inspections

Although the proposed rule made no changes to the inspection requirements contained in § 75.5, the Department received a number of comments on the existing regulations.

One comment proposes that the amount of time for which business premises be open for inspections should not be 20 hours per week as per § 75.5(c). The comment says that there is a need to address inspection timing where a producer has an entirely separate full-time job elsewhere. Two comments, including this one, contend that this problem would be eliminated by using third-party record-keepers. Four comments state that small businesses in this field work out of their homes, and cannot staff their operation for 20 hours per week while performing outside employment. These comments also expressed concern about inspections occurring in their homes.

The same question was raised in the context of the rulemaking on the prior version of the regulations, and the Department declined to accept the comment. *See* Inspection of Records Relating to Depiction of Sexually Explicit Performances, 70 FR 29607, 29614 (May 24, 2005). At the time, the Department believed that permitting third-party custodianship would unnecessary complicate the inspection process and undermine its effectiveness.

Upon reconsideration, the Department adopts this comment in part. The Department now believes that it can still accomplish the purposes of the statute—in particular, effective inspections—even allowing for third-party custodianship of the records. Hence, although it will not modify § 75.5(c), the Department will permit records required under part 75 to be held by third parties. By allowing third-party custodians to maintain the records, the burden on small businesses is reduced, including any fears arising from posting home addresses, where many of these small businesses are reported to operate, and any concerns of record-keeping inspections of those same premises. In the text of the regulation, such a third party is referred to a ''non-employee custodian of records'' to distinguish it from the producer and any person he may directly employ to maintain the records.

In addition to this change, in response to one comment, the Department has eliminated the requirement that the name of an individual be listed on the disclosure statement and has permitted only the title to be listed.

One comment states that section 2257 allows the Attorney General to inspect records, and that, therefore, the obligation of the producer is to make records available only to ''the Attorney General.'' Section 75.5(a) allows inspectors other than the Attorney General, and the comment claims that the statute does not permit such individuals to inspect. The comment further notes that the rule should

identify the class of persons who are investigators, lest the custodian be uncertain concerning which people he should allow to inspect the premises. The comment maintains that there is a need for the Department to demonstrate to those subject to inspections that the inspection authority will not be abused.

The Department declines to adopt this comment. Under general principles of delegation, the Attorney General may delegate to subordinate officials the performance of the Attorney General's duties. The commenter's fear that under the language of the proposed rule, unaccountable or unknown individuals could conduct the record searches is therefore unwarranted.

The Department received thousands of similar comments that note that § 75.5(b) provides for inspections without advance notice and request that it should instead require such notice. Some commenters say producers will not destroy any records if given notice because they would then face liability for a missing record. If notice is used to put into order records that have not been organized, then the comment believes that no legitimate purpose of the record-keeping requirement would be harmed by providing notice. The commenters further ask the Department to specify the consequences at the premises if no one is present when the investigator arrives, such as whether the inspector will knock down the door. Two other comments request that the Department eliminate no-notice inspections.

The Department declines to adopt these comments. As it stated previously:

> 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.

70 FR at 29619.

The Department received thousands of similar comments that argue that non-routine inspections should always require probable cause and a search warrant. The Department declines to adopt these comments. These inspections are administrative in nature, and, under well-established legal principles, no search warrant is required. *See id.*

One comment states that a single owner of a home-based Web site would be captive in his own home for 20 hours per week. The Department responds to this comment by noting that it is permitting required records under Part 75 to be held by third parties.

One comment maintains that the ''reasonable times'' provision of § 75.5(c)(1) could mean that an inspection could be made at 2:30 a.m. if a live Webstream or production work is being conducted then, and that such an inspection would interrupt production. Moreover, according to the comment, production could be done during the day in Europe while it is 2:30 a.m. in the United States, even though it would not yet be clear which images will be published and there will not have been time to cross-reference. The comment argues that if there is probable cause to believe that an underage performer is actually working in an off-hours production, the courts can issue warrants without the need for any late-night records inspection at all.

The Department declines to adopt this comment. The ''reasonable times'' provision will be applied according to its plain meaning. Moreover, the comment misunderstands the nature of the statutory requirement which the rule implements. The goal of the record-keeping regime is not to intervene to stop crimes involving underage performers that have already occurred. Rather, the point of the record-keeping is to prevent victimization in the future. The inspection requirement is designed to ensure that the prophylactic identification- and age-verification measures are complied with.

One comment concerning the four-month interval for inspections states that although some large entities or a custodian arrangement may warrant inspections as often as every four months, the many small production operations with small numbers and static images do not. It claims that inspections of such entities that occurred with such frequency would simply mean that inspectors would review the same images, which it contends is an invitation to harassment. The Department responds to this comment by noting that while inspections may take place as often as every four months, they are not required to occur so frequently. Moreover, the regulation requires that inspections ''be conducted so as not to unreasonably disrupt the operations of the establishment.''

One comment notes that § 75.5(c)(4) specifies what the investigator may say at the end of an inspection, and what the producer is permitted to say. The comment expresses that the regulations should also include a statement that the authority to search does not include the authority to require that any questions be answered. The comment also maintains that the regulation should say that everyone on the premises is free to leave before or during a records inspection. If everyone is not free to leave, the comment believes that the rule should say so and include the constitutional safeguards appropriate for custodial investigation situations.

The Department declines to adopt this comment. Administrative inspections are not custodial investigations that would require advisories concerning the right to counsel or to avoid self-incrimination.

One comment states that the Department should consider ''legislation'' forbidding anyone other than a custodian or a Department investigator from moving, disturbing, or interfering with the required records in any way. It contends that the integrity of the records, including their cross-referencing, otherwise could be disturbed. The comment also asks that this notice clarify that the seizure or theft of some or all of the records does not require the cessation of any ongoing or planned ''expression.'' If the seizure did have this effect, according to the comment, then the records would have to be returned within 24 hours so that ''expression'' could promptly resume.

The Department declines to adopt this comment. The Department has no evidence that unauthorized individuals have interfered with records or that there is a serious risk of such interference occurring in the future. (The Department also notes that it lacks the authority to enact laws, and that its authority is limited to executing laws, including through the publication of implementing regulations such as this one.)

One comment posits that searches under section 2257 have not identified any underage performers, so their purpose cannot be to catch and prosecute people who arrange for such performances. It claims that no producer knowingly uses underage performers, and that section 2257 is an after-the-fact tool, not one that advances prevention.

The Department does not adopt this comment. It does not agree that no producer knowingly uses underage performers. On the contrary, the Department's successful prosecution of child pornography cases every year proves that some producers do knowingly or recklessly use underage performers. Further, as discussed above, the Department believes that section 2257 is in fact preventive because it ensures that before any production occurs, the producer undertakes steps to ensure that the performers are of legal

age. Finally, the purpose of the regulation in large part is to prevent unknowing use of underage performers.

Location of Records

Statement of Location of Books and Records

The proposed rule changes the requirement under § 75.6(a) that producers place on every ''copy'' of a depiction of sexually explicit conduct a statement that indicates the location of books and records. Under the current regulation, that statement could be contained in a label or a hyperlink. The proposed rule would require that the definition of ''copy'' mean that the producer must attach a ''statement describing the location of records * * * [that is to] be affixed to every page of a Web site (controlled by the producer) on which visual depictions of sexually explicit conduct appear.''

One comment argues that an exemption statement is not required if a depiction is produced by foreign producers who did not intend at the time of production for the depiction to enter the United States market.

The Department does not adopt this comment. Determining when the producers of the foreign production intended to distribute the depiction in the United States would be essentially impossible, leaving producers free to claim that they had no such intention on the date of original production. If the depiction is made available in the United States, then the disclosure statement is required, regardless of the intent at the time of production.

Eleven comments claim that the proposed rule's change to including the statement on every page could lead to harassment of Web page operators who operate their sexually explicit businesses out of their homes, potentially resulting in physical injury, stalking, burglary, or identity theft. They say that placing a link on the Web page constitutes affixing the copy to a Web page but avoids harassment risk because the exposure of the custodian's name will be limited to people who are seriously seeking the records information. Two commenters raise their concerns that sharing this information with secondary producers could result in the same harms and ask that secondary producers not keep this information. Nine comments raise similar harms as potentially occurring to performers if the location of the records were placed on every page. One comment expresses concern that the primary producer's sharing with others of the addresses and other contact information could make it liable for how the information might be used by others, including crimes against the performers. Two comments request that the secondary producer's home address not appear on the disclosure statement, while another comment recommends that the secondary producer's street address be included but not the street address of the primary producer, which would keep the secondary producer's statements of locations of records from being unmanageably long due to the inclusion of other producers' locations. One comment states that the proposed rule will greatly increase exposure of identification of producers, chill protected speech, and serve the rule's purpose no better than a link would.

One comment reported that Web sites based on static pages would have to manually update every page if changes must be made to the compliance notice, such as the publication date, business address, producer name, and custodian name. Each update would cause the potential for error, and each honest mistake could result in prosecution. Although dynamic sites could more easily update the compliance notice, extra processing by the Web site server would be necessary, which is costly. There would be a considerable extra load on the server for individual page compliance, according to the comment, and dynamic pages will face technical challenges if operators of such Web sites are to comply.

The Department adopts these comments in part. The Act requires that the location of the records must appear on each ''copy'' of a depiction of sexually explicit conduct, meaning every Web page for Internet sites. The Department believes that its final rule allowing producers to place records in the care of third-party custodians will obviate any harms to performers that might otherwise occur due to disclosure of the address where the records are kept. It also will amend the final rule to permit the posting of a link or ''mouseover'' on each Web page to satisfy the requirement that every page of a Web site provide the location where the required records are stored.

Five comments say that a hyperlink text to a full statement that can be updated as needed would fulfill the purpose of the proposed rule. The hyperlink would appear on each page. One of these comments notes that the Act requires that a notice appear on every page on which a depiction appears, but that notice could still appear in a dedicated link. It claims that although the Act required that the notice appear on every page, the Act did not alter the manner in which the notice is presented. One comment says that the Web site could use an appropriately labeled link that opens to several pages of disclosure statements or an elaborate table of disclosure statements. Producers could use a series of links to keep individual disclosure statements close to the galleries to which they relate. One comment believes that one notice linked to every page of a site provides everything the Department needs to enforce the statute by identifying the responsible record and the place where the records are located.

Four comments claim that the requirement that a notice appear on every page would ruin the aesthetics of the Web site. Attention of viewers is measured in seconds, according to these comments, and clutter will harm gaining attention. One comment thought that a solution to the aesthetics problem would be to avoid having the disclosure statement appear on the face of the image, so as not to increase the size of the image files or to harm the integrity of the image itself. If the disclosure statement appeared in a comment field within the digital file, at a defined location, then both the producer and the Department would know where it could be found, the comment concluded.

The Department adopts these comments in part. Without accepting as valid every fear that the comments raise, the Department does believe that the language in the proposed rule, and even its comments at 72 FR at 38035, allow it to require a less-burdensome disclosure statement than commenters anticipated by eliminating language in the current regulation that permitted a home page statement or hyperlink on that page. Although the current regulations that allow such a statement to be placed only on the home page cannot be squared with the statutory changes, the Department does believe that the Act would permit the required statement that appears on each page to be a hyperlink that contained all the statutorily required record-keeping compliance information. By adopting this change, the Department believes that it will respond to essentially every concern that a comment raised regarding privacy, threats, aesthetics, or computer technology.

Seven comments state that moving the disclosure statement from the main page to every page is unnecessary and a nuisance. One comment says that each printed page is necessary for records and books, but an explanation is needed for applying this mandate to electronic media. Another comment thought that the disclosure statement could be affixed to a magazine or other printed matter in the same fashion as a shoplifting tag, not printed on the copy

itself, and that only movies would actually require appearance of the statement on the work itself. Two comments state that the existing requirement of a disclosure statement on the homepage or principal URL of a Web site has worked well and that there is no need for it to appear on each and every Web page where the triggering content appears.

Two comments state that it is impossible to apply the requirement that the disclosure statement appear on every Web page to live Web casts. Another contends that it is unrealistic to expect a separate disclosure statement or a separate line in a disclosure statement for every separate work that is placed on each and every Web page. One comment notes that for composite works, there are thousands of images often organized into separate galleries. A Web page could have an index page with 100 images that were produced on different dates, according to the comment, and that more generality should be allowed in the statement.

The Department declines to adopt these statements. Section 2257A(e)(1) requires that a statement describing where the records are located ''shall cause to be affixed to every copy,'' and provides specifically that ''the term 'copy' includes every page of a Web site on which matter describes in subsection (a) appears.'' The Department must issue regulations implementing the statute, and it is prevented from adopting those comments asking that each page not be required to contain the disclosure notice, or stating that such notices are unnecessary, that notices should be able to appear on a separate tag, or that it is unrealistic to expect that each Web page will contain a disclosure notice. And because the statutory requirement applies to ''[a]ny person to whom subsection (a) applies,'' the Department may exempt neither primary producers, secondary producers, nor producers of live Web casts. As noted in the proposed rule, and finalized in this rule at § 75.2(a)(1), however, producers of live Web casts may satisfy the requirement by ''includ[ing] 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.''

One comment states that the records should require not the name and address of the individual, but a title, since the name of the relevant individual changes over time. The comment believes that such a change would avoid an invasion of privacy if the person maintaining the records is a performer. The comment believes that this is the same privacy interest that led the Department in the proposed rule to redact non-essential information from copies of performers' identification cards before providing secondary producers with copies of records. The Department believes that its allowance of the keeping of the records by third-party custodians eliminates any possibility of invasions of privacy of this type. The Department also accepts the comment's view that the title of the custodian could be provided rather than the name of a specific individual, since the responsible person could change over time, otherwise requiring that each existing disclosure statement be changed.

One comment expressed the view that the disclosure statement should provide information concerning the date of photography and the name, address, and title of a person who produced it, including its insertion into a Web page, and state the name of the person responsible for maintaining the records. The Department declines to adopt this comment, because the Department does not believe it is necessary for the disclosure statement to contain all of this information. Instead, the Department believes that the objectives of the statute are advanced through the rule's record-keeping requirements, which will ensure that the necessary information is available, while at the same time reducing the burdens on entities compared to those that would be imposed by additional requirements concerning the disclosure statement.

One comment recommends that the existing regulations on the appearance of the disclosure statement contained at § 75.6(e) should be changed. It contends that the typeface requirements are inadequate because point size is an objective criterion. It would prefer that the regulation specify how large the type should be but not how large it is compared to other printing. It also argues that a point-measured minimum size is irrelevant on a computer site because the appearance of the text will depend on the settings of each monitor displaying it.

The Department has declined to adopt this comment. Precisely because typeface appearance can vary, the Department believes that it is important to require that disclosure-statement typeface be a certain size compared to other printing. Because the size of computer screens and their settings tend to vary little among the general public, the Department concludes that specifications governing the size of type should be retained.

One comment asks which entity bears the obligation of providing a disclosure statement when one Web site frames content originating from, and wholly contained on, the servers of another producer, where the content is selected and changed in the originator's sole and exclusive discretion. The Department states that where a Web site operator operates as a producer, even as a secondary producer, it must comply with the disclosure statement requirements of the final rule. Where a Web site operator is a distributor, it need not comply with those requirements.

Date of Original Production

The proposed rule also would require that the date of original production be among the records that are required to be contained in the statement describing the location of books and records. One comment argues that it is sensible to use the date of first production because this is the date that matters for the production of child pornography, to which the records relate, and which would determine when the record-keeping obligations expire. However, this comment states that the date of original production should not appear on the disclosure statement because it is important only once the performers' dates of birth are known. Since that information is not a part of the disclosure statement, the comment states that inclusion of the production date makes no sense. The commenter suggests requiring that the records referred to in the disclosure statement themselves detail the relevant production dates: The earliest date that the primary producer created any sexual image depicted of each performer.

As noted above, the Department adopts this comment.

Location of the Statement

One comment requests that the Department describe how the rules requiring a statement apply to simulated sexually explicit material on digital video discs (DVDs) that are divided into different segments, such as bonus material. The regulations at § 75.8, the comment notes, tell what should be done where end credits exist, but often such bonus material has no end credits. The comment advocates that § 75.8(e) should apply in this circumstance rather than §§ 75.8(b) and (c). The comment also asks the Department to conclude that the statement can appear at the end of each item of bonus material available, or if identical for all materials, in a separate dedicated menu option that opens the statement.

The Department adopts this comment and has clarified in the final rule that for purpose of § 75.8, a DVD containing

multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD. This is analogous to a magazine containing multiple depictions, per § 75.8(a), locating the statement on a single page.

Two comments state that some Web sites contain thousands of pages of constitutionally protected visual depictions and other content. They question whether producers would be required to display thousands of disclosure statements, especially when so many different depictions can appear on one site. They contend that affixing disclosure statements to thousands of depictions would create a stigma based on an ambiguous definition of lascivious exhibition in one picture out of thousands.

The Department does not adopt these comments. If any entity operates a Web site that contains thousands of pages of depictions of sexually explicit conduct, then those entities are required by law to display thousands of disclosure statements. As noted, the Department in this final rule is permitting those statements to appear as hyperlinks. The number of depictions on a site is not the relevant issue, but whether on a particular Web page there appears one or more such depictions. If the owner of a Web site chooses to display thousands of depictions on one Web page and one of those is a depiction of lascivious exhibition, then that Web page must contain a disclosure statement. The comments offer no evidence to support a view that such a statement would create a stigma, nor does the Department believe that ''lascivious exhibition'' is defined ambiguously. Any person who believes that only one depiction among thousands is of lascivious exhibition can display that depiction on a Web page unto itself. Moreover, a studio or any other entity that conforms to section 2257A's certification safe harbor will not face the situation that these comments hypothesize.

These comments also ask the Department to delay the compliance date of the disclosure statement until the Department issues its regulations effectuating the safe harbor of section 2257A, which may apply to the entities referenced in the comments. The Department believes that Congress intended that the safe harbor was to be available to entities who qualified for its operation in a manner that would preclude the need for such entities to conform to the disclosure and record-keeping requirements. Therefore, as noted earlier, the Department adopts this portion of the comments.

One comment specifically requests that the current language of § 75.8(d) that permits a hyperlink on the homepage of a URL be retained. The Department declines to adopt this comment. The Act requires a disclosure statement on each page of a Web site. As noted above, however, the Department will allow that statement to appear as a hyperlink that is displayed on each page that depicts sexually explicit conduct.

One comment asks that if the Department allows a hyperlink on the index page, that it make clear where the disclosure hyperlink should appear since the first page may not contain any covered depiction. Because the Department does not adopt the view that the Act permits the appearance of a hyperlink only on an index page, it does not adopt this comment.

Two comments ask whether the disclosure statement that the Act requires for each page depicting actual sexually explicit conduct applies to every page of such Web site, or only the pages that contain actual sexually explicit conduct. The Department responds to this comment by referencing that the plain language of section 2257A(e)(1) of the Act provides that a disclosure statement must appear on ''every page of a Web site on which matter described in subsection (a) appears.''

One comment asks what the word ''matter'' means, and the Department again references the plain language of the Act in subsection (a), which refers to depictions of sexually explicit conduct. Another comment asks whether a Web site is a ''matter'' subject to regulation and, if so, whether each of its elements is an individually ''matter'' for such a purpose. It also inquires whether a Web site as a whole is a ''matter'' or whether it is simply an amalgamation of many matters, and whether the Department is requiring many different disclosure statements because a Web site has many different pages.

The Department answers this comment by stating that it requires many different disclosure statements only when a Web site displays many different depictions of sexual explicit conduct. The Act requires that when any page of any Web site depicts any sexually explicit conduct—''matter'' as contained in subsection (a)—then the page must contain a disclosure statement. Hence, it is not the Web site or its pages that is a ''matter,'' but the depiction itself.

One comment related that neither the statute nor regulations define a ''Web page.'' The comment says that the term could mean a screen that appears on a computer, an HTML document on the Internet, or anything covered by a single URL. The comment suggests that a definition is needed to avoid vagueness and provides a list of 28 definitions of the term.

The Department declines to adopt this comment. The use of the term ''Web page'' in the regulation predates the amendment of the statute in the Act, and the lack of a definition of ''Web page'' was not previously raised in the comments in the rulemaking for the 2005 version of the regulation. That is the case even though the definition of ''URL'' was commented upon, and responded to by the Department. See 70 FR and 29610. This confirms the Department's belief that a definition of the term is not needed for compliance with the regulation.

The same comment contends that it would be impractical and unnecessary to require the disclosure statement to appear on the screen during the playing of a video clip that depicts actual sexually explicit conduct. The Department does not accept this comment. It refers the commenter to the terms of existing § 75.8(b), which describes where the disclosure statement must appear for a motion picture or videotape.

Exemption Statement

One comment states that there should not be an exemption statement under § 75.7. Even in the presence of such a statement, the comment contends that the government must still prove all the elements of an offense. It says that many depictions are not required to contain a disclosure statement—not just ones produced before the compliance date, but also later depictions for which the record-keeping period has expired. The comment also maintains that no such exemption statement is required if a depiction is foreign-produced by producers who did not intend at the time of production for the depiction to enter the United States market, or by married couples who produce videotaped images of themselves for their own personal use.

The Department declines to adopt these comments. It does not agree that foreign-produced materials will not require disclosure statements if they were not intended to be made available in the United States at the time of production. Determining when the producers of the foreign production intended to distribute the depiction in the United States would be essentially impossible, and even if it were possible to do so, producers would simply claim that on the date of original production, no such intent had manifested itself. If

the depiction is made available in the United States, then the disclosure statement is required, regardless of the intent at the time of production. With respect to personal use, the Department does not construe section 2257 and part 75 to encompass an adult couple's recording of its intimate activity for the couple's private use in the home.

Exemption From Statutory Requirements With Respect to Visual Depictions of Lascivious Exhibition and of Simulated Sexually Explicit Conduct In Certain Circumstances and 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 of 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, although the records may not necessarily be 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.

In the proposed rule, the Department crafted a certification regime (described in detail below) that would have implemented the safe harbor in such as 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. Four comments recommend several major changes to the certification provision. These comments are described below.

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 itself and all sub-entities that it owns or controls. The names of all sub-entities covered must be listed in such certification, however, and must be 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 use of a broad description of laws and other documentation that would satisfy the certification to provide authority for this permission to foreign entities.

The proposed rule would have required that the certification 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.

One comment recommends that due to chief executive officers' demanding schedules, other executive officers should be able to sign the certification. The Department adopts this comment.

One comment urges the Department to confirm that if an entity produces both materials that are and are not covered by the certification regime, the entity is not disqualified from using the certification regime for covered materials. The Department adopts this comment.

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

Time Period for Certification

The proposed rule would have required the certification to be filed every two years. The Department could have chosen a shorter period for certification, a longer period, or a permanent certification. The Department believed, however, that two years is a reasonable period, as it would ensure that certifications remained up-to-date without imposing overly onerous burdens on regulated entities.

One comment recommends the elimination of proposed § 75.9(e), which would require certifications every two years. The comment points out that if the requirement to list the titles of works covered by the certification and other related information were deleted, it would not be necessary to require producers to submit certifications every two years. Instead, the Department could simply require re-certification if there are material changes in the information the producer certified under § 75.9(c)(1) and (2) concerning how the producer collects and maintains information concerning its employees who perform in its works covered by the certification regime.

The Department adopts this comment. As explained below, as the Department adopts various comments concerning the information to be provided in the certification under § 75.9, it is not necessary to require producers to re-certify every two years. It is, however, still necessary to establish certifications on the record as soon as possible. Accordingly, the Department will require an initial certification due 180 days after the publication of this proposed rule as a final rule. This will provide sufficient time for entities to determine if they wish to certify and to come into compliance with the certification requirements. Initial certifications of producers who begin production after the publication of this proposed rule but before the expiration of the 180-day period following its publication as a final rule are due on the last day of the 180-day period. Initial certifications of producers who begin production after the expiration of the 180-day period are due within 60 days of the start of production. 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 be 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. The proposed rule stated that ''a false certification will result in a violation of section 2257A and potentially other criminal statutes.'' *See* 72 FR at 32266.

One comment asks the Department to clarify that a ''false certification'' is one that is knowingly and willfully false, and to specify the criminal statutes that may be violated by such a false certification.

The Department adopts this comment. The federal statute criminalizing a false certification is 18 U.S.C. 1001, which requires that a statement be knowingly and willfully false. Depending on the facts of a particular case, however, a person submitting a false certification could violate other federal statutes. The Department notes that a false certification would necessarily result in

a violation of sections 2257 or 2257A if a producer submitting that false certification did not comply with the record-keeping provisions of the relevant statute.

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 relevant sub-entities are permitted to avail themselves of the safe harbor;

(2) Certifies that regularly and in the normal course of business, the producer, and any relevant sub-entities 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 a certification to the Attorney General, and the producer making the certification has copies of those records or certification; or, for visual depictions of simulated sexually explicit conduct only, has 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; and

(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).

The Department received several comments on the certification provisions of the proposed rule. These comments are discussed below in turn.

One comment states that the Department should prepare a form for the certification instead of requiring producers to submit a letter.

The Department declines to adopt this comment. As outlined below, the Department has simplified the requirements for the certification in response to comments received. Accordingly, the short letter that would be required would not be significantly more burdensome on producers, if at all, than requiring producers to fill out a form.

Statutory Basis for the Certification

The first requirement 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: (i) 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 (ii) 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).

No comments were received on this provision.

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 five elements: that 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.

One comment states that the proposed rule's certification statement is inconsistent with the statutory safe harbor provision because it requires the producer to certify that it maintains records concerning all performers employed by the producer who appear in depictions of simulated sexually explicit conduct or lascivious exhibition, whereas the statute permits a blanket certification as to all performers employed by the producer. The comment then states that requiring the producer to certify only as to performers who appear in visual depictions of simulated sexually explicit conduct or lascivious exhibition would first require the producer to determine which depictions may contain simulated sexually explicit conduct or lascivious exhibition, which would be difficult and time-consuming (another comment also notes the ''troubling'' nature of requiring producers to determine what materials depict lascivious exhibition or simulated sexually explicit conduct ''given the vagueness of the definitions for these terms''). Moreover, the comment states that the proposed rule would be inconsistent with Congressional intent because it would deny producers the ability to make the blanket certification contemplated by the statute. The comment also states that a blanket certification will better serve the Department's goals than a tailored certification. The comment thus recommends that the certification language at § 75.9(c)(2) be revised to end at ''all performers employed by [name of entity],'' deleting ''who appear in visual depictions of simulated sexually explicit conduct or of lascivious exhibition of the genitals or pubic area.'' The comment makes a conforming recommendation that the definitions of ''regularly and in the normal course of business collects and maintains'' and ''all performers, including minor performers'' at § 75.1(p) and (r), respectively, be amended to clarify that the certification applies to all performers a producer employs, not just those appearing in depictions of lascivious exhibition or simulated sexually explicit conduct.

The Department adopts this comment. Section 75.9(c)(2) in the final rule thus has been amended to end at ''all performers employed by [name of entity].'' Sections 75.1(p) and (r) in the final rule have also been amended pursuant to the comment.

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

As an extra precaution against evasion, the proposed rule's third requirement would have been a list of all visual depictions or matter containing visual depictions in which non-employees have engaged in sexually explicit conduct. This would have provided the Department with notice and a record that such visual depictions by the producers exist and, if necessary, would have enabled the Department to investigate the bona fides of the certifying entity. The Department believed the list would not be so burdensome as to have defeated the purpose of the certification regime—namely, reducing the burden of the record-keeping requirements otherwise imposed in part 75. Rather than maintaining age-verification records, copies of each performance, etc., the certifying entities would have needed only to provide a list of their productions that include depictions of lascivious exhibition or simulated sexually explicit conduct by non-employee performers.

Four comments state that this provision, § 75.9(c)(3) of the proposed rule, is overly burdensome, not contemplated by the statute, and should be stricken. Four comments also state that § 75.9(c)(4) and (6) should be stricken, while three comments state that § 75.9(c)(5) and (7) should be stricken. Because these comments generally apply to § 75.9(c)(3) through (7) of the proposed rule, the Department will summarize and respond to them all here rather than repetitively throughout the preamble.

These comments make various claims, described below, in seeking the deletion of these provisions. First, these provisions go beyond the statutory requirements for the certification by requiring the producer to determine whether materials depict lascivious exhibition or simulated sexually explicit conduct. Second, these provisions are inconsistent with the statutory requirements for the certification by requiring the producers to make lists, whereas the statute does not mention lists at all. Third, the list requirements would likely be found unconstitutional because they would result in eviscerating the statutory safe harbor: By limiting the safe harbor to producers who go through the burdensome process of identifying which materials depict lascivious exhibition or simulated sexually explicit conduct, the proposed rule would impose substantial content-based restrictions on protected speech, with the result that the government would interfere with protected speech in the name of targeting unprotected speech. Fourth, unlike other provisions of the relevant statutes, which expressly permit the Department to specify the records that must be kept and how they must be maintained, section 2257A(h) does not provide the Department any flexibility as to what a producer must certify to be eligible for the safe harbor. Fifth, the list provisions are inconsistent with Congressional intent that once a producer makes the certification required by statute, it should ''not be subject to the more burdensome requirements of this statute.'' Sixth, much ''back office'' work will be required to enable producers to have a reasonable basis for the expansive certifications required. Seventh, while the certification process as outlined in the proposed rule may be less burdensome than full record-keeping under part 75, the difference is only a matter of degree, as the amount of information required to complete a certification under the proposed rule would be significant.

The Department adopts these comments in part, and will strike § 75.9(c)(3), (4), (6), and (7) from the final rule. As explained below, the Department will amend § 75.9(c)(5) in the final rule rather than striking it entirely.

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

The fourth requirement in the proposed rule would have provided the Department with both a notice and a record regarding which depictions or matters are subject to the certification. In drafting the proposed rule, 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 initially determined, however, that depiction-specific information would 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 would have included the titles, names, or other identifying information of visual depictions acquired by the certifying entity from foreign or U.S. primary producers.

As noted above, the Department is adopting comments to strike this provision from the final rule.

Certification for Entities Acquiring Foreign-Produced Matter

The fifth requirement in the proposed rule was 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 rights 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.

One comment describes as vague and unreasonably burdensome the proposed rule's certification at § 75.9(c)(5) that U.S. secondary producers take ''reasonable steps to confirm'' that performers in foreign works are not minors. The comment states that the Department should either impose a lesser standard, such as a good faith belief that the foreign work does not depict minors, or specify what is meant by ''reasonable steps.'' The comment suggests that ''reasonable steps'' could include reliance on representations and warranties from a foreign producer. Another comment makes the same points, stating that if the proposed rule's § 75.9(c)(5) is not stricken, the section should be amended to specify what constitutes ''reasonable steps'' and that such steps should not impose a duty to investigate but rather should permit reliance on a review of the work itself and/or reliance on a representation or warranty of the foreign producer. This comment also notes that the certification as to the age of the performers should explicitly state that the performer was not a minor at the time the visual depiction was produced.

The Department adopts these comments to the extent they recommend clarification of ''reasonable steps,'' with the caveat that any review of the materials or reliance on the representations made by a foreign producer must itself be in good faith. The Department also adopts these comments to the extent they recommend the certification be revised to state the performer's age at the time the visual depiction was originally produced. Accordingly, the corresponding section in the final rule (designated as § 75.9(c)(3) due to the deletion of the proposed rule's § 75.9(c)(3) and (4)) will explain that reasonable steps may include, but are not limited to, a good-faith review of the material itself or good-faith reliance on representations and warranties from a foreign producer, and the certification will be revised to state that the performers were not minors at the time the visual depiction was originally produced.

One comment states that the proposed rule's § 75.9(c)(5) would require a producer to take affirmative steps where a foreign producer either did not make a certification itself to the Attorney General or does not collect and maintain the requisite records, which would be an additional burden. Another comment vigorously opposes any suggestion that foreign producers must comply with any provision of section 2256 or 2257A in order for their material to be eligible into the United States, and acknowledged that the Department itself recognized that any such suggestion could be construed as a burden on First Amendment rights. A third comment also notes the Department's recognition of this constitutional concern, stating that ''permitting a secondary producer to make an alternative certification [the ''reasonable steps'' certification under the proposed rule's § 75.9(c)(5)] for such [foreign-produced] materials is consistent with the purpose of the Act and constitutional principles.'' This commenter believes that the alternative certification ''is a reasonable accommodation to ensure that American citizens are not deprived of access to a substantial amount of foreign material.''

The Department of course recognizes that the ''reasonable steps'' certification would require a U.S. producer to take additional steps concerning foreign-produced material if the foreign producer neither has made a certification to the Attorney General nor collects and maintains foreign-equivalent records. For the reasons outlined above, however, a certification that provided no assurance or indication whatsoever that the performers in foreign-produced works are not minors could lead to the possibility that U.S. producers could inadvertently introduce foreign material depicting minors engaged in simulated sexually explicit conduct into the United States market. The Department believes that the alternate certification for foreign-produced material in the final rule, which is significantly less burdensome than that originally proposed (because it does not require the production of any list of covered material and specifies that a U.S. producer may rely on the representations and warranties of the foreign producer), strikes an appropriate balance.

The proposed rule would not have permitted the same certification process for visual depictions of lascivious exhibition acquired from foreign entities. The Department considered that the risks of exploitation of children in such visual depictions and the risk of evasion of the record-keeping requirements would be too great to permit the accommodation for visual depictions of simulated sexually explicit conduct outlined above. The Department was further 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 did note, 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.

Three comments state that the alternative certification outlined above concerning foreign-produced material depicting simulated sexually explicit conduct should also be available for foreign material depicting lascivious exhibition. One of these comments provided the following proposed text for this certification: ''I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify 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, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute * * * [simulated sexually explicit conduct] or * * * [lascivious exhibition] are not minors.'' This comment further notes that ''[d]ue to the comparably small number of foreign films at issue, the burdens associated with making such reasonable efforts would be minimal when compared with the burdens of reviewing all domestically-produced matter to identify scenes containing'' simulated sexually explicit conduct or lascivious exhibition.

One comment explained that the Department was wrong to suggest, by providing an alternate certification for materials depicting simulated sexually explicit conduct but not for materials depicting lascivious exhibition, that ''posing a minor for simulated sexual conduct is necessarily less abusive than depicting a minor in the lascivious display of genitals or pubic area'' and that the Department should treat both kinds of material similarly to minimize constitutional concerns. The comment also notes that expanding the alternate certification to cover lascivious exhibition materials will not place foreign children at risk of being victimized through the production of child pornography because ''the

importation and even the mere possession of child pornography remains seriously criminal in all of the United States, even if all of the children depicted are other than U.S. nationals.'' Another comment states that it was inexplicable for the Department to permit an alternative certification for materials depicting simulated sexually explicit conduct but not for materials depicting lascivious exhibition.

The Department adopts these comments. Accordingly, in the final rule § 75.9(c)(3) (renumbered from the proposed rule's § 75.9(c)(5)) will use the text proposed by the comment above.

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

The sixth requirement in the proposed rule would have required that the entity making the certification include a list of the visual depictions or matter, including those visual depictions for which no records exist but for which the certifying entity had 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 would have provided the Department with notice and a record that such visual depictions existed and, if necessary, would have enabled 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 would have provided as much protection as possible without unduly infringing on constitutional rights. The Department considered that the risk of evasion would have been mitigated by the severe criminal penalties for production of child pornography that would apply to any matter covered by the record-keeping requirements.

As noted above, the Department is adopting comments to strike this provision from the final rule.

Certification of Record-Keeping by Primary Producers

The seventh requirement in the proposed rule would have been 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 on its own that it (the primary producer) has made a certification and that the entity has a copy of that certification.

As noted above, the Department is adopting comments to strike this provision from the final rule. A key consideration in the Department's determination to adopt these comments is that this provision necessarily would have only applied to material produced in the United States. As the U.S. primary producers of that material would either be required to comply with the record-keeping provisions of sections 2257 or 2257A or to have themselves provided with the certification to the Attorney General required by § 75.9, it appears that the Act's goals would be met without requiring the secondary producers to provide another certification.

Application to Secondary Producers

The Department has received many comments on the application of the proposed rule to secondary producers. Two comments note that the proposed rule applies to secondary producers as of July 3, 1995, except that no penalties would be imposed against secondary producers who failed to maintain records for acts of production that occurred prior to the 2006 effective date of the Adam Walsh Act. The comments argue that this would allow criminal prosecutions of secondary producers to be based on materials that were not covered at the time of their creation. The Department believes that application of its regulations to secondary producers has reflected the statutory language since 1995 and that the Act reinforces this applicability. Nonetheless, the Department, recognizing that some secondary producers might not have believed that they were required to adhere to the requirements of part 75, agreed in the proposed rule to apply the penalties against secondary producers only for depictions with dates of production after the 2006 effective date of the Act. However, the statutory language is clear that secondary producers are subject to the Act, and, therefore, it is not the case that any prosecution of any secondary producer for failure to adhere to part 75 for depictions originally produced prior to the Act's 2006 effective date would subject anyone to criminal sanctions based on materials that were not covered at the time of their creation.

One comment states that the regulations should not apply to a secondary producer who obtained the materials before the compliance date without reproduction rights. According to the commenter, the republication rights would be worthless since it is impossible to go back to the primary producer to obtain those records, particularly if the contract at the time did not permit providing the records.

The Department does not adopt this comment. As stated above, once the Adam Walsh Act took effect, all secondary producers were clearly on notice that part 75 applied to all depictions that were originally produced after the compliance date. However difficult obtaining the necessary records may now be, the secondary producer could have done so at the time in accordance with its statutory obligation. Failure to have done so will not excuse noncompliance. However, as elaborated more fully below, the Department in response to comments has changed the compliance date of the final rule for entities who can claim the exemption from part 75 obligations that is contained in section 2257A. Thus, although secondary producers who are governed by part 75 must comply with its provisions with respect to depictions of actual sexually explicit conduct originally produced after the Act's compliance date, secondary producers who can claim the exemption in section 2257A will not need to comply with part 75 in the interim.

Two comments argue that secondary producers will not be able to comply with the terms of the proposed rule because primary producers have not made information available to secondary producers in all cases due to privacy concerns. Two other comments remark that even if the primary producer provides the records to the secondary producer, requiring the secondary producer to keep the records harms the performers' privacy.

The Department does not adopt these comments. The Act applies to secondary producers, and, therefore, the final rule does so as well. Moreover, privacy concerns may not always be the reason why a primary producer chooses not to provide such identification records. The possibility exists that the primary producer declines to provide the records because the models are not of legal age. Congress applied section 2257 to secondary producers, and reaffirmed that applicability in the Act, so that child pornography would not be able to gain a market among secondary producers. Eliminating that market is critical to the suppression of child pornography. Given the Department's willingness to allow redaction of personal information to the extent possible to protect privacy while at the same time confirming legal age, it believes that there will be no unwarranted invasion of the performers' privacy as a result of the proposed rule.

Four comments objected to applicability of the proposed rule to secondary producers on the ground that

secondary producers rarely come into contact with performers. These commenters claim that it is impossible for secondary producers to inspect the original identification of the performers, and that secondary producers cannot comply with this requirement.

The Department declines to adopt these comments. As stated, Congress intended to prevent secondary producers from creating a commercial market for child pornography by relying on their lack of knowledge of the age of performers used by primary producers. The Department believes that it is inaccurate to state that secondary producers cannot comply with the proposed rule. No aspect of the rule is such that secondary producers will find it ''impossible'' in any sense to comply with them. Moreover, the legal duty that the final rule imposes on secondary producers relates to record-keeping only. The comments' claim that the secondary producer must inspect the original identification documents of the performers is incorrect, although secondary producers should take steps to ensure that they do not violate criminal prohibitions relating to child pornography.

Another comment states that secondary producers cannot know whether the information that the primary producers possess is accurate. It notes that a secondary producer can be non-compliant despite taking all possible compliance measures. The Department agrees that both primary and secondary producers who keep the required records may lack full certainty that the information that they have is accurate. However, the rule does not require that producers be completely certain of accuracy. Primary producers must check documents and keep records based on those documents, with the entitlement to see driver's license or passport numbers to ensure that the identification validly identifies that the named performer is of legal age. A secondary producer is not required to examine documents, and if it chooses to do so, will not face liability simply because the documents are not accurate.

Two comments contend that the proposed rule should not extend to secondary producers because concerns relating to those entities' document availability can be addressed by referencing the name and address of the primary producer's records custodian, without requiring a duplicate and separate set of regulatory documents by the secondary producer. A third comment makes a similar point, noting that such a reference is permitted under the current § 75.2(b) of the regulations. The comment asks that only primary producers—not secondary producers—be required to personally discharge the record-keeping requirements.

The Department does not adopt these comments. Under the suggested approach, the secondary producer will not have demonstrated that he has actually received copies of the records from the primary producer. If secondary producers were exempted from an obligation to keep records, then the Department could never determine the identity of the primary producer. Failing to have the rule apply to secondary producers would also thwart the language of the Act that makes section 2257 applicable to secondary producers, increasing the chances that a commercial market would exist for child pornography and thus for child exploitation.

One related comment notes that under the proposed rule and section 2257(f)(4), each republisher must include the producer's disclosure statement on every republished copy. According to the comment, an investigator would therefore know where to find the primary producer, and it would be easier for an investigator to locate the primary producer rather than to inspect the secondary producer's records. Two other comments state that secondary producers should not be inspected because they use content provided by primary producers; they argue that inspection of primary producers' records would be easier than inspecting thousands of secondary producer sites.

The Department declines to adopt these comments. The Act imposed a requirement for secondary producers to maintain records that governs the Department's final regulation.

One comment posits that when original footage is created by a foreign primary producer, but an American secondary producer seeks to use the footage in news or a documentary, the foreign producer is beyond the reach of section 2257 and may not have any documents. The secondary producer in this circumstance will be unable to obtain the necessary records, and will have to forgo the footage or risk criminal penalties. According to the comment, this would result in a ban on certain programming, raising major First Amendment concerns.

The Department does not adopt this comment. In such a circumstance, the U.S. producer would be able to rely on the certification.

General Comments

Numerous comments address the proposed rules in general ways that do not require individual responses. For example, many comments argue that the rule is an unconstitutional burden on free speech, a violation of the Equal Protection Clause of the Constitution, a violation of the Fourth Amendment, or a violation of privacy rights. Other comments argue that the rule legislates morality, targets a legal industry for harassment, impedes citizen access to the Internet, or establishes government surveillance of citizens' Internet activities. Some comments recommend that rather than the government publishing this rule, the government should encourage better parenting, enforce laws prohibiting and punishing child pornography more vigorously, or establish an alternative age verification program, such as a database of all performers. A number of comments claim that the rule unfairly burdens small businesses run by women. Some comments misunderstand the scope of the rule to apply to consumers of pornography and therefore suggest that consumers be subject to age verifications procedures. Three comments raised the possibility that producers might experience stress over the fear that they might go to jail for inadvertently misfiling or misplacing records, another commenter is concerned that a person could face liability for inadvertently posting a depiction of sexually explicit conduct, and other commenters fear that producers are liable to suit for disclosing information about performers or that a Web site operator could be liable to suit for disclosing information about those who post depictions on their Web sites. Other commenters request exemptions for certain types of media or Web site operations that are not provided for in the statute. One comment recommends ending all record-keeping requirements prior to this rule and starting anew.

The Department notes that these comments essentially took issue with the underlying statute and its requirements. The Department responds with three points. First, many of the comments either misunderstand or overstate the effect of the regulation. Second, courts have upheld existing section 2257 and its implementing regulation as a valid exercise of power by Congress and the Executive Branch, and the Department believes that the Adam Walsh Act and the final regulations are as well. Third, the Department is under a statutory obligation to publish the rule and cannot ignore its duty or change the statutory requirements through its rulemaking. To the extent these comments raise issues relating to the regulations themselves, the Department

also relies on the discussion in other parts of the supplementary information in support of the rule.

Finally, the Department responds to three other comments regarding the regulation's applicability to non-commercial activities. One comment states that the definition of ''sell, distribute, redistribute, and re-release,'' in § 75.1(d) suggests that the entire record-keeping obligation of producers is limited to commercial production operations. One comment stated that age-verification requirements should apply only to producers who pay performers, not individuals who post photos of themselves, and another comment maintains that an exemption statement should not be required if a depiction is produced by married couples who produce videotaped images of themselves for their own personal use.

The Department adopts these comments in part and rejects them in part. The statute is not clearly limited to producers who pay performers. However, it is limited to pornography intended for sale or trade. Section 2257 speaks in terms of participants in the professional pornography industry: The persons exhibited are ''sexual performers'' who must provide their ''alias, nickname, stage, or professional name,'' 18 U.S.C. 2257(b)(2), and the producer's relationship with the ''performer'' is described as ''hiring, contracting for, managing and otherwise arranging for the depiction of'' the individual to be shown in the images, *id.* 2257(h)(2)(B)(iii). Similarly, records must be kept for ''every performer portrayed'' (suggesting multiple ''performers''); a disclosure statement is to be affixed to ''every copy'' of covered sexually explicit material (suggesting multiple copies); and producers working with images already in existence by definition produce materials ''intended for commercial distribution.'' *Id.* 2257(a), (e)(1), (h)(2)(A)(ii). Further, age records must be maintained at the producer's ''business premises'' and made available for administrative inspection. *Id.* 2257(c). Likewise, under the implementing regulations, age records must be cross-indexed by performer and by title of the explicit work, 28 CFR 75.2, and maintained ''at the producer's place of business,'' *id.* § 75.4. Finally, records inspections may be carried out at ''any establishment of a producer,'' and ''during the producer's normal business hours.'' *Id.* § 75.5. The legislative history of section 2257 further underscores Congress's intent to regulate images produced by the pornography industry: The age-verification system was proposed by the 1986 Pornography Commission, which described the recommended legislation as reaching anyone ''engaged in the sale or trade of sexually explicit material'' so that minors could be protected ''through every level of the pornography industry.'' Atty Gen. Comm'n on Pornography, *Final Report* at 619 (1986).

Regulatory Procedures

Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Department of Justice drafted this rule in a way to minimize its impact on small businesses in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, while meeting its intended objectives. Because the Department, based on the preliminary information available to it through past investigations and enforcement actions involving the affected industry, was unable to state with certainty that the proposed rule, if promulgated as a final rule, would not have any effect on small businesses of the type described in 5 U.S.C. 601(3), the Department prepared preliminary Regulatory Flexibility Analyses in accordance with 5 U.S.C. 604. Based on this same information, the Department concluded that there were likely to be a number of small businesses that are producers of sexually explicit conduct as defined in the statute, as amended by the Act. In the proposed rules, the Department specifically requested information from affected entities. This information was requested, in part, to assist us in determining the nature and extent of the impact the final rule will have on affected entities. Although the Department received some comments, the information we received was not sufficiently detailed to allow us to state with certainty that this rule, if promulgated, will not have the effect on small businesses of the type described in 5 U.S.C. 605. Accordingly, the Department has prepared the following final Regulatory Flexibility Act analysis in accordance with 5 U.S.C. 603.

A. Need for and Objectives of the Rules

As described in detail in the ''Background'' section above, the objectives of the rules were to reduce the chances that minors are depicted in actual or simulated sexually explicit conduct by requiring that producers ensure that all performers are in fact of legal age, so as to reduce harm to children at the time of production and in subsequent years.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

The Department received 35 comments on its preliminary Regulatory Flexibility Analysis with regard to the proposed rule implementing revised section 2257. No commenters on the proposed rule to implement section 2257A commented specifically on that proposed rule's Regulatory Flexibility Analysis; comments as to the cost of that proposed rule are addressed below in the sections on the Small Business Regulatory Enforcement Fairness Act of 1996 and Paperwork Reduction Act.

Many of these provided general comments about expenses that small businesses would incur without comparing such costs to their total revenues. One comment states that individual women who put depictions of lascivious exhibition on the Web make between $15,000 and $50,000 and do not have the money to buy office space. Three comments noted that producers who work from home will have to rent office space if they want to keep their home address private, or they will be required to pay for day care. One comment states that the proposed rule would create significant bureaucratic challenges to content producers by implementing a requirement to provide production-date information in more locations.

The significant issues raised by the public comments in response to the initial regulatory flexibility analysis are as follows: One comment estimated that costs of compliance for an ''adult business'' would be $250,000, about 25% of the business' net revenues.

For example, one comment remarked that his business would need to hire three full-time staff to manage and collect information concerning 205,000 profile holders on a personal posting Web site and compile the required age documents. The comment estimated that the cost of the three base salaries would be $150,000 per year, which exceeded the business' current revenue, and that his home (office space) lacked room for three additional staff. The comment also notes that it could not pass these costs on because the business did not charge a membership fee, and that making copies of records on 205,000 users would mean that it would have to purchase 136 three-drawer filing cabinets. It contends that the space required for this many cabinets would mean that it would have to rent external storage units for $67,200 per year, that the cost of the filing cabinets would be $68,000, and that the total compliance cost for the business would be $345,800.

Three comments made similar comments concerning types of expenses without specifying amounts.

Six comments claim that compliance costs for collecting records, documentation, updating, cross-referencing, and legal services would be high. One comment states that small businesses would incur excessive legal costs because of the ''draconian sanctions'' for failure to comply with the substantive or procedural requirements of the statute and regulations. One comment claims that the costs of compliance would present a large obstacle to expanding a business. Three comments state generally that the proposed rule would harm small business. Two comments point out that small businesses would need to separate these records from others, which would be costly, and that they would incur vastly increased storage costs due to the necessity of maintaining records for every photograph of every performer. Two comments contend that the proposed rule would place an unreasonable burden on many law-abiding businesses. One comment claims that the vast majority of Web sites are small entities, and that listing their owner's street (often home) address and individual name is a substantial burden and creates a chilling effect on constitutionally protected expression. One comment states that secondary producers are often small businesses that could not afford the time or expense to obtain and maintain copies of records that are best created and maintained by the primary producer that does see the original documents. Two commenters represented that some secondary producers will go out of business due to the proposed rule's requirements. One comment states that it would lose revenue from international profile holders because he will not be able to obtain required United States documents from foreigners who post self-nudes on the commenter's profile Web site. Two commenters from small businesses claimed that they could never generate the money necessary to pay for the increased expenses associated with the proposed rule.

One comment states that the Department would greatly reduce compliance costs if section 2257 producers could take advantage of the 2257A process under 2257A(h)(1)(A)(ii). The comment states that this would eliminate the need to produce and maintain segregated records. Doing so, the comment states, would give these producers the same compliance option as producers who are identical in every permissible relevant respect. One comment argues that the Department is required under 5 U.S.C. 605(b) to conduct analyses to ensure that the regulation will not have a ''significant impact on a number of small entities.'' The comment states that analyses are required unless the agency can make a ''no significant impact'' certification. One comment argues that the Department failed to conduct or write a proper initial regulatory flexibility analysis.

These comments are not all specifically addressed to the proposed rule's initial regulatory flexibility analysis, but the content of the comments raise issues that are in substance addressed to the analysis, and are therefore discussed in the final regulatory flexibility analysis. The Department offers the following as a summary of its assessment of the issues that were raised.

The Department believes that there is merit in those comments that raised cost impact and logistical concerns relating to individuals who produce actual sexually explicit depictions on Web sites at their homes. The Department has made changes to the proposed rule as a result of these comments. The Department believes that the final rule relieves three restrictions that will largely respond to the generalized comments that the Department received concerning the cost impact of the proposed rule on small businesses. First, the final rule does not require the keeping of hard copies, only that such copies be produced on the demand of inspectors. This relief of a restriction will reduce costs of storage, personnel, and related expenses that were noted in the comments. The combined effect of these reliefs of restrictions will greatly reduce the impact of the rule on law-abiding businesses, on expanding businesses, and on the profitability of businesses. Second, the final rule, in a change from the proposed rule, allows hyperlinks to appear on each Web page, rather than require that the full disclosure statement appear on each such Web page. This relief of a restriction will reduce the cost of providing information concerning the original production date in more locations, as one comment raised. Third, the final rule permits the producer not to retain records onsite. Rather, the required records can be retained by third-party custodians. This change, although imposing a cost of custodian services by those entities that choose to take advantage of it, will greatly reduce compliance costs in the categories of storage, rental space, and record-keeping including segregation of records, legal, and staff salaries. Additionally, this change will relieve other burdens on small businesses enunciated by the comments, such as release of home address information. Finally, small businesses that can fall within the safe harbors contained in section 2257A will be relieved of record-keeping and disclosure-statement requirements altogether as outlined above.

In addition to the reduction in burden on small businesses associated with substantive changes to the proposed rule, the Department notes the importance of the change in the compliance date of the final rule in alleviating burdens on small businesses. Originally, the record-keeping obligations that the rule imposes on small businesses were to relate to all works produced after the effective date of the statute in 2006. But the Department has changed the final rule's compliance date to the compliance date of the final rules that will be issued to implement section 2257A. The Department believes that the two statutes are interrelated because section 2257A contemplates that some entities, including some small businesses, are to be able to comply with its terms, and that by doing so, they would not have to comply with the regulations issued under the Act. Because the final rule's record-keeping requirements will never apply even for a single day to small businesses that comply with the section 2257A certification process, the record-keeping cost burden on such small businesses is completely eliminated. Moreover, even those small businesses that will eventually need to comply with the final rule because their conduct does not permit them to use the section 2257A certification exemption will not have to expend resources complying with the final rule for the years that have lapsed since the proposed rule's compliance date.

Two of the commenters were Internet sites on which users can post profiles who claim that the rule would adversely affect their business operations. The Department does not believe that these comments reflected the effect of either the proposed rule or the final rule on their businesses. A profile site is not normally a producer. The individuals who post depictions of lascivious exhibition on those sites are producers. It is the latter, not the former, assuming that the Web site does not act as a producer, who are required to comply with the record-keeping and disclosure statements. Furthermore, this final rule does not impose as large an impact on small business as some commenters understood from the proposed rule.

The Department responds to the comment that recommends that small businesses receive the opportunity to comply with the statutory safe harbor by stating that the exemption referred to in the comment is available to any producer who can meet its conditions. The Department's ability to apply an exemption is limited by the statutory language. However, the Department has recognized the exception that is created in section 2257A(h)(1)(A)(ii), and in its final rule, the Department has stated that it will ensure that the applicability of that safe harbor will operate despite the fact that no regulation implementing it has been promulgated. As stated above, the Department has set the compliance date for the final rule so as to allow entities who are compliant with section 2257A(h)(1)(A)(ii) not to comply with the final rule or incur the costs of doing so, even as an interim measure. Moreover, the Department notes that applicability of the exemption does not turn on whether the entity seeking to comply with the safe harbor is a large or small business. The exemption turns on the conduct of the entity that seeks to utilize it, not the status of the entity itself.

With respect to the procedural requirements for a regulatory flexibility analysis, the Department believes that this final regulatory flexibility analysis fully satisfies 5 U.S.C. 604.

As in its initial regulatory flexibility analysis, the Department continues to believe that approximately 500,000 Web sites involving 5,000 businesses that depict actual sexually explicit conduct are affected by the rule. As a result of being subject to the final rule, these businesses will be required to check identification documents, record information about production dates and age and names of performers, and affix disclosure statements to each copy of a page that depicts actual sexually explicit conduct. These businesses are in the film, magazine, Internet, satellite, mail order, magazine, content aggregation, and wholesaler industries. Although one commenter claims that there are more affected businesses based on considerable exposure to the industry, the comment provides no specific basis for that belief, nor did it offer any competing number or evidence for such a number. One other commenter notes that there are about 1,000 firms that operate more than 100,000 adult subscription Web sites. This statement does not affect the validity of the Department's estimates of the number of Web sites and firms that the rule would affect. The Department's estimate did not estimate the number of subscription sites or the number of firms that operate them. The commenter's estimate of a portion of the relevant site universe is fully consistent with the Department's estimate of the entire number of affected Web sites. No other commenters specifically took issue with the Department's estimate, which it continues to adhere to.

The final rule requires small businesses and other entities that produce actual sexually explicit materials to undertake record-keeping and other compliance requirements. They must check particular forms of identification to determine that all performers portrayed in such depictions are of legal age, they must keep records, they must segregate the records, and they must place disclosure statements on each page of a Web site that contains actual sexually explicit conduct. The professional skills required to comply are those necessary to produce the records and to place the disclosure statement on a hyperlink on each page of a Web site.

C. Description and Estimates of the Number of Small Entities Affected by the Rules

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). As in its initial regulatory flexibility analysis, the Department continues to believe that approximately 500,000 Web sites involving 5,000 businesses that depict actual sexually explicit conduct are affected by the rule. The Department believes that of these 5,000 businesses, 4,000 are small businesses. It reaches this conclusion from comments that stated that the vast majority of businesses affected by the final rule are small businesses.

In the proposed rule to implement revisions to section 2257, the Department stated that, based upon the information provided to the Department through past investigations and enforcement actions involving the affected industry, there are likely to be a number of small businesses that are producers of visual depictions of sexually explicit conduct as defined in the statute, as amended by the Adam Walsh Act. In the proposed rule to implement section 2257A, the Department stated that 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 requested 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 Department also stated that the proposed rules had no effect on State or local governmental agencies.

D. Description of the Proposed Reporting, Record-Keeping and Other Compliance Requirements of the Rule

In the proposed rule to implement revisions to section 2257, the Department stated that the proposed rule modified existing requirements for private companies with regard to visual depictions of sexually explicit conduct to ensure that minors are not used in such depictions. One of these requirements that would specifically affect private companies is Congress's expansion of the coverage of the definition of ''sexually explicit conduct'' to cover lascivious exhibition of the genitals.

In the proposed rule to implement section 2257A, the Department stated that the proposed rule imposed 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 Department noted, the rule imposed 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 Department also noted that the proposed rule, however, provided an exemption from these requirements applicable in certain circumstances.

The costs of the rule to small entities are less than the Department originally anticipated. Thus, the conclusions of the cost estimate that was submitted to the Department by Georgetown Economic Services reflect assumptions that no longer apply. For instance, that report estimated average small business monthly compliance costs of $5,000, plus up-front conversion costs and time to ensure initial compliance. The report contends that most small businesses in the pornography industry generate insufficient revenue to cover this level of regulatory cost imposition. However, because the Department has listened to the comments that it has received, and

believes that its objectives can be accomplished while at the same time implementing regulatory changes resulting in imposing a lighter burden on regulated industry, it does not believe that the report's conclusion, if it ever was correct, applies to the final rule.

For instance, the report assumes in its high cost estimate figures related to formatting section 2257 records and leasing storage space. However, the final rule changed the requirements that imposed these costs so as to dramatically reduce them. For instance, far less storage space is needed now that the final rule, in response to comments, has eliminated the hard-copy requirement. It was the proposed rule's hard-copy requirement that had generated the need for significant storage space. Similarly, the cost of legal fees will be significantly less than anticipated. The report estimated that the proposed rule would require affected businesses to hire at least one full-time employee to maintain the database at a cost of $20 per hour. Since the final rule, responding to various comments concerning the need to hire employees and the difficulties that this requirement posed for part-time operators and for operations that were run out of the home, has permitted records to be stored in offsite, third-party locations, businesses will not need to incur the cost of hiring full-time individuals to maintain only their own records. And it bears repeating that the cost estimate's figures for online dating sites misapprehend the nature of both the proposed and final rules. The operator of such a site incurs no obligations under either rule if it simply operates as a location where users post lascivious exhibitions; it is the individual producer who posts such material on the Web site who must comply with the regulatory provisions.

E. Description of the Steps Agency Has Taken To Minimize the Significant Adverse Economic Impact on Small Entities

The Department took numerous steps to minimize the economic impact on small entities consistent with the objectives of the Act. As noted above, precisely to minimize the concerns of commenters that significant compliance costs would be incurred by small businesses if the proposed rule were promulgated without change as a final rule, the Department adopted three significant substantive changes to that proposed rule: (1) Elimination of a ''hard copy'' requirement for record-keeping; (2) allowing third parties to be custodians of the records; and (3) allowing the disclosure statement to appear as a hyperlink, rather than in full, on each page. The Department also changed the compliance date. These changes will reduce staffing requirements, the need to rent or purchase filing cabinets, the cost of modifying existing images, and other small business compliance costs that commenters have raised. Although some of the general comments that the Department received were rejected based on policy concerns, few of the comments submitted on the economic impact of the rule on small business were rejected for policy reasons. Such comments were either adopted to reduce the restrictions on small businesses where the Act permitted or, in almost all circumstances, were rejected because the Act did not legally permit the Department to adopt them.

Section 2257(a) requires that whoever produces matter that contains actual sexually explicit conduct ''create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.'' This requirement prevents the Department from modifying the proposed rule to exempt secondary producers or small businesses as a class. Moreover, each person with this obligation must ascertain by examining identification documents the name and date of birth of each performer who is visually depicted in sexually explicit conduct. And each must also ascertain other names of the performer. Subsection (c) requires that the records be maintained under the terms of regulations promulgated by the Attorney General and that they be made available at all reasonable times for inspection. These provisions impose burdens on small and other businesses that are not reducible to insignificance. Similarly, subsection (e) requires that all covered entities affix to every copy of sexually explicit material a statement indicating where the mandated records are kept. Those records are to conform to standards issued by the Attorney General. And section 2257A(h) contains a specific safe harbor certification process that allows some entities to avoid compliance with these requirements.

The Department, however, may not expand the category of entities that fall within that subsection's parameters beyond those who meet the statutory conditions. Nor may the Department exempt secondary producers from record-keeping and other compliance requirements that the Act mandates. Therefore, the Department accepted alternatives to the proposed rule that effectuated the statutory objectives while reducing the compliance burdens of small businesses, but rejected those alternatives that were inconsistent with the statute and its purposes.

One proposed reduction in compliance costs for small businesses that was rejected on policy grounds was the request to end the segregation-of-records requirement for section 2257 records. Because the Attorney General must inspect these records, the Department believes that a lesser imposition will occur on those subject to inspection if the requisite records are kept separately. The Attorney General will not then need to review all of a producer's records in search of section 2257 records, nor will the small business need to disrupt its business for the length of time for all of its records to be inspected. Therefore, the Department believes that its position on this point will not impose substantial cost on small business. Further, it believes that it has drafted the final rule to take into account the legitimate cost concerns of small businesses to the proposed rule wherever possible. The Department is unaware of any other federal rules that may duplicate or conflict with the proposed rule, and no commenter has brought any such rule to its attention.

Executive Order 12866

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

The benefit of the rule is that children will be better protected from exploitation in the production of visual depiction of 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 slightly higher record-keeping costs.

Executive Order 13132

This rule 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 rule meets the applicable standards set forth in sections 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

Proposed Rule on Revisions to Section 2257

At the time of the proposed rule the Department stated that the proposed rule was not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5 U.S.C. 804. 72 FR at 38037. The Department determined that the proposed rule would 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.

One comment disputes the Department's view that the proposed rule would not cost the economy more than $100,000,000. According to this comment, software support and legal advice costs ''will be substantial and probably incalculable.'' It claims that secondary producers will need to employ a records custodian at least 20 hour per week and that doing so for the 5,000 businesses that the Department estimates will be affected would cost $30,000 each, for a total cost of more than $100,000,000. One comment cited a poll of businesses asking them what they expected the cost of compliance with the proposed rule would be and determined an average cost of more than $210,000 per business. The comment asks that the proposed rule be reviewed and promulgated in accordance with requirements pertaining to rules that impose a greater than $100,000,000 impact on the economy. The Department received a comment containing a long technical cost estimate that had been prepared by an entity other than the commenter that posited that compliance costs associated with the proposed rule would be significant.

The Department does not adopt these comments. First, as outlining the substance of the comments in the notice demonstrates, not all commenters have accurately understood the proposed rule. In each instance, those commenters overstate the burden of the proposed rule upon them. That overstatement would necessarily cause such entities who participated in a poll to overestimate the compliance costs they would incur as a result of the rule. Second, the comments on the proposed rule by affected entities were entirely unfavorable. These entities would have every reason to overstate their compliance costs, and there is reason to believe that this has occurred. The Department questions the salary estimates that were offered for hiring staff to keep records, for instance. Similarly, one commenter states that compliance costs per small business would amount to $30,000 and another that the cost would be more than $200,000. This chasm in the estimates raises serious questions concerning the accuracy of the estimates and the methodology that produced them.

Moreover, whatever validity these estimates may have had with respect to the proposed rule, the decreased compliance costs due to removing restrictions as contained in the final rule reduces the accuracy of the submitted estimates significantly. Although a business that produces depictions of lascivious exhibition will be required to keep records, because such a business could use a third-party custodian that would benefit from economies of scale, because hard copies would not have to be kept, and because the disclosure statement requirements have been significantly eased, such a business would avoid significant amounts of compliance costs for such categories as legal, storage, and staffing costs. There is no reason to believe that the final rule would impose $100,000,000 in costs on the economy. Many of the entities covered by this final rule already produce actual sexually explicit conduct as defined under the narrower existing rule, which imposes greater costs on such entities than those associated with this final rule; hence, they will face only negligible additional costs.

Because the cost estimates are based on assumptions regarding the proposed rule that were changed for the final rule, its conclusions that ''most web-based businesses will exit from the industry'' and that other types of businesses ''will either shut down or move their businesses to another country'' are not valid. The Department has adopted the legitimate concerns of legitimate pornographic small businesses, and has changed the final rule in ways that significantly reduce the costs of the regulations on operations, and that will result in few if any business failures on the part of entities that wish to comply with the laws against producing child pornography.

In addition, the Department believes that the best estimate of cost of compliance per affected small business is in actuality far less than what commenters have submitted. The Department is aware of the existence of businesses that provide section 2257 services to regulated entities to ensure satisfaction of the requirements of the 2005 final rule, and it therefore fully expects that such entrepreneurial activity will also provide compliance services with respect to this final rule. Various Web sites provide model releases, software, technical support, installation, assistance with data, and additional hardware such as scanners. For example, one service provides tracking of content, performers, identification, and other section 2257 compliance information for a cost of $8,000 to the producer. Another Web site offers similar services with respect to performer data collection, creation of digitized images, indexing, cross-referencing, record-creation, offsite maintenance of records, release documents, reports, correction of record discrepancies, generation of documents for vendors and distributors, storage of scanned releases and compliance statements, and storage of names and aliases, for an initial cost of $1,500 plus $60 per month for online record access and stored performer records.

The Department also expects that since the final rule allows third parties to hold records of small businesses, even apart from the services now being offered, some of which include offsite record maintenance, a third-party custodian industry will exist to support regulated small businesses at reasonable costs, should a small business wish to outsource only those elements of its compliance costs with the final rule.

One comment states that many of the entities regulated by the final rule would be considered small businesses, in that their revenue would be less than $27,000,000, or if secondary producers, $23,000,000, or $13,500,000, or $6,500,000, depending on their respective operations; however, the comment provided no average revenue per small business. In any event, averages in the context of the rule could diverge widely from medians. Suffice it to say, given that the comment states that the adult pornography business generates $12 billion in revenues, even

a small business with revenues considerably less than the smallest category of small business—$6,500,000—would not find to be overly burdensome compliance costs ranging from (at the low end) $1,500 plus $60 per month to (at the high end) $8000.

One comment argues that SBREFA requires agencies to consider alternatives that fit federal regulatory initiatives to the scope and scale of small entities. It states that agencies must consider the regulatory impact of their rules on small businesses, and analyze alternatives that minimize effects on small businesses. The Department adopts this comment, and as noted elsewhere in this notice, has made multiple changes to the proposed rule that demonstrate consideration of alternatives that would reduce the impact of the rule on small businesses, and has adopted several proposals that commenters have asked the Department to accept where the statutory language permitted it to do so.

One comment characterizes the compliance costs of the proposed rule as burdensome with respect to staffing, software development, updating and maintenance, and institution of new compliance procedures. The Department has addressed this comment in part by adopting the cost-saving measures described earlier in this preamble: reducing the staffing and computer burdens of the final rule by allowing third-party custodians to keep records, by eliminating the hard copy requirement of the proposed rule, and by permitting the disclosure statement to appear on each page by hyperlink text.

Five comments state that the proposed rule would force small companies to shut down. These five comments also maintained that surviving firms would face a much harder time in continuing operations. Yet another comment posited that the remaining firms would produce less output as a result of the proposed rule. One comment raised concerns that affiliate sites that contain photographs will not be able to survive the cost of formatting records, maintaining a database, and leasing space, and may go out of business as a result. One other comment related that dating sites that displayed about 8,000,000 profiles with graphic content would need to make photo records at 3 minutes per record, with a staffer paid $20 per hour to create a picture for every file. That comment cited a National Research Council report that compliance with the regulations would be likely to increase expenses and drive out some of the small enterprises.

The Department does not adopt these comments. First, as stated above, the Department does not believe that the final rule will cause the outcomes that the comments predicted, since the final rule takes into account so many of the concerns of small businesses. Also, as stated above, businesses such as dating services that in fact do not produce depictions of sexually explicit conduct, are not the entities that are responsible for record-keeping and disclosure statements. Those responsibilities in those circumstances would fall upon the individuals who post graphic content on the site. To the extent that the final regulation does impose costs on small businesses that could affect their operations, the Department believes that these costs are the irreducible minimum costs that Congress imposed in the Act as a consequence of increasing the likelihood that underage depictions would not be produced or that demand for and distribution of such depictions would not be increased because of the existence of secondary producers who wittingly or unwittingly made them available.

In addition, the Department does not believe that the National Research Council's 2002 report, *Youth, Pornography, and the Internet,* quoted by one commenter, provides support for the commenter's position. First, the report is now six years old and was issued before the current regulations were published. Second, the report did not quantify the purported effect of regulations on small businesses that would occur as a result of even the prior rules, much less this rule. Moreover, at page 213, the report notes that ''[m]ore active enforcement'' of the record-keeping requirements ''may better protect minors from participation in the creation of child pornography.'' To the extent that the comment relies on the report to claim that the effect of the rule might be to drive some small operators out of business, the Department agrees, but that report makes that statement only with respect to businesses who do not comply with their statutory obligations.

Many comments pertained to the proposed rule's effect on social networking sites. These comments claim that the proposed rule would harm adult social networking sites because of record-keeping requirements on users, a decline in the number of users, and their unwillingness to provide the required information because of fear of discrimination, because their names would be posted. Additionally, they state that the effect of the proposed rule could be the elimination of the social networking site industry, which the comments described as a legal and valuable way for adults to meet one another.

The Department does not adopt these comments. Although the rule would require users who chose to display actual sexually explicit conduct on adult social networking sites to keep records, the rule is inapplicable to social network site operators. The rule cannot exempt users from the record-keeping requirements the Act imposes. The Department has minimized these effects by reducing the costs of compliance. Moreover, it has eliminated any concerns, whether or not justified, that such users would face discrimination by allowing third-party custodians to maintain the records. The user's disclosure statement that is required to appear on the Web site would therefore not need to identify any name or address of the user, but merely the location of the third party that holds the records.

Two comments claim that secondary producers' income would decline as a result of having to comply with the rule. According to these commenters, out of fear of relying on primary producers' records, rather than reproducing depictions provided by primary producers, they would instead use text links to primary producers' sites. The Department does not adopt these comments. As a result of the final rule, secondary producers can trust that primary producers complied with section 2257 and did not employ underage performers.

Four comments state that the proposed rule would not affect foreign Web masters, and the federal government would have to spend funds to determine which businesses were or were not foreign. These comments also contend that harm to domestic business would occur vis-a-vis foreign businesses as perhaps more production would occur offshore, which would circumvent the safeguards. One comment claims that the rule would worsen the balance of payments because Americans will have to obtain their pornography from foreign sources. One comment states that the regulation would create an unfair trade barrier (against the United States) because offshore personal page Web sites will be more attractive for American citizens who wish to self-post nude content, and all users will shift their profiles to offshore sites.

The Department does not adopt these comments. The rule can apply only to circumstances to which the Act applies. Congress has limited authority to apply American criminal prohibitions against entities that operate only in foreign

countries, and the Department can only issue regulations implementing those prohibitions that have the same reach. To the extent that production of depictions of actual sexually explicit conduct shifts offshore as a result of record-keeping requirements generally, that is the unavoidable effect of the Act. The Department has minimized burdens on small business to minimize the effect of the rule on the situation these comments raise. To the extent that the rule reduces production of child pornography in the United States, that is the desired goal of both the Act and the rule. With respect to balance of payments, Americans who seek pornography will have access to numerous domestic sources of pornography under the rule, even if some production moved offshore. The comment makes no showing that the rule will cause the price of access to domestic pornography to rise compared to foreign pornography to a level that would lead pornography-seeking Americans to shift their purchases from domestic to imported product.

One commenter notes that the EU Privacy Directive means that some primary producers will only obtain affidavits that relate to people under 18 and that state where the records are located. Therefore, American businesses could not obtain needed records, while foreign competitors do not need to worry about the need to comply or experience compliance costs.

The Department does not adopt this comment. The Act requires that records exceeding those allowed in the EU Privacy Directive be kept. Foreign competitors will operate under different rules to the extent of U.S. and EU authority. The Department is unable to change that fact.

Proposed Rule To Implement Section 2257A

As stated in the proposed rule, 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 the enactment 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 estimation that 10% were engaged in the production of visual depictions of simulated sexually explicit conduct, the Department estimated that approximately 1,116 motion picture and video producing establishments would be covered. 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 estimated 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 was based on the proposed rule's requirements for such certification, which have been drastically curtailed and simplified in the final rule. The proposed rule would have required that the certification 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 would have required 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 assumed that the certification's main burden would have been 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. The Department further estimated that 90% of such entities would qualify for the exemption.

The Department received three comments contesting the Department's estimates for preparing the certification contemplated by the proposed rule. One comment states that the Department's estimation that preparing the certification would require less than 20 hours a year of administrative staff time at a cost of less than $25 per hour ''grossly understates the burden at issue'' because the determination as to whether given depictions constituted lascivious exhibition or simulated sexually explicit conduct, a prerequisite to preparing the lists contemplated by the proposed rule, would require attorneys to review the depictions at a cost far higher than $25 per hour, and thousands of hours of material would have to be reviewed. The comment thus concludes that ''the regulations impose not a trivial burden, but a very substantial one that will surely chill legitimate expression by producers anxious to avoid criminal sanctions.''

The second comment states flatly that the Department's estimate that the certification contemplated by the proposed rule would require less than 20 hours per year to prepare, at an estimated cost of less than $25 per hour ''has no basis in reality'' because some producers will have hundreds or even thousands of depictions, and also because the producers will have certain obligations with respect to foreign-produced materials such as seeking to determine if foreign producers comply with the requirements of United States law or taking reasonable steps to assure that foreign materials do not depict minors in depictions of lascivious exhibition or simulated sexually explicit conduct. This comment also explains that the determination as to whether depictions constitute lascivious exhibition or simulated sexually explicit conduct will have to made with the assistance of counsel, which will entail increased costs.

The third comment bluntly states that the Department's ''assumptions regarding the time and cost of compliance with the proposed [certification] regime * * * are unsupported and fallacious.'' The comment states that Department's citation to the 11,163 producers in 2002, above, ''represented only 'primary producers' '' and that ''there have long been many, many times that many websites featuring sexually explicit materials operating from the United States.'' This comment also states that the Department's estimation that 10% of the 11,163 producers ''disseminate simulated sexually explicit materials or material with lascivious exhibition * * * cannot be justified and seems unrealistic to us.'' Moreover, the comment states that ''since domestic 'secondary producers' are substantially dependent upon foreign primary producers, limiting the number of producers to those counted by the Census Bureau excludes thousands more primary producers'' and ''including 'secondary producers' '' into the Department's numbers multiplies the scope by magnitudes.'' The

comment concludes that ''[a]ssuming a more realistic number of several million adult websites, even keeping the unjustified and unjustifiable ten percent [that produce depictions of lascivious exhibition or simulated sexually explicit conduct], the Department has undercounted the number of entities affected by a factor of one hundred or more'' and that ''rather than the 1100 producers claimed by the Department, there are likely several hundred thousand.''

The Department recognizes the difficulty of estimating the burden of preparing the certification contemplated by the proposed rule and the difficulty of estimating the number of producers of depictions of lascivious exhibition and simulated sexually explicit conduct. Accordingly, the Department appreciates the comments that responded to the Department's request for input on these issues.

With respect to the burden of preparing the certification required by the final rule, the Department believes that it would be minimal compared to the burden of preparing the certification contemplated by the proposed rule. The certification in the final rule does not require producers to identify which of their materials constitute depictions of lascivious exhibition or simulated sexually explicit conduct, nor does it require producers to keep records concerning the depictions produced that include non-employee performers, the depictions produced since the last certification, the foreign-produced depictions that the certifier took reasonable steps to confirm did not depict minors, or a certification that a primary producer either collects and maintains the records required by sections 2257 and 2257A or has itself made the requisite certification to the Attorney General. The final rule now only requires that the producer state the basis under which it qualifies for the certification regime, using the brief certification statement contained in § 75.9(c)(2) of the final rule. For foreign-produced materials, a producer would use either the certification or alternate certification contained in § 75.9(c)(3) of the final rule. The Department thus believes that the certification would impose a far smaller burden than that contemplated by the proposed rule.

In cases other than those involving foreign-produced material, for which the alternate certification is necessary, the Department estimates the certification would require less than two hours to complete. A further reduction in the burden as compared to the certification contemplated by the proposed rule is that the final rule only requires that the certification be submitted once and amended only as needed, rather than requiring that a certification be submitted every two years. Estimating that the certification is prepared by an administrative staffer at a cost of $25 per hour, the certification should cost a producer no more than $50.

In cases involving foreign-produced material where the alternate certification contained in § 75.9(c)(3) of the final rule is necessary, a producer would have to take ''reasonable steps to confirm'' that depictions do not depict minors. The certification in the final rule would impose a reduced burden in this circumstance as well, as the final rule clarifies that such ''reasonable steps'' can include simply reviewing the depictions or relying on a representation or warranty made by the foreign producer of these materials. In cases where the foreign producer makes such a representation or warranty, the Department estimates little or no additional cost in preparing the certification. In cases where the producer is required to review the materials, the Department believes that U.S. producers for sound business reasons already review the materials they obtain from foreign producers, and the review contemplated by the certification would involve little or no additional cost. In particular, the Department does not believe this review would be required to be conducted by an attorney, as a good-faith belief that the material does not depict minors would be sufficient to meet the certification's standard.

Accordingly, even assuming that the Department understated the number of producers by a factor of one hundred as stated by one comment cited above, resulting in an estimate of roughly 100,000 producers in the United States, and further estimating that 90% of these producers qualify for the exemption, the total cost of preparing the certification required for the statutory exemption would be approximately $4.5 million (100,000 producers times 90% times $50 each). Given that a study submitted as a comment to the proposed rule implementing section 2257 (and submitted as an attachment to a comment on the proposed rule implementing section 2257A) estimated that the adult industry had revenues of $12.9 billion in 2006 ($9.2 billion from sectors including: video sales and rentals, the Internet, magazines, cable/satellite/hotel, and mobile), the Department believes the $4.5 million estimated cost of preparing the certification is not excessive.

In the proposed rule, the Department estimated that if 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 estimation that producers of 90% of these depictions would qualify for the statutory exemption from these requirements, the proposed rule estimated that the requirements would only impose a burden of 30,000 hours. The Department further estimated that the record-keeping requirements would cost $6.00 per hour to complete and $0.05 for each image of a verifiable form of identification.

The Department received two comments on its estimate for collecting the required records for those producers that do not qualify for the statutory exemption. One comment states that it was ''ludicrous'' for the Department to estimate that it would only take six minutes to complete the record-keeping requirement for each depiction, estimating four performers in each depiction, often foreign records for each performer, and the need to cross-reference the records to the performance. The comment states that ''there is no possibility that the process could take only six minutes, even for one performer.'' The other comment states that it is ''extraordinarily unlikely that * * * record-keeping associated with certification would 'cost $6.00 per hour to complete.' ''

The Department notes, however, that a study submitted as a comment to the proposed rule implementing section 2257 (and submitted as an attachment to a comment on the proposed rule implementing section 2257A) ''assume[d], based on industry interviews, that * * * [i]t takes at least three minutes to complete a Section 2257 file for a photograph * * * [and] [t]he market rate in California for a worker who can complete a Section 2257 file without error quickly is $20 per hour, including all benefits.'' The Department thus declines to accept the comment that a six-minute-per-depiction estimate is unrealistic, but accepts the comment that its $6 per hour estimate for these record-keeping tasks understates the costs. Given the nature of the work and the availability of software to assist in the record-keeping, it seems unlikely that the associated tasks would require skilled labor. Even providing roughly 130% of the Federal minimum wage for work that would appear to be essentially data

entry would yield only $10 per hour. Therefore, the Department rejects the view that $20 per hour is an accurate estimate, but adopts $10 as more reasonable.

No commenter disputed the Department's 3,000,000 images figure. Therefore, the Department continues to estimate that 3,000,000 visual depictions potentially covered by the statutory exemption are created each year. Applying its estimation that it takes 6 minutes to complete the record-keeping requirement for each depiction, the Department therefore continues to calculate that the record-keeping requirements would impose a burden of 300,000 hours. Although one commenter alleged that the Department understated the number of producers by 100 to 1, no commenter disputed that 90% of those producers would qualify for the statutory exemption. Hence, based on the Department's continued estimation that producers of 90% of the 3,000,000 depictions would qualify for the statutory exemption from these requirements, the final rule continues to estimate that the requirements would only impose a burden of 30,000 hours. The Department now estimates, however, that the record-keeping requirements would cost $10.00 per hour to complete. In an abundance of caution, to account for the costs of software noted above, the Department now estimates that each image would cost $.10 to process (i.e., twice the original estimate). Furthermore, the Department, based on the comment claiming underestimation of the number of primary and secondary producers by 100 to 1, adopts 100,000 as the total number of affected producers. Accordingly, the Department now estimates that the total annual cost for the 10% of entities (i.e., 10,000) not qualifying for the statutory exemption would be $330,000 (30,000 hours times $10 per hour, plus $.10 times 300,000 images). Thus, the average cost to an individual small business producer who did not qualify for the exemption would be $33.00 per year ($330,000 divided by 10,000). Even at the commenter's suggested $20, the cost per small business would be $66.00 per year. As mentioned above, even a small business in the lowest revenue level would find this cost to be manageable.

Paperwork Reduction Act

This final rule modifies existing requirements to conform to newly enacted legislation. It contains a revised information collection that satisfies the requirements of existing regulations to clarify the means of maintaining and organizing the required documents. This information collection will be submitted to the Office of Management and Budget for regular approval in accordance with the Paperwork Reduction Act of 1995. In the proposed rule, the Department asked for public comment on four issues: (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 estimations 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). The Department estimated that there are 500,000 Web sites and at least 200 producers of DVDs, videos, and other images containing visual depictions of actually explicit conduct (as defined by the revised section 2257), constituting 5000 businesses, and invited comments on these estimates. The Department also invited comments on its estimates that the proposed rule implementing section 2257 applied to 2,000,000 depictions of actual sexually explicit conduct (including the visual depictions of lascivious exhibition of the genitals or pubic area of a person not covered by the regulation), that each depiction would generate 6 minutes to complete its associated record-keeping, and that the record-keeping requirements would impose a burden of 200,000 hours.

Two comments state that the entire record-shifting burden arises from the requirement that records be maintained at the producer's own place of business. If third parties were custodians, and their location were properly disclosed, then both primary and secondary producers could rely on the same third-party custodian using the same disclosure statement. This would minimize the record-keeping burdens by concentrating them on third parties who were willing and able to receive the information and then organize, maintain, and make the information available for inspection. The comments posit that there may be interest in the regulated industry to assist in having third-party professional record-keepers trained and compliant in the record-keeping. These third parties would perform cross-reference and maintenance, and allow records to be available for forty hours per week, dramatically easing the overall burdens. According to the comments, the secondary producer could then fulfill its record-keeping obligations by merely referring to the location of the records created by the primary producer.

The Department adopts the comments in part. As stated above, the Department believes that its objectives can be accomplished and the burden reduced on small business by allowing producers to use third-party custodians to store their records. The final rule reflects this change from the proposed rule. The Department believes, however, as stated above, that a secondary producer who does not actually see copies of identification cards that the primary producer uses to prove that the performer was at least 18 years old as of the date of original production may take an unnecessary risk of distributing child pornography.

One comment remarked that some producers of actual sexually explicit conduct exist only virtually and that their records should therefore be permitted to be created only virtually. The Department accepts this comment in part. Regardless of the nature of the entity that produces actual sexually explicit conduct, the final rule permits records to be kept in electronic form.

One comment states that subjecting those who exclusively produce depictions involving lascivious exhibitions to record-keeping as of July 2006 would create a paperwork burden not intended by Congress. The comment expressed the view that Congress intended to reduce these entities' paperwork by creating a certification process. As stated above, the Department is delaying the imposition of the record-keeping requirements for entities whose activities enable them to confirm to the certification safe harbor until such time as the Department issues the final rule that implements section 2257A.

One comment notes the burden imposed by having each Web page contain a substantial amount of regulatory information to enable the producer to display otherwise constitutionally protected expression without criminal penalties, which it contends violates free expression. The Department adopts this comment in part. The final rule's display requirements will not require substantial regulatory information, but will permit hyperlinks. The Department does not accept the remainder of the comment. Under the terms of the final rule, producers of constitutionally

protected depictions of actual sexually explicit conduct will be fully able to create such images without risk of criminal penalties so long as they maintain records and affix a disclosure statement to each page that displays such an image. Without such compliance, there is no guarantee that the depiction is in fact constitutionally protected expression. In fact, experience demonstrates that there is too great a likelihood that a child will have been victimized by such a depiction, and that such a depiction may be used to victimize others.

Four comments state that compliance with the proposed rule is expensive, invasive, and burdensome. One comment notes that the proposed rule placed a burden on a person who displayed depictions of actual sexually explicit conduct to keep and distribute information to strangers about the performers. The Department adopts these comments in part. Although some of the requirements of the Adam Walsh Act will result in additional expenses for businesses, the Department has reduced those burdens in the final rule. It has eliminated the hard copy requirement, permitted hyperlinks rather than complete disclosure statements on each Web page, and permitted producers to place required records in the hands of third-party custodians. Primary producers must share information on performers with secondary producers, but that is a requirement of the Act.

Two comments state that hard copy is not required and is very expensive. One comment says that hard copy is counter to the requirements of the Paperwork Reduction Act requirement that agencies minimize the burden of information collections through appropriate electronic or other information technology. One comment notes that some Web sites have many thousands of pages of actual sexually explicit material, and it argues that there is no reason for a hard copy. Inexpensive scanners, it maintains, can produce digital depictions at a resolution such as 300 dots per inch that can eliminate the need to read a copy of the identification document, and that hard copies may be less clear for inspectors. The Department accepts these comments, without necessarily agreeing with the characterization of the proposed rule under the PRA and, as stated, will permit the required records to be stored electronically.

One comment notes that the proposed rule is burdensome given its requirements concerning the date of original production, which would mandate overhauling each and every disclosure on a Web site after identifying such a date for those images. The Department adopts this comment. Identification of the original date of production is crucial to the inspection process, and the records must indicate that date; however, it is not necessary to have on the disclosure statement. Accordingly, the final rule eliminates § 75.6(B)(2).

Four comments state that the proposed rule would achieve none of its stated goals, either because people will lie about their age or produce fake identification documents or because illicit entities would not keep records. Thirty-five comments claim that the rule would do little to protect minors or curb child pornography.

The Department does not adopt these comments. People who lie about their age must still produce identification cards, or the producers will be criminally liable for depicting them. The Department cannot guarantee that some individuals will not provide fake documents, but such individuals risk incurring criminal penalties, and the Department believes that the existence of these penalties will persuade many people who would be tempted to use fake documentation to avoid doing so. Further, the Department believes the rule will achieve its objective of implementing the policies of the Act, whether or not it is completely successful in eradicating the production of all child pornography.

On a related issue, one comment notes that false identification cards can appear authentic and lead to the production of many depictions and subsequent republications of the performer's image. However, since the rule requires that a copy of each image must be kept in the records of each of the many producers, the comment asks what producers are to do once the fraud is revealed. It states that producers will destroy their images when the fraud is revealed, but asks if the rule permits the destruction of the records, and if not, asks how custodians would be protected against state laws that criminalize even the private possession of child pornography.

The Department responds to this comment by stating that records of the production of such depictions must be retained even after the fraud is discovered. The Department would need to be able to inspect the identification documents that were provided as a basis for creating the depiction.

One comment states that secondary producers cannot determine if a scanned or faxed document was actual or altered, and could unknowingly accept false information. The comment questions whether the producer would be shielded from prosecution if the primary producer presents false or altered documents, and asks whether there will be a database for the secondary producer to check whether the primary producer's age documents are valid, as would be the case with a passport.

The Department responds to this comment by stating that the secondary producer must keep a copy of the relevant identification documents under the terms of the rule. So long as the producer keeps a copy of the document that reasonably appears to conform to the requirements of the rule, the producer will not face criminal liability. But as stated above, the producer must keep the records even if the image turns out not to relate to a performer of legal age. As discussed above, the Department will not establish a database as part of this rule.

One comment states that secondary producers have no relationship with the performers depicted in actual sexually explicit conduct, and that applying the record-keeping requirements to them therefore accomplishes nothing. The Department does not adopt this comment. Unless the secondary performer keeps appropriate records, then the fears that Congress expressed that secondary producers will knowingly or unknowingly create a commercial market for child pornography may materialize.

One comment contends that the proposed rule's requirement that information be placed on every page will not make the required information more easily accessible to the Department, and that it will increase compliance costs. The Department does not adopt this comment. Placement of the required information on every page will enable the Department to determine that any given depiction of actual sexual conduct is of a person who is of appropriate age, and the adherence to this requirement will make that information more accessible to the Department. Additionally, the Act requires that the Department's final rule impose such a requirement, and the Department notes that the final rule will impose the minimal compliance costs associated with the Act's requirement by permitting hyperlinks rather than the full disclosure statement to appear on each regulated page.

One comment concedes that the cross-referencing requirement has a governmental purpose when an inspector needs to obtain performance records based upon a legal name or an alias or a title of a work. However, the

comment contends that there is no basis to require cross-referencing so that an inspector can obtain an alias name that was never used in productions and was never used as an adult, or records concerning unknown works.

The Department does not adopt this comment. The Department would not know (and questions whether many producers would know) that an alias was never used in productions. If an alias had in fact been used in productions, it is vital for the Department to be able to determine that such depictions were originally produced when the performers were over 18. If an alias was never used while a performer was an adult, it may have been used when the performer was a child. Being able to trace records when the performer may have been a minor is of obvious significance to the Department's efforts to combat child exploitation.

One comment requests that the Department prepare a form analogous to an IRS form that, if properly completed, will assure the filer that it has complied with all statutory and regulatory reporting requirements. The form would be available for employers to record the fact that they have examined appropriate identification requirements before employing any individual in covered employment. The comment believes that primary producers should not have to guess concerning the required content of their records or to seek expensive legal advice from attorneys. The comment recommends that the form should be one that is used to create paper records or that can be digitally incorporated into record-keeping software for those who choose to keep the records in digital form.

The Department does not adopt this requirement. It is not possible for the Department to create a form that would ensure that the regulated entity has complied with all requirements. It is the actual performance of the checking function that the record-keeping must document. Individualized records must be kept, rather than filling out a form indicating merely that identity was checked. Moreover, copies of the identification cards must be kept to prove that the performers were of age. Finally, the comment seeks what is essentially a compliance certification procedure rather than a record-keeping principle. Congress created a particular means by which entities may be found to be in compliance with the rule even though the statutory record-keeping and disclosure requirements are not adhered to. The Department is not free to write another alternative method of compliance.

Two comments claim that the current regulations are more than adequate to fulfill their purpose. The Department does not accept this comment. Congress enacted the Act to impose additional requirements to prevent the production of child pornography because section 2257's pre-Act definition of ''actual sexually explicit conduct'' and accompanying regulations were insufficient to achieve that objective. The Department must therefore issue the final rule per statutory command and believes that these additional requirements will make the production of child pornography more difficult than under current rules.

One comment states that some sites have many thousands of images and that each would take many kilobytes of storage and that the largest sites would need many gigabytes of storage to comply with the rule. It claims that sites with streaming video need to retain seven years' worth of recorded video. According to the comment, regardless of whether video is live or recorded, and regardless of whether copies are held in hard form or electronically, the size and number of video files will create a significant burden, in some cases requiring storage of gigabytes of data or thousands of videos. The comment wonders what governmental benefits these requirements will produce.

The Department does not adopt this comment. As to live performances, the proposed rule specifically provides, ''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.'' 72 FR at 38036. This will significantly reduce the storage costs the commenter discusses. As to recorded performances, the Department does not accept the alleged burdensome nature of the storage costs. The district court in *Free Speech Coalition* v. *Gonzales* favorably cited the Department's expert witness to the effect that ''large numbers of depictions can be electronically stored by purchasing hard drives at insubstantial prices.'' *Free Speech I,* 406 F. Supp. 2d at 1208.

Several commenters address the time period for the retention of records. One comment views the seven-year record retention requirement as excessive, noting that at three inspections per year, the producer would face 20 or 21 inspection cycles. The comment believes that there is no reason why that many inspections would be needed for a particular record and that the Department would learn the actual age of a depicted performer before so many inspections were carried out. The comment asks that the final rule make clear that the records of a depiction can be disposed of seven years after a depiction's creation, and that a producer's records concerning a performer can be disposed of seven years after the performer is last depicted by the producer.

One comment points out that the required time for keeping records can be seventeen years. If a corporation leaves the adult entertainment business just before the seven-year record-keeping requirement, it must keep the records for an additional five years. And if the company goes out of business altogether, then the individual custodian must keep the records for another five years. The comment asks that the final rule should say that the operative period is the shortest of whichever of these three contingencies occurs first.

One comment notes that a secondary producer must keep the relevant record for seven years after the depiction was reproduced, perhaps beginning seven years after the depiction was produced. The comment points out that the information in the records properly relates to the initial production and not the reproduction. It posits that there is no reason to restart the clock for each republication. The comment also expresses concern that requiring the records to be maintained as long as the depiction is in circulation would be so cumulatively burdensome as to unconstitutionally harm expression.

One comment asks that no one be required to keep records of a particular depiction more than seven years after it was initially created. A secondary producer may want to reproduce a depiction eight years after it was made, but the primary producer may have eliminated the records. The comment asks whether the secondary producer can reproduce without the records, or its further reproduction is restricted at the cost of the constitutional rights of the primary producer who is also now quite lawfully without the records.

The Department declines to adopt these comments. Concerns about the retention period for records were addressed in the final rule published in 2005. At that time, the Department stated, ''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 Association* v. *Reno*. In that case, the DC Circuit held that part 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.'' 70 FR at 29614.

One comment believes that the proposed rule's record-keeping requirements impose a heavy burden. It argues that copies of the full set of required records must follow any depiction to any secondary producer who assists in disseminating the constitutionally protected expression, which will restrict such dissemination.

The Department does not adopt this comment. Although a burden is imposed by the record-keeping requirement, it is necessary that secondary producers retain copies of records that the primary producer examined prior to producing depictions of sexually explicit conduct. Otherwise, there is no way to determine that the depiction is in fact constitutionally protected expression rather than a record of child exploitation. Since preventing the existence of a commercial market for child pornography is a major purpose of the Act, the Department believes that it has adopted the least-restrictive burden for secondary producers and the Department to be sure that the performers were of legal age on the original production date of the depiction of actual sexually explicit conduct.

One comment points out that because a secondary producer cannot assemble records from scratch, he should be able to receive a copy of the primary producer's records so long as the secondary producer also obtains, records, and maintains the primary producer's business address. The comment expressed a belief that the volume and complexity of the requirements will limit the distribution of constitutionally protected material. It complains that if a primary producer licenses some but not all of a set of its images, it will be difficult for a secondary producer to untangle the cross-references so that the secondary possesses the required records (because possessing extraneous matter subjects that individual to a five-year sentence per § 75.2(e)). The comment anticipates that some primary producers will not want to share records concerning identification cards because secondary producers might compete with those primary producers if they knew where to find the performers. Moreover, if the performer obtained an agreement from the primary producer not to use a secondary producer to republish their depiction, then constitutionally protected expression will be frozen out of existence.

The Department does not adopt this comment. For a secondary producer to know that as of the original production date, the performers were of legal age, copies of the records of the primary producer must be provided that demonstrate that fact. To identify the appropriate primary producer, the secondary producer must keep records itself. The only means of ensuring that children are not performing in the depiction is to determine the birthdates of the performers and to keep records. The Department must have access to these records to ensure that children are not being depicted. First Amendment rights are not implicated if, in response to the rule, primary producers choose not to share records because they fear that secondary producers may compete with them. Moreover, if a performer obtains an agreement through an agent that the primary producer will not use a secondary producer to republish a depiction, then the reason that the secondary producer would become unable to obtain the image is through the operation of the agreement, whether or not the Department had ever issued any regulations. The First Amendment is not implicated under those circumstances.

One comment states that a secondary producer can satisfy the Act by requiring only an email or a letter from the primary producer attesting to the availability of the date of birth documentation's availability at the primary producer's place of business, unless the secondary producer is also a primary producer. The Department does not adopt this comment. A secondary producer's reliance on an email or letter does not ensure that the secondary producer actually retains records documenting that the performer was of legal age as of the date of original production.

One comment notes that each Web site can contain multiple depictions, which may have been created on different dates. Each webmaster would have to develop a unique system of cross-referencing, coding, or identifying the production date of each depiction. The comment would prefer that webmasters be permitted to identify the most relevant date, of either production, duplication, reproduction, or reissuance of a depiction.

The Department does not adopt this comment. Apart from the lack of clarity concerning what the most relevant date from the choices above for a particular depiction, the Department believes that the date of original production is a critical element for the disclosure statement that Congress has required. Confirmation of the date of birth of the performer and of the date of original production are the two most important pieces of information necessary to be recorded if child pornography is to be kept out of production and commercial distribution. Knowledge of only a later date that is unrelated to the date of original production of the image will not ensure that the performer was of legal age as of the date that the depiction was created, the key factor determining whether a particular depiction is child pornography or not.

Two comments oppose cross-referencing requirements because, the commenters say, they are a means only to harass producers. The Department does not adopt this comment. Cross-referencing requirements, as described above, are vital to determining whether a performer under any name that the performer has used has been depicted in actual sexually explicit conduct despite their status as a minor. Cross-referencing will enable the Department to establish, whatever name may be used, whether a performer's identification card demonstrates legality of age for such productions.

Two comments suggest that the burden of segregating records in § 75.2(d) and (e) is too stringent. One points out that if a stray 1099 form, model release, or I–9 form were to wind up in the section 2257 records instead of the more general personnel file, then the producer or custodian would face years in prison. The comment contends that there should be a different rule for inadvertent misfiling.

The Department does not accept this comment. The segregation requirement in fact reduces the burden that the rule imposes upon the regulated entity. Due to segregation of records, the inspector need only review a unified set of records, without need to search every document in the facility.

Two comments request that the final rule reduce the burden on primary producers by not requiring that they make or receive sworn statements that all content is legal and all models are over 18. The Department declines to adopt this comment, as it describes the effect of neither the proposed rule nor existing regulation.

The Department received no comments challenging its estimates that 2,000,000 depictions of actual sexually explicit conduct would be generated this year, that the associated record-keeping for each depiction would amount to 6 minutes, and that the total related burden of compliance for this category was 200,000 hours, and it therefore continues to adhere to these estimates. Two million depictions at a cost of $10 per hour of record-keeping and a duplication cost of $0.10 per depiction produces a total cost of compliance with the final section 2257 rule of $2,400,000.

The OMB Control Number pertaining to the rule is 1105–0083.

List of Subjects in 28 CFR Part 75

Crime, infants and children, Reporting and record-keeping 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 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; RECORDKEEPING 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 heading of part 75 is revised to read as set forth above.

■ 3. Amend § 75.1 by revising paragraphs (b), (c)(1), (c)(2), (c)(4), (d), and (e), and by adding paragraphs (m) through (s), to read as follows:

§ 75.1 Definitions.

* * * * *

(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, the name of the individual identified, and the date of birth of that individual, and provides specific information sufficient for the issuing authority to confirm its validity, such as a passport, Permanent Resident Card (commonly known as a ''Green Card''), or employment authorization document issued by the United States, a driver's license or other 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 the person who is the subject of the picture identification card is a non-U.S. citizen located outside the United States at the time of original production and the producer maintaining the required records, whether a U.S. citizen or non-U.S. citizen, is located outside the United States on the original production date. The picture identification card must be valid as of the original production date.

* * * * *

(c) * * *

(1) *Primary producer* is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or a picture of, or who digitizes an image of, a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. When a corporation or other organization is the primary producer of any particular image or picture, then no individual employee or agent of that corporation or other organization will be considered to be a primary producer of that image or picture.

(2) *Secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or 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. When a corporation or other organization is the secondary producer of any particular image or picture, then no individual of that corporation or other organization will be considered to be the secondary producer of that image or picture.

* * * * *

(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:

(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 duplication;

(ii) 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) The provision of a telecommunications service, or of an Internet access service of Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231));

(v) The transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; or

(vi) Unless the activity or activities are described in section 2257(h)(2)(A), the dissemination of a depiction without having created it or altered its content.

(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.

(e) *Copy*, when used:

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

(2) In reference to a visual depiction of sexually explicit conduct, means a duplicate of the depiction itself (e.g., the film, the image on a Web site, the image taken by a webcam, the photo in a magazine); and

(3) In reference to an image on a webpage for purposes of §§ 75.6(a), 75.7(a), and 75.7(b), means every page of a Web site on which the image appears.

* * * * *

(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 or picture of, the visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. For productions that occur over more than one date, it means the single date that was the first of those dates. For a performer who was not 18 as of this date, the date of original production is the date that such a performer was first actually filmed, videotaped, photographed, or otherwise depicted. With respect to matter that is a secondarily produced compilation of individual, primarily produced depictions, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction in that compilation was produced. For a performer in one of the individual depictions contained in that compilation who was not 18 as of this date, the date of original production is the date that the performer was first actually filmed, videotaped, photographed, or otherwise depicted for the individual depiction at issue.

(n) *Sexually explicit conduct* has the meaning set forth in 18 U.S.C. 2256(2)(A).

(o) *Simulated sexually explicit conduct* means conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean not sexually explicit conduct that is merely suggested.

(p) *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 all employees who perform in visual depictions.

(q) *Individually identifiable information* means information about the name, address, and date of birth of employees that 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 any visual depiction, 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:

■ a. Revising paragraph (a) introductory text and paragraphs (a)(1) and (a)(2), and adding paragraph (a)(4);

■ b. Adding two sentences at the end of paragraph (b);

■ c. Revising paragraphs (c) and (d); and

■ d. Adding paragraphs (g) and (h).

The additions and revisions 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 is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped, transported, or 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 (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or one or more visual depictions of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, 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 (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall also include a legible hard copy or legible digitally scanned or other electronic copy of a 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 (except lascivious exhibition of the genitals or pubic area of any person) made after June 23, 2005, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, 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 (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, 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.

* * * * *

(4) The primary producer shall create a record of the date of original production of the depiction.

(b) * * * The copies of the records may be redacted to eliminate non-essential information, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm the name and age may not be redacted.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the date of original production of the visual depiction to which the records are associated. 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 § 75.2(a)(2). Producers of visual depictions made after July 3, 1995, and before June 23, 2005, may rely on picture identification cards that were valid forms of required identification under the provisions of part 75 in effect during that time period.

(d) For any record of a performer in a visual depiction of actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) created or amended after June 23, 2005, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, 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, 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 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.

* * * * *

(g) Records are not required to be maintained by either a primary producer or by a secondary producer for a visual depiction of sexually explicit conduct that consists only of lascivious exhibition of the genitals or pubic area of a person, and contains no other sexually explicit conduct, whose original production date was prior to March 18, 2009.

(h) A primary or secondary producer may contract with a non-employee custodian to retain copies of the records that are required under this part. Such custodian must comply with all obligations related to records that are required by this Part, and such a contract does not relieve the producer of his liability under this part.

■ 5. Revise § 75.4 to read as follows:

§ 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 or at the place of business of a non-employee custodian of records. 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 or at the place of business of a non-employee custodian of records. If the organization is dissolved, the person who was responsible for maintaining the records, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

■ 6. Section 75.5 is amended by revising:

■ a. Paragraphs (c)(1), (c)(3), and (c)(4);

■ b. Paragraph (d); and

■ c. Paragraph (e).

The revisions read as follows:

§ 75.5 Inspection of records.

* * * * *

(c) *Conduct of inspections.* (1) Inspections shall take place during 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, for inspections to be held at the place of business of a producer, any other time during which the producer is actually conducting business relating to producing a depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, the producer 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 20 hours per week.

* * * * *

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

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

* * * * *

(d) *Frequency of inspections.* Records 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 or to his non-employee custodian of records, during the inspection, any record that is subject to inspection.

* * * * *

■ 7. Amend § 75.6 by:

■ a. Revising paragraph (a);

■ b. Removing and reserving paragraph (b)(2), and removing the second sentence from paragraph (b)(3);

■ c. Revising paragraph (c); and

■ d. Adding paragraph (f).

The addition and revisions 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, 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 sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued after July 3, 1995, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, 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 a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears.

* * * * *

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

* * * * *

(f) If the producer contracts with a non-employee custodian of records to serve as the person responsible for maintaining his records, the statement shall contain the name and business address of that custodian and may contain that information in lieu of the information required in paragraphs (b)(3) and (c) of this section.

■ 8. 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 visual depictions of actual sexually explicit conduct made only before July 3, 1995, or was last produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995. Where the matter consists of a compilation of separate primarily produced depictions, the entirety of the conduct depicted was produced prior to July 3, 1995, regardless of the date of secondary production;

(2) The matter contains only visual depictions of simulated sexually explicit conduct or of actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person, made before March 18, 2009;

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

■ 9. Amend § 75.8 by:

■ a. Revising paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (f); and

■ c. Adding a new paragraph (e).

The revisions and additions 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 a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears. Such computer site or service or Web address may choose to display the required statement in a separate window that opens upon the viewer's clicking or mousing-over a hypertext link that states, ''18 U.S.C. 2257 [and/or 2257A, as appropriate] Record-Keeping Requirements Compliance Statement.''

(e) For purpose of this section, a digital video disc (DVD) containing multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD.

* * * * *

■ 10. Add § 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, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer. (A producer of materials depicting sexually explicit conduct not covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime.)

(b) *Form of certification.* The certification shall take the form of a letter addressed to the Attorney General signed either by the chief executive officer or another executive officer of the entity making the certification, or in the event the entity does not have a chief executive officer or other 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 this part under which the certifying entity and any sub-entities, if applicable, are permitted to avail themselves of this exemption, 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]''; and

(3) 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 produced by [name of entity] 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, employed by that person, pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications.'' The producer may provide the following statement instead: ''I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify 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, or 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, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area of any person were not minors at the time the depictions were originally produced.'' ''Reasonable steps'' for purposes of this statement may include, but are not limited to, a good-faith review of the visual depictions themselves or a good-faith reliance on representations or warranties from a foreign producer.

(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 all sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entity served as the producer.

(e) *Timely submission of certification.* An initial certification is due June 16, 2009. Initial certifications of producers who begin production after December 18, 2008, but before June 16, 2009, are due on June 16, 2009. Initial certifications of producers who begin production after June 16, 2009 are due within 60 days of the start of production. A subsequent certification is required only if there are material changes in the information the producer certified in the initial certification; subsequent certifications are due within 60 days of the occurrence of the material change. 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 December 9, 2008.

Michael B. Mukasey,

Attorney General.

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