

28 C.F.R. Part 75 SMALL BUSINESS COMPLIANCE GUIDE

Recordkeeping for Visual Depictions of Actual and Simulated Sexually Explicit Conduct

Background

18 U.S.C. § 2257 imposes name- and age-verification, recordkeeping, and labeling requirements on producers of visual depictions of actual human beings engaged in actual sexually explicit conduct. Likewise, 18 U.S.C. § 2257A imposes name- and age-verification, recordkeeping, and labeling requirements on producers of visual depictions of actual human beings engaged in simulated sexually explicit conduct. The statutes require producers of such material to ascertain, by examining identification documents, that performers are of legal age, as well as to record and maintain this information. With respect to depictions of actual sexually explicit conduct, failure to do so is a criminal offense punishable by imprisonment of not more than five years for a first offense and not more than 10 years for subsequent offenses. With respect to depictions of simulated explicit conduct, failure to do so is a misdemeanor punishable with up to a year in prison and a fine. 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.

These statutory requirements are implemented through Part 75 of Title 28 of the Code of Federal Regulations. This compliance guide offers information in a question and answer format on the duties of affected entities to adhere to their legal obligations under those regulations. It is not a substitute for Part 75 itself, and all persons who are subject to the regulation should review Part 75 to ensure they comply with its requirements. In addition, Part 75 has been updated and changed twice since its initial promulgation, in 2005 and, most recently, in 2008, with an effective date of January 20, 2009. All persons subject to the regulation may want to refer to the Federal Register notices promulgating the final rules that formed the basis for the regulation for further explanatory information. See *Inspection of Records Relating to Depiction of Sexually Explicit Performances*, 70 Fed. Reg. 29607 (May 24, 2005), and *Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct; Inspection of Records Relating to Depiction of Simulated Sexually Explicit Conduct*, 73 Fed. Reg. 77432 (Dec. 18, 2008).

Summary of Part 75's Requirements

Part 75 requires that, prior to producing a visual depiction of actual or simulated sexually explicit conduct, a primary producer must examine a government-issued picture identification card belonging to each performer in the visual depiction that demonstrates that the performer is 18 years old or older. The primary producer must then record the legal name, any aliases, and the date of birth of the performer, record the date of production of the depiction, and make a copy of the picture identification card. Once production is complete, a copy of the visual depiction must be maintained along with

these records. All information on a performer may be redacted other than the name, date of birth, and information that identifies the type and validity of the picture identification card (e.g., drivers license or passport number). All of the primary producer's records for all its visual depictions must also be cross-referenced by name and alias of the performers. If a secondary producer produces a copy of the visual depiction, the secondary producer must obtain from the primary producer the records associated with that depiction. Finally, the visual depiction must be labeled with the location of the records.

These requirements vary slightly depending on the type of sexually explicit conduct depicted and when a visual depiction was produced. The requirements apply in full to any visual depiction of actual sexually explicit conduct produced after July 3, 1995, either by a primary producer or secondary producer, with the exception of visual depictions of lascivious exhibition of the genitals or pubic area of a person ("lascivious exhibition"). The requirements for depictions of lascivious exhibition apply only to depictions produced after March 18, 2009. Likewise, the requirements for visual depictions of simulated sexually explicit conduct apply only to depictions produced after March 18, 2009. In addition to these variations, some specific differences as to the form of records apply based on these dates and types of material, which are explained in detail in the regulation.

As provided by 18 U.S.C. § 2257A, the regulation also provides a "safe harbor" for depictions of lascivious exhibition and simulated sexually explicit conduct. A producer who regularly and in the regular course of business collects and maintains records that confirm and the identification and age of performers can send a letter to the Attorney General of the United States stating that it does so, for any visual depiction that (1) is intended for commercial distribution; (2) is created as a part of a commercial enterprise; and (3) either (i) is not produced, marketed or made available in circumstances such that an ordinary person would conclude that the matter is child pornography, or (ii) is subject to regulation by the Federal Communications Commission regarding the broadcast of obscene, indecent, or profane programming.

Technical Notes

1. The preamble of the Final Rule suggests that the certification letter to the Attorney General should include a list of works covered by the certification. The preamble states that "the letter should either: (i) Cite 18 U.S.C. 2257A(h)(1)(A) and 28 C.F.R. § 75.9 and state that the visual depictions listed in the letter are 'intended for commercial distribution,'" 73 Fed. Reg. 77,451 (emphasis added). The actual text of the regulation, however, does not require the depictions to be listed. The proposed rule did require such a listing, but that provision was eliminated in the final rule.
2. In 28 C.F.R. § 75.9(d), the rule states that, "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."

73 Fed. Reg. 77,472 (emphasis added). As noted above in paragraph (1) the proposed rule required a list of depictions covered by the certification (that is, the "matter" in the underlined phrase). However, the final rule eliminated that requirement. The underlined phrase was apparently carried over inadvertently from the proposed rule to the final rule even though other provisions were changed to reflect the elimination of the requirement to list the depictions covered by a certification.

3. 28 C.F.R. § 75.1(o), in the second sentence of the definition of "simulated sexually explicit conduct," contains an extraneous second "not" that should be removed. 73 Fed. Reg. 77,469. That sentence currently reads, "It does not mean not sexually explicit conduct that is merely suggested." The second "not" is merely a typographical error.

Frequently Asked Questions

Q. Which depictions are covered by the regulation?

A. The regulation applies to visual depictions of actual human beings engaged in actual or simulated sexually explicit conduct. However, with respect to depictions of actual sexually explicit conduct consisting of only lascivious exhibition or depictions of simulated sexually explicit conduct, the regulation applies only with respect to such depictions that are originally produced after March 18, 2009.

Q. What is "lascivious exhibition of the genitals or pubic area"?

A. The regulation does not define the term "lascivious exhibition of the genitals or pubic area," but the Department of Justice will rely on precedent from child pornography prosecutions for 18 U.S.C. § 2257 investigations and prosecutions involving such depictions. In that context, judicial precedent indicates that a depiction can constitute lascivious exhibition if, among other things:

- (1) the focal point is on the subject's genitalia or pubic area;
 - (2) the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
 - (3) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
 - (4) the visual depiction is intended or designed to elicit a sexual response in the viewer.
- For more detail, see 73 Fed. Reg. at 77433 and 77440-41.

Q. What is "simulated sexually explicit conduct"?

A. Simulated sexually explicit conduct is 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 sexually explicit conduct that is merely suggested. See 28 C.F.R. § 75.1(o) In

addition, it does not include virtual representations of such conduct, i.e., cartoons or computer-generated images that do not depict real human beings.

Q. Who is required to maintain records?

A. Both primary and secondary producers of covered materials. A 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." 28 C.F.R. § 75.1(c)(1). A 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." 28 C.F.R. § 75.1(c)(2).

Q. Who is not required to maintain records?

A. Individuals or entities are not covered producers if their role with respect to covered materials is limited to photo or film processing; distribution; services that do not involve the hiring, managing, or arranging of the participation of depicted performers; providing telecommunications or Internet services; transmission, storage, retrieval, hosting, formatting, or translation of a communication, without selection or alteration of the content of the communication; or dissemination of a depiction without selection or alteration of its content. See 28 C.F.R. § 75.1(c)(4).

Q. How does the rule apply to social networking sites?

A. Most social networking sites would not be covered by the rule because its definition of "produces" excludes "the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the communication." Social networking sites would not then normally need to comply with the rule's record-keeping requirements, labeling requirements, or be required to maintain information concerning their users, and the rule would therefore have no effect on the operations of the site. However, users of social networking sites who post sexually explicit activity on "adult" networking sites may well be primary or secondary producers. Therefore, users of social networking sites may be subject to the rule, depending on their conduct.

Q. How must a producer of covered material verify the age of performers?

A. Each producer must 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. The identification card must contain the performer's date of birth. A producer abroad may rely on foreign government identification cards for foreign performers, but must maintain a copy of that identification. 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.

Q. Can information on a performer be redacted in order to protect his or her privacy?

A. Yes. All information on a performer (such as home address and social security number) may be redacted other than the name, date of birth, and information that identifies the type and validity of the picture identification card (e.g., drivers license or passport number).

Q. Is the producer required to maintain records demonstrating that each performer is of legal age as of the date of original production?

A. The producer must record the date of original production. A performer need not be 18 as of the date of original production as long as the performer is 18 when he or she is first depicted in actual or simulated sexually explicit conduct. Producers who keep records demonstrating that performers are 18 as of the date of original production conform to the rule, as will records demonstrating that the performer was 18 on the first date that the performer was actually filmed for the production at issue.

Q. What is the date of original production for depictions made over the course of multiple dates?

A. The single and earliest of those dates.

Q. What is the date of original production for productions that consist of compilations of earlier produced material?

A. For compilations, the date of original production is the date that the depicted conduct occurred.

Q. When is the producer required to make a record documenting that the performer was of legal age?

A. At the time that the producer examines the identification document.

Q. Is a secondary producer required to check identification documents of performers?

A. A secondary producer is not required to check identification requirements. The secondary producer is required to maintain records that identify the primary producer for any depiction and that verify that the primary producer checked the legal age of performers prior to the date of original production.

Q. Must the required records be kept in hard copy?

A. No. The producer may retain the required records in electronic form.

Q. Must the producer itself retain the required records?

A. No, a third party can retain the records.

Q. What are the regulation's labeling requirements?

A. Each page must contain a label stating where the records required to be maintained may be located. Although the producer need not provide the label on every page of the website that contains actual or simulated sexually explicit material, the regulation requires that if the full label does not appear on each such page, then a hypertext link to the required statement appear on each such page. Further, the name of the individual required to be listed on the disclosure statement may consist only of the title of the individual rather than a specified person. Finally, for a DVD which contains multiple depictions, the disclosure statement may be located in a single place covering all depictions on the DVD.

Q. How do eligible entities comply with the "safe harbor" exemption?

A. Entities seeking to claim the exemption may certify for itself and for all sub-entities that it owns or controls. 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 certification is to 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. A producer of materials not covered by the certification regime as well as materials covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime. Those entities who wish to use the certification process must file an initial certification within 180 days after publication of the 2008 final rule, that is, by June 16, 2009. This will provide sufficient time for entities to determine if they wish to certify and come into compliance with the certification requirements. 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. See, 28 C.F.R. § 75.9.

Q. How is the certification enforced?

A. Certifications that are knowingly and willingly false subject the signer to criminal prosecution for making a false statement regarding a matter within the jurisdiction of the U.S. government.

Q. What is the required format of the certification?

A. The certification must (1) outline the statutory basis for eligibility for the safe harbor; (2) state in specified language that in the regular course of business, the producer and sub-entities collect and maintain individually identifiable information concerning all performers; and, if appropriate, (3) state in specified language that the visual depictions were produced outside the United States, but that either records were kept by the foreign producer on foreign performers or that the U.S. producer took reasonable steps to confirm that foreign performers were not minors. See 28 C.F.R. § 75.9(b) and (c) for the form and specific content of the certification.

Q. What are the recordkeeping obligations for a producer who is eligible for certification once the rule takes effect?

A. The recordkeeping requirements take effect at the same time as the certification regime. Producers who are eligible for the certification will be able to make such certifications without the necessity of having to comply with the recordkeeping requirements.

Q. What steps did the Department of Justice take to minimize the burdens of this regulation on producers?

A. The Department ensured that the regulatory requirements applicable to depictions of actual sexually explicit conduct consisting of lascivious exhibition of the genitals apply starting on the date of availability of the statutorily provided safe harbor. It also permitted third-party custodians, rather than producers themselves, to hold required records, and it permitted records to be maintained digitally. In addition, it permitted the labeling requirement to be complied with through hyperlinks on Internet depictions. Finally, the Department adopted a simpler certification regime than originally proposed.