Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct
DOJ Regulatory Review
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PRA Supporting Statement

Two separate NPRMs (RIN Nos. 1105-AB18 and 1105-AB19), implementing changes to 18 U.S.C. § 2257 and the enactment of 18 U.S.C. § 2257A, respectively, were prepared and submitted previously. Because of the related nature of the two statutes, the two NPRMs were consolidated into one final rule. This PRA supporting statement contains combined information with respect to the consolidated rule finalizing both NPRMs. Within each numbered paragraph, those numbered (a) refer to the requirement imposed by the § 2257 portion of the consolidated final rule, and those numbered (b) refer to the requirement imposed by the § 2257A portion of the consolidated final rule.

1(a). The final rule amends the record-keeping, labeling, and inspection requirements of 28 CFR part 75 for producers of visual depictions of actual sexually explicit conduct, to account for changes in the underlying statute made by Congress in the Adam Walsh Child Protection and Safety Act of 2006 ("the Act"), codified at 18 U.S.C. § 2257.

Under the state and existing regulations, producers of depictions of actual sexually explicit conduct are required to maintain identification of performers for inspection to establish that children are not used in depictions of actual sexually explicit conduct. The United States does not acquire this information except through inspection and does not retain this information except pursuant to criminal investigation and prosecution.

This final rule revises certain provisions of the existing regulations, and it also applies the regulations to visual depictions of the lascivious exhibition of the genitals or pubic area of a person (hereinafter, "lascivious exhibition"). Many of the producers of such depictions are likely already required to provide the information collection, since they likely already produce visual depictions of the sexually explicit conduct currently covered by the regulations. Some businesses not previously required to collect the information may for the first time be covered by this revised rule, if they produce only visual depictions of lascivious exhibition. The final rule permits third parties to store the required records of producers offsite at the discretion of the producer.

1(b). The final rule amends the recordkeeping, labeling, and inspection requirements of 28 CFR part 75 applicable to visual depictions of actual sexually explicit conduct to implement provisions of the Act making them applicable to visual depictions of simulated sexually explicit conduct. The Act also created a certification regime for the exemption of producers, in certain circumstances, from the requirements for visual depictions of simulated sexually explicit conduct and from the requirements for

producers of visual depictions of actual sexually explicit conduct constituting lascivious exhibition.

Part 75 implements the existing recordkeeping, labeling, and inspection requirements for producers of visual depictions of actual sexually explicit conduct, which are codified at 18 U.S.C. § 2257. The final rule revises part 75 to apply those requirements to visual depictions of simulated sexually explicit conduct, codified at 18 U.S.C. § 2257A, with regard to the records at issue, the time, place and manner of inspection of those records, and the labeling of matter containing such visual depictions. The United States does not acquire this information except through inspection and does not retain this inspection except pursuant to criminal investigation and prosecution.

The final rule also implements the exemption provided in section 2257A from these requirements with respect to visual depictions of actual sexually explicit conduct constituting the lascivious exhibition and to visual depictions of simulated sexually explicit conduct and outlines the certifications required for producers to qualify for the exemption.

2(a) and 2(b). The information collected is described in the final rule. Unless inspected, and seized as evidence of a crime, the information remains in the possession of the recordkeeper. If seized as evidence of a crime, the information will be treated in a similar fashion, and under similar restraints, as evidence otherwise held by the Department of Justice (hereinafter "the Department") for the prosecution of criminal offenses.

3(a) and 3(b). Records may be kept in paper or electronic from as the producer may desire, so long as the records meet the requirements of the regulation.

4(a) No such information is otherwise available except to the extent that producers currently comply with the law.

4(b). No such information is otherwise available. The Department notes that in cases where producers qualify for the exemption described in paragraph 1(b) above, the exemption itself avoids duplication because it relies in large part on producers' certification that in the normal course of business they collect and maintain records to confirm that performers in those visual depictions are not minors (even though those records may not necessarily be collected and maintained in the format required by part 75).

5(a). Unknown. As a general proposition, producers of visual depictions of actual sexually explicit conduct may be major corporations or very small operations. There reportedly are more than 200 producers of pornographic films in the United States and approximately 500,000 commercial websites that host visual depictions of sexually explicit conduct, which are owned by at least 5000 businesses. The Department included these estimates in the proposed rule and invited comments on their accuracy. The Department received comments that offered higher industry estimates for the number of websites and businesses, but since the comments used the Department's estimates contained in the proposed rule, the Department continues to adhere to them for the purposes of the final rule.

The figure of 500,000 websites is greater than 100,000 estimated in the original Paperwork Reduction Act analysis performed for the earlier version of these regulations. In addition, this figure covers businesses not previously required to collect the information because they produce only visual depictions of lascivious exhibition, covered for the first time by this revised rule. The Department has no information or way of estimating regarding how many of these businesses are owned and operated by small businesses.

5(b). The Department is unable to determine whether this information collection will have a significant economic impact on a substantial number of small entities. As a general proposition, producers of visual depictions of simulated sexually explicit conduct may be major corporations or very small entities. The Department has no information concerning how many of these producers are small entities. As a partial indication of the total number of entities that may be affected, the Department estimated in the proposed rule that of the 11,163 entities engaged in motion picture and video production in the United States in 2002 according to the U.S. Census Bureau, assuming that 10% were engaged in the production of simulated sexually explicit conduct, approximately 1,116 motion picture and video producing entities would be covered (the Department does not certify this estimate). The Department asked for public comments on these numbers. One comment concluded that the Department had undercounted the number of producers by a factor of 100 or more, or several hundred thousand. Accordingly, for the final rule, the Department assumed that approximately 100,000 producers would be covered. Additionally, the Department was unable to estimate the number of websites containing visual depictions of simulated sexually explicit conduct. The Department asked for comments on this number as well. One commented estimated that there are several million adult websites.

The Department has no information concerning the number of entities producing visual depictions of simulated sexually explicit conduct that would qualify for the exemption described above, nor is it able to estimate this number. For entities that qualify for the exemption, the exemption would virtually eliminate the economic impact of this information collection as the only burden would be the preparation of the required certification necessary for the exemption. In the proposed rule, the Department assumed that 90% of the entities producing visual depictions of simulated sexually explicit conduct would qualify for the exemption; hence, this information collection will impact only 10% of such entities. The Department asked for comments in the proposed rule, but no commenters on the proposed rule challenged this assumption.

Steps taken to minimize the burden of this information collection on small entities include the exemption described above.

6(a). As discussed in the final rule, the recordkeeping, labeling, and inspection requirements are designed to provide assurances that children are not involved in the production of depictions of actual sexually explicit conduct. Without requiring the maintenance of records for inspection that actually establish the identity and age of the performers, it is not possible

to acquire sufficient assurances that children are not involved in the production of depictions of actual sexually explicit conduct.

6(b). As discussed in the final rule, the recordkeeping, labeling, and inspection requirements are designed to provide assurances that children are not involved in the production of visual depictions of simulated sexually explicit conduct. Without requiring the maintenance of records for inspection that actually establish the identity and age of the performers, it is not possible to acquire sufficient assurances that children are not involved in the production of visual depictions of simulated sexually explicit conduct. In certain circumstances where producers already maintain such records, as noted above they will qualify for an exemption from these requirements, as well as from requirements concerning depiction of actual sexually explicit conduct constituting lascivious exhibition.

7(a) and 7(b). Evidence of criminal conduct could cause an inspection to occur more frequently than quarterly. No other factor is relevant.

8(a) The inspection process has been discussed within the law enforcement community to assure that it will be efficacious in administering the act. Currently, the Federal Bureau of Investigation is conducting administrative inspections under 18 U.S.C. § 2257. These inspections involve a review of visual depictions of sexually explicit conduct and a review of the documentation maintained by the producers of those visual depictions to ensure that producers maintain the appropriate records concerning the performers portrayed in those depictions. Although the proposed rule offered no changes to existing regulations governing inspections, the Department received thousands of comments on the existing inspections regime. Only one of these comments addressed a paperwork issue, asking that the disclosure form not contain the name of an individual, but rather permit the title of a person who was the custodian of the records. In the final rule, the Department adopted the suggestion that the commenter offered.

8(b). The inspection process has been discussed within the law enforcement community to assure that it will be efficacious in administering the Act. It is anticipated that an inspection process similar to that used under 18 U.S.C. § 2257 will be used under 18 U.S.C. § 2257A. Industry comments were invited in the proposed rule, but none were received.

9(a) and 9(b). No payment or gift is made to the respondent

10(a) and 10(b) The Department makes no assurances of confidentiality outside the criminal investigative and prosecutive process.

11(a). The recordkeeping requires only documentation of identity and specific products that include depictions of actual sexually explicit conduct. The requirements do not include any of the items identified in the instructions as sensitive.

11(b). The recordkeeping requires only documentation of identity and specific products that include depictions of simulated sexually explicit conduct (and, as noted above, there

is an exemption from these requirements, as well as those applicable to depictions of actual sexually explicit conduct constituting lascivious exhibition, applicable in certain circumstances). These requirements do not include any of the items identified in the instructions as sensitive.

12(a). The Department has no way of estimating the annual recordkeeping hours burden because of the multitude of variables within the control of producers of visual depictions of actual sexually explicit conduct. As noted above, there reportedly are more than 200 producers of pornographic films in the United States and approximately 500,000 commercial websites offering pornography, produced by at least 5000 businesses. There are no statistics available on the number of depictions of actual sexually explicit conduct created each year. In the proposed rule, the Department invited comments on the number of such depictions that are created annually. If, however, OMB assumes (but which the Department will not certify) in the final rule that some 2,000,000 depictions of actual sexually explicit conduct (including the visual depictions of the lascivious exhibition of the genitals or pubic area of a person not previously covered by the regulation) are created each year and that it requires 6 minutes to complete the recordkeeping requirement for each depiction, the recordkeeping requirements would impose a burden of 200,000 hours. Industry comment was invited in the proposed rule, but no comment as to the number of images was received. Accordingly, the final rule adopts these numbers concerning time and depictions, but the Department does not certify the accuracy of these numbers.

12(b). The Department has no way of estimating the annual recordkeeping hours burden with respect to producers of visual depictions of simulated sexually explicit conduct who do not qualify for the exemption described above because of the multitude of variables within the control of these producers. The Department estimated in the proposed rule that the annual recordkeeping hours burden with respect to producers of visual depictions of simulated sexually explicit conduct who qualify for the exemption will be approximately 20 hours or less in preparing the biennial certification necessary for the exemption and asked for comments on this estimate. The final rule eliminates the biennial certification requirement, greatly reducing compliance costs. Instead, the final rule contains a one-time certification process for gaining the benefit of the statutory exemption, which is therefore not characterized as an annual cost of the final rule. The Department estimated that the 90,000 producers of simulated sexually explicit conduct who would qualify for the exemption would incur a one-time cost of $50 to establish eligibility for the exemption separate from any annual costs of the final rule.

As noted above, as a partial indication of the total number of entities that may be affected, the Department estimated in the proposed rule that of the 11,163 entities engaged in motion picture and video production in the United States in 2002 according to the U.S. Census Bureau, assuming that 10% were engaged in the production of simulated sexually explicit conduct, approximately 1,116 motion picture and video producing entities would be covered (the Department does not certify this estimate). The Department asked for public comments on these numbers in the proposed rule. One commenter took issue with the estimate of entities engaged in production of simulated sexually explicit comment, estimating that the

actual number was over one hundred times higher than the Department's estimate, and the Paperwork Reduction Act analysis for the final rule has been adjusted to reflect much larger numbers that commenters offered for the number of producers of simulated sexually explicit conduct, and hence, the number of entities that would be covered by the final rule.

Additionally, in the proposed rule, the Department was unable to estimate the number of websites containing visual depictions of simulated sexually explicit conduct and asked for comments on this number as well. One commenter estimated that there are several million adult websites.

The proposed rule assumed that 3,000,000 visual depictions of simulated sexually explicit conduct are created each year and that it requires 6 minutes to complete the recordkeeping requirement for each depiction, the recordkeeping requirements would impose a burden of 300,000 hours. It further assumed that as producers of 90% of these depictions qualify for the statutory exemption from these requirements, the requirements would only impose a burden of 30,000 hours. The Department does not certify the accuracy of these numbers. The Department did not receive any comment that challenged the estimate of 3,000,000 depictions. While one comment challenged the 6 minute per depiction estimate, as noted in the preamble, one study estimated that it takes only 3 minutes per depiction. Accordingly, the final rule retains the same estimates as did the proposed rule.

13(a). The Department has no way of estimating the annual cost burden because of the multitude of variables within the control of producers of depictions of actual sexually explicit conduct. As noted above, there reportedly are more than 500 producers of pornographic films in the United States and approximately 500,000 commercial websites offering pornography, produced by at least 2000 businesses. There are no statistics available on the number of depictions of actual sexually explicit conduct created each year. The proposed rule sought estimate of the number of depictions of actual sexually explicit conduct are created each year, and further sought comments on the costs of compliance with the terms of the proposed rule. The Department also estimated in the proposed rule that it requires 6 minutes to complete the recordkeeping requirement for each depiction. The Department sought comment on this estimate as well. In the final rule, the Department adopts the position that 2,000,000 depictions of actual sexually explicit material are produced each year. For that number of depictions, and the corresponding 6 minutes of compliance time per depiction, the recordkeeping requirements would impose a burden of 200,000 hours. The proposed rule further assumed that the record keeping requirements will cost $6.00 per hour to complete, and $0.05 for each image of a verifiable form of identification. The Department sought comment on these estimates, and in the final rule, it has adjusted its estimates to include a $10.00 per hour completion cost per hour, and $0.10 to create each image of a verifiable form of identification. For each such depiction of actual sexually explicit conduct, in which 2,000,000 depictions would generate 6 minutes of compliance time, at $10.00 per hour, and $0.10 per each image of a verifiable form of identification, the total annual cost would be $2,400,000.

13(b). The Department has no way of estimating the annual cost burden with respect to producers of visual depictions of simulated sexually explicit conduct who do not qualify for the exemption described above because of the multitude of variables within the control of these producers. The Department estimated in the proposed rule that the annual cost burden with respect to producers of visual depictions of simulated sexually explicit conduct who qualify for the exemption will be less than $500, based on our estimate that preparing the biennial certification necessary for the exemption will require less than 20 hours per year and assuming that preparing the certification will cost less than $ 25.00 per hour to complete. The Department sought comment in the proposed rule on these estimates.

As noted above, as a partial indication of the total number of entities that may be affected, the Department estimated in the proposed rule that of the 11,163 entities engaged in motion picture and video production in the United States in 2002 according to the U.S. Census Bureau, assuming that 10% were engaged in the production of simulated sexually explicit conduct, approximately 1,116 motion picture and video producing entities would be covered (the Department does not certify this estimate). The Department asked for public comments on these numbers. Additionally, the Department is unable to estimate the number of websites containing visual depictions of simulated sexually explicit conduct and has asked for comments on this number as well. One commenter suggested that the number of producing entities is 100 times higher than the Department estimated. Even if this estimate were adopted, and about 100,000 such entities were affected by the final rule, no objections were made with respect to the aggregate amount of covered depictions, which would not affect the total costs of compliance. Moreover, many of the entities to which the final rule for § 2257 also engage in the production of images that would render them subject to the final rule for § 2257A as well. Therefore, the total number of entities that this assessment concludes would be subject to the rule is actually overstated, since it counts separately entities that are subject to each rule separately, which creates a larger number than the total number of entities subject to the combined rules. The final rule assumes that 10,000 producers of simulated sexual material would be subject to its terms.

Assuming that 90% of such entities would qualify for the exemption, based on the estimate that preparing the one-time certification necessary at a cost of $50.00 per hour, the total cost for the entities qualifying for the statutory exemption would be approximately $4,500,000. The Department does not certify the accuracy of these numbers.
Assuming that 3,000,000 visual depictions of simulated sexually explicit conduct are created each year and that it requires 6 minutes to complete the recordkeeping requirement for each depiction, the recordkeeping requirements would impose a burden of 300,000 hours. However, if OMB were to assume that producers of 90% of these depictions qualify for the statutory exemption from these requirements, the requirements would only impose a burden of 30,000 hours. Assuming further that the record keeping requirements will cost $10.00 per hour to complete and $0.10 for each image of a verifiable form of identification, the total annual cost would be $600,000. The Department does not certify the accuracy of these numbers.

14(a). and 14(b). Annualized costs to the United States are limited by appropriations to those cases that can be inspected, investigated and prosecuted.

15(a). This is a revision of a currently approved collection which, among other things, applies the information collection requirement to additional sexually explicit material produced by businesses that have been obligated to collect the information and to some businesses that were not previously obligated to collect the information. The additional requirements are a result of statutory changes in the Adam Walsh Child Protection and Safety Act of 2006.

15(b). This is a new collection which, among other things, applies the information collection requirement to additional sexually explicit material (visual depictions of simulated sexually explicit conduct). As noted above, there is an exemption from these additional requirements applicable in certain cases. The additional requirements are a result of statutory changes in the Adam Walsh Child Protection and Safety Act of 2006.

16(a) and 16(b). This information will not be published.

17(a) and 17(b). There is no form associated with this recordkeeping requirement for this information collection.

18(a) and 18(b). There are no exceptions to the Paperwork Reduction Act Certification for this collection.