

**DEPARTMENT OF JUSTICE****28 CFR Part 81**

[Docket No. CRM 100I; AG Order No. 2692-2003]

RIN 1105-AA65

**Designation of Agencies To Receive and Investigate Reports Required Under the Protection of Children From Sexual Predators Act, as Amended****AGENCY:** Department of Justice.**ACTION:** Interim final rule.

**SUMMARY:** This Interim final rule finalizes a portion of a proposed rule published on May 26, 1999, 64 FR 28422, and fulfills the Attorney General's responsibilities under the child pornography reporting provisions of the Protection of Children from Sexual Predators Act of 1998, as amended. This Interim final rule requires the National Center for Missing and Exploited Children to forward the report of apparent child pornography to the law enforcement agencies designated in the 1999 proposed rule (the Federal Bureau of Investigation and the Bureau of Immigration and Customs Enforcement,<sup>1</sup> and also designates the United States Postal Inspection Service and the United States Secret Service as recipients of the report.

Other matters discussed in the 1999 proposed rule, such as the contents of the report, the means for making the report to Federal agencies, monitoring, and definitions, will be addressed at a later time through a subsequent final rule.

**DATES:** *Effective date:* This Interim final rule is effective December 4, 2003.

*Comment date:* Written comments must be submitted on or before January 5, 2004.

**ADDRESSES:** Please submit written comments to Andrew G. Oosterbaan, Chief, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, 1400 New York Ave., NW., Suite 600, Washington, DC, 20530, telephone (202) 514-5780. To ensure proper handling, please reference CRM 100 on your correspondence. Comments may also be submitted electronically to the Criminal Division at [Admin.Ceos@usdoj.gov](mailto:Admin.Ceos@usdoj.gov). When submitting comments electronically, please include CRM 100 in the subject heading. Comments are available for public inspection at this location by

<sup>1</sup> The Bureau of Immigration and Customs Enforcement was formerly known as the United States Customs Service and was referred to in the 1999 proposed rule as such.

calling (202) 514-5780 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Andrew G. Oosterbaan, Chief, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, 1400 New York Ave., NW., Suite 600, Washington, DC, 20530, telephone (202) 514-5780.

**SUPPLEMENTARY INFORMATION:****Entities Affected by This Regulation**

The child pornography reporting provisions of the Protection of Children from Sexual Predators Act (PCSPA) were enacted as section 604 of the Act, Pub. L. 105-314, 112 Stat. 2974, codified at 42 U.S.C. 13032 (1999 Supp.) and 18 U.S.C. 2702(b)(6). As set forth at 42 U.S.C. 13032, the PCSPA originally required providers of electronic communication services or remote computing services to the public through a facility or means of interstate or foreign commerce ("providers") who obtain knowledge of the apparent production, distribution, or possession of child pornography<sup>2</sup> to make a report of such facts or circumstances to a law enforcement agency or agencies designated by the Attorney General. As set forth *infra*, the statute was subsequently amended to require providers to report directly to the National Center for Missing and Exploited Children (NCMEC), which then forwards reports to designated law enforcement agencies. Thus, in view of the previously-existing statutory reporting requirements imposed on providers, this regulation affects only the law enforcement agencies designated herein and NCMEC (to the extent that it is directed to share reports with designated law enforcement agencies).

**Rulemaking History**

The Department of Justice published a proposed rule on May 26, 1999, 64 FR 28422 (the "1999 proposed rule"), proposing to carry out the Attorney General's responsibilities under the child pornography reporting provisions of the PCSPA.

Under the 1999 proposed rule, reports of child pornography made pursuant to 42 U.S.C. 13032 were to be submitted by providers directly to the Federal Bureau of Investigation (FBI) and the United States Customs Service (USCS) (the investigative arm of the Customs Service is now in the Bureau of Immigration and Customs Enforcement (BICE) at the Department of Homeland Security), which then had jurisdiction to

investigate reports of child pornography on electronic communication services or remote computing services. The 1999 proposed rule also outlined the contents of the report and the means for making the report, indicated that providers had no duty to monitor customers or content,<sup>3</sup> referred providers to the Electronic Communications Privacy Act, and included definitions.

The 1999 proposed rule included a request for comments by July 26, 1999. The Department received three comments concerning two aspects of the proposed rule.

On November 29, 1999, as part of the Consolidated Appropriations Act, 2000, Pub. L. 106-113, 113 Stat. 1501, Congress amended 42 U.S.C. 13032 to require providers to report incidents of suspected child pornography to the "Cyber Tipline" at NCMEC, which is required to forward that report to a law enforcement agency or agencies designated by the Attorney General.

On April 30, 2003, as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (the "PROTECT Act"), Congress amended 42 U.S.C. 13032 to allow NCMEC to forward provider reports to State and local law enforcement agencies where State law has been violated and to expand the duties of the United States Secret Service ("Secret Service") to include providing forensic and investigative assistance to NCMEC in support of any investigation involving missing or exploited children.

**Comparison of This Interim Final Rule With the 1999 Proposed Rule**

Because the 1999 amendment to 42 U.S.C. 13032 changed the recipient of the reports, this Interim final rule ("Interim final rule") reflects that amendment.

This Interim final rule requires the providers to report instances of apparent child pornography to the "Cyber Tipline" at NCMEC (<http://www.CyberTipline.com>). The Interim final rule requires NCMEC to forward the report of apparent child pornography to the law enforcement agencies designated in the 1999 proposed rule (the FBI and the USCS (now BICE)), and also designates the United States Postal Inspection Service (Postal Inspection Service) and the

<sup>3</sup> The statute already notes this fact. See 42 U.S.C. 13032(e) ("Nothing in this section may be construed to require a provider of electronic communication services or remote computing services to engage in the monitoring of any user, subscriber, or customer of that provider, or the content of any communication of any such person.").

<sup>2</sup> See sections 2251, 2251A, 2252, 2252A, and 2260 of title 18, United States Code.

Secret Service as recipients of the report.

The Interim final rule reflects only a portion of the 1999 proposed rule. For example, the Interim final rule does not elaborate on the contents of the report, the means for making the report to Federal agencies (now moot due to the 1999 amendment to the statute), a discussion of monitoring (already explicitly covered by 42 U.S.C. 13032). Nor does the Interim final rule contain any reference to the Electronic Communications Privacy Act, or definitions. These issues will be addressed at a later time through a subsequent final rule.

### Discussion of Comments on the 1999 Proposed Rule

#### *National Center for Missing and Exploited Children as Designated Agency*

NCMEC and the Internet Alliance commented that the Department should designate NCMEC as the conduit agency through which Federal law enforcement would receive reports under the PCSPA. NCMEC stated that its "Cyber Tipline," which already receives reports of illegal Internet activity from citizens and the online industry, would be the appropriate repository of PCSPA reports. According to NCMEC, Federal law enforcement agencies have concurrent access to the "Cyber Tipline" and would be able to review PCSPA reports immediately.

The 1999 amendment to 42 U.S.C. 13032 requires that all reports be sent to NCMEC, and the Interim final rule is consistent with that amendment. Providers will first telephone NCMEC (800-THE-LOST) to obtain an identification number and a password to be used for all future reports. The provider will then be able to log on to a section of the "Cyber Tipline" that is designed for reporting by providers (<http://www.CyberTipline.com>). When the provider logs on to the "Cyber Tipline," it will be required to complete a reporting form requesting information about the apparent child pornography.

The Interim final rule directs NCMEC to fulfill its obligation to forward the reports received through its "Cyber Tipline" by providing them to designated law enforcement agencies. The 1999 proposed rule designated the FBI and BICE (then the U.S. Customs Service) as recipients of the reports. In addition, this Interim final rule designates the Postal Inspection Service and the Secret Service as recipients of reports. The purpose for expanding the number of law enforcement agencies designated to receive the reports from

NCMEC is to increase the amount of law enforcement resources available to combat child pornography on the Internet. Both the Postal Inspection Service and the Secret Service have substantial experience investigating child pornography cases. The need for greater resources is evidenced by two recent changes made by the PROTECT Act. One change authorizes the Secret Service to provide forensic and investigative assistance to NCMEC. See PROTECT Act § 322, codified at 18 U.S.C. 3056. The other allows NCMEC to forward reports to state and local law enforcement agencies where state law is violated. See PROTECT Act § 508, codified at 42 U.S.C. 13032.

#### *Clarification on Reference to the Electronic Communications Privacy Act of 1986*

The Commercial Internet eXchange (CIX) commented that § 84.14, "Contents of the Report," suggested by implication that the provider was required to search its records for the identity of subscribers who are suspected of violating the child pornography laws. CIX argued that such an independent disclosure would be in violation of the Electronic Communications Privacy Act of 1986. It further argued that such disclosure would contravene Congressional statements during consideration of the bill that the statute does not require disclosure of the name of the subscriber that was retrieved from the provider's files. CIX suggested that § 84.14(a) be amended to include the phrase "if they are not obtained from the provider's files" after the section's suggestion that the report could include "the identity of persons or screen names of persons transmitting or receiving child pornography."

The Interim final rule does not contain § 84.14 of the 1999 proposed rule, the substance of which will be promulgated separately at a later date. At that time, the CIX comment will be addressed.

#### **Administrative Procedure Act**

This Interim final rule adopts, in part, the provisions of the 1999 proposed rule, and also makes several changes in response to intervening legislation. Because the changes made in the Interim final rule are a logical outgrowth of the 1999 proposed rule, it is not necessary to provide an additional period of notice and comment. See, e.g., *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1958-59 (D.C. Cir. 2000) (stipulating that a final rule need not be exactly the same as the proposed rule as long as it is a logical outgrowth

of the proposed rule). This Interim final rule is a logical outgrowth of the proposed rule because "reports of child pornography made pursuant to 42 U.S.C. 13032 are to be submitted to the Federal agencies that currently have jurisdiction to investigate reports of child pornography on electronic communication services or remote computing services." See 64 FR 28422, 28423 (1999 proposed rule). This Interim final rule does precisely that—it designates those Federal law enforcement agencies, expanded from two to four, that have jurisdiction to investigate child pornography that should now receive such reports. In addition, this Interim final rule responds to a specific comment to the 1999 proposed rule that NCMEC ought to be the conduit for such reports between the providers and designated Federal law enforcement agencies. In the Interim final rule, NCMEC is now the conduit. The scope and purpose of the two rules are similar: The providers were required under the 1999 proposed rule to report suspected child pornography, and that reporting requirement remains unchanged; merely the recipients of the report are different. The recipients of the providers' reports have been reduced from two possible agencies (the FBI or then-USCS) to one organization, NCMEC. Additional notice and public comment would not elicit criticisms that are relevant to the designation of two additional Federal agencies to receive reports through NCMEC, as those designations are within the Attorney General's discretion and, in the case of the Secret Service, reflect a statutory change to the mission of that agency.

Moreover, additional notice and public commentary are unnecessary. Since 1999, the providers have been required by 42 U.S.C. 13032 to make reports to NCMEC, and the Interim final rule will have no effect on their ongoing reporting obligations. Adding the Postal Inspection Service and the Secret Service as agencies to which NCMEC must forward reports will not impose any additional burden on the providers. Therefore, notice and public commentary are unnecessary, and the Department of Justice has good cause to promulgate this regulation as an Interim final rule without additional notice and comment, see 5 U.S.C. 553(b)(3)(B), although the Department is soliciting post-promulgation public comment on this Interim final rule.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this

regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities. The statute already requires providers of electronic communication services or remote computing services to the public to report incidents of child pornography to NCMEC. See 42 U.S.C. 13032 (2002). The Interim final rule sets forth the mechanism put in place by NCMEC to receive such reports. Specifically, the Interim final rule directs providers to notify NCMEC through the "Cyber Tipline." The provider will initially call NCMEC (800-THE-LOST) to receive an identification number and password that will enable it to log on to the "Cyber Tipline" to report all instances of apparent child pornography. The "Cyber Tipline" will have a specialized electronic reporting form requesting information from the provider about the suspected violation of child pornography laws. In this manner, the Interim final rule complies with the reporting statute, while limiting the service provider's costs as much as possible. The addition of the Postal Inspection Service and Secret Service as agencies to which NCMEC must forward reports will have no impact on providers.

#### **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.

#### **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, 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, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. All providers, whether large or small, are already required by law to submit reports related to child pornography to NCMEC. This rule designates the Federal agencies to which NCMEC, in turn, will forward such reports. The additional designation

of the Postal Inspection Service and the Secret Service as agencies to which NCMEC must forward reports will have no impact on the providers, whether they are small or large.

#### **Executive Order 12866**

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

The Department of Justice has assessed the costs and benefits of this rule and has determined that the benefits of this rule justify its costs. As noted, the costs of compliance for a provider of electronic communications services or remote computing services to the public will continue to be limited to the cost of one telephone call to obtain a password for the "Cyber Tipline" and the cost of completing online reports of child pornography, which is already required by statute. See 42 U.S.C. 13032 (2002). Permitting NCMEC to forward reports to two additional law enforcement agencies will not impose any additional costs on providers. The costs to NCMEC of making reports available to two additional agencies is negligible, as representatives of those agencies will be housed in NCMEC's offices and the reports will be available on-line.

By contrast, the benefits of this new Interim final rule will be appreciable. The availability of child pornography on the Internet is a growing problem in our Nation that perpetuates the molestation and exploitation of children. The addition of the Postal Inspection Service and Secret Service as recipients of reports will substantially enhance the scope of law enforcement investigative abilities with respect to reports of child pornography on the Internet, particularly where use of the United States mail is implicated in the distribution of child pornography.

#### **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 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—Civil Justice Reform**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **List of Subjects in 28 CFR Part 81**

Child abuse, Child pornography, Electronic communication services, Federal buildings and facilities, Remote computing services.

■ By virtue of the authority vested in me as Attorney General, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, 42 U.S.C. 13032, PL 105-314, 112 Stat. 2974, and PL 106-113, 113 Stat. 1501, part 81 of title 28, Code of Federal Regulations, is amended as follows:

#### **PART 81—CHILD ABUSE AND CHILD PORNOGRAPHY REPORTING DESIGNATIONS AND PROCEDURES**

- 1. The heading for part 81 is revised as set forth above.
- 2. The authority citation for part 81 is revised to read as follows:

**Authority:** 28 U.S.C. 509, 510; 42 U.S.C. 13031, 13032.

- 3. Sections 81.1 through 81.5 are designated as subpart A and a new subpart heading is added to read as follows:

#### **Subpart A—Child Abuse Reporting Designations and Procedures**

##### **§ 81.1 [Amended]**

- 4. Section 81.1 is amended by removing the words "this part" and inserting in their place "this subpart A".

#### **PART 81—[AMENDED]**

- 5. Part 81 is amended by adding at the end thereof the following new subpart B to read as follows:

#### **Subpart B—Child Pornography Reporting Designations and Procedures**

Sec.

81.11 Purpose.

81.12 Submission of reports to the "Cyber Tipline" at the National Center for Missing and Exploited Children.

81.13 Submission of reports by the National Center for Missing and Exploited Children to designated agencies; designation of agencies.

#### **Subpart B—Child Pornography Reporting Designations and Procedures**

##### **§ 81.11 Purpose.**

The regulations in this subpart B designate the agencies that are authorized to receive and investigate

reports of child pornography that are forwarded from the National Center for Missing and Exploited Children under the provisions of 42 U.S.C. 13032.

**§ 81.12 Submission of reports to the “Cyber Tipline” at the National Center for Missing and Exploited Children.**

(a) When a provider of electronic communications services or remote computing services to the public (“provider”) obtains knowledge of facts or circumstances concerning an apparent violation of Federal child pornography statutes designated by 42 U.S.C. 13032(b)(1), it shall, as soon as reasonably possible, report all such facts or circumstances to the “Cyber Tipline” at the National Center for Missing and Exploited Children Web site (<http://www.CyberTipline.com>), which contains a reporting form for use by providers.

(b) A provider should initially call the National Center for Missing and Exploited Children to receive an identification number and a password that will enable it to log on to the section of the “Cyber Tipline” that is designed for provider reporting.

**§ 81.13 Submission of reports by the National Center for Missing and Exploited Children to designated agencies; designation of agencies.**

When the National Center for Missing and Exploited Children receives a report from a provider concerning an apparent violation of Federal child pornography statutes specified in 42 U.S.C. 13032(b)(1), it shall immediately forward that report, to the Federal Bureau of Investigation, the Bureau of Immigration and Customs Enforcement, the United States Postal Inspection Service, and the United States Secret Service, designated pursuant to 42 U.S.C. 13032(b)(2).

Dated: October 27, 2003.

**John Ashcroft,**

*Attorney General.*

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**BILLING CODE 4410–14–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 622**

[Docket No. 001005281–0369–02; I.D. 102803B]

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Trip Limit Reduction**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Trip limit reduction.

**SUMMARY:** NMFS reduces the trip limit in the commercial hook-and-line fishery for king mackerel in the northern Florida west coast subzone to 500 lb (227 kg) of king mackerel per day in or from the exclusive economic zone (EEZ). This trip limit reduction is necessary to protect the Gulf king mackerel resource.

**DATES:** This rule is effective 12:01 a.m., local time, October 30, 2003, through June 30, 2004, unless changed by further notification in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mark Godcharles, telephone 727–570–5727, fax 727–570–5583, e-mail [Mark.Godcharles@noaa.gov](mailto:Mark.Godcharles@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Based on the Councils’ recommended total allowable catch and the allocation ratios in the FMP, on April 30, 2001 (66 FR 17368, March 30, 2001), NMFS implemented a commercial quota of 2.25 million lb (1.02 million kg) for the eastern zone (Florida) of the Gulf migratory group of king mackerel. That quota is further divided into separate quotas for the Florida east coast subzone and the northern and southern Florida west coast subzones. On April 27, 2000, NMFS implemented the final rule (65

FR 16336, March 28, 2000) that divided the Florida west coast subzone of the eastern zone into northern and southern subzones, and established their separate quotas. The quota for the northern Florida west coast subzone is 168,750 lb (76,544 kg)(50 CFR 622.42(c)(1)(i)(A)(2)(ii)).

In accordance with 50 CFR 622.44(a)(2)(ii)(B), from the date that 75 percent of the northern Florida west coast subzone’s quota has been harvested until a closure of the subzone’s fishery has been effected or the fishing year ends, king mackerel in or from the EEZ may be possessed on board or landed from a permitted vessel in amounts not exceeding 500 lb (227 kg) per day.

NMFS has determined that 75 percent of the quota for Gulf group king mackerel from the northern Florida west coast subzone has been reached. Accordingly, a 500–lb (227–kg) trip limit applies to vessels in the commercial fishery for king mackerel in or from the EEZ in the northern Florida west coast subzone effective 12:01 a.m., local time, October 30, 2003. The 500–lb (227–kg) trip limit will remain in effect until the fishery closes or until the end of the current fishing year (June 30, 2004), whichever occurs first.

The Florida west coast subzone is that part of the eastern zone south and west of 25°20.4’ N. lat. (a line directly east from the Miami-Dade County, FL, boundary). The Florida west coast subzone is further divided into northern and southern subzones. The northern subzone is that part of the Florida west coast subzone that is between 26°19.8’ N. lat. (a line directly west from the Lee/Collier County, FL boundary) and 87°31’06’ W. long. (a line directly south from the Alabama/Florida boundary).

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such prior notice and opportunity for public comment is contrary to the public interest. Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action in order to protect the fishery since the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment will require time and would potentially