

Amount realized: \$1,050,000  
 Deduction allowed: (100,000)  
 Basis of X's assets: (900,000)  
 Section 481 adjustments: 60,000  
 Net unrealized built-in gain: 110,000

**Example 2. Adjustment to net unrealized built-in gain for built-in gain in eliminated C corporation stock.** (i) X, a calendar year C corporation, elects to become an S corporation effective January 1, 2005. On that date, X's assets (the first pool of assets) have a net unrealized built-in gain of \$15,000. Among the assets in the first pool of assets is all of the outstanding stock of Y, a C corporation, with a fair market value of \$33,000 and an adjusted basis of \$18,000. On March 1, 2009, X sells an asset that it owned on January 1, 2005, and as a result has \$10,000 of recognized built-in gain. X has had no other recognized built-in gain or built-in loss. X's taxable income limitation for 2009 is \$50,000. Effective June 1, 2009, X elects under section 1362 to treat Y as a qualified subchapter S subsidiary (QSub). The election is treated as a transfer of Y's assets to X in a liquidation to which sections 332 and 337(a) apply.

(ii) Under paragraph (b) of this section, the net unrealized built-in gain of the first pool of assets is adjusted to account for the elimination of the Y stock in the liquidation. The net unrealized built-in gain of the first pool of assets, therefore, is decreased by \$15,000, the amount by which the fair market value of the Y stock exceeded its adjusted basis as of January 1, 2005. Accordingly, for taxable years ending after June 1, 2009, the net unrealized built-in gain of the first pool of assets is \$0.

(iii) Under § 1.1374-2(a), X's net recognized built-in gain for any taxable year equals the least of X's pre-limitation amount, taxable income limitation, and net unrealized built-in gain limitation. In 2009, X's pre-limitation amount is \$10,000, X's taxable income limitation is \$50,000, and X's net unrealized built-in gain limitation is \$0. Because the net unrealized built-in gain of the first pool of assets has been adjusted to \$0, despite the \$10,000 of recognized built-in gain in 2009, X has \$0 net recognized built-in gain for the taxable year ending on December 31, 2009.

**Example 3. Adjustment to net unrealized built-in gain for built-in loss in eliminated C corporation stock.** (i) X, a calendar year C corporation, elects to become an S corporation effective January 1, 2005. On that date, X's assets (the first pool of assets) have a net unrealized built-in gain of negative \$5,000. Among the assets in the first pool of assets is 10 percent of the outstanding stock of Y, a C corporation, with a fair market value of \$18,000 and an adjusted basis of \$33,000. On March 1, 2009, X sells an asset that it owned on January 1, 2005, resulting in \$8,000 of recognized built-in gain. X has had no other recognized built-in gains or built-in losses. X's taxable income limitation for 2009 is \$50,000. On June 1, 2009, Y transfers its assets to X in a reorganization under section 368(a)(1)(C).

(ii) Under paragraph (b) of this section, the net unrealized built-in gain of the first pool of assets is adjusted to account for the elimination of the Y stock in the

reorganization. The net unrealized built-in gain of the first pool of assets, therefore, is increased by \$15,000, the amount by which the adjusted basis of the Y stock exceeded its fair market value as of January 1, 2005. Accordingly, for taxable years ending after June 1, 2009, the net unrealized built-in gain of the first pool of assets is \$10,000.

(iii) Under § 1.1374-2(a), X's net recognized built-in gain for any taxable year equals the least of X's pre-limitation amount, taxable income limitation, and net unrealized built-in gain limitation. In 2009, X's pre-limitation amount is \$8,000 and X's taxable income limitation is \$50,000. The net unrealized built-in gain of the first pool of assets has been adjusted to \$10,000, so X's net unrealized built-in gain limitation is \$10,000. X, therefore, has \$8,000 net recognized built-in gain for the taxable year ending on December 31, 2009. X's net unrealized built-in gain limitation for 2010 is \$2,000.

**Example 4. Adjustment to net unrealized built-in gain in case of prior gain recognition.**

(i) X, a calendar year C corporation, elects to become an S corporation effective January 1, 2005. On that date, X's assets (the first pool of assets) have a net unrealized built-in gain of \$30,000. Among the assets in the first pool of assets is all of the outstanding stock of Y, a C corporation, with a fair market value of \$45,000 and an adjusted basis of \$10,000. Y has no current or accumulated earnings and profits. On April 1, 2007, Y distributes \$18,000 to X, \$8,000 of which is treated as gain to X from the sale or exchange of property under section 301(c)(3). That \$8,000 is recognized built-in gain to X under section 1374(d)(3), and results in \$8,000 of net recognized built-in gain to X for 2007. X's net unrealized built-in gain limitation for 2008 is \$22,000. On June 1, 2009, Y transfers its assets to X in a liquidation to which sections 332 and 337(a) apply.

(ii) Under paragraph (b) of this section, the net unrealized built-in gain of the first pool of assets is adjusted to account for the elimination of the Y stock in the liquidation. The net unrealized built-in gain of that pool of assets, however, can only be adjusted to reflect the amount of built-in gain that was inherent in the Y stock on January 1, 2005 that has not resulted in recognized built-in gain during the recognition period. In this case, therefore, the net unrealized built-in gain of the first pool of assets cannot be reduced by more than \$27,000 (\$35,000, the amount by which the fair market value of the Y stock exceeded its adjusted basis as of January 1, 2005, minus \$8,000, the recognized built-in gain with respect to the stock during the recognition period). Accordingly, for taxable years ending after June 1, 2009, the net unrealized built-in gain of the first pool of assets is \$3,000. The net unrealized built-in gain limitation for 2009 is \$0.

**Par. 3.** Paragraph (a) of § 1.1374-10 is revised to read as follows:

**§ 1.1374-10 Effective date and additional rules.**

(a) *In general.* Sections 1.1374-1 through 1.1374-9, other than § 1.1374-

3(b) and (c) *Examples 2 through 4*, apply for taxable years ending on or after December 27, 1994, but only in cases where the S corporation's return for the taxable year is filed pursuant to an S election or a section 1374(d)(8) transaction occurring on or after December 27, 1994. Section 1.1374-3(b) and (c) *Examples 2 through 4* apply for taxable years beginning after the date these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

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**DEPARTMENT OF JUSTICE**

**28 CFR Part 75**

[Docket No. CRM 103; AG Order No. 2723-2004]

**RIN 1105-AB05**

**Inspection of Records Relating to Depiction of Sexually Explicit Performances**

**AGENCY:** Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule amends the record-keeping and inspection requirements of 28 CFR part 75 to bring the regulations up to date with current law, to improve understanding of the regulatory system, and to make the inspection process effective for the purposes of the Child Protection and Obscenity Enforcement Act of 1988, as amended, relating to the sexual exploitation and other abuse of children.

**DATES:** Written comments must be received on or before August 24, 2004.

**ADDRESSES:** Written comments may be submitted to: Andrew Oosterbaan, Chief, Child Exploitation and Obscenity Section, Criminal Division, United States Department of Justice, Washington, DC 20530; Attn: "Docket No. CRM 103."

Comments may be submitted electronically to: [Admin.ceos@usdoj.gov](mailto:Admin.ceos@usdoj.gov) or to [www.regulations.gov](http://www.regulations.gov) by using the electronic comment form provided on that site. Comments submitted electronically must include Docket No. CRM 103 in the subject box. You may also view an electronic version of this rule at the [www.regulations.gov](http://www.regulations.gov) site.

Facsimile comments may be submitted to: (202) 514-1793. This is not a toll-free number. Comments

submitted by facsimile must include Docket No. CRM 103 on the cover sheet.

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:**

**1. Background**

Congress evidenced its concern for the exploitation of children by pornographers in the Child Protection and Obscenity Enforcement Act of 1988, one key provision of which requires producers of sexually explicit matter to maintain certain records concerning the performers to assist in monitoring the industry. See 18 U.S.C. 2257. The statute requires the producers of such matter to “ascertain, by examination of an identification document containing such information, the performer’s name and date of birth,” to “ascertain any name, other than the performer’s present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name,” and to record this information. 18 U.S.C. 2257(b). Violations of these record-keeping requirements are criminal offenses punishable by imprisonment for not more than five years for a first offense and not more than ten years for subsequent offenses. See 18 U.S.C. 2257(i). These provisions supplement the federal statutory provisions criminalizing the production and distribution of materials visually depicting minors engaged in sexually explicit conduct. See 18 U.S.C. 2251, 2252.

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

The Attorney General, under 18 U.S.C. 2257(g), issued regulations implementing the record-keeping requirements on April 24, 1992. See 57 FR 15017 (1992); 28 CFR part 75. In addition to the record-keeping requirements specifically discussed in section 2257, the regulations require

producers to retain copies of the performers’ identification documents, to cross-index the records by “[a]ll name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter,” and to maintain the records for a specified period of time. 28 CFR 75.2(a)(1), 75.3, 75.4.

Most recently, in 2003, Congress made extensive amendments to the child exploitation statutory scheme based on detailed legislative findings, which the Department adopts as grounds for proposing this rule. See *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*, Public Law 108-21, 117 Stat. 650 (April 30, 2003) (hereinafter the “2003 Amendments”). The Department agrees with each of these findings, and proposes to amend the regulations in 28 CFR part 75 on the basis of these specific findings. As explained more fully below, the rules implement a more detailed inspection system to ensure that children are not used as performers in sexually explicit depictions.

**2. Need for the Rule**

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

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

This proposed rule merely provides greater details for the record-keeping and inspection process in order to ensure that minors are not used as

performers in sexually explicit depictions. The rule does not restrict in any way the content of the underlying depictions; it simply clarifies the labeling on, and record-keeping requirements pertaining to, that underlying depiction. Compliance with the record-keeping requirements of this part has no bearing on the legality or illegality of the underlying sexually explicit material.

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

**3. Analysis of the Proposed Rule**

*Identification.* The proposed rule would modify the acceptable types of identification in 28 CFR 75.1(b) by narrowing the categories of documents required to verify the individual’s identity. For example, a selective service card is removed from the list of such documents because it does not have a photograph and is not a part of a system of records that can be independently accessed to verify the legitimacy of the identification card. At the same time, a requirement is proposed to be added that the identification card used to verify identification by the producer must be independently accessible by government entities in order to ensure its legitimacy. Thus, driver’s licenses—which are routinely accessed through the States’ departments that manage such licensing and motor vehicle registration—are a prime form of identification. Similarly, United States passports provide positive identification to the producer and may be accessed by law enforcement agencies through the Department of State for verification. However, less reliable forms of identification, such as college identification cards, which often have no security features and are subject to easy counterfeiting, have been removed from the list of acceptable identification. The point of this proposed rule change is to increase the reliability of the documents used to determine identity and age of performers to better protect minors from exploitation.

*Internet Definitions.* To bring the regulations up to date with the 2003 Amendments, the definition of a producer has been modified in proposed 28 CFR 75.1. Persons who manage the content of computer sites or services are considered secondary producers. An Internet service provider (ISP) is not a producer under this definition; ISPs

merely provide individuals with access to the Internet. See 47 U.S.C. 231(b). The terms used and defined in these regulations are intended to provide common-language guidance and usage and are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes (such as 47 U.S.C. 230, 231).

**Records.** Proposed 28 CFR 75.2 contains a new paragraph (d) providing for a forward application of the provision of the rule to require that any record that is created for a performer after the effective date of the final rule must include updating of related records to reflect the current standards. This requirement is not a retroactive application, but a requirement that any future change in the records must ensure that all records relating to that performer are complete. The proposed rule will establish an implementation timeframe that is the minimum effective date rule required under the Administrative Procedure Act. See 5 U.S.C. 553(d). Accordingly, producers will be required to comply with the regulations 30 days after publication of a final rule.

A new paragraph (e) would specifically provide that the records required by this part must be segregated from all other records. As these specific records are subject to inspection under 28 CFR 75.5, the Department wishes to make clear that the inspection is substantively limited and that other records and items are not subject to such inspection. Accordingly, the Department proposes to require that the records subject to inspection be specifically segregated from all other records to assure that the inspections are limited.

The majority of new depictions are now created for the Internet. The content of the Internet is constantly changing, and these proposed rules recognize this fact. These rules also can be applied to more permanent media. Web pages appear to have an average life of only 100 days, and Web addresses disappear and change to such an extent that a permanent record of the depiction and its temporary locations (URL) are required. See R. Weiss, *On the Web, Research Work Proves Ephemeral*, Wash. Post, p. A8 (Nov. 24, 2003), accessed at <http://www.washingtonpost.com/wp-dyn/articles/A8730-2003Nov23.html> (last accessed on Nov. 25, 2003). Accordingly, proposed 28 CFR 75.2(a)(1) would require computer site or service producers to maintain a "hard" physical or electronic copy of the actual depiction with the

identification and age files, along with and linked to all accession information, such as each URL used for that depiction. This ensures that all of the data about all of the people in the depictions can be accessed to ensure that none of the people in the depictions are minors.

Proposed § 75.5, which governs the inspection process, is completely rewritten and updated. The Department considers the identity and age of the performers to be a critical health and safety issue, and Congress has made clear its intent that minors shall not be performers in covered depictions. As discussed above, the age of the performer is directly linked to whether the producer has produced unlawful child pornography, and the identification and inspection of identification records to determine that performers are of legitimate age is the core underlying purpose of the records and inspection process. Because of the significant potential for child exploitation in the context of pornography production, the Department proposes in revised § 75.5 to adapt regulations of the Occupational Health and Safety Administration, 29 CFR 1903.1 *et seq.*, to the specific purpose of protecting minors from such exploitation.

The regulations and inspections are narrowly tailored to ensure that the process comports with constitutional standards. Although protections of the Fourth Amendment extend to commercial properties, and to administrative inspections, Congress has specifically required that certain records be kept to assure the health and welfare of performers, *i.e.*, that the performers are not children. These specific records are required to be created and maintained by law, and inspection is limited to those required records. The Department believes that the government unquestionably has a substantial interest in avoiding the sexual exploitation of minors. Congress' findings of fact in enacting legislative changes to the child exploitation statutory scheme in 2003 in the PROTECT Act bear this out.

As Justice White noted in *Ferber v. New York*, 458 U.S. 747, 757 (1982), "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Noting the specific findings of the New York legislature in banning the sale of material depicting sexual conduct of children, the Court concluded: "We shall not second-guess this legislative judgment \* \* \* [V]irtually all of the States and the United States have passed legislation

proscribing the production of or otherwise combating 'child pornography.' The legislative judgment \* \* \* is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." *Id.* at 758 (footnote omitted).

Finally, the regulations set out in great detail the specifications that inform producers of sexually explicit depictions of precisely what records are required to be kept, the manner in which the records must be kept, to whom and how the statement of location of such records must be made, and the limited inspection that may be imposed upon those mandatory records.

Proposed 28 CFR 75.6(d) makes clear the requirements for presentation of the notice regarding the locations of covered records. Although the Department did not, in the past, believe that it was necessary to be specific about the manner of display of the required notice, some producers, particularly in the film and Internet media, have attempted to minimize the required notice to such an extent that it has been unreadable, either for lack of size, acuity, contrast, or duration. Accordingly, to provide the industry with clear guidance, and to ensure that the required notice is displayed in such a manner as to be readable, this provision sets out specific requirements for the display. The Department specifically invites comments on how best to make these requirements clearer and applicable to all modes of presentation.

## Regulatory Procedures

### Regulatory Flexibility Act

The Department of Justice has drafted this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The Department of Justice drafted this rule to minimize its impact on small businesses while meeting its intended objectives. Based upon the preliminary information available to the Department through past investigations and enforcement actions involving the affected industry, the Department is unable to state with certainty that this rule, if promulgated as a final rule, will not have any effect on small businesses of the type described in 5 U.S.C. 601(3). Accordingly, the Department has prepared an initial Regulatory Flexibility Act analysis in accordance with 5 U.S.C. 603, as follows:

#### A. Need for and Objectives of This Proposed Rule

This proposed rule, the need for the proposed rule, and the objectives of the proposed rule are described in the **SUPPLEMENTARY INFORMATION**.

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

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

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

Pursuant to the RFA, the Department encourages all affected commercial entities to provide *specific* estimates, wherever possible, of the economic costs that this rule will impose on them and the benefits that it will bring to them and to the public. The Department asks affected small businesses to estimate what these regulations will cost as a percentage of their total revenues in order to enable the Department to ensure that small businesses are not unduly burdened.

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

#### C. Specific Requirements Imposed That Would Impact Private Companies

The proposed rule provides clearer requirements for private companies to maintain records of performers of sexually explicit depictions to ensure that minors are not used in such sexually explicit depictions. The proposed rule requires that these records be properly indexed and cross-referenced. The Department specifically seeks information from affected

producers on the costs of the record-keeping, indexing, and cross-referencing requirements.

#### *Executive Order 12866*

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

The benefit of the proposed regulation is that children will be better protected from exploitation in the production of sexually explicit depictions by requiring producers to document that only those who are 18 years of age perform in such sexually explicit depictions. The costs to the industry include slightly higher record-keeping costs and the potential for obligation of some amount of time assisting inspectors in the process of inspecting the required records. The Department has determined that these benefits and costs are difficult to quantify precisely, but that the benefits are significant, the costs are minimal, and the benefits clearly outweigh the costs.

#### *Executive Order 13132*

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

#### *Executive Order 12988*

This regulation meets the applicable standards set forth in 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*

This rule is not a major rule as defined by section 251 of the Small

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

#### *Paperwork Reduction Act*

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

This rule contains a new information collection that modifies the current 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 (OMB) for regular approval and comments will be solicited from the public, in accordance with the Paperwork Reduction Act of 1995. The title of the information collection is "18 U.S.C. 2257 Record keeping Requirements for Inspection Records Relating to Depiction of Sexually Explicit Performances". Any comments received during the comment period should address one or more of the following four points: (1) Evaluate 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) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) 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.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to: Andrew Oosterbaan, Chief, Child Exploitation and Obscenity Section,

Criminal Division, United States Department of Justice, Washington, DC 20530. Comments should also be sent to: Brenda Dyer, Deputy Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Patrick Henry Building, 601 D Street, NW., Rm. 1600, Washington, DC 20530.

The Criminal Division of the United States Department of Justice cannot estimate the annual burden of collecting the requisite information. The Department of Justice has no way of estimating the annual record-keeping hours burden because of the multitude of variables within the control of producers of depictions of actual sexually explicit conduct. Inasmuch as these records may be maintained on simple spreadsheet or data management software, within the discretion of the producers of depictions of actual sexually explicit conduct, and only file copies of associated identification are required, the Department cannot estimate the annualized hour burden. Industry comment has been invited in the proposed rule.

#### List of Subjects in 28 CFR Part 75

Crime, Infants and children, Reporting and recordkeeping requirements.

Accordingly, the Department of Justice proposes to amend chapter 1 of title 28 of the Code of Federal Regulations as follows:

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

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

Sec.

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

**Authority:** 18 U.S.C. 2257.

##### **§ 75.1 Definitions.**

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

regulations or federal statutes (e.g., 47 U.S.C. 230, 231).

(b) *Picture identification card* means a document issued by the United States, a State government or a political subdivision thereof, or a United States territory that bears the photograph and the name of the individual identified, and provides sufficient specific information that it can be accessed from the issuing authority, e.g., a passport issued by the United States or a foreign country, driver's license issued by a State or the District of Columbia, or identification card issued by a State or the District of Columbia.

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

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

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

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

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

- (i) Photo processing;
- (ii) Mere distribution;
- (iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;
- (iv) A provider of Web-hosting services who does not manage the content of the computer site or service; or

(v) A provider of an electronic communication service or remote computing service who does not manage the content of the computer site or service.

(5) A *producer* includes any subsidiary or parent organization, and any subsidiary of any parent organization, notwithstanding any limitations on liability that would otherwise be applicable.

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

(e) *Copy*, when used in reference to an identification document or a picture identification card, means a photocopy or a photograph.

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

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

(h) *URL* means uniform resource locator.

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

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

(k) *Manage content* means to make editorial or managerial decisions concerning the content of a computer site or service.

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

##### **§ 75.2 Maintenance of records.**

(a) Any producer of any book, magazine, periodical, film, videotape, computer-generated image, digital

image, picture, or other matter that contains one or more visual depictions of actual sexually explicit conduct made after November 1, 1990, 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 an identification document, as defined by 18 U.S.C. 1028(d)(3). For any performer portrayed in such a depiction made after May 26, 1992, the records shall also include a legible copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible copy of a picture identification card. For any performer portrayed in such a depiction after [insert date 30 days after publication of the final rule in the **Federal Register**], the records shall include:

(i) A copy of the depiction, and  
(ii) Where the depiction is published on an Internet Computer site or service, a copy of any URL associated with the depiction.

(2) Any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in such a depiction made after May 26, 1992, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, computer-generated image, digital image, picture, URL, or other matter.

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

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

(c) The information contained in the records required to be created and maintained by this part need be current only as of the time the primary producer actually films, videotapes, or

photographs, or creates a computer-generated image, digital image, or picture, of the visual depiction of actual sexually explicit conduct. If the producer subsequently produces an additional book, magazine, film, videotape, computer-generated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to § 75.2(a)(2).

(d) For any record created or amended after [insert date 30 days after publication of the final rule in the **Federal Register**], 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, computer-generated image, digital image, picture, or other matter (including but not limited to Internet computer site or services). If the producer subsequently produces an additional book, magazine, film, videotape, computer-generated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records and such records shall thereafter be maintained in accordance with this paragraph.

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

### **§ 75.3 Categorization of records.**

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name, or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, computer-generated image, digital image, picture, or other matter.

Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

### **§ 75.4 Location of records.**

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

### **§ 75.5 Inspection of records.**

(a) *Authority to inspect.* Investigators designated by the Attorney General (hereinafter "investigators") are authorized to enter without delay and at reasonable times (as defined in subsection (c)(1)) any establishment of a producer where records under § 75.2 are maintained to inspect, within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of 18 U.S.C. 2257.

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

(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 8 a.m. to 6 p.m., local time, and any other time during which the producer is actually conducting business relating to producing depiction of actual sexually explicit conduct.

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

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

(ii) Explain the nature and purpose of the inspection, including the limited

nature of the records inspection, and the records required to be kept by the Act and this part; and

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

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

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

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

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

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

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

#### **§ 75.6 Statement describing location of books and records.**

(a) Any producer of any book, magazine, periodical, film, videotape, computer-generated image, digital image, picture, or other matter that contains one or more visual depictions of actual sexually explicit conduct made after November 1, 1990, and produced, manufactured, published, duplicated, reproduced, or reissued on or after May 26, 1992, 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, computer-generated image, digital image, picture, or other matter to affix the statement.

(b) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, computer-generated image, digital image, picture, or other matter (unless the title is prominently set out elsewhere in the

book, magazine, periodical, film, or videotape, computer-generated image, digital image, picture, or other matter) or, if there is no title, an identifying number or similar identifier that differentiates this matter from other matters that the producer has produced;

(2) The date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter; and,

(3) A street address at which the records required by this part may be made available. The street address may be an address specified by the primary producer or, if the secondary producer satisfies the requirements of § 75.2(b), the address of the secondary producer. A post office box address does not satisfy this requirement.

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

(d) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, computer-generated image, digital image, picture, or other matter is sold, distributed, redistributed, or rereleased.

(e) For the purposes of this section, the required statement shall be displayed in the same typeface as the names of the performers, director, producer, or owner, whichever is larger, and shall be no smaller in size than the largest of the names of the performers, director, producer, or owner, and in no case in less than 11pt type, in black on a white, untinted background. For any electronic or other display of the notice that is limited in time, the notice must be displayed for a sufficient duration and of a sufficient size to be capable of being read by the average viewer.

#### **§ 75.7 Exemption statement.**

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

(1) The matter contains only visual depictions of actual sexually explicit conduct made before November 1, 1990, or is produced, manufactured, published, duplicated, reproduced, or reissued before May 26, 1992;

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

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

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

#### **§ 75.8 Location of the statement.**

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

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

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

(d) A computer site or service or Web address containing a computer-generated image, digital image, or picture, shall contain the required statement on its homepage or principal URL.

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

Dated: June 14, 2004.

**John Ashcroft,**

*Attorney General.*

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